Ertak v Turkey

Timurtaş v Turkey

State Responsibility in 'Disappearances'

A case report

Part of a series of cases brought to the European Court of Human Rights by the Kurdish Human Rights Project and the Human Rights Association of Turkey

KHRP

Kurdish Human Rights Project

TIMURTAŞ v. TURKEY
&
ERTAK v. TURKEY:

State Responsibility in 'Disappearances'

June 2001

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FOREWORD

In May and June 2000, the European Court of Human Rights handed down its judgments in the cases of *Timurtaş v Turkey* and *Ertak v. Turkey*, two more in the series of cases brought to the Court on behalf of Kurdish applicants by the Kurdish Human Rights Project and the Human Rights Association of Turkey, Diyarbakir branch. Both cases involved the fundamental obligation on a State to protect the right to life that is guaranteed by Article 2 of the European Convention on Human Rights. Both involved Kurds who had been detained by the security forces and subsequently 'disappeared'. In each case, the Court also found that Turkey's failure to conduct an adequate investigation constituted a separate violation of Article 2.

Timurtaş and *Ertak* are but two cases in a large and ongoing litigation project that began in 1992. To date, KHRP has taken on representation of more than 450 applicants and submitted almost 300 cases to the Strasbourg system, and has obtained judgment in 33 cases.[1] Issues raised by these cases include extra-judicial killing, torture, village destruction and freedom of expression. For those courageous applicants who bring their cases to Strasbourg, the outcome is some measure of redress for them personally, but the cases also help to bring about changes in Turkey and raise awareness within Turkey and internationally of the ways in which Turkish law and practice fall short of international human rights standards. The impact of the cases in these respects has been considerable.

The conduct of cases before the European Court of Human Rights also represents many years of work and commitment by numerous individuals and organisations in Turkey, the UK and the rest of Europe.[2] In particular, KHRP's close collaboration over many years with the Diyarbakir branch of the Human Rights Association of Turkey has been both fruitful and crucial to the success of the litigation project.

In addition to the litigation project, KHRP also carries out other activities aimed at raising awareness of human rights violations against Kurds in all the Kurdish regions, including Turkey, Syria, Iran, Iraq and parts of the former Soviet Union. To this end we carry out research, conduct fact-finding missions and trial observations and publish reports aimed at Governments and international organisations as well as lawyers, academics and a wider constituency. We also carry out a proactive media strategy and produce a regular newsletter, *Newsline*, as well as maintaining a website.

The publication of case reports forms part of our ongoing activities aimed at raising awareness of Turkey's violation of its human rights obligations. The introduction to this Case Report assesses the legal aspects of the two cases, and sets them in the socio-political context existing in Turkey. The first section outlines the facts as presented by the different parties and the findings of both the Commission and the Court on the facts (both cases were brought under the old pre-Protocol 11 system, pursuant to which the former European Commission on Human Rights examined the

[1] A list of the judgments can be found in Appendix G.

[2] For example, the University of Essex, the Bar Human Rights Committee of England and Wales, the Law Society of England and Wales and the Human Rights Committee of the Norwegian Bar Association.

facts). The legal proceedings are then summarised, followed by a review of the applicant's complaints including the legal arguments submitted, and the Commission and Court's reasoning and findings. The reports of the Commission and the judgments of the Court are appended, together with written submissions from CEJIL (the Center for Justice and International Law) in the case of Timurtaş. Finally, a summary guide to the system and procedure under the European Convention on Human Rights is included.

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Kerim Yildiz
Executive Director
Kurdish Human Rights Project

London
June 2001

INTRODUCTION

The cases of *Timurtaş v Turkey* and *Ertak v. Turkey* highlight the problem of 'disappearances' which have been prevalent in Southeast Turkey during the past fifteen years of armed conflict in the region between the Turkish security forces and the PKK (Kurdistan Workers' Party). A state of emergency declared in 1987 in five provinces still remains in place in certain areas, together with a system of State Security Courts. Brutal violations of human rights such as 'disappearances', torture and killings were particularly rife in the period 1993 to 1995 but still continue today.[1]

In the two cases that the subject of this report, young Kurdish men were taken into custody and never seen again by their families. In the case of Mehmet Ertak, someone who shared a cell with him testified that he had been brutally tortured. Sightings of Abdulvahap Timurtaş in detention were also reported. In each case, the fathers of these men made persistent inquiries about the whereabouts and fate of their sons, but were met with denials, inadequate investigations and failure to launch prosecutions against those responsible.

The European Court of Human Rights held, in both cases, that the applicants' sons must be presumed dead following unacknowledged detention by the security forces, and that therefore the responsibility of the State was engaged. Since the State had not provided any explanation, nor sought to justify the use of lethal force, it must be held liable for the deaths.

In both cases the Court went on to find that the inadequacies in the investigations carried out by the authorities constituted a separate violation of Article 2 of the Convention. This was based on the procedural obligations imposed on a member State under Article 1 of the Convention *"to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention"*, which required by implication that there be an effective investigation where individuals are killed as a result of the use of force.

This is not the first time that the Court has ruled that Turkey has been responsible for violations of the Convention in relation to 'disappearances', in cases brought by KHRP. However these two cases do mark a significant development in the Court's case law. In particular, they raise the question of how it can be established that a loss of life caused by the State took place where a person 'disappears'. In particular, what evidence is required and where does the burden of proof lie.

In the case of *Kurt v. Turkey*, the Court issued its judgment in May 1998, finding a violation of Articles 5, 3, 13 and 25(1), though not of Article 2 itself. Although accepting that the applicant's son had been taken into detention, the Court found that the absence of evidence regarding his treatment or fate subsequent to that

[1] The case of two missing members of HADEP (the People's Democracy Party) from Silopi in Southeast Turkey who were last seen entering a Gendarmerie base in January 2001 has still not been resolved.

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prevented it from ruling that he in fact met his death in custody. The issue should properly be dealt with under Article 5, the right to liberty and security of person, which the Court duly found had been violated.

In a number of subsequent cases, including *Timurtaş* and *Ertak*, the Court has distinguished *Kurt* and found that the right to life under Article 2 has been violated in cases of 'disappearance'. In *Cakici v. Turkey,* the Court, in its ruling of July 1999, found that there was sufficient evidence for it to conclude beyond reasonable doubt that Ahmet Cakici died following his apprehension and detention by the security forces. In both *Timurtaş* and *Ertak*, the Court was similarly convinced that sufficient evidence existed to conclude that the respective applicants' sons must be presumed to have died after being taken into custody, distinguishing these cases from *Kurt* on that basis.

In *Timurtaş*, the Court had before it written comments from the NGO CEJIL (the Center for Justice and International Law), which analysed the jurisprudence of the Inter-American Commission and Court of Human Rights concerning forced 'disappearances'. The Inter-American Court has been prepared to hold that a violation of the right to life can be proved not only on the facts, but also in other ways, for instance if it is established that the facts of the case in question are consistent with an existing pattern of 'disappearances' in which a victim is killed.

While the European Court has not been prepared to go as far as the Inter-American Court, the cases of *Timurtaş* and *Ertak* display an increasing willingness to rely on "circumstantial evidence based on concrete elements" going beyond the mere fact that the person had been taken into custody, to find that death has occurred following an unacknowledged detention. It has also come to view elements such as the passage of a time (in *Timurtaş,* six and a half years) as relevant.

A further development has been the Court's increasing emphasis on the importance of procedural safeguards to protect the right to life. In both *Timurtaş* and *Ertak* the Court found that the failure of the State to carry out an adequate investigation into the alleged 'disappearance' itself constituted a separate violation of Article 2. This structural question goes to the heart of protection from human rights violations and is a matter that has been taken up also by the Council of Europe's Committee of Ministers. Citing a number of cases against Turkey, including those of 'disappearances', the Committee of Ministers on 9 June 1999 issued an Interim Resolution calling on the Turkish Government to take effective measures to restrain its security forces in order to ensure respect of human rights.

Judgments such as that in *Timurtaş* and *Ertak* send a clear message to Turkey and also to the international community as regards what Turkey still needs to do.

PART I: TIMURTAŞ v. TURKEY

SUMMARY OF TIMURTAŞ v. TURKEY

The case of *Timurtaş v Turkey* was brought by Mr Mehmet Timurtaş, a Turkish citizen of Kurdish origin born in 1928 who at the time of the events giving rise to his application was living in Cizre in Southeast Turkey. His application to the European Commission was brought on his own behalf and on behalf of his son Abdulvahap Timurtaş, who, he alleges, 'disappeared' in circumstances engaging the responsibility of the respondent State.

The applicant claimed before the European Court of Human Rights ('the Court') that the Turkish authorities had violated the right to life (Article 2), the right to freedom from torture or inhuman or degrading treatment or punishment (Article 3), the right to liberty and security of the person (Article 5) and the right to an effective remedy (Article 13) of the European Convention on Human Rights. In addition, the applicant alleged that a practice of 'disappearances' existed in Southeast Turkey (violating Article 5), as well as an officially tolerated practice of violating the right to an effective remedy (Article 13) in respect of those 'disappearances'. The applicant also alleged that the practice of 'disappearances' constitutes a breach of the principle of good faith as set out in Article 18 of the Convention. Finally, the applicant submitted that he was hindered by the Turkish Government in the exercise of his right of individual petition (Article 34) [formerly Article 25(1)]. In a judgment delivered on 13 June 2000, the Court found that violations of Articles 2, 3, 5 and 13 had taken place and awarded compensation under Article 41.

THE FACTS

The facts as presented by the applicant

On 14 August 1993, the applicant received a telephone call from someone who did not identify himself. The caller said that the applicant's son Abdulvahap, who was 31 years old, together with a friend, had been apprehended that day by soldiers attached to Silopi central gendarmerie headquarters. The applicant later heard that Abdulvahap and his friend had been taken round a number of villages to see if the villagers recognised them. Within a week of being apprehended, the muhtars from the surrounding villages were called to Silopi gendarmerie headquarters to see if they recognised the two men.

The applicant was worried about Abdulvahap because an older son had died in custody in Şırnak in 1991. He made various attempts to obtain news of Abdulvahap's fate but was told at the Silopi gendarmerie headquarters that his son had not been detained.

The applicant was subsequently informed by a relative called Bahattin Aktug (who was mayor of the Guclukonak district) that he had spoken to two

'confessors'[2] called Sadik Erdogan and Nimet Nas from his village who were at that time being detained in Şırnak. They had told him that Abdulvahap was being detained in Şırnak, that the two of them were doing what they could to look after him and that Abdulvahap was refusing to make a statement.

After about forty-five days, the applicant went to Guclukonak to see Bahattin Aktug and also met with the two 'confessors' who had been given twenty days' leave from Şırnak. They told the applicant that they had been with Abdulvahap for some time and that when they had left Şırnak, he had still been alive. They also said that they had seen the friend who had been apprehended at the same time as Abdulvahap.

Whilst the applicant was in Guclukonak, Bahattin Aktug spoke to a gendarmerie captain who telephoned Şırnak for information but was told that Aktug should stop asking questions about Abdulvahap. The same message was given when a major who Aktug knew in Igdir telephoned Şırnak.

The applicant went repeatedly to Şırnak to make enquiries about his son. He also went to the Silopi prosecutor and named Erdogan and Nas as witnesses. It was at this point that his statement was taken.

In the spring of 1995, the applicant saw Erdogan again. Erdogan told him he had been asked in court about Abdulvahap and had answered that he had seen Abdulvahap in Şırnak. Upon hearing this, Erdogan said that his interrogator had become very angry. This scared Erdogan. Consequently, on the second occasion when he was asked about Abdulvahap he said that he had seen a man who looked similar but that he did not know whether it had been Abdulvahap.

The facts as presented by the Government

The Government stated that by the applicant's own admission, his son Abdulvahap had left the family home in Cizre two years previously and the applicant had not heard from his son since that time. In the course of the preliminary investigation carried out by Public Prosecutors at Silopi and Şırnak, statements had been taken from persons named as witnesses by the applicant. None of these statements corroborated the applicant's allegations that Abdulvahap Timurtaş had been apprehended by security forces on 14 August 1993 and that he had been held in detention over any subsequent period of time.

Proceedings before the domestic authorities

On 15 October 1993, the applicant submitted a petition to a Silopi Public Prosecutor requesting information as to the fate of his son Abdulvahap Timurtaş. On the same date the prosecutor sent the petition to both the Silopi district gendarmerie headquarters and the police headquarters with a cover letter

[2] Persons who co-operate with the authorities after confessing that they have been involved with the PKK.

requesting an examination of the matter. By letter dated 20 October 1993, the commander of Silopi district gendarmerie headquarters informed the Silopi Public Prosecutor that Abdulvahap Timurtaş had not been detained by his headquarters and that Abdulvahap's name did not appear in their records.

On 21 October 1993 a Silopi prosecutor took a statement from the applicant in which the latter described how his son had left the family home two years previously and that he had learnt from other people that Abdulvahap had gone to Syria. According to the latest information obtained by the applicant, however, Abdulvahap had been detained by security forces in Yenikoy and had been seen in detention in Şırnak by Erdogan and Nas. Also on 21 October 1993, letters were sent by the Public Prosecutor's office to the Silopi district gendarmerie headquarters with a request to secure the presence at the prosecutor's office of the muhtars of Yenikoy and Esenli in order for their statement to be taken, and to the office of the Public Prosecutor in Şırnak for a statement to be taken from Erdogan and Nas. The prosecutor's office at Şırnak was informed by the Şırnak provincial gendarmerie on 29 December 1993 that they had been unable to comply with the request to summon Erdogan and Nas. On 26 January 1994, the muhtars of Esenli and Yenikoy made a statement before the Silopi prosecutor.

On 10 March 1994, the Silopi prosecutor wrote to the prosecutor's office in Cizre requesting that the applicant go to the prosecutor's office in Silopi. The request was passed on to the Cizre police who replied on 28 March 1994 that the applicant and his family had left Cizre and their whereabouts were unknown. On 10 August 1994, the Silopi prosecutor made the same request of the Public Prosecutor in Cizre. On the same date he also asked the Public Prosecutor at Guclukonak to ask Bahattin Aktug whether he personally knew Abdulvahp Timurtaş and whether he had been approached by the applicant and had discussed the fate of his son. He also wrote to the prosecutors of Diyarbakir and Guclukonal making enquiries in relation to Erdogan and Nas.

On 23 August 1994, the Silopi prosecutor informed the Şırnak prosecutor about the State investigation. His conclusions were that Abdulvahap Timurtaş had been detained neither by gendarmerie headquarters nor police headquarters in the district. As the applicant had moved from Cizre to an unknown destination and had not applied to the Silopi prosecutor's office since 21 October 1993, the impression had been created that that Abdulvahap Timurtaş had been found and consequently the applicant had been summoned to Silopi on 10 August 1994 in order to close the file.

On 5 May 1995, Nas made a statement to a Diyarbakir Public Prosecutor.

On 13 July 1995, the Silopi prosecutor issued a decision of lack of jurisdiction and referred the case to the Şırnak prosecutor, since the applicant's son was alleged to have been detained at Şırnak.

On 24 July 1995, the Public Prosecutor at Şırnak asked Şırnak police headquarters and the provincial gendarmerie headquarters to examine their records for August 1993 to see if Abdulvahap Timurtaş had been detained by them. By letter of 9 August 1995, the commander of the Şırnak provincial centre

gendarmerie headquarters replied that the name Abdulvahap Timurtaş did not appear in their records.

On 13 and 15 August 1995, statements were taken from Bahattin Aktug and Erdogan. On 28 December 1995, Nas also made a statement.

On 26 February 1996, a different prosecutor at Şırnak asked the prosecutor's office at Silopi to question the residents of the villages of Yenikoy, Germik, Kartik and Kutnis about their knowledge of Abdulvahap and his detention. Statements were subsequently taken from nine villagers on 7 and 8 March 1996.

Erdogan made a statement to the Şırnak prosecutor on 2 April 1996. Bahattin Aktug made a statement to a Siirt prosecutor on 22 April 1996.

On 3 June 1996, the Şırnak prosecutor issued a decision not to prosecute. The decision lists the various inquiries that had been made in the course of the investigation and gives a summary of the statements which had been obtained. The conclusion not to continue was reached *"in view of the abstract nature of the applicant's complaint"*. Account was also taken of the fact that the applicant had left for an unknown destination following the lodging of his complaint. In addition, the likelihood that Abdulvahap Timurtaş was a member of the PKK terrorist organisation was found to be strengthened by the allegation that he had been in charge of the PKK in Syria and that he was wanted by the Prevention of Terrorism branch of the Şırnak police headquarters.

The Findings of fact by the European Commission of Human Rights

Since the facts of the case were disputed, the Commission conducted an investigation, with the assistance of the parties.

The evidence before the Commission is listed below in summary form. Further details are set out in the Article 31 report of the European Commission of Human Rights which is annexed to this report.

Documentary Evidence

The Commission had particular regard to :

a) Statements by the applicant

i) Statement of 21 October 1993 taken by a Silopi Prosecutor
ii) Statement of 2 December 1993 taken by Mahmut Sakar of the Diyarbakir branch of the Human Rights Association

b) Statements by other persons :

i) Ismail Birlik - Statement of 26 January 1994 taken by Ahmet Yavuz, Silopi Public Prosecutor; Statement of 22 January 1997 taken by officers of the anti-terror branch

ii) Kamil Bilgeç - Statement of 26 January 1994 taken by Ahmet Yavuz, Silopi Prosecutor ; Statement of 13 August 1995 taken by gendarmes

iii) Nimet Naş - Statement of 5 May 1995 taken by a Diyarbakir Public Prosecutor; Statement of 28 December 1995 taken by a Diyarbakir Public Prosecutor

iv) Sadik Erdoğan - Statement of 15 August 1995 taken by gendarmes ; Statement of 2 April 1996 taken by Ozden Kardes, Şırnak Public Prosecutor

v) Bahattin Aktuğ - Statement of 13 August 1995 taken by gendarmes ; Statement of 22 April 1996 taken a Siirt Public Prosecutor

vi) Nine residents of Yenikoy and hamlets belonging to Yenikoy - Statements taken on 7, 8 and 9 March 1996 by gendarmes attached to Silopi district gendarmerie headquarters

vii) Yusuf Bilgec - Statement of 11 March 1996 taken by a Public Prosecutor

c) Petitions submitted by the applicant

i) Petition of 15 October 1993 to the Silopi Public Prosecutor's office
ii) Petition of 2 December 1993 to the Diyarbakir branch of the Human Rights Association
iii) Petition of 30 November 1993 to the Cizre Public Prosecutor's office
iv) Petition of 30 November 1993 to the Cizre central gendarmerie headquarters
v) Petition of 2 December 1993 to the Prosecutor's office at the Diyarbakir State Security Court

d) Decisions and reports

i) Photocopied document entitled 'Post-operation report' dated 15 August 1993
ii) Decision of lack of jurisdiction dated 13 July 1995 issued by Silopi Public Prosecutor Ahmet Yavuz
iii) Decision not to prosecute dated 3 June 1996 issued by Şırnak Public Prosecutor Ozden Kardes

e) Custody Records

i) Silopi gendarmerie headquarters
ii) Silopi police headquarters
iii) Interrogation unit at the Şırnak provincial gendarmerie headquarters (hereinafter "the Şırnak interrogation unit")

Oral evidence

The Commission heard oral evidence from :

i) Mehmet Timurtaş
ii) Bahattin Aktug
iii) Azmi Gundogan (commander of the Silopi district gendarmerie headquarters until 4 August 1993)
iv) Erol Tuna (commander of Şırnak provincial centre gendarmerie headquarters at the relevant time)
v) Husan Durmas (commander of Silopi district gendarmerie headquarters until July 1995)
vi) Sedat Erbas (Public Prosecutor at Silopi until October 1996).

A further five witnesses were summonsed and did not appear: the muhtars of Yenikoy and Esenli; Ozden Kardes, Public Prosecutor at Şırnak; Sadik Erdogan and Nimet Nas. The Government stated that the muhtar of Yenikoy had not been seen for a year and allegedly had been kidnapped by the PKK. Following the hearing, the Government submitted a statement from the muhtar of Esenli explaining that he had not been able to attend the hearing due to his old age and insufficient financial resources. Ozden Kardes informed the Commission by letter that he had nothing to add to the information in the file and for this reason did not consider himself obliged to attend. During the hearing in Ankara, the Commission delegates were informed that Sadik Erdogan and Nimet Nas were in prison in Diyarbakir.

The Commission made a finding in its report that the Government had fallen short of its obligations under former Article 28(1) of the Convention to furnish all necessary facilities to the Commission in its task of finding the facts. In particular it was noted that the Government failed to produce copies of the entries in the records of the Diyarbakir E-type prison concerning the detention there of Erdogan and Nas and its failure to secure the attendance of the witness Ozden Kardes.

The Commission's findings may be summarised as follows :

i) the alleged apprehension and detention of Abdulvahap Timurtaş
The Commission considered a photocopy of the post-operation report dated 14 August 1993 submitted by the applicant's representatives and describing how on that date, Abdulvahap Timurtaş and a man of Syrian nationality had been apprehended near the village of Yenikoy. The Commission concluded that this was a photocopy of an authentic post-operation report, from which it appeared that Abdulvahap Timurtaş had been apprehended on 14 August 1993.

The Commission observed that certain aspects of the applicant's account were corroborated by witnesses and concluded that Abdulvahap's alleged involvement with the PKK may well have constituted the reason for his apprehension.

The Commission found that the available evidence did not allow for the conclusion to be drawn that Erdoğan and Nas had, as submitted by the Government, been detained at the Diyarbakir prison at the time when, according to the applicant, they had seen Abdulvahap in prison in Şırnak. It was noted that in this regard, the Government had failed to provide copies of the relevant custody ledgers.

The Commission found that it was unsafe to rely upon the statements made by Erdogan and Naş to the domestic authorities in which they had denied having seen Abdulvahap, as such a denial may well have been due to a wish on their behalf not to provoke the anger of the authorities.

The Commission also preferred the evidence of the applicant to Bahattin Aktuğ. The Commission found the applicant's oral testimony was largely consistent with his various other statements and found him to be credible and convincing. By contrast Bahattin Aktuğ had in a statement on 13 August 1995 denied all knowledge of the applicant and the applicant's son when clearly he knew the applicant, at least, very well.

The statements of the nine villagers and the son of the muhtar of Yenikoy could not serve to establish that Abdulvahap Timurtaş had not been apprehended as those persons had only been asked if they knew Abdulvahap Timurtaş.

The Commission was disturbed by the number of anomalies contained in the copied custody ledgers provided and concluded that they could not be relied upon to prove that Abdulvahap Timurtaş had not been taken into detention.

Given that the Commission had not been provided with evidence to disprove the applicant's allegations but that some of the evidence corroborated his claims and having accepted that the post-operation report was authentic, the Commission reached the finding that on 14 August 1993 Abdulvahap Timurtaş had been apprehended near the village of Yenikoy by gendarmes attached to the Silopi gendarmerie headquarters and taken into detention in Silopi. At some stage thereafter he had been transferred to a place of detention at Şırnak which was probably the interrogation unit at the provincial centre gendarmerie headquarters.

ii) the alleged ill-treatment of Abdulvahap Timurtaş in detention

The Commission considered that there was an insufficient evidentiary basis to reach a conclusion that Abdulvahap Timurtaş had been subjected to torture or ill-treatment whilst in detention.

iii) the investigation into the alleged 'disappearance' of Abdulvahap Timurtaş

The Commission accepted that the applicant had started to contact the authorities in order to obtain news of his son within one week of having been informed of Abdulvahap's detention on 14 August 1993. However, the first documented action on the part of the authorities dated from 15 October 1993. A long time was then taken to obtain statements from witnesses named by the applicant and those obtained were of limited value due to the limited questions asked of those witnesses. Where a witness did hint to such an incident having occurred, this was not followed up and in some instances denied. Furthermore, official enquiries

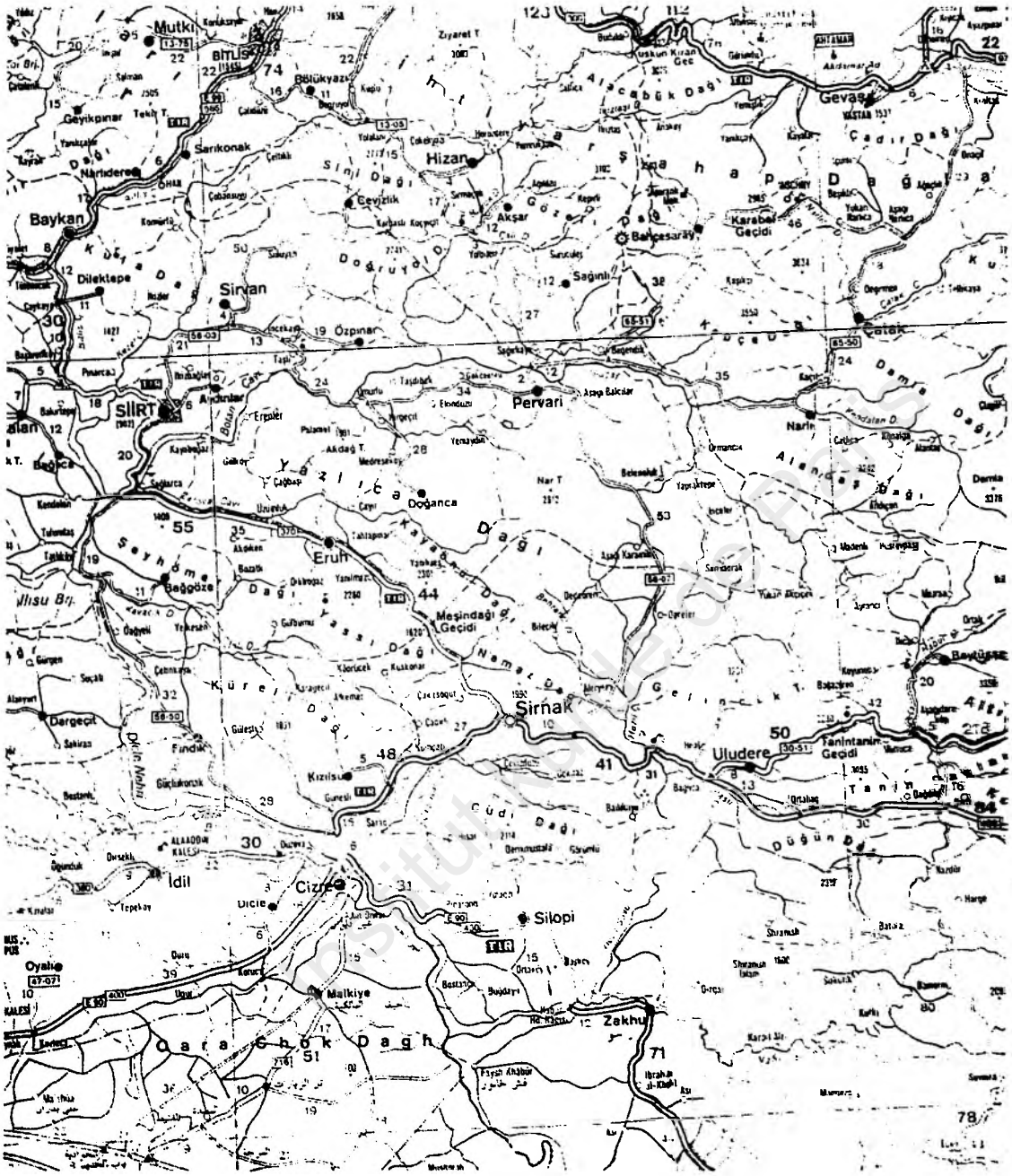
into whether or not Abdulvahap might have been detained at detention facilities in Şırnak were not made until nearly two years after his alleged apprehension. A number of other omissions within the investigation were highlighted.

The findings of fact by the European Court of Human Rights

The Court accepted the Commission's findings on the facts and stated that there was no reason to make its own assessment in the present case.

The Court noted that the Government had not advanced any explanation to account for the omissions relating to documentary evidence and the attendance of a witness. The Court therefore confirmed the Commission's finding that the Government fell short of its obligations under Article 38(1) [former Article 28(1)] of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

MAP OF THE AREA WHERE THE INCIDENT OCCURRED



THE LEGAL PROCEEDINGS

Chronology of events, including legal proceedings

14 August 1993	The applicant receives a telephone call telling him his son Abdulvahap, together with a friend, has been apprehended that day by soldiers attached to Silopi central gendarmerie headquarters.
15 October 1993	The applicant submits a petition to the Silopi public prosecutor requesting information as to the fate of his son.
20 October 1993	The commander of Silopi district gendarmerie headquarters states that Abdulvahap Timurtaş has not been detained by his headquarters and that his name does not appear in their records.
21 October 1993	A Silopi prosecutor takes a statement from the applicant.
9 February 1994	Applicant applies to the European Commission of Human Rights alleging violations of Articles 2, 3, 5, 13, 14 and 18 of the European Convention on Human Rights and under former Article 25 of the Convention.
23 August 1994	The Silopi prosecutor informs the Şırnak prosecutor of his conclusions that Abdulvahap Timurtaş had neither been detained by gendarmerie headquarters or police headquarters in the district.
13 July 1995	The Silopi prosecutor issues a decision of lack of jurisdiction and refers the case to the Şırnak Prosecutor.
24 July 1995	The Public Prosecutor at Şırnak asks Şırnak police headquarters and the provincial gendarmerie headquarters to examine their records for August 1993 to see if Abdulvahap Timurtaş had been detained by them.
9 August 1995	The commander of the Şırnak provincial centre gendarmerie headquarters replies by letter that the name Abdulvahap Timurtaş did not appear in their records.
11 September 1995	The Commission declares the application admissible.
20-22 November 1996	The Commission delegates hear oral evidence from witnesses in Ankara.
8 March 1999	The Commission refers the case to the European Court of Human Rights.

10 June 1999	The President of the Chamber grants leave to the Center for Justice and International Law (CEJIL), a non-governmental human rights organisation in the Americas, to submit written comments relating to the jurisprudence of the Inter-American Court of Human Rights on the issue of forced 'disappearances'.
9 July 1999	Written submissions from CEJIL were received.
13 June 2000	The Court delivers judgment and finds Turkey has violated Articles 2, 3, 5 and 13 of the Convention.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 of the European Convention on Human Rights came into operation.[3] The Protocol established a full-time single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure, all applications are to be submitted to the European Court. Each case is registered and assigned to the Judge Rapporteur who may refer the application to a three-judge committee. The committee, by unanimous decision, can declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine admissibility and merits of the case. The examination of the case by the Court may, if necessary, involve an investigation. States are obliged to furnish "all necessary facilities" for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although this is also rare. It should be noted that the role of the Committee of Ministers is reduced to supervising the execution of judgements.

The *Timurtaş* case was dealt with under the old system. The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999).[4]

The investigation under the old procedure

Under the old Pre-protocol 11 procedure, if the Commission considered it necessary, it was able to "undertake ... an investigation for the effective conduct of which the State concerned shall furnish all necessary facilities" pursuant to the former Article 28(1)(a). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission's action under Article 28(1)(a) took the form of investigations whereby the applicant's and the Government's witnesses gave oral evidence before a select number of Commission delegates (usually three). Investigation hearings were held in *camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

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[3] The new system is described in Appendix F.

[4] Further information about this procedure can be obtained from the relevant editions of human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J. Harris, M. O'Boyle and C. Warbrick (Butterworths, London, Dublin and Edinburgh), *Theory and Practice of the European Convention of Human Rights* by P. van Dijk and G.J.H. van Hoof (Kluwer Law and Taxation Publishers, The Netherlands), *A Practitioner's Guide to the European Convention of Human Rights* by Karen Reid (Sweet & Maxwell, London), *European Human Rights: Taking a Case under the Convention* by Luke Clements, Nuala Mole and Alan Simmons (Sweet & Maxwell, London).

In *Timurtaş*, the Commission conducted an investigation with the assistance of the parties.[5] The documentary evidence included written statements and oral evidence taken from six witnesses. Five other witnesses were summoned to give evidence but did not appear.

Preliminary objections to the Court's jurisdiction

Former Article 26 of the Convention[6] provides as follows:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Government submitted that the applicant had not exhausted domestic remedies before making an application with the commission. This was a failure to comply with the requirements under Article 26 of the Convention. It was submitted, contrary to what the applicant had alleged, that his petition to the State Prosecutor had resulted in the institution of a preliminary investigation which was still pending. The government also argued that the applicant could have made a criminal complaint against the police or military authorities.

The applicant maintained that as any remedies would be illusory and ineffective, it was not necessary to pursue such remedies. The authorities denied the allegation that Abdulvahap Timurtaş had been taken into custody. Therefore, any further action by the applicant would be futile.

The Commission stated that Article 26 only required the exhaustion of remedies which related to breaches of the Convention and provided effective and sufficient redress. Two years had elapsed since the applicant's son was allegedly taken into custody and the pending investigation by the Silopi State Prosecutor had not been concluded. Due to the serious nature of the alleged crimes the Commission was not satisfied that the investigation provided an effective remedy under Article 26.

The Commission concluded that the applicant had complied with Article 26 of the Convention and therefore the application could not be rejected for non-exhaustion of domestic remedies.

Referral to the Court

The Commission referred the case to the Court on 8 March 1999.

[5] See section on The Evidence before the Commission, above.
[6] Now Article 35(1)

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the Court, the applicant in *Timurtaş* complained that Turkey had violated Articles 2, 3 (in respect of the applicant), 5 13, 18 and 34 of the Convention. He further contended that the respondent State had failed to comply with its obligations under Article 34 of the Convention and he requested that the Court award him just satisfaction under Article 41. He did not pursue his original complaints to the Commission of a violation of Article 3 in respect of his son and of Article 14 in conjunction with Articles 2, 3 and 5.

The Court held that there had been a violation of Articles 2, 3, 5 and 13.

Article 2 : Right to life

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 for 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"

The Court dealt separately with the questions of whether Abdulvahap Timurtaş should be presumed dead, and the alleged inadequacy of the investigation.

Whether Abdulvahap Timurtaş should be presumed dead

The applicant acknowledged that the silence surrounding his son's fate following his apprehension did not, in itself, constitute proof beyond reasonable doubt of Abulvahap's death. However, he argued that to hold that this absence of information did not establish that Abdulvahap was dead would, in effect, reward the Government for failing to produce any explanation. He argued that account should be taken not only of the specific context in which the 'disappearance' of his son occurred, but also of the broader context of the large number of 'disappearances' that had taken place in Southeast Turkey in 1993.

The applicant further asserted that an application of the Court's reasoning in the cases of *Tomasi v France (judgment of 27 August 1992, Series A no.241-A) and Ribitsch v Austria (judgment of 4 December 1995, Series A no.336)* would impose a positive obligation on a respondent State to account for detainees in a place of detention. Where no, or no plausible explanation was given as to why a detainee could not be produced alive, and a certain amount of time had elapsed,

the State concerned should be presumed to have failed in its obligation under Article 2 to protect the right to life of the detainee.

Finally, the applicant submitted that the investigation carried out into the 'disappearance' of his son had been so inadequate as to amount to a violation of the procedural obligations of the State to protect the right to life under Article 2.

The Government did not specifically address this issue, maintaining that in the investigation at the domestic level all the evidence had been collected and this did not corroborate the applicant's allegation that his son had been apprehended.

The Commission. The majority of the Commission considered that there was indeed a strong probability that Abdulvahap Timurtaş had died whilst in unacknowledged detention. Nevertheless, it held that in the absence of concrete evidence that Abdulvahap had in fact lost his life or suffered known injury or illness, this probability was insufficient to bring the facts of the case within the scope of Article 2.

CEJIL (the Center for Justice and International Law) in its written comments presented an analysis of the jurisprudence of the Inter-American Commission and Court of Human Rights concerning forced 'disappearances', *inter alia,* in relation to the right to life. The Inter-American Court has on several occasions pronounced that forced 'disappearances' frequently involve the violation of the right to life.[7] In the Inter-American system, a violation of the right to life as a consequence of a forced 'disappearance' can be proved in two different ways. First, it may be established that the facts of the case at hand are consistent with an existing pattern of 'disappearances' in which the victim is killed. Second, the facts of an isolated incident of a fatal forced 'disappearance' may be proved on their own, independent of a context of an official pattern of 'disappearances'. Both methods are used to establish State control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.

The Court accepted from the Commission that Abdulvahap Timurtaş was apprehended on 14 August 1993 and taken into detention at Silopi after which he was transferred to a place of detention in Şırnak. The Court has previously held that where an individual is taken into custody in good health but found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation, failing which an issue arises under Article 3. The Court was of the view that in the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities. Whether the failure on the part of the authorities to provide a plausible explanation as to the detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend upon all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from

[7] Velaquez Rodriguez Case, Judgment of July 29, 1998, Series C, No. 4 p.157; Godinez Cruz Case, Judgment of January 20, 1989, Series C, No. 5 p.265; Blake Case, Judgment of January 24, 1998 p.66; Fiaren Garbi and Solis Corrales Case, Judgment of March 15, 1989, Series C, No. 6 p.150.

which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody. *Cakici v Turkey (case no. 23657/94)* and *Ertak v Turkey (case no. 20764/92).*

The period of time which has elapsed since the person was placed in detention 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 presumed to be dead. The Court considered that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5.

Turning to the particular circumstances of this case, the Court observed that the applicant was initially able to obtain some news of his son through his relative Bahattin Aktug until 45 days after Abdulvahap's apprehension when Bahattin Aktug was told to stop making enquiries. The applicant's official enquiries were met with denials and it may be deduced from the fact that the post-operation report could not be produced from the files that the State felt the need to conceal the apprehension and detention of Abdulvahap.

The Court distinguished the present case from that of *Kurt v Turkey (case no. 15/1997/799/1002)* on the basis that six and a half years had elapsed since Abdulvahap Timurtaş had been apprehended and detained whereas in *Kurt*, the period between the taking into detention of the applicant's son and the Court's judgment was four and a half years. Uzeyir Kurt was last seen surrounded by soldiers in his village, while Abdulvahap was taken to a place of detention by authorities for whom the State is responsible. There were few facts in the case of *Kurt* identifying Uzeyir Kurt as a person under suspicion by the authorities whereas the facts of the present case leave no doubt that Abdulvahap Timurtaş was wanted by the authorities for his alleged PKK activities. In the general context of the situation in Southeast Turkey in 1993, it can be no means be excluded that an unacknowledged detention of such a person would be life-threatening.

For these reasons the Court was satisfied that Abdulvahap Timurtaş must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged. As no explanation has been provided and no reliance placed upon any ground of justification in respect of any use of lethal force, it follows that liability for his death is attributable to the respondent Government. Accordingly, there has been a violation of Article 2.

The alleged inadequacy of the investigation

The Court considered 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 *McCann and Others v the UK 27 September 1995, Series A no. 324 p.49 and Kaya v Turkey 19 February 1998, Reports 1998-I]*

The Commission had analysed the investigation as dilatory, perfunctory, superficial and not constituting a serious attempt to find out what had happened to the applicant's son. The Court saw no reason to assess the investigation any differently, pointing to the length of time before the investigation began and statements were taken from witnesses; the inadequate questions put to witnesses and the manner in which relevant information was ignored and denied by the authorities. In particular, the Court was struck by the fact that it was not until two years after the applicant's son had been taken into detention that enquiries were made of the gendarmes in Şırnak. Moreover, there is no evidence that the Public Prosecutors concerned made an attempt to inspect custody ledgers or places of detention for themselves, or that the Silopi district gendarmerie were asked to account for their actions on 14 August 1993.

In the light of the foregoing, the Court found that the investigation carried out into the 'disappearance' of the applicant's son was inadequate and therefore in breach of the State's procedural obligations to protect the right to life. Accordingly, there had been a violation of Article 2 of the Convention on this account also.

Article 3 : Right to freedom from torture or inhuman or degrading treatment

Article 3 of the Convention states the following :

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

The applicant complained that the 'disappearance' of his son constituted inhuman and degrading treatment in violation of Article 3 of the Convention in relation to himself. He submitted that as the father of the 'disappeared' Abdulvahap Timurtaş, he suffered severe mental distress and anguish as a result of the way in which the authorities responded to him and treated him in relation to his enquiries.

The Government queried how the uncertainty in which the applicant was living could amount to inhuman treatment given that, by his own admission, his son had left the family home for Syria two years prior to the alleged 'disappearance' and during that time he had not received word from his son.

The Commission. The majority of the Commission found that the applicant had been subjected to inhuman and degrading treatment within the meaning of Article 3 in view of its conclusion that the applicant suffered uncertainty, doubt and apprehension over a prolonged period causing severe mental distress and

anguish as a result of the 'disappearance' of his son which was imputable to the authorities.

The Court remembered that in the case of *Cakici v Turkey,* it had held that the question of whether a family member of a 'disappeared' person is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give 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.

In the present case, the Court found that the fact that Abdulvahap Timurtaş had left the family home some two years prior to his apprehension by no means precluded the applicant from feeling grave concern upon receipt of the news of his son's apprehension. This is borne out by the extensive enquiries which the applicant then made to try and ascertain the whereabouts of his son. The Court had no doubt that the applicant's anguish about the fate of his son would have been exacerbated both by the fact that another son had died whilst in custody and by the conduct of the authorities to whom he addressed his multiple enquiries. In this last respect, the Court observed that not only did the investigation into the applicant's allegations lack promptness and efficiency but certain members of the security forces also displayed a callous disregard for the applicant's concerns.

Noting, finally, that the applicant's anguish concerning his son's fate continues to the present day, the Court considered that the 'disappearance' of his son amounts to inhuman and degrading treatment contrary to Article 3 of the Convention in relation to the applicant.

Article 5 : Right to liberty and security of person

Article 5 of the Convention, in so far as is relevant states the following :

1. *"Everyone has the right to liberty and security of the 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."*

The applicant submitted that the 'disappearance' of his son gave rise to multiple violations of Article 5. He argued that this provision had been violated on account of the fact that his son's detention had not been recorded and there had been no prompt or effective investigation of his allegations. Since the authorities denied that Abulvahap had been taken into detention and since this detention had not been recorded, it automatically followed that there would be no effective judicial control of the lawfulness of the detention and no enforceable right to compensation.

The Government reiterated that no issue could arise under Article 5 since it had clearly been shown from the investigation carried out by the domestic authorities that the applicant's son had not been detained.

The Commission was of the view that the responsibility of the respondent Government was engaged due to the fact that the Government had failed to provide a satisfactory explanation for the 'disappearance' of the applicant's son and to the fact that no effective investigation had been conducted into the applicant's allegations. The Commission concluded that the applicant's son had been arbitrarily deprived of his liberty contrary to Article 5 and in disregard of the guarantees of that provision concerning the legal justification for such deprivation and requisite judicial control. Inaccurate custody records and a defective investigation process had subsequently combined to effectuate the 'disappearance' of Abdulvahap Timurtaş. The Commission considered that a particularly serious violation of Article 5 had occurred.

The Court, referring to its reasoning in the cases of *Kurt v. Turkey* and *Cakici v. Turkey,* reiterated 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. 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.

The Court noted that its reasoning and findings in relation to Article 2 above leave no doubt that Abdulvahap Timurtaş' detention was in breach of Article 5. Accordingly, the Court concluded that Abdulvahap Timurtaş was held in unacknowledged detention in the complete absence of the safeguards contained in Article 5 and that there had been a particularly grave violation of the right to liberty and security of person guaranteed under that provision.

Article 13 : Right to an effective remedy

Article 13 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."

The applicant asserted that he had been denied access to an effective domestic remedy and alleged a breach of Article 13. The applicant submitted that there had been a conspiracy to conceal the fact of his son's detention from him. The investigation that had eventually been conducted into his allegations had been superficial and incapable of uncovering the truth.

The Government reaffirmed that all the necessary enquiries had been made and that all the witnesses named by the applicant interviewed, but that the available evidence had not corroborated the applicant's allegations.

The Court considered that on the facts of this case, there can be no doubt that the applicant had an arguable complaint that his son had been taken into custody. Moreover, 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 of Article 13. Accordingly, the authorities were under the obligation to conduct an effective investigation into the 'disappearance' of the applicant's son. The respondent State failed to comply with this obligation and consequently, there has been a violation of Article 13 of the Convention.

Alleged practice by the authorities of infringing Articles 5 and 13 of the Convention

The applicant contended that a practice of 'disappearances' existed in Southeast Turkey in 1993 as well as an officially tolerated practice of violating Article 13 of the Convention. Referring to other cases concerning events in Southeast 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 serious human rights violations as well as a denial of remedies.

The Court considered that the scope of examination of the evidence undertaken in this case and the material on the case file are not sufficient to enable it to

determine whether the failings identified in this case are part of a practice adopted by the authorities.

Alleged violation of Article 18 of the Convention

Article 18 of the Convention states the following :

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

The applicant argued that the respondent Government have allowed a practice of 'disappearances' to develop which subverts the operation of their laws and that they have failed to take any effective action to bring it to an end. According to the applicant, the avoidance by the authorities of their own legal requirements constitutes a breach of the principle of good faith as enshrined in Article 18.

The Government did not address this issue.

The Commission found that there had been no violation of Article 18.

The Court, having regard to its previous findings, did not consider it necessary to examine this complaint separately.

Article 34 : Right to individual petition

Article 34 states the following :

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

The applicant submitted that the lying on oath by a Government witness to the Commission's delegates constituted an interference with the exercise of his right of individual petition as laid down, following the entry into force of Protocol No. 11, in Article 34.

In support of his argument, the applicant argued that the conduct of the gendarmes at Silopi and Şırnak, as exemplified by Husam Durmas, was calculated to frustrate the effective operation of the right of individual petition. Had it not been for the fortuitous discovery of a document, he would not have been able to prove the claims in his application beyond reasonable doubt.

The Government repudiated this allegation, maintaining that Husan Durmas had spoken the truth.

The Commission did not find it established that the conduct of the gendarmes concerned, however reprehensible, had as such hindered the applicant in the exercise of his right to individual petition.

The Court did not consider that in the circumstances of the present case, the conduct of the authorities or more specifically, of Husam Durmas, constituted a failure to comply with the obligation on of Article 34 *in fine* on the part of the respondent Government.

Just satisfaction : Compensation under Article 41[8]

Article 41 of the Convention states the following :

"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 a partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant claimed having regard to the severity and number of violations, £40,000 in respect of his son and £10,000 in respect of himself for non-pecuniary damage.

The Government claimed that these amounts were exaggerated and would lead to unjust enrichment.

The Court noted that there had been findings of violations of Articles 2, 5 and 13 in respect of the unacknowledged detention and failure to protect the life of Abdulvahap Timurtaş and considered that an award of compensation should be made in his favour in the sum of £20,000, which amount is to be paid to, and held by, the applicant for his son's heirs.

As regards the applicant, the Court considered that since it had found a breach of Article 3 in his own regard, due to the conduct of the authorities in relation to his search for the whereabouts and fate of his son, an award of compensation was also justified in his favour. It accordingly awarded the applicant the sum of £10,000.

[8] Formerly Article 50.

PART II: ERTAK v. TURKEY

SUMMARY OF ERTAK v. TURKEY

The case of *Ertak v Turkey* was brought by Mr Ismail Ertak on behalf of himself and his son Mehmet Ertak whom he alleges has 'disappeared' in circumstances engaging the responsibility of the respondent State. Mr Ismail Ertak is a Turkish citizen or Kurdish origin born in 1930 and residing in Şırnak, Southeast Turkey. The applicant complained before the European Court of Human Rights ('the Court') that the Turkish authorities had violated the right to life (Article 2). The applicant also alleged that he had been hindered in the exercise of his right of individual petition (formerly Article 25, now Article 34). The applicant was assisted in bringing his application by the Kurdish Human Rights Project. The Court held, in a judgment delivered on 9 May 2000, that Turkey had violated Article 2 and awarded compensation under Article 41 of the Convention.

THE FACTS

The facts as presented by the applicant

Following serious clashes which took place in Şırnak, a town in Southeast Turkey, between 18 - 20 August 1992, police and gendarmes searched the town and conducted identity controls. Many people were taken into police custody at the security directorate on 21 August 1992.

At the time of these events, the applicant's son Mehmet Ertak was working in a coalmine. At the Bakimevi checkpoint, officers in blue uniforms stopped the taxi which Mehmet and three others had taken when on their return home from work. His companions were Abdulmenaf Kabul, Suleyman Ertak and Yusaf Ertak. The officers took their identity cards and one of them demanded to know which of the men was Mehmet Ertak. Mehmet identified himself and was taken away by the officers.

On 24 August 1992, Abdullah Ertur, an acquaintance who was taken into custody on 21 August 1992 and released on 23 August 1992, told the applicant that he had shared a cell with Mehmet for an entire day and night.

Abdurrahim Demir, a lawyer taken into custody on 22 August 1992 and released on 15 September 1992, told the applicant that he had spent five or six days in the same room as Mehmet. Furthermore, he stated that Mehmet had been severely tortured; notably, on the last occasion, he had spent approximately 15 hours in the torture chamber. He stated that when Mehmet had been brought back to the cell he was unconscious and displayed no signs of life. Several minutes later, someone pulled him out of the cell by the legs. Another person, Ahmet Kaplan, also released on 15 September 1992 told the applicant that he had seen his son whilst he was detained. Three other people in custody in the security directorate

during the same period as Mehmet also stated to the applicant that they had seen Mehmet whilst in police custody.

The facts as presented by the Government

The Government agreed that following the clashes in Şırnak between 18 - 20 August 1992, an operation took place during which approximately one hundred people were taken into police custody. However, it asserts that Mehmet Ertak was not arrested by the security forces. The Government relied upon the letter of 21 December 1994 from the Şırnak security directorate stating that Mehmet Ertak was never apprehended or incarcerated.

In respect of the allegation made in relation to advocate Tahir Elçi, on 23 February 1995, the Government provided the Commission with an official report of the documents seized from him. In addition, a decision of the Diyarbakir State Security Court dated 19 January 1994 was provided, which the Government contended demonstrated that the documents were delivered to that court.

Proceedings before the domestic authorities

The applicant made enquiries at the Şırnak prefecture as to his son's whereabouts and the reason why he had not been released. He was accompanied by elected officials from the region, Abdullah Sakin and Omer Yardimici, as well as his other son Hamit Ertak. The Governor of Şırnak, Mustafa Malay, heard from eyewitness Abdullah Ertur who confirmed that he had seen Mehmet in the security directorate. The Governor made enquiries of the military and the police, who stated that Mehmet had never been taken into custody. By a letter of 4 November 1992, the Governor asked the head of the security directorate to appoint an investigating officer to carry out an inquiry into the applicant's allegations.

On 2 October 1992, the applicant issued a further complaint, this time to the Şırnak Public Prosecutor. He asked to know the fate of his son. He explained that although several witnesses confirmed having seen Mehmet Ertak whilst in police custody, as far as the gendarmerie, the police and the military were concerned, Mehmet Ertak had never been detained. It appears that no investigation resulted from this complaint.

On 8 April 1993, the investigation that had been triggered by the Governor reached its conclusion when the officer responsible for investigating the allegations presented his report to Şırnak Administrative Council. He recommended that the case should not be referred to the courts. On 21 July 1993, the Şırnak Prosecutor declared himself lacking jurisdiction and returned the file to the Şırnak Administrative Council. On 11 November 1993, the Şırnak Administrative Council concluded that in respect of the security directorate police officers, there was no case to answer and that it was not necessary to bring them before the criminal courts.

On 22 November 1993, in accordance with the legal provisions in force, the file was sent to the Council of State which, in a ruling of 22 December 1992, upheld in the same terms the order of no grounds for prosecution made by the Administrative Council.

In addition, the applicant contends that the authorities commenced legal proceedings against Maitre Tahir Elçi (the applicant's lawyer) as a result of the role he played in the case, including the applicant's petition to the European Commission of Human Rights. He states that on 23 November 1993, all the documents relating to the case were seized by the security forces at the time of the arrest of Tahir Elçi.

The findings of fact by the European Commission on Human Rights

Since the facts of the case were disputed, the Commission conducted an investigation, and decided to hold an oral hearing, with the assistance of the parties. The following evidence was before the Commission.

Documentary Evidence

a) Petition of 2 October 1992 submitted by the applicant to the Şırnak Public Prosecutor

b) Decision of lack of jurisdiction from the Şırnak Prosecutor dated 21 July 1993

c) Documents relating to the investigation conducted by Yahya Bal [statements taken 12 and 13 January 1993]

i) Statement of Abdulmenal Kabul
ii) Statement of Suleyman Ertak
iii) Statement of Yusaf Ertak
iv) Statement of Abdullah Ertur

d) The investigation report (presented 8 April 1993 by Yahya Bal)

Oral evidence

On 5, 6 and 7 February 1997, Commission delegates heard evidence from the following witnesses:

a) Ismail Ertak (the applicant, father of Mehmet Ertak)
b) Mustafa Malay (Governor of Şırnak)
c) Süleyman Ertak (cousin of Mehmet Ertak)
d) Ahmet Ertak (brother of Mehmet Ertak)
e) Abdurrahim Demir (lawyer; shared a cell with Mehmet Ertak)
f) Tahir Elçi (lawyer; represented the applicant)
g) Levent Oflaz (Police Superintendent, Şırnak)
h) Kemal Eryaman (head of detention centre, Elaziğ)
i) Serdar Çevirme (head of interrogation, antiterrorist section, Şırnak)
j) Osman Günaydin (Assistant Governor of Şırnak)

k) Yusuf Küçükkahraman (Police officer)
l) Yahya Bal (Police Inspector and investigator in the case)

A further four witnesses were summonsed and did not appear : Ahmet Berke (the Şırnak Public Prosecutor: Şeyhmus Sakin, Kiyas Sakin and Emin Kabul (witnesses who lived in the same area as the applicant and who were said to have seen Mehmet whilst in custody).

In the absence of any judicial examination or in-depth domestic independent investigation into the facts in question, the Commission laid emphasis on the written and oral evidence which was available for its consideration. In particular, careful attention was paid to the demeanour of the witnesses who gave oral evidence before the delegates in Ankara.

The Commission's findings can be summarised as follows. The fact that serious clashes took place in Şırnak between 18-20 August 1992 was not in dispute. The evidence from both documentary sources and oral witnesses was for the most part consistent that subsequent to those dates, the security forces conducted searches in the town and arrested more than one hundred people (including Abdullah Ertur, Abdurrahim Demir, Ahmet Kaplan, Kiyas Sakin, Şeyhmus Sakin, Nezir Olcan, Celal Demir, Ibrahmi Satan and Emin Kabul). Several of those arrested were taken to the brigade headquarters, others were detained at the security directorate. Identity controls were carried out at the entrance to the town and those suspected of terrorist activities were taken by members of the rapid reaction force ("cevik kuvvet") directly to the security directorate.

The Commission considered that the oral evidence given by Süleyman Ertak in relation to the arrest of Mehmet Ertak supported the contentions of the applicant. It noted that Süleyman Ertak confirmed that at the checkpoint the officers in blue uniforms stopped their taxi and, after checking their identity cards, took Mehmet away with them.

Upon examining the documents in the investigation file, the Commission found that the officer in charge of investigating the allegations had taken statements from Süleyman Ertak, Abdulmenaf Kabul, Yusaf Ertak and Abdullah Ertur. The Commission was struck by the stereotypical form and the generally similar contents of the statements of Süleyman Ertak and Yusuf Ertak. It was noted that the police representatives told the Commission delegates that controls were carried out by the security forces at the checkpoint referred to by Süleyman Ertak. Serdar Cevirme, in charge of investigations at the anti-terrorist section of the Şırnak area, indicated that members of the rapid reaction force were at the checkpoint and stressed the fact that at that time, they wore green uniforms. He did say that they presently wear blue uniforms but did not specify from which date.

The Commission noted that the police officers who gave evidence before them agreed that as a result of the clashes, which caused the death of two police officers and two soldiers, several teams of security forces proceeded to make arrests in the town. More than one hundred people were taken into custody and there existed a state of chaos. Serdar Cevirme declared that the rapid reaction

force manned the control points at the entrance to the town and did not take suspects directly to security directorate. He stated in this respect that the rapid reaction force kept separate ledgers. However, the Commission noted that at a late stage in his evidence, he agreed that those persons arrested at the time of the identity controls carried out by the force were taken directly to security directorate.

As for the keeping of custody ledgers, the name Emin Kabul does not appear on the ledgers and on this point no explanation was provided by Serdar Cevirme. The Commission remarked that his statements lacked specificity and clarity in relation to the custody ledgers. Furthermore, the Commission noted that the copies of the custody ledgers from the brigade headquarters and the regional gendarmerie were never produced by the Government, despite explicit requests.

Abdurrahim Demir stated that on 24 or 25 August, Mehmet Ertak was brought into the same detention room as himself and that they spent five or six days together. He relayed in great detail the circumstances in which they were held at the security directorate and the conversation which he had with Mehmet Ertak. The version of events set out by Abdurrahim Demir, in relation to being blindfolded whilst in custody, and the description and the site of the detention room, is consistent with that of Serdar Cervirme. The statement of Abdurrahim Demir corroborates the facts put before the Commission by the applicant and his son Ahmet Ertak. The Commission notes that moreover, Abdurrahim Demir emphasised that he had given evidence in front of the Public Prosecutor, to whom he gave the same version of events as he gave before the Commission, and that he signed a statement to that effect. The Commission found it regrettable that this statement did not find its way into the file of documents put together by the investigating officer.

The Governor of Şırnak at the time of these events, Mustafa Malay, acknowledged in his evidence that the applicant had come to see him several times stating that his son Mehmet Ertak had 'disappeared' after having been taken into police custody. Also he had heard from an eyewitness who had seen Mehmet in the security directorate. The Commission noted that the statement of Abdullah Ertur, taken by the investigating officer, contradicts the applicant's story as well as his evidence to the Governor. It noted that the Governor judged the statement of the eyewitness to be sufficiently credible to ask for investigations to be made into the case. The Commission favoured the version told to them by the applicant and Mustafa Malay over the assertions of Abdullah Ertur. It concluded that the absence of the name of Mehmet Ertak on the security directorate custody ledgers does not prove that he wasn't taken into custody. It accepted the evidence of Süleyman Ertak, the applicant, Ahmet Ertak, Abdurrahim Demire and Mustafa Malay, which the delegates found credible and convincing.

The Commission notes that the petition which the applicant presented to the Public Prosecutor's department in Şırnak on 2 October 1992, names Abdurrahim Demir as an eyewitness. In his oral evidence before the delegates, Abdurrahim Demir stated that on 24 or 25 August 1992, Mehmet Ertak had been brought into his cell. He named certain other people who were also there. The names of these

people appear on the custody ledgers of the antiterrorist section of the security directorate. Abdurrahim Demir specified, in a detailed manner, the circumstances in which they were arrested and the conditions in which they were kept whilst in custody. He stated that following the criminal complaint made by Ismail Ertak, he was heard by the Public Prosecutor of Diyarbakir and gave the names of the people who had been detained with him.

As for the conditions in custody, Abdurrahim Demir gave a detailed description of the treatment to which they were subjected during questioning: they were stripped and subjected to hanging, severely beaten and sprayed with jets of cold water. He stated that on one occasion, they had brought two or three detainees together in the 'torture room'. Mehmet Ertak was among them. Mehmet had been stripped and was suspended in the same way that Abdurrahim himself had been suspended. Assuming that he was able to judge the time correctly, Abdurrahim's own torture lasted one hour but Mehmet Ertak was not brought back until ten hours later. He stated: *'When Mehmet Ertak was brought back to the cell, he could not speak, he was dead, that is to say he had gone rigid. I am 99% sure that he was dead. Two or three minutes later, they pulled him outside by his legs. One of his shoes stayed there. We never saw him again.'*

The Commission found it regrettable that the Government did not provide the investigation file opened by Şırnak Public Prosecutor's department following the criminal complaint made by the applicant on 2 November 1992 and that the Public Prosecutor, Ahmet Berke, did not appear at the hearing before the Commission. It noted that parts of the investigation files revealed that the investigating officer, Yahya Bal, did not even hear from Abdurrahim Demir as an eyewitness.

The Commission noted that all the descriptions given by Abdurrahim Demir concerning the places of detention and interrogation match in those respects the evidence given by Serdar Cevirme. It was acknowledged by Serdar Cevirme that there had been a state of chaos at the time of the confrontations which occurred between 15 and 18 August 1992 and that hundreds of people had been taken into custody. Furthermore, the Commission noted that the Governor of Şırnak gave evidence before the Commission that he had met in his office with persons who had indicated that they had seen Mehmet Ertak whilst in custody and notably, that he had heard from an eyewitness.

The Commission noted that to all the questions posed by its delegates and the representatives of the parties, Abdurrahim Demir had given detailed and specific responses, in particular on the question of the torture suffered during interrogation. They also noted that he had been adamant on numerous occasions that Mehmet Ertak was dead when he was thrown into his cell. The Commission found his evidence plausible on this point.

As regards the preliminary investigation that had been carried out following a written request dated 4 November 1992 from the Governor of Şırnak, the Commission observed that the investigation was conducted by the investigating officer and members of the Administrative Council of Şırnak. The investigating officer was a police inspector who was a part of the same administrative

hierarchy as the members of the security forces upon whom the investigation was focused. The Administrative Council which, following the recommendation of the investigating officer, decided to abandon the proceedings, was headed by the assistant head of the Governor's office and was composed of senior state employees from the department, namely, directors or their deputies from the different sections of the central administration. These senior employees were placed under the direction of the head of the Governor's office who was at the same time responsible for the actions of the security forces. The Commission found that the police inspector charged with carrying out the investigation and the members of the Administrative Council were not equipped with any guarantees of independence that would protect them from pressure from their superiors within the hierarchy.

The Commission noted that the investigating officer questioned four witnesses in a room at the Şırnak security directorate. Notably, the local police brought the witnesses from their homes to the security directorate. In the statements taken, the witnesses completely deny the facts alleged by the applicant. However, the Commission remarked upon the stereotypical format and the overall similarity in contents of those statements. It noted that the investigating officer did not question the applicant and that an official report was drawn up by the security directorate, stating that Ismail Ertak had left his home and had probably left Silopi. Eyewitnesses who could have played a useful role in the investigation were referred to by the applicant in the complaint he presented to the Public Prosecutor's department on 2 November 1992. However, no request was made to hear from these persons even though the statement of one of them, namely Abdullah Ertur, stood in complete contradiction to that which had been given to Governor Mustafa Malay.

The Commission was of the view that the investigation at national level into the applicant's allegations had not been conducted by independent bodies, was not thorough and had been carried out without the applicant being given an opportunity to take part.

The findings of fact by the European Court of Human Rights

The Court accepted the Commission's findings of the facts. The Court recalled that the Commission reached its conclusions after a delegation heard oral evidence from witnesses in Ankara. In this case, the Court saw no reason to justify any need for the Court to use its powers to verify for itself any of the facts.

MAP OF THE AREA WHERE THE INCIDENT OCCURRED

THE LEGAL PROCEEDINGS

Chronology of events, including legal proceedings

18-20 August 1992	Clashes take place in Şırnak. More than one hundred people taken into police custody. Mehmet Ertak apprehended by officers in blue uniforms.
22 August 1992	Abdurrahim Demire taken into custody.
24 August 1992	Abdullah Ertur informs the applicant that he shared a cell with Mehmet for an entire day and night.
24 or 25 Aug 1992	According to Abdurrahim Demir, Mehmet Ertak is brought into the same detention room as himself and they spend five or six days together.
15 September 1992	Abdurrahim Demir and Ahmet Kaplan released.
1 October 1992	The applicant applies to the European Commission of Human Rights.
2 October 1992	The applicant complains to the Şırnak Public Prosecutor, asking to know the fate of his son. His petition names Abdurrahim Demir as an eyewitness.
2 November 1992	The applicant makes a criminal complaint to Şırnak Public Prosecutor's department.
4 November 1992	The Governor asks the head of the security directorate by letter to appoint someone to carry out an investigation into the applicant's allegations.
8 April 1993	The investigating officer presents his report to the Şırnak Administrative Council recommending that the case should not be referred to the courts.
21 June 1993	The Şırnak Prosecutor declares himself lacking jurisdiction.
11 November 1993	The Şırnak Administrative Council concludes that there is no case to answer and therefore no need to bring the security directorate officers before the criminal courts.
23 November 1993	All documents relating to the case are seized from Tahir Elçi by the security forces. Tahir Elçi is arrested.
22 December 1993	The Council of State upholds the decision of the Administrative Council that there is no case to answer.

4 December 1995	The Commission declares the case admissible.
5-7 February 1997	Evidence is heard by Commission delegates in Ankara.
4 December 1998	The Commission declares unanimously that there has been a violation of Article 2 and that there has been no violation of Article 25 (now Article 34) by 28 votes to 2.
6 March 1999	The Commission refers the case to the European Court of Human Rights.
9 November 1999	Hearing before the European Court in Strasbourg.
9 May 2000	The Court delivers judgement and finds a violation of Article 2.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 of the European Convention on Human Rights came into operation.[9] The Protocol established a full-time single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure, all applications are to be submitted to the European Court. Each case is registered and assigned to the Judge Rapporteur who may refer the application to a three-judge committee. The committee, by unanimous decision, can declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine admissibility and merits of the case. The examination of the case by the Court may, if necessary, involve an investigation. States are obliged to furnish "all necessary facilities" for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although this is also rare. It should be noted that the role of the Committee of Ministers is reduced to supervising the execution of judgements.

The *Ertak* case was dealt with under the old system. The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP's previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999).[10]

The investigation under the old procedure

Under the old Pre-protocol 11 procedure, if the Commission considered it necessary, it was able to "undertake ... an investigation for the effective conduct of which the State concerned shall furnish all necessary facilities" pursuant to the former Article 28(1)(a). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission's action under Article 28(1)(a) took the form of investigations whereby the applicant's and the Government's witnesses gave oral evidence before a select number of Commission delegates (usually three). Investigation hearings were held in *camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

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[9] The new system is described in Appendix F.

[10] Further information about this procedure can be obtained from the relevant editions of human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J. Harris, M. O'Boyle and C. Warbrick (Butterworths, London, Dublin and Edinburgh), *Theory and Practice of the European Convention of Human Rights* by P. van Dijk and G.J.H. van Hoof (Kluwer Law and Taxation Publishers, The Netherlands), *A Practitioner's Guide to the European Convention of Human Rights* by Karen Reid (Sweet & Maxwell, London), *European Human Rights: Taking a Case under the Convention* by Luke Clements, Nuala Mole and Alan Simmons (Sweet & Maxwell, London).

In *Ertak*, the Commission conducted an investigation with the assistance of the parties.[11] The documentary evidence included written statements and oral evidence taken from twelve witnesses. Four other witnesses were summoned to give evidence but did not appear.

Preliminary objections to the Court's jurisdiction

The Government claimed that the applicant had not exhausted all domestic remedies as required under Article 35 of the Convention. It referred to the case of *Aytekin v Turkey (judgement of 23 September 1998, RJD 1998-VII)* as establishing that the Turkish authorities did institute criminal proceedings against members of the security forces and that remedies for redress were available and effective.

The applicant stated that he did make a complaint to the Public Prosecutor of Şırnak following the 'disappearance' of his son but following the ruling of the Administrative Council, upheld by the Council of State on 22 December 1993, he asserted that he had exhausted all his domestic remedies.

The Commission rejected the Government's arguments and considered that the applicant had correctly brought his complaints before the competent authorities and were satisfied that he had exhausted his domestic remedies.

The Court considered that the applicant had done everything that one could expect him to do in order to remedy his grievance. He went to the head of the Şırnak Governor's office accompanied by a witness who confirmed having seen Mehmet in the premises of security directorate. The Governor of Şırnak, M. Malay, told the delegates of the Commission that Ismail Ertak had pursued the matter and returned to see him five or six times, on each occasion reiterating his allegations. On 2 October 1992, he lodged a petition at the Şırnak Public Prosecutor's department, alleging that his son had been arrested on 20th August 1992 after an identity check whilst he was returning to work and named the eyewitnesses who indicated having seen him in custody. Nevertheless, his assertion was not seriously examined. Although an investigation file was opened following a written request by the Governor of Şırnak on 4 November 1992 to the head of the security directorate, no useful steps were taken to find the witnesses who confirmed having seen Mehmet Ertak whilst in custody or to hear the plaintiff. Neither did the investigator have in his possession the investigation files opened by the Public Prosecutor following Ismail Ertak's complaint. As the authorities did not carry out an effective inquiry into the alleged 'disappearance' and constantly denied the arrest of Mehmet Ertak, the Court noted that the applicant had no foundation for any recourse in the civil or administrative courts. The Court considered that the applicant did everything that could reasonably be expected in order to exhaust the domestic remedies that were available to him.

Accordingly, the Court dismissed the Government's preliminary argument.

[11] See section on The Evidence before the Commission, above.

THE APPLICANT'S COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Before the Court, the applicant in *Ertak* complained that Turkey had violated Article 2 of the Convention. The Court held that there had been a violation of Article 2.

Article 2: Right to life

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 for 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."

The applicant alleged that his son, Mehmet Ertak, who was taken into custody on 20 August 1992, 'disappeared' whilst in custody and very probably was killed by the security forces whilst being interrogated. He alleged a violation of Article 2.

The applicant stated that at some point after his arrest, the death of Mehmet Ertak was caused by agents of the State and consequently the respondent Government must take responsibility for his death. Furthermore, the applicant alleged that the fact that the authorities failed to conduct a timely, detailed and effective investigation into his son's 'disappearance', also represents a separate violation of Article 2.

The Government maintained that the applicant's allegations were without basis and did not fall within the scope of Article 2. The Government criticised the Commission for basing its decision entirely upon the evidence of Abdurrahim Demir. The Government maintained that an effective investigation had been conducted into the applicant's complaints, the investigation report had been examined by the Administrative Council, and the order that there was no ground for prosecution was upheld by the Council of State.

The Commission was of the view that it had been established beyond all reasonable doubt that the death of Mehmet Ertak had been caused by agents of the State at some point after his arrest and that the Government must bear responsibility.

The Court's assessment agreed with the assessment of facts made by the Commission.

Regarding the fate of Mehmet Ertak

The Court found that there was no dispute that clashes took place in Şırnak between 18 and 20 August 1992 and that according to evidence of the security forces, more than one hundred people were arrested. Checks were carried out at a checkpoint at the entrance to the town and persons suspected of terrorist activities were taken by members of the security forces directly to the security directorate. As the Commission emphasised, very powerful conclusions can be drawn from the evidence before it from Suleyman Ertak concerning the arrest of Mehmet Ertak, from Mustafa Malay, Governor of Şırnak, who agreed that he had met in his office people who said they had seen Mehmet Ertak whilst in custody and Abdurrahim Demir who stated he had spoken with Mehmet during his detention and had seen him as if 'dead' in the security directorate premises following the torture inflicted by the police employees. The Court noted on this basis that there exists sufficient evidence to conclude beyond all reasonable doubt that Mehmet Ertak, after having been arrested and detained, was the victim of unacknowledged severe torture and met his death at the hands of the security forces.

The present case can be distinguished from the case of *Kurt v. Turkey* in which the Court examined in respect of Article 5 the complaints put forward by the applicant in relation to the 'disappearance' of his son. In *Kurt*, whilst the son of the applicant had been in a place of detention, no other element of proof existed in relation to his treatment or the fate which ultimately befell him.

The Court observed that no explanation had been provided as to what took place after the arrest of Mehmet Ertak. The Court considered that the responsibility for the death of Mehmet Ertak, caused by agents of the State at some point following his arrest, falls upon the Government and therefore represents a violation of Article 2.

The investigation conducted by the national authorities

The Court reiterated that Article 2 is among the most important of the Convention and, combined with Article 3, consecrates one of the fundamental values of democratic societies that make up the Council of Europe. The obligation imposed does not exclusively relate to deliberate murder resulting from use of force by agents of the State but also extends to a positive obligation for States to protect, by law, the right to life. This implies and demands an adequate and effective official investigation whenever the use of force results in death. The procedural protection of the right to life provided for in Article 2 of the Convention places an obligation upon agents of the State to account for the exercise of fatal force. Such acts must undergo a form of proper independent and public enquiry in order to determine if the recourse to force was justified in the individual circumstances of the case.

Given that the Court agrees with the Commission's conclusions in relation to the unacknowledged detention of the applicant's son, the terrible treatment inflicted upon him and his 'disappearance' in circumstances leading to the presumption that he is dead since that time, the same considerations, must apply *mutatis*

mutandis in the case in point. It follows that the authorities were under an obligation to conduct an effective and detailed investigation into the 'disappearance' of the applicant's son.

For the Commission, the investigation conducted nationally into the allegations made by the applicant did not constitute an effective investigation by an independent body, was not pursued in any depth and did not involve the applicant. The Court concluded that the defendant State failed in its obligation to conduct an adequate and effective investigation into the circumstances of the 'disappearance' of the applicant's son. Consequently, a separate violation of Article 2 of the Convention had occurred in respect of the State failure to adequately investigate.

Article 25(1): Right to individual petition (now Article 34)

Article 25(1) reads as follows:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right"

The applicant maintained that following his application to the Commission, all the documents relating to his case were seized by the security forces from the premises of his lawyer Tahir Elçi who was also arrested. It was Tahir Elçi who had applied to the Commission in the name of the applicant. The applicant therefore alleged that Turkey had hindered his right to individual petition. However, the applicant had not pursued this complaint before the Court, and therefore the Court saw no need to consider the question.

Alleged practice by the authorities of violating Article 2 of the Convention

The applicant invited the Court to find that in the Southeast of Turkey at the given time, there existed a practice of 'disappearances' which represent a violation of Article 2 of the Convention. Furthermore, it was stated that the practice of inadequate remedies was officially tolerated in the region. The applicant argued in support that there is credible evidence of a policy of denial in relation to killings, torture of detainees and 'disappearances', evidenced by the systematic refusal or failure of the authorities to investigate the complaints of these victims.

The Government rejected these allegations.

The Court considered that the evidence before it was not sufficient to enable it to decide whether or not the Turkish authorities did or did not adopt a practice which violated Article 2 of the Convention.

Article 41 : Just satisfaction

Article 41 of the Convention states as follows :

"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 a partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The applicant claimed £60,630.44 for loss of earnings (calculated by reference to the estimated monthly wages of Mehmet Ertak) to be held for his widow and four children. He also claimed £40,000 for non-pecuniary damage.

The Government asserted that no damages should be paid. It further stated that loss of earnings could not be paid since Mehmet Ertak's death had not been established. Furthermore, it invited the Court to reject the applicant's demands as exorbitant, exaggerated and unjustified.

The Court recalled that its jurisprudence has established the need for a causal link between the alleged damage and the Convention violation. It noted that it had held that Mehmet Ertak died following his arrest by the security forces and that the responsibility of the State was engaged under Article 2 of the Convention. In the circumstances there was a direct causal link between the violation of Article 2 and the loss of Mehmet Ertak's financial support for his wife and children. The Court allocated to the applicant £15,000 to be held for the applicant's son's wife and children.

In relation to non-pecuniary damages, the Court decided to allocate £20,000 to be held by the applicant for his son's widow and four children. In respect of the applicant himself, the Court considered that he undeniably suffered loss as a result of the violation and awarded him a sum of £2,500.

Finally, the Court awarded £12,000 in legal costs and expenses.

Appendix A

Timurtaş v Turkey: Decision of European Commission of Human Rights

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 23531/94

Mehmet TİMURTAŞ

against

Turkey

REPORT OF THE COMMISSION

(adopted on 29 October 1998)

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant is a Turkish citizen, born in 1928 and resident in İstanbul. He was represented before the Commission by Mr K. Boyle and Ms. F. Hampson, both university teachers at the University of Essex, England. The applicant states that he brings the application also on behalf of his son, Abdulvahap Timurtaş, born in 1962.

3. The application is directed against Turkey. The respondent Government were represented by their Agents, Mr Ş. Alpaslan and Mr D. Teczan.

4. The applicant complains that his son Abdulvahap Timurtaş has been taken into custody by the security forces and has "disappeared". He invokes Articles 2, 3, 5, 13, 14 and 18 of the Convention. He also complains of an interference with his right to individual petition contrary to Article 25 para. 1 in fine of the Convention.

B. The proceedings

5. The application was introduced on 9 February 1994 and registered on 24 February 1994.

6. On 9 May 1994 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits. The parties were informed of the Commission's decision by letter of 20 May 1994.

7. The Government submitted preliminary observations on 11 October 1994 in which they requested the Commission to adjourn the examination of the application pending the investigation into the applicant's allegations at the domestic level. Having obtained the applicant's opinion on the matter, the Commission decided on 14 January 1995 not to accede to the request of the Government. The Government were invited to submit any further observations they might wish to submit.

8. The Government's observations were submitted on 16 March 1995, after the expiry of the time-limit set for that purpose. The applicant replied on 22 May 1995.

9. On 11 September 1995 the Commission declared the application admissible.

10. The text of the Commission's decision on admissibility was sent to the parties on 14 September 1995 and they were invited to submit such further information or

observations on the merits as they wished. They were also invited to indicate the oral evidence they might wish to put before delegates. Neither party availed itself of this possibility.

11. On 20 January 1996 the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three Delegates for this purpose: Mr N. Bratza, Mr G. Ress and Mr P. Lorenzen. It notified the parties by letter of 25 January 1996, proposing certain witnesses and requesting the Government to provide a copy of the documents contained in the investigation file. The Government were further requested to identify by name the commanders of the security forces allegedly involved and a public prosecutor, whereas the applicant was requested to identify a village muhtar and the latter's son who had allegedly been taken into custody at the same time as the applicant's son, and to submit the addresses of these witnesses and of the applicant.

12. By letter of 7 March 1996 the applicant's representatives informed the Commission that they were not yet in a position to submit the requested information.

13. On 2 April 1996 the Commission reminded the Government of the outstanding requests for information and documentation.

14. By letter of 17 April 1996 the Government provided the names of the security force commanders and the public prosecutor.

15. On 18 June 1996 the Commission urgently requested the Government to provide copies of the investigation file, and the applicant to submit the names of the village muhtar and his son, their address as well as the address of the applicant.

16. On 28 July 1996 the Government informed the Commission of two decisions which had been taken in the investigation into the applicant's allegations at the domestic level. They submitted a copy of a decision not to prosecute dated 3 June 1996.

17. On 1 August 1996 the Commission requested the Government to submit a copy of the other decision mentioned in their letter of 28 July 1996. In addition, the Government were requested on 12 August 1996 to submit copies of all documents to which reference was made in the decision not to prosecute.

18. On 5 September 1996 the Commission reminded the applicant's representatives of the outstanding request for information.

19. By letter of 12 September 1996 the Government submitted the contents of the investigation file, followed, on 20 September 1996, by a number of statements taken from villagers. From the documents submitted, the names of the muhtar and his son became apparent.

20. On 23 September 1996 the applicant's representatives informed the Commission that they were not yet in possession of the required information.

21. Evidence was heard by the Delegates of the Commission in Ankara on 21 and 23 November 1996 from the applicant, Bahattin Aktuğ (mayor of Güçlükonak district, Şkrnak province), Azmi Gündoğan (commander of Silopi district gendarmerie, Şkrnak province, until 4 August 1993), Erol Tuna (commander of Şkrnak provincial centre gendarmerie headquarters between 1992 and 31 July 1994), Hüsam Durmuş (commander of Silopi district gendarmerie from 17 July 1993 until 1995), and Sedat Erbaş (public prosecutor at Silopi). Before the Delegates the Government were represented by Mr Ş. Alpaslan and Mr D. Teczan, Agents, assisted by Ms. M. Gülsen, Mr A. Kurudal, Mr N. Erdim and Mr A. Kaya. The applicant was represented by Ms. F. Hampson, counsel, assisted by Ms. A. Reidy, Mr O. Baydemir, Ms. D. Deniz (interpreter) and Mr M. Kaya (interpreter). Further documentary material was submitted by the parties during the hearing.

22. On 30 November 1996 the Commission examined the state of proceedings of the application. It decided that the parties should be asked a number of questions relating to a document which had been presented by the applicant's representatives at the hearing and which was said to be a photocopy of a post-operation report dated 15 August 1993. Furthermore, the Commission decided to hear evidence from two persons, Sadkk Erdoğan and Nimet Nas, who had not appeared at the hearing in Ankara. In the subsequent letter of 6 December 1996, the Delegates' requests for certain information and documentation to be submitted by the Government were also confirmed in writing. The information requested included an explanation for the failure of two witnesses to appear before the Delegates and the relevant entries in the custody records of Diyarbakkr E-type prison concerning Sadkk Erdoğan and Nimet Nas.

23. By letter of 31 January 1997 the applicant's representatives informed the Commission that should it prove necessary, the person who had obtained the photocopied document was willing to give evidence before the Delegates subject to certain conditions.

24. On 26 May 1997 the Government were reminded of the outstanding request for information and documentation of 6 December 1996.

25. On 15 July 1997 the Government submitted some of the information and documents requested, including an explanation for the absence of one witness from the hearing in Ankara and information relating to the photocopied document.

26. On 29 August 1997 the Commission reminded the Government of the documents and information which had not yet been submitted.

27. By letter of 7 October 1997 the Government provided an explanation for the absence of a witness from the hearing in Ankara, and some further information relating to the reference number indicated on the photocopied document. They also announced that further information would be submitted. The latter information was produced on 22

October 1997 but did not include the entries in the records of Diyarbakkr E-type prison for Sadkk Erdoğan and Nimet Nas.

28. On 31 October 1997 the parties were requested to inform the Commission before 28 November 1997 whether they wished to maintain the hearing of the witnesses Sadkk Erdoğan and Nimet Nas. The applicant informed the Commission on 3 December 1997 that he had no objection to these witnesses being heard, but that he was not in a position to confirm whether or not they could be contacted or were willing to give evidence. Having received no reply from the Government prior to the expiry of the time-limit set for that purpose, the Commission, on 6 December 1997, decided not to maintain the hearing of these witnesses. It also decided that the parties should be invited to present their written conclusions on the merits of the case before 3 February 1998.

29. In reply to the Commission's letter dated 9 December 1997, in which they were informed of the Commission's decision relating to the witnesses Sadkk Erdoğan and Nimet Nas, the Government informed the Commission on 17 December 1997 that the witnesses concerned wished to give evidence and that the Government considered that their testimony might be of relevance for the establishment of the facts.

30. On 17 January 1998 the Commission decided not to reverse its decision of 6 December 1997.

31. On 11 February 1998 the applicant submitted his final observations on the merits, after two extensions of the time-limit fixed for that purpose.

32. No final observations were received from the Government.

33. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

34. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM S. TRECHSEL, President
J.-C. GEUS
M.P. PELLONPÄÄ
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER

H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
C.L. ROZAKIS
Mrs J. LIDDY
MM L. LOUCAIDES
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

35. The text of this Report was adopted on 29 October 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

36. The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

37. The Commission's decision on the admissibility of the application is annexed hereto.

38. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

39. The facts of the case, in particular those which relate to the events on 14 August 1993, are in dispute between the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has examined written material, as well as oral testimony presented before

the Delegates. The Commission first presents a brief outline of the events, as submitted by the parties, and then a summary of the evidence adduced in this case.

A. The particular circumstances of the case

1. Facts as presented by the applicant

40. The various accounts of events as submitted in written and oral statements by the applicant are summarised in Section B below. The version as presented in the applicant's final observations on the merits is summarised briefly here.

41. On 14 August 1993 the applicant received a telephone call from someone who did not identify himself. The caller said that the applicant's son Abdulvahap had been taken into custody near the village of Yeniköy, in Silopi district, Şkrnak province, by soldiers attached to Silopi central gendarmerie headquarters. Abdulvahap had been arrested together with a friend, who was said to be Syrian, as well as with the muhtar and his son in front of all the villagers. The muhtar was released soon afterwards. The applicant later heard that Abdulvahap and his friend had been taken round a number of villages to see if the villagers recognised them. Moreover, within a week of Abdulvahap being apprehended, the muhtars from the surrounding villages were called to Silopi gendarmerie headquarters to see if they recognised the two men.

42. The applicant made various attempts to obtain news of his son's fate. He submitted petitions to the Silopi prosecutor's office which initially were not registered. At the Silopi gendarmerie headquarters he was told that his son was not detained. When he took a photograph of Abdulvahap to the gendarmerie headquarters the gendarmes said that they did not recognise Abdulvahap and suggested that the applicant should look for his son in the mountains. At some stage, the applicant was told by a gendarme that two people had been detained but that that had not been on 14 August 1993.

43. The applicant also telephoned a relative, Bahattin Aktuğ, who was the mayor of Güçlükonak district. Aktuğ rang him back and said that he had spoken to Sadkk Erdoğan and Nimet Nas, two 'confessors' (persons who co-operate with the authorities after confessing to having been involved with the PKK) from his village who were at that time in Şkrnak. They had told Aktuğ that Abdulvahap was being detained in Şkrnak, that they were doing what they could to look after him and that Abdulvahap was refusing to make a statement.

44. After about forty-five days the applicant went to Güçlükonak to see Bahattin Aktuğ. Whilst there, he also met with Erdoğan and Nas who had been given twenty days' leave from Şkrnak and who could not return to Şkrnak on account of the conditions in the area. When they had left Şkrnak, Abdulvahap had been alive. Erdoğan and Nas told the applicant that they had been with Abdulvahap for quite some time and that they had also seen the Syrian. Bahattin Aktuğ spoke to a gendarmerie captain at Güçlükonak who rang Şkrnak for information but was told that Aktuğ should stop asking questions about

Abdulvahap. The same message was given when a major whom Aktuğ knew in Iğdır rang Şırnak. These developments worried and bewildered Bahattin Aktuğ.

45. The applicant again went to the Silopi prosecutor's office and named Erdoğan and Nas as his witnesses. At that point, his statement was taken. The applicant also went repeatedly to Şırnak where he was told on one occasion that his son had been caught "in Germik village of Karabaş between those two villages".

46. In the spring of 1995 the applicant saw Erdoğan again. Erdoğan told him that he had gone to court where he had said that he had seen Abdulvahap in Şırnak. Upon this his interrogator had got very angry and Erdoğan had become scared. For that reason he had said at the second occasion that he was asked about Abdulvahap that he had seen a man who looked similar but that he did not know whether it had been Abdulvahap.

2. Facts as presented by the Government

47. In their observations on the admissibility and merits of the application the Government submitted that it had appeared from the investigation initiated by the Silopi public prosecutor on 15 October 1993 that the applicant's son had not been apprehended or detained.

3. Proceedings before the domestic authorities

48. On 15 October 1993 the applicant submitted a petition to a Silopi public prosecutor (see para. 91). On the same date the prosecutor sent the petition to both the Silopi district gendarmerie headquarters and the police headquarters with a cover letter requesting examination of the matter.

49. By letter dated 20 October 1993, with reference number 0623-1302-93/7502, Hüsam Durmuş, commander of Silopi district gendarmerie headquarters, informed the Silopi public prosecutor that Abdulvahap Timurtaş had not been detained by his headquarters and that Abdulvahap's name did not appear in their records.

50. On 21 October 1993 a Silopi prosecutor took a statement from the applicant (see para. 66). On that same date letters were sent to the Silopi district gendarmerie headquarters with a request to secure the presence at the prosecutor's office of the muhtars of Yeniköy and Esenli in order for their statement to be taken, and to the office of the public prosecutor in Şırnak for a statement to be taken from Nimet Nas and Sadık Erdoğan, who were said to be in detention either at the Şırnak police headquarters or the provincial gendarmerie headquarters, the applicant having named these persons as witnesses.

51. The prosecutor's office at Şırnak was informed by the Şırnak provincial gendarmerie headquarters on 29 December 1993 that they had been unable to comply with the request to summon Sadık Erdoğan and Nimet Nas since "confessor suspect"

Erdoğan was being held in detention in Diyarbakkr E-type prison and Nas was participating in operations in Güçlükonak.

52. By letter dated 25 January 1994 Hüsam Durmuş, commander of Silopi district gendarmerie headquarters, informed the Silopi public prosecutor that the presence of the muhtar of Esenli village had been secured as requested. On 26 January 1994 İsmail Birlik and Kamil Bilgeç, muhtars of, respectively, Esenli and Yeniköy, made a statement to Silopi prosecutor Ahmet Yavuz (see paras. 78, 80).

53. On 10 March 1994 Silopi prosecutor Yavuz wrote to the prosecutor's office in Cizre requesting them to ensure that the applicant would go to the prosecutor's office in Silopi. This request was passed on to the Cizre police headquarters, which replied on 28 March 1994 that the applicant and his family had left Cizre and that their present whereabouts were unknown. This reply was transmitted from the Cizre prosecutor's office to the office in Silopi on the same day.

54. On 10 August 1994 the Silopi prosecutor Sedat Erbaş again requested the public prosecutor at Cizre to ensure the applicant's appearance at his office in Silopi. On the same date Erbaş also requested the public prosecutor at Güçlükonak to ask Bahattin Aktuğ whether the latter personally knew Abdulvahap Timurtaş and whether he had been approached by the applicant and had discussed the fate of the applicant's son. Erbaş further wrote to the prosecutors of Diyarbakkr and Güçlükonak concerning Erdoğan and Nas respectively, who were to be asked whether they had been kept in custody along with Abdulvahap Timurtaş. It appears that in respect of Erdoğan at least the Silopi prosecutor's office had previously requested that his statement be taken by a Diyarbakkr public prosecutor, since the case-file submitted by the Government includes a letter dated 1 August 1994 from a public prosecutor at Diyarbakkr to the E-type prison in that city requesting that Erdoğan be brought before him.

55. It appears that following the communication of the present application to the Government on 9 May 1994 the Ministry of Justice (International Law and Foreign Relations General Directorate) contacted the Şkrnak public prosecutor's office which in its turn passed the request for information on to the prosecutor's office in Silopi. On 23 August 1994 Silopi prosecutor Erbaş informed his colleague in Şkrnak of the state of the investigation, saying that it had appeared from their examinations that Abdulvahap Timurtaş had neither been detained by the gendarmerie headquarters nor by the police headquarters in the district. Furthermore, the village muhtars whom the applicant had referred to as witnesses had stated that they knew neither the applicant nor his son Abdulvahap. It had not been possible to question Sadkk Erdoğan and Nimet Nas. In view of the facts that the applicant had moved from Cizre to an unknown destination and that he had not applied to the Silopi prosecutor's office since 21 October 1993 the impression had been created that Abdulvahap Timurtaş had been found. For that reason, the applicant had been summoned on 10 August 1994 to the Silopi prosecutor's office in order to close the file.

56. The case-file then contains a series of letters written mainly by public prosecutors at Silopi and Eruh aimed at securing the presence of Bahattin Aktuğ, Sadkk Erdoğan and Nimet Nas in order for their statements to be taken. In another reminder sent on 2 February 1995 by Silopi prosecutor Yavuz to the prosecutor's office at Eruh, Yavuz stated that the subject was important and urgent since it was related to a matter followed by the Ministry of Justice and the European Commission of Human Rights. He continued by stating that Aktuğ, Erdoğan and Nas should be asked whether they personally knew Abdulvahap Timurtaş, whether they had seen Abdulvahap Timurtaş in August, September or October 1993 in Şkrnak brigade or regiment headquarters and whether they had had any conversation with Abdulvahap whilst the latter was in detention. Moreover, they were to be asked whether they had furnished any information to the applicant and to be requested to give detailed information concerning the detention of Abdulvahap Timurtaş by the security forces.

57. In a letter dated 6 February 1995 in which Silopi prosecutor Yavuz informed the Şkrnak prosecutor's office of the progress of the investigation, it is mentioned that the residents of Yeniköy had been summoned for their statements to be taken. Moreover, the public prosecutor's office at Şkrnak had been requested to investigate the incident via the Şkrnak brigade headquarters.

58. The case-file contains a statement drawn up and signed by Bahattin Aktuğ and two gendarmerie officers to the effect that the former was unable to comply with the summons from the Eruh public prosecutor as "road and life security and helicopter activity" could not be established. It also said that Nimet Nas was being held in Diyarbakkr E-type prison. Although this statement is dated 9 September 1994 it would seem more likely that it was drawn up around 9 April 1995 as it refers to correspondence received from a district gendarmerie headquarters dated 9 September, 10 November and 25 December 1994 and 14 March 1995. Moreover, on 18 April 1995 Sedat Erbaş, prosecutor at Silopi, first wrote to the prosecutor's office at Diyarbakkr to request that a statement be taken from Nas. Nas was to be asked, inter alia, whether he had seen Abdulvahap Timurtaş in detention at Şkrnak brigade or regiment headquarters in August, September or October 1993 or at any other time. On 5 May 1995 Nimet Nas made a statement to a Diyarbakkr public prosecutor (see para. 82).

59. By decision of 13 July 1995 Silopi prosecutor Yavuz issued a decision of lack of jurisdiction and referred the case to the prosecutor's office at Şkrnak (see paras. 107-110).

60. Özden Kardeş, public prosecutor at Şkrnak, commenced his investigation by requesting the Şkrnak police headquarters and the provincial centre gendarmerie headquarters on 24 July 1995 to examine their records for August 1993 to see if Abdulvahap Timurtaş had been detained by them. By letter of 9 August 1995 the commander of the Şkrnak provincial centre gendarmerie headquarters replied that the name Abdulvahap Timurtaş did not appear in their records.

61. On 13 August 1995 the Yeniköy muhtar Kamil Bilgeç made another statement at Silopi central gendarmerie headquarters (see para. 81). Moreover, on 13 and 15 August

1995 statements were taken from Bahattin Aktuğ and Sadkk Erdoğan respectively by a gendarmerie officer (see paras. 87, 84). It does not appear, however, that these statements were immediately sent to the Şkrnak prosecutor's office since he also entered into correspondence aimed at having the statements of Aktuğ, Erdoğan and Nas taken. By letter of 8 October 1995 a gendarmerie officer at the Şkrnak provincial centre gendarmerie headquarters informed the public prosecutor that Nimet Nas was being detained in Diyarbakkr E-type prison and that the address of Sadkk Erdoğan could not be established. On 28 December 1995 Nimet Nas made a statement to a Diyarbakkr public prosecutor (see para. 83).

62. Bahattin Aktuğ's statement of 13 August 1995 was forwarded to the Şkrnak prosecutor's office by the Güçlükonak district gendarmerie headquarters on 19 November 1995. Nevertheless, by letter of 8 February 1996 to the Eruh prosecutor's office Şkrnak prosecutor Kardeş again requested that he be supplied with a statement from Bahattin Aktuğ in which the latter was to clarify whether he personally knew Abdulvahap Timurtaş and whether he had any information concerning a detention of Abdulvahap Timurtaş. Kardeş sent the same request in respect of Sadkk Erdoğan. Moreover, on 26 February 1996 another Şkrnak prosecutor asked the prosecutor's office at Silopi to question the residents of the villages of Yeniköy, Germik, Kartkk and Kutnks about their knowledge of Abdulvahap Timurtaş and a detention undergone by the latter. On 26 March 1996 the statements made on 7 and 8 March 1996 by residents of these villages were transmitted to the Silopi prosecutor's office by the Silopi district gendarmerie headquarters (see para. 89). Meanwhile, on 11 March 1996, Yusuf Bilgeç, the son of the Yeniköy muhtar, made a statement to a public prosecutor (see para. 90). Sadkk Erdoğan made a statement to Şkrnak prosecutor Kardeş on 2 April 1996 (see paras. 85-86). A public prosecutor at Siirt took a statement from Bahattin Aktuğ on 22 April 1996 (see para. 88).

63. On 3 June 1996 the Şkrnak prosecutor Özden Kardeş issued a decision not to prosecute (see paras. 111-115).

B. The evidence before the Commission

1. Documentary evidence

64. The parties submitted various documents to the Commission. The documents included reports about Turkey (including extracts on Turkey from a number of Reports of the United Nations Working Group on Enforced or Involuntary Disappearances) and statements from the applicant and witnesses concerning their version of the events at issue in this case.

65. The Commission had particular regard to the following.

a. Statements by the applicant

i. Statement of 21 October 1993 taken by a Silopi public prosecutor

66. The applicant stated that his son Abdulvahap, after being angry with him, had left his house and had gone away two years previously. He had learnt from other people that Abdulvahap had gone to Syria. According to the latest information his son had been apprehended by security forces in Yeniköy. Although the applicant had not seen his son, he might have been seen by the Yeniköy and Esenli muhtars. The applicant had also heard that his son had been seen in Şkrnak by Nimet Nas and Sadkk Erdoğan who resided in Güçlükonak but, according to the applicant's knowledge, were being kept in detention.

ii. Statement of 2 December 1993 taken by Mahmut Şakar of the Diyarbakkr branch of the Human Rights Association

67. The applicant was informed through an anonymous telephone call that his son Abdulvahap, together with a friend whom the applicant did not know, had been taken into custody in Yeniköy on 14 August 1993 by soldiers connected to Silopi central gendarmerie headquarters. The arrest had taken place in front of all the villagers. The muhtar of Yeniköy, Kamil, and the muhtar's son had also been arrested. About three days after being caught, Abdulvahap and his friend were taken around a number of villages in the area. The aim of this exercise was to find out whether the villagers knew them and whether Abdulvahap and his friend knew the villagers. To this end all the villagers were gathered in the village squares. The villagers were unwilling to give their names to the applicant because of the situation in the region, but they remembered Abdulvahap asking for water.

68. In view of the intensity of the clashes in the area at the time, the applicant did not give a petition to the Silopi public prosecutor's office until one week later. The petition was not processed and the applicant was told that Abdulvahap was not there. Within that week the muhtars of the villages in the area were called to Silopi to see if they knew Abdulvahap and his friend. Although these muhtars thus saw Abdulvahap and his friend at Silopi gendarmerie headquarters, they were unwilling to give their names to the applicant out of fear.

69. The applicant then telephoned a relative by the name of Bahattin Aktuğ who had been a village guard and was now the mayor of Güçlükonak district. By speaking to an officer on duty at Şkrnak brigade headquarters Aktuğ found out that Abdulvahap was being detained there. Aktuğ told the applicant not to worry; Abdulvahap would be brought before the court and, as they all knew that he was in custody, the State could not make Abdulvahap disappear.

70. The information given to the applicant by Bahattin Aktuğ was confirmed by Sadkk Erdoğan and Nimet Nas, two people who were from the same village as the applicant and his wife. Erdoğan and Nas had previously been tried on charges of PKK involvement, had confessed and were working with the State. Sadkk Erdoğan told the applicant by telephone that Abdulvahap was well and that they, Erdoğan and Nas, were giving him tea and cigarettes and were having him shaved. On the twenty-fifth day of

Abdulvahap's detention Erdoğan and Nas were sent to their district of Güçlükonak from where they telephoned the applicant and told him that his son was well.

71. In view of the situation in the region, the confessors Erdoğan and Nas could only travel by helicopter. As no helicopter was sent to them from Şkrnak, they were forced to stay in their village in the Güçlükonak district. At the same time, the telephone numbers were changed all over Turkey and it was not possible to telephone anybody for a period of two weeks. Therefore, the applicant was unable to get any more news.

72. After Abdulvahap had been in detention for thirty days, the applicant went to Silopi in the hope of seeing him brought before the court but to no avail. He gave a petition to the prosecutor's office but this was refused and the applicant was told, "We do not have anyone like that." Assuming that his son's detention had been prolonged by fifteen days the applicant returned to the Silopi prosecutor's office when Abdulvahap had been detained for forty-five days. This time the prosecutor signed the petition and transferred it to Silopi police headquarters. When the applicant went there he was told that Abdulvahap was not in custody. The applicant then went to see the commander of Silopi gendarmerie. He told the commander that they were to bring Abdulvahap before the court if he was alive and to give him his body if he was dead. The commander replied, "Uncle, do we have the authority to kill your son? Maybe your son has gone into the mountains, go and look for him there." The commander further said that on 14 August 1993 they had caught two area leaders of an illegal organisation in the Silopi region and that these had been sent to Diyarbakkr a week later. However, these two suspects had had different names.

73. Not being able to get any word of his son, the applicant began to panic. He went to Şkrnak where he presented a petition to the prosecutor's office which was accepted and sent to Şkrnak brigade headquarters. From there it was sent to the political branch or the fight against terrorism branch where the petition was not replied to but where it was said that Abdulvahap was not being detained.

74. The applicant and his wife then went to Güçlükonak to see Bahattin Aktuğ. Aktuğ contacted a number of people and was told that the authorities in Şkrnak denied that Abdulvahap was there. Whilst in Güçlükonak, the applicant also met with Sadkk Erdoğan and Nimet Nas. Erdoğan told him that he had learnt about Abdulvahap's detention at Şkrnak brigade headquarters after Bahattin Aktuğ had telephoned him. He had gone to the custody rooms and had found that Abdulvahap was being interrogated by the authorities. He had said that Abdulvahap was a relative of his and that he would act as a mediator if the authorities wanted anything. The authorities had told him to persuade Abdulvahap to give a statement. Upon this Erdoğan had given a pen and paper to Abdulvahap. Some time later Abdulvahap had returned the paper to him and had asked him to give it to the officer. A little while later the commander had again given paper and pen to Erdoğan, saying that Abdulvahap was to write his statement again. This procedure had been repeated three or four times. Erdoğan had then asked Abdulvahap what he was writing to which Abdulvahap had replied that it was none of his business. After this the authorities had not tried to get any information from Abdulvahap while Erdoğan was still

there. Sometimes he and Nas would take Abdulvahap out for some air and they had chatted.

75. Nimet Nas confirmed Sadkk Erdoğan's account. After having met with them, the applicant and his wife left Güçlükonak. Following this, and on the fifty-fifth day of Abdulvahap's detention, the applicant took another petition to the Silopi prosecutor's office. He named Sadkk Erdoğan and Nimet Nas as witnesses. Upon the applicant's insistence the prosecutor asked for a list of the persons in custody from a clerk. The clerk, hiding the list from the applicant, showed a name to the prosecutor who then proceeded to take the applicant's statement. The prosecutor said he would send the papers to Şkrnak and the applicant was to return in a month's time. One month later the applicant returned but was told that his papers had not yet come back and that he should try again in ten days' time. However, ten days later there was still no news and the applicant was asked to come back one week later. When the applicant made the present statement that week was not yet over.

76. The applicant put three announcements in the Özgür Gündem newspaper saying that his son was missing. He applied to the Human Rights Association. He also spoke to a Member of Parliament for Şkrnak, Mr Selim Sadak. On 4 November 1993 Mr Sadak put a question concerning Abdulvahap Timurtaş to the Ministry of the Interior. On 2 December 1993 the applicant presented a petition at the Diyarbakkr State Security Court which informed him in writing that upon inspection of the records, Abdulvahap had not been found.

77. On 4 January 1991 an older son of the applicant, Tevfik, born in 1956, had been taken into custody. Ten days later police had come to get the applicant and they had shown him the dead body of his son. The applicant had seen large wounds on the soles of the feet. The commander of the Cizre police headquarters had told the applicant, "It's not over yet, it's Abdulvahap's turn, we shall send you his body too."

b. Statements by other persons

İsmail Birlik

i. Statement of 26 January 1994 taken by Ahmet Yavuz, Silopi public prosecutor

78. On the date this statement was taken İsmail Birlik was the muhtar of Esenli village in Silopi district. He stated that he did not know and had never seen the applicant or the applicant's son Abdulvahap. He had heard that someone had been taken into detention near Yeniköy village approximately four to five months previously but he was not aware of the identity of that person and thus did not know whether it was Abdulvahap Timurtaş.

ii. Statement of 22 January 1997 taken by officers of the anti-terror branch

79. İsmail Birlik was asked why he had failed to attend the hearing before Delegates in Ankara. He stated that during his term of office as muhtar of Esenli two or three persons had gone missing - he could not remember exactly how many. Two or three

months before giving the present statement he had received a summons to go to Ankara but due to his old age and poor financial circumstances he had been unable to go.

Kamil Bilgeç

i. Statement of 26 January 1994 taken by Ahmet Yavuz, Silopi public prosecutor

80. Kamil Bilgeç, muhtar of Yeniköy village in Silopi district when this statement was taken, said that he did not know and had never seen the applicant or the applicant's son Abdulvahap. He did not know that two individuals had been apprehended nearby his village approximately four months previously and neither did he know why his name had been given.

ii. Statement of 13 August 1995 taken by gendarmes

81. In this statement Kamil Bilgeç was requested to state his observations and knowledge on the claim that he and his son Yusuf Bilgeç had seen the arrest of Abdulvahap Timurtaş by security forces between 4 and 7 August 1993 (sic). In response, Bilgeç stated that he had been muhtar of Yeniköy village for approximately fifteen years and that he had resided there between the dates mentioned. He had left Yeniköy in July 1994. He did not know, had never seen and would not be able to recognise Abdulvahap Timurtaş. He was prepared to come face to face with anyone who claimed that he knew something and who had given his name.

Nimet Nas

i. Statement of 5 May 1995 taken by a Diyarbakır public prosecutor

82. This statement was taken when Nimet Nas was serving a prison sentence in Diyarbakır E-type prison. After the instructions of the Silopi public prosecutor had been read to him (para. 58), Nas said that he knew Abdulvahap Timurtaş who was a close relative of his, a PKK militant and a cadre. Abdulvahap's code name was Baver and he was responsible for Syria. In 1990 Abdulvahap had been responsible for Cizre. Nas had not seen Abdulvahap in detention in Şırnak brigade or regiment headquarters or other security units in 1993 or at any other time. Therefore, he had not furnished any information to the applicant.

ii. Statement of 28 December 1995 taken by a Diyarbakır public prosecutor

83. When this statement was taken, Nas was still serving a prison sentence at Diyarbakır E-type prison. The instructions of the Şırnak public prosecutor were read out to him and he stated that he knew Abdulvahap Timurtaş who was his cousin. He did not know whether Abdulvahap had been taken into custody but only knew that Abdulvahap had been responsible for contacts with Syria at the time when he, Nas, had surrendered himself to the authorities.

Sadık Erdoğan

i. Statement of 15 August 1995 taken by gendarmes

84. Sadkk Erdoğan was questioned on the subject of being an eye-witness to the presence of Abdulvahap Timurtaş in the Şkrnak interrogation unit between 7 and 20 August 1993. In reply, he said that he definitely did not know Abdulvahap Timurtaş and that he had not even heard of that name. He also said that, "Their purpose is to alienate us from the state with which we are siding". Underneath Erdoğan's name and signature at the bottom of the document, it is indicated that he was a temporary village guard of Damlabaşk village.

ii. Statement of 2 April 1996 taken by Özden Kardeş, Şkrnak public prosecutor

85. Sadkk Erdoğan stated that he had been active within the organisation but that he had escaped from the organisation and surrendered to the security forces on 31 March 1993. Following this, he had been tried and released. He assisted the security forces as a confessor and at the same time served as a temporary village guard at Damlabaşk village in Güçlükonak district. He did not know and had not seen Abdulvahap Timurtaş whose mother came from his village and for that reason frequently visited the village. She used to mention her sons and therefore he only knew Abdulvahap Timurtaş as a name. He had no knowledge as to whether Abdulvahap had been detained or the circumstances of Abdulvahap's disappearance.

86. He acknowledged that he had previously given a statement in which he had said that he did not know and had not seen Abdulvahap Timurtaş. He had not heard anything about Abdulvahap's disappearance.

Bahattin Aktuğ

i. Statement of 13 August 1995 taken by gendarmes

87. In this statement Bahattin Aktuğ was questioned on the subject of "investigating Abdulvahap Timurtaş and informing his father Mehmet Timurtaş on the detention of his son". In response, Aktuğ stated that he definitely did not know these individuals and that they did not reside in his district (of Güçlükonak) or the villages belonging to the district. He had not met them under any circumstances and such incident had not taken place between them. He concluded by saying that, "They might have said this in order to affect me adversely".

ii. Statement of 22 April 1996 taken by a Siirt public prosecutor

88. Bahattin Aktuğ said that he did not know Abdulvahap Timurtaş and that he did not remember anyone residing in his district under that name. He had no knowledge about the detention of Abdulvahap Timurtaş. Moreover, he had no information about the reasons why he was being indicated as a witness since he had no knowledge or any form of information on the incident whatsoever.

Nine residents of Yeniköy and hamlets belonging to Yeniköy

Statements taken on 7 and 8 March 1996 by gendarmes attached to Silopi district gendarmerie headquarters

89. The following questions were put to all of the nine witnesses: "Do you know a person by the name of Abdulvahap Timurtaş who was questioned by the Şkrnak prosecutor's office? If you know him, do you know where that person is at the present time and what his occupation is? Do you know whether that person was taken into custody? Do you know anything about these issues?" In reply, all the witnesses stated that they did not know Abdulvahap Timurtaş, that they had never heard his name and that, therefore, they did not know whether Abdulvahap Timurtaş had been detained.

Yusuf Bilgeç

Statement of 11 March 1996 taken by a public prosecutor

90. Yusuf Bilgeç stated that in 1994 he had been kept in custody for a period of time but that he had been acquitted by the Diyarbakkr State Security Court. He was not acquainted with the applicant or the applicant's sons Mehmet and Abdullah (sic) Timurtaş. During his time in custody he had not witnessed anybody's death as a result of torture. As he was not acquainted with Abdullah Timurtaş he was not aware of his, Abdullah's, disappearance. The last line of the statement reads as follows:

"Upon the declaration that the witness is not acquainted with Mehmet Timurtaş, his sons Mehmet Timurtaş and Abdullah Timurtaş, the witness was not questioned in detail in relation to the incident."

c. Petitions submitted by the applicant

Petition of 15 October 1993 to the Silopi public prosecutor's office

91. This document, which was submitted to the Commission by the Government and is signed by the applicant, states that the applicant's son Abdulvahap Timurtaş left his house approximately two years previously and that the family had not heard from him since then. At a later stage, the family heard that Abdulvahap had been apprehended by the security forces near Yeniköy village in Silopi district on 14 August 1993 and that he had been taken into custody. The applicant, who stated that he was certain that his son was being held in detention, wished to be informed as to Abdulvahap's fate and as to the date on which his son would be brought before the public prosecutor.

Petition of 18 October 1993 to the Diyarbakkr branch of the Human Rights Association

92. The applicant submits that his son Abdulvahap was apprehended on 14 August 1993 by soldiers belonging to Silopi central gendarmerie headquarters in front of all the

villagers in Yeniköy in Silopi district. Abdulvahap was taken to Silopi central gendarmerie headquarters and after having been kept there for a while, he was taken around the villages in the area. He was taken back when it became clear that Abdulvahap had no relations with the villagers, but all the villagers had seen him in the hands of the military. He was later seen by other people in custody at Şkrnak brigade headquarters.

93. Sixty-five days passed without Abdulvahap having been brought before a court. The applicant had not obtained any information about his son, despite making applications, with and without petitions, to all State offices in Silopi and Şkrnak. All these offices denied that Abdulvahap had been taken into custody. As the applicant was concerned for the life of Abdulvahap, and as he had previously lost a son who had been taken into custody, he wanted Abdulvahap brought before a court immediately.

Petition of 30 November 1993 to the Cizre public prosecutor's office

94. This document, which was submitted to the Commission by the applicant himself, bears no official stamps or other signs of having been accepted or processed by the authorities. In the petition, the applicant states that his son Abdulvahap had been taken into custody on 14 August 1993 by State forces in Yeniköy. He had received no information about the whereabouts of his son despite having filed petitions with the Silopi prosecutor's office, Silopi police headquarters, the central gendarmerie headquarters there, the Şkrnak prosecutor's office, the Şkrnak central gendarmerie headquarters, the Şkrnak prison, the National Intelligence Service and the brigade headquarters. He requested that he be assisted in finding out the fate of his son.

Petition of 30 November 1993 to the Cizre central gendarmerie headquarters

95. This petition is worded in terms similar to the petition to the Cizre public prosecutor's office (para. 94). The document was submitted to the Commission by the applicant and bears no official stamps or other signs of having been accepted or processed by the authorities.

Petition of 2 December 1993 to the prosecutor's office at the Diyarbakkr State Security Court

96. In this petition the applicant requests to be informed of the fate of his son Abdulvahap who was taken into custody on 14 August 1993 by soldiers from Silopi central gendarmerie headquarters in Yeniköy and sent to Diyarbakkr. A handwritten note at the bottom of the document, signed by "Clerk no. 34", reads, "Could not be found on examination of the records".

d. Decisions and reports

Photocopied document entitled "Post-operation report" dated 15 August 1993

97. This photocopied document was submitted by the applicant's representatives at the hearing in Ankara on 23 November 1996. It is in the shape of a filled-out pro forma document and corresponds to the standard post-operation report form submitted by the Government at the request of the Commission after the hearing.

98. According to the heading of the report it was sent by the Silopi district gendarmerie headquarters to the following addressees:

- the 23rd gendarmerie border brigade headquarters/Şkrnak;
- the provincial gendarmerie headquarters/Şkrnak;
- the tactical gendarmerie border unit headquarters/Silopi;
- the 1/61st mechanised infantry battalion headquarters/Görümlü;
- the 1/12th mechanised infantry battalion headquarters/Kapklk; and
- the 2/20th tank battalion headquarters/Silopi.

99. The report concerns the "incident of the apprehension of members of the PKK terrorist organisation" on 14 August 1993 around 11.00 hours. The incident had taken place at a terrain 500 metres north of the village of Yeniköy in Silopi district in the province of Şkrnak. The names of the apprehended persons are given as Abdulvahap Timurtaş - code name Yasin, son of Mehmet, date of birth 1962, registered in Cizre, male, resident in Cudi Mahallesi -, and Hosnat Hasan Ahmet - code name Cemal-Besrif, son of Hasan, date of birth 1966, registered in Syria, male, resident in Kamkslk-Dudan village, profession agricultural engineer. In respect of both men the report states that they were in charge of the PKK's Silopi lowlands section and that they were apprehended alive. Two pistols, two pistol magazines, twenty-nine rounds of pistol bullets and a large number of printed documents in Turkish and Arabic belonging to the PKK terrorist organisation as well as a letter written to the PKK Cudi headquarters were seized. The authority dealing with the incident is given as the Silopi district gendarmerie headquarters.

100. The brief summary of the incident contained in the report states that on 14 August 1993 at around 11.00 hours, during a preventive patrol operation between the villages of Yeniköy and Esenli in Silopi district, the individuals named in the report were searched at the location indicated in the report and the weapons and documents described in the report were found. The initial interrogation of the apprehended persons established that they were the leaders of the PKK's Silopi lowlands section. The investigation was commenced and the result would be transmitted in due course.

101. The report concludes with the date of its conception (15 August 1993) and its reference number: 0623-994-93/6038. Above the name "Durmuş" at the bottom of the report is a signature. There is also a handwritten note saying "To its file" at the bottom of the document.

102. The report and its translation have been annexed to the present Report as Appendices IIa and IIb. The blank post-operation report form submitted by the Government and its translation have been annexed as Appendices IIIa and IIIb.

103. On 23 November 1996, during the hearing before Delegates, the applicant's representatives stated that they had been given the document three days earlier and had been told that an original version of the document had been found in the files of the Cizre prosecutor's office in 1993 and that a copy had been made. The representatives were also told that apparently the original of the document was no longer in the file concerned. In reply to a written question by the Commission as to how the document had been obtained, the representatives submitted that should it prove necessary, the person who had obtained it was willing to give evidence before the Delegates subject to certain conditions.

104. The Commission subsequently requested the Government to submit written comments on the authenticity of the document and, if authentic, to provide the original. They were, moreover, requested to submit a blank pro forma report used by the Gendarmerie after the conclusion of an operation, an explanation of the reference number appearing on the photocopied report and copies of all documents bearing the same number.

105. The Government, by letter of 15 July 1997, informed the Commission that "the report as well as the documents relating to it and bearing the same reference are classified as secret. They cannot be submitted to the Commission". Moreover, despite an extensive search carried out by the Şkrnak provincial gendarmerie no trace of the original of the photocopy could be found which, in the Government's opinion, cast doubt on the authenticity of the submitted document.

106. In respect of the reference number appearing on the photocopied report, 0623-994-93/6038, the Government submitted as follows: '0623' is the code number for the public order services; '994' refers to the number of the document in the chronological list of documents relating to the public order services issued in a given year; '93' indicates the last two figures of the year in question, and '6038' indicates the number of the document in the chronological list of documents processed in a given year.

Decision of lack of jurisdiction dated 13 July 1995 issued by Silopi public prosecutor Ahmet Yavuz

107. This decision names the applicant as complainant and describes the incident under investigation as the arbitrary detention, disappearance and unknown fate of Abdulvahap Timurtaş. The location of the incident is cited as Şkrnak brigade headquarters.

108. In stating the applicant's complaint that his son was apprehended by soldiers in Yeniköy on 14 August 1993 the decision refers to the applicant's account contained in his petition to the Diyarbakkr branch of the Human Rights Association of 2 December 1993 (paras. 67-77).

109. The correspondence conducted by the Silopi public prosecutor had resulted in a statement having been obtained from Nimet Nas. It had not been possible to take a statement from Sadkk Erdoğan as his whereabouts were unknown. Furthermore, due to

security reasons the witness Bahattin Aktuğ could not be brought to any public prosecutor's office and therefore it had not been possible to take his statement. Moreover, the Cizre public prosecutor's office had indicated that the applicant had left Cizre and that his whereabouts were unknown.

110. In order for the investigation to proceed rapidly and in view of the fact that the applicant's son was alleged to have been detained at Şkrnak brigade headquarters, it was decided to refer the investigation to the public prosecutor's office in Şkrnak.

Decision not to prosecute dated 3 June 1996 issued by Şkrnak public prosecutor Özden Kardeş

111. This decision names the applicant as the complainant and his son Abdulvahap as victim and missing person. It describes the incident under investigation as the allegation of disappearance during detention. It mentions that the applicant filed a petition with the Silopi public prosecutor's office on 15 October 1993 and that in his statement to the public prosecutor on 21 October 1993 the applicant said that his son had become angry two years previously and had left the house and had gone to Syria.

112. The decision then describes the various inquiries made with, and replies received from, the Silopi district gendarmerie headquarters, the Silopi police headquarters, the Şkrnak provincial centre gendarmerie headquarters and the Şkrnak police headquarters It mentions in this respect, inter alia, that the Silopi police headquarters dispatched a letter dated 13 October 1993 saying that Abdulvahap Timurtaş was not detained by their headquarters and that his name did not appear in their files. Also, on 28 July 1995 the Şkrnak police headquarters reported that Abdulvahap Timurtaş had not been detained by them but that he was wanted by the Prevention of Terrorism branch for having carried out activities on behalf of the PKK terrorist organisation.

113. The statements made by Kamil Bilgeç, İsmail Birlik, Nimet Nas, Sadkk Erdoğan, Bahattin Aktuğ and the residents of Yeniköy, Germik, Kartkk and Kutnks are summarised in the decision. In respect of Kamil Bilgeç and İsmail Birlik it is stated that they were not aware of an incident involving detention.

114. The decision not to prosecute was reached in view of the abstract character of the applicant's complaint that his son disappeared whilst in detention. Account was also taken of the fact that the applicant had left for an unknown destination following the lodging of his complaint. Moreover, the possibility that Abdulvahap Timurtaş was a member of the mountain cadre of the PKK terrorist organisation was strengthened by the facts that he was alleged to have been in charge of Syria on behalf of the PKK and that he was wanted by the Prevention of Terrorism branch of Şkrnak police headquarters.

115. In conclusion, the decision states that its contents are to be announced to the applicant and that appeal rights are reserved.

e. Custody records

Silopi district gendarmerie headquarters

116. A copy of the entries for the period 10 March 1993 until 19 December 1993 (entry nos. 16 to 50) was provided. Abdulvahap Timurtaş' name is not included, nor any entry for 14 August 1993. Between 10 March 1993 and 12 August 1993, three people are recorded as having been detained, all on suspicion of PKK-related offences. On 13 August 1993 a total of twelve persons was entered. The reason for the detention of ten of these persons is given as "enquiries" and they were all released the following day. The other two were suspected of PKK-related offences and held until 14 September 1993.

117. Until 19 December 1993 a further twenty persons were recorded as having been detained, all on suspicion of aiding and abetting the PKK. Four of these people, including Yusuf Bilgeç, son of Kamil, were detained on 31 October 1993 and are recorded as having left the gendarmerie headquarters on 17 November 1993.

Silopi police headquarters

118. A copy of the entries for the period 31 July 1993 until 2 December 1993 (entry nos. 129 to 320) was provided. Abdulvahap Timurtaş' name is not included, nor any entry for 14 August 1993.

Şkrnak provincial centre gendarmerie headquarters

119. A copy of the entries for the period 23 September 1993 until 30 December 1993 (entry nos. 1 to 78) was provided. Abdulvahap Timurtaş' name is not included.

Interrogation unit at the Şkrnak provincial gendarmerie headquarters (hereinafter "the Şkrnak interrogation unit)

120. In their letter of 15 July 1997 the Government informed the Commission that no records were kept by the Şkrnak provincial gendarmerie headquarters since detainees were registered in the records of the interrogation unit.

121. A copy of the entries for the period 31 July 1993 until 13 January 1994 (entry nos. 542 to 722, with entry nos. 681 to 686 missing) was provided. Abdulvahap Timurtaş' name is not included, nor any entry for 14 August 1993.

122. The Government have also provided a copy of a single page from the ledger containing entries nos. 421 to 426. Entry no. 424, Sadkk Erdoğan, is recorded as having entered the interrogation unit on 3 April 1993 and to have left it on 1 May 1993. According to the record Erdoğan was not released but taken into detention on remand. The Government have further submitted that pursuant to a warrant of arrest dated 3 May 1993 Erdoğan was taken to Şkrnak prison from where he was transferred to Diyarbakkr E-type prison on 26 May 1993. He was released on 21 March 1994.

123. In later proceedings Erdoğan was convicted by judgment dated 26 September 1994 of the Diyarbakır State Security Court and sentenced to a term of two years and four months' imprisonment. He started serving this sentence on 15 April 1996 but was conditionally released on 4 February 1997.

124. The Government have furthermore provided a copy of a single page which is said to have been taken from the Şırnak interrogation unit records for 1992. The layout is different from the records for 1993. The page submitted contains an entry, no. 137, for Nimet Nas who is recorded as having entered the interrogation unit on 16 June 1992 and to have left it on 16 July 1992. On the latter date Nas was taken into detention on remand. According to further information submitted by the Government, Nas was found guilty of PKK membership by the Diyarbakır State Court on 7 May 1993 and sentenced to six years' imprisonment. A decision for his conditional release was taken on 12 December 1996 and he left Diyarbakır E-type prison on 15 December 1996.

125. No copies have been provided from the records of Diyarbakır E-type prison concerning either Sadık Erdoğan's or Nimet Nas' detention there (para. 27).

126. In their letter of 15 July 1997 the Government submitted that in view of the fact that the border brigade did not detain people it did not have any custody records.

2. Oral evidence

127. The evidence of the applicant and five witnesses heard by the Delegates may be summarised as follows:

Mehmet Timurtaş

128. The applicant stated that he was born in 1928. Although he now lived in İstanbul, he had been living in Cizre at the time of the events in question. His son Abdulvahap had been living with the family when, either in 1991 or 1992, Abdulvahap had left to look for work in İstanbul. He denied that he had told the public prosecutor in Silopi that Abdulvahap had been angry when he left. It had not been unusual for Abdulvahap, who was a dye-maker, to work elsewhere. Usually Abdulvahap would send money home, but this time his family had not heard from Abdulvahap following his departure. There had been a rumour to the effect that Abdulvahap had gone to Syria but he did not know whether there was any truth in this.

129. On 14 August 1993 he had received a telephone call from a person whom he did not know and who had refused to give his name. This man had told him that his son had been arrested with a friend between two villages near Karabaş around Yeniköy. The applicant did not know who this friend was, but it was said to be somebody who did not speak Turkish, but Arabic so he may have been from Syria. His son and this friend had then been taken to a village where the muhtar of Karabaş and the muhtar's son had also been apprehended and then all four men had been brought to Silopi. The applicant knew

that the muhtar was called Hacк Kamil but he did not know his surname. Hacк Kamil and his, Kamil's, son had been released the following day.

130. He had heard that a few days after their arrest, Abdulvahap and the friend had been taken round a large number of villages in the area. However, all the villagers who were asked had said that they did not know the two men. It was not clear how the applicant had heard about this; although he said that he had been telling people about the situation, he also said that he did not know anybody in the Yeniköy area. He further said that people had been unwilling to talk because they were afraid.

131. He had tried to obtain news of his son's fate from the authorities but he was unable to express clearly when he had gone to which authorities. It appeared that within a week of Abdulvahap's arrest he had gone to the Silopi public prosecutor's office where he had been told to come back in ten or eleven days. When he had gone back to the public prosecutor he was informed that Abdulvahap had not been brought there and that he should go to the police headquarters and the district gendarmerie headquarters. At the police headquarters he had been referred to the gendarmerie headquarters. All authorities had denied that they were keeping Abdulvahap in detention. On one of his visits to the district gendarmerie headquarters the commander there had said that he should look for his son in the mountains as maybe Abdulvahap had joined the PKK. The commander had also told him to bring a photograph of Abdulvahap, which he had done. He had then been told to return after five to ten days. The gendarmerie commander had further read out the names of people who had been caught smuggling around the time of Abdulvahap's arrest. Neither Abdulvahap's name nor those of the muhtar and his son had been amongst them. Moreover, he had been told that before August two area leaders of an illegal organisation had been caught and sent to Diyarbakкr a week later but that their names were different from that of his son.

132. He had telephoned Bahattin Aktuğ after he had returned from Silopi the first time. Although Aktuğ, who was the mayor of Güçlükonak district, was a distant relative, he had been quite close to Aktuğ because they belonged to the same clan. Aktuğ had told him that he would look for Abdulvahap. Aktuğ had rung him back to say that he had contacted two confessors, Sadкk Erdoğan and Nimet Nas, who had seen Abdulvahap in Şкrnak. They had told Aktuğ that they were giving Abdulvahap cigarettes, were having him shaved and were looking after him. Aktuğ had told the applicant not to worry about Abdulvahap, that Abdulvahap was under torture in Şкrnak, that he was not saying anything and that he would be brought before a court after thirty days. The applicant knew Erdoğan and Nas because they also belonged to the same clan.

133. Although he had felt somewhat more at ease after having received this information from Aktuğ he had continued asking the authorities about Abdulvahap's whereabouts. Apart from Silopi, he had also gone to the public prosecutor's office in Şкrnak, the MİT organisation (Milli İstihbarat Teşkilatк - National Intelligence Service) in Şкrnak, the Şкrnak gendarmerie and the Şкrnak brigade. At this last place he had been told that the reply to his petition would be sent to the political branch in Cizre.

134. Having failed to obtain any more information and as he had been unable to contact Bahattin Aktuğ due to the telephone connections having been cut off, he had gone to see Aktuğ in Güçlükonak together with his wife about forty-five days after Abdulvahap's arrest. Erdoğan and Nas had also been staying with Aktuğ; they had been sent on twenty days' leave to Güçlükonak. Abdulvahap had still been in Şkrnak when Erdoğan and Nas had left there.

135. With Erdoğan and Nas no longer in Şkrnak, Aktuğ had not been able to get any more news of Abdulvahap. Upon the applicant's arrival in Güçlükonak Aktuğ had gone to see the local gendarmerie captain who had made a telephone call to Şkrnak. In response to his enquiries, the captain had been told that Abdulvahap was not there and that Aktuğ was to stop looking for Abdulvahap. Aktuğ had then contacted a major in Iğdkr. The following day, the major had said to Aktuğ that Abdulvahap was not in Şkrnak and told him not to have anything to do with Abdulvahap. Aktuğ had told the applicant that he was surprised by the answers he had received and that he felt he had lost face.

136. Whilst in Güçlükonak the applicant had also spoken with Erdoğan and Nas who had told him that they had been with Abdulvahap for twenty-five days. They had told the investigator in Şkrnak that Abdulvahap was their relative and had asked that nothing be done to Abdulvahap. The investigator had then told Erdoğan and Nas that they should get Abdulvahap to make a statement but Abdulvahap had said that he did not know anything. Erdoğan and Nas had also told the applicant that they had given Abdulvahap cigarettes and that they had shaved him. They had not, however, indulged Abdulvahap's friend because the friend had been a stranger.

137. He had subsequently gone back to the Silopi public prosecutor's office and had named Erdoğan and Nas as his witnesses upon which the prosecutor had taken his statement and had told him to return in ten days. After ten days the prosecutor had said to him that the papers had not yet come back and that he would be contacted when Erdoğan and Nas had come forward. At that occasion, he had seen how the clerk had shown the public prosecutor a large volume that looked like a log book. They had hidden it from him and he had become suspicious. Not long after this he and his family had moved to Adana.

138. He had also spoken to Selim Sadak, a Member of Parliament. Selim Sadak had put questions to the Foreign Minister but had not obtained any information. The applicant had gone to Diyarbakkr and had filed a petition with the prosecutor's office. A prosecutor had said to him that his son had not been brought to the prison there and that Abdulvahap's name was not known at the prosecutor's office.

139. He had never tried to get in touch with Hack Kamil as he did not know whether he could trust this man. He had heard that Hack Kamil had an interview with the authorities every week or every month.

140. In the spring of 1995 he had gone to Damlabaşk village in Güçlükonak to speak to Sadkk Erdoğan. Erdoğan told him that he had been to court in Şkrnak where he had been

asked about Abdulvahap. Erdoğan had confirmed having seen Abdulvahap. Then the man asking questions had risen in anger and had said, "Look here, you! I am a full investigator, a man of authority here! I have not seen this man. Why would you have seen him?" This had scared Erdoğan. Afterwards his friends had said to Erdoğan that he had been silly to say he had seen Abdulvahap and that, as a result, he would be "gone". Erdoğan had become so frightened that at the second court he had changed his statement and said that he had seen a man who looked similar but that he did not know if it was Abdulvahap or not.

141. When the applicant was informed about the official statements made by Erdoğan and Nas, to the effect that they had not seen Abdulvahap in custody, he was not surprised since Erdoğan had already told him that he had changed his statement. As regards Nas' statement that Abdulvahap had had relations with the PKK he said that he did not know whether there was any truth in that.

142. The two statements made by Bahattin Aktuğ were read out to the applicant who reacted by calling them a lie. He stressed that he and his wife had spent two nights in Aktuğ's home. In respect of the statements made by Kamil Bilgeç and his son Yusuf Bilgeç he said that he did not know those men but that the people in the villages, people from Bilgeç's clan, had said that Abdulvahap had been apprehended together with the muhtar and the muhtar's son.

143. He had never received a decision not to prosecute.

144. Previously, in the winter of 1991, his eldest son Tevfik had been arrested in Cizre. He had made no further enquiries after the public prosecutor had told him that there was an ongoing investigation and that Tevfik would be released. However, after eleven days a number of policemen had come to his house and had taken him to Şkrnak where he had attended the funeral of Tevfik who had died as a result of torture.

145. The Agent of the Government stated that medical and forensic examinations had revealed that Tevfik Timurtaş had had asthma and had died of associated heart failure.

Bahattin Aktuğ

146. Bahattin Aktuğ said that he was born in 1948. He had been the elected mayor of Güçlükonak district since 1990. He knew the applicant who was a member of his clan, as was the applicant's wife. The applicant had moved from Güçlükonak to Cizre about thirty-five to forty years ago but would visit the Güçlükonak area with his wife once, twice or three times a year. On those occasions the applicant would always come to see him, sometimes just to drink some tea, sometimes to stay the night. Although they would ask each other how their families were, he did not know how many children the applicant had or what they were called. He had heard that one of the applicant's sons had died in custody but the applicant had not told him how this son had died. The applicant had said that another son had gone to work in İstanbul but was not sending any money. This meant

that that son had gone to the mountains to join the PKK. He could not remember when the applicant had told him this.

147. The applicant had not asked him for help in finding his son and they had never discussed this matter. He could not remember ever having spoken to the applicant by telephone. Neither had the applicant and his wife come to him in Güçlükonak to talk about Abdulvahap's detention. If the applicant had told him about his son's disappearance, he would have offered his assistance. It was normal for him to help people from his area if they were in detention or in hospital for instance.

148. He had found out that the applicant had given his name as a witness when he had been asked to make statements about the matter. He had first given a statement to gendarmes in Güçlükonak on 13 August 1995. When it was put to him that according to the text of that statement he had told the gendarmes that he knew neither the applicant nor the applicant's son he said that it must have been written down wrongly as he had only said that he did not know Abdulvahap Timurtaş. In respect of his statement that he had not met the applicant or Abdulvahap in any circumstances, he said that he had meant that he had not met Abdulvahap and that if he had been asked about the applicant he would have said that he did know him as the applicant was a member of his clan.

149. Asked why the applicant would have said anything to affect him adversely, as Aktuğ had claimed in his statement of 13 August 1995, he replied that the applicant must have thought it would look better if he named a mayor as a witness.

150. It was true that when he had made the second statement on 22 April 1996 he had been aware that Abdulvahap Timurtaş was the name of the applicant's son, yet he still did not know Abdulvahap. He had only met the eldest of the applicant's sons and that had been ten years ago.

151. He was not quite clear as to when had been the last time that he had seen the applicant, it might have been two years ago. He said that the applicant had not been to visit Güçlükonak since he had become aware that the applicant had named him as a witness. If he had seen the applicant after that time he would have asked the applicant why the latter had given his name to the authorities.

152. He knew Sadkk Erdoğan who was from the same village. Whenever Erdoğan was in the area they would often see each other. However, he had not seen Erdoğan for six months or so as the latter was serving a prison sentence. He also knew Nimet Nas who was originally from the same village as the applicant. He had never discussed the disappearance of Abdulvahap Timurtaş with either Erdoğan or Nas.

153. It was correct that Erdoğan and Nas were confessors. However, this did not mean that they had to work with the gendarmes or at the gendarmerie. They had simply confessed and served their sentences.

154. Asked whether he remembered a time in the autumn of 1993 when the telephone numbers all over Turkey were being changed and for about two weeks it had been impossible to ring, for example, Cizre, he said that he did remember and that all telephone numbers had gone up to ten digits. The Agent of the Government added in this respect that although telephone numbers had indeed changed, this had occurred without communications having been lost.

Azmi Gündoğan

155. Azmi Gündoğan stated that he was born in 1955. He had been commander of the Silopi district gendarmerie for one year until 4 August 1993. Major Hüsam Durmuş had taken over from him. He had not heard of the alleged taking into custody of Abdulvahap Timurtaş on 14 August 1993 until he had been summoned to the hearing.

156. During his time in Silopi there had been many terrorist incidents. The area was situated close to Northern Iraq and the terrain was mountainous, allowing terrorists to take shelter and to disturb the villages.

157. At the Silopi district gendarmerie headquarters there had been a list of people against whom there were allegations of being involved with PKK activities, but as he could not remember who had been on that list he did not know whether Abdulvahap Timurtaş' name had figured on it.

158. Anybody taken into custody at the district gendarmerie headquarters would be entered into the custody ledger. Moreover, the public prosecutor would be informed. Apart from the name of the person taken into custody, any personal belongings brought in by that person would also be recorded.

159. He explained that as commander of a district gendarmerie headquarters he would report to the provincial gendarmerie headquarters in Şkrnak. The Şkrnak brigade was a different unit. Moreover, the provincial gendarmerie headquarters had a unit responsible for the legal, military and administrative duties in the province. That unit was called the provincial centre gendarmerie headquarters. This unit also had places where people could be detained.

160. Detainees would be interrogated in the district where the alleged offence had been committed. However, it would be possible for a person who had been arrested by Silopi district gendarmerie headquarters to be transferred to Şkrnak provincial gendarmerie headquarters if the offences covered a larger area. Although detainees would sometimes be taken to a specific place in order to identify a location, they would never be taken round a number of villages in order to see if the villagers recognised them.

161. There had been no confessors working alongside him in Silopi. From time to time a confessor, who had left the organisation and who had mentioned certain places in his statement, would come to show them those locations.

162. Before going on an operation he would prepare a report in which he stated what activity would be carried out on which date and in what area. Afterwards, the results of the operation would be written up in a report according to a printed form. After 4 August 1993 it would most probably have been Hüsam Durmuş who would have signed such operation reports.

Erol Tuna

163. Erol Tuna said that he was born in 1953. Between 1992 and 31 July 1994 he had been commander of Şkrnak provincial centre gendarmerie headquarters which meant that he was in charge of the gendarmerie in the central district of Şkrnak province. Just like the Silopi district gendarmerie headquarters, he had reported to the Şkrnak provincial gendarmerie headquarters.

164. There had been a security room at Şkrnak provincial centre gendarmerie headquarters where people could be kept in custody. Anybody detained there would be entered into the custody record. If the provincial gendarmerie headquarters wished to put a person into custody for a short time, they would make use of the detention facilities of the provincial centre gendarmerie headquarters, both organisations being based in the same building. The provincial gendarmerie headquarters thus did not have a separate security room custody ledger, leaving the custody procedures to be carried out by the district gendarmerie headquarters where the person concerned had been taken into custody. However, if the provincial gendarmerie headquarters wished to detain a person for a longer period of time for interrogation they had a separate section for this. Custody for a short time was for forty-eight hours, whereas a longer period would be the period of thirty days provided for in the legislation concerning the state of emergency for crimes falling under the jurisdiction of the State Security Court. He assumed that persons detained at this special section of the provincial gendarmerie headquarters would be entered in a custody ledger.

165. He had never heard of an incident on 14 August 1993 when Abdulvahap Timurtaş was said to have been apprehended in Yeniköy and taken into custody. Yeniköy did not fall within his area of responsibility. Neither did he remember having kept Abdulvahap Timurtaş in custody at his headquarters.

166. A procedure whereby a detainee would be taken to eight or nine villages in order for that detainee to be shown to the villagers and muhtars did not exist. A person would only be taken into custody if there existed some evidence which necessitated the detention. The relatives of a detainee would be informed that that person had been taken into custody but that information would not be passed on to a person who would telephone and ask whether a certain individual had been taken into custody.

167. He had heard of the name of Bahattin Aktuğ and knew that Aktuğ was the mayor of Güçlükonak district. However, he had never met Aktuğ and Aktuğ had never telephoned him to ask about the detention of Abdulvahap Timurtaş.

168. In accordance with certain laws, confessors could be used for location description, identification of individuals and to show places such as warehouses and shelters. Confessors would not be attached to a district gendarmerie headquarters.

169. He did not understand what was meant by "Şkrnak gendarmerie brigade" but he assumed that term referred to the provincial gendarmerie headquarters. There had also been a border brigade in Şkrnak but that had not been specifically formed to interrogate suspected PKK-members. In fact, the brigade had been there before the PKK terror started. The brigade had been formed to protect the borders, but it was also included in the chain of command in connection with terrorist incidents.

Hüsam Durmuş

170. Hüsam Durmuş stated that he was born in 1959. He had been the commander of Silopi district gendarmerie headquarters between 17 July 1993 and 1995. When he had taken up his duties in Silopi the general situation in the area was influenced by the authority vacuum in Northern Iraq and there had been regular clashes with the PKK.

171. He had first met the applicant in September or October 1993, he could not remember the exact date. The applicant had given him a photograph of his son, Abdulvahap Timurtaş, who, according to the applicant, had been taken into custody at Yeniköy. He had checked the custody records as well as the correspondence with the public prosecutor which had been conducted in mid-August 1993. He had told the applicant that there had been no operations in Yeniköy during that period and that nobody had been detained as a result of an operation. He had shown the applicant the custody records.

172. Asked whether he was certain that there had been no operations near Yeniköy around 14 August 1993, he said that there had been no operations in Yeniköy as such but that there had been operations around the foothills of the Cudi mountain which was near Yeniköy. Confronted with İsmail Birlik's statement to the effect that four to five months prior to 26 January 1994 someone was said to have been detained near Yeniköy, he replied that a person had been apprehended in Dader hamlet near Yeniköy but this had been towards the end of the autumn, around November 1993.

173. He had not told the applicant that on 14 August 1993 two area leaders of an illegal organisation had been caught in the Silopi region and sent to Diyarbakır a week later whose names had been different from that of the applicant's son. Whether such an arrest had in fact taken place could be checked in the records.

174. None of the PKK terrorists caught in his jurisdiction had carried authentic identity cards and it was correct that the gendarmerie had sometimes encountered difficulties in establishing a detainee's true identity. Asked whether it would have been possible for Abdulvahap to have been taken into custody in Silopi under a false or assumed name, he said that photographs were also taken of those detained and that he had compared,

together with the central station commander, the photograph of Abdulvahap given to him by the applicant with the photographs featuring in the custody ledger.

175. He had read about the alleged apprehension, detention and disappearance of Abdulvahap Timurtaş in the Özgür Gündem newspaper before the applicant had come to see him. Already at that stage he had searched the records. He had obtained the impression that Abdulvahap was a member of the PKK since the newspaper article had accused the gendarmerie. The PKK had claimed that Abdulvahap had been one of its members and that citizens were being massacred by the gendarmerie. However, Abdulvahap's name had not featured on the list at Silopi district gendarmerie of persons suspected of PKK activities. He was not familiar with the information provided by Nimet Nas in the statement of 5 May 1995 to the effect that Abdulvahap was a PKK militant.

176. It would not be unusual for a person detained on suspicion of involvement with the PKK to be shown round a number of villages in order to obtain more information concerning the suspect's relations with certain villages and in order to find out about the PKK's activities. The village muhtars were also given duties in this respect - they would be invited to state their opinions. Detainees would be shown around since the PKK always used code names for their members and for the people in villages and hamlets who provided them with logistic support. Especially if a terrorist had a foreign nationality or was from another city in Turkey they would try to find out the identity by confronting the detainee with people in the villages. Although he could not remember exactly and it could be checked in the records, it seemed likely to him that he had also taken Syrian or Iraqi nationals into custody.

177. The applicant had come to see him several times. During one of the applicant's later visits, presumably around December 1993, he had told the applicant to look for his son in the mountains. He had said this since the applicant had mentioned that the muhtar of Yeniköy had allegedly been apprehended together with Abdulvahap. He had made a connection with an incident which had taken place towards the end of 1993 in which that muhtar had been kidnapped for twenty to twenty-five days by the PKK. The muhtar had told him that the PKK had wanted to get the tax from the cotton harvest and they had wanted the muhtar to collect these taxes. Also, at that time, one of the muhtar's sons had been serving a prison sentence for having provided logistical support to the PKK. He could not remember the name of this son, but the son had been apprehended before he had taken up his duties in Silopi, probably around April or May 1993. During that incident the muhtar himself had also been detained but the muhtar had been released by the court.

178. He had not taken a statement from the applicant at any time. He explained that it was his gendarmerie headquarters and therefore he himself who was being accused and it would thus have been inappropriate for him to have taken the applicant's statement. He had told the applicant to lodge a petition with the public prosecutor. He had also not registered Abdulvahap as a missing person. As Abdulvahap was from Cizre he had told the applicant to apply to the authorities there so that the procedures could be followed there.

179. He had never been telephoned by a mayor called Aktuğ and asked about the alleged detention of Abdulvahap Timurtaş. He did know, however, that Bahattin Aktuğ was the mayor of Güçlükonak.

180. As far as he remembered he had replied to a letter from the public prosecutor asking whether Abdulvahap Timurtaş had been taken into custody at Silopi district gendarmerie headquarters. They had gone through the records one by one and, thinking that they had perhaps omitted to enter Abdulvahap into the custody ledger, they had also checked all the correspondence with the public prosecutor but they had not found anything. He confirmed that he had signed the letter of 20 October 1993 informing the public prosecutor that Abdulvahap had not been apprehended by or detained at Silopi district gendarmerie headquarters (para. 49). He also acknowledged that he had written a letter to the public prosecutor relating to the securing of the presence of İsmail Birlik (para. 52).

181. Persons taken into custody at the district gendarmerie headquarters would be entered into the custody ledger by the central station commander. The written requests to the public prosecutor for a detention period would always be signed by him, Durmuş. Moreover, the area where temporarily detained people were kept was next to the main entrance. It was thus not possible that anybody could have been taken into custody without his knowledge.

182. Until 1994 there had been a border brigade in Şkrnak. Later, this had begun to operate as a border division. Whereas the gendarmerie headquarters in the districts served in order to protect the lives and property of the citizens, the duty of the border brigade was to safeguard the borders with Syria and Iraq to prevent smuggling. However, PKK terrorism, with its links with Iran, Iraq and Syria, threatened both the lives and property of the citizens as well as the security of the border. Therefore, the border brigade, whose powers were far superior to that of a district gendarmerie headquarters, had become a co-ordinating unit and the district gendarmerie headquarters had begun working under its control.

183. The border brigade in Şkrnak had its own facilities for temporary detention. He assumed that the border brigade also had its own custody records even though it was obliged to inform the district gendarmerie headquarters if it was detaining somebody since the request to the public prosecutor for a detention period would be made through the district gendarmerie headquarters.

184. A detainee of Syrian nationality apprehended by a district gendarmerie headquarters would not be transferred to the border brigade. For every detained person, the district gendarmerie headquarters would prepare the investigation documents and inform the public prosecutor to request a detention period. Interrogations would not be carried out at the district gendarmerie headquarters but at the special investigation/interrogation unit at the provincial gendarmerie headquarters. That unit did not have its own custody record. The records of a detainee transferred there from the

district gendarmerie headquarters would be sent to the provincial centre gendarmerie headquarters. The detention area at the interrogation unit and the detention area at the provincial centre gendarmerie headquarters were the same place.

185. Before going on an operation, the district gendarmerie headquarters would record a plan on paper. Afterwards, another report would be drawn up. If documents or weapons had been seized or people had been apprehended an already prepared form would be filled out. Shown the photocopy of the post-operation report dated 15 August 1993 he remarked that the signature on that document looked like his but that this matter could be investigated. (At this point the Agent of the Government submitted that the witness ought not to be expected to answer questions about this document since he did not accept that the signature was authentic. The Delegates decided that the witness should answer the questions subject to the reservation that he did not necessarily accept that it was his signature.)

186. The document looked like the kind of report which would be drawn up after an incident for internal use. Although according to the document two persons had been apprehended, there had been no corresponding application for a detention period to the public prosecutor. He thought it very odd that this document would turn up at a public prosecutor's office when no permission for detaining the persons mentioned in the document had been obtained. Such permission would in any event have been requested from the public prosecutor at Silopi and not at Cizre. Moreover, there had been no initial report concerning the planning of the operation. The original of a report of this kind would remain at Silopi district gendarmerie headquarters. However, the document could have been drawn up in this format as part of a conspiracy. It would not have been difficult to produce a document like this for a soldier who had joined the PKK after having been discharged from military service, for example.

187. He maintained that the event described in the post-operation report had not occurred.

Sedat Erbaş

188. Sedat Erbaş said that he was born in 1969. He had been public prosecutor at Silopi from 4 July 1994 until October 1996. He had worked with Ahmet Yavuz until the latter left in August or September 1995.

189. He had never met the applicant. When the applicant had gone to the prosecutor's office to lodge a petition, he would have approached either Yavuz or Recai Köylü, the latter having been prosecutor in Silopi until July 1994. He had begun investigating the file upon taking up his duties. He had written warrants in order to find the witnesses named in the file. Delays had occurred due to the conditions prevailing in the South-East. It had only been possible to reach the mayor of Güçlükonak after more than six months. There had been no judicial organisation based in Güçlükonak district; in terms of judicial organisation Güçlükonak was a part of Eruh district in Siirt province. Thus, the mayor had had to travel to that district by helicopter in order to give a statement. One of the

other witnesses had been in prison and despite his efforts it had not been possible to locate a third witness until later.

190. Letters had been sent to Silopi police headquarters as well as Silopi district gendarmerie headquarters asking whether Abdulvahap Timurtaş had been detained by them. The replies had been negative.

191. He had never seen the post-operation report of 15 August 1993 before. If such a document had been in the file a different investigation could have been carried out. He had seen similar documents; the gendarmerie would usually send such documents to the public prosecutor's office when people had been taken into custody. Despite the fact that there was a struggle against terrorism being waged in the region, the security forces were subordinate to the public prosecutor and the prosecutor had to be informed if an incident had occurred. In military matters the Silopi district gendarmerie headquarters fell under the command of the border brigade in Şkrnak but the authority over judicial matters belonged to the public prosecutor in Silopi.

192. In July 1995 a decision of lack of jurisdiction had been taken by his colleague Yavuz. He had been on leave at the time.

193. It was not lawful in Turkey for a person to be detained without the authority of the prosecutor and without having been entered into a custody ledger. In order to ensure that those provisions were respected, prosecutors would make unexpected, on the spot visits to police headquarters and district gendarmerie headquarters. During those visits the detention areas would be checked. In case of unnotified detention or ill-treatment during detention the necessary measures against the persons in charge would be taken. During his period in Silopi he had carried out similar procedures. The frequency of these visits varied from once a week to once every twenty days.

Witnesses who did not appear

194. The Commission's Delegates had also called as witnesses: Kamil Bilgeç (muhtar of Yeniköy), İsmail Birlik (muhtar of Esenli), Özden Kardeş (Şkrnak public prosecutor), Sadkk Erdoğan and Nimet Nas. At the hearing in Ankara, the Agent of the Government informed the Delegates that Kamil Bilgeç had not been seen since 28 November 1995 and that he had allegedly been kidnapped by the PKK. They later submitted statements made to the authorities in Silopi by a number of Bilgeç's relatives and acquaintances on 29 and 30 November 1995. According to some of these statements Kamil Bilgeç had twice before been kidnapped by the PKK while he had still been living in Yeniköy.

195. After the hearing the Government submitted two statements made by İsmail Birlik explaining why he had failed to attend the hearing. Both statements were made on 22 January 1997, one before gendarmerie officers and one before officers of the anti-terrorist branch. The contents of the second statement have been summarised in para. 79 above.

196. The Government were also requested to provide an explanation in writing for the absence of Özden Kardeş from the hearing. By letter of 7 October 1997 they submitted a statement dated 21 November 1996 made by Kardeş in which he declared that he had nothing to add to the information contained in the file and that for this reason he would not be able to participate in the hearing on 21 November 1996.

197. During the hearing the Delegates were informed that both Sadkk Erdoğan and Nimet Nas were in prison in Diyarbakkr. On 22 November 1996 a member of the Commission's Secretariat spoke to both of them by telephone. Nimet Nas said that he had received the summons for the hearing but that he could not come as he was feeling unwell and feared for his safety. He also stated that if he was summoned to Diyarbakkr he would be prepared to come and testify. He would have served his sentence by 12 December 1996 but was prepared to leave his address with the prison authorities. Sadkk Erdoğan, on the other hand, stated that he had not received the summons for the hearing. His release date was 4 February 1997 and he would also leave his address with the prison authorities.

C. Relevant domestic law and practice

198. In this section the Commission has incorporated relevant extracts derived from, inter alia, its summary of the relevant domestic law and practice as submitted by the parties in the case of Aksoy v. Turkey (No. 21987/93, Comm. Report 23.10.95).

199. Article 125 of the Turkish Constitution provides as follows:

"İdarenin her türlü eylem ve işlemlerine karşk yargk yolu açkktkr ...

İdare kendi eylem ve işlemlerinden doğan zarark ödemekle yükümlüdür."

[Translation]

"All acts or decisions of the Administration are subject to judicial review ...

The Administration shall be liable for damage caused by its own acts and measures."

200. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the Administration, whose liability is of an absolute, objective nature, based on a theory of "social risk". Thus, the Administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

201. The Turkish Criminal Code makes it a criminal offence

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

- to subject someone to torture or ill-treatment (Articles 243 and 245).

202. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

203. Generally, if the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Council of State; a refusal to prosecute is subject to an automatic appeal of this kind. If the offender is a member of the armed forces, he would fall under the jurisdiction of the military courts and would be tried in accordance with the provisions of Article 152 of the Military Criminal Code.

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

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

206. The applicant points to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme. Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces.

D. Relevant international material

207. The phenomenon of forced or involuntary disappearance has been the concern of a number of other international judicial and human rights investigatory bodies. Extracts and summaries of materials from the Inter-American system and the United Nations were

included in Appendix II to the Report in the case of Kurt v. Turkey (Comm. Report 5.12.96, Eur. Court HR, judgment of 25 May 1998, to be published in Reports 1998).

208. As regards deaths in custody the applicant refers to material submitted in the case of Kurt v. Turkey (op. cit.), including a list from the Human Rights Foundation of Turkey (Deaths in Detention places or Prisons, File on Torture, 12 September 1980-12 September 1995, HRFT Publications 5, Ankara March 1996, pp. 64-68) and the reports of the United Nations Special Rapporteur on Extra-Judicial, Summary and Arbitrary Executions.

209. In relation to the occurrence of torture in pre-trial detention in Turkey the applicant has made reference to reports of intergovernmental and nongovernmental organisations submitted in the case of Aksoy v. Turkey (Eur. Court HR, judgment of 18 December 1996, Reports 1996, p. 2274), and to the European Committee for the Prevention of Torture's Public Statement on Turkey issued on 6 December 1996.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

210. The Commission has declared admissible the applicant's complaints:

- that his son, Abdulvahap Timurtaş, who has disappeared, has been taken into unacknowledged detention and that his right to life was not adequately protected;

- that his son has been tortured and subjected to inhuman and degrading treatment;

- that his son has been arbitrarily detained without application of the requisite procedural safeguards;

- that his son's disappearance caused the applicant such anguish as to amount to inhuman and degrading treatment;

- that there is no remedy available in respect of these matters;

- that these matters disclose discrimination; and

- that these matters disclose restrictions on Convention rights imposed for ulterior purposes.

211. In addition, in the final observations on the merits of the application, the applicant complains that Turkey has hindered the exercise of his right to individual petition.

B. Points at issue

212. The points at issue in the present case are as follows:

- whether there has been a violation of Article 2 of the Convention in respect of the alleged disappearance of the applicant's son;

- whether there has been a violation of Article 3 of the Convention in respect of the applicant's son;

- whether there has been a violation of Article 5 of the Convention in respect of the alleged unacknowledged detention of the applicant's son;

- whether there has been a violation of Article 3 of the Convention in respect of the applicant;

- whether there has been a violation of Article 13 of the Convention by reason of an alleged lack of an effective remedy before a national authority in respect of the above complaints;

- whether there has been a violation of Article 14 of the Convention in conjunction with Articles 2, 3 and 5 of the Convention;

- whether there has been a violation of Article 18 of the Convention; and

- whether there has been a failure by the Turkish Government to comply with their obligations under Article 25 of the Convention.

C. The evaluation of the evidence

213. Before dealing with the applicant's allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) of the Convention. It would make a number of preliminary observations in this respect:

i. There have been no findings of fact made by domestic courts as regards the subject-matter of the applicant's complaints. The Commission has accordingly based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings; in the assessment as to whether or not the applicant's allegations are well-founded the standard of proof is that of "beyond reasonable doubt" as adopted by the Court. Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and, in addition, the conduct of the parties when evidence is being obtained may be taken into account (mutatis mutandis, Eur. Court H.R., Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, para. 161).

ii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters: it has therefore paid careful and cautious attention to the meaning and significance which

should be attributed to the statements made by witnesses appearing before its Delegates. In relation to both written and oral evidence, the Commission has been aware that the cultural context of the applicant and a number of the witnesses has rendered inevitable a certain imprecision with regard to dates in particular and other details and does not consider that this by itself reflects on the credibility of the testimony;

iii. In a case where there are contradictory and conflicting factual accounts of events, the Commission particularly regrets the absence of a thorough domestic judicial examination or other detailed independent investigation of the events in question. It is acutely aware of its own shortcomings as a first instance tribunal of fact. The problems of language are adverted to above; there is also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. In addition, the Commission has no powers of compulsion as regards the attendance of witnesses. In the present case, while eleven witnesses were summoned to appear, only six, including the applicant, in fact gave evidence before the Commission's Delegates. The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony. It acknowledges the unsatisfactory nature of these elements which highlights forcefully the importance of Contracting States' primary undertaking in Article 1 to secure the rights guaranteed under the Convention, including the provision of effective remedies as under Article 13.

1. Concerning the alleged apprehension and detention of the applicant's son Abdulvahap Timurtaş

214. The Commission notes in the first place that it has not been presented with any eye-witness evidence of the alleged apprehension of the applicant's son by gendarmes attached to Silopi district gendarmerie headquarters on 14 August 1993 and his subsequent detention. The applicant himself stated that he had been informed of his son's apprehension through an anonymous telephone call. The people whom he said had provided him with information about Abdulvahap's whereabouts - Bahattin Aktuğ, Sadkk Erdoğan and Nimet Nas - denied any knowledge of this in their various statements. Furthermore, the apprehension and detention have throughout been denied by the authorities and are not recorded in any of the custody records of which copies have been provided to the Commission.

215. On the other hand, the photocopied post-operation report with reference number 0623-994-93/6038 submitted by his representatives confirms in a detailed manner the applicant's allegations, setting out as it does the apprehension on suspicion of being a PKK area-leader of Abdulvahap Timurtaş, together with a person of Syrian nationality, effected between the villages of Yeniköy and Esenli on 14 August 1993. The Commission considers that, if authentic, this document is of crucial importance.

216. In this respect the Commission observes in the first place that at the hearing before its Delegates Hüsam Durmuş, the alleged author of the report, stated that the signature on the document looked like his (para. 185). It is also not in dispute that the style and format of the report correspond to the way in which such reports are usually

drawn up. However, according to the Government, the fact that the original of the report, despite a thorough search, could not be found casts doubt on its authenticity (para. 105).

217. Although it is well aware that it should treat with caution any document purporting to be official and bearing out an applicant's allegations where only a photocopy, the provenance of which is unclear, has been provided, the Commission considers nevertheless that in the circumstances of the present case the Government's argument as to why the report's authenticity appears in doubt is insufficient and wholly unconvincing. This becomes even more apparent when account is taken of the fact that it would have been relatively straightforward for the Government to disprove the report's authenticity. After all, it follows from the system of reference numbers used by the gendarmerie (para. 106) that, if the submitted report is a forgery, there must be another document which bears a reference number ending in '93/6038'. The Commission observes in this regard that the case-file contains a letter written by Hüsam Durmuş on 20 October 1993 with a reference number ending in '93/7502' (para. 49) from which it may be concluded that at least 7,502 and thus more than 6,038 documents were processed at the Silopi district gendarmerie headquarters in 1993. Therefore, if the report submitted by the applicant is a forgery as the Government contend, it was incumbent on them pursuant to Article 28 para. 1 (a) of the Convention to produce the real document that was the 6,038th to be processed in 1993. In this respect the Commission cannot accept that it is denied access to that document for the reason that it has been classified as secret (para. 105).

218. As to why the post-operation report would have been found in the files of the public prosecutor in Cizre, who was not among the addressees indicated at the top of the document, the Commission notes that the material before it contains indications to the effect that the authorities in Cizre might well have been apprised of Abdulvahap's fate. The Commission observes in the first place that Hüsam Durmuş told the applicant to report his son's disappearance to the authorities in Cizre as that was where Abdulvahap was from and the procedures could be followed there (para. 178). Also, the applicant has submitted copies of two petitions which he said he lodged with the Cizre public prosecutor and the Cizre central gendarmerie headquarters respectively (paras. 94, 95). In addition, the applicant told the Delegates that he was informed by the Şkrnak brigade that the reply to his enquiries would be sent to the political branch in Cizre (para. 133). The fact, therefore, that the original of the submitted document was said to have been found in Cizre is not, in itself, sufficient to establish that it is a forgery.

219. On the basis of the foregoing considerations the Commission accepts that the document submitted is indeed a photocopy of an authentic post-operation report from which it appears that Abdulvahap Timurtaş was apprehended on 14 August 1993.

220. Nevertheless, the Commission considers that the other material before it also requires a careful and cautious examination before any definitive conclusions can be drawn from the above.

221. As to the applicant's account in general, the Commission observes that his oral testimony was largely consistent with the statements he had given to both the Human Rights Association and various authorities, notwithstanding the fact that his account of the dates on which he went to these authorities to enquire about his son was somewhat imprecise. Moreover, the Commission's Delegates found him credible and convincing.

222. Certain aspects of the applicant's account were corroborated by other witnesses. Hüsam Durmuş, the commander of the Silopi district gendarmerie headquarters at the relevant time, acknowledged that the applicant had brought him a photograph of his son and that he had advised the applicant to look for his son in the mountains (paras. 171, 177). He also confirmed that detainees suspected of PKK-related offences could be shown around villages or be presented to muhtars in order for them to be identified (para. 176), although both Azmi Gündoğan (para. 160) and Erol Tuna (para. 166) denied that this practice existed.

223. The Commission further observes that Abdulvahap's alleged involvement with the PKK may have provided a reason for his apprehension. In this respect it notes that in his two statements to public prosecutors, Nimet Nas said that Abdulvahap was a prominent PKK member (paras. 82, 83). More importantly, the decision not to prosecute states that according to a letter dated 28 July 1995 from the Şkrnak police headquarters the applicant's son was wanted by the Prevention of Terrorism branch for having carried out activities on behalf of the PKK terrorist organisation (para. 112).

224. As regards the applicant's claim that Sadkk Erdoğan and Nimet Nas saw his son in detention in Şkrnak, the Commission notes the following. From information submitted by the Government it appears that both Erdoğan and Nas were serving a prison sentence in August/September 1993. According to copies of the custody records of the Şkrnak interrogation unit, Erdoğan was detained there from 3 April 1993 to 1 May 1993 and Nas from 16 June 1992 to 16 July 1992 (paras. 122, 124). Erdoğan is then said to have been detained at Şkrnak prison until 26 May 1993 when he was transferred to Diyarbakkr E-type prison. He was released from that prison on 21 March 1994 (para. 122). Nas is said to have been sentenced on 7 May 1993 and to have been released from Diyarbakkr E-type prison on 15 December 1996 (para. 124).

225. The Commission notes, however, that it has not been provided with information as to the exact whereabouts of Erdoğan and Nas in August/September 1993. Despite an explicit request the Government have failed to produce the records from Diyarbakkr E-type prison concerning Erdoğan's and Nas' detention there (paras. 27, 125). The Commission considers that it cannot automatically be assumed that Erdoğan and Nas were detained at the E-type prison throughout the time they were serving their sentence since the evidence would appear to suggest that the circumstances under which confessors serve their sentence enables them to leave prison from time to time. In this respect the Commission notes, for example, that Erdoğan said that he was a confessor and a temporary village guard at the same time (para. 85). Azmi Gündoğan told the Delegates that confessors would be used to identify certain locations (para. 161). Erol Tuna added that in accordance with certain laws, confessors could be used for location description,

identification of individuals and to show places such as warehouses and shelters (para. 168).

226. The fact that Erdoğan and Nas may have been thus employed to assist the security forces is, at least as far as the latter is concerned, borne out by a letter from the Şkrnak provincial gendarmerie headquarters informing the Şkrnak public prosecutor that they had been unable to summon Nas as he was participating in operations in Güçlükonak (para. 51). This letter was written on 29 December 1993, i.e. at a time when Nas was said to be serving his prison sentence.

227. The Commission accordingly concludes that the information relating to their detention is not sufficient to establish that Erdoğan and Nas were not in Şkrnak or subsequently in Güçlükonak at the time the applicant alleged they were there. Although not conclusive, the Commission notes in addition that neither man, when asked by the authorities about his knowledge of Abdulvahap's alleged detention in Şkrnak in August 1993, said that he himself had not been in Şkrnak at that time (paras. 82-86).

228. The fact remains that in their statements to the authorities both men denied having seen Abdulvahap in detention. The question arises, however, whether they might not have compromised their position with the authorities if they had admitted looking after a PKK-suspect. In fact, according to the applicant's account of a conversation he had had with Erdoğan the latter had been warned by friends not to admit having seen Abdulvahap after his first statement in which he confirmed that he had seen Abdulvahap had been met with anger and incredulity. Erdoğan had subsequently, on the second occasion that he was asked about this matter by the authorities, denied having seen Abdulvahap (para. 140). The Commission finds it significant that the applicant related this conversation to the Delegates before he was confronted with the statements in which Erdoğan was indeed said to have denied any knowledge of Abdulvahap's fate (para. 141).

229. If the applicant's account is correct, and Erdoğan told the authorities on 15 August 1995 that he had seen Abdulvahap, it means that the written record of that statement does not reflect what he actually said. The possibility that this is indeed the case seems strengthened by a startling contradiction contained in the two statements: in the first one Erdoğan is stated as saying that he had never even heard of the name Abdulvahap Timurtaş whereas in the second statement he said that he did know this name because Abdulvahap's mother had mentioned it when she visited Damlabaşk. The Commission, considering it unlikely that such a contradiction would appear in two truthful statements, finds that it detracts substantially from the credibility of the statements. Bearing in mind the applicant's account, it does not appear altogether implausible that the fact that Erdoğan told the gendarmes that he had seen Abdulvahap did not suit them and they wrote down something else.

230. As noted above, Bahattin Aktuğ also denied having provided the applicant with information concerning Abdulvahap's detention. He did so before the Delegates and in two statements to the authorities. The Commission notes that in his first statement Aktuğ denied all knowledge of the applicant and his son (para. 87). He told the Delegates that he

had not said that he did not know the applicant and that this part of his statement must have been recorded wrongly (para. 148). Even assuming that to be the case, the Commission observes that Aktuğ was unable to offer a convincing explanation as to why he had told the gendarmes on 13 August 1995 that the applicant might have wished to affect him adversely. It can find nothing in either the applicant's or Aktuğ's own account of their relation to suggest that there was ever any bad feeling between them. Indeed, given that the applicant used to visit Aktuğ several times a year on which occasions they would talk about their children, including the death of the applicant's son Tevfik, it seems rather surprising that the applicant would not have mentioned the disappearance of his son Abdulvahap to Aktuğ. Aktuğ's evidence to the Delegates thus appeared less than frank.

231. For the above reasons the Commission considers it unsafe to rely on the statements made by Sadık Erdoğan, Nimet Nas and Bahattin Aktuğ.

232. As regards the statements taken from nine villagers (para. 89) the Commission finds that they cannot serve to establish that Abdulvahap was not apprehended on 14 August 1993. It notes that the villagers were asked what, if anything, they knew about the apprehension of Abdulvahap Timurtaş although it had at no time been suggested by the applicant that his son, who was from Cizre originally, was known in the area around Yeniköy. The fact that the villagers did not know Abdulvahap and hence knew nothing about his alleged apprehension by no means excludes the possibility that a person unknown to them had been apprehended.

233. The same applies to the statement made by Yusuf Bilgeç, the son of the Yeniköy muhtar Kamil Bilgeç, on 11 March 1996 (para. 90). Although it does not appear from the wording of this statement what questions were put to him, the public prosecutor who took the statement concluded that it was not necessary to question Yusuf Bilgeç in detail in view of the fact that Bilgeç did not know Abdulvahap (or Abdullah as he is called in the statement) Timurtaş.

234. In his statements of 26 January 1994 and 13 August 1995 Kamil Bilgeç said that he did not know and had never seen Abdulvahap Timurtaş (paras. 80, 81). Even though that in itself does not exclude the possibility that he did see a person whom he did not know was called Abdulvahap Timurtaş - bearing in mind also that according to the post-operation report Abdulvahap used a code name -, Kamil Bilgeç also said on 26 January 1994 that he knew nothing about two persons having been apprehended near his village of Yeniköy approximately four months previously. The mayor of Esenli, İsmail Birlik, however, said on the same day that he had heard of a person having been taken into custody near Yeniköy four to five months previously (para. 78) which casts doubt on the veracity of Kamil Bilgeç's account.

235. Finally, the Commission has examined the copies of all the custody records with which it has been provided (paras. 116-121) even though it would appear that those of the Silopi district gendarmerie headquarters and the Şırnak interrogation unit are of particular relevance in this case for the following reasons.

236. The Silopi district gendarmerie would have been responsible for any operations carried out in the area of Yeniköy, this village being located outside Silopi town where the police were responsible for maintaining law and order.

237. As regards the relevance of the records of the Şkrnak interrogation unit the Commission recalls that the applicant claims that at some time following his son having been shown around a number of villages he was transferred to Şkrnak brigade headquarters (paras. 69, 92). The Commission considers that it is not clear what is meant by "brigade headquarters". According to information provided by the Government, the border brigade does not detain people (para. 126). It would appear more likely that "brigade headquarters" refers to the provincial gendarmerie headquarters. Erol Tuna made the same assumption (para. 169). Furthermore, on 15 August 1995 Sadkk Erdoğan was questioned about Abdulvahap's presence at the Şkrnak interrogation unit (para. 84). The interrogation unit is the special section at the provincial gendarmerie headquarters where persons who are suspected of offences which cover an area larger than a district and who are detained for a longer period are held (Azmi Gündoğan, para. 160, Erol Tuna, para. 165). Moreover, the Government have confirmed that the Şkrnak provincial gendarmerie headquarters does not keep a custody record since detainees are registered in the records of the interrogation unit (para. 120).

238. The Commission notes that the records submitted, apart from those of the Şkrnak provincial centre gendarmerie headquarters - which only cover the limited period of 23 September to 30 December 1993 (para. 119) -, reveal the following anomalies.

Concerning the Silopi district gendarmerie headquarters records

239. Entries nos. 36-39 record four detainees (including one Yusuf Bilgeç, son of Kamil) being taken into custody on 31 October 1993, which predates the previous four entries nos. 32-35 where the detainees are recorded as entering custody on 4 November 1993.

240. In respect of the entries nos. 36-39 the Commission further notes that they were taken into detention on remand and that the date of their transfer is given as 17 November 1993, thus creating the impression that these four persons were detained at the Silopi district gendarmerie headquarters from 31 October to 17 November 1993. However, these same four men are also registered as having been detained in the Şkrnak interrogation unit from 1 to 16 November 1993. Similarly, while the detainees with entry nos. 28 and 30 are recorded as having been detained at the Silopi district gendarmerie headquarters from 13 August to 14 September 1993, these persons also appear under entry nos. 556 and 559 in the custody record for the Şkrnak interrogation unit where they are stated to have been detained from 22 August to 12 September 1993.

Concerning the Silopi police headquarters records

241. Three entries, nos. 152, 155 and 158, have been crossed through. Entries nos. 152 and 155 give 12 August 1993 as the date on which these persons entered into custody but no release date is given. The third entry, no. 158, has been entered out of sequence: the date on which this person was taken into custody is given as 15 August 1993 whereas the four entries that follow it are dated 13 August 1993. In addition, the suspect for entry no. 158 is stated to have left the police headquarters (either because he was released or transferred, this is illegible) on 24 August 1998 which appears peculiar if this entry was crossed through because the person concerned had not been taken into custody. The data concerning the suspects for these three entries (i.e. name of the suspect, name of his father and year and place of birth) appear again under nos. 185, 186 and 196 respectively, albeit that in respect of no. 186 a different place of birth is given than for no. 155 and that no. 196 contains a different year of birth from no. 158. Moreover, all three entries have been entered out of sequence: the detainees pertaining to the four entry numbers directly preceding nos. 185 and 186 were taken into custody on 17 August 1993 and nos. 185 and 186 on 15 August 1993. The detainee for entry no. 196 was taken into custody on 18 August 1993 whereas the preceding entry was dated 20 August 1993.

242. Entries nos. 166 and 167 are out of sequence: they have been entered on 13 August 1993 whereas the three preceding entries are dated 15 August 1993. Moreover, it appears that the suspects for these entries had already been released, namely on 14 August according to the ledger, before the suspects for the preceding entries had been taken into custody. In addition, entries nos. 231 and 284 are also out of sequence.

243. Entries no. 244 and 245 record detainees being taken into custody on a date after their stated date of release.

Concerning the Şkrnak interrogation unit records

244. The apparently simultaneous detention at the Şkrnak interrogation unit and the Silopi district gendarmerie headquarters of a number of persons has already been referred to above (para. 241).

245. The following entries are out of sequence:

- no. 566 records a detainee being taken into custody on 18 August 1993, predating the preceding entry which records the person entering custody on 23 August 1993;
- no. 622 records a detainee being taken into custody on 29 September 1993, predating the preceding entry which records the person entering custody on either 1 or 4 October 1993 (due to the poor quality of the photocopy this is not clear); and
- no. 658 records a detainee being taken into custody on 30 September 1993 predating the preceding entry which records the person entering custody on 20 October 1993. In this last case it thus appears that the suspect for no. 658 was not entered into the custody record for the first three weeks of his detention.

246. Entries no. 573 and 671 record detainees being taken into custody on a date after their stated date of release or transfer.

247. Although a number, but not all, of the anomalies described above might be explained by administrative error or a system of non-comtemporaneous recording of entries (cf. Izzet Çakкcк v. Turkey, No. 23657/94, Comm. Rep. 12.3.98, p. 40, para. 209, currently pending before the Court), the Commission is disturbed by the frequency with which they occur, the more so as this does not appear to be an isolated incident. In previous cases involving events in South-East Turkey the Commission has also had reason to doubt the accuracy of custody registers (Aydкn v. Turkey, Comm. Report 7.3.96, para. 172, Eur. Court HR, Reports 1997, p. 1941; Çakкcк v. Turkey, op. cit.). As it did in those cases, the Commission concludes that the custody records disclosed to it cannot be relied upon to prove that Abdulvahap Timurtaş was not taken into detention.

248. The Commission considers that the examination of the other material before it as conducted in the preceding paragraphs has not revealed any facts or circumstances capable of disproving the applicant's allegations. Indeed, some of the evidence corroborates his claims. It recalls, moreover, that it has accepted that the post-operation report is authentic.

249. Accordingly, the Commission is satisfied that the applicant's allegations have been proved beyond reasonable doubt. It finds that on 14 August 1993 Abdulvahap Timurtaş was apprehended near the village of Yeniköy by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi. At some stage thereafter he was transferred to a place of detention in Şкrnak which was probably the interrogation unit at the provincial centre gendarmerie headquarters.

2. Concerning the treatment of Abdulvahap Timurtaş in detention

250. The evidence with regard to the alleged torture or ill-treatment of Abdulvahap Timurtaş in detention consists of the applicant's oral testimony. He said that Nimet Nas had told Bahattin Aktuğ that Abdulvahap was "under torture" but that the applicant was not to worry about his son (para. 132).

251. The Commission recalls that it has found the applicant credible and convincing. Nevertheless, it considers that in the absence of more direct evidence it cannot find it established beyond reasonable doubt that Abdulvahap Timurtaş was subjected to torture or ill-treatment whilst in detention.

3. Concerning the official investigation into the disappearance

252. Noting that the applicant also alleges that the investigations by the domestic authorities into his son's apprehension and subsequent disappearance were inadequate, the Commission will next assess the evidence relating to these investigations.

253. The Commission observes that the first documented action on the part of the authorities appears to have been taken on 15 October 1993 by the public prosecutor at Silopi who requested the Silopi district gendarmerie headquarters and the Silopi police headquarters to examine the applicant's claim contained in his petition of the same date

that his son had been taken into detention on 14 August 1993 (para. 48). Yet it is the applicant's contention that he started asking various authorities about Abdulvahap's apprehension within a week of having been informed about it on 14 August 1993 (paras. 68, 131). The Commission's Delegates found the applicant to be credible and convincing in this respect as well; despite the fact that his account lacked precision as to dates, he was able to relate a number of his attempts to obtain news in terms of the number of days that had passed since Abdulvahap's apprehension. It thus appears that an official investigation into the apprehension was not commenced until two months after it had taken place. The Commission further finds it peculiar that the applicant's statement was not taken until nearly another week after his petition had been accepted, namely on 21 October 1993.

254. After the applicant's statement had been taken a large amount of correspondence was entered into, aimed mainly at obtaining statements from persons named by the applicant. The Commission notes that it took a long time for any of these statements to be produced. The first ones, from the muhtars of Esenli and Yeniköy, were not taken until 26 January 1994. As noted above (para. 234), however, despite the muhtar of Esenli saying that he had heard that someone had been taken into detention near Yeniköy village approximately four to five months previously, the investigation file does not disclose anything to suggest that this information was acted upon.

255. On 23 August 1994 Sedat Erbaş, public prosecutor at Silopi, apprised his counterpart in Şkrnak of the state of the investigation in response to a query received from the Ministry of Justice (International Law and Foreign Relations General Directorate) following the communication of the application (para. 55). In his letter, Erbaş submitted that because the applicant had not been to the Silopi public prosecutor s office since 21 October 1993 the impression had been created that the matter had been resolved. For that reason, on 10 August 1994, he had summoned the applicant to his office in order to close the file.

256. The Commission is somewhat puzzled by the contents of Erbaş's letter for a number of reasons. Firstly, a summons for the applicant was sent to the Cizre public prosecutor's office on 10 March 1994 (para. 53), which office had, on 28 March 1994, transmitted to the Silopi public prosecutor's office the letter from the Cizre police headquarters to the effect that the applicant had moved from Cizre and that his whereabouts were unknown. Thus, Erbaş must have known that he would not reach the applicant in Cizre which casts doubt on the usefulness of the summons of 10 August 1994. Secondly, the Commission notes that on the same day on which Erbaş summoned the applicant in order to close the file, he also sent out requests to have statements taken from Sadkk Erdoğan, Nimet Nas and Bahattin Aktuğ (para. 54) which does not appear to serve any useful purpose if he was intending to close the investigation.

257. From the documents submitted, it appears that Erbaş's request of 10 August 1994 for a statement to be taken from Aktuğ was the first such request. Erbaş told the Delegates that as a result of the conditions in the area it had taken six months to reach

Aktuğ (para. 189). The Commission notes that in fact it took more than a year before Aktuğ made a statement, namely on 13 August 1995 (para. 87).

258. Sadık Erdoğan first made a statement on 15 August 1995, i.e. more than one year and nine months after the applicant had made his statement to the Silopi public prosecutor in which he had named Erdoğan. In the case of Nimet Nas, who made a first statement on 5 May 1995, it took more than one and a half years.

259. The Commission accepts that the conditions in the area may to some extent have hampered the speed with which examinations were carried out but it finds that they cannot justify such delays as occurred in the present case. Although a reproach can be made of the applicant if it is indeed the case that he moved from Cizre without leaving a forwarding address, the Commission observes that no serious attempts were made to trace him. Moreover, from 20 May 1994, when the Government was informed about the Commission's decision to communicate the application, the authorities were aware of the fact that the applicant's son was still missing and that the matter had thus not been resolved. The Commission fails to see why the authorities could not have addressed any queries they may have wished to put to the applicant to his representatives.

260. It does not appear, moreover, that the investigation was conducted with any more urgency following the communication of the application. This is quite graphically illustrated by the fact that it was not until 24 July 1995, i.e. almost two years after Abdulvahap's alleged apprehension, that enquiries were made at the provincial centre gendarmerie headquarters and the police headquarters in Şırnak as to whether or not Abdulvahap Timurtaş had been detained there in August 1993 (para. 60). The case-file provided to the Commission shows that up to that moment such enquiries had only been made with the district gendarmerie and police headquarters in Silopi. It is true that in a letter of 6 February 1995 Ahmet Yavuz, public prosecutor at Silopi, wrote that the public prosecutor's office at Şırnak had been requested to investigate the incident via the Şırnak brigade headquarters (para. 57), but no copies of documents have been provided which substantiate that any such enquiries were in fact made or that any replies were received.

261. Similarly, although Ahmet Yavuz wrote in the same letter that the residents of Yeniköy had been summoned to give statements, the only evidence to the effect that this step had indeed been taken is the letter written by a Şırnak prosecutor on 26 February 1996 (para. 62).

262. This leads the Commission to reflect on the general manner in which the investigation was conducted and the steps that were taken. It observes in this respect that a considerable number of the statements which were obtained were of limited value due to the particular questions put to the persons concerned. Emphasis was put on the question whether or not the person making the statement knew either the applicant or his son rather than if he had any knowledge of two persons having been apprehended near Yeniköy on 14 August 1993 and/or subsequently having been shown to the inhabitants of the villages in the area for identification purposes. The Commission has already commented on this issue above (paras. 233, 234). Where a witness stated that he had

heard of two persons having been apprehended, as was the case with İsmail Birlik, this information was ignored and subsequently denied: in the decision not to prosecute of 3 June 1996 prosecutor Kardeş wrote that Kamil Bilgeç and İsmail Birlik were not aware of an incident involving detention (para. 113).

263. The Commission considers that the investigation was characterised by a lackadaisical approach on the part of the investigating authorities who do not appear to have taken the applicant's grave allegations seriously. It resulted in a seemingly endless stream of requests for information and instructions for statements to be taken without any decisive steps having been taken to hurry this process along. At no time did any of the public prosecutors involved personally go to inspect the detention areas in the various gendarmerie or police headquarters, nor did they question any of the officers in charge nor demand to see the custody records for themselves. Neither were the Silopi district gendarmerie asked if any operations had been carried out by them in the Yeniköy area on 14 August 1993 or were they expected to account for their movements on that day.

264. The Commission concludes that the investigation carried out was dilatory, perfunctory and superficial and did not constitute a serious attempt to find out what, if anything, had happened to Abdulvahap Timurtaş.

265. Finally, in its assessment of the statements made by Sadкk Erdoğan and Nimet Nas the Commission noted the possibility that they may not have spoken the truth so as not to compromise their position. In respect of Erdoğan, moreover, the Commission also considered the possibility that the written record of his statement of 15 August 1995 did not reflect what he had actually said. Although it did not reach a finding to the effect that this statement had been falsified since this has not been proved beyond reasonable doubt, it is clear that such an act would make a travesty of any investigation process.

Concluding remarks

266. The Commission recalls that the Government, despite repeated requests, failed to provide copies of the records of Diyarbakкr E-type prison concerning either Sadкk Erdoğan's or Nimet Nas' detention there (paras. 22, 24, 26, 27, 125). It also notes that the Government have taken a passive attitude as regards the attendance of Şкrnak public prosecutor Özden Kardeş who stated that he had nothing to add to the information contained in the file and that for this reason he would not appear before the Delegates. Kardeş's letter to the Commission of 21 November 1996, which was thus written at the time that the Delegates were in Ankara, was submitted by the Government nearly one year later, i.e. on 7 October 1997 (para. 196). The Commission reiterates that it is unacceptable that officials, such as Özden Kardeş, decline to attend on the basis of their own opinion that they have no useful testimony to give. It is not apparent that the Government have taken any step with a view to encouraging or advising him in regard to the desirability of co-operation with the Convention organs (cf. Tekin v. Turkey, Comm. Report 17.04.97, para. 171 sub i, Eur. Court HR, judgment of 9 June 1998, to be published in Reports 1998; Çakкcк v. Turkey, op. cit., para. 245; and Tanrкkulu v. Turkey, Comm. Report 15.04.98, para. 237, currently pending before the Court).

267. The Commission considers that in this case the Government have fallen short of their obligations under Article 28 para. 1(a) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts of this case.

268. In his final observations on the merits the applicant invited the Commission to consider whether the fact that Hüsam Durmuş, a Government witness, had lied on oath to the Delegates also raised an issue under Article 28 para. 1(a) of the Convention. Although in itself a matter for grave concern, the Commission considers that in the circumstances of the present case this does not entail a failure of the Government to furnish all necessary facilities within the meaning of Article 28 para. 1(a).

269. On the basis of its findings above, the Commission will now proceed to examine the applicant's complaints under the various Articles of the Convention.

D. As regards the disappearance of the applicant's son

270. The applicant has invoked a number of provisions in respect of the disappearance of his son Abdulvahap Timurtaş.

1. As regards Article 2 of the Convention

271. Article 2 of the Convention 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."

272. The applicant submits that the disappearance of his son constitutes a violation of the State's obligations under Article 2. He argues that where his son was taken into detention by agents of the State it was incumbent on the State to provide a plausible explanation as to their failure to produce him alive. Not having produced such an explanation beyond a denial that the applicant's son was taken into detention the State has failed in its obligation to protect the right to life.

273. In this respect the applicant submits in the first place that there is evidence that Abdulvahap is dead. Although the applicant had for a while been able to obtain information about his son's whereabouts through Bahattin Aktuğ, the latter was then told to stop asking questions about Abdulvahap. This element combined with Hüsam Durmuş's attempt before the Delegates to cover up the fact of Abdulvahap's detention is, in the applicant's opinion, sufficient to establish the probability that his son died as a result of his treatment whilst detained in Şkrnak.

274. Secondly, the applicant submits that the context in which his son was taken into unacknowledged detention was life-threatening. He points to the unreliability of the custody records and the ineffective investigation conducted by the domestic authorities. Moreover, there exists a well-documented high incidence of ill-treatment and extra-judicial killings of those in detention in South-East Turkey such as to justify a finding of an aggravated violation of Article 2.

275. Finally, the applicant asserts that the failure of the authorities to conduct a thorough, prompt and impartial investigation into his complaints constitutes a separate violation of Article 2. The applicant complains, furthermore, that there exists a practice of inadequate investigations, in aggravated violation of Article 2.

276. The Government deny that the applicant's son was detained by security forces. They contend that the investigation carried out has shown that the applicant's allegations that his son's disappearance occurred in custody are unsubstantiated.

277. The Commission recalls that it has found that Abdulvahap Timurtaş was taken into detention on 14 August 1993 (para. 249). For more than five years there has been no information as to his subsequent fate. Having regard to the fact that the need was felt to cover up Abdulvahap's apprehension the Commission considers that there is indeed a strong probability that Abdulvahap died whilst in unacknowledged detention.

278. The Commission has next to examine whether that strong probability is sufficient to trigger the applicability of Article 2 in the absence of concrete evidence that Abdulvahap has in fact lost his life or suffered known injury of illness. In the case of Çakkck v. Turkey, the Commission did reach the conclusion that Article 2 applied, finding that the "very strong probability" that the applicant's brother Ahmet Çakkck was dead arose in the context of an unacknowledged detention and findings of ill-treatment (op. cit., para. 253).

279. However, even though the Commission did not find that Ahmet Çakkck had been killed as alleged by the Government, he was regarded as dead in official terms (op. cit., paras. 239, 253). In the present case there is no official claim that Abdulvahap Timurtaş is presumed to be no longer alive. In addition, the Commission accepted evidence from a fellow detainee of Ahmet Çakkck to the effect that he had seen Ahmet Çakkck in the Diyarbakkr provincial gendarmerie headquarters with injuries, that Ahmet Çakkck had told him that he had been tortured and that he himself had also been subjected to torture

(op. cit., para. 252). The Commission recalls that in the present case it was unable to reach a finding that Abdulvahap Timurtaş was tortured or ill-treated (para. 251).

280. The Commission considers, therefore, that the application falls to be distinguished from the case of Çakkck. In the circumstances of the present case it finds it more appropriate to follow the approach adopted by the Commission and the Court in the case of Kurt v. Turkey (op. cit.).

281. The Court held in that case that it was not necessary to decide on the applicant's complaint under Article 2 since there was no concrete evidence capable of proving beyond reasonable doubt that her son had been killed by the authorities either while in detention or at some subsequent stage. The Court further held that

"... in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play." (op. cit., para. 107).

282. The Commission notes that the present case similarly discloses no such concrete evidence of the killing of Abdulvahap Timurtaş. It observes in addition that the applicant has submitted the same "more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State" as those on which Koçeri Kurt relied and which were deemed by the Court to be not "sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody" (op. cit., para. 108).

283. Consequently, the Commission considers that the applicant's allegations of the State's failure to safeguard his son from disappearance fall to be examined in the context of Article 5 of the Convention.

2. As regards Article 3 of the Convention

284. Article 3 of the Convention reads as follows:

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

285. The applicant complains that his son was a victim of treatment contrary to Article 3 on account of the evidence that Abdulvahap was personally ill-treated or on account of the evidence of the practice of torture in detention in Turkey. He further submits that a prolonged period of unacknowledged detention involving a complete denial of any security of person in itself constitutes torture. He also complains of a separate violation of Article 3 in respect of the inadequate investigation of his allegations.

286. The Government submit that the applicant's allegations are unfounded.

287. The Commission recalls in the first place that it has found there to be insufficient evidence of Abdulvahap Timurtaş having been subjected to ill-treatment in custody (para. 251). It further refers to its considerations above in relation to Article 2 and to the reasoning adopted by the Commission and the Court in the case of Kurt as regards Article 3 (op. cit., judgment paras. 116-117, Comm. Report, paras. 194-197).

288. Considering that there is nothing in the present application which should lead to a different approach from the one adopted in the Kurt case, the Commission will examine the present complaints from the standpoint of Article 5 of the Convention.

3. As regards Article 5 of the Convention

289. Article 5 of the Convention, insofar as relevant, 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."

290. The applicant contends that the unacknowledged detention of his son amounted to an arbitrary deprivation of liberty contrary to Article 5 para. 1. He submits that there is no evidence that his son was informed of the reasons for his arrest as required by Article 5 para. 2 and that in violation of para. 3 his son was never brought before a judicial officer. Since it is futile to challenge the lawfulness of, and to claim compensation for, detention which is denied there is also a breach of Article 5 paras. 4 and 5 of the Convention.

291. In their observations on the admissibility of the application the Government denied that any restriction of liberty had been imposed on the applicant's son. While maintaining the validity of their derogation under Article 5, they submitted that there was no basis on which it could come into play since the applicant's allegations were factually and jurisprudentially unfounded.

292. The Commission considers that the disappearance of the applicant's son raises fundamental and grave issues under Article 5 of the Convention, which guarantees liberty and security of person. In its judgment in the Kurt case, the Court held that Article 5 guarantees

"... a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. The requirements of Article 5 paras. 3 and 4 with their emphasis on promptitude and judicial control assume particular importance in this context. Prompt judicial intervention may lead to the detection and prevention of life-threatening measures or serious ill-treatment which violate the fundamental guarantees contained in Articles 2 and 3 of the Convention." (op. cit., para. 123)

293. The Court went on to emphasise that

"the unacknowledged detention of an individual is a complete negation of these guarantees and a most grave violation of Article 5. Having assumed control over that individual it is incumbent on the authorities to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since." (op. cit., para. 124)

294. The Commission recalls its finding above (para. 249) that on 14 August 1993 the applicant's son was apprehended near the village of Yeniköy by gendarmes attached to the Silopi district gendarmerie headquarters, taken into detention in Silopi and at some stage thereafter transferred to a place of detention in Şkrnak. Abdulvahap Timurtaş's detention was not recorded in any custody register either in Silopi or Şkrnak. As the

Court has held, the failure to record holding data is in itself incompatible with the very purpose of Article 5 of the Convention (Kurt v. Turkey, op. cit., para. 125).

295. However, the fact of Abdulvahap's apprehension was recorded in a post-operation report of 15 August 1993. It appears, therefore, that at some subsequent stage a decision was taken that the apprehension of Abdulvahap Timurtaş and the fate that had befallen him were to be concealed. As a result of that decision, the gendarme officers, including Hüsam Durmuş, to whom the applicant spoke and who replied to queries from public prosecutors at Silopi and Şkrnak, denied that Abdulvahap had ever been apprehended. The existence of the post-operation report did not come to light until a copy of it was handed to the applicant's representatives on 20 November 1996.

296. As to the investigation conducted by the authorities, the Commission considers that this can be regarded as neither prompt nor effective. In this respect it refers to its findings above (para. 263) relating to the delay which occurred before an investigation even got under way, the lack of speed with which it was conducted, the manner of questioning as well as the absence of a number of important investigative measures. If the Silopi public prosecutor had immediately launched a thorough investigation, he might have discovered that the Silopi district gendarmerie had carried out an operation near Yeniköy on 14 August 1993 and the post-operation document might even have been recovered prior to the decision that is was to be suppressed.

297. Instead, at the conclusion of the investigation, such as it was, the authorities advanced as an explanation for Abdulvahap's disappearance the possibility that he was a member of the PKK mountain cadre (para. 114). This was based on Nimet Nas' statement that Abdulvahap had been in charge of the PKK in Syria and on the fact that Abdulvahap's name appeared on the list of wanted persons of the Prevention of Terrorism branch of Şkrnak police headquarters. In the Commission's view, these elements could just as easily have served as an indication of the fact that Abdulvahap was indeed being sought by the security forces but it does not appear that the investigating authorities were willing to consider that option.

298. The Commission finds that the Government have failed to provide a satisfactory explanation for the disappearance of the applicant's son following his apprehension on 14 August 1993. In light of this finding, together with the nature of the investigation into the applicant's allegations, the Commission is of the opinion that the responsibility of the Government is engaged.

299. The Commission concludes that the applicant's son has been arbitrarily deprived of his liberty contrary to Article 5 and in disregard of the guarantees of that provision concerning the legal justification for such deprivation and requisite judicial control. Moreover, inaccurate custody records combined with a defective investigation process enabled the subsequent disappearance of the applicant's son to be effected, disclosing a violation of his right to security of person and raising grave doubts as to the treatment which he received and as to whether he is still alive. Such unaccounted disappearance of

a detained person must be considered as a particularly serious violation of Article 5 of the Convention taken as a whole.

300. The Commission notes that in support of his allegation that there exists a practice of unacknowledged detention and disappearances in South-East Turkey the applicant relies on the same material which was submitted to the Court in the case of Kurt v. Turkey. In that case the Court found that the evidence submitted did not substantiate the applicant's allegations (op. cit., para. 169). The Commission considers that there is nothing in the present application which should lead it to come to a different conclusion and it does, therefore, not find that Article 5 has been violated in this respect.

301. As regards the derogation of 5 May 1992 under Article 15 of the Convention in relation to Article 5, the Commission recalls that the Government has placed no reliance on it in their observations on the merits. While they referred to it in their observations on admissibility, they stated that its application did not come into play since Abdulvahap Timurtaş had never been in detention. The Commission finds that, in the case of unacknowledged detention, a derogation which provides for measures relating to detention pursuant to criminal procedures provided for in law can have no application.

CONCLUSIONS

302. The Commission concludes, unanimously, that there has been a violation of Article 5 of the Convention in respect of the unacknowledged detention and disappearance of Abdulvahap Timurtaş.

303. The Commission concludes, by 28 votes to 2, that it is not necessary to examine separately the complaints made under Article 2 of the Convention in relation to Abdulvahap Timurtaş.

304. The Commission concludes, by 28 votes to 2, that it is not necessary to examine separately the complaints made under Article 3 of the Convention in relation to Abdulvahap Timurtaş.

E. As regards violation alleged by the applicant on his own behalf under Article 3 of the Convention

305. Article 3 of the Convention reads as follows:

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

306. The applicant also complains that the disappearance of his son constitutes inhuman and degrading treatment contrary to Article 3 in respect of himself (see para. 284 above).

307. The Government have not addressed this issue, beyond their denials that State authorities were responsible for the disappearance of the applicant's son.

308. The case-law of the Convention organs establishes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. Further, the Court has held that the suffering occasioned must attain a certain level before treatment can be classified as inhuman. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects (see eg. Eur. Court H.R., Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

309. The Commission recalls that the applicant has been living in the uncertainty as to what has happened to his son since he was informed that Abdulvahap had been apprehended, i.e. for more than five years. The fact that in 1991 one of his other sons, Tevfik, died whilst in detention, regardless of the cause of death, would only have served to enhance the applicant's anxiety. His attempts to find out where his son was being detained were met by blank denials on the part of the security forces, some of whom, like Hüsam Durmuş, deliberately concealed the truth. The Commission considers that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time has caused him severe mental distress and anguish. It has found above that the responsibility of the Government is engaged as regards the disappearance and their failure to account satisfactorily for what has happened to him. The Commission finds as a result that the applicant has been subjected to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

CONCLUSION

310. The Commission concludes, by 29 votes to 1, that there has been a violation of Article 3 of the Convention in respect of the applicant.

F. As regards Article 13 of the Convention

311. Article 13 of the Convention provides:

"Everyone whose rights and freedoms as set forth in this 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."

312. The applicant submits that he was denied access to an effective domestic remedy. In this respect he argues in the first place that there was a conspiracy to conceal the fact of his son's detention from him. Further, the gendarmes who took a statement from Sadkk Erdoğan did not record what he told them and frightened him to such an extent that he subsequently changed his story before a public prosecutor. Moreover, the investigation carried out by the public prosecutors was superficial and incapable of uncovering the truth. Finally, the applicant contends that there is a practice of ineffective remedies, in aggravated violation of Article 13.

313. The Government deny that the applicant's son was detained and, in their submissions on the admissibility of the application, argued that the applicant had failed to make use of available domestic remedies.

314. The Commission recalls that Article 13 of the Convention requires the provision of a domestic remedy allowing the "competent national authority" both to deal with the substance of the relevant Convention complaint and to grant appropriate relief. In the Kurt v. Turkey judgment, the Court held that where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the requirements of Article 13 are broader than a Contracting State's obligation under Article 5 to conduct an effective investigation into the disappearance of that person who has been shown to be under the authorities' control and for whose welfare they are accordingly responsible (op. cit., para. 140).

315. The Commission is of the opinion that the applicant had arguable grounds for claiming that his son was being held in detention. In this respect it notes that he went to the authorities with specific information concerning the time and place of his son's apprehension, and, at a later stage, also provided names of people who had told him that they had seen Abdulvahap in detention. The applicant was thus entitled, in addition to the payment of compensation where appropriate, to a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access to the investigatory procedure (Kurt v. Turkey, loc. cit.).

316. The Commission recalls its findings in the present case relating to the dilatory, perfunctory and superficial nature of the investigation (para. 264). It has previously held that allegations of disappearances require prompt and thorough investigation (Çakkck v. Turkey, op. cit., para. 284). The Commission is not persuaded that the applicant's concerns received sufficiently serious attention by the authorities.

317. There is no evidence before the Commission to indicate that, in the absence of an effective investigation of the circumstances of the case by the public prosecution authorities, any other remedy would have offered the applicant a possibility of obtaining redress for a disappearance resulting from an unacknowledged detention.

318. Accordingly, the Commission finds that the applicant did not have an effective remedy available to him in respect of his complaints about the disappearance of his son.

319. Referring to its reasoning under Article 5 the Commission would not find that there has been a separate breach of Article 13 in respect of the applicant's allegations of a practice of ineffective remedies.

CONCLUSION

320. The Commission concludes, by 29 votes to 1, that there has been a violation of Article 13 of the Convention in respect of the applicant's complaints that his son had disappeared in circumstances engaging the responsibility of the authorities.

G. As regards Article 14 in conjunction with Articles 2, 3 and 5 of the Convention

321. Article 14 of the Convention reads as follows:

"The enjoyment of the rights and freedoms set forth in this 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."

322. The applicant contends that the violations alleged - unlawful, life-threatening unacknowledged detention, disappearance and the lack of investigation - occur overwhelmingly against citizens of Kurdish origin and disclose a breach of Article 14 of the Convention. He relies on the same material as submitted to the Court in the case of Kurt v. Turkey (op. cit.).

323. In their observations on the admissibility of the application the Government stressed that the Turkish Constitution guaranteed the enjoyment of rights to everyone within its jurisdiction regardless of considerations of, inter alia, ethnic origin, race or religion. In any event, the applicant had not been subjected to any treatment contrary to Article 14 which could be attributed to the Government.

324. The Commission has examined the applicant's allegations in the light of the evidence submitted to it, but considers that this does not substantiate the applicant's claim that his son was the deliberate target of a forced disappearance on account of his ethnic origin.

CONCLUSION

325. The Commission concludes, by 29 votes to 1, that there has been no violation of Article 14 in conjunction with Articles 2, 3 and 5 of the Convention.

H. As regards Article 18 of the Convention

326. Article 18 of the Convention provides as follows:

"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."

327. The applicant, arguing that Article 18 imposes a requirement of good faith on Contracting States, submits that the conspiracy to conceal from him the unlawful detention of his son discloses a lack of respect for the principle of good faith by those

acting in the name of the State. Such conduct, moreover, constitutes an abnegation of effective accountability, the rule of law and democratic values.

328. The Government, in their observations on the admissibility of the application, maintained that even in the difficult conditions of the struggle against terrorism the security forces in those areas subject to the state of emergency carried out all their operations in accordance with the law.

329. The Commission considers that it has already examined the merits of the applicant's allegations made under this provision in the context of Article 3 of the Convention. Since Article 3 does not provide for any restrictions there can be no application of Article 18 in relation to Article 3.

CONCLUSION

330. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention.

I. As regards Article 25 of the Convention

331. Article 25 para. 1 of the Convention provides:

"1. The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

332. The applicant also complains that the conduct of the Silopi and Şkrnak gendarmes, as exemplified by Hüsam Durmuş, was calculated to frustrate the effective operation of the right of individual petition. Moreover, there was also an interference with this right as a result of Hüsam Durmuş, a witness for the Government, having lied on oath to the Commission's Delegates.

333. The Commission does not find it established that the conduct of the gendarmes concerned, however reprehensible, as such hindered the applicant in the exercise of his right of individual petition.

CONCLUSION

334. The Commission concludes, unanimously that Turkey has not failed to comply with its obligations under Article 25 para. 1 of the Convention.

J. Recapitulation

335. The Commission concludes, unanimously, that there has been a violation of Article 5 of the Convention in respect of the unacknowledged detention and disappearance of Abdulvahap Timurtaş (para. 302 above).

336. The Commission concludes, by 28 votes to 2, that it is not necessary to examine separately the complaints made under Article 2 of the Convention in relation to Abdulvahap Timurtaş (para. 303 above).

337. The Commission concludes, by 28 votes to 2, that it is not necessary to examine separately the complaints made under Article 3 of the Convention in relation to Abdulvahap Timurtaş (para. 304 above).

338. The Commission concludes, by 29 votes to 1, that there has been a violation of Article 3 of the Convention in respect of the applicant (para. 310 above).

339. The Commission concludes, by 29 votes to 1, that there has been a violation of Article 13 of the Convention in respect of the applicant's complaints that his son had disappeared in circumstances engaging the responsibility of the authorities (para. 320 above).

340. The Commission concludes, by 29 votes to 1, that there has been no violation of Article 14 in conjunction with Articles 2, 3 and 5 of the Convention (para. 325 above).

341. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention (para. 330 above).

342. The Commission concludes, unanimously, that Turkey has not failed to comply with its obligations under Article 25 of the Convention (para. 337 above).

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

PARTLY DISSENTING OPINION OF MR S. TRECHSEL

I have voted against the wording of the Commission's conclusions in paras. 303 and 304. In the present case the Commission has undertaken an investigation in order to find out whether the respondent Government could be held responsible for the death and/or any treatment contrary to Article 3 of the Convention inflicted upon the applicant's son. The result of the investigation was that no such responsibility was established. In such a situation it does not seem fair to me to let the original complaint open by using the formula that "no separate issue arises". At any rate, if there had been a violation of Articles 2, 3 and 5, the former would have had priority as they are the more fundamental guarantees.

In my view, in the present case the Commission ought to have concluded that there was no violation of Articles 2 and 3.

Appendix B

Timurtaş v Turkey: Judgment of the European Court of Human Rights

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF TİMURTAŞ v. TURKEY

(Application no. 23531/94)

JUDGMENT

STRASBOURG

13 June 2000

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of TİMURTAŞ 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 J. CASADEVALL,
Mr B. ZUPANČIČ,
Mr R. MARUSTE, *judges*,
Mr F. GÖLCÜKLÜ, *ad hoc judge*,
and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 23 November 1999 and on 23 May 2000,
Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (23531/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Mehmet Timurtaş, on 9 February 1994. The applicant is represented by Ms Françoise Hampson, a barrister and university lecturer in the United Kingdom. The Government of Turkey are represented by their Co-Agent, Mr Şükrü Alpaslan.
The Commission's request referred to former Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 3, 5, 13, 14 and 18 of the Convention and under former Article 25 of the Convention.
2. On 31 March 1999 the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the First Section.
3. The Chamber constituted within the Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court) and Mrs E. Palm, President of the Section (Rules 12 and 26 § 1 (a)). The other members

designated by the latter to complete the Chamber were Mr J. Casadevall, Mr L. Ferrari Bravo, Mr B. Zupančič, Mrs W. Thomassen and Mr R. Maruste.

4. Subsequently Mr Türmen withdrew from sitting in the Chamber (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).

5. On 6 July 1999 the Chamber decided to hold a hearing.

6. In accordance with Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the applicant's and Government's memorials on 12 July and 1 July 1999 respectively.

7. On 10 June 1999 the President of the Chamber granted leave to the Center for Justice and International Law (CEJIL), a non-governmental human rights organisation in the Americas, to submit written comments relating to the jurisprudence of the Inter-American Court of Human Rights on the issue of forced disappearances (Article 36 § 2 of the Convention and Rule 61 § 3). These comments were received on 9 July 1999.

8. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 23 November 1999.

There appeared before the Court:

(a) *for the Government*

Mr Ş. ALPASLAN, *Agent*,
Ms M. GÜLŞEN,
Mr N. GÜNGÖR,
Mr F. POLAT, *Advisers*;

(b) *for the applicant*

Ms F. HAMPSON, *Counsel*.

The Court heard addresses by Ms Hampson and Mr Alpaslan.

AS TO THE FACTS

THE CIRCUMSTANCES OF THE CASE

A. THE APPLICANT

9. The applicant, Mr Mehmet Timurtaş, is a Turkish citizen who was born in 1928 and is at present living in Istanbul. At the time of the events giving rise to his application to the Commission he was living in Cizre in south-east Turkey. His application to the Commission was brought on his own behalf and on behalf of his son, Abdulvahap Timurtaş, who, he alleges, has disappeared in circumstances engaging the responsibility of the respondent State.

B. THE FACTS

10. The facts surrounding the disappearance of the applicant's son are disputed.
11. The facts as presented by the applicant are set out in paragraphs 15 to 21 below. In his memorial to the Court, the applicant relied on the facts as established by the Commission in its report (former Article 31) adopted on 29 October 1998 and his previous submissions to the Commission.
12. The facts as presented by the Government are set out in paragraph 22 below.
13. A description of the material submitted to the Commission will be found in paragraphs 23 to 29 below. A description of the proceedings before the domestic authorities regarding the disappearance of the applicant's son as established by the Commission is set out in paragraphs 30 to 38 below.
14. The Commission, in order to establish the facts in the light of the dispute over the circumstances surrounding the alleged disappearance of the applicant's son, conducted its own investigation pursuant to former Article 28 § 1 (a) of the Convention. To this end, the Commission examined a series of documents submitted by both the applicant and the Government in support of their respective assertions and appointed three delegates to take the evidence of witnesses at a hearing conducted in Ankara on 21 and 23 November 1996. The Commission's evaluation of the evidence and its findings are summarised in paragraphs 39 to 47 below.

1. Facts as presented by the applicant

15. On 14 August 1993 the applicant received a telephone call from someone who did not identify himself. The caller said that the applicant's son Abdulvahap had been apprehended that day near the village of Yeniköy,

in Silopi district, Şırnak province, by soldiers attached to Silopi central gendarmerie headquarters. Abdulvahap had been apprehended together with a friend, who was said to be Syrian, as well as with the *muhtar* and the latter's son in front of all the villagers. The *muhtar* was released soon afterwards. The applicant later heard that Abdulvahap and his friend had been taken round a number of villages to see if the villagers recognised them. Moreover, within a week of Abdulvahap being apprehended, the *muhtars* from the surrounding villages were called to Silopi gendarmerie headquarters to see if they recognised the two men.

16. The applicant was worried about Abdulvahap because another son, Tevfik, had died in custody in Şırnak in 1991. The applicant made various attempts to obtain news of Abdulvahap's fate. He submitted petitions to the Silopi prosecutor's office which initially were not registered. At the Silopi gendarmerie headquarters he was told that his son was not detained. When he took a photograph of Abdulvahap to the gendarmerie headquarters, the commander, Hüsam Durmuş, said that he did not recognise Abdulvahap and he advised the applicant to look for his son in the mountains, thereby suggesting that Abdulvahap had joined the PKK.

17. The applicant also telephoned a relative, Bahattin Aktuğ, who was the mayor of Güçlükonak district. Aktuğ subsequently informed the applicant that he had spoken to Sadık Erdoğan and Nimet Nas, two 'confessors'[1] from his village who were at that time being detained in Şırnak. They had told Aktuğ that Abdulvahap was being detained in Şırnak, that they were doing what they could to look after him and that Abdulvahap was refusing to make a statement.

18. After about forty-five days the applicant went to Güçlükonak to see Bahattin Aktuğ. Whilst there, he also met with Erdoğan and Nas who had been given twenty days' leave from Şırnak. They told the applicant that when they had left Şırnak, Abdulvahap had been alive. Erdoğan and Nas also told the applicant that they had been with Abdulvahap for quite some time and that they had also seen the Syrian friend who had been apprehended at the same time as Abdulvahap.

19. Whilst the applicant was in Güçlükonak, Bahattin Aktuğ spoke to a gendarmerie captain there who telephoned Şırnak for information but was told that Aktuğ should stop asking questions about Abdulvahap. The same message was given when a major whom Aktuğ knew in İğdır telephoned Şırnak.

20. The applicant again went to the Silopi prosecutor's office and named Erdoğan and Nas as his witnesses. At that point, his statement was taken. The applicant also went repeatedly to Şırnak to make enquiries about his son.

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1. Persons who co-operate with the authorities after confessing to having been involved with the PKK.

21. In the spring of 1995 the applicant saw Erdoğan again. Erdoğan told him that he had gone to court where he had said that he had seen Abdulvahap in Şırnak. Upon this his interrogator had got very angry and Erdoğan had become scared. For that reason, on the second occasion that he was asked about Abdulvahap, he said that he had seen a man who looked similar but that the did not know whether it had been Abdulvahap.

2. Facts as presented by the Government

22. The Government state that by the applicant's own admission, his son Abdulvahap had left the family home in Cizre two years previously and the applicant had not heard from his son since that time. In the course of the preliminary investigation carried out by public prosecutors at Silopi and Şırnak statements had been taken from persons named as witnesses by the applicant. None of these statements corroborated the applicant's allegations that Abdulvahap Timurtaş had been apprehended by security forces on 14 August 1993 and that he had been held in detention over any subsequent period of time.

C. MATERIALS SUBMITTED BY THE APPLICANT AND THE GOVERNMENT TO THE COMMISSION IN SUPPORT OF THEIR RESPECTIVE ASSERTIONS

23. In the proceedings before the Commission, the applicant and the Government submitted statements by the applicant, which he had made to the Human Rights Association in Diyarbakır and to the public prosecutor at Silopi. According to this last statement, of 21 October 1993, the applicant told the public prosecutor that his son Abdulvahap had left his house two years previously and that he had learnt from other people that his son had gone to Syria. However, the applicant had received information to the effect that his son had been apprehended by security forces in Yeniköy and this might have been witnessed by the *muhtars* of Yeniköy and Esenli. The applicant had also heard that his son had been seen in Şırnak by the detainees Nimet Nas and Sadık Erdoğan.

24. The Government also provided statements taken by a public prosecutor on 26 January 1994 from the *muhtars* of the villages of Yeniköy and Esenli. Both stated that they did not know and had never seen either the applicant or the applicant's son, but whereas the *muhtar* of Yeniköy professed to have no knowledge of two individuals having been apprehended near his village, the *muhtar* of Esenli had heard that someone had been arrested near Yeniköy approximately four to five months previously. In a further statement of 22 January 1997 this *muhtar* also said that during his term of office two or three persons had gone missing.

25. In two statements, dated 5 May and 28 December 1995 respectively, taken by a public prosecutor whilst Nimet Nas was serving a prison sentence in Diyarbakır, the latter said that he knew Abdulvahap Timurtaş and that Abdulvahap was a PKK militant who had been responsible for contacts with Syria but that he had not seen Abdulvahap in detention.

Sadık Erdoğan also made two statements to the authorities. In the first, taken by gendarmes on 15 August 1995, he said that he did not know Abdulvahap Timurtaş and that he had never even heard of that name. In the second statement, made before a public prosecutor on 2 April 1996, Erdoğan said that although he had never met Abdulvahap Timurtaş, he knew Abdulvahap's mother who had mentioned her son's name. In this statement Erdoğan also said that he did not know whether Abdulvahap had been detained.

26. On 13 August 1995 Bahattin Aktuğ was interviewed by gendarmes on the subject of "investigating Abdulvahap Timurtaş and informing his father Mehmet Timurtaş on the detention of his son". Aktuğ stated that he did not know these individuals and that he had never met them. In a subsequent statement made before a public prosecutor on 22 April 1996 Aktuğ repeated that he did not know Abdulvahap Timurtaş.

27. On 7 and 8 March 1996 nine residents of Yeniköy and hamlets belonging to Yeniköy were asked by gendarmes whether they knew a person by the name of Abdulvahap Timurtaş, if they knew where he was and whether he had been taken into custody. All the witnesses stated that they did not know Abdulvahap, that they had never heard his name and that, therefore, they did not know whether Abdulvahap had been detained.

The son of the *muhtar* of Yeniköy made a statement on 11 March 1996 before a public prosecutor in which he said that he was not acquainted with either the applicant or the applicant's sons Mehmet and Abdullah (*sic*).

28. At the hearing before the Commission's delegates, the applicant's representatives produced a document said to be a photocopy of a post-operation report drawn up and signed by Hüsam Durmuş, commander of Silopi district gendarmerie headquarters. The report, dated 14 August 1993 and bearing a reference number, describes how on that date Abdulvahap Timurtaş and a man with Syrian nationality had been apprehended near the village of Yeniköy. The initial interrogation of the apprehended persons had established that they were the leaders of the PKK's Silopi lowlands section. According to the applicant's representatives, this document had been copied in 1993 from an original report at the public prosecutor's office in Cizre but that original had subsequently been removed from the files.

At the request of the Commission's delegates a search was carried out by the Government for the original of the report but this proved without success which, according to the Government, cast doubt on the authenticity of the report. In addition, the original document which bore the reference

number that appeared on the photocopied document was classified as secret and could therefore not be provided to the Commission.

29. Apart from the above material, the Commission also had regard to copies of custody records with which it had been provided. These concerned the Silopi district gendarmerie headquarters (entries for the period 10 March 1993 - 19 December 1993), the Silopi police headquarters (31 July 1993 - 2 December 1993), the Şırnak provincial centre gendarmerie headquarters (23 September 1993 - 30 December 1993) and the interrogation unit at the Şırnak provincial gendarmerie headquarters (31 July 1993 - 13 January 1994). The name of Abdulvahap Timurtaş is not included in any of these records.

The Government provided copies of entries in the custody ledger of the above-mentioned interrogation unit which showed that Sadık Erdoğan had been detained there from 3 April 1993 to 1 May 1993 and Nimet Nas from 16 June 1992 to 16 July 1992. Both men were said by the Government to have subsequently been transferred to the Diyarbakır E-type prison. The Commission requested the Government to submit copies of the relevant entries in the records of that prison but these were not produced.

D. PROCEEDINGS BEFORE THE DOMESTIC AUTHORITIES

30. On 15 October 1993 the applicant submitted a petition to a Silopi public prosecutor requesting information as to the fate of his son Abdulvahap Timurtaş whom he had heard had been apprehended on 14 August 1993. On the same date the prosecutor sent the petition to both the Silopi district gendarmerie headquarters and the police headquarters with a cover letter requesting examination of the matter. By letter dated 20 October 1993, Hüsam Durmuş, commander of Silopi district gendarmerie headquarters, informed the Silopi public prosecutor that Abdulvahap Timurtaş had not been detained by his headquarters and that Abdulvahap's name did not appear in their records.

31. On 21 October 1993 a Silopi prosecutor took a statement from the applicant in which the latter described how his son Abdulvahap had left the family home two years previously and that he had learnt from other people that Abdulvahap had gone to Syria. According to the latest information obtained by the applicant, however, Abdulvahap had been detained by security forces in Yeniköy and had been seen in detention in Şırnak by Sadık Erdoğan and Nimet Nas. Also on 21 October 1993 letters were sent by the public prosecutor's office to the Silopi district gendarmerie headquarters with a request to secure the presence at the prosecutor's office of the *muhtars* of Yeniköy and Esenli in order for their statement to be taken, and to the office of the public prosecutor in Şırnak for a statement to be taken from Sadık Erdoğan and Nimet Nas. The prosecutor's office at Şırnak was informed by the Şırnak provincial gendarmerie headquarters on

29 December 1993 that they had been unable to comply with the request to summon Sadık Erdoğan and Nimet Nas since the former was being detained at Diyarbakır E-type prison and the latter was participating in operations in Güçlükonak. On 26 January 1994 the *muhtars* of Esenli and Yeniköy made a statement before Silopi prosecutor Ahmet Yavuz (see paragraph 24 above).

32. On 10 March 1994 Silopi prosecutor Yavuz wrote to the prosecutor's office in Cizre requesting them to ensure that the applicant would go to the prosecutor's office in Silopi. This request was passed on to the Cizre police headquarters, which replied on 28 March 1994 that the applicant and his family had left Cizre and that their present whereabouts were unknown. On 10 August 1994 the Silopi prosecutor Sedat Erbaş again requested the public prosecutor at Cizre to ensure the applicant's appearance at his office in Silopi. On the same date Erbaş also requested the public prosecutor at Güçlükonak to ask Bahattin Aktuğ whether the latter personally knew Abdulvahap Timurtaş and whether he had been approached by the applicant and had discussed the fate of the applicant's son. Erbaş further wrote to the prosecutors of Diyarbakır and Güçlükonak concerning Erdoğan and Nas respectively, who were to be asked whether they had been kept in custody along with Abdulvahap Timurtaş.

33. On 23 August 1994 Silopi prosecutor Erbaş informed his counterpart in Şırnak of the state of the investigation, saying that it had appeared from his examinations that Abdulvahap Timurtaş had neither been detained by the gendarmerie headquarters nor by the police headquarters in the district. In view of the facts that the applicant had moved from Cizre to an unknown destination and that he had not applied to the Silopi prosecutor's office since 21 October 1993 the impression had been created that Abdulvahap Timurtaş had been found. For that reason, the applicant had been summoned on 10 August 1994 to the Silopi prosecutor's office in order to close the file.

34. The case-file then contains a series of letters written mainly by public prosecutors at Silopi and Eruh aimed at securing the presence of Bahattin Aktuğ, Sadık Erdoğan and Nimet Nas in order for their statements to be taken.

35. On 5 May 1995 Nimet Nas made a statement to a Diyarbakır public prosecutor (see paragraph 25 above).

36. By decision of 13 July 1995 Silopi prosecutor Yavuz issued a decision of lack of jurisdiction and referred the case to the prosecutor's office at Şırnak since the applicant's son was alleged to have been detained at Şırnak.

37. Özden Kardeş, public prosecutor at Şırnak, commenced his investigation by requesting the Şırnak police headquarters and the provincial centre gendarmerie headquarters on 24 July 1995 to examine their records for August 1993 to see if Abdulvahap Timurtaş had been detained by them. By letter of 9 August 1995 the commander of the Şırnak

provincial centre gendarmerie headquarters replied that the name Abdulvahap Timurtaş did not appear in their records.
On 13 and 15 August 1995 statements were taken from Bahattin Aktuğ and Sadık Erdoğan respectively by a gendarmerie officer (see paragraphs 25 and 26 above). On 28 December 1995 Nimet Nas made a statement to a Diyarbakır public prosecutor (see paragraph 25 above).
On 26 February 1996 a different prosecutor at Şırnak asked the prosecutor's office at Silopi to question the residents of the villages of Yeniköy, Germik, Kartık and Kutnıs about their knowledge of Abdulvahap Timurtaş and a detention undergone by the latter. Statements were taken from nine villagers on 7 and 8 March 1996 (see paragraph 27 above).
Sadık Erdoğan made a statement to Şırnak prosecutor Kardeş on 2 April 1996 (see paragraph 25 above). A public prosecutor at Siirt took a statement from Bahattin Aktuğ on 22 April 1996 (see paragraph 26 above).
38. On 3 June 1996 the Şırnak prosecutor Özden Kardeş issued a decision not to prosecute. The decision lists the various inquiries that had been made in the course of the investigation and gives a summary of the statements that had been obtained. The conclusion not to continue was reached "in view of the abstract nature of the applicant's complaint". Account was also taken of the fact that the applicant had left for an unknown destination following the lodging of his complaint. In addition, the likelihood that Abdulvahap Timurtaş was a member of the PKK terrorist organisation was found to be strengthened by the facts that he was alleged to have been in charge of the PKK in Syria and that he was wanted by the Prevention of Terrorism branch of Şırnak police headquarters.

E. THE COMMISSION'S EVALUATION OF THE EVIDENCE AND ITS FINDINGS OF FACT

39. Since the facts of the case were disputed, the Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence, including written statements and oral evidence taken from six witnesses: the applicant; Bahattin Aktuğ; Azmi Gündoğan, commander of the Silopi district gendarmerie headquarters until 4 August 1993; Hüsam Durmuş, commander of Silopi district gendarmerie headquarters between 17 July 1993 and 1995; Erol Tuna, commander of Şırnak provincial centre gendarmerie headquarters at the relevant time; and Sedat Erbaş, public prosecutor at Silopi between 4 July 1994 and October 1996.
A further five witnesses had been summoned but did not appear: the *muhtars* of Yeniköy and Esenli; Özden Kardeş, public prosecutor at Şırnak; Sadık Erdoğan; and Nimet Nas. The Government stated that the *muhtar* of Yeniköy had not been seen for a year and that he had allegedly been kidnapped by the PKK. Following the hearing the Government submitted a statement taken from the *muhtar* of Esenli who explained that he had not

been able to attend the hearing due to his old age and insufficient financial resources. Özden Kardeş had informed the Commission by letter that he had nothing to add to the information contained in the file and that for this reason he did not consider himself obliged to attend. During the hearing in Ankara the Commission's delegates were informed that both Sadık Erdoğan and Nimet Nas were in prison in Diyarbakır.

The Commission made a finding in its report (at paragraph 267) that the Government had fallen short of their 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. It referred to

(i) the Government's failure to produce copies of the entries in the records of the Diyarbakır E-type prison concerning the detention there of Sadık Erdoğan and Nimet Nas (see paragraph 29) above;

(ii) the Government's failure to secure the attendance of the witness Özden Kardeş.

40. In relation to the oral evidence, the Commission was aware of the difficulties attached to assessing evidence obtained orally through interpreters. It therefore paid careful attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its delegates.

In a case where there were contradictory and conflicting factual accounts of events, the Commission particularly regretted the absence of a thorough domestic judicial examination. It was aware of its own limitations as a first-instance tribunal of fact. In addition to the problem of language adverted to above, there was also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. Moreover, the Commission had no power to compel witnesses to appear and testify. In the present case, while eleven witnesses had been summoned to appear, only six, including the applicant, gave evidence. The Commission was therefore faced with the difficult task of determining events in the absence of potentially significant evidence.

The Commission's findings may be summarised as follows.

1. The alleged apprehension and detention of Abdulvahap Timurtaş

41. In its analysis of the photocopied post-operation report submitted by the applicant's representatives (see paragraph 28 above) the Commission observed in the first place that the alleged author of the report, Hüsam Durmuş, had stated before the delegates that the signature on the photocopy looked like his. Furthermore, the style and format of the report corresponded to that of a blank post-operation report produced by the Government. Since it followed from the system of reference numbers used by the gendarmerie that, if the submitted photocopy was a forgery, there

should be another document bearing the same reference number as featured on the photocopy, it had been incumbent on the Government pursuant to former Article 28 § 1 (a) to produce that document. The Commission did not accept that it had been denied access to that document for the reason that it was said to have been classified as secret. Finally, the Commission was not convinced by the Government's argument that a report relating to an operation carried out in Silopi would not have been sent to the public prosecutor's office in Cizre (where, according to the applicant's representatives, the original was found from which the photocopy had been taken, see paragraph 28). In this respect the Commission had regard to the oral evidence of Hüsam Durmuş to the effect that he had told the applicant to report his son's disappearance to the authorities in Cizre as that was where Abdulvahap was from and the procedures could be followed there. In addition, the applicant stated that he had filed a petition with the public prosecutor's office in Cizre and that he had been informed by the Şırnak brigade that the reply to his enquiries would be sent to Cizre.

The Commission concluded that the document submitted was a photocopy of an authentic post-operation report from which it appeared that Abdulvahap Timurtaş had been apprehended on 14 August 1993.

42. Evaluating the other material before it, the Commission observed that certain aspects of the applicant's account were corroborated by witnesses. Thus, Hüsam Durmuş had acknowledged before the delegates that the applicant had brought him a photograph of his son and he had also confirmed that detainees of PKK-related offences could be shown around villages or be presented to *muhtars* for identification purposes. The Commission considered, moreover, Abdulvahap Timurtaş' alleged involvement with the PKK, as referred to by Nimet Nas as well as by Şırnak public prosecutor Kardeş (see paragraphs 25 and 38 above), might have constituted the reason for his apprehension.

The Commission found that the available evidence did not allow for the conclusion to be drawn that Sadık Erdoğan and Nimet Nas had indeed, as submitted by the Government, been detained at the Diyarbakır E-type prison at the time when they, according to the applicant, had seen Abdulvahap in detention in Şırnak. It noted in this respect that the Government had failed to provide copies from the relevant custody ledgers (see paragraph 29 above).

The Commission further found that it was unsafe to rely on the statements made by Erdoğan and Nas to the domestic authorities in which they had denied having seen the applicant's son in detention. Before the delegates, the applicant had given an account of a conversation he had had with Erdoğan during which the latter had informed the applicant that in his first interview with gendarmes he had confirmed having seen Abdulvahap but that this statement had been met with incredulity and anger. Erdoğan had told the applicant that for that reason he had stated in his second interview

that he had not seen Abdulvahap. The Commission considered it significant that the applicant had related this conversation in his oral testimony prior to the records of Erdoğan's statements having been put before the applicant by the delegates. Whereas in the first statement Erdoğan was reported as having said that he had never heard of the name of Abdulvahap Timurtaş, according to the second statement he was familiar with that name. These statements thus contained a startling contradiction which, in the opinion of the Commission, would not appear in two truthful statements.

The Commission also preferred the evidence of the applicant, whose oral testimony was largely consistent with his various other statements and who was found to be credible and convincing by the delegates, to that of Bahattin Aktuğ. According to the record of Aktuğ's statement of 13 August 1995, he had denied all knowledge of the applicant and the applicant's son although it was clear that he knew at least the applicant quite well. In addition, before the delegates Aktuğ had been unable to provide a convincing explanation of why the applicant would have wished to affect him adversely, as he had told the gendarmes in his statement.

43. The statements taken from the nine villagers and the son of the *muhtar* of Yeniköy could not serve to establish that Abdulvahap Timurtaş had not been apprehended as alleged, since these persons had only been asked if they knew Abdulvahap Timurtaş. The statements of the *muhtars* of Yeniköy and Esenli were contradictory.

44. Finally, the Commission examined the copied custody ledgers with which it had been provided. It was disturbed by the number of anomalies these were found to contain, and it noted that it had previously had occasion to doubt the accuracy of custody registers submitted in other cases involving events in south-east Turkey. In the light of the anomalies found in the registers in the present case, the Commission concluded that these ledgers could not be relied upon to prove that Abdulvahap Timurtaş had not been taken into detention.

45. Given that it had not been presented with evidence to disprove the applicant's allegations but that some of the evidence corroborated his claims, and having accepted that the post-operation report was authentic, the Commission reached the finding that on 14 August 1993 Abdulvahap Timurtaş had been apprehended near the village of Yeniköy by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi. At some stage thereafter he had been transferred to a place of detention at Şırnak which was probably the interrogation unit at the provincial centre gendarmerie headquarters.

2. The alleged ill-treatment of Abdulvahap Timurtaş in detention

46. The Commission considered that there was an insufficient evidentiary basis to reach a conclusion that Abdulvahap Timurtaş had been subjected to torture or ill-treatment whilst in detention.

3. The investigation into the alleged disappearance of Abdulvahap Timurtaş

47. The Commission accepted that the applicant had started to contact various authorities in order to obtain news of his son within a week of having been informed about Abdulvahap's apprehension on 14 August 1993; yet the first documented action on the part of the authorities dated only from 15 October 1993. It then took a long time before statements were obtained from the witnesses named by the applicant. A considerable number of these statements were of limited value in that the witnesses had merely been asked whether they knew the applicant or his son, rather than if they were aware of two persons, whose names they might not know, having been apprehended. Where a witness (the *muhtar* of Esenli) did hint to such an incident having occurred, this was not followed up and even denied - in the decision not to prosecute, Özden Kardeş wrote that the *muhtar* of Esenli was not aware of an incident involving detention. Moreover, official enquiries into whether or not Abdulvahap might have been detained at detention facilities in Şırnak were not made until nearly two years after his alleged apprehension. The public prosecutors involved in the investigation failed to inspect personally either the detention areas in the various gendarmerie and police headquarters or the pertaining custody ledgers. The Silopi district gendarmerie, allegedly responsible for the apprehension of the applicant's son, were not asked whether they had carried out any operations at the relevant time and place.

II. RELEVANT DOMESTIC LAW AND PRACTICE

48. The Government have not submitted in their memorial any details on domestic legal provisions which have a bearing on the circumstances of this case. The Court refers to the overview of domestic law derived from previous submissions in other cases, in particular the Kurt v. Turkey judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998-III, pp. 1169-70, §§ 56-62, and the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1512-13, §§ 25-29.

A. STATE OF EMERGENCY

49. Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

50. Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law no. 2935, 25 October 1983). The first, Decree no. 285 (10 July 1987), established a regional governorship of the state of emergency in ten of the eleven provinces of south-eastern Turkey. Under Article 4 (b) and (d) of the decree, all private and public security forces and the Gendarmerie Public Peace Command are at the disposal of the regional governor.

51. The second, Decree no. 430 (16 December 1990), reinforced the powers of the regional governor, for example to order transfers out of the region of public officials and employees, including judges and prosecutors, and provided in Article 8:

"No criminal, financial or legal responsibility may be claimed against the state of emergency regional governor or a provincial governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this Decree, and no application shall be made to any judicial authority to this end. This is without prejudice to the rights of individuals to claim indemnity from the State for damage suffered by them without justification."

B. CONSTITUTIONAL PROVISIONS ON ADMINISTRATIVE LIABILITY

52. Article 125 §§ 1 and 7 of the Turkish Constitution provides as follows:

"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."

53. This provision is not subject to any restrictions even in a state of emergency or war. The latter requirement of the provision does not necessarily require proof of the existence of any fault on the part of the administration, whose liability is of an absolute, objective nature, based on the theory of "social risk". Thus, the administration may indemnify people who have suffered damage from acts committed by unknown or terrorist authors when the State may be said to have failed in its duty to maintain public order and safety, or in its duty to safeguard individual life and property.

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

C. CRIMINAL LAW AND PROCEDURE

55. The Turkish Criminal Code makes it a criminal offence:
– to deprive an individual unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants);
– to issue threats (Article 191);
– to subject an individual to torture or ill-treatment (Articles 243 and 245);
– to commit unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).
56. For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. 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 to bring a prosecution (Article 153). Complaints may be made in writing or orally. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings.

D. CIVIL-LAW PROVISIONS

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

E. IMPACT OF DECREE NO. 285

58. 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.
59. The public prosecutor is also deprived of jurisdiction with regard to offences alleged against members of the security forces in the state of emergency region. Decree no. 285, Article 4 § 1, provides that all security forces under the command of the regional governor (see paragraph 50 above) shall be subject, in respect of acts performed in the course of their duties, to the Law of 1914 on the prosecution of civil servants. Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must make a decision of non-jurisdiction and transfer the file to the Administrative Council. These councils are made up of civil servants, chaired by the governor. A decision by the Council not to

prosecute is subject to an automatic appeal to the Supreme Administrative Court. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

FINAL SUBMISSIONS TO THE COURT

60. The applicant requested the Court in his memorial to find that the respondent State was in violation of Articles 2, 5, 13 and 18 of the Convention on account of his son's "disappearance" and that he himself was a victim of a violation of Article 3. He further contended that the respondent State had failed to comply with its obligations under former Articles 25 and 28 § 1 (a). He requested the Court to award him just satisfaction under Article 41.

61. The Government, for their part, argued in their memorial that the applicant's complaints were not substantiated by the evidence. In their opinion, the application had been brought with the aim of discrediting the security forces engaged in combating separatist terrorist violence.

AS TO THE LAW

I. Subject matter of the dispute

62. In his application to the Commission the applicant had, *inter alia*, alleged a violation of Article 3 of the Convention in respect of his son and of Article 14 in conjunction with Articles 2, 3 and 5. The applicant did not pursue those complaints in the proceedings before the Court, which sees no reason to consider them of its own motion (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports* 1998-I, p. 28, § 62). The case before the Court therefore concerns allegations under Articles 2, 3 (in respect of the applicant), 5, 13, 18 and 34 of the Convention.

II. The Court's assessment of the facts

63. 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). 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 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. 1214, § 78).

64. In the present case the Court points out that the Commission reached its findings of fact after a delegation had heard evidence in Ankara (see

paragraphs 14 and 39 above). It notes that the applicant's allegations of the apprehension of his son together with a man of Syrian nationality near the village of Yeniköy on 14 August 1993 find confirmation in the document submitted on his behalf to the Commission's delegates (see paragraph 28 above). Since the Commission was not presented with any eye-witness evidence of this apprehension or of Abdulvahap Timurtaş' alleged subsequent detention, the question whether this document is a photocopy of an authentic post-operation report is of preponderant importance to the establishment of the facts and their assessment.

65. Whereas the Commission concluded that the document was indeed a photocopy of an authentic post-operation report (see paragraph 41 above), the Government disputed this finding. In their memorial they argued that a document of this nature could not have been found at the public prosecutor's office in Cizre where, according to the applicant, the original had been found from which the copy had been taken. In the first place, a post-operation report, being a document drawn up solely for military purposes, would not be sent to a public prosecutor, and secondly, no file concerning the alleged apprehension of Abdulvahap Timurtaş existed at the public prosecutor's office in Cizre. Moreover, any document put in a file by a public prosecutor would not only bear the mention "*dosyasına*" ("to its file"), but also the signature of the public prosecutor - which this document lacked.

Furthermore, the authenticity of a document could not be established from a photocopy. In order for a photocopy to have any legal value in Turkey, it should be certified as a true copy of the original. The document in question bore no such certification. In addition, photocopied documents could be manipulated, either electronically or chemically, without detection. This was illustrated by the representative of the Government who submitted a number of copies of the document during the hearing to which, with the use of a personal computer, a scanner and a photocopier, he had made slight changes - such as moving the hand-written remark "*dosyasına*" from the bottom to the middle of the document, and replacing the name of the apprehended Syrian man by his own.

Finally, the real report bearing the reference number featuring on the submitted photocopy was a different document which could not be produced to the Convention organs as it contained military secrets.

66. The Court considers, as did the Commission, that a photocopied document should be subjected to close scrutiny before it can be accepted as a true copy of an original, the more so as it is undeniably true that modern technological devices can be employed to forge, or to tamper with, documents. Nevertheless, it is also true that the means at the disposal of the former Commission to carry out an examination capable of detecting forgeries, even assuming this to be technically possible, were limited.

More importantly, the Court would emphasise that Convention proceedings do not in all cases lend themselves for rigorous application of the principle of *affirmanti incumbit probatio* (he who alleges something must prove that allegation). The Court has previously held 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) that States should furnish all necessary facilities to make possible a proper and effective examination of applications (see, for example, *Tanrıkulu v. Turkey* [GC], no. 23763/94, § 70, to be published in ECHR 1999). It is inherent in proceedings relating to cases of this nature, where an individual applicant accuses State agents of violating his rights under the Convention, that in certain instances solely the respondent Government have access to information capable of corroborating or refuting these allegations. A failure on a Government's part to submit such information which is in their hands without a satisfactory explanation may not only reflect negatively on the level of compliance by a respondent State with its obligations under Article 38 § 1 (a) of the Convention (former Article 28 § 1 (a)), but may also give rise to the drawing of inferences as to the well-foundedness of the allegations. In this respect the Court reiterates that the conduct of the parties may be taken into account when evidence is being obtained (Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, § 161).

67. It is for the above reasons that the Court is of the opinion that in the particular circumstances of the present case the Government were in a pre-eminent position to assist the Commission within the meaning of former Article 28 § 1 (a) by providing access to the document which they claim is the genuine document bearing the reference number featuring on the photocopy. It is insufficient for the Government to rely on the allegedly secret nature of that document which, in the Court's opinion, would not have precluded it from having been made available to the Commission's delegates, none of whom are Turkish (see paragraph 11 of the Commission's report), so that they could have proceeded to a simple comparison of the two documents without actually taking cognisance of the contents. Consequently, the Court finds it appropriate to draw an inference from the Government's failure to produce the document without a satisfactory explanation.

68. Noting, furthermore, that in its assessment of the photocopy the Commission also had regard to the fact that the alleged author of the document, Hüsam Durmuş, acknowledged that the signature on the document looked like his, that the style and format of the document corresponded to those of a standard post-operation report, and that there were several reasons why this document may have been found in Cizre (see paragraphs 216 and 218 of the Commission's report), the Court agrees with the Commission's finding that this document was indeed a photocopy of an authentic post-operation report.

69. The Court considers that the Commission also approached its task of assessing the other evidence with the requisite caution, giving detailed consideration to the elements which supported the applicant's account and to those which cast doubt on its credibility. It thus considers that it should accept the facts as established by the Commission.

70. In addition to the difficulties inevitably arising from a fact-finding exercise of this nature, the Commission was unable to obtain certain documentary evidence and testimony which it considered essential for discharging its functions. The Commission found that the Government had failed to provide specific detention records relating to Sadık Erdoğan and Nimet Nas and that they had failed to secure the attendance before the delegates of a State official, Mr Özden Kardeş, a public prosecutor (see paragraph 39 above). It considered in this respect that the respondent Government had failed to furnish all necessary facilities to the Commission in its task of establishing the facts of the case within the meaning of former Article 28 § 1 (a) of the Convention.

71. The applicant had invited the Commission to make a similar finding with regard to the fact that Hüsam Durmuş had lied on oath to the delegates when he (Durmuş) stated that the applicant's son had not been apprehended. Although the Commission qualified Hüsam Durmuş' conduct as reprehensible, it found that it did not entail a failure on the part of the Government to comply with their obligations under former Article 28 § 1 (a) (see paragraph 268 of the Commission's report).

72. The Court observes that the Government have not advanced any explanation to account for the omissions relating to documentary evidence and the attendance of a witness. Referring to the importance of a respondent Government's co-operation in Convention proceedings as outlined above (paragraph 66), the Court 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) of the Convention to furnish all necessary facilities to the Commission in its task of establishing the facts.

The Court, like the Commission, cannot find in the circumstances of the present case that the nature of the testimony of Hüsam Durmuş raises an issue under former Article 28 § 1 (a).

III. Alleged violations of Article 2 of the Convention

73. The applicant alleged that his son died whilst in unacknowledged detention and submitted that the respondent Government should be held responsible for failing to protect the right to life of his son in violation of Article 2 of the Convention. This provision provides:

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a

court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;

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

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

A. ARGUMENTS BEFORE THE COURT

1. The applicant

74. Although the applicant acknowledged that the silence surrounding his son's fate following the latter's apprehension did not, in itself, constitute proof beyond reasonable doubt of Abdulvahap's death, he argued that to hold that this absence of information did not establish that Abdulvahap was dead amounted to rewarding the lack of any explanation being forthcoming from the part of the Government. He submitted that account should be taken not only of the specific context in which the disappearance of his son occurred, but also of the broader context of a large number of such disappearances in south-east Turkey in 1993.

75. The applicant further asserted that an analogous application of the Court's reasoning in the cases of Tomasi v. France (judgment of 27 August 1992, Series A no. 241-A) and Ribitsch v. Austria (judgment of 4 December 1995, Series A no. 336) would impose a positive obligation on a respondent State to account for detainees in a place of detention. Where no, or no plausible, explanation was given as to why a detainee could not be produced alive, and a certain amount of time had elapsed, the State concerned should be presumed to have failed in its obligation under Article 2 to protect the right to life of the detainee.

76. Finally, the applicant submitted that the investigation carried out into the disappearance of his son had been so inadequate as to amount to a violation of the procedural obligations of the State to protect the right to life under Article 2.

2. The Government

77. The Government did not specifically address this issue, beyond maintaining that in the investigation at the domestic level all the available evidence had been collected, and this did not corroborate the applicant's allegation that his son had been apprehended.

3. The Commission

78. The majority of the Commission considered that there was indeed a strong probability that Abdulvahap Timurtaş had died whilst in unacknowledged detention. Nevertheless, it held that in the absence of concrete evidence that Abdulvahap had in fact lost his life or suffered known injury or illness, this probability was insufficient to bring the facts of the case within the scope of Article 2.

4. CEJIL

79. In its written comments, CEJIL (see paragraph 7 above) presented an analysis of the jurisprudence of the Inter-American Commission and Court of Human Rights concerning forced disappearances, *inter alia*, in relation to the right to life.

80. The Inter-American Court has on several occasions pronounced that forced disappearances frequently involve the violation of the right to life[1]. In the inter-American system, a violation of the right to life as a consequence of a forced disappearance can be proved in two different ways. First, it may be established that the facts of the case at hand are consistent with an existing pattern of disappearances in which the victim is killed. Second, the facts of an isolated incident of a fatal forced disappearance may be proved on their own, independent of a context of an official pattern of disappearances. Both methods are used to establish State control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.

B. THE COURT'S ASSESSMENT

1. Whether Abdulvahap Timurtaş should be presumed dead

81. The Court recalls at the outset that it has accepted the Commission's establishment of the facts in this case, namely, that Abdulvahap Timurtaş was apprehended on 14 August 1993 by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi, after which he was transferred to a place of detention at Şırnak. More than six and a half years have passed without information as to his subsequent whereabouts or fate. The question arises whether, as the applicant submits, the authorities of the respondent State should be considered to have failed in

1. Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C, No. 4, § 157; Godínez Cruz Case, Judgment of Jan. 20, 1989, Series C, No, 5, § 165; Blake Case, Judgment of Jan. 24, 1998, § 66; Fairén Garbi and Solís Corrales Case, Judgment of Mar. 15, 1989, Series C, No. 6, § 150.

their obligation to protect his son's right to life under Article 2 of the Convention.

82. 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 Tomasi v. France, loc. cit., §§ 108-111, Ribitsch v. Austria, loc. cit., § 34, and *Selmouni v. France* [GC], no. 25803/94, § 87, to be published in ECHR 1999). In the same vein, Article 5 imposes an obligation on the State to account for the whereabouts of any person taken into detention and who has thus been placed under the control of the authorities (see Kurt v. Turkey, loc. cit., § 124). Whether the failure on the part of the authorities to provide a plausible explanation as to a detainee's fate, in the absence of a body, might also raise issues under Article 2 of the Convention will depend on all the circumstances of the case, and in particular on the existence of sufficient circumstantial evidence, based on concrete elements, from which it may be concluded to the requisite standard of proof that the detainee must be presumed to have died in custody (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 85, to be published in ECHR 1999; and *Ertak v. Turkey*, no. 20764/92, § 131, to be published in ECHR 2000).

83. In this respect the period of time which has elapsed since the person was placed in detention, although not decisive in itself, is a relevant factor to be taken into account. It must be accepted that the more time goes by without any news of the detained person, the greater the likelihood that he or she has died. The passage of time may therefore to some extent affect the weight to be attached to other elements of circumstantial evidence before it can be concluded that the person concerned is to be presumed dead. In this respect the Court considers that this situation gives rise to issues which go beyond a mere irregular detention in violation of Article 5. Such an interpretation is in keeping with the effective protection of the right to life as afforded by Article 2, which ranks as one of the most fundamental provisions in the Convention (see, amongst other authorities, the above-mentioned Çakıcı judgment, § 86).

84. Turning to the particular circumstances of the case, the Court observes that according to the applicant, who was found credible and consistent by the Commission's delegates, he was initially able to obtain some news of his son through his relative Bahattin Aktuğ. However, some forty-five days after Abdulvahap's apprehension, Bahattin Aktuğ was told to stop making enquiries (see paragraph 19 above). The applicant's official enquiries were met with denials and it may be deduced from the fact that the post-operation report could not be produced from the files that the need was felt to conceal the apprehension and detention of Abdulvahap Timurtaş.

85. There are also a number of elements distinguishing the present case from the case of Kurt, in which the Court held that there were insufficient

persuasive indications that the applicant's son had met his death in custody (loc. cit., § 108). In the first place, six and a half years have now elapsed since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the Court's judgment in the case of Kurt. Furthermore, whereas Üzeyir Kurt was last seen surrounded by soldiers in his village, it has been established in the present case that Abdulvahap Timurtaş was taken to a place of detention - first at Silopi, then at Şırnak – by authorities for whom the State is responsible. Finally, there were few elements in the Kurt case file identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the present case leave no doubt that Abdulvahap Timurtaş was wanted by the authorities for his alleged PKK activities (see paragraph 38 above). 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 *Cemil Kılıç v. Turkey*, no. 22492/93, § 75, and *Mahmut Kaya v. Turkey*, no. 22535/93, § 98, both to be published in ECHR 2000).

86. For the above reasons the Court is satisfied that Abdulvahap Timurtaş must be presumed dead following an unacknowledged detention by the security forces. Consequently, the responsibility of the respondent State for his death is engaged. Noting that the authorities have not provided any explanation as to what occurred after Abdulvahap Timurtaş' apprehension and that they do not rely on any ground of justification in respect of any use of lethal force by their agents, it follows that liability for 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.

2. The alleged inadequacy of the investigation

87. 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).

88. While the Government maintained that all the available evidence had been gathered and that this did not corroborate the applicant's allegations

but pointed rather to the possibility that Abdulvahap Timurtaş was either in Syria or amongst the ranks of the PKK, the Commission in its report analysed the investigation as dilatory, perfunctory, superficial and not constituting a serious attempt to find out what had happened to the applicant's son (paragraph 264 of the Commission's report). The findings of the Commission have been summarised in paragraph 47 above.

89. The Court perceives no cause to assess the investigation differently from the Commission. It notes the length of time it took before an official investigation got underway and before statements from witnesses were obtained, the inadequate questions put to the witnesses and the manner in which relevant information was ignored and subsequently denied by the investigating authorities. The Court is in particular struck by the fact that it was not until two years after the applicant's son had been taken into detention that enquiries were made of the gendarmes in Şırnak. However, it is not in dispute that the applicant had apprised the authorities long before then of the information he had obtained through Bahattin Aktuğ, to the effect that his son had been transferred to Şırnak and had been seen there by Sadık Erdoğan and Nimet Nas. Moreover, there is no evidence to suggest that the public prosecutors concerned made an attempt to inspect custody ledgers or places of detention for themselves, or that the Silopi district gendarmerie were asked to account for their actions on 14 August 1993.

The lassitude displayed by the investigating authorities poignantly bears out the importance attached to the prompt judicial intervention required by Article 5 §§ 3 and 4 of the Convention which, as the Court emphasised in the case of Kurt, may lead to the detection and prevention of life-threatening measures in violation of the fundamental guarantees contained in Article 2 (loc. cit., § 123).

90. In the light of the foregoing the Court finds that the investigation carried out into the disappearance of the applicant's son was inadequate and therefore in breach of the State's procedural obligations to protect the right to life. There has accordingly been a violation of Article 2 of the Convention on this account also.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

91. The applicant complained that the disappearance of his son constituted inhuman and degrading treatment in violation of Article 3 of the Convention in relation to himself. Article 3 provides:

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

92. The applicant submitted that as the father of the disappeared Abdulvahap Timurtaş he suffered severe mental distress and anguish as a result of the way in which the authorities responded to and treated him in relation to his enquiries.

93. At the hearing the Government queried how the uncertainty in which the applicant was living could amount to inhuman treatment given that, by the applicant's own admission, his son had left the family home for Syria two years prior to the alleged disappearance and during that time he had not received word from his son.

94. The majority of the Commission considered that the uncertainty, doubt and apprehension suffered by the applicant over a prolonged and continuing period of time caused him severe mental distress and anguish. In view of its conclusion that the disappearance of the applicant's son was imputable to the authorities, the Commission found that the applicant had been subjected to inhuman and degrading treatment within the meaning of Article 3.

95. In its judgment in the case of Çakıcı v. Turkey the Court held that the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie - in that context, a certain weight will attach to the parent-child bond -, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. In the Çakıcı case, the Court also 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 (loc. cit., § 98).

96. In the present case, the applicant was the father of the disappeared person. It appears from the summary of the applicant's oral evidence to the delegates contained in the Commission's report (paragraph 128), as well as from his statement to the Silopi public prosecutor on 21 October 1993 (see paragraph 23 above), that his son left the family home in Cizre some two years prior to being apprehended and that during that time the applicant received no word from his son. However, the Court finds that this element by no means precluded the applicant from feeling grave concern upon receipt of the news of his son's apprehension. This is borne out by the many enquiries which he then proceeded to make in order to find out what had happened to his son. The Court also has no doubt that the applicant's anguish about the fate of his son would have been exacerbated, on the one hand, by the fact that another son had died whilst in custody (see paragraph 16 above) and, on the other, by the conduct of the authorities to whom he addressed his multiple enquiries.

97. In this last respect the Court observes that not only did the investigation into the applicant's allegations lack promptitude and efficiency, certain members of the security forces also displayed a callous disregard for the applicant's concerns by denying, to the applicant's face and contrary to the truth, that his son had been taken into custody. In the case of Hüsam Durmuş, the author of the post-operation report, this even extended to allowing the applicant to submit a photograph of his son only to make out he had never seen the person in that photograph (see paragraphs 16 and 42 above).

98. Noting, finally, that the applicant's anguish concerning his son's fate continues to the present day, the Court considers that the disappearance of his son amounts to inhuman and degrading treatment contrary to Article 3 of the Convention in relation to the applicant.

V. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

99. The applicant submitted that the disappearance of his son gave rise to multiple violations of Article 5, which, in so far as relevant, 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."

100. The applicant argued that this provision had been violated on account of the fact that his son's detention had not been recorded and there had been no prompt or effective investigation of his allegations. Since the authorities denied that Abdulvahap Timurtaş had been taken into detention and since this detention had not been recorded, it automatically followed that there would be no effective judicial control of the lawfulness of the detention and no enforceable right to compensation.

101. The Government reiterated that no issue could arise under Article 5 since it had clearly been shown from the investigation carried out by the domestic authorities that the applicant's son had not been detained.

102. In the opinion of the Commission the responsibility of the respondent Government was engaged due to the fact that the Government had failed to provide a satisfactory explanation for the disappearance of the applicant's son and to the fact that no effective investigation had been conducted into the applicant's allegations. The Commission concluded that the applicant's son had been arbitrarily deprived of his liberty contrary to Article 5 and in disregard of the guarantees of that provision concerning the legal justification for such deprivation and requisite judicial control. Inaccurate custody records and a defective investigation process had subsequently combined to effectuate the "disappearance" of Abdulvahap Timurtaş. The Commission considered that a particularly serious violation of Article 5 had occurred.

103. The Court would at the outset refer to its reasoning in the cases of Kurt and Çakıcı, where it stressed 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 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).

104. The Court notes that its reasoning and findings in relation to Article 2 above leave no doubt that Abdulvahap Timurtaş' detention was in breach of Article 5. Thus, it is recalled that he was apprehended on 14 August 1993 by gendarmes attached to the Silopi district gendarmerie headquarters and taken into detention at Silopi, following which he was transferred 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. The investigation carried out by the domestic authorities into the applicant's allegations was neither prompt nor effective.

105. With regard to this last element, the Court notes that one of the criticisms levelled at the investigation process was the failure of the public prosecutors concerned to inspect personally the relevant custody ledgers. Though this would indeed appear to have been a logical step in an investigation of this nature, it is nevertheless clear that it would have been fruitless in the present case since the detention of Abdulvahap Timurtaş was not recorded other than in the post-operation report the existence of which was officially denied. This is an illustration of the serious failing which the absence of holding data constitutes since it 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).

This failing is further aggravated by the Commission's findings as to the general unreliability and inaccuracy of the records submitted to it by the respondent Government (see paragraph 44 above).

106. Accordingly, the Court concludes that Abdulvahap Timurtaş was held in unacknowledged 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.

VI. ALLEGED VIOLATION OF ARTICLE 13

107. 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."

108. The applicant submitted that there had been a conspiracy to conceal the fact of his son's detention from him. The investigation that had eventually been conducted into his allegations had been superficial and incapable of uncovering the truth.

109. The Government reaffirmed that all the necessary enquiries had been made and all the witnesses named by the applicant interviewed, but that the available evidence had not corroborated the applicant's allegations.

110. Referring to its findings that the investigation in the present case had been dilatory, perfunctory and superficial, the Commission was not persuaded that the applicant's concerns received sufficiently serious attention by the authorities. It accordingly held that there had been a breach of Article 13.

111. 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).

112. 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 been taken into custody. The applicant went to the authorities with specific information as to where, when and with whom his son was alleged to have been apprehended, and he followed this up by providing names of persons who had seen his son whilst in detention. 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.

113. Accordingly, the authorities were under the obligation to conduct an effective investigation into the disappearance of the applicant's son. Having regard to paragraph 89 above, the Court finds that the respondent State has failed to comply with this obligation.

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

VII. ALLEGED PRACTICE BY THE AUTHORITIES OF INFRINGING ARTICLES 5 AND 13 OF THE CONVENTION

114. The applicant contended that a practice of "disappearances" existed in south-east Turkey in 1993 as well as an officially tolerated practice of violating Article 13 of the Convention, which aggravated the breaches of which he and his son had been a victim. 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.

115. The Court considers that the scope of examination of the evidence undertaken in this case and the material on the case file are not sufficient to enable it to determine whether the failings identified in this case are part of a practice adopted by the authorities.

VIII. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

116. The applicant argued that the respondent Government have allowed a practice of "disappearances" to develop which subverts the operation of their laws, and that they have failed to take any effective action to bring it to an end. According to the applicant, the avoidance by the authorities of their own legal requirements constitutes a breach of the principle of good faith as enshrined in Article 18, 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."

117. The Government did not address this issue, whereas the Commission found that there had been no violation of Article 18.

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

IX. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

119. Finally, the applicant submitted that the lying on oath by a Government witness to the Commission's delegates constituted an interference with the exercise of his right of individual petition as laid down, following the entry into force of Protocol No. 11, in Article 34, which provides:

"The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right."

120. In support of his argument, the applicant argued that the conduct of the gendarmes at Silopi and Şırnak, as exemplified by Hüsam Durmuş, was calculated to frustrate the effective operation of the right of individual petition. Had it not been for the fortuitous discovery of a document, he would not have been able to prove the claims in his application beyond reasonable doubt.
121. The Government repudiated this allegation, maintaining that Hüsam Durmuş had spoken the truth.
122. The Commission did not find it established that the conduct of the gendarmes concerned, however reprehensible, had as such hindered the applicant in the exercise of his right of individual petition.
123. The Court does not consider that in the circumstances of the present case the conduct of the authorities or, more specifically, of Hüsam Durmuş, constituted a failure to comply with the obligation of Article 34 *in fine* on the part of the respondent Government.

X. APPLICATION OF ARTICLE 41 OF THE CONVENTION

124. 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. Non-pecuniary damage

125. The applicant claimed, having regard to the severity and number of violations, 40,000 pounds sterling (GBP) in respect of his son and GBP 10,000 in respect of himself for non-pecuniary damage.
126. The Government claimed that these amounts were exaggerated and would lead to unjust enrichment.
127. As regards the claim made on behalf of non-pecuniary damage for the applicant's 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 only awarded sums as regards a deceased where it was found that there had been arbitrary detention or torture before that person's disappearance or death, such sums to be held for the person's heirs (see Kurt v. Turkey judgment, cited above, §§174-175 and Çakıcı 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 unacknowledged detention and failure to protect the life of Abdulvahap Timurtaş and it considers that an award of compensation should be made in his favour. It awards the sum of GBP 20,000, which amount is to be paid to, and held by, the applicant for his son's heirs.

128. As regards the applicant, the Court has found a breach of Article 3 in his own regard 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.

B. Costs and expenses

129. The applicant claimed a total of GBP 29,041.28 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 and attendance at the hearing before the Court in Strasbourg. A sum of GBP 5,165 is 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, as well as a sum of GBP 4,020 in respect of work undertaken by lawyers in Turkey.

130. The Government regarded the professional fees as exaggerated and unreasonable and submitted that regard should be had to the applicable rates for the bar in İstanbul.

131. In relation to the claim for costs the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards him the sum of GBP 20,000 together with any value-added tax that may be chargeable, less the 10,245.06 French francs (FRF) received by way of legal aid from the Council of Europe, such sum to be paid into the applicant's sterling bank account in the United Kingdom as set out in his just satisfaction claim.

C. Default interest

132. 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 respondent State is liable for the death of Abdulvahap Timurtaş in violation of Article 2 of the Convention;

2. *Holds* by six votes to one 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 disappearance of Abdulvahap Timurtaş;

3. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention in respect of the applicant;

4. *Holds* unanimously that there has been a violation of Article 5 of the Convention;

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

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

7. *Holds* unanimously that the respondent State has not failed to comply with its obligations under Article 34 *in fine* of the Convention;

8. *Holds* unanimously 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 rate applicable on 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 rate applicable on the date of settlement;

10. *Holds* by six votes to one that the respondent State is to pay the applicant, within three months and into the latter's bank account in the United Kingdom, in respect of costs and expenses, 20,000 (twenty thousand) pounds sterling together with any value-added tax that may be chargeable, less 10,245 (ten thousand two hundred and forty-five) French francs, 6 (six) centimes to be converted into pounds sterling at the 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 13 June 2000, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE	Elisabeth PALM
Registrar	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 F. Gölcüklü is annexed to this judgment.

DISSENTING OPINION OF JUDGE Gölcüklü
(*Translation*)

1. To my great regret I am unable to share the opinion of the majority of the Court, in particular, as to a violation of Article 2 on the ground that "... the Court is satisfied that Abdulvahap Timurtaş must be presumed dead (stress added) following an unacknowledged detention by the security forces" (see § 86 of the judgment). Thus, according to the judgment, the basis for the finding of a "violation" is a mere – unfounded – "presumption". Nor do I agree with that statement by the Court, which, in order to justify applying Article 2, refers to other Turkish cases. The Court cannot assert that unproven allegations are true by referring to a precedent which, as a mere guide to interpretation when applying the Convention, is incapable of "creating" non-existent events or a presumption that they occurred.
2. That conclusion is quite irreconcilable with the principles previously laid down unanimously by the Commission and the Court in the identical case of Kurt v. Turkey (judgment of 25 May 1998, *Reports of Judgments and Decisions* 1998, p. 1152). In my opinion, there has been a major departure from precedent.
3. In order to differentiate the Kurt case cited above, the majority – wrongly in my view – refers to certain features distinguishing the Timurtaş case from the Kurt case and justifying a different conclusion being reached in the instant case. Allow me to explain.
4. "In the first place," says the Court in the Timurtaş judgment, "six and a half years have now elapsed since Abdulvahap Timurtaş was apprehended and detained – a period markedly longer than the four and a half years between the taking into detention of the applicant's son and the Court's judgment in the case of Kurt. Furthermore," confirms the Court, "whereas Üzeyir Kurt was last seen surrounded by soldiers in his village, it has been established in the present case that Abdulvahap Timurtaş was taken to a place of detention... by authorities for whom the State is responsible. Finally," says the majority, "there were few elements in the Kurt case identifying Üzeyir Kurt as a person under suspicion by the authorities, whereas the facts of the present case leave no doubt that Abdulvahap Timurtaş was wanted by the authorities for his alleged PKK activities..." (see the Timurtaş judgment, § 85).
Those are artificial and superficial arguments, assertions unsupported by fact, a sort of "*trompe-l'œil*". In cases of forced disappearance, what difference does it make whether the period has been six and a half years or four and a half years?
In the Kurt case, the Court, like the Commission, also made a finding of fact regarding "...the detention of the applicant's son by soldiers and village guards on 25 November 1993" (see, the Kurt judgment, §§ 15 and 106). Must I add that in the Kurt case, both the Commission and the Court held

that the only Article applicable in the case was Article 5 of the Convention, (which was not the same thing as saying that Üzeyir Kurt had in fact been arrested and detained by the security forces).
Lastly, the Commission's investigation clearly showed that Üzeyir Kurt and Abdulvahap Timurtaş had been accused of collaborating with PKK terrorists and were wanted in that connection. When the security forces arrived in the village and did not find Üzeyir Kurt among the villagers assembled in the square, they immediately asked where he was and arrested him in a house where he had been hiding (see the Kurt judgment, §§ 15 and 28).
5. I reiterate that the Timurtaş case is indistinguishable from the Kurt case (in which, as in the Timurtaş case, it was not established beyond all reasonable doubt that the applicant's son, Üzeyir Kurt, died in detention) and has nothing in common with the Çakıcı case (in which both the Commission and the Court found that the applicant's brother, Ahmet Çakıcı, had died in detention – see the Timurtaş case, Report of the Commission § 278 et seq.; see also the Çakıcı v. Turkey judgment of 8 July 1999 to the same effect). Here is the conclusion of the Commission in the Timurtaş case: "The Commission considers, therefore, that the application falls to be distinguished from the case of Çakıcı. In the circumstances of the present case it finds it more appropriate to follow the approach adopted by the Commission and the Court in the case of Kurt v. Turkey" (see the Report of the Commission, Timurtaş case, § 278 et seq.; see also the Çakıcı v. Turkey judgment of 8 July 1999, to the same effect).
6. Thus the backdrop to the Timurtaş judgment is the Commission's report and the Court's judgment in the Kurt v. Turkey case and the Commission's report in the Timurtaş case. Both of those institutions unanimously concluded in these two cases that it was not Article 2 of the Convention that was applicable, but Article 5.
7. In view of its importance for a proper understanding of my dissenting opinion I have decided to reproduce *in extenso* the relevant paragraphs of the Kurt judgment cited above and of the opinion expressed by the Commission in the Timurtaş case, which merely repeats my opinion and the Court's judgment in the Kurt case.
8. In its Kurt judgment, the Court said:
"105. The Commission found that in the absence of any evidence as to the fate of Üzeyir Kurt subsequent to his detention in the village, it would be inappropriate to draw the conclusion that he had been a victim of a violation of Article 2. It disagreed with the applicant's argument that it could be inferred that her son had been killed either from the life-threatening context she described or from an alleged administrative practice of disappearances in the respondent State. In the Commission's opinion, the applicant's allegation as to the apparent forced disappearance of her son and the alleged failure of the authorities to take reasonable steps to safeguard him against

the risks to his life attendant on his disappearance fell to be considered under Article 5 of the Convention.

106. The Court recalls at the outset that it has accepted the Commission's findings of fact in respect of the detention of the applicant's son by soldiers and village guards on 25 November 1993. Almost four and a half years have passed without information as to his subsequent whereabouts or fate. In such circumstances the applicant's fears that her son may have died in unacknowledged custody at the hands of his captors cannot be said to be without foundation. She has contended that there are compelling grounds for drawing the conclusion that he has in fact been killed.

107. However, like the Commission, the Court must carefully scrutinise whether there does in fact exist concrete evidence which would lead it to conclude that her son was, beyond reasonable doubt, killed by the authorities either while in detention in the village or at some subsequent stage. It also notes in this respect that in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play (see the above-mentioned McCann and Others judgment; and the Kaya v. Turkey judgment of 19 February 1998, Reports 1998-I).

108. It is to be observed in this regard that the applicant's case rests entirely on presumptions deduced from the circumstances of her son's initial detention bolstered by more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State. The Court for its part considers that these arguments are not in themselves sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody. As to the applicant's argument that there exists a practice of violation of, *inter alia*, Article 2, the Court considers that the evidence which she has adduced does not substantiate that claim.

109. Having regard to the above considerations, the Court is of the opinion that the applicant's assertions that the respondent State failed in its obligation to protect her son's life in the circumstances described fall to be assessed from the standpoint of Article 5 of the Convention.

9. Here is the opinion of the Commission in the Timurtaş case:

The Commission questioned:

"...whether that strong probability (that Abdulvahap died whilst in unacknowledged detention) is sufficient to trigger the applicability of Article 2 in the absence of concrete evidence that Abdulvahap has in fact lost his life or suffered known injury of illness."

It went on:

"In the case of Çakıcı v. Turkey, the Commission did reach the conclusion that Article 2 applied, finding that the 'very strong probability' that the

applicant's brother Ahmet Çakıcı was dead arose in the context of an unacknowledged detention and findings of ill-treatment (op. cit., para. 253).
279. However, even though the Commission did not find that Ahmet Çakıcı had been killed as alleged by the Government, he was regarded as dead in official terms (op. cit., paras. 239, 253). In the present case there is no official claim that Abdulvahap Timurtaş is presumed to be no longer alive. In addition, the Commission accepted evidence from a fellow detainee of Ahmet Çakıcı to the effect that he had seen Ahmet Çakıcı in the Diyarbakır provincial gendarmerie headquarters with injuries, that Ahmet Çakıcı had told him that he had been tortured and that he himself had also been subjected to torture (op. cit., para. 252). The Commission recalls that in the present case it was unable to reach a finding that Abdulvahap Timurtaş was tortured or ill-treated (para. 251).
280. The Commission considers, therefore, that the application falls to be distinguished from the case of Çakıcı. In the circumstances of the present case it finds it more appropriate to follow the approach adopted by the Commission and the Court in the case of Kurt v. Turkey (op. cit.).
281. The Court held in that case (Kurt) that it was not necessary to decide on the applicant's complaint under Article 2 since there was no concrete evidence capable of proving beyond reasonable doubt that her son had been killed by the authorities either while in detention or at some subsequent stage. The Court further held that
"...in those cases where it has found that a Contracting State had a positive obligation under Article 2 to conduct an effective investigation into the circumstances surrounding an alleged unlawful killing by the agents of that State, there existed concrete evidence of a fatal shooting which could bring that obligation into play." (op. cit., para. 107).
282. The Commission notes that the present case similarly (Timurtaş) discloses no such concrete evidence of the killing of Abdulvahap Timurtaş. It observes in addition that the applicant has submitted the same 'more general analyses of an alleged officially tolerated practice of disappearances and associated ill-treatment and extra-judicial killing of detainees in the respondent State' as those on which Koçeri Kurt relied and which were deemed by the Court to be not 'sufficient to compensate for the absence of more persuasive indications that her son did in fact meet his death in custody' (op. cit., para. 108).
283. Consequently, the Commission considers that the applicant's allegations of the State's failure to safeguard his son from disappearance fall to be examined in the context of Article 5 of the Convention."
10. Must I add, lastly, that in the Ertak v. Turkey case the same Chamber of the Court as sat in the Timurtaş case acknowledged that the Kurt case was distinguishable from the Ertak case in that the latter concerned a violation of Article 2 as a result of the death of the applicant's son caused by State agents (see the Ertak v. Turkey judgment, § 131 – to be published). That

amounted to saying that the cases of Kurt and Timurtaş were similar and could thus be distinguished from the Ertak case.

11. In conclusion, as it has not been established beyond all reasonable doubt that Abdulvahap Timurtaş died in detention, Article 2 of the Convention is not applicable in the instant case.

12. In the light of the aforementioned considerations it is unnecessary for me to respond to the issues concerning the merits of the case.

13. As regards the applicant's position, unlike the majority of the Court, I find it difficult to accept that he genuinely suffered distress when, as a father, he showed no concern for his son's welfare after he left home and therefore disappeared from the scene two years before his alleged forced disappearance to join, or so it would seem, the PKK in Syria (see §§ 23 and 25 of the judgment).

14. As regards the violation de Article 13 of the Convention, I refer to my dissenting opinion in the case of Ergi v. Turkey (see the judgment of 28 July 1998, *Reports of Judgments and Decisions* 1998-IV).

I am of the view that "once the conclusion has been reached that there has been a violation of Article 2 of the Convention on the grounds that there was no effective investigation into the death that has given rise to the complaint, no separate question arises under Article 13. The fact that there was no satisfactory and adequate investigation into the death which resulted in the applicant's complaints, both under Article 2 and Article 13, automatically means that there was no effective remedy before a national court. On that subject, I refer to my dissenting opinion in the case of Kaya v. Turkey (see the judgment of 19 February 1998, *Reports* 1998) and the opinion expressed by the Commission with a large majority (see Aytekin v. Turkey, application no. 23828/94, 20 May 1997; Yaşa v. Turkey, application no. 22495/93, 8 April 1997)."

15. As regards the application of Article 41, I cannot accept that the legal costs should be paid into the applicant's "bank account in the United Kingdom".

This is one of the points arising under the general issue of reimbursement of "costs and expenses". So that my views on this subject may be properly understood, I must refer to previous events and developments on this subject. The use of former Article 50 (now Article 41) for legal costs (including counsel's fees) was the subject of a full debate by the former Court because certain lawyers (always the same ones) acting for the applicants repeatedly insisted on direct payment of the legal costs into a foreign bank account and in foreign currency. The Court consistently rejected such requests other than in one or two cases in which it allowed payment in a foreign currency, provided it was made in the respondent State. Following the deliberations, the Court decided that legal costs should be paid:

– to the applicant,

– in the respondent State, and
– in the currency of the respondent State (if, owing to the high level of inflation in the country, the amount is expressed in a foreign currency it is converted into local currency on the date of payment).

In line with that decision, all other requests were categorically rejected. Thereupon, lawyers acting for applicants began to request that legal costs be paid into the applicants' overseas bank accounts in foreign currency, despite the fact that the applicants were nationals of the respondent State and lived there. Those requests have also been consistently rejected by the Court. Despite many similar requests (once again by the same lawyers), to date not a single decision has been given in their favour.

16. Is it not astonishing to find that virtually all the inhabitants of small villages or isolated hamlets in remote parts of south-eastern Anatolia – people of modest means – have bank accounts in European cities?

17. The fact that certain lawyers have problems with their clients is no concern of the respondent State. Contracts between lawyers and their clients are private-law agreements and concern only them; the respondent State should not be affected by any dispute between them.

18. I must add that under the system established by the Convention, the Court has no jurisdiction to give Contracting States orders about how its judgments should be executed.

I am of the opinion that all payments under Article 41 should be made, as in the past, to the applicant in the local currency and in that country.

Appendix C

Timurtaş v Turkey: Written submissions by CEJIL

IN THE EUROPEAN COURT OF HUMAN RIGHTS
IN THE MATTER OF:

TIMURTAS

v.

TURKEY
(Application No. 23531/94)

WRITTEN COMMENTS OF THE CENTER FOR JUSTICE AND INTERNATIONAL LAW

I. Introduction

The Center for Justice and International Law ("CEJIL")[1] appreciates the opportunity to submit its written comments on this case by permission of the President of the First Chamber of the European Court of Human Rights (the "Court") on June 10, 1999, pursuant to Rule 61 §§3-5 of the Rules of Court.

Since 1991, CEJIL's principle objective has been to achieve the full implementation of international human rights law in the member states of the Organization of American States. A central component of CEJIL's work is the defense of victims of human rights abuses, including victims of forced disappearances, before the Inter-American Commission of Human Rights (the "Inter-American Commission") and the Inter-American Court of Human Rights (the "Inter-American Court").

In the spirit of dialogue and cooperation between our regional systems, CEJIL welcomes this occasion to offer an analysis of inter-American jurisprudence. These comments will examine the methods of proving violations of the right to life and the right to personal integrity in cases of forced disappearances. It is hoped that the Court will consider the wealth of inter-American jurisprudence in the treatment of the crime of forced disappearances in examining this case.

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[1]The Executive Director of CEJIL, Viviana Krsticevic, was assisted in the preparation of these written comments by *pro bono* attorneys for CEJIL, Monica Smith and Tea Gorjanc. For further information on CEJIL, see Appendix A.

II. Disappearances in Latin America

Forced disappearances[2] have been called the perfect crime as they are intended to ensure absolute impunity for state actors involved in a heinous act. The perpetrators are unknown and the victim has vanished; without bodies of the victims, witnesses or identifiable guilty parties, there are no traces of a crime.[3] Over time, as numerous incidents of forced disappearances have been reported in countries ruled by dictatorships as well as by democratically elected governments, the defining characteristics of the crime become apparent. In the most common scenario, the victim is a political activist or a criminal suspect who is taken by state agents, or with state complicity, to a secret location. No facts are divulged to the families of the victim or anyone outside the state apparatus. The *incommunicado* detention effectively prohibits the victim's access to judicial remedies and due process protections. Usually, the victim is subjected to torture and other cruel and inhuman treatment, eventually leading to death and the disposal of the body. From start to finish, every effort is made by the perpetrators to erase all trace of the victim and of the crime itself. It would appear as though the person had simply vanished. A wall of denial is erected to surround the circumstances of the disappearance, effectively insuring impunity.

Although not a new phenomenon in the realm of human rights violations, it was in Latin America during the 1960's and 1970's that incidents of forced disappearances became common. This situation corresponded with the rise of repressive governments in various parts of the hemisphere. The Inter-American Commission, alerted by numerous complaints during the 1970's, became increasingly concerned about forced disappearances and the subsequent development of a systematic practice.[4] In response, the Inter-American Commission relied on its broad powers to protest, deter, and in many cases prevent disappearances. Its efforts were both creative and flexible, having to walk a fine line between serving its quasi-judicial and political roles.[5]

In the mid-1980's, the Inter-American Commission submitted several cases to the Inter-American Court dealing with the practice of forced disappearances, namely, *Velásquez Rodríguez*,

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[2]The word "disappearances" is derived from the Spanish term *desaparecidos* (disappeared persons), which has been widely used in Latin America for several decades.

[3]Ana Lucrecia Molina Theissen, "La Desaparición Forzada de Personas en América Latina," ESTUDIOS BASICOS DE DERECHOS HUMANOS VII, San José, IIDH, 1996, at 65.

[4]Systematic violations were carried out with exceptional intensity in, among other countries, Argentina, Guatemala and Chile.

[5]For instance, the Inter-American Commission requested information, encouraged mediation and utilization of its complaint system. It issued direct appeals and conducted on-site missions to the countries where forced disappearances were occurring, urging acknowledgment of the detention and release of the victims. It also issued reports on the human rights situation in several countries that were important for defining and publicizing the practice as well as establishing evidence of state responsibility. See generally, Cecelia Medina Quiroga, THE BATTLE OF HUMAN RIGHTS: GROSS, SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM, Martinus Nijhoff Publishers, 1988, at Section 6.5.

Godinez Cruz, and *Fairén Garbi and Solis Corrales*.[6] This led to the issuance of ground-breaking decisions condemning the practice. In the 1990's, the Inter-American Court continued to develop its jurisprudence on the subject of forced disappearances and illegal detentions both in isolated incidents and in systematic patterns of practice,[7] in cases such as *Castillo Páez*,[8] *Neira Alegría*,[9] *Suárez Rosero*,[10] *Blake*,[11] *Caballero Delgado and Santana*,[12] *Castillo Petruzzi*,[13] *Paniagua Morales*,[14] *Loayza Tamayo*,[15] and *Aloaboetoe*.[16]

According to various governmental reports, the number of victims of forced disappearances in Latin America reaches into the tens of thousands.[17] The history of these events has affected an

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[6] *Velásquez Rodríguez Case*, Inter-Am. Ct.H.R., Judgment of July 29, 1988, Series C, No. 4 (hereinafter, "*Velásquez Rodríguez*"); *Godínez Cruz Case*, Inter-Am. Ct.H.R., Judgment of Jan. 20, 1989, Series C, No. 5 (hereinafter, "*Godínez Cruz*"); and *Fairén Garbi and Solís Corrales Case*, Inter-Am. Ct.H.R., Judgment of Mar. 15, 1989, Series C, No. 6 (hereinafter, "*Fairén Garbi and Solís Corrales*"). These cases were collectively known as the "Honduran Disappearance Cases."

[7] In this text, the term "isolated incident" means a case of forced disappearance in which no pattern of practice is used to prove state responsibility. It may nonetheless refer to cases that occur in countries where an officially tolerated practice exists. The term "pattern" or "pattern of practice" refers to a state sponsored or tolerated plan to carry out forced disappearances which have been shown in a court of law to consist of specific steps that are often systematically repeated.

[8] *Castillo Páez Case*, Inter-Am. Ct.H.R., Judgment of Nov. 3, 1997, Series C, No. 34 (hereinafter, "*Castillo Páez*").

[9] *Neira Alegría et. al. Case*, Inter-Am. Ct.H.R., Judgment of Jan. 19, 1995, Series C, No. 20 (hereinafter, "*Neira Alegría*").

[10] *Suárez Rosero Case*, Inter-Am. Ct.H.R., Judgment of Nov. 12, 1997 (hereinafter, "*Suárez Rosero*").

[11] *Blake Case*, Inter-Am. Ct.H.R., Judgment of Jan. 24, 1998 (hereinafter, "*Blake*").

[12] *Caballero Delgado and Santana Case*, Inter-Am. Ct.H.R., Judgment of Dec. 8, 1995 (hereinafter, "*Caballero Delgado and Santana*").

[13] *Castillo Petruzzi Case*, Inter-Am. Ct.H.R., Judgment of May 30, 1999, Series C (hereinafter, "*Castillo Petruzzi*").

[14] *Paniagua Morales et. al. Case*, Inter-Am. Ct.H.R., Judgment of Mar. 8, 1998, Series C, No. 37 (hereinafter, "*Paniagua Morales*").

[15] *Loayza Tamayo Case*, Inter-Am. Ct.H.R., Judgment of Sept. 17, 1997, Series C, No. 33 (hereinafter, "*Loayza Tamayo*").

[16] *Aloaboetoe Case*, Inter-Am. Ct.H.R., Judgment of Dec. 4, 1991, Series C, No. 11.

[17] It has been estimated by human rights groups that over 90,000 people have been forcibly disappeared in Latin America, numbers provided by state-sponsored investigations predictably show more conservative estimates. In Argentina, in the years from 1975 to 1980 (at the height of repression), a total of 8,961 persons were forcibly disappeared, according to the statistics in the Annex to the National Commission on the Disappearance of Persons report, NUNCA MÁS, 1984. In Guatemala, there were 6,159 persons who were forcibly disappeared from the time of the internal uprisings in 1962 through 1996, according to GUATEMALA: MEMORIA DEL SILENCIO: CONCLUSIONES Y RECOMENDACIONES DEL INFORME DE LA COMISIÓN PARA EL ESCLARECIMIENTO HISTÓRICO, 1999. In Chile, the victims numbered 957 for the years of 1973 to 1990, as stated in the REPORT OF THE NATIONAL COMMISSION ON TRUTH AND RECONCILIATION, Vol. 2, Talleres La Nación, 1991. In Honduras, for the years of 1980 to 1993, it was disclosed that 179 persons were forcibly disappeared at the hands of the armed forces, according to the study of Leo Valladeres Lanza, THE FACTS SPEAK FOR THEMSELVES: THE PRELIMINARY REPORT ON DISAPPEARANCES OF THE NATIONAL COMMISSIONER FOR THE PROTECTION OF HUMAN RIGHTS IN HONDURAS, Human Rights Watch & CEJIL translation, 1994. Statistics were compiled for the period of 1980 to 1997 in the REPORT OF THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES, E/CN.4/1998/43 of Jan. 12, 1998, Annex II: Cases of Enforced or Involuntary Disappearances Reported to the Working Group Between 1980 and 1997, for,

even greater number of people, as victims' families continue to suffer because of the absence of information about the fate of their missing family members. Unfortunately, according to reports of the Inter-American Commission, the Inter-American Court and the United Nations Working Group on Enforced and Involuntary Disappearances,[18] incidents of forced disappearances continue to be reported in the Americas and in many countries around the world.[19]

Increased awareness of the pervasive nature of forced disappearances led to an international legislative effort at both regional and global levels. This resulted in the establishment of the Working Group on Enforced or Involuntary Disappearances of the United Nations Commission on Human Rights, the United Nations Declaration on the Protection of all Persons from Enforced Disappearances; numerous resolutions of the General Assembly of the Organization of American States from 1979 onwards, urging investigation and an end to the practice of forced disappearances; and the Inter-American Convention on Forced Disappearance of Persons, adopted in 1994.

III. Elements of the Crime of Forced Disappearances

The use of international law has strengthened the common understanding of this crime and has provided tools to deter further occurrences. This included the development of several definitions of forced disappearances describing the crime's essential elements. For instance, the Inter-American Convention on Forced Disappearance of Persons uses the following definition:

> "... forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."[20]

This definition, substantially similar that of the United Nations Declaration on the Protection of All

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among others, the following countries: Argentina (3,453 reported cases of involuntary disappearances); Colombia (1,006 cases); El Salvador (2,661 cases); Mexico (343 cases); Nicaragua (234 cases) and Peru (3,004 cases).

[18]This was accomplished by Resolution 20 (XXXVI) on February 29, 1980.

[19]According to the REPORT OF THE WORKING GROUP ON ENFORCED AND INVOLUNTARY DISAPPEARANCES, E/CN 4/1998/43 of Jan. 12, 1998, forced disappearances have occurred in recent years in the following Latin American countries: Argentina, Bolivia, Brazil, Colombia, Chile, El Salvador, Guatemala, Haiti, Honduras, Mexico, Paraguay, Peru and Uruguay. At present, incidents of forced disappearances occur frequently in Colombia and Mexico. Worldwide, incidents and systematic practices have been documented in countries from Afghanistan to Zaire. *Id.*

[20]Article II, Inter-American Convention on Forced Disappearance of Persons, adopted at Belém do Pará, 9 June 1994, 24th regular session of the General Assembly of the OAS.

Persons from Enforced Disappearances,[21] identifies the following elements of crime:

- deprivation of freedom,
- state agent responsibility,
- absence of information regarding the victim,
- the victim remains outside the protection of the law.

Taken together, these elements contribute to a finding of multiple violations of the victim's rights, particularly the right to personal liberty and security, the right to protection from cruel and inhuman treatment, and, in the vast majority of cases, the right to life.[22] In fact, the Inter-American Court considers the crime of forced disappearances to constitute a multiple and continuing violation for as long as the whereabouts or fate of the victim remain unknown.[23] As the Inter-American Commission stated early on, "a 'disappearance' not only constitutes an arbitrary deprivation of freedom but also a serious danger to the personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process."[24] This characterization of human rights violations encompassed by the crime of forced disappearances also corresponds with Article I of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances.[25]

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[21]The definition in the third paragraph of the United Nations Declaration on the Protection of all Persons from Enforced Disappearance reads: "... enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law." (U.N. General Assembly Resolution 47/133 of Dec. 18, 1992 (hereinafter, "U.N. Res. 47/133").)

[22]Such was the finding the landmark cases *Velásquez Rodriguez* and *Godinez Cruz*, where the Inter-American Court found that forced disappearances cause the following violations (among others) of the Inter-American Convention: a violation of the right to personal liberty and security, which includes in Article 7 the right to protection from arbitrary arrest or imprisonment, the right of detainees to be brought promptly before a judge and their entitlement to trial within a reasonable time; a violation to the right to humane treatment, which encompasses through Article 5 the prohibition against torture and cruel or inhuman treatment or degrading punishment, and the right to respect for the inherent dignity as a human being; and a violation of the right to life, under Article 4. *Velásquez Rodriguez*, at paras. 155-57; *Godinez Cruz*, at paras. 163-65. (The American Convention on Human Rights was signed at the Inter-American Specialized Conference on Human Rights, at San José, Costa Rica, on November 22, 1969, and is also known as the Pact of San José.)

[23]*Blake Case*, Inter-Am. Ct.H.R., Judgment of July 2, 1996, Preliminary Exceptions, at para. 39; see also, *Velásquez Rodriguez*, at para. 155; *Godinez Cruz*, at para. 163. This principle is included as well in Article III of the Inter-American Convention on Forced Disappearances of Persons.

[24]TEN YEARS OF ACTIVITIES, 1971-1981, Inter-American Commission on Human Rights, General Secretariat, OAS, 1982 (hereinafter, "TEN YEARS OF ACTIVITIES"), at 319. See also, *Fairén Garbi and Solis Corrales*, at para. 151: "[the] practice [of disappearances] is a radical departure from the Pact of San José because it implies the crass abandonment of the values that emanate from human dignity and of the fundamental principles on which the inter-American system and the Convention are based."

[25]Article I states: "Any act of enforced disappearance is an offense to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition

IV. Evaluation of the Evidence

The defining characteristic of the crime of forced disappearances is the persistent denial of information regarding the victim by government authorities who have placed the victim outside the protection of the law and who control - or often destroy - the evidence. This technique adds to the difficulty of proving responsibility at the individual and state levels, facilitating impunity.

While cases of forced disappearances, like any other case, are governed by principles of evidence of the inter-American system, the Inter-American Court considers the specific nature and elements of the crime while applying the principles to a particular set of facts. Since the lack of information regarding the victim is a central element of forced disappearances, the evidentiary issues of the burden and standard of proof are of critical importance in establishing responsibility. The Inter-American Court therefore analyzes (a) the burden of proof of each party, (b) the standard of proof necessary to draw legal conclusions, and (c) the nature of permissible proof in determining whether the facts of the case support a finding for the alleged violations.

A. Burden of proof

According to the principles of evidence in the inter-American system, the petitioners must prove the alleged human rights violations.[26] However, there are certain circumstances which allow this burden to shift onto the respondant state. Three are discussed here with respect to cases of forced disappearances: the existence of a pattern of practice, state control of the evidence, and the silence of the state.

The first instance in which the burden of proof can shift is through the establishment of a pattern of disappearances. Accordingly, once the Inter-American Commission succeeds in proving an officially tolerated or orchestrated pattern of practice, and that the facts of an individual case fit the pattern, the state must then prove that the individual was not a victim of such a practice.[27]

Another instance in which the burden might shift to the state is in cases in which it has been concluded that the state has control over the evidence. The Inter-American Court has discussed the burden on the state as follows:

> "[it] is not up to the Inter-American Commission to determine the whereabouts of the three persons to whom these proceedings refer, but instead, because of the circumstances at the

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as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life." Declaration on the Protection of all Persons from Enforced Disappearances, U.N. Res. 47/133.

[26] *Velásquez Rodríguez*, at para. 123.

[27] *Id.*, at para. 126. "If it can be shown that there was an official practice of disappearances in Honduras, carried out by the Government or at least tolerated by it, and if the disappearance of Manfredo Velásquez can be linked to that practice, the Commission's allegations will have been proven to the Court's satisfaction, so long as the evidence presented on both points meets the standard of proof required in cases such as this."

time, the prisons and then the investigations were under the exclusive control of the Government, *the burden of proof therefore corresponds to the defendant State.* This evidence was or should have been at the disposal of the Government had it acted with the diligence it required."[28]

The Inter-American Court has repeatedly noted that:

> "In contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation. The State controls the means to verify acts occurring within its territory."[29]

Therefore, once it is established that the state controls or should control the evidence, the burden will be on the state to show that it was not involved in the alleged forced disappearance.

In a third example of burden-shifting in forced disappearance cases, the Inter-American Court has considered the silence or ambiguity of the state to have certain evidentiary value. The Inter-American Court has stated, "the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgement of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law."[30] As a result, failure by the state to present sufficient probative evidence creates a presumption in favor of the petitioner.[31]

B. Standard of proof

The standard of proof in cases of forced disappearances, as applied on several occasions by the Inter-American Court, is one "which considers the seriousness of the charge and which ... is capable of establishing the truth of the allegations in a *convincing manner*."[32] Again, this contrasts with domestic criminal law, which has a higher standard of proof.[33] In this way, especiallly with

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[28] *Neira Alegría*, at para. 65 (italics added).

[29] *Paniagua Morales*, at para. 71, *Velásquez Rodríguez*, at paras. 134-138 and *Godínez Cruz*, at paras. 140-144.

[30] *Velásquez Rodríguez*, at paras. 134-138; *Godínez Cruz*, at paras. 140-144; see also, *Paniagua Morales*, at para. 71.

[31] *Suárez Rosero*, at para. 33 *in fine*; *Neira Alegría*, at para. 44. Any such evidence presented by the state must be of enough weight to shift the burden back to the petitioners; for instance, in *Castillo Páez*, the Inter-American Court found insufficient the state's simple denial regarding Mr. Castillo-Páez's arrest, along with their presentation of altered police logs which failed to mention him as a detainee. *Castillo Páez*, at paras. 58-59.

[32] *Velásquez Rodríguez*, at para. 129; *Godínez Cruz*, at para. 135; *Fairen Garbi and Solís Corrales*, at para. 132; *Gangaram Panday*, at para. 49 (italics added).

[33] *Paniagua Morales*, at para. 71, *Velásquez Rodríguez*, at paras. 134-138 and *Godínez Cruz*, at paras. 140-144: "The international protection of human rights should not be confused with criminal justice. States do not appear before the Court as defendants in a criminal action. The objective of international human rights law is not to punish those individuals who are guilty of violations, but rather to protect the victims and to provide for the reparation of damages resulting from the acts of the States responsible."

regard to forced disappearance cases in which the evidence is by definition scarce, the Inter-American Court adopts international jurisprudence recognizing the power of courts to freely weigh evidence, avoiding a rigid rule regarding the amount of proof necessary to support a judgment.[34]

C. Admissibility of evidence

The Inter-American Court has a liberal rule governing the admissibility of evidence and has shown flexibility in its evidentiary review. It has found circumstantial or presumptive evidence to be "especially important in allegations of disappearances, because this type of repression is characterized by an attempt to suppress all information about the kidnaping or the whereabouts and fate of the victim."[35] The use of indirect and circumstantial evidence is essential in cases of forced disappearances, since the little direct evidence that may exist is in the control of the accused state. The Inter-American Court takes into account both direct and indirect evidence, "in accordance with the rules of logic and on the basis of experience."[36]

V. Disappearances and the Right to Life

The documented history of disappearances in Latin America and in other parts of the world has repeatedly demonstrated that this is a crime which most often leads to the death of the victim. In the overwhelming majority of cases, victims of forced disappearances die while in detention. In fact, "they are victims of a secret violation of the right to life."[37] International bodies have also noted the fatal nature of the crime; for instance, the Inter-American Court has pronounced on several occasions that forced disappearances frequently involve the violation of the right to life.[38] The

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[34] *Paniagua Morales*, at para. 70.

[35] *Velásquez Rodríguez*, at para. 131. See also, *Godínez Cruz*, at para. 155: "in cases of forced disappearances of human beings, circumstantial evidence on which a judicial presumption is based is especially valid." See also, *Gangaram Panday Case*, Inter-Am. Ct.H.R., Judgment of January 21, 1994, Series C, No. 16 (hereinafter, "*Gangaram Panday*"), at para. 49; *Blake*, at paras. 47 and 49; *Paniagua Morales*, at para. 72; *Castillo Páez*, at para. 39; *Loayza Tamayo Case*, at para. 42.

[36] *Castillo Páez*, at para. 39: "the criteria used in evaluating the evidence before a human rights tribunal possess special characteristics, since the determination of a State's international responsibility for violation of the rights of a human person bestows greater latitude in the evaluation of the testimony it has heard on the pertinent facts, in accordance with the rules of logic and on the basis of experience (citation to *Loayza Tamayo*)."

[37] Nigel S. Rodley, THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW, 2nd ed., Oxford, 1999 (hereinafter, "Rodley"), at 246. See also, "DISAPPEARANCES" AND POLITICAL KILLINGS: HUMAN RIGHTS CRISES OF THE 1990S. A MANUAL FOR ACTION, Amnesty International, Amsterdam, 1994, at 85: "... often the 'disappeared' are never seen again alive. As time passes the fear will grow that a 'disappeared' person has been killed, ... [The victims] must face the prospect of being killed, and indeed this is often how their life ends." See also, Juan E. Méndez et. al., "Disappearances and the Inter-American Court: Reflections on a Litigation Experience," 13 Hamline L.Rev. 507, at 511: "For the most part, [the policy of disappearances] includes the decision to eliminate the victim as soon as he or she ceases to provide any intelligence, and to dispose of the corpse in a way to ensure the continued 'deniability' of the process."

[38] "[the] practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life...." *Velásquez Rodríguez*, at para. 157; *Godínez Cruz*, at para. 165. See also, *Blake*, at para. 66, stating that forced or

United Nations has issued similar language, stating in the Declaration on the Protection of All Persons from Enforced Disappearances that forced disappearances violate or constitute a grave threat to the right to life.[39]

In the inter-American system, a violation of the right to life as a consequence of a forced disappearance can be proven in two different ways. First, it may be established that the facts of the case at hand are consistent with an existing pattern of disappearances in which the victim is killed. Second, the facts of an isolated incident of a fatal forced disappearance can be proven on their own, independent of a context of an official pattern of disappearances. Both methods are used to establish state control over the victim's fate which, in conjunction with the passage of time, leads to the conclusion of a violation of the right to life.

Using the first approach involves proving that an officially tolerated or sponsored pattern of forced disappearances that results in the death of the victim existed in the region, and that the victim's disappearance is linked to such practice.[40] In cases that meet the evidentiary standards on both points, the Inter-American Court will deem the Inter-American Commission's case to be proven.[41]

Evidence linking the disappearance of the victim to the practice includes the amount of time that has passed without information regarding the victim. In *Velásquez Rodríguez*, for instance, the Inter-American Court found that the victim's right to life had been violated, given both the circumstances of the disappearance and the fact that seven years had passed without any knowledge of the fate of the victim. These facts, taken together, create "a reasonable presumption that he was killed."[42] Similarly, in *Godínez Cruz* the Inter-American Court found a violation of the victim's

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involuntary disappearances constitute one of the most grave and cruel of human rights violations, which not only causes the arbitrary deprivation of liberty but also endangers personal integrity, security and the life of the detainee. See also, *Fairén Garbi and Solís Corrales*, at para. 150: "the practice of forced disappearances has often implied the secret execution of prisoners, without a trial, and the hiding of their bodies. That violation of the right to life infringes on Article 4 of the Convention."

[39]Declaration on the Protection of all Persons from Enforced Disappearances, U.N. Res. 47/133, Article 1.

[40]See quote at footnote 27, above.

[41]The amount of evidence necessary to establish the existence of a pattern varies from the presentation of documentary and personal evidence, such as expert reports, eye-witness accounts and testimony to the use of press clippings and indirect evidence. An exact standard has not been established for concluding that a pattern of practice exists within a country; the Inter-American Court takes into consideration all of the relevant evidence, defined broadly, as described above. See, e.g., *Castillo Páez*, at para. 42: "On the basis of the documentary and personal evidence, especially the expert report submitted by the Commission, the Court deems it to have been proven that during the period in question, there existed in Peru a practice on the part of the forces of law and order which consisted in the forced disappearance of persons thought to be members of subversive groups, a practice well-publicized by the press." See also, *Velásquez Rodríguez*, at para. 146, discussing the admissibility into evidence of certain press clippings: "many of them contain public and well-known facts which, as such, do not require proof; others are of evidentiary value, as has been recognized in international jurisprudence ... insofar as they textually reproduce public statements, especially those of high-ranking members of the Armed Forces, of the Government, or even of the Supreme Court of Honduras, such as some of those made by the President of the latter. Finally, others are important as a whole insofar as they corroborate testimony regarding the responsibility of the Honduran military and policy for disappearances."

[42]*Velásquez Rodríguez*, at para. 188.

right to life, considering the context of the disappearance and the lack of information six and a half years later about his fate.[43]

The second approach is to prove the facts of an individual death which resulted from a forced disappearance. One crucial element in demonstrating state responsibility for such a violation is showing that the victim was in the custody of state actors, whether lawfully or unlawfully. For instance, in *Neira Alegría*, it was established that the victims were legally in state custody. Since they were later unaccounted for, the sole fact of having proved state responsibility shifted the burden onto the state to explain the whereabouts of the victims, in accordance with the principles of evidence described in Section IV above. In the view of the Inter-American Court, the government was, or should have been, in control of evidence regarding the victims.[44]

In addition to proving state control, the elapse of time creates a presumption that the victim has died as a result of an isolated incident of forced disappearance, as in proving a case of a pattern of practice. In *Neira Alegría*, the Inter-American Court maintained that, among other things, the fact that eight years had passed without record of the three victims led to the reasonable conclusion that they were killed.[45] Additionally, in *Castillo Páez* the Inter-American Court considered the amount of time that had elapsed since the victim had disappeared (seven years), and concluded that indeed there had been a violation of the right to life.[46] In that case, the Inter-American Court reaffirmed that "the disappearance of persons violates several rights established in the Convention including the right to life, when, as in this case, several years have passed without knowledge of the victims whereabouts (citations to *Neira Alegría*, *Caballero Delgado*, and *Blake*)."[47]

Along these lines, the Inter-American Court in *Castillo Páez* dismissed the state's line of reasoning that a violation to the right to life cannot be concluded without additional evidence, namely, the body of the victim.[48] Having established the abduction by the police, the Inter-American Court rejected the argument that a body should be required as evidence of the violation of the right to life, because typically the perpetrators of forced disappearances destroy all trace of the crime, including the corpse. It stated:

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[43]*Godínez Cruz*, at para. 198.

[44]*Neira Alegría*, at para. 65; *Paniagua Morales*, at paras. 3-7.

[45]*Neira Alegría*, at para. 76.

[46]*Castillo Páez*, at para. 70-71: "The Court deems to have been proven the violation of Article 4 of the Convention which protects the right to life, inasmuch as Mr. Castillo Páez was arbitrarily detained by agents of the Peruvian police force, that the detention was denied by the authorities who, on the contrary, hid him so that he would not be located, and his whereabouts have been unknown since that time, so that it may be concluded that the victim was deprived of his life, given the time that has elapsed since October 21, 1990."

[47]*Id.*, at para. 72.

[48]*Id.*, at para. 71.

"The State's argument that the fact that there is no knowledge of a person's whereabouts does not mean that he has been deprived of his life, since 'the body in the crime [...] would be missing,' which it claims to be a requirement of contemporary criminal doctrine, is inadmissible. This reasoning is unsound since it would suffice for the perpetrators of a forced disappearance to hide or destroy a victim's body, which is frequent in such cases, for there to be total impunity for the criminals, who in these situations attempt to erase all traces of the disappearance."[49]

These cases demonstrate the Inter-American Court's willingness to find a violation of the right to life of a forced disappearance victim on the sole basis of proven state custody, without further evidence. Given the scarcity of direct evidence in cases where the body of the victim is not found, the Inter-American Court will consider proof that the victim was in state custody to be sufficient to shift the burden to the state, which is in control of the evidence, and which must then prove that the detainee has not been killed. Relevant evidentiary standards do not require production of additional evidence such as the confession of a perpetrator, eye-witness testimony, a corpse, or blood in order to establish the violation of the right to life.

Moreover, it is incumbent upon the accused state to produce any information it has regarding the victim. In the inter-American system, there is a recognized duty of the state to investigate human rights violations,[50] which continues as long as information about the fate of the victim is lacking.[51] Conducting an investigation into cases of forced disappearances deters repetition of the crime and strengthens judicial due process, while failure to do so constitutes a blatant disregard by the state of the rights that have been violated and compounds the crime.[52] In fact, the lack of investigation of the crime implies a violation of the guarantee of the right to life.[53]

VI. Disappearances and the Prohibition Against Torture

Both inter-American and other international legal instruments recognize the strong correlation between acts of forced disappearance on one hand and torture and cruel and inhuman

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[49] *Id.*, at para. 73.

[50] *Velásquez Rodriguez*, at para. 174: "The State has the duty ... to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation." See also, *Godínez Cruz*, at para. 184; *Castillo Páez*, at para. 90. See also, the U.N. Declaration on the Protection of All Persons from Enforced Disappearances (U.N. Res. 47/133), Article 13, which calls on governments to ensure effective investigations into cases of forced disappearances.

[51] *Velásquez Rodriguez*, at para. 181; *Godínez Cruz*, at para. 191.

[52] See, TEN YEARS OF ACTIVITIES, at 319-320: "[Disappearances are] a demonstration of the government's inability to maintain public order and state security by legally authorized means and of its defiant attitude towards national and international agencies engaged in the protection of human rights. ... [The] lack of an immediate acknowledgment of detention may lead to the disappearance of a person or to the practice of other abuses which endanger the life or physical integrity of the person detained."

[53] *Velásquez Rodriguez*, at para. 188.

treatment on the other. Several Articles of the American Declaration of the Rights and Duties of Man call for the protection of the right to personal integrity, which encompasses the prohibition of torture and cruel and inhuman treatment: Article I, Article XXV and Article XXVI.[54] The American Convention contains similar provisions in Article 5 regarding the right to humane treatment.[55] The United Nations Declaration on the Protection of All Persons from Enforced Disappearances refers to the connection between forced disappearances and torture in Article I, which states that "Any act of enforced disappearance... constitutes a violation of ... the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment."[56]

Inter-American jurisprudence is consistent with such legal instruments and has found state responsibility for torture in cases of forced disappearances. In *Velásquez Rodríguez* and *Godínez Cruz*, the Inter-American Court found convincing the fact that the Honduran government had subjected other detainees to cruelty and torture, as well as the history of disappearances in that country, in order to conclude that these victims had also been tortured. It is of sufficient probative value that incidents of forced disappearances tend to involve acts of torture. The Inter-American Court stated:

> "investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the [American] Convention."[57]

In addition to finding torture, the Inter-American Court has determined that forced disappearance or *incommunicado* detention of the victim at the hands of the state in itself constitutes proof of cruel and inhuman treatment. It elaborated its view in *Velásquez Rodríguez* and *Godínez Cruz*, where it stated that:

> "the mere subjection of an individual to prolonged isolation and deprivation of communication is in itself cruel and inhuman treatment which harms the psychological and

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[54]American Declaration of the Rights and Duties of Man was adopted by the Ninth International Conference of American States in Bogotá, Colombia, 1948. Article I reads: "Every human being has the right to life, liberty and the security of his person." Article XXV includes in part: "No person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law. ... Every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. He also has the right to humane treatment during the time he is in custody." Article XVII states in part: "Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

[55]Article 5 of the American Convention states: "1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."

[56]Article I, United Nations Declaration on the Protection of all Persons from Enforced Disappearances, (U.N. Res. 47/133).

[57]*Velásquez Rodríguez*, at para. 156; *Godínez Cruz*, at para. 164.

moral integrity of the person, and violates the right of every detainee under Article 5(1) and 5(2) to treatment respectful of his dignity."[58]

The Inter-American Court presumes that a person held at the mercy of state agents who deny the detention will suffer anguish which amounts to cruel and inhuman treatment. This line of reasoning has been followed by the Inter-American Court in recent cases of isolated incidents of *incommunicado* detention, even in a detention admitted by state authorities. The Inter-American Court stated:

> "One of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effect that it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position and increases the risk of aggression and arbitrary acts in prisons."[59]

Notably, the Inter-American Court has also concluded that the right to life and to humane treatment are threatened in the absence of protection of *habeas corpus*, implicit in a disappearance case. It stated in an advisory opinion that:

> "Habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment. This conclusion is buttressed by the realities that have been the experience of some of the peoples of this hemisphere in recent decades, particularly disappearances, torture and murder committed or tolerated by some governments. This experience has demonstrated over and over again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended."[60]

Finally, the Inter-American Court has found that forced disappearances affect not **only** the person abducted but also his or her family. The disappeared person is first victimized. Then, the victim's family is left in a state of helplessness because of the complete absence of knowledge of the fate of the victim, which in turn generates further suffering. This is compounded by the denial of *habeas corpus* petitions which may be filed by family members on behalf of the victim. Such distress has been characterized by the Inter-American Court as a violation of family members' rights against cruel and inhuman treatment.[61]

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[58] *Velásquez Rodríguez*, at para. 187; *Godínez Cruz*, at para. 197.

[59] *Suárez Rosero*, at para. 90.

[60] Inter-Am. Ct.H.R., Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), advisory Opinion OC-8/87 of January 30, 1987, Series A, No. 8. See also, *Castillo Páez*, at para. 83.

[61] *Blake*, at para. 114.

VII. Conclusion

In sum, given the drastic nature of the crime of forced disappearances and the scarcity of direct evidence in most cases, the Inter-American Court will consider both direct and indirect evidence to inductively conclude that the victim of a forced disappearance has been killed or tortured.[62] Moreover, taking into account the concerted efforts of the perpetrators to erase any traces of the crime, the Inter-American Court has shifted the burden of proof in certain circumstances in order not to legitimize impunity for those states which have perfected the technique of forced disappearances, leaving no witnesses or evidence of their crime.

CEJIL would ask that the Court consider the ramifications of finding no violation to the right to life or the right to humane treatment for the victim of a forced disappearance. The international community has made clear that the practice of forced disappearances constitutes a crime against humanity and mocks the rule of law.[63] Should the perpetrators of such crimes find that, by the very nature of the crime, it is impossible to prove their responsibility for the fate of the victim, then the crimes will continue and the recommendations of the General Assemblies of the Organization of American States and the United Nations that forced disappearances be investigated and stopped, will come to naught.

In the words of Ernesto Sábato:

> "They [the victims] were brutally snatched, no longer existing in the eyes of the law. Who exactly had taken them? Where were they? There were no precise answers to these anguished pleas: the authorities had never heard of them, prison cells had never housed them, the justice system disowned them. An ominous silence surrounded them. No kidnappers, no place of captivity, no punishment for the guilty. Days, weeks, months, years of uncertainty and anguish passed..."[64]

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[62] *Castillo Páez*, at para. 39.

[63] The practice of forced or involuntary disappearances has been characterized by the General Assembly of the Organization of American States as a crime against humanity, weakening those norms that guarantee protection against arbitrary detention and the right to personal safety and security. (AG/RES. 666 (XIII-0/83) (OAS General Assembly Resolution adopted on Nov. 18, 1983); AG/RES. 742 (XIV-0/84) (OAS General Assembly Resolution adopted on Nov. 17, 1984); AG/RES. 950 (XVIII-0/88) (OAS General Assembly Resolution adopted on Nov. 19, 1988); AG/RES. 1022 (XIX-0/89) (OAS General Assembly Resolution adopted on Nov. 18, 1989); AG/RES. 1044 (XX-0/90) (OAS General Assembly Resolution adopted on June 8, 1990).) See also, Rome Statute of the International Criminal Court, July 17, 1998, Article 7; Rodley, at 267-69; and U.N. Res. 47/133.

[64] LA DESAPARICIÓN FORZADA CRIMEN CONTRA LA HUMANIDAD, APDH, Buenos Aires, 1987, at 19, prologue by Ernesto Sábato, who headed the Argentine National Commission on the Disappearances of Persons (unofficial translation).

Appendix A: The Center for Justice and International Law

The Center for Justice and International Law (CEJIL) is a regional non-governmental organization working toward the full respect of basic human rights throughout the Americas and the Caribbean through the use of the Inter-American System for the protection of Human Rights. Established in 1991 by a group of prominent human rights defenders from Latin American and the Caribbean, CEJIL is today the leading organization in the fields of defense, legal assistance, education and oversight of the inter-American system for the protection of human rights.

CEJIL's work is divided into four separate areas: (A) Defense; (B) Consulting Services and Training; (C) Publications: and (D) the Strengthening of the Inter-American System of Human Rights.

(A) Defense

A central element of CEJIL's work has been the defense of human rights before the Inter-American Commission and Court. CEJIL litigates more than 150 cases in about 22 countries, and serves as adviser to the Commission in 95% of the cases litigated before the Court, by far the largest and most effective effort of furthering human rights in the inter-American system.

The litigation of cases before the Commission has been the result of a joint effort with over 120 local NGO's in several countries and has focused on attacking the roots and consequences of the most prevalent human rights abuses in Latin America. These include, *inter alia*, forced disappearances, extrajudicial executions, due process violations, inhumane prison conditions, obstructions to freedom of expression, children's rights, inhumane treatment and torture, and discrimination. CEJIL has brought these cases to fruition by closely and directly monitoring the adjudicative process, developing and advancing creative legal arguments, and constantly updating case files with relevant information.

Before the Court, CEJIL has played an instrumental role in aiding the Commission to advance important jurisprudential precedent regarding prevalent human rights violations in the Americas. Indeed, CEJIL has participated in the litigation of nearly all cases involving forced disappearance before the Court, including Velásques Rodríguez, which has since become the leading case on forced disappearances in the inter-American system.

The ultimate goal of CEJIL in the litigation of cases is the integration of international human rights norms into domestic legislation. For this reason, CEJIL concentrates its limited resources on illustrative cases that could have a direct legal, social or political impact for the purpose of encouraging local governments to modify laws and practices according to the standards set forth in international treaties which they have signed. To this end, CEJIL also assists the efforts of local human rights activists in introducing international jurisprudence into domestic courts by filing *amicus briefs* in local cases that raise human rights concerns.

Moreover, CEJIL believes that international systems for the protection of human rights benefit greatly from developing consistent international jurisprudence. For this reason, CEJIL has, from time to time, responded enthusiastically to requests from human rights organizations from Europe and Africa by presenting *amicus briefs* to the European Court of Human Rights or to the African Commission on human rights violations, particularly in the area of forced disappearance and extrajudicial executions.

(B) Consulting Services and Training

In addition, CEJIL has been instrumental in training and providing technical assistance to hundreds of non-governmental organizations (NGO's) in Latin America and the Caribbean that litigate human rights cases before the Commission and the Court. CEJIL offers substantive legal and procedural advice on a permanent basis and free of charge to NGOs that are currently litigating or wish to present cases before the inter-American system.

CEJIL also organizes educational programs throughout the Americas and the Caribbean on the use of international mechanisms to protect human rights both domestically and internationally. CEJIL has gained considerable knowledge and experience in bringing cases before the inter-American system, and its attorneys are therefore well-situated to develop and employ educational materials regarding the international protection of human rights.

Moreover, CEJIL has advised NGOs through the elaboration of reports on topics such as: the rights of indigenous peoples from the perspective of international law; the strengthening of civil society; the role of the armed forces in a democratic state; amnesty laws in light of international human rights norms; torture; forced disappearances, the use of international mechanisms for the protection of human rights; freedom of expression; and procedure for hearings before the Commission.

(C) CEJIL Publications

Currently there is a very limited amount of information available on the practice and application of international human rights law in the inter-American system. To meet this need, CEJIL publishes a *Gazette* in English, Spanish and Portuguese. Its intention is to educate its readers about the defense of international human rights in Latin America, precedents established by international bodies, and in general, the activities of the Commission and the Court. CEJIL believes this information should be easily accessible to victims, families, local NGO's and governments. The *Gazette* is, therefore, distributed widely across the Americas, as well as in Africa and Europe.

(D) The Strengthening of the Inter-American System of Human Rights

In 1996, as a result of an effort lead by several States, the inter-American system of human

rights protection faced one of the most important political challenges since its creation. In June of 1996, the General Assembly of the OAS approved a resolution that charged the Permanent Council with the task of evaluating the operation of the inter-American system and recommending reforms. NGOs, lawyers, human rights activists and governments share a sincere interest in seeing the Commission streamline its procedures to become more efficient and expedient. However, as the reform process began, only the governments were party to official reform discussions. In the absence of a plurality of voices, the future of the inter-American system was at the mercy of State interests, and many States, in fact, sought to restrict the system's scope and power.

In light of this and with the goal of producing a frank dialogue about the system's reform, CEJIL has established a Campaign to Strengthen the Inter-American System. Within this framework, we have created a network of NGO's, periodically distributed information about events taking place at the government levels, conducted analysis and put together proposals for effective action. In addition, CEJIL has facilitated meetings, seminars, round table discussions, and ongoing communications among several NGO's throughout the continent. Through these efforts, we hope to achieve our goal of producing reforms which fortify, rather than weaken, the system.

To date, these efforts have been successful in many ways. As a result of the information campaign, the most damaging proposals have been stopped and the terms of the debate has changed. The debate is now centered on the need to streamline some procedures and make international protection more effective. The campaign has also defended the integrity of the monitoring bodies of the inter-American system by successfully lobbying against the election of new members whose lack of commitment to human rights protection would have undermined the system's integrity. Moreover, CEJIL has coordinated the lobbying efforts before the OAS General Assembly to promote the adoption of human rights resolutions and treaties, as well as to ensure the formal participation of civil society in the decisions taken by the OAS affecting human rights.

CEJIL's work is conducted from its main office in Washington, DC, the home of the Inter-American Commission (the Commission), from its regional offices in Costa Rica, the home of the Inter-American Court (the Court), and Brazil, and through its legal representatives in Chile, Argentina, Paraguay and Geneva, the home of the United Nations headquarters. Moreover, CEJIL continues to benefit greatly from the advise of several prominent human rights activists who serve on our Board of Directors: Ligia Bolívar of the Programa Venzolano de Educación-Acción en Derechos Humanos, Michael McCormack of the Guyana Human Rights Association, Mariclaire Acosta of the Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, Hellen Mack Chang of the Myrna Mack Foundation, Benjamín Cuellar of the Institute de Derechos Humanos de la Universidad "José Simeón Cañas," Gustavo Gallón of the Comisión Colombiana de Juristas, Alejandro Garro, professor at Columbia University Law School, Paulo Sérgio Pinheiro of the Nucleo de Estudos da Violencia da Universidade de Sao Paulo, and José Miguel Vivanco of Human Rights Watch/Americas.

Appendix D

Ertak v Turkey: Decision of the European Commission of Human Rights

COMMISSION EUROPÉENNE DES DROITS DE L'HOMME

Requête N° 20764/92

İsmail ERTAK

contre

Turquie

RAPPORT DE LA COMMISSION

(adopté le 4 décembre 1998)

TABLE DES MATIERES

I. INTRODUCTION

1. On trouvera ci-après un résumé des faits de la cause, tels qu'ils ont été exposés par les parties à la Commission européenne des Droits de l'Homme, ainsi qu'une description de la procédure devant la Commission.

A. LA REQUETE

2. Le requérant, de nationalité turque, est né en 1930 et est domicilié à Şırnak. Devant la Commission il est représenté par M. Kevin Boyle et Mme Françoise Hampson, enseignants à l'université d'Essex (Angleterre).

3. La requête est dirigée contre la Turquie. Le Gouvernement défendeur a été représenté par M. Aslan Gündüz, professeur à l'université de Marmara, en qualité d'agent.

4. La requête concerne la disparition du fils du requérant pendant sa garde à vue. Le requérant invoque l'article 2 de la Convention.

B. LA PROCEDURE

5. La présente requête a été introduite le 1er octobre 1992 et enregistrée le 2 octobre 1992.

6. Le 11 octobre 1993, la Commission a décidé, en application de l'article 48 par. 2 b) de son Règlement intérieur, de donner connaissance de la requête au gouvernement mis en cause et d'inviter les parties à présenter des observations sur sa recevabilité et son bien-fondé.

7. Le Gouvernement a présenté ses observations le 21 février 1994, après prorogation du délai imparti à cet effet. Le requérant n'a pas présenté d'observations en réponse au stade de la recevabilité de la requête. Il a expliqué que tous les documents concernant sa requête ont été saisis par les forces de l'ordre lors de l'arrestation de Maître Tahir Elçi, son ancien représentant.

8. Le 4 décembre 1995, la Commission a déclaré la requête recevable.

9. Le 11 décembre 1995, la Commission a adressé aux parties le texte de sa décision sur la recevabilité de la requête et les a invitées à lui soumettre toute information ou observation complémentaire sur le bien-fondé de la requête dont elles souhaitaient faire état. Les parties n'ont pas présenté d'observations.

10. Le 30 novembre 1996, la Commission a décidé de procéder à l'audition de témoins pour vérifier les allégations du requérant. Elle a désigné trois délégués à cet effet : MM. G. Jörundsson, B. Conforti et N. Bratza.

11. La délégation a entendu des témoins entre les 3 et 8 février 1997 à Ankara. Lors de ces auditions, le Gouvernement était représenté par MM. Şükrü Alpaslan, Durmuş Tezcan, Fırat Polat, Abdülkadir Kaya, Aydın Kurudal, Orhan Sever, Mmes Meltem Gülşen et Nermin Erdim. Le requérant était représenté par ses conseils, Mmes Françoise Hampson, Aisling Reidy et M. Osman Baydemir, assistés d'interprètes.

12. Le 10 mars 1998, le requérant a soumis un mémoire contenant ses conclusions. Le Gouvernement ne s'est pas prévalu de cette faculté.

13. Après avoir déclaré la requête recevable, la Commission, conformément à l'ancien article 28 par. 1 b) de la Convention , s'est mise à la disposition des parties en vue de parvenir à un règlement amiable de l'affaire. Eu égard aux réactions des parties, la Commission constate qu'il n'existe aucune base permettant d'obtenir un tel règlement.

C. LE PRESENT RAPPORT

14. Le présent rapport a été établi par la Commission, conformément à l'ancien article 31 de la Convention, après délibérations et votes en présence des membres suivants :

MM. S. TRECHSEL, Président
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
MM. F. MARTINEZ
C.L. ROZAKIS
Mme J. LIDDY
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ

Mme M. HION
MM. R. NICOLINI
A. ARABADJIEV

15. Le texte du présent rapport, adopté par la Commission le 4 décembre 1998 sera transmis au Comité des Ministres du Conseil de l'Europe, en application de l'ancien article 31 par. 2 de la Convention.

16. Ce rapport a pour objet, conformément à l'ancien article 31 de la Convention :

(i) d'établir les faits, et

(ii) de formuler un avis sur le point de savoir si les faits constatés révèlent de la part du gouvernement défendeur une violation des obligations qui lui incombent aux termes de la Convention.

17. La décision de la Commission sur la recevabilité de la requête est jointe au présent rapport.

18. Le texte intégral de l'argumentation des parties ainsi que les pièces soumises à la Commission sont conservés dans les archives de la Commission.

II. ETABLISSEMENT DES FAITS

19. Les faits de la cause, notamment en ce qui concerne la prétendue garde à vue et la disparition de Mehmet Ertak pendant sa garde à vue aux alentours du 20 août 1992, sont contestés par les parties. C'est pourquoi la Commission, conformément à l'article 28 par. 1 a) de la Convention, a procédé à une enquête avec l'assistance des parties, et a pris acte des documents écrits et des dépositions orales qui lui ont été soumis. La Commission présente tout d'abord un bref résumé des faits, tels qu'ils ont été exposés par les parties ; puis elle résume les éléments de preuve qui lui ont été présentés.

A. Circonstances particulières de l'affaire

1. Les faits tels qu'ils ont été exposés par le requérant

20. Les divers comptes rendus des événements présentés par le requérant et des membres de sa famille dans leurs dépositions orales sont résumés dans la partie B intitulée : « Eléments de preuve devant la Commission ». La version donnée par le requérant dans ses observations finales sur le bien-fondé est brièvement résumée ci-après.

a. Quant à la disparition du fils du requérant

21. Suite à des incidents survenus à Şırnak (ville du sud-est de la Turquie) du 18 au 20 août 1992, plusieurs personnes furent placées en garde à vue le 21 août dans les locaux du commandement de la gendarmerie et de la direction de la sûreté de Şırnak.

Lors de ces événements, le fils du requérant, Mehmet Ertak, travaillait dans les mines de charbon.

22. Au point de contrôle de Bakımevi, des policiers en uniformes bleus arrêtèrent le taxi que Mehmet Ertak avait pris alors qu'il rentrait de son travail en compagnie de trois autres personnes, à savoir Abdulmenaf Kabul, Süleyman Ertak et Yusuf Ertak. Les policiers prirent leurs pièces d'identités et l'un d'entre eux vint demander qui était Mehmet Ertak. Celui-ci se présenta et ils l'emmenèrent avec eux.

23. Le lendemain, une connaissance, Abdullah Ertur, qui fut placé en garde à vue le 21 août 1992 et mis en liberté le 23 août 1992, affirma au requérant qu'il avait partagé une cellule avec Mehmet Ertak, toute une journée et une nuit.

24. Un avocat, Abdurrahim Demir, placé en garde à vue le 22 août 1992 et relâché le 15 septembre 1992, indiqua au requérant qu'il avait passé cinq ou six jours dans la même pièce que Mehmet Ertak. Il exposa en outre que Mehmet Ertak avait été sévèrement torturé ; la dernière fois, notamment, il était resté dans la « salle de torture » environ quinze heures. Il indiqua que lorsque Mehmet Ertak avait été ramené dans la cellule, il était inconscient et ne donnait aucun signe de vie. Quelques minutes plus tard, on l'avait sorti de la cellule en le tirant par une jambe.

25. Une autre personne, Ahmet Kaplan, également relâchée le 15 septembre 1992, indiqua au requérant qu'il avait vu son fils lors de sa détention.

26. Les trois personnes placées en garde à vue à la même période dans les locaux de la sûreté, indiquèrent eux aussi, lors d'un entretien à la prison de Şırnak avec le requérant qui était venu leur rendre visite, qu'ils avaient vu Mehmet Ertak pendant la garde à vue.

27. Le requérant présenta une requête au préfet de Şırnak afin de connaître la raison pour laquelle son fils n'avait pas été libéré et afin de savoir où il se trouvait. Il était accompagné par les élus du quartier, Abdullah Sakın et Ömer Yardımcı, ainsi que de son autre fils Hamit Ertak. Le préfet, M. Mustafa Malay, entendit comme témoin oculaire Abdullah Ertur qui confirma avoir vu Mehmet Ertak dans les locaux de la sûreté. Le préfet effectua des recherches auprès des militaires et de la police. Ces derniers indiquèrent que Mehmet Ertak n'avait jamais été placé en garde à vue.

28. Par lettre du 4 novembre 1992, le préfet demanda à la direction générale de la sûreté de charger un enquêteur de mener une enquête sur les allégations du requérant.

29. Le 2 octobre 1992, le requérant porta plainte auprès du parquet du Şırnak. Il demanda à être informé du sort de son fils. Il précisa qu'alors que plusieurs témoins affirmaient avoir vu son fils pendant la période de la garde à vue, la préfecture, la police et les militaires indiquaient, quant à eux, que Mehmet Ertak n'avait jamais été placé en garde à vue.

30. Le 8 avril 1993, l'enquêteur présenta son rapport au conseil administratif de Şırnak en proposant de ne pas saisir les juridictions.

31. Le 21 juin 1993, le procureur de la République de Şırnak se déclara incompétent et renvoya le dossier au conseil administratif du département de Şırnak afin que celui-ci menât l'instruction.

32. Le 11 novembre 1993, le conseil administratif de Şırnak rendit une ordonnance de non-lieu à l'égard des fonctionnaires de police de la direction de la sûreté de Şırnak. Il considéra que les faits allégués n'avaient pas été établis.

33. Le 22 novembre 1993, conformément aux dispositions légales en vigueur le dossier fut transmis au Conseil d'Etat. Par arrêt du 22 décembre 1993, le Conseil d'Etat confirma l'ordonnance de non-lieu rendue par le conseil administratif.

b. Quant aux prétendues tentatives d'ingérences dans l'exercice du droit de recours individuel Mesure prise contre Tahir Elçi, avocat du requérant lors de l'introduction de la requête

34. Le requérant affirme que les autorités ont intenté des poursuites contre Maître Tahir Elçi en raison du rôle qu'il a joué dans l'introduction des requêtes, dont la sienne, à la Commission européenne des Droits de l'Homme. Il affirme que le 23 novembre 1993, tous les documents relatifs à l'affaire furent saisis par les forces de l'ordre lors de l'arrestation de Maître Tahir Elçi.

2. Les faits tels qu'ils ont été exposés par le Gouvernement

35. Le 21 décembre 1994, la direction générale de la sûreté du ministère de l'Intérieur indiqua que Mehmet Ertak n'aurait jamais été placé en garde à vue.

36. Le 23 février 1995, le Gouvernement fournit le procès-verbal de saisie ainsi que la décision de la cour de sûreté de l'Etat de Diyarbakır, datée du 10 janvier 1994, faisant état des documents remis à Maître Tahir Elçi.

B. Eléments de preuve devant la Commission

a) Preuves écrites

37. Les parties ont soumis divers documents relatifs à l'enquête menée suite à la plainte pénale du requérant.

38. La Commission a notamment pris en compte les documents suivants :

1) Pétition déposée par le requérant le 2 octobre 1992 auprès du parquet de Şırnak

39. Le requérant allégua que suite aux événements survenus à Şırnak, son fils avait été arrêté le 20 août 1992 lors d'un contrôle d'identité alors qu'il rentrait de son travail en compagnie de trois membres de sa famille. Il précisa et nomma des témoins oculaires ayant affirmé avoir vu son fils pendant sa garde à vue. Il demanda à être informé du sort de son fils.

2) Ordonnance d'incompétence ratione materiae rendue le 21 juillet 1993 par le procureur de la République de Şırnak

40. Le parquet de Şırnak, par cette ordonnance, se déclara incompétent pour examiner la plainte pénale du requérant contre les fonctionnaires de police de la direction de la sûreté de Şırnak. Il rappela que les actions des forces de l'ordre placées sous les ordres du préfet de la région où l'état d'urgence est en vigueur devaient être soumises aux règles régissant les poursuites contre les fonctionnaires. Il renvoya le dossier au conseil administratif du département de Şırnak.

3) Documents relatifs à l'enquête menée par l'enquêteur, Yahya Bal

41. Par lettre du 4 novembre 1992, se référant à la pétition déposée par le requérant le 10 septembre 1992 auprès de la préfecture de Şırnak, le préfet de Şırnak, Mustafa Malay demanda à la direction générale de la sûreté de charger un enquêteur afin de mener une enquête sur les allégations du requérant.

42. Par lettre du 3 décembre 1992, le conseil d'inspection de la direction générale de la sûreté désigna Yahya Bal, inspecteur de police, comme enquêteur.

Yahya Bal entendit les témoins suivants :

43. a) Abdulmenaf Kabul, déposition faite le 12 janvier 1993: « J'habitais dans le même hameau que Mehmet Ertak et je le connaissais personnellement. Toutefois le nom de son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Lors des incidents j'étais chez moi et je n'ai pas été placé en garde à vue (par la sûreté) comme il a été allégué, ni ce jour-là ni les jours suivants. J'ai appris sa disparition lors de ma déposition faite auprès du parquet de Şırnak, où j'ai dit la même chose que ce que je dis devant vous. Moi et mes proches, nous avons travaillé comme gardes du village en 1987. Le frère de Mehmet Ertak, Salih, est actuellement militant du PKK et est parti dans les montagnes. Comme nous sommes pro-gouvernementaux ces personnes ont attaqué ma maison et celle de mes proches ; lors de cet incident, certains membres de ma famille et moi-même avons été blessés et mon cousin Hasan Ertak a été tué ; et depuis, nous sommes en litige avec eux. Ils auraient ainsi voulu mêler notre nom à cette affaire pour nous causer du tort; je n'ai aucune information sur la prétendue disparition de Mehmet Ertak et contrairement à ce qui a été allégué je n'ai pas été placé en garde à vue avec lui par la police. »

b) Süleyman Ertak, déposition faite par l'intermédiaire d'un interprète le 13 janvier 1993 : « Je connais Mehmet Ertak. Nous habitions dans le même hameau et nous travaillions de temps en temps ensemble dans les mines de charbon. Toutefois le nom de

son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Le jour de l'incident moi et mon neveu Yusuf travaillions dans les mines de charbon. Nous avons entendu des coups de feu venant de la ville et nous sommes allés sur la route principale pour pouvoir retourner en ville. Nous avons fait arrêter, en levant la main, un taxi venant de la direction de Cizre. Mehmet Ertak se trouvait dans ce taxi avec lequel nous sommes allés en ville. A l'entrée de la ville, les policiers faisaient un contrôle d'identité. Ils nous ont pris et contrôlé nos cartes d'identités à tous les trois et ils nous les ont rendues. Avec mon neveu nous sommes allés chez nous ; quant à Mehmet Ertak, il nous a quittés et, en nous disant qu'il avait des courses à faire, il s'est dirigé vers les épiceries qui se trouvaient de l'autre côté de la route. Je ne l'ai plus revu. Je ne sais pas où il est. Je n'ai pas été placé en garde à vue le jour de l'incident, soit le 18 août 1992 ou après cette date, ni seul ni avec Mehmet Ertak comme il a été allégué par son père. Je ne sais pas pourquoi ce dernier a fait cette déclaration. »

c) Yusuf Ertak, déposition faite par l'intermédiaire d'un interprète le 12 janvier 1993 :« Je connais Mehmet Ertak. Nous habitions dans le même hameau. Malgré le fait que nous avons le même nom de famille nous n'avons pas de lien de parenté. Toutefois le nom de son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Je n'ai pas été placé en garde à vue le 18 août 1992, à la station d'entretien de l'administration des routes nationales (Bakımevi), comme il a été allégué par le père de cette personne. Lors des incidents, je travaillais dans une mine de charbon se trouvant à 5-6 km de la ville. Nous avons entendu des coups de feu venant de la ville et avec les autres ouvriers nous avons voulu retourner en ville, mais la route était barrée par des soldats, ils avaient interdit les entrées et sorties de la ville. En raison de cela nous n'avons pas pu retourner à Şırnak et en conséquence je n'ai pas été placé en garde à vue. Je ne sais pas si Mehmet Ertak avait été placé en garde à vue par la police. J'ai oublié de vous dire qu'à la fin des incidents, je ne me rappelle pas l'heure, un taxi dans lequel se trouvait Mehmet Ertak est venu de la direction de Cizre. Je ne sais pas à qui appartenait ce taxi. Le soldat qui se trouvait sur les lieux nous a fait monter, moi et Süleyman Ertak, dans le taxi et nous a envoyés à Şırnak. Au point d'entrée se trouvaient des agents de police. Ils ont contrôlé nos pièces d'identité et puis Mehmet Ertak nous a quittés et s'est dirigé vers les épiceries qui se trouvaient en face. Nous sommes allés chez nous, toutefois les policiers n'ont placé en garde à vue ni nous ni Mehmet Ertak. Je ne sais pas pourquoi son père a dit cela. »

d) Abdullah Ertur (Ertuğrul) déposition faite le 12 janvier 1993 : « Le 18 août 1992, suite aux incidents survenus à Şırnak, dans la journée, les policiers m'ont arrêté chez moi ; je rectifie : les soldats m'ont arrêté et m'ont remis aux mains des policiers. Après l'instruction menée par la sûreté, le lendemain j'ai été mis en liberté. Quand je suis revenu chez moi, le père de Mehmet Ertak, que je connaissais personnellement des mines de charbon où nous travaillions ensemble, est venu me voir. Il m'a demandé si j'avais été placé en garde à vue et si son fils aussi était dans les locaux de la sûreté. Je lui ai répondu que nous étions une quarantaine ou cinquantaine mais que je n'avais pas vu son fils parmi ces personnes. Toutefois, dans sa plainte pénale, il avait menti en exposant le contraire. Je ne sais pas pour quel motif il a agi ainsi mais nous ne parlons pas avec la famille Ertak. Leur fils, Salih Ertak, qui est avec le PKK et les amis de celui-ci avaient tué mon oncle Hasan Ertak. Il a dit cela pour susciter un différend entre nous et les forces de l'ordre. Je

répète qu'il ment. Je ne suis pas resté dans la même cellule que Mehmet Ertak et je ne sais où il se trouve actuellement. »

4) Résumé de l'enquête présenté le 8 avril 1993 par Yahya Bal

44. L'enquêteur Yahya Bal établit les faits comme suit :

« (...)İsmail Ertak allègue dans sa pétition déposée auprès du préfet le 10 septembre 1992 que son fils Mehmet Ertak avait été placé en garde à vue suite aux incidents survenus à Şırnak le 18 août 1992, et que depuis cette date il n'a aucune nouvelle de lui. »

L'enquêteur releva que dans le cadre de l'enquête il est allé sur les lieux et a examiné les registres de garde à vue dont les copies sont annexées à son rapport. Il observa en outre qu'il n'avait pas pu entendre İsmail Ertak au motif que son adresse était inconnue des autorités.

45. Conclusion de l'enquêteur Yahya Bal et motifs qui l'ont amené à cette conclusion :

L'enquêteur releva que malgré des lettres envoyées à la direction de la sûreté demandant l'audition d'İsmail Ertak qui aurait déménagé à Silopi, les autorités n'avaient pas pu trouver son adresse. Il observa qu'il ressortait des dépositions d'Abdulmenaf Kabul, Süleyman Ertak et Yusuf Ertak qu'ils n'étaient pas placés en garde à vue par la police ni avant ni après les incidents et que ce fait était prouvé par l'examen des registres de garde à vue. L'instructeur se référa en outre à la lettre envoyée par la direction de la sûreté de Şırnak faisant état de ce que Mehmet Ertak n'avait pas été placé en garde à vue lors ou suite aux incidents.

L'enquêteur constata qu'il ressortait de la déposition d'Abdullah Ertur que celui-ci avait été arrêté par les gendarmes et remis dans les mains de la police suite aux incidents survenus à Şırnak le 18 août 1992, qu'il avait été libéré le lendemain et que son nom figurait au 602ème rang du registre de garde à vue. Il releva qu'Abdullah Ertur avait indiqué dans sa déposition qu'il n'avait pas vu Mehmet Ertak dans les locaux de la sûreté et qu'il n'était donc pas resté avec lui dans la même cellule.

46. L'enquêteur conclut ce qui suit : « Je propose de ne pas saisir les juridictions, étant donné que les allégations d'İsmail Ertak et du député Orhan Doğan concernant la mise en garde à vue et la disparition de Mehmet Ertak lors de sa garde à vue sont dépourvues de fondement. »

5) Ordonnance de non-lieu rendue le 11 novembre 1993 par le conseil administratif du département de Şırnak

47. Selon cette ordonnance, signée par le préfet adjoint et les adjoints des directeurs ou directeurs des différents services publics du département (le poste de directeur des affaires juridiques était vacant à l'époque) et rendue à la suite de l'enquête menée par

l'enquêteur il n'y avait pas lieu de saisir les juridictions pénales contre les fonctionnaires de police de la direction de la sûreté de Şırnak.

Le conseil administratif estima que « l'examen du dossier démontrait que les allégations d'İsmail Ertak et du député Orhan Doğan concernant la mise en garde à vue et la disparition de Mehmet Ertak lors de sa garde à vue étaient dépourvues de fondement ».

6) Arrêt du Conseil d'Etat du 22 décembre 1993

48. Par cet arrêt, le Conseil d'Etat confirma l'ordonnance de non-lieu rendue le 11 novembre 1993, pour les motifs suivants :

« (...) Les délits commis par des fonctionnaires agissant dans l'exercice ou au titre de leurs fonctions sont soumis aux procédures régissant les poursuites à l'encontre des fonctionnaires (...), un enquêteur administratif chargé de mener l'enquête est nommé par ordonnance (...).

(...) Pour mener une enquête contre un fonctionnaire, il faut tout d'abord que celui-ci soit précisément identifié. Faute d'identification précise, aucune enquête ne peut être menée, aucun résumé d'enquête ne peut être rédigé et aucune juridiction compétente en la matière ne peut rendre de jugement.

Les informations contenues dans le dossier d'enquête n'ont pas permis de déterminer qui a commis les actes allégués ; en conséquence, cette enquête n'aurait pas dû être ouverte. Toutefois, un dossier d'enquête a été constitué par l'enquêteur désigné et, se fondant sur ce dossier, le conseil administratif du département a rendu une ordonnance de non-lieu, du fait que les responsables sont inconnus et qu'il est impossible d'enquêter sur l'affaire. Le Conseil décide à l'unanimité, pour les raisons susmentionnées, de confirmer la décision du conseil administratif et de retourner le dossier. »

b) Dépositions orales

1) İsmail Ertak

49. Le témoin, né en 1930, est le père de Mehmet Ertak. Il est le requérant dans la présente affaire. En août 1992 il entendit des coups de feu qui durèrent trois jours. La nuit des incidents, son fils Mehmet Ertak travaillait dans la mine de charbon.

50. Il expliqua que son fils n'était pas impliqué dans ces incidents et lui ainsi qu'une centaine de personnes n'avaient pas pu quitter les lieux de leur travail durant deux ou trois jours. Le 21 ou 22 août, Mehmet Ertak et trois autres villageois, à savoir Abdülmenaf Kabul, Yusuf Ertak et Süleyman Ertak prirent un taxi pour rentrer chez eux, à Şırnak.

51. Il exposa que son fils, père de quatre enfants vivait dans un hameau situé près de la ville et qu'avant l'incident il le voyait tous les jours.

52. Il avait été informé par Süleyman Ertak, Yusuf Ertak et Abdülmenaf Kabul que les agents de police du commissariat avaient arrêté le taxi au point de contrôle de Bakımevi (un quartier de Şırnak) et avaient pris leurs pièces d'identité. Ils avaient demandé « qui d'entre eux était Mehmet Ertak », avaient remis aux autres leurs pièces d'identité et avaient emmené Mehmet Ertak avec eux à la « cabane ».

53. Le témoin exposa qu'il s 'était rendu à la direction de la sûreté et avait demandé à être informé du sort de son fils. Toutefois un des responsables lui avait indiqué que son fils ne se trouvait pas dans les locaux de la sûreté. Il lui avait répondu qu'une connaissance, Abdullah Ertuğrul, lui avait affirmé qu'il avait vu Mehmet Ertak à la sûreté et qu'ils étaient dans la même cellule. Le policier lui avait recommandé de se rendre à la brigade.

54. Il indiqua qu'il avait rencontré d'autres personnes, notamment Abdurrahim Demir (un avocat), Ahmet Kaplan, Şeymus Sakın, Kıyas Sakın et Emin Kabul qui eux aussi lui avaient affirmé qu'ils avaient vu Mehmet à la direction de la sûreté. Il avait vu les quatre derniers à la maison d'arrêt de Şırnak. Selon Abdurrahim, Mehmet Ertak était inconscient et dans un mauvais état lorsque les policiers l'avait emmené dans la cellule après son interrogatoire.

55. Le témoin affirma qu'il s'était rendu au poste de commandement de la brigade où un major, après vérification de la liste des personnes gardées à vue, lui avait précisé que son fils n'avait pas été détenu à la caserne. Il avait en outre assisté à une réunion tenue dans la caserne et demandé de nouveau à cette occasion à être informé du sort de son fils. Il s'était rendu, accompagné des élus du quartier (muhtar), Abdullah Sakın (muhtar du quartier de Yeşilyurt) et Ömer Yardımcı (muhtar du quartier de Gazipaşa), devant le préfet de Şırnak et lui avait présenté Abdulah Ertuğrul. Ce dernier avait dit au préfet que lors de sa garde à vue, il avait passé une nuit dans la même cellule que Mehmet Ertak. Le préfet avait remis une lettre à l'élu du village et les avait envoyés à la direction de la sûreté. Le fils du témoin Hamit Ertak, Abdullah Sakın et Abdullah Ertuğrul s'étaient rendus à la direction de la sûreté.

56. Le témoin prétendit avoir porté plainte auprès du parquet de Şırnak ; il ne se rappelait pas si le parquet avait interrogé Abdullah Ertuğrul et les autres personnes qu'il avait mentionnées dans sa pétition. Il précisa que le parquet lui avait fait remarquer qu'il était fort probable que son fils était parti dans les montagnes. Il avait contesté cette allégation en expliquant que Mehmet avait quatre enfants et que sa femme était encore très jeune.

57. Il affirma qu'au courant de l'année, son fils Mehmet Ertak avait été interrogé par la police. Il ne savait pas pour quel motif il avait été appelé par la police. Il ajouta qu'un de ses fils, Mehmet Salih Ertak, avait disparu depuis 1989 et il avait entendu dire qu'il avait rejoint les camps du PKK. Il ne savait pas s'il est vivant ou mort. Un autre de ses fils, Mesut Ertak, impliqué dans un incident d'explosion, avait été jugé et condamné à 12 ans d'emprisonnement. Le témoin répéta que son fils Mehmet Ertak, père de quatre

enfants en bas âge, ne faisait que « travailler à droite et à gauche pour leur apporter du pain ». Il s'exprima ainsi : « Cet enfant (Mehmet) est innocent. Son frère est parti dans les montagnes depuis neuf ans. C'est peut être ça qu'on lui reproche ».

2) Mustafa Malay

58. Le témoin, né en 1948, était en août 1992 préfet de Şırnak.

59. Il expliqua que le 18 août 1992, des affrontements avaient eu lieu entre les forces de l'ordre et des terroristes qui avaient déclenché l'attaque. Plusieurs personnes avaient été tuées par balles. Les attaques venaient de la région où se trouvaient les mines de charbon. Suite à ces incidents les forces de l'ordre composées de policiers et de gendarmes avaient effectué des perquisitions et plus d'une centaine de personnes avaient été arrêtées et traduites devant les instances judiciaires. Une partie de ces personnes avaient été placées en garde à vue dans les locaux de la sûreté et d'autres au centre de détention de la brigade. Il indiqua que deux registres séparés étaient tenus.

60. Le témoin expliqua que les mines de charbon se trouvaient dans une région où les activités terroristes étaient assez intenses. Plus de la moitié des attaques terroristes à Şırnak se déroulaient près des mines. Il avait été informé qu'un nombre important d'ouvriers qui travaillaient dans les mines dans la journée participaient aux attaques terroristes pendant la nuit.

61. Le témoin indiqua que suite à cet incident İsmail Ertak était venu lui dire que son fils avait été placé en garde à vue et que depuis il n'avait aucune nouvelle de lui. Il avait téléphoné à Necati Altıntaş, le directeur de la police, et lui avait fait part des allégations en lui demandant d'effectuer de recherches et d'informer les personnes concernées. Il avait envoyé İsmail Ertak à la direction de la sûreté.

62. Le témoin précisa qu'İsmail Ertak, n'ayant pas été satisfait par la réponse de la police, était revenu un ou deux jours après lui présenter une pétition contenant les noms des personnes qui avaient dit avoir vu Mehmet Ertak lors de sa garde à vue. Il avait transmis ladite pétition à la direction de la sûreté et avait envoyé une lettre à la brigade de la gendarmerie en leur demandant d'enquêter sur l'affaire. La police et les militaires avaient répondu que Mehmet Ertak n'avait pas été placé en garde à vue.

63. Le témoin affirma avoir rencontré dans son office une personne qui lui avait affirmé être restée dans la même cellule avec Mehmet Ertak pendant toute une nuit. Il ne se rappelait pas si ce témoin s'appelait Abdullah Ertuğrul. Il avait conseillé à İsmail Ertak d'emmener ledit témoin oculaire devant le procureur de la République. Il avait en outre entendu d'autres personnes qui lui avaient indiqué avoir vu Mehmet Ertak lors de leur garde à vue dans les locaux de la sûreté.

64. Il affirma qu'İsmail Ertak avait suivi l'affaire et il était revenu le voir dans son bureau, cinq ou six fois en réitérant ses allégations. Il avait écrit une lettre confidentielle à la direction générale de la sûreté à Ankara et au ministère de l'Intérieur en demandant la

nomination d'un enquêteur pour mener l'enquête. Il indiqua que par la suite, il avait examiné les registres de garde à vue de la direction de la sûreté et constaté que le nom de Mehmet Ertak ne figurait pas sur la liste des personnes détenues. La gendarmerie l'avait informé oralement que Mehmet Ertak n'était pas détenu dans leurs locaux. Il ajouta qu'un enquêteur avait été chargé de l'enquête. Il avait été muté en février 1993 et ainsi il n'eut plus d'information sur le déroulement de l'enquête.

65. Le témoin décrivit les règles régissant les poursuites à l'encontre des forces de l'ordre : l'enquêteur nommé sur demande du préfet recueille tous les éléments de preuve, se rend sur les lieux, entend des témoins et soumet ses conclusions au conseil administratif. Le dossier est examiné par le conseil administratif, présidé par le préfet adjoint. La décision de saisir les juridictions pénales ou de rendre un non-lieu est prise par ledit conseil. Cette décision est notifiée au requérant.

3) Süleyman Ertak

66. Le témoin, né en 1952, travaillait dans les mines de charbon à l'époque des faits. Mehmet Ertak est son cousin.

67. Lors des incidents survenus à Şırnak il travaillait dans les mines de charbon. Mehmet Ertak, Abdulmenaf Kabul et Yusuf Ertak aussi se trouvaient dans les mines et travaillaient dans des endroits différents. A cause des incidents ils n'avaient pas pu retourner à Şırnak du 18 au 22 août. Ils étaient avertis par la station de la gendarmerie située près de la mine de ne pas quitter les lieux.

68. Il affirma que des affrontements avaient eu lieu en ville mais pas du côté des mines.

69. Le témoin indiqua qu'après quatre jours passés dans les mines ils avaient suivi la route principale, et pour rentrer à Şırnak ils avaient pris un taxi qui venait de la direction de Cizre. Il faisait presque nuit.

70. Près de Şırnak, dans la ville même, au point de contrôle, des policiers en uniforme bleu avaient arrêté le taxi qui les transportait et avaient demandé leurs cartes d'identité. Après avoir examiné les pièces d'identité dans une cabane ils avaient demandé « qui d'entre vous est Mehmet ? » Mehmet Ertak avait répondu « c'est moi ». Ils avaient emmené Mehmet Ertak avec eux et leur avaient ordonné de quitter immédiatement les lieux. Ils étaient montés dans le taxi et étaient retournés chez eux.

71. Le témoin exposa qu'un des fils d'İsmail Ertak, Salih Ertak, avait rejoint le PKK et était dans les montagnes. Il affirma que Mehmet Ertak était pauvre et n'était pas impliqué dans les incidents survenus à Şırnak.

72. Le témoin indiqua qu'İsmail Ertak lui avait demandé où était son fils et il l'avait informé de l'incident. Il n'avait pas été entendu par une autorité sur cet incident.

4) Ahmet Ertak

73. Le témoin, né en 1965, est le frère de Mehmet Ertak. A l'époque des faits, il résidait à Diyarbakır. Il précisa que lors des incidents, il était à Şırnak pour une visite à sa famille. Le 22 août 1992, il avait quitté la ville avec sa famille.

74. Il indiqua que son frère Mehmet Salih Ertak avait disparu depuis 1987. Ils avaient entendu dire qu'il avait rejoint les militants du PKK. Une confusion entre les deux frères lui paraissait improbable du fait que d'une part ils n'avaient pas de nouvelles de lui depuis des années et d'autre part Mehmet Ertak était né en 1960 et Mehmet Salih Ertak en 1973. Il affirma que son frère, avant sa disparition, n'avait jamais eu de problème avec les autorités et travaillait dans les mines pour subvenir aux besoins de sa famille. Il n'était pas assuré par l'employeur. Les mines se trouvaient à une distance d'environ 5 km de la ville.

75. Le témoin relata les incidents survenus à Şırnak. Le soir du 18 août, vers 19-20 heures ils avaient entendu des coups de feu ininterrompus pendant environ 60 heures. Personne n'avait pu sortir de chez soi et ils avaient entendu des annonces faites par la brigade qui indiquaient que la ville était attaquée. A la fin de la deuxième journée les tirs s'étaient tus durant une quinzaine de minutes pour repartir jusqu'au 19 août. Dans la soirée du 20 août les coups de feu avaient recommencé et continué sans interruption jusqu'au 21 août.

76. Le témoin raconta que les forces de l'ordre avaient procédé à une perquisition générale et plusieurs personnes avaient été emmenées à la brigade. La nuit du 21 août il y avait eu à nouveau des coups de feu. Des tirs partaient des véhicules blindés et des mortiers. Le matin du 22 août, sans attendre la fin des coups de feu, les habitants de Şırnak avaient quitté leurs maisons. Une partie de leurs maisons avaient été brûlées. Lors de ces incidents aucun terroriste n'avait été appréhendé, blessé ou tué.

77. Il avait été informé de l'arrestation de son frère dans la matinée du 22 août. Abdullah Ertuğrul leur avait affirmé qu'il avait partagé une cellule avec Mehmet Ertak lors de sa garde à vue. Abdullah Ertuğrul lui avait dit que plusieurs personnes étaient détenus au même endroit et qu'ils avaient les yeux bandés. Il avait précisé qu'il avait soulevé son bandeau et avait pu ainsi voir et parler avec Mehmet Ertak. Le lendemain matin, de bonne heure, Abdullah avait été remis en liberté. L'après midi de cette même date, Abdülmenaf Kabul, Süleyman Ertak et Yusuf Ertak les avaient informés que lors d'un contrôle d'identité au point de contrôle de Bakımevi à Şırnak, alors qu'ils retournaient des mines chez eux, les policiers avaient emmené Mehmet Ertak.

78. Le témoin expliqua qu'il avait rencontré Abdurrahim Demir et lui avait demandé dans quelles circonstances il avait vu Mehmet Ertak. Son interlocuteur lui avait fait la réponse suivante :« Quand Mehmet Ertak a été emmené dans la cellule, nous étions une douzaine ; de temps à autre, certains détenus quittaient la cellule pour interrogatoire et revenaient plus tard et ceci se répétait. Mehmet Ertak aussi a été amené et ramené plusieurs fois. Nous avons subi des tortures. » Le témoin ajouta à cet égard

qu'Abdurrahim avait affirmé être resté dans la même cellule que Mehmet Ertak durant sept ou huit jours. Le dernier jour, roué de coups, Mehmet Ertak avait été jeté dans la cellule. Il gisait par terre comme s'il était mort. Peu de temps après il avait été emmené et il ne l'avait plus revu. Le témoin affirma qu'Abdurrahim Demir avait auparavant donné les mêmes informations à son père. Il lui avait dit : « Ton fils était presque mort quand il était emmené la dernière fois. Son état était si sérieux qu'il n'avait aucune chance de survivre. »

79. Il indiqua avoir aidé son père à rédiger la pétition présentée au procureur de la République et il était allé avec lui à l'association des droits de l'Homme, à Diyarbakır. Il avait distribué des pétitions aux délégations parlementaires qui étaient venus visiter Şırnak. Comme il devait rejoindre ses fonctions comme professeur au collège, son frère Hamit Ertak était parti pour porter plainte et aider celui-ci dans ses démarches auprès des autorités.

80. Le témoin précisa qu'il n'avait pas été interrogé par les autorités à propos de la disparition de son frère et il n'était au courant ni de la décision d'abandonner les poursuites rendue par le conseil administratif de Şırnak ni de l'arrêt du Conseil d'Etat confirmant cette décision.

81. Le témoin affirma qu'un de ses frères, Mesut Ertak, avait été accusé en 1993 d'avoir participé à un attentat à la bombe. Il avait été jugé et condamné à 12 ans et six mois d'emprisonnement.

5) Abdurrahim Demir

82. Le témoin, né en 1954, est avocat et exerce sa profession à Diyarbakır. Le 18 août 1992, au premier jour des incidents survenus à Şırnak, il avait été arrêté par les forces de l'ordre et était resté en garde à vue durant 29 jours.

83. Le témoin raconta que suite à son arrestation, il avait été emmené au centre de la brigade et y était resté deux jours. Environ 1200 personnes y étaient détenues. Le 21 août des confesseurs et des agents de la section spéciale de la police étaient venus choisir 128 personnes et les avaient emmenées à la direction de la sûreté de Şırnak. Le témoin affirma avoir resté à la sûreté jusqu'à la date de sa mise en liberté, aux alentours de 20 septembre.

84. Le deuxième ou le troisième jour de sa détention dans les locaux de la sûreté, le 24 ou 25 août, Mehmet Ertak avait été amené dans la salle où il était détenu. Comme ils avaient été soumis à des tortures, il n'était pas conscient du nombre des jours qu'il avait passé avec Mehmet Ertak ; peut être quatre, cinq ou six jours. Le témoin indiqua que dans une salle se trouvaient plus de douze détenus ; il se souvenait des noms de certains d'entre eux : Nezir Olcan, Kıyas Sakın, Şeymus Sakın, Celal Demir, İbrahim Satan.

85. Mehmet Ertak lui avait raconté que lors des incidents survenus à Şırnak il travaillait dans les mines de charbon et il y était resté durant trois jours. Quand les

incidents s'étaient calmés, il avait quitté les mines avec d'autres travailleurs pour retourner à la ville. Au point de contrôle, situé à 100 mètres de la sûreté, très proche du centre administratif, ils avaient été arrêtés pour un contrôle d'identité. Les policiers avaient pris sa carte et l'avaient emmené avec eux à la direction de la sûreté. Il était resté deux ou trois jours dans un autre endroit avant d'être emmené dans la même cellule. Quant aux motifs de son arrestation, Mehmet Ertak lui avait dit :« J'ai un frère qui a rejoint le PKK. A cause de lui la famille est continuellement intimidée. Je crois que c'est la raison pour laquelle je suis détenu. Les autres personnes qui étaient avec moi n'ont pas été arrêtés. Je ne vois pas d'autre motif. »

86. Le témoin expliqua que lors de leur détention dans les locaux de la police ils furent soumis systématiquement à des tortures. Ils furent emmenés, durant plusieurs jours, deux ou trois fois dans la journée pour subir des tortures. Ils avaient été traités comme des « animaux » et souvent ils étaient obligés de faire leur besoin sous eux. Il déclara que Mehmet Ertak avait aussi subi les mêmes traitements. Il était emmené une fois par jour pendant une quinzaine de minutes. Une fois ils avaient été emmenés (deux ou trois) ensemble dans la « salle de torture ». Il avait pu voir à travers le bandeau qui cachait ses yeux comment il était torturé. Ils étaient dévêtus et soumis à la pendaison; certains d'entre eux avaient été électrocutés. Ils étaient sévèrement battus et arrosés de jets d'eau froide. Ce jour-là, il était resté suspendu environ une heure ; Mehmet Ertak était toujours suspendu quand il avait quitté ladite salle. Mehmet Ertak avait été ramené dans la cellule environ dix heures plus tard. Le témoin déclara : « Quand Mehmet Ertak a été ramené dans la cellule il ne pouvait pas parler, il était mort, c'est à dire qu'il était devenu rigide. Je suis sûr à 99 % qu'il était mort. Deux, trois minutes plus tard ils l'ont traîné dehors en tenant par les jambes. Une de ses chaussures est restée dans la cellule. Nous ne l'avons plus revu. » Il précisa qu'il mettait cette chaussure sous sa tête quand il dormait sur le béton.

87. İsmail Ertak était venu le voir en prison, mais il lui avait dit qu'il parlerait après sa mise en liberté. İsmail Ertak était venu le voir à son retour chez lui. Il l'avait informé que son fils était mort lors de la garde à vue. İsmail Ertak l'avait traité de menteur.

88. Le témoin indiqua que le procureur de la République de Diyarbakır avait recueilli sa déposition sur l'incident. Dans sa déposition il avait relaté les faits qu'il a exposé devant les délégués de la Commission, et il avait signé le procès-verbal contenant sa déposition. Il n'avait été entendu par aucune autre autorité.

89. Le témoin déclara qu'à la suite de leur arrestation, ils avaient été emmenés à la brigade où on avait pris leurs empreintes digitales et noté leurs noms. 128 personnes avaient été transférées à la direction de la sûreté dans des véhicules militaires. Quand ils étaient arrivés à la sûreté, les policiers leur avaient bandé les yeux. Ils avaient confisqué leurs cartes d'identité et demandé leur nom. Les cellules étaient au sous-sol du bâtiment. Durant toute sa détention il était resté dans la même cellule, qui portait le numéro 8, avec un bandeau sur les yeux.

90. Le témoin indiqua que Mehmet Ertak avait été torturé plus que les autres. Il n'avait pas de force pour parler et n'avait pu discuter avec lui qu'à son arrivée dans la cellule. Il lui avait dit qu'après son arrestation, il avait été amené directement à la direction de la sûreté. Il expliqua qu'après les coups qui leur étaient infligés quelqu'un mettait une pommade sur les ecchymoses, sur leur visage. Une de ses dents avait été cassée et son visage était enflé. C'était dans cet état que le procureur l'avait entendu. Le procureur lui avait demandé s'il avait été torturé et il avait répondu par l'affirmative. Le procureur avait répliqué « que ceci ne reflétait pas la vérité que c'était lui-même qui avait causé cette enflure ».

91. Le témoin expliqua que par peur des représailles il n'avait pas porté plainte à l'encontre des policiers qui lui avaient infligé des tortures. Il affirma avoir dit la vérité et avoir raconté le minimum de tous ce qu'ils ont subi.

92. Selon le témoin, les incidents survenus à Şırnak avaient été provoqués par les agents de l'Etat aux fins de réprimer la population qui, antérieurement, avait assisté aux funérailles de deux militants du PKK et avait voté pour le parti politique pro-kurde, HADEP.

6) Tahir Elçi

93. Le témoin, né en 1966, est avocat et représentait le requérant lors de l'introduction de la requête devant la Commission. Il expliqua qu'il n'avait pas assisté le requérant devant les autorités internes. Il lui avait seulement donné des conseils et écrit des lettres.

94. Le témoin déclara qu'en novembre 1993, suite à son arrestation, les forces de l'ordre avaient effectué des descentes à son cabinet et saisi tous les documents relatifs à ses activités professionnelles, y compris les documents concernant l'affaire de la disparition de Mehmet Ertak. Il était resté en garde à vue durant 21 jours dans les locaux du commandement de la gendarmerie de Diyarbakır, au service des renseignements de la gendarmerie (JİTEM). Il avait été détenu environ trois mois et faisant suite à la demande de son représentant, les autorités avaient restitué seulement les dossiers des affaires qu'il défendait au niveau interne et des objets personnels. Après avoir examiné les listes établies par les autorités faisant état des documents saisis et restitués, le témoin en contesta le contenu. Il expliqua que selon l'article 58 de la loi sur les avocats il incombait au parquet de mener les investigations concernant un avocat et qu'il en était de même pour la perquisition. Le témoin affirma que l'oppression des avocats dans la région avait débuté en 1992 et duré jusqu'en 1995. Il déclara que les avocats qui assistaient les requérants devant la Commission et les cours de sûreté de l'Etat étaient intimidés par les autorités et soutint que les forces de l'ordre voyaient d'un mauvais œil l'introduction d'une requête devant la Commission.

95. Le témoin indiqua qu'il n'avait pas pris les dépositions des témoins oculaires mentionnés dans la pétition d'İsmail Ertak. Certains d'entre eux se trouvaient en prison et ne se sentaient pas en sécurité et lui même avait eu peur d'aller recueillir leurs

dépositions en prison. Plus tard, il avait vu Abdurrahim Demir qui lui avait affirmé avoir vu Mehmet lors de sa garde à vue. Il déclara qu'İsmail Ertak avait relaté très brièvement son entrevue avec Abdurrahim Demir. Il ne voulait pas admettre que son fils pouvait être mort mais au fond de lui- même il savait qu'il était mort. Le témoin affirma à cet égard que si pour une personne détenue depuis une semaine aucune demande de prolongation de la garde à vue ne se fait devant le procureur on peut être sûr que sa vie est en danger ou qu'elle est morte.

96. Le témoin affirma avoir envoyé une lettre à la Commission autorisant M. Boyle et Mme Hampson à représenter le requérant devant les instances européennes et prétendit que sans son intervention, le requérant n'aurait pas pu trouver, à Şırnak, un avocat pour défendre sa cause.

97. Le témoin indiqua qu'avant d'introduire la requête devant la Commission le requérant avait porté plainte auprès du parquet de Şırnak. Il fait valoir que le parquet n'avait pas les pleins pouvoirs pour mener des enquêtes sur les violations des libertés publiques commises par les forces de l'ordre et que ces enquêtes étaient menées par celles-ci. De l'avis du témoin, les voies de recours internes ne fonctionnaient pas efficacement pour des affaires comme celle-ci et il ne put donner aucun exemple où la victime aurait obtenu gain de cause. Il expliqua que cinq ans s'étaient écoulés depuis l'incident et aucun résultat n'a pu être obtenu.

98. Faisant valoir tous les efforts déployés par le requérant pour être informé du sort de son fils, le témoin rejeta toute éventualité que Mehmet Ertak appartienne à l'organisation illégale. Selon lui, Mehmet Ertak était mort lors de sa garde à vue ; lui-même avait été témoin de plusieurs cas similaires.

7) Levent Oflaz

99. Le témoin, né en 1965, était commissaire du poste de police de la direction de la sûreté de Şırnak.

100. La nuit du 18 août, il était au poste de police. Soudain, ils avaient entendu des coups de feu provenant du centre ville. Ils avaient été informés par radio que des terroristes avaient attaqué Şırnak. Ils avaient pris leurs précautions pour se protéger.

101. Le témoin expliqua qu'il ne faisait pas partie de l'équipe qui avait procédé aux arrestations. Son travail consistait à protéger les bâtiments publics. Lors des incidents, durant quatre ou cinq jours, il n'avait pas quitté le poste de police.

102. Le témoin précisa que la direction de la sûreté et le poste de police étaient situés dans deux bâtiments séparés, à une distance d'environ un kilomètre l'un de l'autre. Le bâtiment de la gendarmerie du district se trouvait à côté d'eux et selon lui, lors des incidents, personne n'y était détenu. Le bâtiment de la brigade était à la sortie de la ville, sur la route d'Uludere. Il n'avait pas de connaissance de ce qui s'était passé entre les 18

et 23 août au centre de détention de la sûreté. Il ne savait rien à propos de ce qui aurait pu arriver à Mehmet Ertak, en particulier sur sa disparition.

103. Le témoin affirma qu'à l'époque des faits, il était normal de faire des contrôles d'identité à l'entrée et à la sortie de la ville. Les agents de police arrêtaient les véhicules, faisaient descendre les passagers et leur demandaient un par un leurs cartes d'identité. Ils contrôlaient les pièces d'identité et, s'ils avaient des soupçons, fouillaient les voitures. Selon le témoin, le contrôle se déroulait en plein air ; les petites cabines servaient à protéger les postes récepteurs de la police de la pluie et des saletés et les policiers avaient des uniformes verts. Il précisa qu'un point de contrôle se trouvait à Bakımevi, près de l'entrée de la ville sur la route Cizre-Şırnak.

104. Le témoin indiqua qu'une gendarmerie se trouvait près des mines de charbon.

105. Le témoin examina le procès-verbal établi le 23 août 1992, selon lequel à la suite des affrontements survenus entre 18 et 21 août, des perquisitions avaient été effectuées dans les maisons au centre ville et aucune douille n'avait été trouvée. Il reconnut que ce document portait sa signature. Il admit contrairement à ses affirmations antérieures, qu'il faisait partie de l'équipe qui avait perquisitionné les maisons.

8) Kemal Eryaman

106. Le témoin, né en 1952, était directeur de la maison d'arrêt d'Elazığ à l'époque des faits.

107. Le témoin indiqua qu'ils tenaient un registre des détenus et aussi des visiteurs. Les noms de Şeymus Sakın, Kıyas Sakın et Emin Kabul lui semblaient familiers mais il fut incapable de donner une réponse précise.

108. Le témoin décrivit comment étaient tenus les registres sur lesquels toute information était notée : le motif de la détention, la personne ou l'autorité qui a envoyé le détenu ou le condamné. Il affirma qu'il n'y avait dans les registres aucune indication sur la garde à vue.

109. Le témoin affirma que suite aux incidents survenus à Şırnak entre les 18 et 20 août, plusieurs détenus avaient été emmenés à la maison d'arrêt d'Elazığ. Il indiqua que si le procureur de la République de Şırnak voulait procéder à l'audition d'un détenu à Elazığ, il devrait en informer le parquet de ladite ville et le faire savoir par courrier la direction de la prison concernée. Il expliqua que les inspecteurs du ministère de la Justice avaient le pouvoir de visiter les détenus sans l'autorisation préalable du procureur.

9) Serdar Çevirme

110. Le témoin, né en 1962, était le chef de la section des interrogatoires et des renseignements de la section antiterroriste de la direction de la sûreté de Şırnak à l'époque des faits. Il décrivit ses fonctions ainsi : il était dans l'équipe qui procédait à l'arrestation et à l'interrogatoire des personnes soupçonnées d'activités terroristes.

111. Le témoin déclara que les « incidents d'août » avaient débuté la nuit du 15 août. Des tirs provenant d'armes lourdes venaient de toutes parts. Deux policiers dont l'un des « forces d'intervention rapide » et deux ou trois soldats de la gendarmerie du district avaient été tués. Le 18 août un bus des forces agiles avait été incendié. L'arrivée des renforts avait mis un terme aux incidents. Le 18 août les personnes qui habitaient les maisons d'où les tirs étaient partis et d'autres suspects avaient été emmenés à la brigade. Les maisons avaient été détruites et plusieurs personnes avaient quitté la ville. Des opérations avaient été effectuées en ville et aux alentours.

112. Le témoin expliqua qu'à la section antiterroriste de la sûreté se trouvait un centre de détention avec huit cellules. Dans des circonstances normales une ou deux personnes pouvaient rester dans chacune de ces cellules. Il expliqua que lorsqu'ils devaient placer en garde à vue plusieurs personnes ils les mettaient dans une grande pièce, située près de l'entrée et qui pouvait abriter 40-50 personnes en même temps. Selon le témoin, cette pièce n'était pas souvent utilisée. Il ajouta qu'après réflexion, il concluait qu'il était difficile de loger 10-12 personnes dans cette pièce. Il précisa qu'un militant de l'organisation, arrêté avec des armes et documents était toujours détenu dans une cellule. Les détenus qui étaient dans les cellules ne pouvaient pas voir ceux qui étaient dans la grande pièce, qui était utilisée en général pour des prévenus soupçonnés de délits mineurs. Il déclara qu'à l'époque des faits cette pièce, qui n'avait pas de numéro, avait été utilisée suite à l'arrestation de plusieurs personnes. Il affirma que les suspects y restaient un jour maximum.

113. Selon le témoin, les personnes qui devaient subir un interrogatoire étaient placées dans des cellules ; tel était le cas pour les personnes soupçonnées d'activités terroristes.

114. Quant à l'explication concernant le placement en garde à vue selon les registres, fin août, de 80 personnes au centre de détention de la sûreté, le témoin expliqua que les incidents du mois d'août étaient des circonstances extraordinaires ; à son avis leur garde à vue avait duré 48 heures.

115. Le témoin ne se rappelait pas si toutes les personnes appréhendées avaient été emmenées à la brigade ou directement à la sûreté. Selon les instructions, elles devaient être placées en garde à vue à la brigade mais quand il s'agissait de deux ou trois personnes, elles étaient emmenées à la sûreté. Ils avaient accueilli dans les locaux de la sûreté, au sous-sol, des médecins, des infirmières et quelques familles en vue de les protéger.

116. Le témoin reconnut que le 21 août, 57 personnes impliquées dans les incidents avaient été emmenées de la brigade. Quant à un autre groupe de 22 personnes emmenées

le lendemain et 12 autres le 24 août, il ne fut pas en mesure de dire précisément d'où ils étaient venus. Il déclara qu'à cette époque c'était le chaos.

117. Malgré ses constatations antérieures, il admit que dans des cas où 23 personnes restaient en garde à vue pour interrogatoire pendant plus de 20 jours, ils les plaçaient dans la grande salle. Il précisa qu'il avait vécu de tels cas à deux reprises lorsqu'il était en fonction : au mois d'août et le 21 mars. Il indiqua que les cellules, la grande salle, la salle des interrogatoires et la chaufferie ainsi que les toilettes et une petite pièce pour faire du thé se trouvaient au sous-sol.

118. Le témoin affirma que durant toute leur garde à vue, les détenus avaient les yeux bandés ; il en était ainsi lors de leur interrogatoire et ils essayaient de les empêcher de communiquer entre eux.

119. Le témoin déclara que les personnes interrogées étaient soumises à des contrôles médicaux lors de leur placement en garde à vue et à la fin de leur garde à vue. Les rapports établis étaient gardés à la sûreté.

120. Le témoin admit avoir participé aux interrogatoires dans le cadre de l'enquête des incidents du 18 août. Il indiqua qu'ils ne tenaient pas de registres décrivant quand et par qui était interrogé tel détenu. Ils conservaient dans leurs registres internes des notes signées par l'agent qui les avaient établies ; ces notes n'étaient pas versées aux registres officielles.

121. Le témoin indiqua avoir appris, dans le cadre de l'enquête, qu'İsmail Ertak alléguait que son fils avait été placé en garde à vue. Il déclara ne pas connaître Mehmet Ertak et ne pas savoir pas pour quel motif et par quelle équipe il avait été arrêté ou placé en garde à vue.

122. L'enquête qu'ils avaient entamée s'était déroulée ainsi : Ils avaient examiné les registres ; le nom de Mehmet Ertak ne s'y trouvait pas. Ils avaient contrôlé ses antécédents. Ils avaient mené des investigations pour trouver quelle équipe l'avait arrêté et aussi comment il avait été arrêté. Mais ces recherches n'avaient abouti à rien.

123. Le témoin indiqua qu'il n'était pas toujours présent à la sûreté. Durant son absence, l'agent de permanence en charge tenait les registres. Selon lui, il était impossible qu'ils omettent d'inscrire sur le registre le nom d'une personne placée en garde à vue et, à cet égard, ils suivaient des instructions, verbales et écrites, assez rigoureuses. Il affirma qu'un rapport de garde à vue était envoyé quotidiennement au chef de la section. Le témoin ne put pas donner une réponse précise quant au fait que le nom d'Emin Kabul, qui avait été transféré à la prison d'Elazığ ne figurait pas sur les registres de la garde à vue. Toutefois ce nom lui paraissait familier.

124. Le témoin indiqua ne pas pouvoir apporter d'explication logique au fait que six personnes avaient déclaré avoir vu Mehmet Ertak lors de sa garde à vue et que le nom de ce dernier ne figurait sur aucun registre. Il se posa les questions suivantes : « qui étaient

ces six personnes ? Avaient-elles été interrogées par la police ? Purgeaient-elles une peine d'emprisonnement pour appartenance à l'organisation illégale ? »

125. Le témoin reconnut qu'il ne pouvait y avoir que deux solutions dans le cas d'espèce : soit les six témoins avaient menti, soit les agents avaient omis d'enregistrer le nom de Mehmet Ertak sur le registre de garde à vue. Il déclara toutefois qu'une troisième solution était possible, expliquant qu'à l'époque des faits, plusieurs personnes disparaissaient dans cette région. Ces personnes étaient des miliciens qui exerçaient des activités pour l'organisation tout en menant une vie normale. Ils pouvaient perdre la vie lors d'un affrontement, il y avait des mines partout et l'organisation profitait de tous ces faits.

126. Le témoin déclara que suite aux incidents d'août 1992, ils n'avaient dressé aucune liste de personnes recherchées. Ils avaient identifié, par les dépositions des confesseurs, les personnes qui menaient des activités terroristes. Toutes les évaluations se déroulaient à la direction de la sûreté de Şırnak.

127. Le témoin admit que le point de contrôle de la direction des mines se trouvait à l'entrée de la ville. C'étaient les agents des « forces d'intervention rapide » et des services de renseignements et de prévention de la contrebande qui y effectuaient des contrôles et, lorsqu'ils procédaient à une arrestation, ils emmenaient les suspects à la section concernée de la direction de la sûreté. Le témoin indiqua que ces derniers tenaient aussi des registres de garde à vue mais qu'il n'y avait pas de cellules pour la garde à vue dans leur section. Quant à la couleur de leurs uniformes, le témoin déclara qu'à l'époque des faits, ils portaient des uniformes verts et qu'actuellement ils en ont des bleus mais il lui fut impossible de préciser la date du changement de la couleur des uniformes. Le témoin affirma que les agents des « forces d'intervention rapide » emmenaient les personnes soupçonnées d'activités terroristes à la direction de la sûreté.

128. Le témoin indiqua qu'à la suite de la pétition d'İsmail Ertak il avait appris que le frère de Mehmet Ertak était dans les camps de l'organisation et que comme tous les militants, celui-ci utilisait un nom codé. Il déclara qu'il ne se rappelait pas si Mehmet Ertak vivait en ville ou dans un village aux alentours. Ils n'avaient pas eu affaire à la famille Ertak. Il se rappelait de certains noms, comme la famille Kabul mais pas de Mehmet Salih Ertak ou Salih Mehmet Ertak.

129. Le témoin admit que dans la région il était courant qu'il y avait dans chaque famille plus d'une personne soupçonnée d'avoir des liens avec l'organisation illégale. Quant à ses commentaires concernant les témoignages recueillis par les délégués sur le fait que Mehmet Ertak aurait été jeté dans la cellule en présence de dix personnes, il les déclara illogiques et sans fondement. Il affirma que des détenus inventaient un tel scénario par vengeance, avec l'intention de nuire à leur image.

10) Osman Günaydın

130. Le témoin, né en 1962, était préfet adjoint à Şırnak à l'époque des faits. Il présidait, au nom du préfet, le conseil administratif de Şırnak qui avait rendu une décision d'abandon des poursuites le 11 novembre 1993 à l'égard des fonctionnaires de police de la direction de la sûreté.

131. Le témoin ne se souvenait pas des circonstances particulières de l'affaire et fut incapable d'expliquer pour quel motif le délit avait été située à la date du 16 septembre 1992 alors que les incidents avaient eu lieu le 18 août 1992.

132. Le témoin déclara qu'enquêteur chargé des investigations était un inspecteur de police compétent en la matière. Il indiqua que l'enquêteur avait entendu quatre témoins et que tous les quatre avait contredit les allégations d'İsmail Ertak. Il expliqua que le conseil administratif n'avait pas jugé opportun de demander des investigations complémentaires. Il précisa que la décision, confirmée par le Conseil d'Etat, avait été rendue à l'unanimité.

133. Le témoin décrivit les règles régissant les poursuites à l'encontre des fonctionnaires : l'enquêteur recueille tous les éléments de preuve, entend les témoins et soumet ses conclusions au conseil administratif. La décision de renvoyer l'affaire en jugement ou d'abandonner les poursuites est prise à l'unanimité ou à la majorité. La décision du conseil administratif est transmise au Conseil d'Etat qui confirme ou infirme ladite décision.

134. Le témoin expliqua que le conseil administratif fondait sa décision, rendue dans un délai d'une semaine, sur les documents déjà versés au dossier par l'enquêteur et n'était pas véritablement habilité lui-même à enquêter. C'était le préfet qui avait ce pouvoir. Selon le témoin, la décision rendue dans cette affaire n'était pas une décision de classement mais une décision de ne pas engager de poursuites à l'encontre des fonctionnaires de police. Il reconnut qu'aucun des membres du conseil administratif n'était juriste et que le poste du directeur des affaires juridiques était vacant à l'époque.

135. Le témoin indiqua que les membres pouvaient examiner les documents versés au dossier et s'opposer aux conclusions proposées. Il expliqua qu'en général, les membres se ralliaient à la proposition de l'enquêteur. Chaque membre avait ses propres fonctions et ne pouvait procéder à un examen aussi détaillé qu'un enquêteur.

136. Il fut incapable de préciser si cette décision avait été notifiée à İsmail Ertak, qui n'avait pas pu être entendu par l'enquêteur. A cet égard, le témoin déclara que les allégations formulées par İsmail Ertak dans sa plainte étaient assez précises et qu'il était probable qu'il les aurait réitérées devant l'enquêteur. Il ne se rappelait pas si l'ordonnance d'incompétence ratione materiae se trouvait dans le dossier d'enquête présenté par l'enquêteur.

11) Yusuf Küçükkahraman

137. Yusuf Küçükkahraman était agent de police au commissariat central. Il n'avait pas été à la section antiterroriste de la sûreté et n'avait rien à déclarer à propos de la

disparition de Mehmet Ertak. Il n'était pas l'agent de police qui, à la sûreté de Şırnak, avait enregistré la pétition d'İsmail Ertak.

12) Yahya Bal

138. Le témoin, né en 1951, était inspecteur de police au conseil d'inspection de la police et enquêteur dans le cadre de la présente affaire.

139. Le témoin reconnut que la lettre du préfet, en date du 4 novembre 1992, faisant état des allégations d'İsmail Ertak et d'un député, constituait le document principal de l'enquête. Pendant l'enquête qu'il avait menée, il n'avait pas été informé de la plainte adressée par İsmail Ertak au parquet le 2 octobre 1992, dans laquelle il mentionnait les noms des personnes qui indiquaient avoir vu Mehmet Ertak lors de la garde à vue. Il affirma ne pas avoir été informé qu'un des témoins, Abdullah Ertur, avait indiqué antérieurement au préfet de Şırnak qu'il avait vu Mehmet Ertak lors de sa garde à vue dans les locaux de la direction de la sûreté. Il reconnut que s'il avait été informé de ladite déclaration, au vu des contradictions entre les dépositions, il aurait procédé à une autre audition pour clarifier les faits.

140. Le témoin déclara avoir sollicité par lettres adressées les 13 janvier 1993, 18 janvier 1993 et 3 mars 1993, à la direction de la sûreté de Şırnak, une commission rogatoire lui permettant d'entendre İsmail Ertak. Selon un procès-verbal établi par les agents de police de la sûreté de Şırnak le 25 mars 1993 et portant les signatures de quatre policiers, dont Serdar Çevirme et l'élu du quartier, Ömer Yardımcı, İsmail Ertak avait déménagé à Silopi et les autorités n'avaient pas pu trouver son adresse. Il ne demanda pas aux autres témoins portant le même nom de famille s'ils savaient où vivait İsmail Ertak. Le témoin affirma que l'audition du plaignant au stade initial d'une enquête pouvait aider l'enquêteur pour l'orientation des investigations.

141. Le témoin affirma s'être rendu sur les lieux et avoir entendu les témoins dans une pièce de la direction de la sûreté de Şırnak. C'était la police locale qui les avait cherchés de leur domicile et amenés devant lui et ils avaient déposé sous serment.

142. Le témoin précisa que lors de son enquête il n'avait pas contacté le procureur de la République. Il avait mené l'enquête uniquement en se basant sur le dossier qui lui avait été transmis.

Autres témoins

143. Les témoins suivants ont été invités à déposer mais n'ont pas comparu:

- Ahmet Berke, procureur de la République de Şırnak qui avait rendu l'ordonnance d'incompétence ratione materiae le 21 juillet 1993,

- Şeyhmus Sakın, Kıyas Sakın, Emin Kabul, qui habitaient le mêmequartier que le requérant et avaient indiqué au requérant qui, selon lui, avaient vu Mehmet Ertak lors de leur garde à vue.

Par lettre du 5 février 1997, M. Berke exposa que pour des motifs personnels et professionnels et ainsi qu'en raison de mauvaises conditions de temps il ne pouvait pas se présenter devant les délégués.

Par lettre du 5 mai 1997, le Gouvernement informa la Commission que Şeyhmus Sakın et Kıyas Sakın avaient été mis en liberté le 24 novembre 1994 et que leurs adresses actuelles n'étaient pas connues des autorités. Il indiqua en outre que le nom d'Emin Kabul ne figurait pas sur les registres de la maison d'arrêt d'Elazığ.

Les registres de garde à vue

144. Le nom de Mehmet Ertak ne figure pas sur les registres de garde à vue de la direction de la sûreté de Şırnak.

145. La Commission relève que le Gouvernement n'a pas produit les copies des registres de garde à vue de la brigade de la gendarmerie et du commandement de la gendarmerie régionale de Şırnak.

C. Droit et pratique internes pertinents

146. Les parties n'ont pas présenté d'observations séparées et détaillées sur le droit et la pratique internes applicables en l'espèce. La Commission a intégré notamment des passages pertinents du résumé de la Cour sur le droit et de la pratique internes constatés dans l'affaire Aksoy c. Turquie (arrêt Aksoy c. Turquie du 18 décembre 1996) et dans l'affaire Kurt c. Turquie (arrêt Kurt c. Turquie du 25 mai 1998).

147. Le Code pénal turc réprime le fait pour un agent public de soumettre quelqu'un à la torture ou à des mauvais traitements (article 243 pour la torture et 245 pour les mauvais traitements).

148. Conformément aux articles 151 et 153 du Code de procédure pénale, il est possible de porter plainte auprès du procureur de la République ou des autorités administratives locales. Le procureur et la police sont tenus d'instruire les plaintes dont ils sont saisis, le premier décidant s'il y a lieu d'engager des poursuites, conformément à l'article 148 dudit code. Un plaignant peut également faire appel de la décision du procureur de ne pas engager de poursuites.

149. Les procureurs ont le devoir d'examiner les allégations d'infractions graves qui viennent à leur connaissance, même en l'absence de toute plainte. Toutefois dans la région soumise à l'état d'urgence, les enquêtes au sujet d'infractions pénales commises par des agents de l'Etat sont menées par des conseils administratifs locaux composés de fonctionnaires. Ces conseils sont également habilités à décider de l'ouverture ou non de

poursuites, sous réserve d'un contrôle judiciaire automatique devant le Conseil d'Etat dans les cas où ils décident de ne pas poursuivre (décret-loi n° 285).

150. L'article 125 de la Constitution turque est ainsi libellé :

« Tout acte ou décision de l'administration est susceptible d'un contrôle juridictionnel (...)

L'administration est tenu de réparer des dommages résultant de ses actes et mesures. »

En vertu de cette disposition, l'Etat est tenu d'indemniser toute personne à même de démontrer qu'elle a subi un préjudice dans des circonstances où l'Etat a manqué à son obligation de sauvegarder la vie et la propriété individuelles.

151. La disposition précitée ne souffre aucune restriction, même en cas d'état d'urgence ou de guerre. Le second alinéa ne requiert pas forcément d'apporter la preuve de l'existence d'une faute de l'administration, dont la responsabilité revêt un caractère absolu et objectif fondé sur la théorie du « risque social ». L'administration peut donc indemniser quiconque est victime d'un préjudice résultant d'actes commis par des personnes non identifiées, lorsque l'on peut dire que l'Etat a manqué à son obligation de protéger la vie ou les biens d'un individu.

152. Tout acte illégal dommageable commis par un fonctionnaire (à l'exception du préfet de la région soumise à l'état d'urgence et ceux des départements de la dite région) peut donner lieu à une action en réparation devant les tribunaux civils ordinaires.

153. Des poursuites peuvent être engagées contre l'administration devant les juridictions administratives, dont la procédure est écrite.

D. Données internationales pertinentes

154. Un certain nombre d'autres organes d'investigation internationaux et œuvrant dans le domaine des droits de l'homme se sont occupés des disparitions forcées ou involontaires ainsi que de leurs aspects juridiques. Des extraits et résumés de documents émanant du système interaméricain et des Nations unies figurent en annexe II du rapport de la Commission Kurt c. Turquie (N° 24276/94, rapport Comm. 5.12.96, Cour eur. D.H. arrêt du 25 mai 1998, à paraître dans le Recueil 1998).

A. Documents des Nations unies

La Déclaration des Nations unies sur la protection de toutes les personnes contre les disparitions forcées (A.G. Res. 47/133, 18 décembre 1992) dispose notamment ceci :

« [La] pratique systématique [des disparitions forcées] est de l'ordre du crime contre l'humanité (...) [et] constitue une violation [du] droit [de chacun] à la reconnaissance de sa personnalité juridique, [du] droit à la liberté et à la sécurité de sa personne et [du] droit

de ne pas être soumis à la torture ni à d'autres peines ou traitements cruels inhumains ou dégradants. Il viole en outre le droit à la vie ou le met gravement en danger. »

B. Jurisprudence du Comité des droits de l'homme des Nations unies (CDH)

1. Le Comité des droits de l'homme des Nations unies, agissant dans le cadre du Pacte international relatif aux droits civils et politiques, a établi des rapports sur plusieurs affaires de disparitions forcées : Quinteros c. Uruguay (107/1981), rapport, Assemblée générale ordinaire, trente-huitième session, supplément n° 40 (1983), annexe XXII, § 14 ; Mojica c. République dominicaine, décision du 15 juillet 1994, observations du Comité au titre de l'article 5 § 4 du Protocole facultatif au Pacte concernant la communication n° 449/1991, Human Rights Law Journal, vol. 17, nos 1-2, p. 18 ; Bautista c. Colombie, décision du 27 octobre 1995, observations du Comité au titre de l'article 5 § 4 du Protocole facultatif au Pacte concernant la communication n° 563/1993, Human Rights Law Journal, vol. 17, nos 1–2, p. 19).

C. Documents de l'Organisation des Etats américains (OEA)

2. La Convention interaméricaine sur la disparition forcée des personnes (résolution adoptée par l'Assemblée générale à sa septième session plénière le 9 juin 1994, OEA/Ser. P AG/doc. 3114/9 rév. 1 : non encore en vigueur) dispose entre autres :

« Préambule

(...) Considérant que la disparition forcée des personnes constitue une forme extrêmement grave de répression, qui viole des droits fondamentaux de l'homme consacrés dans la Déclaration américaine des droits et devoirs de l'homme, la Déclaration universelle des droits de l'homme, le Pacte international relatif aux droits civils et politiques et la Convention américaine relative aux droits de l'homme,
(...)

Article 2

Aux fins de la présente Convention, une disparition forcée s'entend de l'enlèvement ou de la détention d'une personne commis par un agent de l'Etat ou par des personnes agissant avec l'autorisation ou l'acquiescement de l'Etat lorsque, passé un laps de temps raisonnable, n'est fournie aucune information qui permettrait de déterminer le sort réservé à la personne enlevée ou détenue ou l'endroit où elle se trouve.
(...)

Article 4

La disparition forcée d'une personne est un crime contre l'humanité. Aux termes de la présente Convention, elle engage la responsabilité de ses auteurs ainsi que la responsabilité de l'Etat dont les autorités ont exécuté la disparition ou y ont consenti.
(...)

Article 18

En ratifiant la présente Convention ou en y adhérant, les Etats parties adoptent l'Ensemble des règles minima des Nations unies pour le traitement des détenus (Résolution 663 C [XXIV] du 31 juillet 1957 du Conseil économique et social) comme partie intégrante de leur droit interne. »

D. Jurisprudence de la Cour interaméricaine des droits de l'homme

3. La Cour interaméricaine des droits de l'homme a examiné la question des disparitions forcées dans plusieurs affaires en vertu des dispositions de la Convention américaine relative aux droits de l'homme et avant l'adoption de la Convention interaméricaine sur la disparition forcée des personnes et a développé dans ce contexte une jurisprudence spécifique : arrêts Velásquez Rodríguez c. Honduras du 29 juillet 1988 (Inter-Am. Ct. H.R. (Ser. C) n° 4) (1988)), Godínez Cruz c. Honduras du 20 janvier 1989 (Inter-Am. Ct. H.R. (Ser. C) n° 5) (1989)), et Cabellero-Delgado et Santana c. Colombie du 8 décembre 1995 (Inter-Am. Ct. H.R.).

III. AVIS DE LA COMMISSION

A. Griefs déclarés recevables

155. La Commission a déclaré recevable le grief du requérant selon lequel son fils, Mehmet Ertak, placé en garde à vue le 20 août 1992, aurait disparu pendant sa garde à vue et aurait très probablement été tué par les forces de l'ordre lors de son interrogatoire.

156. En outre, dans ses observations finales, le requérant se plaint que la Turquie a entravé l'exercice efficace du droit de requête individuel.

B. Points en litige

157. Les points en litige en l'espèce sont les suivants :

- Y a-t-il eu, en l'espèce, violation de l'article 2 de la Convention ?

- La Turquie a-t-elle manqué aux obligations qui lui incombent en vertu de l'ancien article 25 par. 1 de la Convention ?

C. Appréciation des preuves

158. Avant d'examiner les allégations du requérant sous l'angle de l'article 2 de la Convention, la Commission juge opportun d'apprécier d'abord les éléments de preuve et, conformément à l'ancien article 28 par. 1 a) de la Convention de tenter d'établir les faits. Elle tient à formuler un certain nombre d'observations liminaires à cet égard.

159. En l'absence de constations de fait des tribunaux internes quant aux griefs du requérant, la Commission a fondé ses conclusions sur les dépositions faites oralement devant ses délégués ou les éléments présentés par écrit au cours de la procédure. Pour apprécier les éléments de preuve quant au bien-fondé des allégations du requérant, la Commission se rallie au principe de la preuve « au-delà de tout doute raisonnable », tel qu'adopté par la Cour dans l'affaire Irlande c. Royaume-Uni sur le terrain de l'article 3 (Cour eur. D.H., arrêt du 18 janvier 1978, série A n° 25, p. 65, par. 161) et tel qu'elle l'a appliqué dans un certain nombre d'affaires relatives à des allégations mettant en cause les forces de l'ordre dans le sud-est de la Turquie (voir N° 23178/94, Şükran Aydın c. Turquie, rapport Comm. 7.3.96, pp. 28-29, par. 163 iii ; N° 22275/93, İsmet Gündem c. Turquie, rapport Comm 3.9.96, p. 23, par. 152). Une telle preuve peut résulter d'un faisceau d'indices ou de présomptions non réfutées, qui sont suffisamment graves, précis et concordants.

160. Lorsque, comme en l'espèce, les récits des événements sont contradictoires et discordants, la Commission regrette particulièrement l'absence d'examen judiciaire ou d'une autre enquête indépendante approfondie au niveau interne sur les faits en question. Elle rappelle à cet égard l'importance de l'engagement premier que prennent les Etats contractants, conformément à l'article 1, de reconnaître les droits garantis par la Convention, notamment l'octroi d'un recours effectif prévu par l'article 13 de la Convention.

a) Quant aux opérations menées dans Şırnak suite aux incidents survenus du 18 au 20 août 1992

161. Il n'est pas contesté que des affrontements ont eu lieu dans Şırnak du 18 au 20 août 1992. La Commission relève à cet égard que Serdar Çevirme, le chef de la section des interrogatoires et des renseignements de la section antiterroriste de la sûreté a exposé que les incidents avaient débuté le 15 août. Les éléments de preuve soumis à la Commission provenant des documents et des dépositions orales des témoins sont pour l'essentiel cohérents quant au déroulement général des opérations menées suite aux incidents survenus entre lesdites dates. Suite à ces incidents les forces de l'ordre composées de policiers et de gendarmes perquisitionnèrent dans la ville et plus d'une centaine de personnes, entre autres Abdullah Ertur, Abdurrahim Demir, Ahmet Kaplan, Kıyas Sakın, Şeyhmus Sakın, Nezir Olcan, Celal Demir, İbrahim Satan, Emin Kabul furent arrêtés. Plusieurs personnes arrêtées furent emmenées à la brigade, d'autres furent détenues à la direction de sûreté. Des contrôles d'identité furent effectuées à l'entrée de la ville et les personnes soupçonnées d'activités terroristes furent emmenées par les agents des « forces d'intervention rapide » (çevik kuvvet) directement à la direction de la sûreté.

b) Quant à l'arrestation alléguée de Mehmet Ertak, fils du requérant

162. Le requérant indique dans sa requête que son fils a été arrêté le 22 août 1992 lors d'un contrôle d'identité, alors qu'il rentrait de son travail aux mines, en compagnie de Süleyman Ertak, Abdülmenaf Kabul et Yusuf Ertak.

163. La déposition orale de Süleyman Ertak devant les délégués de la Commission, pour ce qui concerne l'arrestation de Mehmet Ertak, est conforme aux allégations du requérant. Süleyman Ertak confirme qu'au point de contrôle, des policiers en uniformes bleus ont arrêté le taxi dans lequel ils se trouvaient et, après avoir contrôlé leurs pièces d'identité, ont emmené Mehmet Ertak avec eux. Il précise que les agents de police ont contrôlé les cartes d'identité dans une cabane et, à leur retour, ont demandé lequel d'entre eux était Mehmet Ertak ; il n'a pas été entendu par une autorité concernant cet incident (par. 66-71 ci-dessus). Cependant, après l'examen du dossier d'enquête et de la déposition orale devant la Commission de l'enquêteur Yahya Bal (par. 42 b) ci-dessus) la Commission constate que Süleyman Ertak dans sa déposition du 13 janvier 1993 recueilli par l'enquêteur, indique que les policiers, après avoir contrôlé les pièces d'identité, leur ont rendu leurs cartes, et que Mehmet Ertak les a quittés pour faire des courses. Une déposition dans le même sens a été faite le 12 janvier 1993 par Yusuf Ertak (par. 42 c) ci-dessus).

164. La Commission relève qu'il ressort de l'examen des documents du dossier de l'enquête menée par l'enquêteur que Süleyman Ertak, Abdülmenaf Kabul, Yusuf Ertak et Abdullah Ertur ont été convoqués par la police à la direction de la sûreté de Şırnak et ont déposé devant l'enquêteur en présence d'un agent de police qui notait leurs dépositions. A cet égard, la Commission est frappée par la forme stéréotypée et le contenu globalement similaire des dépositions de Süleyman Ertak et Yusuf Ertak (par. 42 b) et c). La Commission constate que les fonctionnaires de police entendus par les délégués ont affirmé que des contrôles étaient effectués par les forces de l'ordre au point de contrôle comme il a été décrit par Süleyman Ertak. Quant à la couleur des uniformes des policiers, Serdar Çevirme a indiqué que les agents des « forces d'intervention rapide » se trouvaient au point de contrôle et il a mis l'accent sur le fait qu'à l'époque des faits, ils portaient des uniformes verts. Sans préciser de date il a ajouté que ces derniers ont actuellement des uniformes bleus.

165. La Commission relève que les fonctionnaires de police qui ont témoigné devant les délégués de la Commission reconnaissent que suite à des incidents ayant causé la mort de deux policiers et de deux soldats, plusieurs équipes des forces de l'ordre avaient procédé à des arrestations dans la ville. Plus d'une centaine de personnes avaient été placées en garde à vue et ils avaient vécu une ambiance chaotique. Serdar Çevirme déclare que les « forces d'intervention rapide » effectuaient des contrôles à l'entrée de la ville et n'emmenaient pas les suspects directement à la direction de la sûreté. Il affirme à cet égard que ces derniers tenaient des registres séparés. Toutefois la Commission relève qu'au stade ultérieur de sa déposition, il reconnaît que les personnes arrêtées lors des contrôles d'identités par lesdits agents sont emmenées directement à la sûreté.

166. Quant à la tenue des registres de garde à vue, la Commission note que le nom d'Emin Kabul ne figure pas sur les registres et, sur ce point, aucune explication n'a été

apporté par Serdar Çevirme (par. 53 et 122 ci-dessus). La Commission relève que les déclarations de celui-ci manquent de précision et de clarté quant à la tenue des registres de garde à vue. Elle note en outre que les copies des registres de garde à vue de la brigade et de la gendarmerie régionale, malgré des demandes explicites, n'ont pas été produites par le Gouvernement. La Commission rappelle à cet égard que, précédemment, dans d'autres affaires portant sur des allégations concernant des incidents dans le Sud-Est de la Turquie, elle a conclu que de sérieux doutes subsistaient quant à l'exactitude des données consignées dans les registres de la garde à vue (voir Aydın c. Turquie, rapport Comm. 7.3.96, par. 172, Cour eur. D.H., Recueil des arrêts et décisions 1997-VI, p. 1941 ; Çakıcı c. Turquie N° 23657/94, rapport Comm. 12.3.98, p. 40, par. 209, affaire pendante devant la Cour).

167. Abdurrahim Demir, dans sa déposition devant les délégués de la Commission, indique que le 24 ou 25 août, Mehmet Ertak a été emmené dans la salle de détention où lui-même se trouvait et qu'il a passé cinq ou six jours avec lui. Il relate de façon détaillée les circonstances dans lesquelles ils ont été détenus à la direction de la sûreté et la conversation qu'il a eue avec Mehmet Ertak (par. 82-91 ci-dessus). La Commission note que la version exposée par Abdurrahim Demir quant aux détails des yeux bandés lors de la garde à vue, à la description et à l'emplacement de la salle de détention est concordante avec celle de Serdar Çevirme. La déposition d'Abdurrahim Demir corrobore avec les récits faits par le requérant et son fils Ahmet Ertak aux délégués. La Commission relève en outre qu'Abdurrahim Demir a souligné qu'il avait déposé devant le procureur, à qui il avait donné la même version des faits qu'aux délégués et qu'il avait signé sa déposition (par. 87 ci-dessus). La Commission constate avec regret que cette déposition ne figure pas dans les documents du dossier constitué par l'enquêteur.

168. La Commission note que le préfet de Şırnak à l'époque des faits, Mustafa Malay, a reconnu dans sa déposition orale que le requérant était venu le voir plusieurs fois en alléguant que son fils Mehmet Ertak avait disparu suite à sa garde à vue, et qu'il avait entendu un témoin oculaire qui avait confirmé avoir vu Mehmet Ertak dans les locaux de la sûreté.

169. La Commission regrette que Şeyhmus Sakın, Kıyas Sakın, Emin Kabul et Abdullah Ertur n'aient pas comparu devant les délégués. La déposition d'Abdullah Ertur, recueillie par l'enquêteur, contredit le récit du requérant ainsi que son témoignage devant le préfet. Cependant, le préfet jugeant la déposition du témoin oculaire suffisamment crédible, a demandé que des investigations soient menées sur l'affaire. La Commission privilégie la version donnée par le requérant et Mustafa Malay aux délégués quant aux affirmations d'Abdullah Ertur.

170. Eu égard à ses constatations ci-dessus, la Commission conclut que l'absence du nom de Mehmet Ertak sur les registres de garde à vue de la direction de la sûreté ne prouve pas en soi que celui-ci n'a pas été placé en garde à vue (par. 165 ci-dessus).

171. Dans ces conditions, la Commission admet les témoignages de Süleyman Ertak, du requérant, d'Ahmet Ertak, d'Abdurrahim Demir et de Mustafa Malay, que les délégués ont jugés crédibles et convaincants.

c) Quant au sort du fils du requérant

172. Quant aux allégations concernant la « disparition » du fils du requérant lors de sa garde à vue, la Commission constate qu'un avocat, Abdurrahim Demir, cité par le requérant dans sa pétition présentée au parquet de Şırnak le 2 octobre 1992 comme témoin oculaire, déclare dans sa déposition orale faite devant les délégués que le 24 ou 25 août 1992, Mehmet Ertak a été amené dans la salle où lui-même était détenu. Il nomme certaines personnes qui se trouvaient au même endroit. La Commission relève que les noms de ces personnes figurent sur les registres de garde à vue de la section antiterroriste de la direction de la sûreté.

173. La Commission note qu'Abdurrahim Demir précise d'une manière détaillée dans sa déposition orale les circonstances dans lesquelles ils ont été arrêtés et les conditions de leur garde à vue (par. 82-91). Il met en exergue que suite à la plainte pénale d'İsmail Ertak il a été entendu par le procureur de la République de Diyarbakır et il a mentionné dans sa déposition les noms de certaines personnes qui étaient détenues au même endroit que lui. Il précise qu'il a apposé sa signature sur ladite déposition.

174. Abdurrahim Demir déclare que Mehmet Ertak lui a indiqué que selon lui, il avait été arrêté à cause de son frère qui avait rejoint les rangs du PKK. S'agissant des conditions de leur garde à vue, Abdurrahim Demir fait une description détaillée des traitements qu'ils auraient subis lors de l'interrogatoire : ils étaient dévêtus et soumis à la pendaison, sévèrement battus et arrosés de jets d'eau froide. Il expose qu'une fois ils avaient été emmenés deux ou trois ensemble à la « salle de torture ». Mehmet Ertak aussi était parmi eux. Il était dévêtu, suspendu comme lui. Pour autant qu'il ait pu en juger, les sévices avaient duré une heure pour lui et c'est seulement dix heures après que Mehmet Ertak avait été ramené. Il déclare comme suit : « Quand Mehmet Ertak a été ramené dans la cellule, il ne pouvait pas parler, il était mort, c'est à dire qu'il était devenu rigide. Je suis sûr à 99 % qu'il était mort. Deux, trois minutes plus tard ils l'ont traîné dehors en le tenant par les jambes. Une de ses chaussures était restée là-bas. Nous ne l'avons plus revu. » Il précise qu'il mettait cette paire de chaussures sous sa tête quand il dormait sur le béton (par. 85 ci-dessus).

175. La Commission regrette que le Gouvernement n'ait pas fourni le dossier d'enquête ouverte par le parquet du Şırnak suite à la plainte pénale du requérant en date du 2 novembre 1992 et que le procureur Ahmet Berke n'ait pas comparu devant les délégués. Il ressort des éléments du dossier de l'enquête menée par l'enquêteur Yahya Bal qu'Abdurrahim Demir n'a pas été entendu en tant que témoin oculaire par ce dernier.

176. La Commission relève que Serdar Çevirme, chef de la section des interrogatoires et des renseignements de la section antiterroriste de la direction de la sûreté, indique dans sa déposition orale devant les délégués qu'il ne peut apporter aucune explication quant au

fait que six personnes ont déclaré avoir vu Mehmet Ertak lors de la garde à vue, et n'explique pas pourquoi il trouve illogiques et sans fondement les témoignages concernant le fait qu'ils avaient interrogé et jeté Mehmet Ertak dans une cellule en présence de dix détenus. Il déclare qu'il faut examiner le passé de ces personnes qui avaient, selon lui, des liens avec l'organisation.

177. La Commission relève que toutes les descriptions faites par Abdurrahim Demir concernant les lieux de détention et d'interrogatoire sont en conformité avec la version faite à cet égard par Serdar Çevirme. Ce dernier reconnaît en outre qu'ils ont vécu une ambiance chaotique lors des incidents survenus entre les 15 et 18 août et que des centaines de personnes avaient été placées en garde à vue.

178. Par ailleurs, la Commission relève que le préfet de Şırnak, lors de son audition devant les délégués, reconnaît qu'il a rencontré dans son office des personnes qui avaient indiqué d'avoir vu Mehmet Ertak lors de la garde à vue et qu'il a notamment entendu un témoin oculaire.

179. Toutefois, la Commission observe que l'enquêteur n'avait pas en sa possession le dossier de l'enquête ouverte par le procureur suite à la plainte d'İsmail Ertak et qu'il n'a pas recueilli dans le cadre de ses investigations la déposition de ce dernier ainsi que celles des personnes citées par lui dans sa plainte.

180. La Commission estime que la déclaration d'Abdurrahim Demir ne peut être écartée. Elle relève qu'à toutes les questions posées par les délégués et les représentants des parties il a donné des réponses précises et détaillées, en particulier sur les sévices subis lors des interrogatoires, et qu'il a affirmé avec insistance et à plusieurs reprises que Mehmet Ertak était mort quand il avait été « jeté » dans la cellule.

181. En conséquence, la Commission considère comme plausible son témoignage selon lequel il a vu Mehmet Ertak comme « mort » dans les locaux de la direction de la sûreté.

d) Quant à l'enquête menée au niveau interne sur la disparition du fils du requérant

182. Le requérant soutient que sa plainte déposée auprès du parquet de Şırnak est restée sans effet. Il soutient que dans cette région de la Turquie, le parquet est impuissant pour mener une enquête sur les violations des libertés publiques commises par les forces de l'ordre. Il ajoute que la législation sur les poursuites des agents de l'Etat fait obstacle à l'identification des responsables des agissements incriminés.

183. Quant à l'indépendance des organes d'enquête qui, à la suite de la demande écrite adressée le 4 novembre 1992 par le préfet de Şırnak à la direction générale de la sûreté, ont mené l'enquête préliminaire aboutissant à une décision de classement, la Commission observe qu'ils étaient composés d'un enquêteur et des membres du conseil administratif du département de Şırnak. L'enquêteur était un inspecteur de police. Il dépendait de la

même hiérarchie administrative que les membres des forces de l'ordre contre lesquels il conduisait son enquête. Le conseil administratif qui, sur proposition de l'enquêteur, a décidé d'abandonner les poursuites, était présidé par le préfet adjoint et était composé de hauts fonctionnaires du département, à savoir des directeurs, ou de leurs adjoints, des différents services de l'administration centrale. Ces hauts fonctionnaires étaient placés sous la direction du préfet, qui était en même temps responsable, sur le plan juridique, des actes des forces de l'ordre en cause dans la présente affaire. L'inspecteur de police désigné comme enquêteur et les membres du conseil administratif n'étaient dotés ni des signes extérieurs d'indépendance, ni des garanties d'inamovibilité, ni des garanties légales qui les auraient protégés contre les pressions de leurs supérieurs hiérarchiques.

184. Quant au point de savoir si l'enquête menée par les organes administratifs d'enquête a été approfondie, la Commission constate que l'enquêteur a interrogé quatre témoins dans une pièce de la direction de la sûreté de Şırnak. Elle note à cet égard que c'était la police locale qui les avait cherchés de leur domicile et amenés dans la direction de la sûreté. Or, dans les dépositions qui ont été recueillies, ceux-ci nient complètement les faits allégués par le requérant. Toutefois, la Commission note que l'enquêteur n'a pas interrogé le requérant. Elle relève à cet égard qu'un procès-verbal, selon lequel İsmail Ertak avait quitté son domicile et était probablement parti pour Silopi, a été établi par la direction de la sûreté. Ledit procès-verbal a été signé entre autres par l'élu du quartier Ömer Yardımcı et Serdar Çevirme, chef de la section des interrogatoires et des renseignements de la section antiterroriste de la sûreté. Il ressort des faits que les témoins oculaires qui auraient pu apporter des éléments utiles au déroulement de l'enquête étaient cités par le requérant dans sa plainte du 2 novembre 1992, présentée au parquet. Or, les organes administratifs d'enquête n'ont formulé aucune demande d'audition de ces personnes alors que la déposition de l'une d'entre elles, à savoir Abdullah Ertur, était en totale contradiction avec ses propos tenus devant le préfet, Mustafa Malay.

185. Par ailleurs, la Commission constate la forme stéréotypée et le contenu globalement similaire des dépositions des témoins entendus par l'enquêteur dans les locaux de la direction de la sûreté (par. 42 a) b) c) d). La Commission relève que la déposition de l'un des témoins, Süleyman Ertak, faite devant les délégués, est en totale contradiction avec sa déposition devant l'enquêteur. A cet égard, se référant à ses conclusions aux paragraphes 161 à 168 ci-dessus, elle rappelle qu'elle privilégie cette dernière déposition.

186. La Commission note que les témoignages de l'enquêteur et du préfet adjoint, qui présidait au nom du préfet le conseil administratif qui a rendu une décision de classement dans la présente affaire, constituent des éléments démontrant le caractère superficiel de l'enquête administrative sur la base de laquelle a été prise la décision de classement (par. 130-135 et 138-141).

187. Au vu de l'examen du dossier d'enquête soumis par l'enquêteur aux délégués, la Commission relève qu'aucune démarche utile n'a été accomplie pour rechercher d'autres témoins qui avaient affirmé avoir vu Mehmet Ertak lors de sa garde à vue, et notamment pour entendre le plaignant. Force est donc de constater que l'enquête administrative

nationale s'est basée sur la présomption selon laquelle Mehmet Ertak n'avait jamais été placé en garde à vue.

188. Quant à la nature de la procédure en cause, la Commission observe que les investigations menées par l'enquêteur et par le conseil administratif sont inaccessibles à la partie plaignante. Le contrôle exercé par le Conseil d'Etat quant à la décision de classement prononcé par le conseil administratif s'est effectué sur dossier dans le cadre d'une procédure écrite. Cette partie de la procédure était également inaccessible au requérant. Par ailleurs, la décision de classement n'a pas été notifiée au requérant. Or, la notification aurait pu lui permettre de présenter un recours devant le Conseil d'Etat. Enfin, la décision des organes administratifs de classer l'affaire a empêché le requérant de bénéficier d'un procès public devant les juridictions pénales.

Remarques finales

189. Les représentants du requérant prétendent que les documents relatifs à la requête ont été confisqués lors de l'arrestation de Maître Tahir Elçi, qui était le représentant du requérant lors de l'introduction de la requête. Ils soutiennent que le Gouvernement n'a pas répondu aux demandes de restitution desdits documents présentées par la Commission. La Commission relève que Maître Tahir Elçi, lors de sa déposition orale devant les délégués, réitère ces allégations et conteste les listes établies par les autorités faisant état des documents saisis et restitués. La Commission constate que le 23 février 1995, le Gouvernement a fourni le procès-verbal de saisie ainsi que la décision de la cour de sûreté de l'Etat de Diyarbakır, datée du 10 janvier 1994, énumérant les documents remis à Maître Tahir Elçi, lesquels ne faisaient pas mention du dossier de la requête introduite devant la Commission. Elle note à cet égard que Maître Tahir Elçi a indiqué aux délégués qu'il n'avait pas pris les dépositions des témoins et n'a pas pu préciser le contenu du dossier.

Au vu des éléments en sa possession, la Commission estime qu'il n'y a pas lieu de conclure que le Gouvernement n'a pas respecté les obligations qui lui incombent en vertu de l'ancien article 28 par. 1 a) de la Convention.

Eu égard à ses constations ci-dessus, la Commission examinera présentement les griefs du requérant.

D. Quant à la violation de l'article 2 de la Convention

190. L'article 2 de la Convention se lit ainsi :

« 1. Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi.

2. La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument nécessaire :

a. pour assurer la défense de toute personne contre la violence illégale ;

b. pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue ;

c. pour réprimer, conformément à la loi, une émeute ou une insurrection. »

191. Selon le requérant, l'Etat est responsable du sort de son fils qui, selon tous les témoignages, a disparu lors de sa garde à vue dans les locaux de la direction de la sûreté de Şırnak. Se basant sur la déposition d'un témoin oculaire, il allègue que son fils est mort suite aux tortures qui lui ont été infligées par les forces de l'ordre. Il soutient que celles-ci n'ayant pu donner aucune explication plausible de cette « disparition », il y a violation grave de l'article 2 de la Convention. En outre, il souligne que l'absence d'enquête officielle réelle et efficace sur la disparition de son fils constitue une violation distincte de l'obligation de l'Etat d'assurer, en vertu de l'article 2, une protection efficace du droit à la vie.

192. Le requérant, qui réitère dans ses observations finales les arguments présentés ci-dessus, invoque des violations distinctes de l'article 3 de la Convention quant au traitement infligé à Mehmet Ertak durant sa détention et, à titre personnel, en tant que victime d'une disparition forcée. Il soutient que son fils a été arbitrairement privé de sa liberté, en violation de l'article 5 de la Convention et au mépris des garanties de cette disposition relatives à la justification légale d'une telle privation et au contrôle judiciaire requis. Se référant à l'arrêt Kaya c. Turquie du 19 février 1998, le requérant allègue la violation de l'article 13 de la Convention, dans la mesure où il s'est vu refuser un recours « effectif » qui lui eût permis de faire la lumière sur les circonstances dans lesquelles son fils Mehmet Ertak a trouvé la mort.

193. Le Gouvernement, qui nie que le fils du requérant ait été détenu par les forces de l'ordre, prétend que les allégations du requérant quant à la disparition de l'intéressé durant sa garde à vue ne sont pas fondées.

194. La Commission examinera le fond des questions soulevées par le requérant sous l'angle de l'article 2 de la Convention. Eu égard à ses conclusions ci-dessous, la Commission estime qu'aucune question distincte ne se pose sous l'angle des articles 3, 5 et 13 de la Convention.

A. Sur le sort du fils du requérant

195. La Commission rappelle que l'interprétation de l'article 2 de la Convention doit être guidée par l'acceptation du fait qu'il constitue l'un des droits les plus importants reconnus par la Convention, auquel aucune dérogation n'est possible. Les situations dans lesquelles il peut être justifié d'infliger la mort sont définies de manière exhaustive et doivent être interprétées de manière stricte.

196. Lorsqu'il y a « disparition » d'une personne détenue par les autorités de l'Etat, il y a de fortes présomptions pour que cette détention ait été fatale pour la personne concernée. La Commission relève que dans les affaires traitant de disparitions et dans lesquelles une personne a disparu depuis longtemps, la Cour interaméricaine des Droits de l'Homme a conclu à la violation du droit à la vie lorsque la durée et le contexte de la disparition de celle-ci permettaient de présumer raisonnablement que la personne avait été tuée (arrêts Velasquez Rodriguez c. Honduras du 29 juillet 1988, Inter-Am. Ct. H.R. (Ser. C) n° 4 ; Godinez Cruz c. Honduras du 20 janvier 1989, Inter-Am. Ct. H.R. (Ser. C) n° 5 ; Caballero-Delgado et Santana c. Colombie du 8 décembre 1995, Inter-Am. Ct. H.R.). Selon la Cour interaméricaine des Droits de l'Homme, les preuves indirectes sont particulièrement pertinentes dans les cas de disparitions qui s'accompagnent d'une volonté d'occulter ce qui s'est passé. Toutefois, la Commission observe que dans l'affaire Velasquez Rodriguez, la Cour interaméricaine a conclu à une pratique systématique de disparitions associée à des mauvais traitements et à des exécutions sommaires, alors que dans l'affaire Caballero-Delgado et Santana, certains éléments permettaient de penser qu'il y avait eu exécution.

197. La Commission observe que dans l'affaire Kurt c. Turquie, elle a conclu que les allégations relatives à une apparente disparition forcée et aux défaillances imputées au Gouvernement quant aux mesures qu'il aurait raisonnablement dû prendre pour protéger la personne contre une telle disparition relèvent plutôt de l'article 5, qui garantit le droit à la liberté et sûreté des personnes (rapport Comm. 5.12.96, par. 189, voir aussi arrêt Kurt c. Turquie du 25 mai 1998, Recueil des arrêts et décisions 1998-..., p..., par. 109).

198. Toutefois, en l'espèce, la Commission vient de conclure que le fils du requérant avait été arrêté lors d'un contrôle d'identité. Elle a en outre accepté le témoignage d'Abdurrahim Demir qui avait indiqué avec insistance et à maintes reprises que Mehmet Ertak gisait comme « mort » quand il avait été ramené dans la cellule suite aux tortures infligées par les fonctionnaires de police (par. 171-179).

199. Dans ces circonstances, la Commission estime qu'il a été établi au-delà de tout doute raisonnable que la mort de Mehmet Ertak a été causée par les agents de l'Etat à une période postérieure à son arrestation, par un traitement dont le Gouvernement porte la responsabilité.

B. Sur l'enquête menée par les autorités nationales

200. La Commission rappelle qu'à l'instar d'autres articles de la Convention, l'article 2 implique des obligations positives de la part de l'Etat (N° 9438/81, déc. 28.2.83, D.R. 32, pp. 190-200).

201. Ainsi, la Commission a déjà considéré que :

« L'obligation imposée à l'Etat, selon laquelle le droit de toute personne à la vie sera 'protégé par la loi', peut inclure un aspect procédural. Ceci englobe la condition minimale d'un dispositif par lequel les circonstances d'un homicide commis par les

représentants d'un Etat peuvent être soumises à un examen approfondi, public et indépendant. La nature et le niveau d'un examen qui satisfasse au seuil minimum doivent, de l'avis de la Commission, dépendre des circonstances de l'espèce. Des affaires peuvent se présenter dans lesquelles les faits entourant un homicide sont clairs et incontestés et où l'examen inquisitoire subséquent peut légitimement se réduire à une formalité minimale. Mais, de la même manière, d'autres situations peuvent se présenter dans lesquelles une victime meurt dans des circonstances troubles, auquel cas l'absence de toute procédure effective permettant d'enquêter sur la cause de l'homicide pourrait par elle-même soulever une question au titre de l'article 2 de la Convention » (voir Cour eur. D.H., arrêt McCann et autres c. Royaume-Uni du 27 septembre 1995, série A n° 324, p. 79, par. 193).

202. La Cour a confirmé le point de vue de la Commission selon lequel une loi interdisant de manière générale aux agents de l'Etat de procéder à des homicides arbitraires serait en pratique inefficace s'il n'existait pas de procédure permettant de contrôler la légalité du recours à la force meurtrière par les autorités de l'Etat. Elle a considéré que :

« L'obligation de protéger le droit à la vie qu'impose cette disposition, combinée avec le devoir général incombant à l'Etat en vertu de l'article 1 de la Convention de « reconna[ître] à toute personne relevant de [sa] juridiction les droits et libertés définis [dans] la (...) Convention », implique et exige de mener une forme d'enquête efficace lorsque le recours à la force, notamment par des agents de l'Etat, a entraîné mort d'homme » (voir arrêt McCann et autres c. Royaume-Uni, précité, p. 49, par. 161).

203. La Commission rappelle que la protection procédurale du droit à la vie prévue à l'article 2 de la Convention implique pour les agents de l'Etat l'obligation de rendre compte de leur usage de la force meurtrière, leurs actes doivent être soumis à une forme d'enquête indépendante et publique propre à déterminer si le recours à la force était ou non justifiée dans les circonstances particulières d'une affaire (Cour eur. D.H., arrêt Kaya c. Turquie du 19 février 1998, Recueil 1998-..., p. ..., par. 87).

204. La Commission estime que les considérations ci-dessus doivent s'appliquer mutatis mutandis au cas d'espèce. Elle considère en particulier que les circonstances de la cause étaient telles qu'une enquête approfondie de la part des autorités aurait dû être menée.

205. Or, la Commission vient de constater que l'enquête menée au plan interne sur la disparition du fils du requérant n'a pas été effectuée par des organes indépendants, n'était pas approfondie et s'est déroulée sans que le requérant ait pu y prendre part (par. 181-187). Une telle situation constitue, selon la Commission, un manquement de l'Etat à son obligation de protéger le droit à la vie par la loi.

CONCLUSION

206. La Commission conclut, à l'unanimité, qu'il y a eu, en l'espèce, violation de l'article 2 de la Convention en raison de la mort de Mehmet Ertak causée par les agents de l'Etat et de l'absence d'une enquête adéquate et efficace sur les circonstances de la disparition de celui-ci.

E. Quant à l'ancien article 25 de la Convention

Atteinte alléguée à l'exercice des droits de l'avocat du requérant

207. L'ancien article 25 de la Convention est ainsi libellé :

« 1. La Commission peut être saisie d'une requête adressée au Secrétaire Général du Conseil de l'Europe par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers, qui se prétend victime d'une violation par l'une des Hautes Parties contractantes des droits reconnus dans la présente Convention, dans le cas où la Haute Partie contractante mise en cause a déclaré reconnaître la compétence de la Commission dans cette matière. Les Hautes Parties contractantes ayant souscrit une telle déclaration s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit. »

208. Les représentants du requérant prétendent que le 23 novembre 1993, tous les documents relatifs à l'affaire ont été saisis par les forces de l'ordre lors de l'arrestation de Maître Tahir Elçi, qui avait introduit au nom du requérant la requête devant la Commission. Ils se réfèrent à cet égard à la conclusion de la Commission dans son rapport en l'affaire Kurt c. Turquie susmentionnée, dans laquelle elle a estimé que les mesures prises par les autorités en vue d'intenter une action pénale contre le représentant de la requérante en raison des observations qu'il avait formulées dans sa requête à la Commission n'étaient pas compatibles avec l'obligation du Gouvernement de ne pas entraver l'exercice efficace du droit de recours individuel garanti par l'ancien article 25 de la Convention.

209. Le Gouvernement n'a pas soumis d'observations sur ce point, soulevé par les représentants du requérant dans leurs observations finales sur le bien-fondé.

210. La Commission relève que le 23 février 1995 le Gouvernement a fourni le procès-verbal des documents saisis chez le représentant du requérant, sur lequel ne figuraient pas les documents concernant la requête. Elle constate que Maître Tahir Elçi, dans sa déposition orale devant les délégués conteste le contenu des listes établies par les autorités en énumérant des documents saisis et restitués (par. 94 ci-dessus).

211. La Commission note qu'il ne ressort pas des dépositions de Maître Tahir Elçi, ni des éléments du dossier que la procédure pénale engagée à l'encontre de l'avocat du requérant concernait la requête introduite devant la Commission. Elle constate à cet égard que Maître Tahir Elçi, dans sa déposition faite devant les délégués, affirme qu'il n'a pas pris les dépositions des témoins oculaires et ne spécifie pas le contenu du dossier. Il

soutient que les avocats qui assistent les requérants devant la Commission et les cours de sûreté de l'Etat sont intimidés par les autorités internes.

212. La Commission relève que les faits de la cause ne permettent pas de constater que l'ouverture d'une procédure pénale contre l'avocat concernait la requête introduite devant la Commission.

CONCLUSION

213. La Commission conclut, par 28 voix contre 2, qu'il n'y a pas eu violation de l'ancien article 25 de la Convention.

F. Récapitulation

214. La Commission conclut, à l'unanimité, qu'il y a eu, en l'espèce, violation de l'article 2 de la Convention en raison de la mort de Mehmet Ertak causée par les agents de l'Etat et de l'absence d'une enquête adéquate et efficace sur les circonstances la disparition de celui-ci (paragraphe 206).

215. La Commission conclut, par 28 voix contre 2, qu'il n'y a pas eu violation de l'ancien article 25 de la Convention (paragraphe 213).

M.-T. SCHOEPFER
Secrétaire
de la Commission

S. TRECHSEL
Président
de la Commission

OPINION PARTIELLEMENT DISSIDENTE DE Mme J. LIDDY

I agree that there has been a violation of Article 2 but I have voted against the finding under former Article 25.

The applicant complains under former Article 25 that on 23 November 1993 the documents relating to his case were seised when his lawyer in the proceedings before the Commission, Maître Tahir Elci, was arrested.

On 2 December 1996 the Commission declared admissible an application (N° 23145/93) brought by Tahir Elci (as well as other lawyers) in which he invoked Articles 3, 5, 8 and 25 of the Convention and Article 1 of Protocol No. 1 in relation, inter alia, to the events of 23 November 1993.

The Commission is at present carrying out its functions under former Article 28 para. 1 and has yet to adopt its Report on the merits.

In these circumstances I consider it premature to reach any final conclusion under Article 25 in relation to the present applicant, who was a client of Maître Elci, and I would have preferred to adopt a partial Report limited to the Article 2 issue.

Appendix E

Ertak v Turkey: Judgment of the European Court of Human Rights

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

PREMIÈRE SECTION

AFFAIRE ISMAIL ERTAK c. TURQUIE

(Requête n° 20764/92)

ARRÊT

STRASBOURG

9 mai 2000

Cet arrêt peut subir des retouches de forme avant la parution de sa version définitive dans le recueil officiel contenant un choix d'arrêts et de décisions de la Cour.

En l'affaire Ismail ERTAK c. Turquie,

La Cour européenne des Droits de l'Homme (première section), siégeant en une chambre composée de :

M^me^ E. PALM, *présidente*,
M. J. CASADEVALL,
M. L. FERRARI BRAVO,
M. B. ZUPANČIČ,
M^me^ W. THOMASSEN,
M. T. PANȚÎRU, *juges*
M. F. GÖLCÜKLÜ, *juge* ad hoc,
et de M. M. O'BOYLE, *greffier de section*,

Après en avoir délibéré en chambre du conseil le 4 avril 2000,

Rend l'arrêt que voici, adopté à cette date :

PROCEDURE

1. A l'origine de l'affaire se trouve une requête (n° 20764/92) dirigée contre la République de Turquie et dont un ressortissant de cet Etat, M. İsmail Ertak (« le requérant »), avait saisi la Commission européenne des Droits de l'Homme (« la Commission ») le 1^er^ octobre 1992 en vertu de l'ancien article 25 de la Convention de sauvegarde des Droits de l'Homme et des Libertés fondamentales (« la Convention »).

2. Le requérant, qui a été admis au bénéfice de l'assistance judiciaire, est représenté par M. Kevin Boyle et M^me^ Françoise Hampson, enseignants à l'université d'Essex (Angleterre). Le gouvernement turc (« le Gouvernement ») est représenté par son agent.

3. Le requérant alléguait que son fils, placé en garde à vue le 20 août 1992, aurait disparu pendant sa garde à vue et aurait très probablement été tué par les forces de l'ordre lors de son interrogatoire.

4. L'affaire a été déférée à la Cour, conformément aux dispositions qui s'appliquaient avant l'entrée en vigueur du Protocole n° 11 à la Convention[1], par la Commission, le 6 mars 1999 (article 5 § 4 du Protocole n° 11 et anciens articles 47 et 48 de la Convention). La Commission a déclaré la requête recevable le 4 décembre 1995. Dans son rapport du 4 décembre 1998 (ancien article 31 de la Convention), elle formule l'avis unanime qu'il y a eu violation de l'article 2 de la Convention et, par 28 voix contre 2, qu'il n'y a pas eu violation de l'ancien article 25 de la Convention.

5. Le 31 mars 1999, le collège de la Grande Chambre a décidé que l'affaire devait être examinée par une des sections de la Cour (article 100 § 1 du règlement). La requête a été attribuée à la première section (article 52

Notes du greffe

1. Le Protocole n° 11 est entré en vigueur le 1^er^ novembre 1998.

§ 1 du règlement). Au sein de celle-ci, la chambre chargée d'examiner l'affaire (article 27 § 1 de la Convention) a été constituée conformément à l'article 26 § 1 du règlement. A la suite du déport de M. R. Türmen, juge élu au titre de la Turquie (article 28), le Gouvernement a désigné M. Feyyaz Gölcüklü pour siéger en qualité de juge *ad hoc* (articles 27 § 2 de la Convention et 29 § 1 du règlement).

6. Tant le requérant que le Gouvernement ont déposé des observations écrites sur le fond de l'affaire (article 59 § 1 du règlement).

7. Une audience s'est déroulée en public au Palais des Droits de l'Homme, à Strasbourg, le 9 novembre 1999.

Ont comparu :

– *pour le Gouvernement*
M^me^ D. AKÇAY, *co-agente,*
M B.ÇALIŞKAN,
M E. GENEL,
M. C. AYDIN,
M^me^ M. GÜLŞEN,
M^me^ A. GÜNYAKTI, *conseillers* ;

– *pour le requérant*
M^me^ F. HAMPSON, *conseil,*
M^me^ R. YALÇINDAĞ,
M C. AYDIN,
M K. YILDIZ, *conseillers.*

La Cour a entendu en leurs déclarations M^mes^ Hampson et Akçay.

EN FAIT

I. LES CIRCONSTANCES DE L'ESPECE

8. Le requérant, İsmail Ertak, ressortissant turc né en 1930, réside à Şırnak, dans le sud-est de la Turquie. Il a saisi la Commission en son nom propre et en celui de son fils, Mehmet Ertak, qui, selon lui, a disparu dans des circonstances engageant la responsabilité de l'Etat.

A. Les faits

9. Les faits qui entourent la disparition du fils du requérant sont controversés.

10. La version qui en a été fournie par le requérant se trouve exposée au point 1 ci-après. Dans son mémoire à la Cour, M. Ertak s'est appuyé sur les faits tels que la Commission les a établis dans son rapport (ancien article 31) adopté le 4 décembre 1998, ainsi que sur les observations qu'il avait adressées à la Commission.

11. Les faits tels que le Gouvernement les a décrits figurent au point 2 ci-après.

12. La partie B détaille les éléments communiqués à la Commission.

13. En vue d'établir les faits compte tenu du différend relatif aux circonstances entourant la disparition du fils du requérant, la Commission a mené sa propre enquête conformément à l'ancien article 28 § 1 a) de la Convention. A cette fin, elle a examiné plusieurs documents que le requérant et le Gouvernement avaient produits à l'appui de leurs assertions respectives et désigné trois délégués pour procéder à une audition de témoins à Ankara les 5, 6 et 7 février 1997. L'appréciation des preuves par la Commission et ses constatations y relatives se trouvent résumées en partie C.

1. Les faits tels qu'ils ont été exposés par le requérant

a) Quant à la disparition du fils du requérant

14. Suite à des incidents survenus à Şırnak (ville du sud-est de la Turquie) du 18 au 20 août 1992, plusieurs personnes furent placées en garde à vue le 21 août dans les locaux du commandement de la gendarmerie et de la direction de la sûreté de Şırnak. Lors de ces événements, le fils du requérant, Mehmet Ertak, travaillait dans les mines de charbon.

15. Au point de contrôle de Bakımevi, des policiers en uniforme bleu arrêtèrent le taxi que Mehmet Ertak avait pris alors qu'il rentrait de son travail en compagnie de trois autres personnes, à savoir Abdulmenaf Kabul, Süleyman Ertak et Yusuf Ertak. Les policiers prirent leurs pièces d'identité et l'un d'entre eux vint demander qui était Mehmet Ertak. Celui-ci se présenta et ils l'emmenèrent avec eux.

16. Le 24 août 1992, Abdullah Ertur, une connaissance, qui fut placé en garde à vue le 21 août 1992 et mis en liberté le 23 août 1992, affirma au requérant qu'il avait partagé une cellule avec Mehmet Ertak toute une journée et une nuit.

17. Abdurrahim Demir, un avocat placé en garde à vue le 22 août 1992 et relâché le 15 septembre 1992, indiqua au requérant qu'il avait passé cinq ou six jours dans la même pièce que Mehmet Ertak. Il exposa en outre que Mehmet Ertak avait été sévèrement torturé ; la dernière fois, notamment, il était resté dans la « salle de torture » environ quinze heures. Il indiqua que lorsque Mehmet Ertak avait été ramené en cellule, il était inconscient et ne donnait aucun signe de vie. Quelques minutes plus tard, on l'avait sorti de la cellule en le tirant par une jambe. Une autre personne, Ahmet Kaplan,

également relâché le 15 septembre 1992, dit au requérant qu'il avait vu son fils lors de sa détention. Trois autres personnes placées en garde à vue à la même période que Mehmet Ertak dans les locaux de la sûreté, indiquèrent elles aussi, lors d'un entretien à la prison de Şırnak avec le requérant qui était venu leur rendre visite, qu'elles avaient vu Mehmet Ertak pendant la garde à vue.

18. Le requérant présenta une requête au préfet de Şırnak afin de connaître la raison pour laquelle son fils n'avait pas été libéré et de savoir où il se trouvait. Il était accompagné des élus du quartier, Abdullah Sakın et Ömer Yardımcı, ainsi que de son autre fils, Hamit Ertak. Le préfet, Mustafa Malay, entendit comme témoin oculaire Abdullah Ertur qui confirma avoir vu Mehmet Ertak dans les locaux de la sûreté. Le préfet effectua des recherches auprès des militaires et de la police. Ces derniers indiquèrent que Mehmet Ertak n'avait jamais été placé en garde à vue. Par lettre du 4 novembre 1992, le préfet demanda à la direction générale de la sûreté de charger un instructeur de mener une enquête sur les allégations du requérant.

19. Le 2 octobre 1992, le requérant porta plainte auprès du parquet de Şırnak. Il demanda à être informé du sort de son fils. Il précisa qu'alors que plusieurs témoins affirmaient avoir vu son fils pendant la période de la garde à vue, la préfecture, la police et les militaires indiquaient, quant à eux, que Mehmet Ertak n'avait jamais été placé en garde à vue.

20. Le 8 avril 1993, l'enquêteur présenta son rapport au conseil administratif de Şırnak en proposant de ne pas saisir les juridictions.

21. Le 21 juin 1993, le procureur de la République de Şırnak se déclara incompétent et renvoya le dossier au conseil administratif du département de Şırnak afin que celui-ci menât l'instruction.

22. Le 11 novembre 1993, le conseil administratif de Şırnak rendit une ordonnance signée par le préfet adjoint et les adjoints des directeurs ou directeurs des différents services publics du département (le poste de directeur des affaires juridiques était vacant à l'époque). Celui-ci y conclut qu'il n'y avait pas lieu de saisir les juridictions pénales contre les fonctionnaires de police de la direction de la sûreté de Şırnak. Il considéra que les faits allégués n'avaient pas été établis.

23. Le 22 novembre 1993, conformément aux dispositions légales en vigueur, le dossier fut transmis au Conseil d'Etat. Par arrêt du 22 décembre 1993, le Conseil d'Etat confirma en ces termes l'ordonnance de non-lieu rendue par le conseil administratif :

> « (...) Les délits commis par des fonctionnaires agissant dans l'exercice ou au titre de leurs fonctions sont soumis aux procédures régissant les poursuites à l'encontre des fonctionnaires (...). un enquêteur administratif chargé de mener l'enquête est nommé par ordonnance (...).
>
> (...) Pour mener une enquête contre un fonctionnaire, il faut tout d'abord que celui-ci soit précisément identifié. Faute d'identification précise, aucune enquête ne peut

être menée, aucun résumé d'enquête ne peut être rédigé et aucune juridiction compétente en la matière ne peut rendre de jugement.

Les informations contenues dans le dossier d'enquête n'ont pas permis de déterminer qui a commis les actes allégués ; en conséquence, cette enquête n'aurait pas dû être ouverte. Toutefois, un dossier d'enquête a été constitué par l'enquêteur désigné et, se fondant sur ce dossier, le conseil administratif du département a rendu une ordonnance de non-lieu, du fait que les responsables sont inconnus et qu'il est impossible d'enquêter sur l'affaire. Le Conseil décide à l'unanimité, pour les raisons susmentionnées, de confirmer la décision du conseil administratif et de retourner le dossier. »

b) Quant aux allégations d'entrave à l'exercice du droit de recours individuel

Mesures prises contre Maître Elçi, avocat du requérant lors de l'introduction de la requête

24. Le requérant affirme que les autorités ont intenté des poursuites contre Maître Tahir Elçi en raison du rôle qu'il a joué dans l'introduction des requêtes, dont la sienne, à la Commission européenne des Droits de l'Homme. Il affirme que le 23 novembre 1993, tous les documents relatifs à l'affaire furent saisis par les forces de l'ordre lors de l'arrestation de Maître Tahir Elçi.

2. Les faits tels qu'ils ont été exposés par le Gouvernement

a) Quant à la disparition du fils du requérant

25. S'il est exact que, suite aux affrontements survenus dans la ville de Şırnak du 18 au 20 août 1992, une opération a été menée et que près d'une centaine de personnes ont été placées en garde à vue, Mehmet Ertak n'a pas été arrêté par les forces de l'ordre. Comme en fit état la lettre du 21 décembre 1994 de la direction générale de la sûreté, selon les registres de la garde à vue il n'avait jamais été appréhendé ni incarcéré.

b) Quant aux allégations d'entrave à l'exercice du droit de recours individuel

26. Le 23 février 1995, le Gouvernement fournit à la Commission le procès-verbal des documents saisis chez Maître Elçi ainsi que la décision de la cour de sûreté de l'Etat de Diyarbakır, datée du 10 janvier 1994, faisant état des documents remis à celui-ci.

B. Les éléments de preuve recueillis par la Commission

1. Les éléments de preuve écrits

27. Les comparants ont présenté divers documents relatifs à l'enquête menée suite à la plainte pénale du requérant.

a) Pétition déposée par le requérant le 2 octobre 1992 auprès du parquet de Şırnak

28. Le requérant allégua que, suite aux événements survenus à Şırnak, son fils avait été arrêté le 20 août 1992 lors d'un contrôle d'identité alors qu'il rentrait de son travail en compagnie de trois membres de sa famille. Il précisa et nomma des témoins oculaires ayant affirmé avoir vu son fils pendant sa garde à vue. Il demanda à être informé du sort de son fils.

b) Ordonnance d'incompétence *ratione materiae* rendue le 21 juillet 1993 par le procureur de la République de Şırnak

29. Le parquet de Şırnak, par cette ordonnance, se déclara incompétent pour examiner la plainte pénale du requérant contre les fonctionnaires de police de la direction de la sûreté de Şırnak. Il rappela que les actions des forces de l'ordre placées sous les ordres du préfet de la région où l'état d'urgence est en vigueur devaient être soumises aux règles régissant les poursuites contre les fonctionnaires. Il renvoya le dossier au conseil administratif du département de Şırnak.

c) Documents relatifs à l'enquête menée par l'enquêteur, Yahya Bal

30. Par lettre du 4 novembre 1992, se référant à la pétition déposée par le requérant le 10 septembre 1992 auprès de la préfecture de Şırnak, le préfet de Şırnak, Mustafa Malay, demanda à la direction générale de la sûreté de charger un enquêteur de mener une enquête sur les allégations du requérant.

31. Par lettre du 3 décembre 1992, le conseil d'inspection de la direction générale de la sûreté désigna Yahya Bal, inspecteur de police, comme enquêteur. Les 12 et 13 janvier 1993, celui-ci entendit comme témoins Abdulmenaf Kabul, Süleyman Ertak, Yusuf Ertak et Abdullah Ertur. Les dépositions, dont celle du deuxième faite avec l'aide d'un interprète, furent consignées comme suit :

> (a) Abdulmenaf Kabul : « J'habitais dans le même hameau que Mehmet Ertak et je le connaissais personnellement. Toutefois le nom de son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Lors des incidents, j'étais chez moi et je n'ai pas été placé en garde à vue (par la sûreté) comme il a été allégué, ni ce jour-là ni les jours suivants. J'ai appris sa disparition lors de ma déposition auprès du parquet de Şırnak, où j'ai dit la même chose que ce que je dis devant vous. Moi et mes proches, nous avons travaillé comme gardes du village en 1987. Le frère de Mehmet Ertak, Salih, est actuellement militant du PKK et est parti dans les montagnes. Comme nous sommes

pro-gouvernementaux, ces personnes ont attaqué ma maison et celle de mes proches ; lors de cet incident, certains membres de ma famille et moi-même avons été blessés et mon cousin, Hasan Ertak, a été tué ; et depuis, nous sommes en litige avec eux. Ils auraient ainsi voulu mêler notre nom à cette affaire pour nous causer du tort ; je n'ai aucune information sur la prétendue disparition de Mehmet Ertak et, contrairement à ce qui a été allégué, je n'ai pas été placé en garde à vue avec lui par la police. »

(b) Süleyman Ertak: « Je connais Mehmet Ertak. Nous habitions dans le même hameau et nous travaillions de temps en temps ensemble dans les mines de charbon. Toutefois le nom de son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Le jour de l'incident, moi et mon neveu Yusuf travaillions dans les mines de charbon. Nous avons entendu des coups de feu venant de la ville et nous sommes allés sur la route principale pour pouvoir retourner en ville. Nous avons fait arrêter, en levant la main, un taxi venant de la direction de Cizre. Mehmet Ertak se trouvait dans ce taxi avec lequel nous sommes allés en ville. A l'entrée de la ville, les policiers faisaient un contrôle d'identité. Ils nous ont pris et contrôlé nos cartes d'identité à tous les trois et nous les ont rendues. Avec mon neveu, nous sommes allés chez nous ; quant à Mehmet Ertak, il nous a quittés et, en nous disant qu'il avait des courses à faire, s'est dirigé vers les épiceries qui se trouvaient de l'autre côté de la route. Je ne l'ai plus revu. Je ne sais pas où il est. Je n'ai pas été placé en garde à vue le jour de l'incident, soit le 18 août 1992 ou après cette date, ni seul ni avec Mehmet Ertak comme il a été allégué par son père. Je ne sais pas pourquoi ce dernier a fait cette déclaration. »

(c) Yusuf Ertak : « Je connais Mehmet Ertak. Nous habitions dans le même hameau. Malgré le fait que nous avons le même nom de famille nous n'avons pas de lien de parenté. Toutefois le nom de son père n'est pas Mehmet, comme vous avez dit, mais İsmail. Je n'ai pas été placé en garde à vue le 18 août 1992, à la station d'entretien de l'administration des routes nationales (*Bakımevi*), comme il a été allégué par le père de cette personne. Lors des incidents, je travaillais dans une mine de charbon se trouvant à 5-6 km de la ville. Nous avons entendu des coups de feu venant de la ville et avec les autres ouvriers nous avons voulu retourner en ville mais la route était barrée par des soldats qui avaient interdit les entrées et sorties de la ville. Pour cette raison, nous n'avons pas pu retourner à Şırnak et en conséquence je n'ai pas été placé en garde à vue. Je ne sais pas si Mehmet Ertak avait été placé en garde à vue par la police. J'ai oublié de vous dire qu'à la fin des incidents, je ne me rappelle pas l'heure, un taxi dans lequel se trouvait Mehmet Ertak est venu de la direction de Cizre. Je ne sais pas à qui appartenait ce taxi. Le soldat qui se trouvait sur les lieux nous a fait monter, moi et Süleyman Ertak, dans le taxi et nous a envoyés à Şırnak. Au point d'entrée se trouvaient des agents de police. Ils ont contrôlé nos pièces d'identité et puis Mehmet Ertak nous a quittés et s'est dirigé vers les épiceries qui se trouvaient en face. Nous sommes allés chez nous, toutefois les policiers n'ont placé en garde à vue ni nous ni Mehmet Ertak. Je ne sais pas pourquoi son père a dit cela. »

(d) Abdullah Ertur (Ertuğrul) : « Le 18 août 1992, suite aux incidents survenus à Şırnak, dans la journée, les policiers m'ont arrêté chez moi ; je rectifie : les soldats m'ont arrêté et m'ont remis aux mains des policiers. Après l'instruction menée par la sûreté, le lendemain j'ai été mis en liberté. Quand je suis revenu chez moi, le père de Mehmet Ertak, que je connaissais personnellement des mines de charbon où nous travaillions ensemble, est venu me voir. Il m'a demandé si j'avais été placé en garde à vue et si son fils aussi était dans les locaux de la sûreté. Je lui ai répondu que nous étions une quarantaine ou cinquantaine mais que je n'avais pas vu son fils parmi ces personnes. Toutefois, dans sa plainte pénale, il avait menti en exposant le contraire. Je ne sais pas pour quel motif il a agi ainsi mais nous ne parlons pas avec la famille

Ertak. Leur fils, Salih Ertak, qui est avec le PKK et les amis de celui-ci avaient tué mon oncle Hasan Ertak. Il a dit cela pour susciter un différend entre nous et les forces de l'ordre. Je répète qu'il ment. Je ne suis pas resté dans la même cellule que Mehmet Ertak et je ne sais où il se trouve actuellement. »

d) Le rapport d'enquête présenté le 8 avril 1993 par l'enquêteur, Yahya Bal

32. L'enquêteur releva que, dans le cadre de l'enquête, il est allé sur les lieux et a examiné les registres de garde à vue dont les copies sont annexées à son rapport. Il indiqua que, malgré des lettres envoyées à la direction de la sûreté demandant l'audition d'İsmail Ertak qui aurait déménagé à Silopi, les autorités n'avaient pas pu trouver son adresse. Il observa qu'il ressortait des dépositions d'Abdulmenaf Kabul, Süleyman Ertak et Yusuf Ertak que ceux-ci n'avaient pas été placés en garde à vue par la police ni avant ni après les incidents et que ce fait était prouvé par l'examen des registres de garde à vue. L'enquêteur se référa en outre à la lettre envoyée par la direction de la sûreté de Şırnak faisant état de ce que Mehmet Ertak n'avait pas été placé en garde à vue lors ou suite aux incidents et constata qu'il ressortait de la déposition d'Abdullah Ertur que celui-ci avait été arrêté par les gendarmes et remis dans les mains de la police suite aux incidents survenus à Şırnak le 18 août 1992, qu'il avait été libéré le lendemain et que son nom figurait au 602ème rang du registre de garde à vue. Il releva qu'Abdullah Ertur avait indiqué dans sa déposition qu'il n'avait pas vu Mehmet Ertak dans les locaux de la sûreté et qu'il n'était donc pas resté avec lui dans la même cellule. L'enquêteur conclut comme suit :

« Je propose de ne pas saisir les juridictions étant donné que les allégations d'İsmail Ertak et du député Orhan Doğan concernant la mise en garde à vue et la disparition de Mehmet Ertak lors de sa garde à vue sont dépourvues de fondement. »

2. Les dépositions orales

33. Les 5, 6 et 7 février 1997, trois délégués de la Commission ont recueilli à Ankara les dépositions orales suivantes.

a) İsmail Ertak

34. Le témoin est le requérant et père de Mehmet Ertak. En août 1992, il entendit des coups de feu qui durèrent trois jours. La nuit des incidents, son fils Mehmet Ertak travaillait dans la mine de charbon.

35. Il réitéra les faits tels qu'il les a exposés dans sa formule de requête.

36. Le témoin affirma qu'il s'était rendu au poste de commandement de la brigade où un major, après vérification de la liste des personnes gardées à vue, lui avait précisé que son fils n'avait pas été détenu à la caserne. Il avait en outre assisté à une réunion tenue dans la caserne et demandé à nouveau à cette occasion à être informé du sort de son fils. Il s'était rendu, accompagné des élus du quartier (*muhtar*), Abdullah Sakın (*muhtar* du

quartier de Yeşilyurt) et Ömer Yardımcı (*muhtar* du quartier de Gazipaşa), devant le préfet de Şırnak et lui avait présenté Abdulah Ertur. Ce dernier avait dit au préfet que, lors de sa garde à vue, il avait passé une nuit dans la même cellule que Mehmet Ertak. Le préfet avait remis une lettre à l'élu du village et les avait envoyés à la direction de la sûreté. Le fils du témoin Hamit Ertak, Abdullah Sakın et Abdullah Ertur s'étaient rendus à la direction de la sûreté.

37. Le témoin prétendit avoir porté plainte auprès du parquet de Şırnak ; il ne se rappelait pas si le parquet avait interrogé Abdullah Ertur et les autres personnes qu'il avait mentionnées dans sa pétition. Il précisa que le parquet lui avait fait remarquer qu'il était fort probable que son fils était parti dans les montagnes. Il avait contesté cette allégation en expliquant que Mehmet avait quatre enfants et que sa femme était encore très jeune.

38. Il affirma qu'au courant de l'année, son fils Mehmet Ertak avait été interrogé par la police. Il ne savait pas pour quel motif il avait été appelé par la police. Il ajouta qu'un de ses fils, Mehmet Salih Ertak, avait disparu depuis 1989 et avait entendu dire qu'il avait rejoint les camps du PKK. Il ne savait pas s'il était vivant ou mort. Un autre de ses fils, Mesut Ertak, impliqué dans un incident d'explosion, avait été jugé et condamné à douze ans d'emprisonnement. Le témoin répéta que son fils Mehmet Ertak, père de quatre enfants en bas âge, ne faisait que « travailler à droite et à gauche pour leur apporter du pain ». Il s'exprima ainsi : « Cet enfant (Mehmet) est innocent. Son frère est parti dans les montagnes depuis neuf ans. C'est peut-être ça qu'on lui reproche ».

b) Mustafa Malay

39. Le témoin était préfet de Şırnak en août 1992. Il expliqua que le 18 août 1992 des affrontements avaient eu lieu entre les forces de l'ordre et des terroristes qui avaient déclenché l'attaque. Plusieurs personnes avaient été tuées par balles. Les attaques venaient de la région où se trouvaient les mines de charbon. Suite à ces incidents, les forces de l'ordre composées de policiers et de gendarmes avaient effectué des perquisitions et plus d'une centaine de personnes avaient été arrêtées et traduites devant les instances judiciaires. Une partie de ces personnes avaient été placées en garde à vue dans les locaux de la sûreté et d'autres au centre de détention de la brigade. Il indiqua que deux registres séparés étaient tenus.

40. Le témoin affirma avoir rencontré dans son bureau une personne qui lui avait affirmé être restée dans la même cellule que Mehmet Ertak pendant toute une nuit. Il ne se rappelait pas si ce témoin s'appelait Abdullah Ertuğrul. Il avait conseillé à İsmail Ertak d'emmener ledit témoin oculaire devant le procureur de la République. Il avait en outre entendu d'autres personnes qui lui avaient indiqué avoir vu Mehmet Ertak lors de leur garde à vue dans les locaux de la sûreté. Il affirma qu'İsmail Ertak avait suivi l'affaire et il était revenu le voir dans son bureau, cinq ou six fois, en

réitérant ses allégations. Il avait écrit une lettre confidentielle à la direction générale de la sûreté à Ankara et au ministère de l'Intérieur en demandant la nomination d'un enquêteur pour mener une investigation. Il indiqua que par la suite, il avait examiné les registres de garde à vue de la direction de la sûreté et constaté que le nom de Mehmet Ertak ne figurait pas sur la liste des personnes détenues. La gendarmerie l'avait informé oralement que Mehmet Ertak n'était pas détenu dans leurs locaux. Il ajouta qu'un enquêteur avait été chargé de l'enquête. Il avait été muté en février 1993 et ainsi n'eut plus d'information sur le déroulement de l'enquête.

c) Süleyman Ertak

41. Le témoin travaillait dans les mines de charbon à l'époque des faits. Mehmet Ertak est son cousin. Lors des incidents survenus à Şırnak, il travaillait dans les mines de charbon. Mehmet Ertak, Abdulmenaf Kabul et Yusuf Ertak se trouvaient aussi dans les mines et travaillaient dans des endroits différents. A cause des incidents ils n'avaient pas pu retourner à Şırnak entre le 18 et le 22 août. Ils avaient été avertis par la station de la gendarmerie située près de la mine de ne pas quitter les lieux.

42. Il affirma que des affrontements avaient eu lieu en ville mais pas du côté des mines. Le témoin indiqua qu'après quatre jours passés dans les mines, ils avaient suivi la route principale et que, pour rentrer à Şırnak, ils avaient pris un taxi qui venait de la direction de Cizre. Il faisait presque nuit. Près de Şırnak, dans la ville même, au point de contrôle, des policiers en uniforme bleu avaient arrêté le taxi qui les transportait et avaient demandé leurs cartes d'identité. Après avoir examiné les pièces d'identité dans une cabane, ils avaient demandé « qui d'entre-vous est Mehmet ? ». Mehmet Ertak avait répondu « c'est moi ». Ils l'avaient emmené avec eux et leur avaient ordonné de quitter immédiatement les lieux. Ils étaient montés dans le taxi et étaient retournés chez eux.

43. Le témoin indiqua qu'İsmail Ertak lui avait demandé où était son fils et il l'avait informé de l'incident. Il n'avait pas été entendu par une autorité sur cet incident.

d) Ahmet Ertak

44. Le témoin est le frère de Mehmet Ertak. A l'époque des faits, il résidait à Diyarbakır. Il précisa que lors des incidents, il était à Şırnak pour une visite à sa famille. Le 22 août 1992, il avait quitté la ville avec sa famille.

45. Le témoin relata les incidents survenus à Şırnak. Il avait été informé de l'arrestation de son frère dans la matinée du 22 août. Abdullah Ertuğrul leur avait affirmé qu'il avait partagé une cellule avec Mehmet Ertak lors de sa garde à vue. Abdullah Ertuğrul lui avait dit que plusieurs personnes étaient détenues au même endroit et qu'ils avaient les yeux bandés. Il avait précisé qu'il avait soulevé son bandeau et avait pu ainsi voir et parler avec

Mehmet Ertak. Le lendemain matin, de bonne heure, Abdullah avait été remis en liberté. L'après midi de cette même date, Abdülmenaf Kabul, Süleyman Ertak et Yusuf Ertak les avaient informés que lors d'un contrôle d'identité au point de contrôle de Bakımevi à Şırnak, alors qu'ils revenaient des mines pour rentrer chez eux, les policiers avaient emmené Mehmet Ertak.

46. Le témoin expliqua qu'il avait rencontré l'avocat Abdurrahim Demir et lui avait demandé dans quelles circonstances il avait vu Mehmet Ertak. Son interlocuteur lui avait fait la réponse suivante : « Quand Mehmet Ertak a été emmené dans la cellule, nous étions une douzaine ; de temps à autre, certains détenus quittaient la cellule pour interrogatoire et revenaient plus tard et ceci se répétait. Mehmet Ertak aussi a été amené et ramené plusieurs fois. Nous avons subi des tortures. » Le témoin ajouta à cet égard qu'Abdurrahim avait affirmé être resté dans la même cellule que Mehmet Ertak durant sept ou huit jours. Le dernier jour, roué de coups, Mehmet Ertak avait été jeté dans la cellule. Il gisait par terre comme s'il était mort. Peu de temps après, il avait été emmené et il ne l'avait plus revu. Le témoin affirma qu'Abdurrahim Demir avait auparavant donné les mêmes informations à son père. Il lui avait dit : « Ton fils était presque mort quand il était emmené la dernière fois. Son état était si sérieux qu'il n'avait aucune chance de survivre. »

47. Il indiqua avoir aidé son père à rédiger la pétition présentée au procureur de la République et être allé avec lui à l'association des Droits de l'Homme à Diyarbakır. Il avait distribué des pétitions aux délégations parlementaires qui étaient venues visiter Şırnak.

c) Abdurrahim Demir

48. Le témoin est avocat et exerce sa profession à Diyarbakır. Le 18 août 1992, au premier jour des incidents survenus à Şırnak, il avait été arrêté par les forces de l'ordre et était resté en garde à vue durant 29 jours. Le témoin raconta que suite à son arrestation, il avait été emmené au centre de la brigade et y était resté deux jours. Environ 1200 personnes y étaient détenues. Le 21 août, des confesseurs et des agents de la section spéciale de la police étaient venus choisir 128 personnes et les avaient emmenées à la direction de la sûreté de Şırnak. Le témoin affirma être resté à la sûreté jusqu'à la date de sa mise en liberté, aux alentours du 20 septembre.

49. Le deuxième ou le troisième jour de sa détention dans les locaux de la sûreté, le 24 ou le 25 août, Mehmet Ertak avait été amené dans la salle où il était détenu. Comme ils avaient été soumis à des tortures, il n'était pas conscient du nombre de jours qu'il avait passés avec Mehmet Ertak ; peut-être quatre, cinq ou six jours. Le témoin indiqua que dans une salle se trouvaient plus de douze détenus ; il se souvenait des noms de certains d'entre eux : Nezir Olcan, Kıyas Sakın, Şeymus Sakın, Celal Demir, İbrahim Satan.

50. Le témoin expliqua que, lors de leur détention dans les locaux de la police, ils furent systématiquement soumis à des tortures. Ils furent emmenés, durant plusieurs jours, deux ou trois fois dans la journée, pour subir des tortures. Ils avaient été traités comme des « animaux » et souvent ils étaient obligés de faire leur besoin sous eux. Il déclara que Mehmet Ertak avait aussi subi les mêmes traitements. Il était emmené une fois par jour pendant une quinzaine de minutes. Une fois ils avaient été emmenés (deux ou trois) ensemble dans la « salle de torture ». Il avait pu voir à travers le bandeau qui cachait ses yeux comment il était torturé. Ils étaient dévêtus et soumis à la pendaison ; certains d'entre eux avaient été électrocutés. Ils étaient sévèrement battus et arrosés de jets d'eau froide. Ce jour-là, il était resté suspendu environ une heure ; Mehmet Ertak était toujours suspendu quand il avait quitté ladite salle. Mehmet Ertak avait été ramené dans la cellule environ dix heures plus tard. Le témoin déclara : « Quand Mehmet Ertak a été ramené dans la cellule il ne pouvait pas parler, il était mort, c'est à dire qu'il était devenu rigide. Je suis sûr à 99 % qu'il était mort. Deux, trois minutes plus tard, ils l'ont traîné dehors en tenant par les jambes. Une de ses chaussures est restée dans la cellule. Nous ne l'avons plus revu. » Il précisa qu'il mettait cette chaussure sous sa tête quand il dormait sur le béton.

51. İsmail Ertak était venu le voir en prison mais il lui avait dit qu'il parlerait après sa mise en liberté. İsmail Ertak était venu le voir à son retour chez lui. Il l'avait informé que son fils était mort lors de la garde à vue. İsmail Ertak l'avait traité de menteur.

52. Le témoin indiqua que le procureur de la République de Diyarbakır avait recueilli sa déposition sur l'incident. Dans sa déposition il avait relaté les faits qu'il a exposés devant les délégués de la Commission et avait signé le procès-verbal contenant sa déposition. Il n'avait été entendu par aucune autre autorité.

53. Durant toute sa détention, il était resté dans la même cellule, qui portait le numéro 8, avec un bandeau sur les yeux. Il indiqua que Mehmet Ertak avait été torturé plus que les autres. Il n'avait pas de force pour parler et n'avait pu discuter avec lui qu'à son arrivée dans la cellule. Il lui avait dit qu'après son arrestation, il avait été amené directement à la direction de la sûreté. Il expliqua qu'après les coups qui leur étaient infligés quelqu'un mettait une pommade sur les ecchymoses, sur leur visage. Une de ses dents avait été cassée et son visage était enflé. C'était dans cet état que le procureur l'avait entendu. Le procureur lui avait demandé s'il avait été torturé et il avait répondu par l'affirmative. Le procureur avait répliqué « que ceci ne reflétait pas la vérité, que c'était lui-même qui avait causé cette enflure ».

54. Le témoin expliqua que par peur des représailles il n'avait pas porté plainte à l'encontre des policiers qui lui avaient infligé des tortures. Il affirma avoir dit la vérité et avoir raconté le minimum de tout ce qu'ils ont

subi. Selon lui, les incidents survenus à Şırnak avaient été provoqués par les agents de l'Etat aux fins de réprimer la population qui, antérieurement, avait assisté aux funérailles de deux militants du PKK et avait voté pour le parti politique pro-kurde, HADEP.

f) Tahir Elçi

55. Le témoin est avocat et représentait le requérant lors de l'introduction de la requête devant la Commission. Il expliqua qu'il n'avait pas assisté le requérant devant les autorités internes. Il lui avait seulement donné des conseils et écrit des lettres.

56. Le témoin déclara qu'en novembre 1993, suite à son arrestation, les forces de l'ordre avaient effectué des descentes à son cabinet et saisi tous les documents relatifs à ses activités professionnelles, y compris les documents concernant l'affaire de la disparition de Mehmet Ertak. Il était resté en garde à vue durant 21 jours dans les locaux du commandement de la gendarmerie de Diyarbakır, au service des renseignements de la gendarmerie (JİTEM).

57. Le témoin indiqua qu'il n'avait pas pris les dépositions des témoins oculaires mentionnés dans la pétition d'İsmail Ertak. Certains d'entre eux se trouvaient en prison et ne se sentaient pas en sécurité et lui-même avait eu peur d'aller recueillir leurs dépositions en prison. Plus tard, il avait vu Abdurrahim Demir qui lui avait affirmé avoir vu Mehmet lors de sa garde à vue. Il déclara qu'İsmail Ertak avait relaté très brièvement son entrevue avec Abdurrahim Demir. Il ne voulait pas admettre que son fils pouvait être mort mais, au fond de lui- même, il savait qu'il était mort. Le témoin affirma à cet égard que si pour une personne détenue depuis une semaine aucune demande de prolongation de la garde à vue ne se fait devant le procureur, on peut être sûr que sa vie est en danger ou qu'elle est morte.

58. Selon lui, Mehmet Ertak est mort lors de sa garde à vue ; lui-même avait été témoin de plusieurs cas similaires.

g) Levent Oflaz

59. Le témoin était commissaire du poste de police de la direction de la sûreté de Şırnak. La nuit du 18 août, il était au poste de police. Soudain, ils avaient entendu des coups de feu provenant du centre-ville. Ils avaient été informés par radio que des terroristes avaient attaqué Şırnak. Ils avaient pris leurs précautions pour se protéger. Le témoin expliqua qu'il ne faisait pas partie de l'équipe qui avait procédé aux arrestations. Son travail consistait à protéger les bâtiments publics. Lors des incidents, durant quatre ou cinq jours, il n'avait pas quitté le poste de police.

60. Le témoin examina le procès-verbal établi le 23 août 1992 selon lequel, à la suite des affrontements survenus entre le 18 et le 21 août, des perquisitions avaient été effectuées dans les maisons du centre ville et aucune douille n'avait été trouvée. Il reconnut que ce document portait sa

signature. Il admit, contrairement à ses affirmations antérieures, qu'il faisait partie de l'équipe qui avait perquisitionné les maisons.

h) Kemal Eryaman

61. Le témoin était directeur de la maison d'arrêt d'Elazığ à l'époque des faits. Il indiqua qu'ils tenaient un registre des détenus et aussi des visiteurs. Les noms de Şeyhmus Sakın, Kıyas Sakın et Emin Kabul lui semblaient familiers mais il fut incapable de donner une réponse précise.

62. Le témoin décrivit la manière dont étaient tenus les registres sur lesquels toute information était notée : le motif de la détention, la personne ou l'autorité qui a envoyé le détenu ou le condamné. Il affirma qu'il n'y avait dans les registres aucune indication sur la garde à vue.

63. Le témoin affirma que suite aux incidents survenus à Şırnak entre le 18 et le 20 août, plusieurs détenus avaient été emmenés à la maison d'arrêt d'Elazığ.

i) Serdar Çevirme

64. Le témoin était, à l'époque des faits, le chef de la section des interrogatoires et des renseignements de la section antiterroriste de la direction de la sûreté de Şırnak. Il décrivit ses fonctions ainsi : il était dans l'équipe qui procédait à l'arrestation et à l'interrogatoire des personnes soupçonnées d'activités terroristes.

65. Le témoin déclara que les « incidents d'août » avaient débuté la nuit du 15 août. Des tirs provenant d'armes lourdes venaient de toutes parts. Deux policiers dont l'un des « forces d'intervention rapide » et deux ou trois soldats de la gendarmerie du district avaient été tués.

66. Quant à l'explication, selon les registres, du placement en garde à vue de 80 personnes, fin août, au centre de détention de la sûreté, le témoin expliqua que les incidents du mois d'août étaient des circonstances extraordinaires ; à son avis, leur garde à vue avait duré 48 heures.

67. Le témoin ne se rappelait pas si toutes les personnes appréhendées avaient été emmenées à la brigade ou directement à la sûreté. Selon les instructions, elles devaient être placées en garde à vue à la brigade mais quand il s'agissait de deux ou trois personnes, elles étaient emmenées à la sûreté. Ils avaient accueilli dans les locaux de la sûreté, au sous-sol, des médecins, des infirmières et quelques familles en vue de les protéger. Il reconnut que, le 21 août, 57 personnes impliquées dans les incidents avaient été emmenées de la brigade. Quant à un autre groupe de 22 personnes emmenées le lendemain et 12 autres le 24 août, il ne fut pas en mesure de dire précisément d'où elles étaient venues. Il déclara qu'à cette époque c'était le chaos.

68. Malgré ses constatations antérieures, il admit que dans des cas où 23 personnes restaient en garde à vue pour interrogatoire pendant plus de 20 jours, ils les plaçaient dans la grande salle. Il précisa qu'il avait vécu de

tels cas à deux reprises lorsqu'il était en fonction : au mois d'août et le 21 mars. Il indiqua que les cellules, la grande salle, la salle des interrogatoires et la chaufferie ainsi que les toilettes et une petite pièce pour faire du thé se trouvaient au sous-sol.

69. Le témoin admit avoir participé aux interrogatoires dans le cadre de l'enquête sur les incidents du 18 août. Il indiqua qu'ils ne tenaient pas de registres décrivant quand et par qui était interrogé tel détenu. Ils conservaient dans leurs registres internes des notes signées par l'agent qui les avaient établies ; ces notes n'étaient pas versées aux registres officiels.

70. L'enquête qu'ils avaient entamée s'était déroulée ainsi : ils avaient examiné les registres ; le nom de Mehmet Ertak ne s'y trouvait pas. Ils avaient contrôlé ses antécédents. Ils avaient mené des investigations pour trouver quelle équipe l'avait arrêté et aussi comment il avait été arrêté. Mais ces recherches n'avaient abouti à rien.

71. Le témoin indiqua qu'il n'était pas toujours présent à la sûreté. Durant son absence, l'agent de permanence en charge tenait les registres. Selon lui, il était impossible qu'ils omettent d'inscrire sur le registre le nom d'une personne placée en garde à vue et, à cet égard, ils suivaient des instructions, verbales et écrites, assez rigoureuses. Il affirma qu'un rapport de garde à vue était envoyé quotidiennement au chef de la section. Le témoin ne put donner de réponse précise quant au fait que le nom d'Emin Kabul, qui avait été transféré à la prison d'Elazığ, ne figurait pas sur les registres de la garde à vue. Toutefois, ce nom lui paraissait familier.

72. Le témoin indiqua ne pas pouvoir apporter d'explication logique au fait que six personnes avaient déclaré avoir vu Mehmet Ertak lors de sa garde à vue et que le nom de ce dernier ne figurait sur aucun registre.

73. Le témoin admit que le point de contrôle de la direction des mines se trouvait à l'entrée de la ville. C'étaient les agents des « forces d'intervention rapide » et des services de renseignements et de prévention de la contrebande qui y effectuaient des contrôles et, lorsqu'ils procédaient à une arrestation, ils emmenaient les suspects à la section concernée de la direction de la sûreté. Il indiqua que ces derniers tenaient aussi des registres de garde à vue mais qu'il n'y avait pas de cellules pour la garde à vue dans leur section. Quant à la couleur de leurs uniformes, le témoin déclara qu'à l'époque des faits ils portaient des uniformes verts et qu'actuellement ils en ont des bleus mais il lui fut impossible de préciser la date du changement de couleur des uniformes. Le témoin affirma que les agents des « forces d'intervention rapide » emmenaient les personnes soupçonnées d'activités terroristes à la direction de la sûreté.

j) Osman Günaydın

74. Le témoin était préfet adjoint à Şırnak à l'époque des faits. Il présidait, au nom du préfet, le conseil administratif de Şırnak qui avait

rendu une décision d'abandon des poursuites le 11 novembre 1993 à l'égard des fonctionnaires de police de la direction de la sûreté.

75. Le témoin ne se souvenait pas des circonstances particulières de l'affaire et fut incapable d'expliquer pour quel motif la date du délit figurant sur le document contenu dans le rapport d'enquête avait été située à la date du 16 septembre 1992 alors que les incidents avaient eu lieu le 18 août 1992. Il déclara que l'enquêteur chargé des investigations était un inspecteur de police compétent en la matière et indiqua que celui-ci avait entendu quatre témoins et qu'ils avaient tous contredit les allégations d'İsmail Ertak. Il expliqua que le conseil administratif n'avait pas jugé opportun de demander des investigations complémentaires. Il précisa que la décision, confirmée par le Conseil d'Etat, avait été rendue à l'unanimité.

k) Yahya Bal

76. Le témoin était inspecteur de police au conseil d'inspection de la police et enquêteur dans le cadre de la présente affaire. Il reconnut que la lettre du préfet, en date du 4 novembre 1992, faisant état des allégations d'İsmail Ertak et d'un député, constituait le document principal de l'enquête. Pendant l'investigation qu'il avait menée, il n'avait pas été informé de la plainte adressée par İsmail Ertak au parquet le 2 octobre 1992, dans laquelle il mentionnait les noms des personnes qui indiquaient avoir vu Mehmet Ertak lors de la garde à vue. Il affirma ne pas avoir été informé qu'un des témoins, Abdullah Ertur, avait indiqué antérieurement au préfet de Şırnak qu'il avait vu Mehmet Ertak lors de sa garde à vue dans les locaux de la direction de la sûreté. Il reconnut que s'il avait été informé de ladite déclaration, au vu des contradictions entre les dépositions, il aurait procédé à une autre audition pour clarifier les faits.

77. Le témoin déclara avoir sollicité, par lettres adressées les 13 et 18 janvier et 3 mars 1993 à la direction de la sûreté de Şırnak, une commission rogatoire lui permettant d'entendre İsmail Ertak. Selon un procès-verbal établi par les agents de police de la sûreté de Şırnak le 25 mars 1993 et portant les signatures de quatre policiers, dont Serdar Çevirme et l'élu du quartier, Ömer Yardımcı, İsmail Ertak avait déménagé à Silopi et les autorités n'avaient pas pu trouver son adresse. Il ne demanda pas aux autres témoins portant le même nom de famille s'ils savaient où vivait İsmail Ertak. Le témoin affirma que l'audition du plaignant au stade initial d'une enquête pouvait aider l'enquêteur pour l'orientation des investigations.

78. Le témoin affirma s'être rendu sur les lieux et avoir entendu les témoins dans une pièce de la direction de la sûreté de Şırnak. C'était la police locale qui les avait cherchés à leur domicile et amenés devant lui et ils avaient déposé sous serment. Il précisa que lors de son enquête il n'avait pas contacté le procureur de la République et avait mené l'enquête uniquement en se basant sur le dossier qui lui avait été transmis.

m) Autres témoins

79. La Commission convoqua encore les témoins suivants, lesquels ne comparurent pas :

- Ahmet Berke, procureur de la République de Şırnak qui avait rendu l'ordonnance d'incompétence *ratione materiae* le 21 juillet 1993,
- Şeyhmus Sakın, Kıyas Sakın et Emin Kabul qui habitaient le même quartier que le requérant et lui avaient indiqué qu'ils avaient vu Mehmet Ertak lors de leur garde à vue.

C. Appréciation des preuves et constatations effectuées par la Commission

80. La Commission a abordé sa tâche en l'absence d'un examen judiciaire ou d'une enquête indépendante approfondie au plan interne sur les faits en question. Ce faisant, elle s'est livrée à l'appréciation des éléments écrits et oraux dont elle disposait en considérant notamment le comportement des témoins que les délégués entendirent à Ankara et la nécessité de prendre en compte, pour parvenir à ses conclusions, un faisceau d'indices, ou de présomptions non réfutées, suffisamment graves, précis et concordants. Ses constatations peuvent se résumer comme suit.

1) Les opérations menées dans Şırnak suite aux incidents survenus du 18 au 20 août 1992

81. La Commission note qu'il n'est pas contesté que des affrontements ont eu lieu dans Şırnak du 18 au 20 août 1992. Elle relève à cet égard que Serdar Çevirme, le chef de la section des interrogatoires et des renseignements de la section antiterroriste de la sûreté, a exposé que les incidents avaient débuté le 15 août. Les éléments de preuve soumis provenant des documents et des dépositions orales des témoins sont pour l'essentiel cohérents quant au déroulement général des opérations menées suite aux incidents survenus entre lesdites dates. Suite à ces incidents, les forces de l'ordre composées de policiers et de gendarmes perquisitionnèrent dans la ville et plus d'une centaine de personnes, entre autres Abdullah Ertur, Abdurrahim Demir, Ahmet Kaplan, Kıyas Sakın, Şeyhmus Sakın, Nezir Olcan, Celal Demir, İbrahim Satan et Emin Kabul furent arrêtés. Plusieurs personnes arrêtées furent emmenées à la brigade, d'autres furent détenues à la direction de sûreté. Des contrôles d'identité furent effectués à l'entrée de la ville et les personnes soupçonnées d'activités terroristes furent emmenées par les agents des « forces d'intervention rapide » (*çevik kuvvet*) directement à la direction de la sûreté.

2) L'arrestation alléguée de Mehmet Ertak, fils du requérant

82. La Commission estime que la déposition orale de Süleyman Ertak devant les délégués, pour ce qui concerne l'arrestation de Mehmet Ertak, est conforme aux allégations du requérant. Elle note à cet égard que Süleyman Ertak confirme qu'au point de contrôle, des policiers en uniforme bleu ont arrêté le taxi dans lequel ils se trouvaient et, après avoir contrôlé leurs pièces d'identité, ont emmené Mehmet Ertak avec eux. Après l'examen du dossier d'enquête et de la déposition orale devant les délégués de l'enquêteur Yahya Bal, la Commission constate que Süleyman Ertak dans sa déposition du 13 janvier 1993, recueilli par celui-ci, indique que les policiers, après avoir contrôlé les pièces d'identité, leur ont rendu leurs cartes et que Mehmet Ertak les a quittés pour faire des courses. Une déposition dans le même sens a été faite le 12 janvier 1993 par Yusuf Ertak.

83. La Commission relève qu'il ressort de l'examen des documents du dossier de l'enquête menée par l'enquêteur que Süleyman Ertak, Abdülmenaf Kabul, Yusuf Ertak et Abdullah Ertur ont été convoqués par la police à la direction de la sûreté de Şırnak et ont déposé devant l'enquêteur en présence d'un agent de police qui notait leurs dépositions. A cet égard, la Commission est frappée par la forme stéréotypée et le contenu globalement similaire des dépositions de Süleyman Ertak et Yusuf Ertak. Elle constate que les fonctionnaires de police entendus par les délégués ont affirmé que des contrôles étaient effectués par les forces de l'ordre au point de contrôle comme il a été décrit par Süleyman Ertak. Quant à la couleur des uniformes des policiers, Serdar Çevirme a indiqué que les agents des « forces d'intervention rapide » se trouvaient au point de contrôle et a mis l'accent sur le fait qu'à l'époque des faits, ils portaient des uniformes verts. Sans préciser de date il a ajouté que ces derniers ont actuellement des uniformes bleus.

84. La Commission relève que les fonctionnaires de police qui ont témoigné devant les délégués reconnaissent que, suite à des incidents ayant causé la mort de deux policiers et de deux soldats, plusieurs équipes des forces de l'ordre avaient procédé à des arrestations dans la ville. Plus d'une centaine de personnes avaient été placées en garde à vue et ils avaient vécu une ambiance chaotique. Serdar Çevirme déclare que les « forces d'intervention rapide » effectuaient des contrôles à l'entrée de la ville et n'emmenaient pas les suspects directement à la direction de la sûreté. Il affirme à cet égard que ces derniers tenaient des registres séparés. Toutefois, la Commission relève qu'à un stade ultérieur de sa déposition, il reconnaît que les personnes arrêtées lors des contrôles d'identité par lesdits agents sont emmenées directement à la sûreté.

85. Quant à la tenue des registres de garde à vue, le nom d'Emin Kabul ne figure pas sur les registres et, sur ce point, aucune explication n'a été apportée par Serdar Çevirme. Elle relève que les déclarations de celui-ci manquent de précision et de clarté quant à la tenue des registres de garde à

vue. Elle note en outre que les copies des registres de garde à vue de la brigade et de la gendarmerie régionale, malgré des demandes explicites, n'ont pas été produites par le Gouvernement.

86. Abdurrahim Demir indique que le 24 ou le 25 août, Mehmet Ertak a été emmené dans la salle de détention où lui-même se trouvait et qu'il a passé cinq ou six jours avec lui. Il relate de façon détaillée les circonstances dans lesquelles ils ont été détenus à la direction de la sûreté et la conversation qu'il a eue avec Mehmet Ertak. La version exposée par Abdurrahim Demir quant aux détails des yeux bandés lors de la garde à vue, à la description et à l'emplacement de la salle de détention est concordante avec celle de Serdar Çevirme. La déposition d'Abdurrahim Demir corrobore les récits faits par le requérant et son fils Ahmet Ertak aux délégués. La Commission relève en outre qu'Abdurrahim Demir a souligné qu'il avait déposé devant le procureur, à qui il avait donné la même version des faits qu'aux délégués et qu'il avait signé sa déposition. Elle regrette que cette déposition ne figure pas dans les documents du dossier constitué par l'instructeur.

87. Le préfet de Şırnak à l'époque des faits, Mustafa Malay, a reconnu dans sa déposition orale que le requérant était venu le voir plusieurs fois en alléguant que son fils Mehmet Ertak avait disparu suite à sa garde à vue et qu'il avait entendu un témoin oculaire qui avait confirmé avoir vu Mehmet Ertak dans les locaux de la sûreté. La Commission relève que la déposition d'Abdullah Ertur, recueillie par l'enquêteur, contredit le récit du requérant ainsi que son témoignage devant le préfet. Mettant en exergue le fait que le préfet, jugeant la déposition du témoin oculaire suffisamment crédible, a demandé que des investigations soient menées sur l'affaire, elle privilégie la version donnée par le requérant et Mustafa Malay aux délégués quant aux affirmations d'Abdullah Ertur ; elle conclut que l'absence du nom de Mehmet Ertak sur les registres de garde à vue de la direction de la sûreté ne prouve pas en soi que celui-ci n'a pas été placé en garde à vue et admet les témoignages de Süleyman Ertak, du requérant, d'Ahmet Ertak, d'Abdurrahim Demir et de Mustafa Malay, que les délégués ont jugés crédibles et convaincants.

3) La détention et le sort de Mehmet Ertak

88. La Commission constate qu'un avocat, Abdurrahim Demir, cité par le requérant dans sa pétition présentée au parquet de Şırnak le 2 octobre 1992 comme témoin oculaire, déclare dans sa déposition orale devant les délégués que, le 24 ou le 25 août 1992, Mehmet Ertak a été amené dans la salle où lui-même était détenu. Il nomme certaines personnes qui se trouvaient au même endroit. Les noms de ces personnes figurent sur les registres de garde à vue de la section antiterroriste de la direction de la sûreté. Abdurrahim Demir précise d'une manière détaillée les circonstances dans lesquelles ils ont été arrêtés et les conditions de leur garde à vue. Il met

en exergue que, suite à la plainte pénale d'İsmail Ertak, il a été entendu par le procureur de la République de Diyarbakır et a mentionné dans sa déposition les noms de certaines personnes qui étaient détenues au même endroit que lui. S'agissant des conditions de leur garde à vue, Abdurrahim Demir fait une description détaillée des traitements qu'ils auraient subis lors de l'interrogatoire : ils étaient dévêtus et soumis à la pendaison, sévèrement battus et arrosés de jets d'eau froide. Il expose qu'une fois ils avaient été emmenés deux ou trois détenus ensemble à la « salle de torture ». Mehmet Ertak aussi était parmi eux. Il était dévêtu, suspendu comme lui. Pour autant qu'il ait pu en juger, les sévices avaient duré une heure pour lui et c'est seulement dix heures après que Mehmet Ertak avait été ramené. Il déclare comme suit : « Quand Mehmet Ertak a été ramené dans la cellule, il ne pouvait pas parler, il était mort, c'est à dire qu'il était devenu rigide. Je suis sûr à 99 % qu'il était mort. Deux, trois minutes plus tard, ils l'ont traîné dehors en le tenant par les jambes. Une de ses chaussures était restée là-bas. Nous ne l'avons plus revu. »

89. La Commission regrette que le Gouvernement n'ait pas fourni le dossier d'enquête ouverte par le parquet du Şırnak suite à la plainte pénale du requérant en date du 2 novembre 1992 et que le procureur Ahmet Berke n'ait pas comparu devant les délégués. Il ressort des éléments du dossier de l'enquête menée par l'enquêteur Yahya Bal qu'Abdurrahim Demir n'a pas été entendu en tant que témoin oculaire par ce dernier.

90. La Commission relève que toutes les descriptions faites par Abdurrahim Demir concernant les lieux de détention et d'interrogatoire sont en conformité avec la version donnée à cet égard par Serdar Çevirme. Ce dernier reconnaît en outre qu'ils ont vécu une ambiance chaotique lors des incidents survenus entre les 15 et 18 août et que des centaines de personnes avaient été placées en garde à vue. Par ailleurs, la Commission note que le préfet de Şırnak, lors de son audition devant les délégués, reconnaît qu'il a rencontré dans son bureau des personnes qui avaient indiqué avoir vu Mehmet Ertak lors de la garde à vue et qu'il a notamment entendu un témoin oculaire.

91. La Commission relève qu'à toutes les questions posées par les délégués et les représentants des parties Abdurrahim Demir a donné des réponses précises et détaillées, en particulier sur les sévices subis lors des interrogatoires, et qu'il a affirmé avec insistance et à plusieurs reprises que Mehmet Ertak était mort quand il avait été « jeté » dans la cellule. En conséquence, elle considère comme plausible son témoignage selon lequel il a vu Mehmet Ertak comme « mort » dans les locaux de la direction de la sûreté.

4) L'enquête sur la disparition alléguée de Mehmet Ertak

92. La Commission a constaté que le requérant avait adressé des demandes et posé des questions au procureur de la République de Şırnak

ainsi qu'au préfet de Şırnak concernant la disparition de Mehmet Ertak. Quant à l'indépendance des organes d'enquête qui, à la suite de la demande écrite adressée le 4 novembre 1992 par le préfet de Şırnak à la direction générale de la sûreté, ont mené l'enquête préliminaire aboutissant à une décision de classement, la Commission observe qu'ils étaient composés d'un enquêteur et des membres du conseil administratif du département de Şırnak. L'enquêteur était un inspecteur de police. Il dépendait de la même hiérarchie administrative que les membres des forces de l'ordre contre lesquels il conduisait son enquête. Le conseil administratif qui, sur proposition de l'enquêteur, a décidé d'abandonner les poursuites était présidé par le préfet adjoint et était composé de hauts fonctionnaires du département, à savoir des directeurs, ou de leurs adjoints, des différents services de l'administration centrale. Ces hauts fonctionnaires étaient placés sous la direction du préfet qui était en même temps responsable, sur le plan juridique, des actes des forces de l'ordre en cause dans la présente affaire. L'inspecteur de police désigné comme enquêteur et les membres du conseil administratif n'étaient dotés ni des signes extérieurs d'indépendance ni des garanties d'inamovibilité ni des garanties légales qui les auraient protégés contre les pressions de leurs supérieurs hiérarchiques.

93. La Commission constate que l'enquêteur a interrogé quatre témoins dans une pièce de la direction de la sûreté de Şırnak. Elle note à cet égard que c'était la police locale qui les avait cherchés à leur domicile et amenés dans la direction de la sûreté. Or, dans les dépositions qui ont été recueillies, ceux-ci nient complètement les faits allégués par le requérant. Par ailleurs, la Commission constate la forme stéréotypée et le contenu globalement similaire desdites dépositions. Elle note que l'enquêteur n'a pas interrogé le requérant et relève à cet égard qu'un procès-verbal, selon lequel İsmail Ertak avait quitté son domicile et était probablement parti pour Silopi, a été établi par la direction de la sûreté. Il ressort des faits que les témoins oculaires qui auraient pu apporter des éléments utiles au déroulement de l'enquête étaient cités par le requérant dans sa plainte du 2 novembre 1992 présentée au parquet. Or, les organes administratifs d'enquête n'ont formulé aucune demande d'audition de ces personnes alors que la déposition de l'une d'entre elles, à savoir Abdullah Ertur, était en totale contradiction avec ses propos tenus devant le préfet, Mustafa Malay.

II. LE DROIT ET LA PRATIQUE INTERNES PERTINENTS

94. Dans son mémoire, le Gouvernement n'a fourni aucune précision sur les dispositions légales internes pouvant avoir une incidence en l'espèce. Aussi la Cour se réfère-t-elle à l'aperçu du droit interne livré dans d'autres arrêts, et notamment Kurt c. Turquie du 25 mai 1998 (*Recueil des arrêts et décisions* 1998-III, pp. 1169-1170, §§ 56-67) ; Tekin c. Turquie du 9 juin

1998 (*Recueil* 1998-IV, pp. 1512-1513, §§ 25-29) et Çakıcı c. Turquie (arrêt du 8 juillet 1999, §§ 56-67).

A. Etat d'urgence

95. Depuis 1985 environ, de graves troubles font rage dans le sud-est de la Turquie entre les forces de l'ordre et les membres du PKK (Parti des travailleurs du Kurdistan). D'après le Gouvernement, ce conflit a coûté la vie à des milliers de civils et de membres des forces de l'ordre.

96. Deux grands décrets concernant la région du sud-est ont été adoptés en application de la loi sur l'état d'urgence (loi n° 2935 du 25 octobre 1983). Le premier - le décret n° 285 (du 10 juillet 1987) - institue un gouvernorat de la région soumise à l'état d'urgence dans dix des onze provinces du sud-est de la Turquie. Aux termes de son article 4 b) et d), l'ensemble des forces de l'ordre ainsi que le commandement de la force de paix de la gendarmerie sont à la disposition du gouverneur de région.

97. Le second - le décret n° 430 (du 16 décembre 1990) - renforce les pouvoirs du gouverneur de région qu'il habilite par exemple à ordonner des transferts hors de la région de fonctionnaires et d'agents des services publics, notamment des juges et procureurs. Il prévoit en son article 8 :

> « La responsabilité pénale, financière ou juridique, du gouverneur de la région soumise à l'état d'urgence ou d'un préfet d'une région où a été proclamé l'état d'urgence ne saurait être engagée pour des décisions ou des actes pris dans l'exercice des pouvoirs que leur confère le présent décret, et aucune action ne saurait être intentée en ce sens contre l'Etat devant quelque autorité judiciaire que ce soit, sans préjudice du droit pour la victime de demander réparation à l'Etat des dommages injustifiés subis par elle. »

B. Dispositions constitutionnelles sur la responsabilité administrative

98. L'article 125 §§ 1 et 7 de la Constitution turque énonce :

> « Tout acte ou décision de l'administration est susceptible d'un contrôle juridictionnel (...)
>
> L'administration est tenue de réparer tout dommage résultant de ses actes et mesures. »

99. La disposition précitée ne souffre aucune restriction, même en cas d'état d'urgence ou de guerre. Le second alinéa ne requiert pas forcément d'apporter la preuve de l'existence d'une faute de l'administration, dont la responsabilité revêt un caractère absolu et objectif fondé sur la théorie du « risque social ». L'administration peut donc indemniser quiconque est victime d'un préjudice résultant d'actes commis par des personnes non identifiées ou des terroristes lorsque l'on peut dire que l'Etat a manqué à

son devoir de maintenir l'ordre et la sûreté publique ou à son obligation de sauvegarder la vie et la propriété individuelles.

100. Des poursuites peuvent être engagées contre l'administration devant les juridictions administratives dont la procédure est écrite.

C. Droit pénal et procédure pénale

101. Le code pénal turc érige en infraction le fait :
- de priver arbitrairement un individu de sa liberté (article 179 en général et article 181 pour les fonctionnaires) ;
- de proférer des menaces (article 191) ;
- de soumettre un individu à la torture ou à des mauvais traitements (articles 243 et 245) ;
- de commettre un homicide involontaire (articles 452 et 459), un homicide volontaire (article 448) ou un assassinat (article 450).

102. Conformément aux articles 151 et 153 du code de procédure pénale, il est possible, pour ces différentes infractions, de porter plainte auprès du procureur de la République ou des autorités administratives locales. Le procureur qui est informé de quelque manière que ce soit d'une situation permettant de soupçonner qu'une infraction a été commise est tenu d'enquêter sur les faits pour décider s'il y a lieu d'engager des poursuites (article 153). Les plaintes peuvent être écrites ou orales. Le plaignant peut faire appel de la décision du procureur de ne pas engager de poursuites.

D. Dispositions de droit civil

103. Tout acte illégal commis par un fonctionnaire, qu'il s'agisse d'une infraction pénale ou d'un délit civil, provoquant un dommage matériel ou moral, peut faire l'objet d'une action en réparation devant les juridictions civiles de droit commun. Aux termes de l'article 41 du code des obligations, toute personne victime d'un dommage résultant d'un acte illégal peut demander réparation à l'auteur présumé de celui-ci, qu'il ait agi délibérément, par négligence ou par imprudence. Les juridictions civiles peuvent accorder réparation au titre des dommages patrimoniaux (article 46 du code des obligations) ou extrapatrimoniaux (article 47 du même code).

E. Impact du décret n° 285

104. Dans le cas d'actes de terrorisme présumés, le procureur est privé de sa compétence au profit d'un système distinct de procureurs et de cours de sûreté de l'Etat réparties dans toute la Turquie.

105. Le procureur est également privé de sa compétence s'agissant d'infractions imputées à des membres des forces de l'ordre dans la région soumise à l'état d'urgence. Le décret n° 285 prévoit en son article 4 § 1 que

toutes les forces de l'ordre placées sous le commandement du gouverneur de région sont assujetties à la loi de 1914 sur les poursuites dont les fonctionnaires peuvent faire l'objet pour les actes accomplis dans le cadre de leurs fonctions. Dès lors, le procureur qui reçoit une plainte dénonçant un acte délictueux commis par un membre des forces de l'ordre a l'obligation de décliner sa compétence et de transférer le dossier au conseil administratif. Ce dernier se compose de fonctionnaires et est présidé par le gouverneur. S'il décide de ne pas poursuivre, sa décision est examinée *ex officio* par le Conseil d'Etat. Une fois prise la décision de poursuivre, c'est au procureur qu'il incombe d'instruire l'affaire.

III. DOCUMENTS INTERNATIONAUX PERTINENTS

106. Dans ses observations écrites à la Cour, le requérant appelle l'attention sur des documents internationaux concernant la question des disparitions forcées, tels que :

- la Déclaration des Nations unies sur la protection de toutes les personnes contre les disparitions forcées (A.G. Res. 47/133, 18 décembre 1992),
- la jurisprudence du Comité des droits de l'homme des Nations unies (CDH),
- la jurisprudence de la Cour interaméricaine des droits de l'homme, notamment les arrêts Velásquez Rodríguez c. Honduras du 29 juillet 1988 (*Inter-Am. Ct. H. R.* (Ser. C) n° 4) (1988), Godínez Cruz c. Honduras du 20 janvier 1989 (*Inter-Am. Ct. H. R.* (Ser. C) n° 5) (1989), et Cabellero-Delgado et Santana c. Colombie du 8 décembre 1995 (*Inter-Am. Ct. H. R.*).

PROCEDURE DEVANT LA COMMISSION

107. Ismail Ertak s'est adressé à la Commission le 1er octobre 1992. Il alléguait que son fils, Mehmet Ertak, avait été placé en garde à vue, qu'il avait disparu et qu'il avait très probablement été tué par les forces de l'ordre lors de son interrogatoire. Il invoquait l'article 2 de la Convention.

108. La Commission a déclaré la requête (n° 20764/92) recevable le 4 décembre 1995. Dans son rapport du 4 décembre 1998 (ancien article 31 de la Convention), elle formule l'avis qu'il y a eu, en l'espèce, violation de l'article 2 de la Convention en raison de la mort de Mehmet Ertak causée par les agents de l'Etat et de l'absence d'une enquête adéquate et efficace sur les circonstances de la disparition de celui-ci (unanimité) et qu'il n'y a pas eu violation de l'ancien article 25 de la Convention (vingt-huit voix contre deux).

CONCLUSIONS PRESENTEES A LA COUR

109. Dans son mémoire, le requérant invite la Cour à constater que l'Etat défendeur a enfreint l'article 2 de la Convention. Il prie la Cour de lui octroyer, à lui ainsi qu'à la veuve et les quatre enfants de son fils, une satisfaction équitable en vertu de l'article 41 de la Convention.

110. Le Gouvernement, quant à lui, demande à la Cour dans son mémoire de dire que l'affaire est irrecevable faute d'épuisement des voies de recours internes. A titre subsidiaire, il fait valoir que les griefs du requérant ne sont pas étayés par des preuves.

EN DROIT

1. APPRÉCIATION DES FAITS PAR LA COUR

111. La Cour rappelle sa jurisprudence constante d'après laquelle le système de la Convention antérieur au 1er novembre 1998 confiait en premier lieu à la Commission l'établissement et la vérification des faits (anciens articles 28 § 1 et 31). Si la Cour n'est pas liée par les constatations de la Commission et demeure libre d'apprécier les faits elle-même, à la lumière de tous les éléments qu'elle possède, elle n'use de ses propres pouvoirs en la matière que dans des circonstances exceptionnelles (voir, entre autres, l'arrêt Akdivar et autres c. Turquie du 16 septembre 1996, *Recueil des arrêts et décisions* 1996-IV, p. 1214, § 78).

112. Le Gouvernement, tant dans son mémoire que dans ses plaidoiries, a soutenu que l'évaluation par la Commission des dépositions était lacunaire, notamment en ce qu'elle ne tenait pas compte de certaines contradictions et faiblesses des dépositions de Süleyman Ertak et d'Abdurrahim Demir, accordait un poids sélectif et exclusif au témoignage de celui-ci et prenait en considération les prétendues irrégularités de registres de garde à vue. Il invite dès lors la Cour à réexaminer les constatations faites par la Commission.

113. En l'espèce, la Cour rappelle que la Commission est parvenue à ses conclusions après qu'une délégation eut recueilli les dépositions orales de témoins à Ankara (paragraphes 33-79 ci-dessus). Elle constate que la Commission a fait preuve de la prudence requise pour s'acquitter de sa tâche d'évaluation des témoignages, en insistant minutieusement sur les éléments qui étayent le récit du requérant et sur ceux qui jettent un doute sur sa crédibilité. En particulier, elle a soigneusement examiné les éléments de preuve tirés des dépositions de Süleyman Ertak, Abdurrahim Demir et Mustafa Malay.

114. De l'avis de la Cour, les critiques formulées par le Gouvernement ne révèlent aucun problème substantiel justifiant qu'elle exerce ses pouvoirs de vérifier par elle-même les faits.

115. Dans ces conditions ainsi qu'en l'absence de nouveaux éléments de preuve présentés par les comparants devant elle, la Cour s'appuiera sur ceux qui ont été rassemblés par la Commission mais en évaluera leur valeur.

116. La Cour relève que la Commission a rejeté les allégations du requérant quant à la prétendue confiscation des documents relatifs à la requête au moment de l'arrestation de M[e] Tahir Elçi qui était le représentant du requérant lors de l'introduction de la requête et non restitution de ceux-ci par le Gouvernement. Elle a estimé que le procès-verbal de saisie et la décision de la cour de sûreté de l'Etat de Diyarbakır énuméraient les documents remis à M[e] Tahir Elçi, lesquels ne faisaient pas mention du dossier de la requête introduite devant la Commission. Elle a noté en outre que celui-ci avait indiqué aux délégués qu'il n'avait pas pris les dépositions des témoins et n'avait pas pu préciser le contenu du dossier.

Partant, la Cour confirme le constat fait par la Commission dans son rapport (paragraphe 189), qu'en l'espèce il n'y a pas lieu de conclure que le Gouvernement n'a pas respecté les obligations qui lui incombent en vertu de l'ancien article 28 § 1 a) de la Convention.

II. SUR L'EXCEPTION PRELIMINAIRE SOULEVEE PAR LE GOUVERNEMENT

117. Le Gouvernement soutient que, contrairement à ce qu'exige l'article 35 de la Convention, le requérant n'a pas épuisé les recours internes en usant convenablement des voies possibles. L'intéressé aurait pu engager des poursuites pénales ou saisir les juridictions civiles ou administratives. Il invoque à cet égard l'arrêt Aytekin c. Turquie rendu par la Cour le 23 septembre 1998 (Recueil 1998-VII) dont il ressortirait que les autorités turques ne se montrent nullement réticentes à engager des poursuites pénales contre des membres des forces de l'ordre et que les recours civils et administratifs ont un caractère effectif. S'agissant en particulier du recours administratif fondé sur l'article 125 de la Constitution, le Gouvernement renvoie à l'abondante jurisprudence qu'il a fournie à la Cour et qui démontre, selon lui, l'efficacité de ce recours.

118. Le Gouvernement affirme notamment que le requérant a introduit sa requête un mois et demi après la date des allégations de disparition de son fils, à savoir le 1[er] octobre 1992, et qu'il ne s'est pas adressé au parquet comme il le prétend puisque le recours du 2 octobre 1992 ne portait aucune adresse ni aucun cachet de réception ou d'enregistrement indiquant qu'il serait parvenu au parquet et n'était qu'une déclaration publique. Le Gouvernement souligne à cet égard que le requérant, mise à part sa plainte devant le préfet de Şırnak, n'a déclenché aucune voie de recours interne et,

se limitant à une demande d'information, ne s'est pas intéressé au résultat de ses demandes. Se référant aux arrêts rendus par la Cour dans les affaires Cardot c. France (arrêt du 19 mars 1991, série A n° 200), Ahmet Sadık c. Grèce (arrêt du 15 novembre 1996, *Recueil des arrêts et décisions* 1996-V) et Aytekin c. Turquie précité, le Gouvernement conclut dès lors à l'irrecevabilité de la requête pour non- épuisement des voies de recours internes.

119. Le requérant affirme avoir porté plainte auprès du procureur de la République de Şırnak suite à la disparition de son fils et que cette plainte a été classée par une ordonnance rendue par le conseil administratif après que la Commission eut communiqué la requête au Gouvernement. Il fait valoir que ladite ordonnance, par arrêt du 22 décembre 1993, fut confirmée par le Conseil d'Etat et estime en conséquence avoir épuisé les voies de recours internes.

120. Dans sa décision sur la recevabilité, la Commission, rejetant les arguments du Gouvernement, a estimé pouvoir considérer que le requérant avait bien porté ses griefs devant les autorités compétentes et avait satisfait à l'exigence d'épuisement des voies de recours internes.

121. La Cour note que le requérant a fait tout ce que l'on pouvait attendre de lui pour voir remédier à ce dont il tirait grief. Il s'est adressé au préfet de Şırnak en présence d'un témoin qui affirmait avoir vu Mehmet Ertak dans les locaux de la sûreté. Le préfet de Şırnak, M. Malay, a exposé devant les délégués de la Commission qu'Ismail Ertak avait suivi l'affaire et était revenu le voir dans son bureau cinq ou six fois en réitérant ses allégations. Le 2 octobre 1992, il a déposé une pétition au parquet de Şırnak en alléguant que son fils avait été arrêté le 20 août 1992 lors d'un contrôle d'identité alors qu'il rentrait de son travail et nommé des témoins oculaires ayant indiqué l'avoir vu pendant sa garde à vue. Pourtant son assertion n'a pas été examinée sérieusement. Il ressort du dossier d'enquête entamée suite à la demande écrite adressée le 4 novembre 1992 par le préfet de Şırnak à la direction générale de la sûreté, qu'aucune démarche utile n'a été accomplie pour rechercher des témoins qui avaient affirmé avoir vu Mehmet Ertak lors de sa garde à vue, et notamment pour entendre le plaignant, et que l'enquêteur n'avait pas en sa possession le dossier de l'enquête ouverte par le procureur suite à la plainte d'İsmail Ertak. Les autorités n'ayant pas mené d'enquête effective sur la disparition alléguée et ayant constamment démenti l'arrestation de Mehmet Ertak, la Cour constate que le requérant ne disposait d'aucun fondement pour exercer utilement les recours civils et administratifs qu'évoque le Gouvernement ; elle considère qu'il a fait tout ce que l'on pouvait raisonnablement attendre de lui pour épuiser les voies de recours internes qui lui étaient offerts (voir, notamment, les arrêts Kurt c. Turquie du 25 mai 1998 précités, pp. 1175-1177, §§ 79-83 et Çakıcı c. Turquie du 8 juillet 1999, §§ 77-80).

122. Partant, la Cour écarte l'exception préliminaire du Gouvernement.

III. SUR LES VIOLATIONS ALLEGUEES DE L'ARTICLE 2 DE LA CONVENTION

123. Le requérant allègue que son fils, Mehmet Ertak, placé en garde à vue le 20 août 1992, aurait disparu pendant sa garde à vue et aurait très probablement été tué par les forces de l'ordre lors de son interrogatoire. Il invoque à cet égard une violation de l'article 2 de la Convention ainsi libellé :

> « 1. Le droit de toute personne à la vie est protégé par la loi. La mort ne peut être infligée à quiconque intentionnellement, sauf en exécution d'une sentence capitale prononcée par un tribunal au cas où le délit est puni de cette peine par la loi.
>
> 2. La mort n'est pas considérée comme infligée en violation de cet article dans les cas où elle résulterait d'un recours à la force rendu absolument nécessaire :
>
> a) pour assurer la défense de toute personne contre la violence illégale ;
>
> b) pour effectuer une arrestation régulière ou pour empêcher l'évasion d'une personne régulièrement détenue ;
>
> c) pour réprimer, conformément à la loi, une émeute ou une insurrection. »

A. Arguments des comparants

1. Le requérant

124. Le requérant renvoie aux constatations de la Commission selon lesquelles la mort de Mehmet Ertak a été causée par les agents de l'Etat à une période postérieure à son arrestation et par un traitement dont le Gouvernement porte la responsabilité. Il soutient qu'un gouvernement assume une responsabilité particulière en matière de sécurité et de droit à la vie des détenus et que pèse sur lui l'obligation positive de répondre du détenu et de montrer qu'il est en vie.

125. Considérant la démarche de la Cour dans les arrêts Tomasi c. France du 27 août 1992 (série A n° 241-A), Ribitsch c. Autriche du 4 décembre 1995 (série A n° 336) et Selmouni c. France du 28 juillet 1999, face à des preuves de mauvais traitements d'un détenu, le requérant soutient qu'il y a lieu d'adopter une attitude analogue, *mutatis mutandis*, quant au décès de son fils. Il affirme qu'il existe de nombreux cas, largement prouvés, de tortures, de morts inexpliquées survenues en cours de détention ainsi que de « disparitions » dans le sud-est de la Turquie en 1993, ce qui permet raisonnablement de supposer que les autorités ont manqué à leur obligation de protéger la vie de son fils au regard de l'article 2 et constitue la preuve d'une pratique de « disparitions » telle qu'il est fondé à plaider que son fils a aussi été victime d'une violation aggravée de cette disposition.

Par ailleurs, se référant entre autres aux arrêts McCann et autres c. Royaume-Uni du 27 septembre 1995 (série A n° 324), Kaya c. Turquie du 19 février 1998, Güleç c. Turquie du 27 juillet 1998, le requérant invite la Cour à voir dans le fait que les autorités n'ont pas mené une enquête rapide, approfondie et efficace sur la disparition de son fils, une violation distincte de l'article 2.

2) Le Gouvernement

126. Le Gouvernement soutient que les allégations du requérant sont dénuées de fondement et que, partant, aucune question ne se pose sur le terrain de l'article 2 de la Convention. En refusant catégoriquement tout parallélisme avec les allégations de disparitions systématiques, il soutient que de nombreuses personnes, prétendument disparues, ont réapparu ou ont été découvertes dans les camps de l'organisation terroriste par les autorités compétentes.

127. Le Gouvernement réitère ses critiques contre toute constatation se fondant sur les déclarations incohérentes, manifestement infondées et contradictoires de Süleyman Ertak et d'Abdurrahim Demir concernant l'arrestation et la détention alléguées de Mehmet Ertak ou les mauvais traitements qu'il aurait subis. Contrairement à la décision de la Commission n'ayant pris en considération que les dépositions de certains témoins, le Gouvernement estime que la Cour devrait examiner toutes les dépositions recueillies lors de l'audition de témoins. Il souligne à cet égard que l'enquêteur Yahya Bal, en tenant compte des dépositions de quatre témoins cités dans la plainte du requérant déposée au préfet et dans la demande écrite à la Grande Assemblée du député Orhan Doğan, après l'examen des registres de la garde à vue, avait toutes les raisons de conclure dans son rapport que les griefs étaient mal fondés. Le Gouvernement reproche à la Commission d'accepter d'office l'existence d'autres témoins sans que les délégués aient pu les entendre et ceci, se basant seulement sur les dires du requérant ainsi que le témoignage d'Abdurrahim Demir et marque son désaccord avec sa conclusion, fondée uniquement sur la déposition de M. Demir, « qu'il a été établi au-delà de tout doute raisonnable que la mort de Mehmet Ertak était causée par les agents de l'Etat ».

128. Le Gouvernement soutient qu'une enquête efficace a été conduite par l'enquêteur quant aux griefs du requérant, le rapport établi par celui-ci a été examiné par le conseil administratif et l'ordonnance de non-lieu dudit conseil a été confirmé par le Conseil d'Etat saisi d'office selon la législation en la matière. Des bureaux chargés de poursuivre des plaintes concernant les personnes portées disparues, instaurés à partir du 1er août 1995, auraient constaté que l'organisation terroriste, en vue d'augmenter le nombre de militants, aurait procédé à l'enlèvement de personnes dans les villages ; ainsi ces personnes auraient été découvertes par les autorités dans les camps de l'organisation.

3. La Commission

129. La Commission estime qu'il a été établi au-delà de tout doute raisonnable que la mort de Mehmet Ertak a été causée par les agents de l'Etat à une période postérieure à son arrestation, par un traitement dont le Gouvernement porte la responsabilité.

130. En analysant à plusieurs égards la manière dont l'enquête a été menée en l'espèce, la Commission a constaté plusieurs manquements graves et considéré que l'article avait été violé aussi sous son angle procédural (paragraphes 92-93).

B. Appréciation de la Cour

1. Quant au sort de Mehmet Ertak

131. La Cour a entériné ci-dessus l'établissement des faits auquel s'est livrée la Commission (paragraphes 113-115) . Il n'est pas contesté que des affrontements ont eu lieu dans Şırnak du 18 au 20 août 1992 et que, selon la déposition des membres des forces de l'ordre, plus d'une centaine de personnes ont été arrêtées, des contrôles d'identité effectués à l'entrée de la ville et les personnes soupçonnées d'activités terroristes emmenées par des agents des « forces d'intervention rapide » directement à la direction de la sûreté. Comme l'a souligné la Commission, de très puissantes déductions peuvent être tirées des dépositions devant les délégués de Süleyman Ertak, pour ce qui concerne l'arrestation de Mehmet Ertak, de Mustafa Malay, préfet de Şırnak, qui reconnaît avoir rencontré dans son office des personnes qui avaient indiqué d'avoir vu Mehmet Ertak lors de la garde à vue et d'Abdurrahim Demir qui affirme avoir parlé avec Mehmet Ertak pendant sa détention et l'avoir vu comme « mort » dans les locaux de la sûreté suite aux tortures infligées par les fonctionnaires de police. La Cour constate sur cette base qu'il existe des preuves suffisantes permettant de conclure, au-delà de tout doute raisonnable, que Mehmet Ertak, après avoir été arrêté et détenu, a été victime de graves sévices non reconnus et a trouvé la mort alors qu'il se trouvait entre les mains des forces de l'ordre. La présente affaire doit dès lors se distinguer de l'affaire Kurt (arrêt Kurt précité, p. 1182, §§ 107-108), dans laquelle la Cour a examiné au regard de l'article 5 les griefs formulés par la requérante quant à la disparition de son fils. Dans l'affaire Kurt, en effet, bien que le fils de la requérante eût été placé en détention, aucun autre élément de preuve n'existait concernant le traitement ou le sort qui lui avait été réservé ultérieurement.

132. Rappelant l'obligation pour les autorités de rendre compte des individus placés sous leur contrôle, la Cour observe qu'aucune explication n'a été fournie sur ce qui s'est passé après l'arrestation de Mehmet Ertak.

133. En conclusion, la Cour considère que dans les circonstances de la cause le Gouvernement porte la responsabilité de la mort de Mehmet Ertak, causée par les agents de l'Etat à une période postérieure à son arrestation et qu'il y a donc eu violation de l'article 2 de ce chef.

2. Quant à l'enquête menée par les autorités nationales

134. La Cour répète que l'article 2 se place parmi les articles primordiaux de la Convention et que, combiné avec son article 3, il consacre l'une des valeurs fondamentales des sociétés démocratiques qui forment le Conseil de l'Europe (arrêt McCann et autres précité, pp. 45-46, §§ 146-147). L'obligation imposée ne concerne pas exclusivement le meurtre délibéré résultant de l'usage de la force par des agents de l'Etat mais s'étend aussi, dans la première phrase de l'article 2 § 1, à l'obligation positive pour les Etats de protéger par la loi le droit à la vie. Cela implique et exige de mener une forme d'enquête officielle adéquate et effective lorsque le recours à la force a entraîné mort d'homme (voir, notamment, l'arrêt Yaşa c. Turquie du 2 septembre 1998, *Recueil* 1998-VI, p. 2438, § 98). La protection procédurale du droit à la vie prévue à l'article 2 de la Convention implique pour les agents de l'Etat l'obligation de rendre compte de leur usage de la force meurtrière, leurs actes doivent être soumis à une forme d'enquête indépendante et publique propre à déterminer si le recours à la force était ou non justifié dans les circonstances particulières d'une affaire (arrêt Kaya c. Turquie du 19 février 1998, *Recueil* 1998-I, p. 324, § 87).

135. Etant donné que la Cour a confirmé les constats opérés par la Commission concernant la détention non reconnue du fils du requérant, les mauvais traitements qui lui ont été infligés et sa disparition dans des circonstances permettant de présumer qu'il est mort depuis lors, les considérations ci-dessus doivent s'appliquer *mutatis mutandis* dans le cas d'espèce. Il en découle que les autorités avaient l'obligation de mener une enquête effective et approfondie sur la disparition du fils du requérant.

Pour la Commission, l'enquête menée au plan national sur les allégations du requérant n'a pas été effectuée par des organes indépendants, n'était pas approfondie et s'est déroulée sans que le requérant ait pu y prendre part.

La Cour observe à cet égard que suite à la pétition déposée par le requérant le 10 septembre 1992, le préfet de Şırnak a demandé à la direction générale de la sûreté de charger un enquêteur afin de mener une investigation sur les allégations du requérant. Dans sa plainte du 2 octobre 1992, porté devant le parquet, le requérant a précisé et nommé des témoins oculaires ayant affirmé avoir vu Mehmet Ertak pendant sa garde à vue. Abdurrahim Demir a mis en exergue que suite à la plainte pénale d'Ismail Ertak il avait été entendu par le procureur de la République de Diyarbakır et avait mentionné dans sa déposition les noms de certaines personnes qui étaient détenues au même endroit que lui. Dans son ordonnance d'incompétence *ratione materiae* rendue le 21 juillet 1993, le procureur a

indiqué qu'il renvoyait le dossier au conseil administratif de Şırnak. Il echet de noter que l'enquêteur n'a pas eu en sa possession ledit dossier et n'a pas recueilli dans le cadre de ses investigations la déposition d'Ismail Ertak ainsi que celles des personnes citées par lui dans sa plainte.

Vu les paragraphes 92-93 et 121 ci-dessus et eu égard aux considérations qui précèdent, la Cour conclut que l'Etat défendeur a manqué à son obligation de mener une enquête adéquate et efficace sur les circonstances de la disparition du fils du requérant. Partant, l'article 2 de la Convention a été violé de ce chef également.

IV. SUR LA VIOLATION ALLEGUEE DE L'ANCIEN ARTICLE 25 § 1 DE LA CONVENTION

136. Devant la Commission, les représentants du requérant ont soutenu qu'à une date postérieure à l'introduction de la requête, tous les documents relatifs à l'affaire ont été saisis par les forces de l'ordre lors de l'arrestation de Maître Tahir Elçi qui avait introduit au nom du requérant la requête devant la Commission. Invoquant l'ancien article 25 § 1 de la Convention, ils se sont plaints que la Turquie a entravé l'exercice efficace du droit de requête individuelle.

137. L'ancien article 25 de la Convention est ainsi libellé :

> « 1. La Commission peut être saisie d'une requête adressée au Secrétaire Général du Conseil de l'Europe par toute personne physique, toute organisation non gouvernementale ou tout groupe de particuliers, qui se prétend victime d'une violation par l'une des Hautes Parties contractantes des droits reconnus dans la présente Convention, dans le cas où la Haute Partie contractante mise en cause a déclaré reconnaître la compétence de la Commission dans cette matière. Les Hautes Parties contractantes ayant souscrit une telle déclaration s'engagent à n'entraver par aucune mesure l'exercice efficace de ce droit. »

138. La Commission estime qu'il ne ressort pas des dépositions de Maître Tahir Elçi, ni des éléments du dossier, que la procédure pénale engagée à l'encontre de l'avocat du requérant concernait la requête introduite devant la Commission.

139. Le Gouvernement ne formule aucune observation.

140. Devant la Cour, le requérant n'a pas souhaité maintenir ce grief.

141. Cela étant, la Cour ne juge pas devoir examiner la question d'office.

V. SUR LA PRATIQUE ALLEGUEE DE VIOLATION DE L'ARTICLE 2 DE LA CONVENTION

142. Le requérant invite la Cour à dire qu'il existe dans le sud-est de la Turquie une pratique de « disparitions » qui emporte violation aggravée de l'article 2 de la Convention. Il affirme en outre que la pratique des recours

ineffectifs est officiellement tolérée dans cette région de la Turquie. Il invoque à l'appui de cette assertion le fait qu'il existe des preuves convaincantes d'une politique du démenti en ce qui concerne les cas d'homicides, de tortures de détenus et de disparitions, ainsi que le refus ou l'abstention systématique des autorités d'enquêter sur les griefs des victimes.

143. Le Gouvernement rejette les allégations du requérant.

144. La Cour considère que les preuves recueillies et les éléments versés au dossier en l'espèce ne lui suffisent pas pour décider du point de savoir si les autorités turques ont ou non adopté une pratique de violation de l'article 2 de la Convention.

VI. SUR L'APPLICATION DE L'ARTICLE 41 DE LA CONVENTION

145. Aux termes de l'article 41 de la Convention,

> « Si la Cour déclare qu'il y a eu violation de la Convention ou de ses Protocoles, et si le droit interne de la Haute Partie contractante ne permet d'effacer qu'imparfaitement les conséquences de cette violation, la Cour accorde à la partie lésée, s'il y a lieu, une satisfaction équitable. »

A. Dommage

146. Le requérant demande une réparation pécuniaire de 60 630,44 GBP pour pertes de revenus, montant calculé par référence aux revenus mensuels estimés de Mehmet Ertak, soit 180 000 000 TRL, en valeur actuelle, qu'il détiendra pour la veuve et les quatre enfants de celui-ci.

147. Le requérant réclame 40 000 GBP en réparation du dommage moral lié aux violations de la Convention subies par son fils ainsi que d'une pratique de telles violations, somme qu'il détiendra pour la veuve et les quatre enfants de celui-ci, plus 2 500 GBP pour lui-même en raison de l'absence d'un recours effectif. Il invoque les précédentes décisions de la Cour rendues pour détention illégale, torture et absence d'enquête effective.

148. A titre principal, le Gouvernement soutient qu'aucune réparation ne s'impose en l'espèce. Il soutient qu'il serait déplacé de lui faire payer la perte de revenus prétendument subie par Mehmet Ertak puisque la mort de celui-ci n'a pas été établie. A titre subsidiaire, il invite la Cour à rejeter les demandes exorbitantes, exagérées et injustifiées d'indemnités présentées par le requérant.

149. Plus généralement, le Gouvernement soutient que les sommes revendiquées ont été présentées sans égard aux conditions sociales, ni au niveau de salaire minimum en vigueur dans le pays. Sur ce point, il fait valoir que les indemnités octroyées par la Cour ne doivent pas être pour les requérants un moyen de s'enrichir.

150. Pour ce qui est de la demande du requérant concernant la perte de revenus, la jurisprudence de la Cour établit qu'il doit y avoir un lien de causalité manifeste entre le dommage allégué par le requérant et la violation de la Convention et que cela peut, le cas échéant, inclure une indemnité au titre de la perte de revenus (voir, entre autres, l'arrêt Barberà, Messegué et Jabardo c. Espagne du 13 juin 1994 (article 50), série A n° 285-C, pp. 57-58, §§ 16-20). La Cour a constaté (paragraphe 155 ci-dessus) qu'elle peut tenir pour établi que Mehmet Ertak est décédé à la suite de son arrestation par les forces de l'ordre et que la responsabilité de l'Etat est engagée au regard de l'article 2 de la Convention. Dans ces conditions, il existe bien un lien de causalité directe entre la violation de l'article 2 et la perte par la veuve et les orphelins de Mehmet Ertak du soutien financier qu'il leur fournissait (voir arrêt Çakıcı précité, § 127). La Cour alloue au requérant, qui la détiendra pour le compte de la veuve et des orphelins de son fils, la somme de 15 000 GBP.

151. Quant au dommage moral, la Cour rappelle que, dans l'arrêt Çakıcı précité (§ 130), elle a alloué, pour violation des articles 2, 3, 5 et 13 de la Convention en raison du décès du frère du requérant à la suite de son arrestation par les forces de l'ordre, une somme de 25 000 GBP devant être détenue par celui-ci pour les héritiers de son frère, l'intéressé lui-même recevant une somme de 2 500 GBP, comme « partie lésée » au sens de l'article 41 de la Convention. En l'espèce, la Cour a constaté une violation substantielle et procédurale de l'article 2. Prenant acte des sommes précédemment octroyées dans des affaires concernant l'application de cette même disposition dans le sud-est de la Turquie (voir, les arrêts Kaya (précité), p. 333, § 122, Güleç c. Turquie du 27 juillet 1998, Recueil 1998-IV, p. 1734, § 88, Ergi c. Turquie du 28 juillet 1998, Recueil 1998-IV, p. 1785, § 110, Yasa (précité), pp. 2444-2445, § 124 et Oğur c. Turquie du 20 mai 1999, à paraître dans le recueil officiel de la Cour, p. ..., § 98) et tenant compte des circonstances de l'affaire, la Cour décide d'accorder, en réparation du dommage moral, une somme de 20 000 GBP, que le requérant détiendra pour la veuve et les quatre enfants de son fils. En ce qui concerne le requérant lui-même, la Cour estime que celui-ci a indéniablement subi un dommage en raison de la violation constatée, et statuant en équité, accorde à l'intéressé 2 500 GBP.

B. Frais et dépens

152. Le requérant demande au total 26 022,68 GBP pour les honoraires et frais entraînés par le dépôt de sa requête. Cette somme couvre les honoraires et les frais que l'intéressé a du payer pour venir déposer devant les délégués de la Commission lors des auditions organisées à Ankara et pour assister à l'audience devant la Cour. Il indique un montant de 5 395 GBP correspondant à des honoraires et des frais administratifs en

rapport avec l'assistance assurée par le Projet kurde pour les droits de l'homme (KHRP) dans son rôle de liaison entre l'équipe des juristes au Royaume-Uni d'une part, et les avocats et lui-même en Turquie d'autre part ; un montant de 4 890 GBP pour le travail effectué par quatre avocats en Turquie ; 14 950 GBP pour les honoraires de ses représentants au Royaume-Uni ; 255 GBP pour les frais administratifs divers ; 532,68 GBP pour les frais de voyage, de séjour et d'interprétation occasionnés par les auditions en Turquie.

153. Le requérant demande que la somme accordée par la Cour soit libellée en livres sterling et versée sur le compte en banque du requérant au Royaume-Uni.

154. Le Gouvernement invite la Cour à rejeter cette demande car elle est dénuée de fondement et au demeurant excessive. Il conteste que le requérant ait eu besoin de faire appel à des avocats étrangers et s'oppose catégoriquement à ce qu'une somme, quelle qu'elle soit, soit octroyée pour les frais et dépens encourus par le KHRP.

155. La Cour n'est pas convaincue que la somme demandée à propos du KHRP ait été nécessairement exposée : elle rejette donc cette prétention. En ce qui concerne le surplus de la demande pour frais et dépens, la Cour statuant en équité et prenant en considération les détails des prétentions formulées par le requérant, lui octroie 12 000 GBP, plus tout montant pouvant être dû au titre de la taxe sur la valeur ajoutée (TVA), moins 14 660,35 francs français (FRF) perçus du Conseil de l'Europe au titre de l'assistance judiciaire.

C. Intérêts moratoires

156. Selon les informations dont dispose la Cour, le taux d'intérêt légal applicable au Royaume-Uni à la date d'adoption du présent arrêt est de 7,5 % l'an.

PAR CES MOTIFS, LA COUR, A L'UNANIMITE,

1. *Rejette* l'exception préliminaire du Gouvernement ;

2. *Dit* qu'il y a eu violation de l'article 2 de la Convention en raison de la mort du fils du requérant causée par les agents de l'Etat et de l'absence d'une enquête adéquate et efficace sur les circonstances de la disparition de celui-ci ;

3. *Dit*,

a) que l'Etat défendeur doit verser au requérant, dans les trois mois, les sommes suivantes :

i. 15 000 (quinze mille) livres sterling, à convertir en livres turques au taux applicable à la date du règlement, pour dommage matériel, somme que le requérant détiendra pour la veuve et les quatre enfants de son fils ;

ii. 20 000 (vingt mille) livres sterling pour dommage moral, somme que le requérant détiendra pour la veuve et les quatre enfants de son fils Mehmet Ertak et 2 500 (deux mille cinq cent) livres sterling au titre du dommage subi par le requérant, sommes à convertir en livres turques au taux applicable à la date du règlement ;

iii. 12 000 (douze mille) livres sterling pour frais et dépens, plus tout montant pouvant être dû au titre de la taxe sur la valeur ajoutée, moins 14 660,35 francs français (FRF) perçus du Conseil de l'Europe au titre de l'assistance judiciaire, à convertir en livres sterling au taux applicable à la date du prononcé de l'arrêt ;

b) que ces montants seront à majorer d'un intérêt simple de 7,5 % l'an à compter de l'expiration dudit délai et jusqu'au versement ;

4. *Rejette* la demande de satisfaction équitable pour le surplus.

Fait en français, puis prononcé en audience publique au Palais des Droits de l'Homme, à Strasbourg, le 9 mai 2000.

Michael O'BOYLE
Greffier

Elisabeth PALM
Présidente

Appendix F

The European Court of Human Rights: System and Procedure

THE EUROPEAN COURT OF HUMAN RIGHTS:

SYSTEM AND PROCEDURE

As from 1 November 1998, Protocol 11 to the European Convention on Human Rights abolished the former two-tier system of the European Commission and Court, and created a single full-time permanent Court. This note briefly summarises the main points of the new system in Strasbourg and sets out how a case will progress through the system.

The new system under Protocol 11

- There are no changes to the substantive human rights protected by the Convention (Articles 1-18).
- The amended Convention created a new Court functioning on a permanent basis (Article 19). One judge is elected by the Parliamentary Assembly for each state party, holds office for six years and may be re-elected (Article 23).
- The Court may establish Committees of three judges which will be able unanimously to declare cases inadmissible (Article 28). Chambers of seven judges will determine the remainder of the cases (Articles 27 & 29). The national judge will be an *ex officio* member of the chamber. There is no right of appeal from an admissibility decision.
- The pre-existing admissibility criteria have been retained (Article 35). The most important of these are the requirement to exhaust all available, effective domestic remedies and the requirement to lodge a case at the European Court within six months of the final decision of the domestic courts (or within six months of the incident complained of, if there are no effective domestic remedies).
- The President of the Court may permit any Convention state or "any person concerned" (including human rights organisations) to submit written comments or take part in hearings as a 'third party' (i.e. even if the organisation is not acting for the applicant).
- New rules of the Court were adopted on 4 November 1998. The rules specify the procedure and internal workings of the Court.

How a case is handled by the European Court of Human Rights

Lodging the application with the Court

- An application can initially lodged simply by letter. There is no Court fee.

Registration and examination of the case

- The Court will open a provisional file. A Court Registry lawyer will respond with an application form and a form of authority (which should be signed by the applicant and which authorises the lawyer to act on his/her behalf).

- The application form and form of authority should be completed and returned to the Court within six weeks. Copies of all relevant documents should be lodged at the Court with the application form.

- The application is registered on receipt of the completed application form. Following registration, all documents lodged with the Court are accessible to the public (unless the Court decides otherwise).

- Once registered, an application is assigned to a Judge Rapporteur (whose identity is not disclosed to the applicant) to consider admissibility.

- The Court (in Committees of three or Chambers of seven) may declare an application inadmissible or the application may be sent to the respondent Government for a reply.

Communication of a case

- If a case is sent to the Government, the Government will be asked to reply to specific questions (copies of which are sent to the applicant) within a stipulated time.

Legal Aid

- When a case is sent to the Government, the applicant is then invited to apply for legal aid. The assessment of the applicant's financial situation is carried out by the appropriate domestic body (in Turkey, this is usually the muhtar or the local municipal authorities). The Court will send an application for legal aid to the Government to comment on.

Government's Observations

- A copy of the Government's written Observations will be sent to the applicant. The applicant may submit further written Observations in reply (within a stipulated time).

Interim Measures

- In very urgent cases, where there is an imminent threat to life or of serious injury, the Court may ask the Government to take particular action or to stop from taking certain action. For example, 'interim measures' may be applied where an applicant is threatened with expulsion to a country where there is a danger of torture or death. In that situation, the Court may ask the Government not to deport the applicant whilst the case is pending at the European Court.

Decision on admissibility

- An application may be declared inadmissible by a Committee of three judges (if unanimous). The remainder of the cases are dealt with by a Chamber of seven judges.

- The Court may hold an oral hearing to decide admissibility, although this is now rare and usually only if the case raises difficult or new issues. An application may be declared admissible/inadmissible in part.

Friendly settlement

- The friendly settlement procedure provides the Government and the applicant with an opportunity to resolve the dispute. The Court will write to the parties asking for any proposals as to settlement. The case is struck off the Court's list of cases if settlement is agreed.

Consideration of the merits

- The parties are invited to lodge final written submissions (commonly referred to as the 'Memorial'). Details of any costs or compensation which are being claimed should either be included with the Memorial or should be submitted to the Court within two months of the admissibility decision (or other stipulated time).

- The Court now decides most cases without holding a hearing. However, if there is a hearing, it takes place in public (unless there are particular reasons for the hearing to be held in private). The hearings usually take no more than two hours in total. Applicants' representatives are usually given 30 minutes to make their initial oral arguments, followed by the same period for the government's representatives. If the Court asks questions of the parties there may be a 15-20 minute adjournment, then each party may have 15-20 minutes to answer questions and reply to the other side.

Judgment

- Most judgments are issued by chambers of seven judges, but the most significant cases will be heard by a Grand Chamber of 17 judges. The Court's judgment is published several months after any hearing or after the parties' final written submissions. The Court may reach a decision unanimously or by a majority. In either case, full reasons are provided in the judgment. Individual judges may also add their dissenting judgment to the majority judgment. Within three months of a chamber judgment, any party may ask for the case to be referred to the Grand Chamber of 17 judges for a final judgment. The request is considered by a panel of five judges from the Grand Chamber. Once final, judgments are legally binding on the Government (Article 46(1)).

- The Court's primary remedy is a declaration that there has been a violation of one or more Convention rights.

- The judgment may include an award for 'just satisfaction' under Article 41 (previously Article 50). This may include compensation for both pecuniary and non-

pecuniary loss, legal costs and expenses. Awards for just satisfaction may be reserved in order for the Court to receive further submissions.

- The Court will not quash decisions of the domestic authorities or courts, strike down domestic legislation or otherwise require a Government to take particular measures.

- There is no provision in the Convention for costs to be awarded against an applicant.

Supervision of enforcement of Court judgments

- Judgments are sent to the Committee of Ministers which will review at regular intervals whether the Government has complied with it (Article 46(2)).

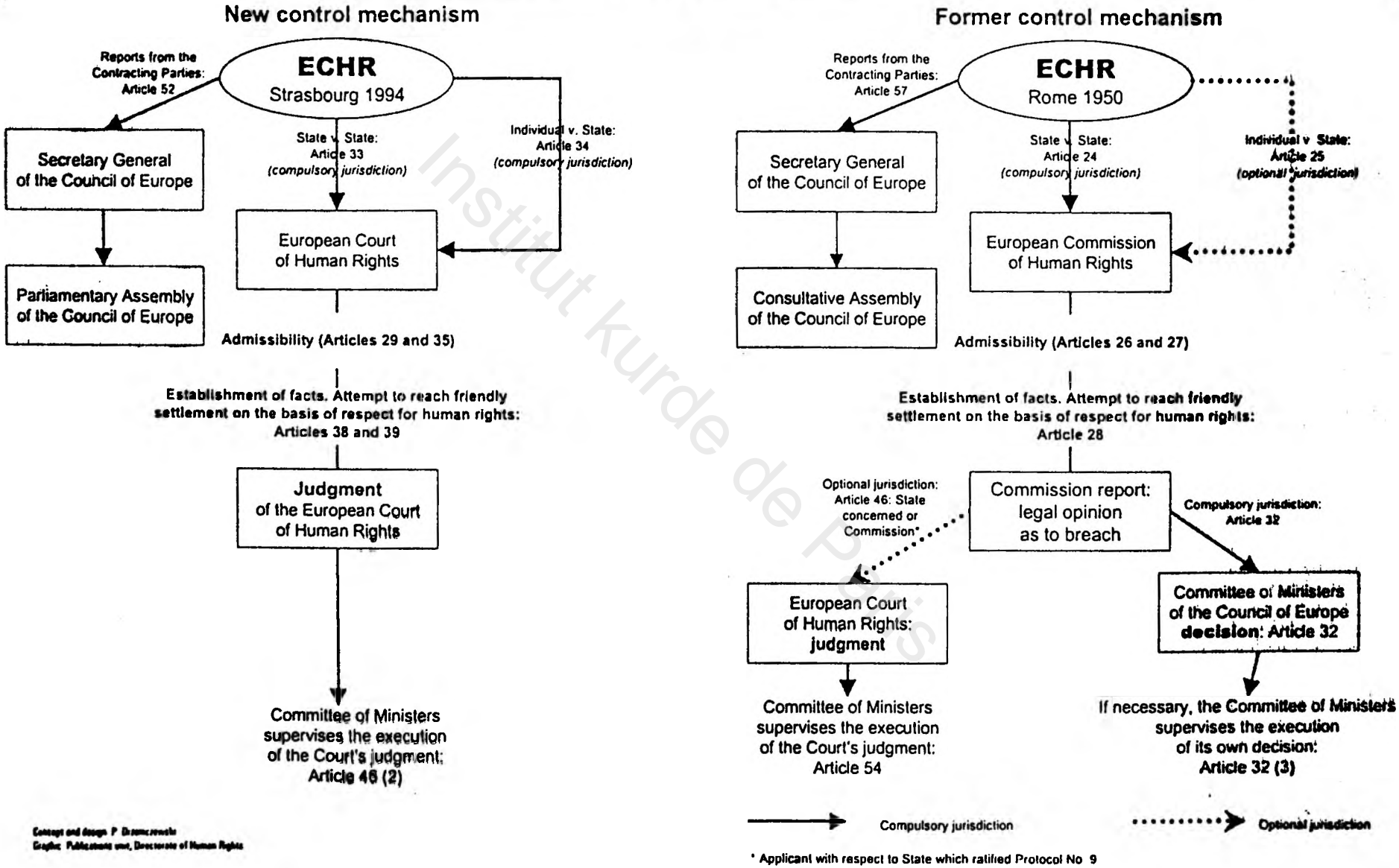
How long will the case take?

European Court cases are still taking several years to progress through the system. A case will be registered shortly after the application is lodged, but it may take more than a year for the Court even to decide whether to refer the case to the Government to reply.

Usually, it takes at least two to three years for admissibility decisions to be taken (unless there are clear reasons why the case should be declared inadmissible at the outset).

Where a case is declared admissible it is likely to take at least four to five years (from the initial introduction of the case) before the Court will produce a final judgment.

European Convention on Human Rights (ECHR)
Summary overview



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Appendix G

List of judgments in KHRP assisted cases in the European Court of Human Rights

JUDGMENTS OF KHRP-ASSISTED CASES
IN THE EUROPEAN COURT OF HUMAN RIGHTS

Case name	Case number	Date of Decision	Nature
1. ***Akdivar and Others*** *(merits)*	99/1995/605/693	16 September 1996	Village Destruction
2. ***Aksoy***	100/1995/606/694	18 December 1996	Torture
3. ***Aydin***	57/1996/676/866	25 September 1997	Rape and Torture
4. ***Mentes and Others*** *(merits)*	58/1996/677/867	27 November 1997	Village Destruction
5. ***Kaya***	158/1996/777/978	19 February 1998	Killing
6. ***Selcuk and Asker***	12/1997/796/998-999	24 April 1998	Village Destruction
7. ***Gundem***	139/1996/758/957	25 May 1998	Village Destruction
8. ***Kurt***	15/1997/799/1002	25 May 1998	Disappearance
9. ***Tekin***	52/1997/836/1042	9 June 1998	Torture and ill-treatment
10. ***Ergi***	66/1997/850/1057	28 July 1998	Killing
11. ***Yasa***	63/1997/847/1054	2 September 1998	Killing
12. ***Aytekin***	102/1997/886/1098	23 September 1998	Killing

Case name	Case number	Date of Decision	Nature
13. *Tanrikulu*	23763/94	8 July 1999	Extra-judicial killing
14. *Cakici*	23657/94	8 July 1999	Disappearance
15. *Ozgur Gundem*	23144/93	16 March 2000	Freedom of Expression
16. *Kaya*	22535/93	28 March 2000	Killing
17. *Kilic*	22492/93	28 March 2000	Killing
18. *Ertak*	20764/92	9 May 2000	Disappearance
19. *Timurtas*	23531/94	13 June 2000	Disappearance
20. *Salman*	21986/93	26 June 2000	Torture; death in custody
21. *Ilhan*	22277/93	26 June 2000	Torture
22. *Aksoy**	28635/95 30171/96 34535/97	10 October 2000	Freedom of expression
23. *Akkoç*	22947/93	10 October 2000	Killing and torture
24. *Taş*	24396/94	14 November 2000	Killing and torture
25. *Bilgin*	23819/94	16 November 2000	Village destruction
26. *Gül*	22676/93	14 December 2000	Extra-judicial killing
27. *Dulas*	25801/94	30 January 2001	Village destruction

28. ***Çiçek***	25704/94	27 February 2001	Disappearance
29. ***Berktay***	22493/93	1 March 2001	Torture
30. ***Tanli***	26129/95	10 April 2001	Death in custody
31. ***Şarli***	24490/94	22 May 2001	Disappearance
32. ***Akdeniz***	23954/94	31 May 2001	Disappearance/ Torture
33. ***Akman***	37453/97	26 June 2001	Extra-judicial killing
34. ***Aydin & others***	28293/95 29494/95 30219/96	10 July 2001	Extra-judicial killing/Inhuman treatment
35. ***Avşar***	25557/94	10 July 2001	Extra-judicial killing

Relevant Articles of the European Convention on Human Rights

(Note the changes made following the coming into force of Protocol 11).

Convention

Article 2: Right to life.
Article 3: Prohibition of torture or inhuman or degrading treatment or punishment.
Article 4: Prohibition of slavery and forced labour.
Article 5: Right to liberty and security.
Article 6: Right to a fair trial.
Article 7: No punishment without law.
Article 8: Right to respect for private and family life.
Article 9: Freedom of thought, conscience and religion.
Article 10: Freedom of expression.
Article 11: Freedom of assembly and association.
Article 12: Right to marry.
Article 13: Right to an effective remedy.
Article 14: Prohibition of discrimination.
Article 15: Derogation in time of emergency.
Article 16: Restrictions on political activity of aliens.
Article 17: Prohibition of abuse of rights.
Article 18: Restrictions under Convention shall only be applied for prescribed purpose.
Article 34: Application by person, non-governmental organisations or groups of individuals. (formerly Article 25).
Article 38: Examination of the case and friendly settlement proceedings (formerly Article 28).
Article 41: Just satisfaction to injured party in event of breach of Convention. (formerly Article 50).

Protocol No. 1

Article 1: Protection of property.
Article 2: Right to education.
Article 3: Right to free elections.

Protocol No. 2

Article 1: Prohibition of imprisonment for debt.
Article 2: Freedom of movement.
Article 3: Prohibition of expulsion of nationals.
Article 4: Prohibition of collective expulsion of aliens.

Protocol No. 6

Article 1: Abolition of the death penalty.

Protocol No. 7

Article 1: Procedural safeguards relating to expulsion of aliens..
Article 2: Right to appeal in criminal matters.
Article 3: Compensation for wrongful conviction.
Article 4: Right not to be tried or punished twice.
Article 5: Equality between spouses.

To date, Turkey has only ratified the Convention and Protocol No. 1.

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and the countries of the former Soviet Union
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

METHODS

- Monitoring legislation including emergency legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, the national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms

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