KHRP

Kurdish Human Rights Project

GÜNDEM v TURKEY

SELÇUK and ASKER v TURKEY

CASE REPORT

OCTOBER 1998

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Table of Contents **Pages**

Foreword **i-ii**

PART I

Summary of the Cases 1

The Facts 1

Gündem v Turkey

The facts as presented by the applicants 1
The facts as presented by the Government 2
The findings of fact of the Commission 3
The findings of fact of the Court 4

Selçuk and Asker v Turkey

The facts as presented by the applicants 4
The facts as presented by the Government 5
The findings of fact of the Commission 5
The findings of fact of the Court 6

Map of the area where the incidents occurred 7

The Legal Proceedings 7

Chronology of events and legal proceedings in the case of Gündem v Turkey 8
Chronology of events and legal proceedings in in the case of Selçuk and Asker v Turkey 10
How to bring a case before the Commission and the Court 11
What are investigation hearings? 11

The obligation to exhaust domestic remedies 13
The debate on exhaustion of domestic remedies in the case of Gündem v Turkey 14
The debate on exhaustion of domestic remedies in the case of Selçuk and Asker v Turkey 15

The specific violations of the Convention complained of in both cases 16

Article 6, 13, 14 and 1 of Protocol 1 17
Article 18 18

Gündem v Turkey

The Government's position 19
The applicant's complaints 19
The opinion of the Commission 20
The Court's judgment 21

The speech made by the applicant's representative
Before the Court 22

Selçuk and Asker v Turkey

The Government's position 23
The applicant's complaints 23
The opinion of the Commission 24
The Court's judgment 25

Just satisfaction, article 50 27

Pecuniary damage and non-pecuniary damage
(case of Selçuk and Asker only) 28

Part II - Appendices

Appendix A: Gündem v Turkey

Admissibility Decision of the European Commission of Human Rights including the Judgment of the European Court of Human Rights.

Decision of the European Commission of Human Rights (article 31 report)

Appendix B: Selçuk and Asker vTurkey

Admissibility decision of the European Commission of Human Rights including the Judgment of the European Court of Human Rights

Decision of the European Commission of Human Rights (article 31 report)

Foreword

This report deals with the cases of **Gündem v Turkey and Selçuk and Asker v Turkey.** These cases are part of a series of judgments of the European Court of Human Rights on the issues of village Evacuations and Destruction in the Kurdish Region (south east) of Turkey.

The KHRP has been involved with the Human Rights Association (IHD)[1] of Turkey in bringing a large number of cases complaining of the most serious violations of human rights to the European Commission of Human Rights. According to the statistics of the European Commission and the Court, until 1993 there were very few cases brought against the state of Turkey, however, Turkey now ranks highest among the states with complaints registered against it.

The Kurdish Human Rights Project (KHRP) has assisted over 400 individuals from Turkey in bringing their cases before the European Commission and Court of Human Rights. So far, 61 cases have been declared fully admissible by the Commission, 12 have been declared inadmissible and 3 partly inadmissible/ partly adjourned. Out of all these cases, 12 have actually been the subject of judgments by the European Court of Human Rights.

The Court found Turkey to be in breach of its obligations under the European Convention on Human Rights in 11 of these cases. The violations found were always very serious and involved issues of torture, village destruction, extra-judicial killings and disappearances. In order to establish the facts, the Commission often resorts to investigation hearings whereby the applicants and any witnesses, whether for the applicant or for the Government give evidence. This procedure is crucial, not only to find out what exactly happened but also to assess the witnesses' credibility.

In the case of Gündem v Turkey, the applicant failed to appear at the two investigation hearings scheduled by the Commission. He alleged he feared reprisals at the hands of the Turkish State. The applicant's story was unfortunately not strongly corroborated by other witnesses and this is why his evidence would have been crucial. In these circumstances, the Commission felt hampered in their exercise of determining what exactly happened on the day of the alleged incident and felt unable to find that violations of the European Convention had occurred beyond reasonable doubt.

In the case of Selçuk and Asker v Turkey, the Commission and the Court reached an extraordinary result in terms of jurisprudence which will then be followed by the Strasbourg organs. Both found that the burning of the applicants' homes in their presence constituted acts of violence and deliberate destruction. They noted in

[1] The IHD (Insan Haklari Derneği) (Human Rights Association) was established in July 1986 with the purpose of promoting human rights and civil liberties in Turkey. It is a non-governmental organisation with nearly 16,000 members and 58 local branches around Turkey. One of the activities of the Diyarbakir branch of IHD of IHD is to assist individuals who have suffered a violation of their human rights to obtain a domestic remedy and if this fails, to assist them in applying to the European Commission of Human Rights. IHD staff have been arrested and subjected to intimidation on many occasions.

particular the traumatic circumstances surrounding the burning of Mr Asker' s house, which put him in danger from fire as he and his wife attempted to save their belongings. Accordingly, the Court found that the applicants had been subjected to inhuman and degrading treatment in violation of article 3. This is actually the first case involving destruction of homes and property where the Court found a violation of article 3 on account of the distressing circumstances in which the burning occurred and the utter disregard paid for the safety and welfare of the applicants. It is an extremely important step towards widening the scope of the provisions under the Convention as well as the rights protected under it.

This report will provide the reader with a summary of the cases as well as an analysis of the decisions. It is useful for those who wish to have a good overview of the cases and any further detail can be found in the text of the decisions and judgments.

Kerim Yildiz
Executive Director

PART I

THE CASES: GÜNDEM v. TURKEY And SELÇUK & ASKER v. TURKEY

SUMMARY OF THE CASES

On 25 May 1998, the European Court of Human Rights (the Court) delivered its judgment in the case of **Gündem v Turkey**. In this case, the Court saw no reason to depart from the European Commission of Human Rights'[1] findings that it had not been established beyond reasonable doubt that the events as alleged by the applicant had occurred. It considered that it had insufficient factual basis on which to reach a conclusion that there had been a violation of articles 3, 5(1), 8, 18 and 1 of Protocol 1 of the Convention as alleged by the applicant. As regards articles 6(1) and 13, whereas the Commission found a violation of article 6(1), the Court decided that the complaint was best examined under the more general obligation on States under article 13 to provide an effective remedy. However, in the circumstances, the Court was not satisfied that the applicant had an arguable claim and concluded, by a majority of 13 to 7, that article 13 had therefore not been violated.

On 24 April 1998, the Court delivered its judgment in the case of **Selçuk and Asker v Turkey.** In this case, the Court shared the Commission's opinion as to the genuineness of the applicants' claim and was also satisfied that there existed special circumstances which dispensed the applicants from the obligation to exhaust domestic remedies. Bearing in mind the manner in which the applicants' homes were destroyed, the Court thought it right to categorise the acts of the security forces as inhuman treatment and consequently found a violation of article 3 and 8 and 1 of Protocol 1 of the Convention. The Court thought it more appropriate to examine the complaint as regards the lack of effective remedy under article 13 rather than 6(1) and concluded that there had been a breach of article 13 on account of the ineffective and inadequate investigation carried out by the authorities into the applicants' complaints.

THE FACTS

Gündem v Turkey

The facts as presented by the applicant

The applicant, Mr. Ismet Gündem, was born in 1955. He is a Turkish national of Kurdish origin who, at the time of the events, lived in the hamlet of Kaniye Meheme, in Sarıerik village, in the Hazro District of the Province of Diyarbakır, in south-east

[1] Thereafer, 'the Commission'.

Turkey. At the time of the events, the hamlet consisted of 15 households. The applicant and his family owned 11 of these households and occupied 7 of them at the time of the incident. The applicant now resides in Diayarbakır.

The applicant stated that on 7 January 1993, at about 10.30 pm, Turkish security forces consisting of approximately 200 soldiers and 150 village guards from the villages of Kırmataş and Meşebağlar carried out the first of two raids involving violence against property and persons in the applicant's hamlet of Kaniye Meheme. He stated that the security forces gathered the villagers in one place, beat some of them up while verbally abusing the others, including children, and used heavy weapons to shoot at the houses and shatter the windows. They mixed all the winter crops and destroyed various household goods. They threatened to return to burn the houses if the villagers did not leave the village. The applicant and his family had always refused to become village guards.

On 13 February 1993 the security forces returned to the village at about 5.00 am. The soldiers surrounded the village while the village guards entered, firing at the houses for about 20 minutes. Women and children caught in the attack had to lie on the floor to take cover. They were taken out of their homes which were then destroyed. Some were beaten with fists and riffle butts. Threats were made to the villagers that if they did not leave the village, it would be demolished. The applicant was able to hear village guards communicating with walkie-talkies. His house was particularly targeted. Most houses were rendered unusable and the applicant's house was severely damaged. Everything inside the house was destroyed. The applicant and other villagers fled to Diyarbakır in March 1993.

The applicants claimed that over 1000 villages have been evacuated in a similar way and that many villages have been destroyed since 1990. 1 million people were displaced without alternative accommodation or livelihood and without compensation.

A number of houses belonging to the applicant's family in Kaniye Meheme neighbourhood, but not his house, were subsequently destroyed by fire in summer 1993, apparently as a result of a raid by the PKK. By this time, a number of villagers in Sarıerik had become village guards.

The facts as presented by the Government of Turkey

The Government stated that the Turkish security forces were in operation in the village of Sarıerik between 7th and 13th February 1993. The operations were aimed at impeding the activities of the militants from the PKK, maintaining order and protecting the villagers and their property. They stated that a number of houses belonging to the relatives of the applicant were burned in a terrorist attack 6 or 7 months after the events complained of. The day after this later incident, the security forces arrived at the village to investigate the attack.

The findings of fact of the European Commission of Human Rights (article 31 report)

The investigation hearings

In this case, like in many cases against Turkey where it is sometimes difficult to ascertain the facts, the Commission decided to hold an investigation hearing pursuant to article 28(1) of the Convention[2]. However, the applicant failed to appear at the first investigation hearing organised by the Commission in Diyarbakır on 7 and 8 November 1995 and was not willing to appear at the second hearing organised in Strasbourg as he feared reprisals, as a result of which this second hearing was cancelled.

The Commission had the opportunity to hear the applicant's father, Mr Haci Ahmet Gündem who said that his son did not come because he had to work and was afraid that, if he appeared, the government and the village guards would make him disappear like they did to his brother Ibrahim.

Unfortunately, the Commission could not ensure the appearance of all other persons summoned by the Commission Delegates either. In particular, one of the Public Prosecutors in charge of the investigation into the events, Mr Çiçek, was unable to come and give evidence.

The Commission heard evidence from Mr Şakar, a lawyer working for the Human Rights Association of Diyarbakır, who took the applicant's statements in Diyarbakır. The Government of Turkey strongly objected to Mr Şakar being heard and, refusing to listen to him, left the Court room.

The Commission's findings

The Commission noted that as regards the evidence obtained in respect of specific events alleged to have happened, it is only the oral testimony of the applicant's father, Haci Ahmet Gündem, which provides support for the applicant's account of events. However, the applicant's father testimony differed in some aspects with the statements provided by the applicant and the Commission felt that the presence of the applicant would have been needed to clarify these matters.[3] The testimonies provided by other witnesses contradicted the applicant's version of events and the Commission was thus presented with diverging versions of whether and how the applicant's house and property were damaged.

The Commission concluded that "whatever reason there may have been for the applicant's absence, the Commission finds that his failure to give evidence made it difficult to establish the facts. It would have been necessary, in order to make a reliable assessment of the situation, to hear the applicant in person in order to assess his general credibility and to put questions to him about various details, including the background of the events."

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[2] See below the section on: 'what are investigation hearings'?

[3] See Report of the Commission, para.148.

The Commission was therefore of the opinion that it has not been established beyond reasonable doubt that the applicant's house and property were damages by security forces and village guards on 7 January and 13 February 1993.

The findings of fact of the European Court of Human Rights (Judgment)

The Court reiterated the Commission's findings of fact. It considers that the evidence gave rise to serious doubts as to whether the applicant had made out a factual basis for his allegation that his house and property had been purposely destroyed by the security forces. In the circumstances of the case, including the absence of an opportunity for the Commission to test directly with him the statements taken by the Human Rights Association, the Court was not satisfied that the applicant had an arguable claim that the provisions of the Convention invoked by him had been violated.

Selçuk and Asker v Turkey

The facts as presented by the applicants

The applicants, Mrs Selçuk and Mr Asker are Turkish nationals of Kurdish origin who, at the time of the incident lived in the village of Islamköy in the Kulp District of the province of Diyarbakır. Mrs Selçuk, who, at the time of the events was aged 54 years old, is a widow and mother of 5 children. She now lives with one of her married daughters in Diyarbakır. Mr Asker was aged 60 years old, and is the father of 7 children. He also now lives in Diyarbakır with his wife.

They alleged that on or about 16 June 1993, at around 7.00am, approximately 400 soldiers under the control of Kulp Gendarme Commander Recep Cömert, made a raid on their village consisting of 100 households. According to Mr Asker, in winter 1992 the security forces sent a list of names to 10 families living in the village requiring the people named on the list to leave the village.

The house of H.I.A. was first set on fire together with all his goods. The soldiers then proceeded to burning Mr Asker's house. Before doing so, they ordered the applicant and his wife to go and get their belongings out of the house. As they went in, they realised that the house had been set on fire so they rushed out of the back door. The security forces threatened the other villagers who had come to try to extinguish the fire so that the entire house was burnt down.

The soldiers then made their way to the house of Mrs Selçuk and ejected her with her children. They gathered all the goods in one room, poured petrol over them and set them on fire. When the villagers tried to put out the fire, they were beaten by the soldiers with clubs and truncheons.

Once the houses were completely burnt down, Commander Cömert turned towards all the villagers that had gathered around the house and told them to leave the village otherwise "all their houses will be burnt with them inside".

On or about 26 June 1993, the soldiers returned to the village and burnt down other houses. They also burnt down the only mill of the village which was owned by the applicant and 3 other villagers. They again threatened the villagers that if they did not leave the village, they would end up being burnt together with all their houses. By that time, Mrs Selçuk had already left the village and she was informed of the destruction of her mill by her brother in law.

Mr Asker lodged a petition with the District Governor of Kulp dated 23 June 1993 in which he listed all the damage done to his property.

The facts as presented by the Government of Turkey

The Government submitted that the applications were invalid because they were not submitted by the applicants and had been fabricated under the influence of the PKK and / or with a view to obtaining money. The applicants' homes were burnt by the PKK as a punishment and warning because Mr Askers' son was doing the military service, contrary to PKK orders. According to the Government, the village of Islamköy had good relations with the security forces and no order threatening 10 families could therefore have been issued 6 months before the alleged events. The Government also disputed the fact that Mr Asker had petitioned the Governor as no records revealed the registration of such complaint. The Government also pointed to various discrepancies in the written statements made by the applicants.

The findings of fact of the European Commission of Human Rights (article 31 report)

The Commission considered that notwithstanding the discrepancies in the written petitions, the applicants maintained before the Commission Delegates the substance of their complaints and showed no unwillingness in participating in the proceedings. The Commission therefore found that the applications disclosed a genuine exercise of the applicants' right of individual petition.

The Commission did not find the accounts given by the applicants to be fundamentally flawed by the points identified by the Government. It had regard to the age and infirmity of the applicants, as well as to the traumatic nature of the incident and did not find it surprising that the applicants may have been a little confused.

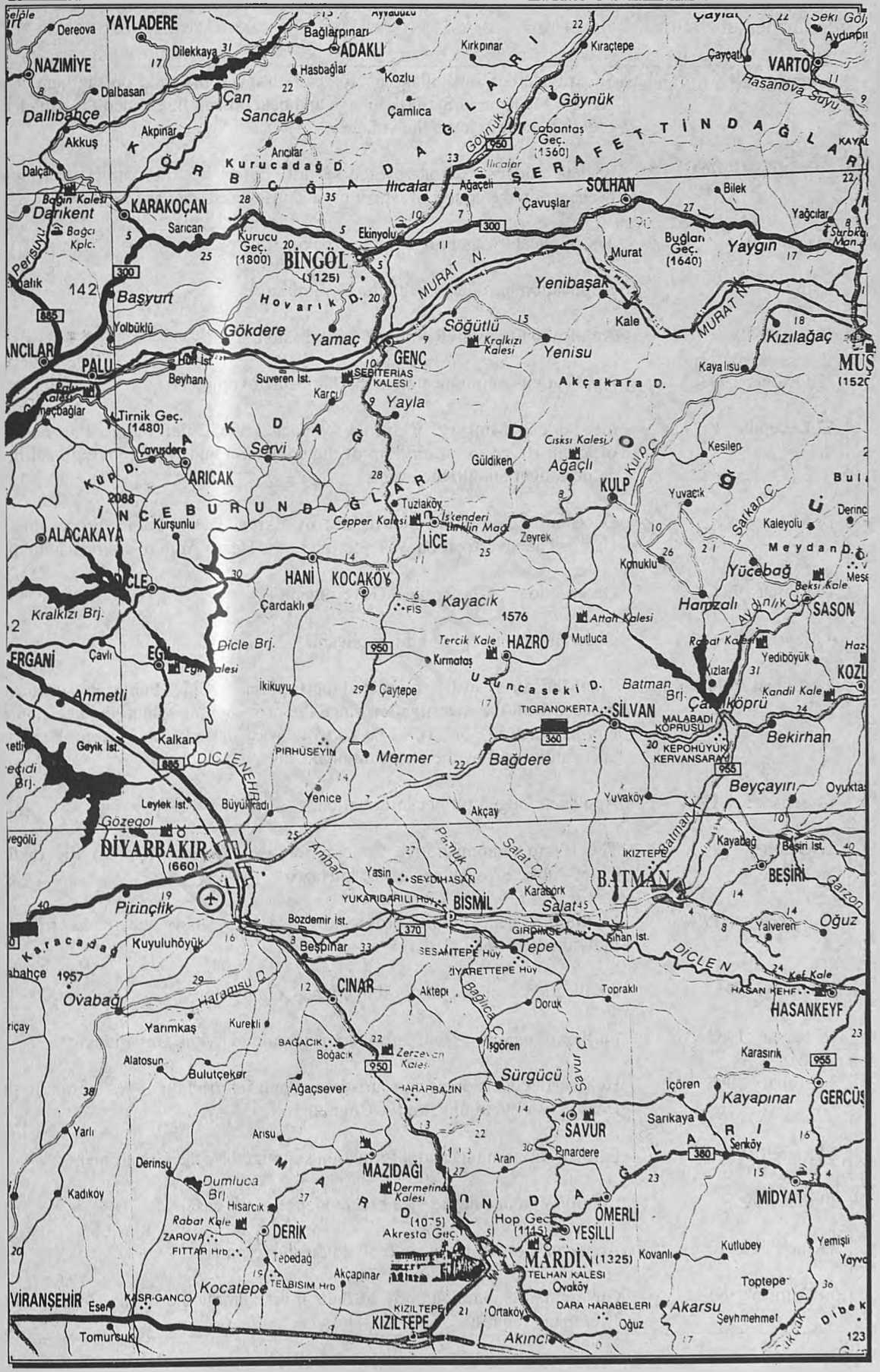
Accordingly, the Commission found it established that on the morning of 16 June 1993, a large force of gendarmes arrived in the village under the apparent command of Recep Cömert and set the house of Mr Asker on fire by pouring gasoline on to it. Just before the soldiers set fire to the house or while they were doing so, Mr Asker and his wife rushed inside the house in an attempt to save their possessions. The couple was therefore forced to leave the house because of the smoke and flames. Villagers were prevented from putting the fire out. Then a number of gendarmes including Commander Cömert proceeded to Mrs Selçuk's house and despite her protests poured petrol all over it. The house was set on fire by or under the order of Recep Cömert and villagers were prevented from trying to put out the fire.

The Commission found that on or about 26 June 1993, the soldiers returned to the village and destroyed the mill by setting it on fire. Recep Cömert was seen with the gendarmes at the mill when this occurred. Mr Asker complained of the destruction of his home to the district governor in Kulp by presenting a petition. No steps were taken in response to his petition.

The findings of fact of the European Court of Human Rights (Judgment)

The Court shared the Commission's opinion as to the genuineness of the application and found no cause to doubt that the claims made were not valid. Having itself examined the evidence, the Court found that the Commission's assessment and conclusion to be reasonable and credible, particularly bearing in mind that the Delegates had the advantage of hearing the oral testimony of the applicants and the witnesses first hand.

MAP OF THE AREA WHERE THE ALLEGED INCIDENT OCCURRED



CHRONOLOGY OF EVENTS AND LEGAL PROCEEDINGS
GUNDEM v TURKEY

7 January 1993	Security forces and village guards carried out a first raid on the hamlet of Keniye Meheme in Sarıerik village and beat up and threatened the villagers, ordering them to leave the village.
13 February 1993	Second raid carried out by the security forces on the hamlet of Keniye Meheme, in the course of which more houses were damaged.
March 1993	The applicant went to live in Diyarbakır.
7 July 1993	Application introduced with the Commission.
19 July 1993	Application registered with the Commission.
11 October 1993	Application communicated to the Turkish Government
17 December 1993	the Turkish Ministry of Justice contacted the Chief Public Prosecutor's office in Hazro to inform him of the complaint and with a view to starting an investigation into the events.
18 May 1994	Decision of non-jurisdiction issued by Ekrem Bakır, Public Prosecutor in Hazro. The investigation was referred to the Hazro Administrative Council.
10 March 1994	Observations of the Turkish Government.
4 May 1994	Observations in reply of the applicant.
31 August 1994	The Ministry of Justice requested the Diyarbakır Chief Public Prosecutor to proceed with the investigation since the provision on which the decision of non-jurisdiction of 18 May 1994 was based had been declared unconstitutional by the Constitutional Court.
14 September 1994	Applicant lodged further information.
21 October 1994	The Hazro Administrative Council returned the investigation file to the Chief Public Prosecutor's office in Hazro.
17 November 1994	Muhittin Çiçek, Public Prosecutor in Hazro, took statements from 5 individuals.
9 January 1995	Application declared admissible by the Commission
16 January 1995	Further observations and information submitted by the Government.
2 February 1995	He issued a decision of non-jurisdiction and referred the investigation to the Hazro District Administrative Council.
29 March 1995	Further observations and information submitted by the Government.
20 May 1995	Commission decides to take oral evidence in the case.
23 June 1995	Applicant's observations in reply to the Government.
30 October 1995	Government submits a copy of their investigation file to the Commission, after many requests.

1 November 1995	Applicant's representatives notify the Commission that because of fear of reprisal, the applicant found it impossible to attend the hearing.
7-8 November 1995	Investigation hearing (taking of evidence) held in Diyarbakır.
2 December 1995	Commission decides to take further evidence. A second investigation hearing is scheduled for 7-8 March 1996 in Strasbourg.
10 January 1996	The applicant's representatives notify the Commission that the applicant would not attend this hearing for fear of reprisals and because he did not have a passport and was sought by the police.
20 January 1996	The Commission decided not to maintain the second hearing.
11 March 1996	Applicant's final observations lodged.
3 September 1996	Article 31 report of the Commission. The Commission considered it had an insufficient factual basis on which to reach a conclusion that there has been a violation of article 3, 5, 8, 18 and 1 of Protocol 1. However, the Commission was of the opinion that the applicant did not have effective access to a tribunal and that this constituted a breach of article 6.
28 October 1996	The case was referred to the Court.
25 May 1998	The Court saw no reason to depart from the findings of fact of the Commission and accordingly did not find a violation of articles 3, 5, 8, 18 and 1 of Protocol 1. The Court examined the complaint as regard the lack of effective remedy under article 13 but, in the light of the circumstances of the case, it was not satisfied that the applicant had an arguable claim that this provision had been breached.

CHRONOLOGY OF EVENTS AND LEGAL PROCEEDINGS
SELÇUK and ASKER v TURKEY

16 June 1993	Security forces under the control of the Kulp Gendarme Commander Recep Cömert raided the village of Islamköy, burnt the houses of the applicants down and threatened the villagers that they would also be burnt if they did not leave the village.
26 June 1993	The security forces returned to the village and burnt the mill which was partly owned by Mrs Selçuk. They again threatened the villagers.
15 December 1993	Applications of both Mrs Selçuk and Mr Asker introduced with the Commission.
7 January 1994	Application of Mr Asker registered with the Commission.
11 January 1994	Application of Mrs Selçuk registered with the Commission.
5 April 1994	Communication of the applications to the Government of Turkey for observations on admissibility and merits.
4 May 1994	Ministry of Justice of Turkey contacted the Chief Public Prosecutor Office in Diyarbakır to enquire whether any petition had been submitted by the applicant to the Public Prosecutor in Kulp and requesting that an investigation be started if this had not already been done.
26 May 1994	Gendarme Captain Ali Ergulmez said to the Public Prosecutor that an examination of the records showed that no complaint had been filed by Mr Asker.
20 /21 June 1994	Mr Asker and Mrs Selçuk made a statement to the Public Prosecutor of Kulp upon his request.
18 August 1994	The Public Prosecutor sent a request to the Gendarmerie Commander for information to be given as to whether an operation led by Recep Cömert had been carried out on 16 June 1993. No reply was included with the documents from the investigation file provided to the Commission.
27 September 1994	Government's observations submitted.
23 November 1994	Applicant's observations in reply.
28 November 1994	The Commission declared Mr Asker's application to be admissible.
30 November 1994	Erdal Yatmış, Public Prosecutor of Kulp issued a decision of lack of jurisdiction in regard to the applicant's complaint against Recep Cömert.
8 December 1994	The Commission refused the Government's request to adjourn the examination of the case pending the investigation by the Public Prosecutor and requested the Government to submit any other observations by 23 January 1995.
7 February 1995	The Government submitted further observations in the case of Mr Asker.
3 April 1995	The Commission declared Mrs Selçuk' s application to be admissible.
23 May 1995	The applicant lodged observations in reply.

1 July 1995	The Commission decided to take oral evidence in the cases.
12 September 1995	The applicants' representatives made proposals as to the witnesses to be heard in both cases.
5/6 February 1996	Evidence heard in Ankara.
8 March 1996	Parties are invited to present their written conclusion on the merits of the case. The Commission joined the two applications.
20 May 1996	Applicant's final observations.
25 June 1996	Government's final observations.
28 November 1996	Commission's article 31 report.
22 January 1997	The case was referred to the Court.
24 April 1998	Judgment of the Court.

How to Bring a Case before the European Commission and Court of Human Rights

The procedure involved in lodging a complaint with the Commission has already been explained in our previous publication **Aksoy v. Turkey and Aydin v. Turkey - A Case Report on the Practice of Torture in Turkey** (December 1997). For further information about the procedure in the Commission and the Court, please consult that publication or any leading human rights textbook 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 1995.

What are 'investigation hearings' or 'taking of oral evidence'?

If the Commission considers it necessary, it may, under article 28(1)(a) of the Convention, "undertake...an investigation for the effective conduct of which the state concerned shall furnish all necessary facilities". These powers of investigation have been used in inter-state complaints and have sometimes taken the form of on the spot inquiries such as those in the complaint brought by Greece against the United Kingdom.[4] In the case of individual complaints where the facts are very much in dispute, action under article 28(1)(a) of the Convention usually takes the form of investigation hearings whereby all proposed witnesses give evidence before a selected number of Commission delegates (usually three).

Investigation hearings are held *in camera* with the parties in attendance. For the sake of convenience, they are usually conducted in the country of the respondent government. The evidence obtained during investigation hearings is then communicated to the parties for their observations.

The procedure adopted during investigation hearings is as follows: the parties draw up a list of their witnesses, and subject to the Commission's approval and time constraints, summonses to give evidence at the hearing are served on proposed witnesses.

The Commission hears the applicants and their witnesses first. The government then cross-examines them. The government's witnesses are usually heard last and they are then cross-examined by the applicants' legal representatives. Investigation hearings enable the Commission to establish the facts, having had the advantage of hearing the witnesses "live", it is able to observe their reactions and demeanour and thereby assess the veracity and probative value of all the evidence. The onus of proof is on the applicant. The requisite standard of proof is that of proof beyond reasonable doubt, but as the Court has constantly stated in its case law (see for example, *Ireland v. United Kingdom, Judgment of 18 January 1978*), such proof may follow from "the co-existence of sufficiently strong, clear and concordant inferences".[5]

[4] Application No.176/56, YB II (1972). On that occasion, an inquiry was made in Cyprus into the existence of certain torture practices allegedly undertaken by the UK and into whether the threat to public order was such that the UK's interference was justified.

[5] See the Court's judgment at paragraph 66.

In the course of investigation hearings, parties are also permitted to present documentary evidence[6] to the Commission, including written witness statements.

In **Gündem v Turkey,** the documentary evidence before the Commission included 2 statements by the applicant dated 15 march 1993 and 31 May 1994, 5 statements taken on 17 November 1994 by Muhittin Çiçek, Hazro Public Prosecutor, one from Kasim Tatlı, mayor of Sarıerik village and the others from Esref Güç, Ibrahim Türkoğuz, Musa Can, and Yusuf Yaşa. The first two were members of the village council of elders and all four lived in the neighbourhood of Kaniye Meheme. In addition, the Commission heard evidence from 7 witnesses, including Mr Şakar, a lawyer working for the Human Rights Association, Mr Tatlı and the five witnesses from the village, as well as the applicant's father.

The obligation to exhaust domestic remedies

According to article 26 of the Convention: "the Commission may only deal with the matter after all domestic remedies have been exhausted..." This rule is founded on the principle of international law that the state must first have the opportunity to redress the wrong alleged. An applicant should therefore raise in domestic legal proceedings the substance of the complaint to be made to the Commission. Any effective and adequate domestic procedure which provides redress must be exhausted.

However, the obligation to exhaust domestic remedies does not apply where the available remedies are ineffective and inadequate. In case of doubt about the effectiveness of a remedy, the remedy should be pursued. The rule is also inapplicable where an administrative practice consisting of a repetition of acts incompatible with the Convention and official tolerance by state authorities have been shown to exist and is of such a nature as to make proceedings futile and ineffective. There may also be special circumstances which absolve the applicant from the obligation to exhaust domestic remedies at his disposal.

[6] The Commission had also regard to a report published by the KHRP and medico international entitled: "Village evacuations and Destruction in south-east Turkey" 1996, and to an explanation provided by the KHRP on the "Village guards" system.

The Debate on the exhaustion of domestic remedies in the case of Gündem v Turkey

In this case, **the applicant** did not complain to the authorities about the destruction of his home and property, alleging a fear of reprisals. Following, however, the communication of the applicant's complaints to the Government by the Commission in October 1993, the Public Prosecutor of Hazro commenced an investigation into the events. The applicant alleged that any domestic remedy are illusory, inadequate and ineffective, since the operation in question was officially organised by the agents of the state.

The government contended that the applicant had a number of remedies at his disposal which he did not try. He could have introduced an administrative action before the administrative courts for compensation. The acts alleged would constitute punishable criminal offences under criminal and military law in respect of which complaints could be lodged.

The Commission, referring to the case of **Akduvar v Turkey**[7], noted that it was a well known fact that many villages had been destroyed in south east Turkey as a result of which many people were displaced. It further noted that the government had not provided a single example of compensation being awarded to villagers for damage comparable to that suffered by the applicant. No relevant examples were given of successful prosecution against members of the security forces for the destruction of villages.

The Commission said that it was unlikely that such prosecution could follow from acts committed pursuant to orders of the Regional Governor under the state of Emergency to effect evacuation of villages. The Commission had also regard to the vulnerability of dispossessed applicants under pressure from both the PKK and security forces. It concluded that in the absence of clear examples that the remedies put forward by the government would be effective in the circumstances of the case, the applicant was absolved from the obligation to pursue them.

The Court noted that the investigation only started once the application had been communicated to the Government. It noted that the file was "shuttled back and forth" several times between the Public Prosecutors and the Administrative Council due to difficulties related to issues of competence. The Hazro Prosecutor did little in the direction of elucidating the facts and the second Public Prosecutor made no attempts to interview members of the applicant's family.

However, **the Court** also noted that the protracted and limited character of the investigation was to some extent caused by the applicant's failure to co-operate with the authorities. In these circumstances, the Court had doubts as to whether it could be said that there existed such special circumstances in the present case as could dispense the applicant at the time of the events complained of from the obligation to exhaust domestic remedies.

Finally, the Court considered that this objection by the Government as to the non-exhaustion of domestic remedies raised issues which are closely linked to those raised by the applicant's complaint under article 13 and it joined this plea to the merits of the case.

[7] See judgment of 16 September 1996 and KHRP report: "*Akduvar v. Turkey, The story of Kurdish Villagers Seeking Justice in Europe*", October 1996.

The Debate on the exhaustion of domestic remedies in the case of Selçuk and Asker v Turkey

Mrs Selçuk alleged she did not sought to exhaust domestic remedies because the raid in question was executed by the security forces and that, on the facts as alleged by her, no remedy could be effective for the purposes of article 26. Besides, the scale of destruction of villages, as well as the expulsion and creation of internal refugees is so great in south-east Turkey that this must be considered high-level Government policy in regard to which all remedies are theoretical and irrelevant (an administrative practice). **Mr Asker** also considered that there was no requirement for him to exhaust domestic remedies for the same reasons as those put forward by Mrs Selçuk. Besides, Mr Asker had done everything he could by submitting a petition to the Governor.

The Government, in the case of Mrs Selçuk, contended that the applicant had failed to complain to the competent judicial authorities and point out that there was a pending investigation before the Public Prosecutor of Kulp.

In the case of Mrs Selçuk, **the Commission** did not deem it necessary to determine whether there existed an administrative practice on the part of the Turkish authorities. It referred to its findings in Akdivar which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact that there had been destruction of villages in south-east Turkey. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it quite significant that the Government had not provided a single example of compensation being awarded to villages for damage like that suffered by the applicants.

The Commission considered it unlikely that such a prosecution of members of security forces could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to evacuate the village. The Commission was of the opinion that it could not be said at this stage that the applicants' fear of reprisals if they complained about acts of the security forces was wholly without foundation. It concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the case of Mr Asker, **the Government** failed to submit any observations as regards admissibility. The Commission's practice once a case has been communicated to the Government is not to declare the application inadmissible for failure to exhaust domestic remedies, unless this matter has been raised by the Government in their observations. The same principle applies where the Government have not submitted any observations at all. For these reasons, the Commission was of the opinion that the application could not be rejected on the ground that domestic remedies had not been exhausted.

The Court recalled that Mr Asker presented a petition complaining about the destruction of his home to the District Governor. Despite this, no investigation file was opened by the state authorities until May 1994 after the Commission had communicated the application to the Government. Furthermore, it would appear from t he information available to the Court that the ensuing investigation had been extremely limited and has not yet been concluded.

The Court considered that it was understandable that the applicant formed the belief that the petition to the District Governor having elicited no response, it was pointless for him to try to secure satisfaction through national legal channels. The Court concluded that there existed special circumstances which dispensed the applicants from the obligation to exhaust domestic remedies.

THE SPECIFIC VIOLATIONS OF THE CONVENTION COMPLAINED OF IN BOTH CASES

The applicants in both cases have alleged breaches of the following provisions of the Convention:

Article 8: Right to respect for private and family life, home and correspondence

Article 8 of the Convention provides as follows:

> 1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

Article 3: Freedom from torture or inhuman or degrading treatment or punishment

Article 3 of the Convention provides as follows:

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

Article 5(1): Right to liberty and security of the person

Article 5(1) of the Convention relevantly provides:

> *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.*

Articles 6(1) and 13: Right to access to a court and right to an effective remedy before a national authority

Article 6(1) of the Convention provides as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...*

Article 13 of the Convention provides as follows:

> *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.*

Article 1 of Protocol 1: Protection of property.

Article 1 of Protocol 1 reads:

> *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".*

Article 14 of the Convention: freedom from discrimination.

Article 14 of the Convention reads:

> *"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."*

In the case of Selçuk and Asker, the applicants also alleged a violation of article 14 in conjunction with article 18.

Article 18 of the Convention: restrictions applied for the purpose for which they have been prescribed.

Article 18 of the Convention reads:

> *"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".*

The Government's position

In the case of **Gündem v Turkey,** the Government did not present any written submissions on the merits regarding the overall assessment of the evidence and other material before the Commission. The reader is therefore referred to the section of this report entitled: "the facts as presented by the Government of Turkey" above.

The applicant's complaints

The applicant submitted that the two alleged attacks on his house represent separate violations of **article 8**. His violation is, in his view, aggravated by the fact that the village guards and security forces targeted the applicant and his family.

The applicant complained that the deliberate targeting of him and his family and the actions carried out against them to force them to flee their homes constitutes inhuman and degrading treatment contrary to **article 3** of the Convention

The applicant submitted that the harassment and intimidation by agents of the State have resulted in the deprivation of his security of life, contrary to **article 5**. In this respect he recalls that his brother, Ibrahim, has disappeared at, he believes, the hands of the State.

The applicant submitted that he was unable to obtain an effective remedy for the violation he has suffered or to obtain a determination of his civil rights, in breach of **articles 6 and 13**. He contends that the prosecution system in south east Turkey does not operate so as to investigate effectively complaints concerning human rights abuses by agents of the State.

The Government, in their observations on the admissibility of the application, submitted that the applicant had a number of remedies at his disposal but that he had tried none of them.

The applicant alleged that the infliction of serious damage on his house and property represents unjustifiable deprivation of his right to possession of property as well as a violation of his right to enjoyment of his property as guaranteed by **Article 1 of Protocol 1**. In addition, he argues that his rights under the provision are violated and continue to be violated as the incidents perpetrated by State forces amount to a constructive expulsion from his property.

The applicant claimed that his experience represented an authorised practice by the State in breach of **Article 18.**

The opinion of the Commission:

As regards articles 3, 5(1), 8, 1 of Protocol 1 and 18 of the Convention.

The Commission found that there had been no violation of the above articles.

The Commission recalled that the applicant's failure to give evidence, for whatever reason this may be, made it difficult to establish the facts. The Commission was presented with diverging versions of whether and how the applicant's house and property were damaged. On the basis of the written and oral evidence before it, the Commission did not consider it to have been established beyond reasonable doubt that the events as alleged by the applicant occurred. The Commission therefore considered that it had an insufficient basis on which to reach a conclusion that there had been a violation of article **3, 5, 8 or 1 of Protocol 1** of the Convention.

Since it had in fact not been established that the events as alleged by the applicant occurred, no question of restrictions having been applied for improper purposes under **article 18** arose in regard to these events.

As regards articles 6(1) and 13 of the Convention.

The Commission found a violation of article 6(1).

The Commission considered that the claims which would have required determination by a court in the present case included compensation for damage to the applicant's house and property and that his rights within the meaning of article 6(1) were therefore at issue. **Article 6(1)** of the Convention requires effective access to a court for civil claims.

The Commission recalled it s decision on admissibility and pointed to the "undoubted practical difficulties and inhibitions confronting persons like the present applicant who complain of destruction of their homes...in south-east Turkey". Moreover, in the present case, no investigation into the events was undertaken until after the Commission had communicated the application to the Government and the subsequent investigation by successive prosecutors could not be considered to have been conducted in an efficient way.

In the circumstances, the Commission was of the opinion that the applicant did not have an effective access to a tribunal that could have determined his civil rights within the meaning of article 6(1).

Since the applicant had not specified in what way his complaints also related to matters other than those which concern his civil rights, the Commission found that no separate issue arose in regard to **article 13** of the Convention.

The Court's judgment

As regards articles 3, 5(1), 8, 18 and 1 of Protocol 1 of the Convention

The Court recalled the Commission's findings to the effect that it did not have a sufficient factual basis on which to reach a conclusion that there had been a violation of Article 3, 5, 8, 18 or 1 of Protocol 1 of the Convention.

The Court noted that, in the proceedings before it, the applicant did not contest the findings of the Commission as to the facts. The Court saw no reason to depart from those findings, recalling that under its case-law the establishment of the facts was primarily a matter for the Commission. Accordingly, the Court found that there has been no violation of article 3, 5(1), 8, 18 and 1 of Protocol of the Convention[8].

As regards articles 6(1) and 13.

The Court decided to examine the complaint under the more general obligation on states under article 13 to provide an effective remedy. However, the Court recalled that this provision only applied in respect to grievances under the Convention which are arguable.

The Court went on to consider that the evidence in this case gave rise to serious doubts as to whether the applicant had made out a factual basis for his allegation that his house and property had been purposely destroyed by the security forces. In the circumstances of the case, including the absence of an opportunity for the Commission to test directly with the applicant the statements taken by the Human Rights Association, the Court was not satisfied that he had an arguable claim that the Convention provision invoked by him had been violated. It concluded that there had been no violation of article 13 and that it was not necessary to examine whether there had been a violation of article 6(1).

It is worth mentioning at this stage that 7 judges dissented on this point and were in favour of finding a violation of article 13. Five of these judges thought that the applicant's complaints of violations of articles 8 and 1 of Protocol 1 could be said to have been arguable ones for the purposes of article 13. They recalled that the Commission had declared admissible the applicant's complaint that his home and property had been purposely destroyed by the security forces. They further found it established that no thorough and effective investigation was conducted into the applicant's allegations and that this resulted in undermining the exercise of any remedies that the applicant had at his disposal, including the pursuit of compensation before the Court.[9]

[8] See para. 68 of the Court's judgment.

[9] See dissenting opinions of Judges Valticos and Casadevall as well as Judges Pekkanen, Pettitti, Loizou, Repik and Lohmus.

The Speech made by the applicant's representative before the European Court of Human Rights in Strasbourg.

The applicant's representative sought to address the Court on the reasons why the applicant feared reprisals from the state. He also sought a finding of violation of article 13, rather than 6, on account of the lack of proper investigation by the authorities into the applicant's complaints.

The applicant's representative emphasized before the Court that although the Commission was not satisfied that the applicant's complaints had been established beyond reasonable doubt, there was no suggestion in the Commission's report that the applicant's account of the events was false or manufactured.

It was conceded that a direct result of the applicant's failure to appear was that the Commission had been unable to decide upon his substantive complaints. In the absence of the applicant, the Commission had found itself unable to determine whether his fear of reprisals from the security forces was or was not justified. The Commission itself had felt concerns about this and had not dismissed the applicant's claim in this respect. Moreover, the Commission in the cases of **Ergi v Turkey**[10], **Aydin v Turkey**[11] and **Kurt v Turkey** had found the Government of Turkey to be in breach of its obligations under article 25 not to interfere or otherwise put pressure on applicants and witnesses. In the case of **Akdivar v Turkey**[12], the Court itself recalled..."the vulnerable position of the applicant villagers and the reality that in south-east Turkey complaints against the security forces might well give rise to a legitimate fear of reprisals".

The applicant's representative recalled that the applicant's brother, Ibrahim, had disappeared on 26 September 1991. Following this disappearance, the applicant had gone to the Gendarme station to name the officer he alleged was responsible for the abduction of his brother. He was severely beaten and threatened with death. This is in dispute between the two parties.

A parallel was drawn between this case and that of Akdivar, where the applicants did not complain either to the authorities after being evacuated from their village. The Gundem family enquired constantly about the disappearance of the applicant's brother is not disputed by the Government. The report drafted following the investigation into the incidents of January and February 1993 does not address the allegation that the security forces came to the village and destroyed it. The applicant therefore asked the Court to confirm that the investigation undertaken into the events was wholly inadequate.

The applicant submitted he had a clearly arguable claim was a victim of a violation of article 13. He submitted that "the absence of any remedy flows directly from the existence and operation in practice of the emergency legal regime in south-east Turkey...and that there is an official policy to avoid at all costs accountability of all security forces for their action in counter insurgency operations in south east Turkey".

[10] See judgment of the Court of 28 July 1998.

[11] Judgment of the Court of 25 September 1997 and see also KHRP report: "*Aksoy v Turkey; Aydin v Turkey - a case report on the practice of torture in Turkey*" -Volume I and II, December 1997.

[12] See judgment of 16 September 1996 and article 50 judgment of 1 April 1998 and KHRP first case report: "*Akdivar v Turkey - the story of Kurdish villagers seeking justice in Europe*", October 1996.

The Government's position

The Government submitted that the claims were fabricated and that the applications were produced under the influence of the PKK and were therefore invalid. They pointed to the apparent inconsistencies and contradictions in the written and oral evidence submitted by and on behalf of the applicants. The Government also contended that all the allegations were groundless since no operations were carried out by the security forces on the dates alleged.

They also alleged that the applicants had failed to exhaust local remedies. They refer in particular to the administrative courts which have been created to deal with disputes between the individuals and the State and which may decide in favour of persons in the position of the applicants and award compensation.

The applicant's complaints

The applicants alleged that the destruction of their homes by the security forces and their arbitrary expulsion from their village constitute violations of the right to respect for their family life and home, ensured by **article 8** and disclosed an interference with the peaceful enjoyment of their possessions, contrary to **article 1 of Protocol 1.**

The applicants also alleged that their forced expulsion from their village, inflicted in the circumstances surrounding the incident, caused them such severe physical and mental suffering as to constitute inhuman and degrading treatment contrary to **article 3**. They refer to the systematic terrorising of villages and destruction of villages as a form of collective punishment which is inhuman and degrading.

The applicants invoked **article 2** in that the security forces knew that he was in the house when they set the house on fire and that this was an indication of a reckless disregard for the protection of the right to life.

The applicants allege that they were compelled to abandon their homes and village in flagrant breach of the right to the exercise of liberty and the enjoyment of the person, contrary to **article 5 (1).**

As regards article 6(1) and 13, the applicants alleged that the arbitrary expulsion from their homes and village was a flagrant direct interference with their civil rights within the meaning of **article 6(1).** They claim to have been denied an effective procedure to challenge or resist the deprivation of their possessions. They also claim to have had no effective domestic remedies for their various Convention claims, contrary to **article 13.**

The applicants also maintained that because of their Kurdish origin, the various alleged violations of their Convention rights were discriminatory, and in breach of **article 14**. They also claim that their experiences represented an authorised practice

by the State in breach of **article 18.**

The opinion of the Commission

The Commission found that the security forces had deliberately destroyed the houses and property of the applicants, necessitating their moving away from their village. It found that this disclosed a very serious interference with the applicants' rights under the above provisions for which no justification has ever been given. It accordingly found a violation of **article 8(1).**

The Commission also found that the deliberate destruction of the homes was carried out in utter disregard of the safety and welfare of the applicants who were deprived of most of their personal belongings and left without shelter or assistance and in circumstances which caused them anguish and suffering. It noted in particular the age and infirmity of the applicant Mr Asker and the traumatic circumstances surrounding the burning in which Mr Asker and his wife were in danger from smoke and flames as they tried to save their belongings. The Commission had also regard to the difficult personal situation in which the applicant subsequently found themselves, being deprived of their own homes in their village and the livelihood which they had been able to derive from their gardens and fields, and the in the case of Mrs Selçuk, the mill of which she was a co-owner. The Commission concluded that the applicant had been subjected to inhuman and degrading treatment within the meaning of **article 3.**

As regards **article 2**, the Commission recalled that it had not been established that the security forces had set fire to the house after the applicant had run inside. It referred to the traumatic circumstances of the incident (article 3) and found no separate element arising in the context of article 2, there being no indication of any deliberate attempt on the life of Mr Asker or that he suffered any life-threatening injury as a result of any recklessness or careless disregard on the part of the security forces. Accordingly, the Commission found no violation of article 2.

As regards **article 5(1)**, the Commission recalled that the primary concern of article 5(1) is protection from arbitrary deprivation of liberty. Here, neither the applicant was arrested or detained or otherwise deprived of his or her liberty. The Commission considered that their insecure personal circumstances arising from the loss of their homes does not fall within the notion of security of person as envisaged by article 5(1). The Commission concluded that no violation of article 5(1) had therefore occurred.

As regards articles 6(1) and 13

In response to the Government's arguments, the Commission recalled that in the case of **Akdivar v Turkey**, it considered that the case law referred to by the Government was insufficient to demonstrate that compensation claims were effective remedies in the emergency regions of south-east Turkey for the destruction of homes and villages allegedly perpetrated by the security forces. The Commission noted that there had been no example given to the Commission of compensation paid to a villager in respect of the destruction of a house by the security forces.

In that case, the Commission noted that an investigation had been opened into the applicants' allegations pursuant to the communication to the Government of the application. The Commission asked on repeated occasions for the investigation to be provided but only a relatively small number of documents was provided. It appeared that the investigation was limited and inconclusive. Enquiries were confined to taking statements from the applicants and enquiring from the gendarmes whether an operation had taken place in the village on 16 June 1993. No steps were taken to seek information from the alleged perpetrators of the burning or from other villagers who might have witnessed the events. The investigation ended on 30 November 1994 with a decision of lack of jurisdiction. The Commission was not informed of any outcome of the proceedings before the Administrative Council which had jurisdiction transferred to it more than 3 years ago.

The Commission considered that the unsatisfactory nature of the investigation process disclosed in these cases supports its finding that complaints that security forces have destroyed villagers' houses do not in practice receive the serious or detailed consideration necessary for any prosecution to be initiated.

In the light of these considerations, the Commission is of the opinion that the applicants did not have effective access to a tribunal that could have determined their civil rights within the meaning of **article 6.** "Positive action to investigate the incidents promptly, to re-house or financially assist these villagers rather than passively awaiting administrative court intervention, may have been a more appropriate response to the applicant's plight."

According to the Commission, the question arose under article 13 whether the applicants have been afforded effective domestic remedy for these claims notwithstanding that the violations have allegedly been "committed by persons acting in an official capacity".

For the same reasons outlined above, the Commission considers that the applicants did not have other effective remedy at their disposal for their remaining Convention claims as required by article 13. The Commission accordingly also found a violation of article 13. [13]

As regards articles 14 and 18, the Commission considered that the applicants' allegations were unsubstantiated and therefore rejected their claims.

The opinion of the Court

As regards **article 3**, the court recalled that Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village of Islamköy all their lives. The Court stated: "it would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicant. They

[13] Nick Bratza in his partly dissenting opinion like in the cases of Akdivar v Turkey and Menteş v Turkey, voted in favour of a violation of article 13 and not article 6 because in his opinion, "these cases are concerned not with the right of access to court but rather with the effectiveness of the remedies available, including court remedy".

were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored and no assistance was provided to them afterwards. (...) Bearing in mind in particular the manner in which the applicants' homes were destroyed, and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of article 3".

The Court added: "Even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as discouragement to others, this would not provide a justification for the ill-treatment".

The applicants did not pursue their claims under **article 2 and 5(1)** before the Court and the Court did not therefore find it necessary to consider theses complaints.

As regards **article 8 and 1 of Protocol 1**, the Court recalled that it found it established that the security forces deliberately destroyed the applicants' homes and household property and the mill partly owned by Mrs Selçuk, obliging them to leave Islamköy. There can be no doubt that these acts, in addition to giving rise to a violation of article 3, constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes and to the peaceful enjoyment of their possessions.

As regards **articles 6(1) and 13**, the Court noted that for the reasons set above (in the facts), the applicants did not attempt to make any application to the national authorities. It is therefore impossible to determine whether the Turkish courts would have been able to adjudicate on the applicants' claims had they initiated proceedings.

In these circumstances, the court found it appropriate to examine this complaint in relation to the more general obligation on states under article 13 to provide an effective remedy in respect of alleged violations and does not find it necessary to determine whether there had been a violation of article 6(1).

As regards article 13, the Court considered that the nature and gravity of the violations complained of in the instant case under article 3 and 8 of the Convention and article 1 of Protocol1 have implications for article 13.

The Court recalled that where an individual has an arguable claim that his or her home and possession shave been purposely destroyed by agents of the State, the notion of an effective remedy entails, in addition to the payment of compensation, (...) an obligation on the respondent State to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and include effective access for the complainant to the investigative procedure.

The Court accepted that Mr Asker presented a petition of complaint to the District Governor shortly after the destruction of his house. However, it was not until the Commission's communication of the application to the respondent Government that the Kulp Public Prosecutor instigated a criminal investigation. The Court found it

striking that Recep Cömert was not interviewed during the course of the investigation, despite the fact that the applicant had clearly named him as the officer in charge of the operation. Furthermore, apart from the statements taken from the applicants, it does not appear that any attempt was made to establish the truth through questioning other villagers who might have witnessed the events under consideration.

In November 1994, jurisdiction over the investigation was transferred to Kulp Administrative Council. Over 3 years later, the Court has not been provided with any evidence to suggest that the latter body has taken any action in connection with it. The Court concluded that in these circumstances, it could not be said that the respondent State had carried out a thorough and effective investigation as required by article 13 and accordingly found a violation of this article.

As regards **articles 14 in conjunction with articles 6, 8, 13, 18 and 1 of Protocol 1**, the Court, on the basis of the facts as established by the Commission found no violation of these provisions.

Just satisfaction: Compensation under article 50

Article 50 of the Convention provides as follows:

> *If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party, is completely or partially in conflict with the obligations arising from ...the Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.*

Entitlement to Just Satisfaction

Article 50 of the Convention provides that the Court should grant compensation "if necessary". There is therefore no entitlement to an award of compensation and the Court, in exercising its discretion, is guided by the circumstances of each case. On many occasions the Court has held that no award should be made since the finding of a violation constituted sufficient just satisfaction. This reasoning would be quite unsatisfactory in respect of cases involving willful destruction of property by the authorities.

Where the Court awards just satisfaction, it does so under two heads: (1) pecuniary and non-pecuniary damage; and (2) costs and expenses. Pecuniary damages refer to the loss of tangible property, as well as loss of past and future earnings. Non-pecuniary damages are damages awarded in respect of distress, anxiety, loss of employment prospects and other forms of pain and suffering.

As regards costs and expenses, the injured party must prove that these were actually and necessarily incurred and were reasonable in amount.

Summary of compensatory awards: pecuniary and non-pecuniary damage.

Thus, in respect of pecuniary damages, the Court awarded in total 6,060,000,000 Turkish Lira (TL) to Mrs Selçuk and 7,646,000,000TL for Mr Asker. Mrs Selçuk had initially claimed 11,073,300,000TL and Mr Asker had claimed 13,490,000,000TL. The Court also awarded each applicant £10,000 for non-pecuniary damage. The applicants had initially claimed £20,000 each for non-pecuniary damage, £10,000 for punitive damages and £10,000 for aggravated damages.

a) Pecuniary damage

The applicants claimed pecuniary damage in respect of the loss of their houses, cultivated land, household property, livestock and, in the case of Mrs Selçuk, her mill. They also claimed that an award should be made in respect of cost of alternative accommodation.

The Government argued that the applicants' allegations that their property had been destroyed by security forces had not been proved, and that there was therefore no requirement to award any compensation. In the alternative, they submitted that the amounts claimed were excessive and should not be such as to cause any unjust enrichment.

The Court recalled its findings that the applicants' homes and household property and Mrs Selçuk's mill, were destroyed by security forces. The Court thought that, in view of this finding, it was undoubtedly necessary to award pecuniary compensation. However, the Court' s assessment of the awards had to be speculative and based on principles of equity, the applicants not having substantiated their claims as to the quantity and value of their lost property with any documentary evidence.

Mrs Selçuk claimed damages in respect of her house, cement and stone stable and mill in the sum of 3,330,000,000TL. Mr Asker claimed in respect of the destruction of his house and stable the sum of 3,150,000,000 TL.

The Court decided to award 1,000,000,000 TL to each of the applicants, with reference to equitable considerations and the approach adopted in the case of Akdivar v Turkey (article 50 judgment).

The applicants also submitted claims in respect of household goods such as bedding, kilims, electrical goods amounting to 1,451,650,000 TL for Mrs Selçuk and 2,415,000,000 for Mr Asker. They also claimed to have lost livestock and fruit trees in the garden worth in total 6,046,650,000 TL for Mrs Selçuk and 7,630,000,000 TL for Mr Asker.

In the absence of any evidence and making its assessment on an equitable basis, the Court awarded 4,000,000,000TL to Mrs Selçuk and 5,000,000,000TL to Mr Asker.

The applicants also claimed compensation in respect of the loss of their income from farming and, in respect of Mrs Selçuk, from the mill which she owned with three

others. In total, Mrs Selçuk stated her annual income to have been 245,000,000TL and Mr Asker 295,000,000TL.

Again, in the absence of any independent evidence concerning the size of the applicants' land-holdings and income, and having regard to equitable considerations and the approach adopted in the case of Akdivar v Turkey, the Court awarded under this head the sums of 889,000,000TL to Mrs Selçuk and 1,475,000,000TL to Mr Asker.

b) Non-pecuniary damage

The applicants submitted that they should each be awarded £20,000 in respect of non-pecuniary damage. They also claimed £10,000 each for punitive damages and £10,000 each for aggravated damages in respect of the violation of their Convention rights.

The Government contended that, in the event that the Court found a violation, this would be sufficient to offset any non-pecuniary damage suffered by the applicants.

The Court considered that an award should be made in respect of non-pecuniary damage bearing in mind the seriousness of the violations which it has found in respect of articles 3, 8, 13 and 1 of Protocol 1 and it awarded £10,000 to each applicant. However, the Court rejected the claims for punitive and aggravated damages. The Court also rejected the claim for restoration of rights whereby the applicants had further submitted that they were entitled to be re-established in their village or, if this were not possible, to an equivalent monetary award.

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application Nos. 23184/94 and 23185/94

Keje SELÇUK and Ismet ASKER
against
Turkey

Report of the Commission

(Adopted on 28 November 1996)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application Nos. 23184/94 and 23185/94

Keje SELÇUK and İsmet ASKER

against

Turkey

REPORT OF THE COMMISSION

(adopted on 28 November 1996)

TABLE OF CONTENTS

Page

I. INTRODUCTION (paras. 1-27) 1

A. The application (paras. 2-4) 1

B. The proceedings (paras. 5-22) 1

C. The present Report (paras. 23-27) 3

II. ESTABLISHMENT OF THE FACTS (paras. 28-137) 5

A. The particular circumstances of the case (paras. 29-44) 5

B. The evidence before the Commission (paras. 45-118) 7

1) Documentary evidence (paras. 45-63) 7

2) Oral evidence (paras. 64-118) 11

C. Relevant domestic law and practice (paras. 119-137) 21

III. OPINION OF THE COMMISSION (paras. 138-216) 24

A. Complaints declared admissible (para. 138) 24

B. Points at issue (para. 139) 24

C. Concerning the existence of valid applications (paras. 140-143) 24

Decision (para. 144) 25

D. The evaluation of the evidence (paras. 145-166) 25

E. As regards Article 8 of the Convention and Article 1 of Protocol No. 1 (paras. 167-171) 33

CONCLUSIONS (paras. 172-173) 34

TABLE OF CONTENTS

Page

F. As regards Article 3 of the Convention
(paras. 174-177) 34

CONCLUSION
(para. 178) 35

G. As regards Article 2 of the Convention
(paras. 179-180) 35

CONCLUSION
(para. 181) 35

H. As regards Article 5 para. 1 of the Convention
(paras. 182-186) 35

CONCLUSION
(para. 187) 36

I. As regards Articles 6 para. 1 and 13 of the Convention
(paras. 188-198) 36

CONCLUSIONS
(paras. 199-200) 38

J. As regards Articles 14 and 18 of the Convention
(paras. 201-204) 39

CONCLUSIONS
(paras. 205-206) 39

K. Recapitulation
(paras. 207-216) 40

PARTLY DISSENTING OPINION OF MR. N. BRATZA 41

PARTLY DISSENTING OPINION OF MR. I. CABRAL BARRETO 42

APPENDIX I: DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF APPLICATION 23184/94 43

APPENDIX II: DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF APPLICATION 23185/94 52

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 applicants are Turkish citizens who were residents of the village of İslamköy in the Kulp district of the province of Diyarbakır. They were born in 1938 and 1933 respectively. They were represented before the Commission by Professor K. Boyle and Ms. F. Hampson, both teachers at the University of Essex.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. B. Çaglar.

4. The applicants allege that their homes and property were burned and that they were forcibly and summarily expelled from their village by State security forces in June 1993. They invoke Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of the First Protocol. The second applicant, İsmet Asker, also invokes Article 2 of the Convention in relation to the alleged events.

B. The proceedings

5. The applications were introduced on 15 December 1993 and registered on 7 and 11 January 1994 respectively.

6. On 5 April 1994, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the applications to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. As regards Application No. 23185/94, in the absence of any observations submitted by the Government and following notification to the Government that the application would be examined by the Commission, the Commission declared the application admissible on 28 November 1994.

8. As regards Application No. 23184/95, the Government's observations were submitted on 27 September 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 23 November 1994. On 8 December 1994, the Commission refused the Government's request to adjourn the examination of the case pending the investigation by the public prosecutor and requested them to submit any further observations which they might wish to make by 23 January 1995. On 3 April 1995, the Commission declared the application admissible.

9. The text of the Commission's decisions on admissibility was sent to the parties on 5 December 1994 and 26 April 1995 respectively 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 which they might wish to put before delegates.

10. On 7 February 1995, the Government submitted further observations in Application No. 23185/94 and on 15 May 1995, provided a requested document. On 23 May 1995, the applicant's representatives submitted further observations in reply.

11. On 1 July 1995, the Commission decided to take oral evidence in respect of the applicants' allegations. It appointed three delegates for this purpose: Mrs. G.H. Thune, Mr. N. Bratza and Mr. E. Konstantinov. It notified the parties by letter of 21 July 1995, proposing certain witnesses and requesting the Government to identify certain security force personnel and two public prosecutors. The Government were also requested to provide the contents of the investigation files of the two public prosecutors apparently involved in investigating the alleged incident.

12. On 11 August 1995, the Government submitted a document relating to Application No. 23184/94.

13. By letter of 12 September 1995, the applicant's representatives made proposals as to witnesses in both cases. By letter of 15 September 1996, the Government identified one of the witnesses proposed by the Commission.

14. A further request for outstanding information and documents was sent to the Government by the Secretariat on 26 September 1995.

15. By letter of 9 January 1996, after the expiry of the time-limit set for that purpose, the Government proposed 4-5 additional witnesses. On 26 January 1996, the Government provided copies of documents in one of the investigation files requested. On 30 January 1996, the Government proposed an additional witness.

16. Evidence was heard by the delegation of the Commission in Ankara from 5 to 6 February 1996. Before the Delegates the Government were represented by Mr. A. Gündüz, Agent, assisted by Mr A. Şölen, Mr. A. Kurudal, Ms. N. Erdim, Mr. Abdülkadir Kaya, Mr. A. Polat, Mr. Ahmet Kaya, Mr. C. Aydin, Ms. T. Toros, Ms. M. Gülşen and Ms. A. Emülser. The applicants were represented by Ms. F. Hampson, and Mr. O. Baydemir, counsel, assisted by Ms. A. Reidy and Ms. D. Deniz (interpreter). Further documentary material was submitted by the Government during the hearings. At the conclusion of the hearings, and later confirmed by letter of 14 February 1996, the Delegates requested the Government to provide certain documents and information concerning matters arising out of the hearings and providing explanations for the absence of certain witnesses. The time-limit expired on 5 April 1996.

17. On 8 March 1996, the Commission decided to invite the parties to present their written conclusions on the merits of the case, following transmission to the parties of the verbatim record. The Commission joined the two applications.

18. On 20 May 1996, after an extension of the time-limit, the applicants' representatives submitted their final observations on the merits. On 25 June 1996, after a further extension in the time-limit, the Government submitted their final observations, appending a number of documents.

19. By letter dated 23 September 1996, the Secretariat informed the Government that it had not provided certain documents and items of information requested following the hearings in Ankara. The Government were requested to clarify whether they intended to provide the information or whether they were unable to, and were informed in light of the Commission's intention to resume examination of the case that their response should reach the Commission by 1 November 1996 at the latest.

20. By letter dated 30 October 1996, which arrived on 4 November 1996, the Government submitted further documents.

21. By letter dated 19 November 1996, the Government submitted copies of extracts of duty logs.

22. 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

23. 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:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS
E.A. ALKEMA
M. VILA AMIGÓ

24. The text of this Report was adopted on 28 November 1996 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.

25. 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.

26. The Commission's decision on the admissibility of the application No. 23184/94 is attached hereto as Appendix I and the decision in No. 23185/94 attached as Appendix II.

27. 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

28. The facts of the case, particularly concerning events in or about June 1993, are disputed by 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 accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

1. Concerning the alleged events in the village of İslamköy

a. Facts as presented by the applicants

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

30. About six months prior to June 1993, the villagers at İslamköy had been threatened by the security forces that the homes of ten named villagers would be burned down. It had later appeared that the threat had been retracted. There had been no clashes in the village between the security forces and the PKK but the PKK used the road which ended near the village and the security forces regularly visited the village.

31. On 16 June 1993, the security forces came to İslamköy in large numbers. Two houses were burned. Recep Cömert, the commander, gave orders for the house of İsmet Asker to be burned. Soldiers poured gasoline on the house and set fire to it, even though İsmet Asker and his wife Fatma were inside. Villagers who came to put out the fire were threatened by the security forces and prevented from helping. The house and its contents were totally destroyed.

32. The security forces then went to the house of Keje Selçuk. Despite her pleas to Recep Cömert, her house was set on fire, also by gasoline. Villagers were again prevented from assisting and Recep Cömert pushed Keje Selçuk to the ground. She understood that she was being told to leave the village.

33. İsmet Asker left the village and went to complain to the Kulp district governor, naming Recep Cömert as the officer in charge. He was sent to the gendarmes.

34. Ten days after the burning of the houses, the security forces returned to the village. Recep Cömert was present and gave the order to set fire to the mill belonging to Keje Selçuk and three others. Villagers were prevented from trying to put out the fire. Two other houses were set on fire in the village and destroyed that day. Another house was set alight but the fire was put out.

35. Keje Selçuk had left the village and was staying with her daughter-in-law in Diyarbakır. Her brother-in-law Nesih Selçuk telephoned her to inform her that the mill had been destroyed.

b. Facts as presented by the Government

36. The Government submit that applications by Keje Selçuk and İsmet Asker have been concocted by others and that they are apparently acting under the influence of the PKK and/or with a view to obtaining money. The villagers of İslamköy were under real and intense pressure from the PKK, who purported to replace the State and punished any recourse to the Turkish authorities. The applicants' homes and possessions were burned by the PKK as a punishment and warning. In the case of İsmet Asker, his son was doing his military service and the PKK urged people not to send their sons into the army. In the case of Keje Selçuk, she has two sons, one in the army and the other a civil servant who had stood up against the PKK. The Government also point to the incident in a neighbouring hamlet, Tur, where a hundred or so PKK terrorists locked the people in the mosque and set fire to the buildings, the people having to escape by breaking down the door. The village of İslamköy had on the other hand had good relations with the security forces, had had village guards and neither applicant was suspected by the authorities of any anti-Government activity but were both law-abiding.

37. The Government dispute that any order or paper was issued six months before the incidents in June, threatening ten households. They also submit that it is not clear from the evidence that Keje Selçuk's mill was burned at all, or that it was at that time in a functional state, but even if it was destroyed, this was not done by the security forces.

38. İsmet Asker did not, as he alleges, make any petition to the Kulp district governor, since the records reveal that no petition was registered and İsmet Asker has no acknowledgement receipt or registration number, which would be the case if he had made such a petition.

2. **Proceedings before the domestic authorities**

39. Following the communication of the applications by the Commission to the respondent Government on 15 April 1994, it appears that the Ministry of Justice (International Law and External Relations General Directorate) contacted the Chief Public Prosecutors' office in Diyarbakır, which in turn made enquiry of the public prosecutor's office in Kulp by letter dated 4 May 1994 as to whether the applicants had applied to them and requesting that an investigation be initiated if they had not.

40. Since no petitions had been received from the applicants, the Kulp prosecutor opened investigation file 1994/57. By letter dated 11 May 1994, the public prosecutor in Kulp requested the gendarmerie in Kulp to ascertain the addresses of the applicants and to invite applicants to present themselves to the prosecutor's office as soon as possible. By letter of 18 May 1994 the public prosecutor enquired of the district governor whether any petition had been filed by İsmet Asker. By letter dated 26 May 1994, Gendarme Captain Ali Ergulmez replied, on behalf of the district governor, that an examination of the records disclosed that no complaint had been filed by İsmet Asker. On 16 June 1994, the public prosecutor's office reminded the gendarmerie that it had had no response to its enquiries as to the whereabouts of the applicants.

41. On 20 June 1994, İsmet Asker made a statement in the office of the public prosecutor. Keje Selçuk made a statement to the public prosecutor on 21 June 1994.

42. On 18 August 1994, the public prosecutor sent a request to the district gendarmerie commander for information to be given promptly as to whether an operation led by Recep Cömert had been carried out at İslamköy on 16 June 1993 and whether the applicants' houses had been burned by those units. No reply is included with documents from the investigation file provided to the Commission.

43. On 30 November 1994, the Kulp public prosecutor, Erdal Yatmis, issued a decision of lack of jurisdiction in regard to the applicants' complaints against Recep Cömert and the security personnel under his command alleging offences against property in the winter months of 1993. The decision stated that, while the applicants had complained to the effect that on the date of the offence intensive clashes took place in İslamköy between the security forces and terrorists and that their houses burned down during those clashes under the orders of Recep Cömert, it transpired from the investigation that the incident occurred while the members of the security forces were carrying out their administrative duties. Pursuant to the provisions of the Public Officer Legal Proceedings Procedure and Articles 1/b and 4/i of the Decree establishing the State of Emergency Regional Governor's Office as well as Article 2 of Law No. 3713, the Kulp Administrative Council was the body with authority to conduct an investigation in relation to the defendants. The public prosecutor's office therefore decided to transfer the file to the Kulp District Governor's office for the necessary measures to be taken.

44. On 30 November 1995, the investigation file was referred to the Governor of Kulp district.

B. The evidence before the Commission

1) Documentary evidence

45. The parties submitted various documents to the Commission. The documents included reports about Turkey, domestic case-law and statements from the applicants and witnesses concerning their version of the events in the case.

46. The Commission had particular regard to the following documents:

a) Statements by applicants

Keje Selçuk

Statement dated 22 July 1993, taken by the Human Rights Association (HRA), Diyarbakır

47. On 16 June 1993, 400 gendarmes from the Kulp gendarmerie under the command of officer Recep Cömert carried out a raid on İslamköy at about 7-8.00 hours. First, they set fire to the house of İsmet Asker, with all his property. Then, they came to the applicant's house, ejected her and her children, gathered their goods into one room,

poured petrol over them and set them on fire. After the house had burned down, he (Recep Cömert) told the villagers that, if they did not leave, the security forces would burn their houses, and the villagers inside, without blinking an eye.

48. About ten days later, the same gendarmes returned to the village. They threw petrol over, and set fire to, the houses of Serif Tanrikulu, A. Kerim Ergül and Kazim Sahin as well as the mill owned by the applicant and three others, including Nesih Selçuk. The gendarmes beat with sticks and truncheons some of the villagers who tried to put out the fires. The villagers whose homes had been burned were forced to move to the towns. The applicant went to live with her daughter in Diyarbakır. She had not applied to any institution in respect of her complaints. She referred to İsmet Asker's petition to the Kulp district governor remaining unanswered.

Statement dated 21 June 1994, taken by the public prosecutor (unidentified)

49. Gendarmes came to the village about a year before. They wanted İsmet Asker and herself to leave the village but they had not done so. She took some of her belongings out of her house and then the gendarmes set fire to it. They burned İsmet Asker's house also. When she asked why they burned her house and were driving her out of the village, they said that it was because she harboured terrorists and supplied them with meals. She had never done so. She did not know the soldiers or their commanding officer. There had been no incidents before in the village.

50. The applicant's statement taken by the HRA (above) was read out to her. She stated in reply to questioning that she did not know the commanding officer, that she did not know whether villagers were hit with truncheons or whether they had come to the village and set fire to houses after her own house had been burned down. She had never said those things but it was what they had written down. All she wanted was compensation for the damage caused.

Statement dated 28 October 1994 taken by Servet Ayhan (HRA)

51. A policeman had come to her daughter's house on 17 June 1994 and said that she should give a statement to the public prosecutor. When she went to the prosecutor's office, they would not allow her daughter to enter with her and a person that she did not know interpreted. The prosecutor had asked her questions relating to her complaints. She had replied that she did know the commander's name, Recep. She explained in this statement that she knew him as he had come to the village from time to time. When the HRA had asked for his surname, she had found out his surname from the villagers and given it to them. In answer to the prosecutor, she had explained that she had been present when her house was burned down, and had only been able to save the clothes that she was wearing. When her mill had burned down, she had been staying with her daughter in Diyarbakır and her business partner had informed her of it.

Statement dated 22 August 1995, taken by the HRA, Diyarbakır

52. After the applicant had made her application, she had been called to the gendarme station and asked to sign a paper but did not know what was in it. Since her house was burned between 7.00 and 8.00 hours many villagers had witnessed it including Nesih Selçuk, Necmettin Korkmaz and İsmet Asker. She wanted to continue with her case.

İsmet Asker

Petition to the District Governor, dated 25 June 1993

53. On 16 June 1993 his two storeyed house with eight rooms was burned down completely during an operation at Islam village (Islamköy). The property destroyed included 10 woollen mattresses, 3 carpets, 9 kilim rugs, kitchenware, crockery, a wooden grain bin, 2 tons of wheat, sacks of rice, tea, sugar and his store of 180 poplar trunks. His home had been burned unnecessarily and he and his family had been left homeless and in a desperate situation. He asked for recompense for his house and goods and respectfully requested his petition to be processed.

Statement dated 14 July 1993 taken by the HRA, Diyarbakır

54. On 16 June 1993, about 400 gendarmes under orders of Recep Cömert from the Kulp district gendarmerie organised a raid on the village. First they came to his house and told him and his wife Fatma to get their things from the house. As they did so, they realised the house was burning and rushed out through the back door. The gendarmes seemed to intend to burn them alive. The gendarmes threatened the villagers who arrived to help put out the fire. After waiting for his house to burn down completely, the gendarmes went to the house of Keje Selçuk and burned it with all the goods inside. Then they left.

55. The previous winter, the security forces had sent a list of names concerning ten families telling them that they should leave the village by summer. He did not understand why, since at one point they said that they would not burn things, they then came in an operation without warning to burn his house.

56. Ten days after the raid, gendarmes under Recep Cömert came again. They completely burned down the houses of Serif Tanrikulu, A. Kerim Ergül and Kazim Sahin as well as the mill belonging to Keje Selçuk and three others. After that, Recep Cömert addressed the villagers, threatening them and stating that if the villagers did not leave the village, they would be burnt together with their houses.

57. The applicant made an application to the Kulp district governorship on 25 June 1996 relating to the first incident. The district governor asked him through an interpreter (since the applicant did not know Turkish) whether he knew anyone amongst the gendarmes, and he replied that he knew Captain Recep Cömert. The district governor stated that he would accept the petition.

Statement dated 20 June 1994, taken by a magistrate in the public prosecutor's office

58. In the winter of 1993 the Kulp district gendarmerie company commander came to the village, assembled the villagers and threatened them, saying that if they did not leave the village he would burn it. In August 1993, as far as he could remember, Cömert carried out a raid on the village with a large number of soldiers. They set fire to his house without giving reasons. A gendarme had told them to fetch their things before they began burning it. When he and his wife were in the house, they realised it was on fire and ran outside. They did not know how it was set on fire. The soldiers prevented him and the villagers from putting out the fire. After his house burned, they went to burn down Keje Selçuk's house. He did not know who it was who had burned his house until later, when other villagers told him that they were soldiers under the orders of Recep Cömert.

59. He had suffered damage to property amounting to 200.000.000 (million) TL. He submitted a petition to the Kulp district governor's office and they later took a statement from him at the gendarmerie. He received no response to his petition. After the incident, he went to a building site in Diyarbakır looking for work and told his story to the contractor. The contractor told him to go to the provincial governor's office to ask for help. A person with the contractor, whom he did not know, wrote out a petition and made him sign it. He did not know what was in it. He was not aware of giving a statement to the HRA.

60. Before his house burned down, PKK activists (took) food and supplies (from) the village. He had nothing to do with the PKK.

b) Statements by other persons

Servet Ayhan

Statement dated 28 October 1994

61. The HRA staff who took Keje Selçuk's statement made mistakes. She was not in the village when the second incident took place. Nesih Selçuk had witnessed it.

Sedat Aslantaş

Statement dated 12 April 1995

62. The HRA people took statements at their association premises. The only exception was when they performed investigations at the scene of incidents. They would take statements there. There was no logic to statements having been taken at a construction site.

c) Official Records

63. The Government have supplied copies of the duty log of Kulp gendarmerie for the dates 15-19, 21-26 June 1993. These daily records indicate the routine duties eg. guard duties, training at the gendarmerie station. They also indicate patrols to villages in the area or "village duty". Such visits are recorded as having taken place on 17 June (a motorised patrol to Narli involving 10 gendarmes), on

21 June (a patrol on foot to Karabalak of 10 gendarmes), on 22 June (a motorised patrol to Dolmetepe and Özbek involving nine gendarmes led by Recep Comërt) and on 23 June (a motorised patrol to Yaylak and Baloğlu of nine gendarmes led by Recep Comërt).

2) Oral evidence

64. The evidence of 10 witnesses heard by the Commission's Delegates may be summarised as follows:

İsmet Asker

65. İsmet Asker stated that he was born in 1933. In June 1993, at about 08.00 hours, soldiers came to the village. There was no road beyond his house, so they got out of their vehicles and continued in to the village on foot. There were many soldiers about (he only guessed that there were 400) and seven tanks and 27-28 vehicles. He was near the front door watering the wheat when the soldiers arrived. At that moment, his wife was at the house holding a breakfast tray. He went into the house where the soldiers were looking around, having forced a door. He went outside again. They set the house on fire and he went inside to try to save his furniture. A soldier whispered in his ear that he could take out his furniture. There was too much smoke and they were unable to save anything, except for some mattresses. The house was set on fire by gasoline or petrol. He saw the container in a soldier's hand when he was on the upper floor, throwing furniture out. There was a lot of wood and the flames reached the ceiling: he and his wife were almost trapped inside. He had thought that if he and his wife stayed inside they would not set the house on fire.

66. The commander was there when they burned his house. He asked the commander why they burned his house. The commander, swearing, told him to go away (he understood from the gesture). While he said at one point that he did not know the commander's name, he referred to a diminutive name Reco and the name Recep and said that this was the only name he knew from all the soldiers present. It was Recep and members of his team who burned down his house.

67. The soldiers prevented his relatives and the villagers from putting out the fire or removing the furniture. They were rough but he did not see any beatings himself.

68. Ten days later, the soldiers returned to the village at night. He saw the soldiers when he left in the morning to go to Kulp. The soldiers asked for his identity card. He did not see the mill burned with his own eyes but he saw smoke and, when he asked, he was told that they had burned the mill. The mill had been functional before. This was the same day he went to Kulp to hand in his petition.

69. He submitted a petition to the district governor. He usually put his thumbprint on documents but he had signed the petition. On being shown the copy of the petition, he said that it was his signature. A man whom he did not know wrote the petition for him. The governor signed it and sent it to the police. He had received no response to his petition.

70. Previously the terrorists had used the road passing the village. There had been village guards at one time and in those days the soldiers had gone into the mountains. The soldiers had come to the village before by helicopter.

71. Six or seven months before the incident, news had come to the village warning that villagers should move from outside areas into the village and then they might not be burned. He was told by a number of people, including his younger sister, that his name was on the paper. It was an order from the police. Ten houses were chosen, as it was said that terrorists went there. He had moved some of his furniture out of the house at this stage, sending some of it to his son and sister. His house stood alone on the road at the edge of the village. They (the PKK) used to knock on his door, but he was hard of hearing and they would go away and leave him alone. Even if he had bread, he said that he did not.

72. As regarded his statement to the HRA, it was written in an office (possibly Osman's office), not at a construction site. He chose Osman (Osman Baydemir) for his lawyer. He told him what to write.

Fatma Asker

73. Fatma Asker was born in 1938. At about 08.00 hours, when she was holding a tray and teapot, four soldiers came to the door and asked whose house it was. When she told them, they told her to call her husband. He was outside in the fields not far away. There were 27 military vehicles filled with soldiers. Their commander was Recep, whom she recognised as he had come to the village many times before. By the time her husband came, the soldiers had set the house on fire. She saw a soldier holding a white plastic bag with a gasoline container inside. Recep told him to pour and the soldier poured gasoline in four places. Recep was angry with her and told her that if she interfered he would kill her. She went into the house to try to save furniture and shoes but there was so much smoke that she thought that she would be suffocated. The soldiers knew that they were in the house. Recep was standing by the house. He did not let the villagers help her or her husband. When their house had burned down, Recep and the soldiers went next to burn the house of Keje Selçuk. She did not see Sait Memiş, Celal Şeker or Şah Şimşek in the village that day. Tevfik Karaaslan was there that day.

74. That night, she stayed in a neighbour's house. Since Recep had told them to go, they left the village to go to Diyarbakır. Ten days later they returned to the village to harvest their wheat. Early in the morning, when she and her husband were travelling to Kulp, as they passed the upper part of the village, she could see the mill below burning. Before this happened, the mill had been working and they had taken their wheat there. Two houses were also burned. She did not see who started the fire. On the road to Kulp they met soldiers who stopped them. There were soldiers in the village also. She did not recognise any of them. She did not see anyone being beaten.

75. There had been news in the village that they would have to leave or houses would be burned but she did not know where it came from and it did not say whose houses were to be burnt.

76. The PKK used to come and go in the area of the village, using the road to reach the mountains but there had been no clashes. The PKK were armed: they held meetings, and they forced the villagers to give them their mules and foodstuffs. Her husband had a grocery store, with matches, light bulbs etc but did not sell food. They were poor and did not give the PKK what they did not have. But they were alone and when they had something they gave it out of fear. When asked by the Government Agent why Recep burned their house, she said that they (the security forces) used to say that PKK members came to the village, that they fed them and were not friends.

77. All the villagers had left the village. They were frightened. She and her husband had received no help from the State.

Keje Selçuk

78. Keje Selçuk stated that she was born in 1938 and was a widow. One of her sons worked for the rectorate of religious affairs. She lived in a two-storey house with four rooms. In June 1993, in the morning when she had eaten breakfast, Necmettin Korkmaz warned her that soldiers were in the village. She saw smoke and the neighbours were saying that the soldiers had burned İsmet Asker's house. There were many soldiers around the village and many vehicles. Recep, whom she knew since he had been to the village on previous occasions, and five soldiers came to her house. Recep poured gasoline on the house and set in on fire. When she protested and pleaded, they answered that she helped outsiders and fed the PKK. She took the Koran to show it to Recep. When she asked where she should go now, Recep said that she should leave the village. He pushed her away. When her brother came to put out the fire, Recep swore at him. The soldiers did not let her brother, Nesih Selçuk or Necmettin Korkmaz put out the fire. Though she did not speak Turkish, she could understand when he told her to get out and the motion which he made with his hand. Her own children were not there but there were children of the neighbours at her house.

79. She remained in the village at the house of a neighbour (Necmettin Korkmaz) that night and in the morning went to her daughter's house. Ten days later, her brother-in-law rang her in Diyarbakır and told her that the mill, which she owned with him and two others, had been burned by the soldiers. He said nothing about villagers being beaten.

80. Previously, the soldiers used to come to the village, search it quickly and leave. Threats had been made to the village. First, they said that ten houses would be burned, then that all the houses should be evacuated and burned and then later they said that they would not burn them. Villagers said that they heard this from the soldiers. Her house, in the centre of the village, but separated from the other houses by a creek, was on the list of ten houses to be burned.

81. She went to Diyarbakır and told her story. She did not remember the names of the people who took her statement. She did not know the name Sedat Aslantaş. No-one told her anything about how to apply for compensation to the administrative courts. She also gave her statement to the public prosecutor. She had told the prosecutor the name of Recep. She received no help from the State.

82. She knew Celal Şeker, Şah Şimşek and Sait Memiş but they lived far away and they were not there when her house was burning. The first two were or had been village guards. No-one lived in the village any more. Even the village guards were afraid.

Necmettin Korkmaz

83. The witness, aged 73, was a muhtar in İslamköy for 32 years and was muhtar in June 1993. The village consisted of 145 households and, including the nomads nearby, had 3 110 people. On the day of the incident, at about 07.00 hours, the witness heard children shouting that there was a fire. He took an axe and found the house of İsmet Asker was burning. He shouted to the villagers to put out the fire. The officer Recep, a senior sergeant, was there however, holding a container and a bag saying that he would kill them if they tried to help. He knew Recep as he had been to the village before and had been in Kulp for 5-6 years. Recep said that he was going to Keje's house and the witness pleaded with him. The witness told Keje to take the Koran to him to dissuade him. Recep pushed Keje who fell on her back. He saw Recep pour gasoline on three parts of Keje's house and burn it. He ordered the soldiers to kill anyone coming near and used obscene words. Recep said that he was burning İsmet Asker's house because he provided food for terrorists. There were many soldiers in the village.

84. Ten days later, Recep returned. There were soldiers in the fields. The witness saw smoke coming from the mill. He saw with his own eyes that Recep gave the orders and the soldier with him was pouring petrol. Recep told the other soldiers to shoot anyone who came near. He said that the mill was burned so that the PKK could not use it. Kazim Sahin's house was burned also. At a date around this time, of which the witness was not sure, General Aydin arrived in a helicopter and wanted to know what had been happening. The General had asked who had burned Keje's house and the witness had said that it was Recep. The General had called Recep, who was present and scolded him. The witness stated that General Bahtiyar Aydin had stayed as a guest in the village on three occasions. One or two months after the mill incident, the witness gave up and went to live in Istanbul.

85. The village had previously had very good relations with the security forces. They used to conduct searches. The PKK generally used to come to the village, take a look and leave. He denied seeing any meetings or that he had been warned not to take his complaints to the Government. By this time, the village has been empty for three years and all the people were scattered. The whole village, including his house, was destroyed by Major Ali. The village was burned in instalments. About 120 houses were destroyed by the soldiers. Another 22 houses were burned by the PKK, during an incident in the Tur hamlet far from the village. The Tur incident happened after he had left the village for Istanbul: he heard that the PKK had locked everyone in the mosque and burned the houses. The people escaped by breaking down the door.

86. Before the incident, during the winter, news had reached the witness that a warning was being given that people should leave ten of the houses. People said that they had received a paper telling them to

leave. The witness saw a paper which at one stage he said was signed by the Major, then that it was signed by Recep. There had been a telephone call telling them the same thing. The witness went to the Major about it three times. The Major said that if the people did not let in any strangers nothing would happen.

87. When asked why a village on good terms with the authorities would be burned, the witness said that he had been told that their village was in the foothills and that they (the security forces) did not believe (trust) them any more. On the one hand the soldiers were bothering them, on the other the PKK: they were between a stone and a hard rock.

Nesih Selçuk

88. The witness was a neighbour of Keje Selçuk and her brother-in-law. He lived 15-20 metres away. He stated that there was a military operation in the village - he did not know how many soldiers there were. They used to come in vehicles, anything from 10 to 30. Necmettin Korkmaz told him that the commander, Recep, intended to burn Keje's house. The witness went to the house where he saw Recep standing outside the door and pleaded with him. Recep swore at him and told him to clear off or he would kill him. Keje's house was set on fire. Recep was with two privates to whom he gave the order to start the fire. He shouted at the villagers to stop them trying to put the fire out. The house of İsmet Asker was also burned. He heard that the houses were burned because the terrorists had been coming, but he did not know if that was true or not. The witness, an elder, knew Recep as the district commander based in Kulp and had seen him frequently. Recep had visited the village once a week, once a fortnight. While he knew Recep he did not know who any of the other commanders might be and he did not know who was the chief of the operation.

89. Ten days later, at the hour of morning prayer, the witness who lived opposite the health centre, saw soldiers banging on its door. The soldiers used to use the centre to sleep in at night. The witness took over the key. One soldier was left to look after their equipment. He had a white bag in his hand and went off with it. The soldiers set fire to the house of his maternal uncle, who was absent in Diyarbakır, and also to the house of Kazim Sahin. They set fire to the mill which the witness co-owned with two others. It was already burning when he ran over. He protested to Recep who was at the mill. Recep said "It was an old mill. Build yourself a new one." He telephoned Keje, who had gone to her daughter's house in Diyarbakır and informed her that the mill had been burned. The mill was waterpowered from a canal which had been built and was the only one which functioned in the summer. People from the village and a neighbouring village brought their wheat and it was ground into flour.

90. Previously the soldiers used to come to the area but did not pay much attention to the village. They would ask if the villagers had seen any strangers. As regarded the PKK, this witness never saw them. He heard that they visited another village and that, at night, they used to pass down the road through their village. In response to the Government Agent, he agreed that the PKK came to the village to take things. The villagers were forced to give things. On one occasion, the PKK took his mule. They used it to carry loads and then left it near the village. He never heard the PKK tell the people not to go to the

State but he knew that if they complained their lives were in danger. İsmet Asker's house was burned because it was situated on the road where the PKK used to pass. İsmet used to have a small store which sold goods but no food. The PKK did not come to the mill.

91. He stayed in the village that summer but left in the winter. They left the village because they could not cope. They were between two forces, both sides were armed and though they respected the State they came at them with weapons from both sides. He had heard nothing about previous threats to burn certain houses. He made no complaint about the mill since it was the State that had burned it down. No-one ever asked him to make a statement about it. Sait Memiş was the muhtar in June 1993. He had taken over from Necmettin Korkmaz who had been muhtar for over thirty years. Memiş lived in Tur, a hamlet half an hour away and knew that the soldiers had burned the houses. He did not see him on the days the houses and mill were burned. He recalled seeing a helicopter land in the field in front of his house and a high ranking officer arrive. He heard that the general had asked who had set fire to the house and when the people gave Reco's name, the general chided him. He heard that this general was later killed in Lice. This occurred on the day that Keje's house burned.

92. İsmet Asker stayed in the village for a few months. Keje also returned for a while and then left again after a few months.

M. Sait Memiş

93. The witness was born in 1955 and had been living in Diyarbakır for a year. He was muhtar of İslamköy from 1989 to 1994. Necmettin Korkmaz was the previous muhtar. Tevfik Karaaslan became muhtar after the witness. The witness used to live in Tur hamlet, one or one and a half kilometres (20 minutes by foot) away from İslamköy village, which was on a lower level.

94. On the morning of the incident, the witness saw smoke coming from the lower area. He asked what was going on and children, who had been minding animals, said that İsmet Asker and Keje Selçuk's houses had been burned by terrorists during the night. Other passers-by said the same thing. There were definitely no soldiers and the security forces never raided or caused damage to the village. Because of the situation of the hamlet, they could see if soldiers came to the area below or passed by or would at least hear news of it. Though it was his duty to go to the village, it was dangerous and his life would have been at risk. He referred to PKK activity and the laying of mines which meant they could not walk around freely. He went to the village two days later. He saw that İsmet Asker's house had been burned but did not see İsmet. He did speak to Keje Selçuk who said that terrorists had come at night, taken her out and burned the house. He did not see Nesih Selçuk. All the people he asked said that it was the PKK who had come and burned two houses. He went shortly afterwards (a week to ten days) to report orally to the district governor what had occurred. Nothing was written down. Afterwards he told the gendarmerie. He could only guess at the name of the commander in charge of the gendarmerie, a major, but he knew Recep Cömert to be in charge of the district gendarmes. He told him about the burning. He was not asked to make a statement. He was summoned by the public prosecutor in about January/February 1994 and responded orally to questions about a petition alleging that an incident had occurred..

95. Recep came to the village 10-15 days later on an operation with other soldiers. The witness talked to him on that occasion. The soldiers looked at the houses which were burned.

96. There were six mills in the village. He did not know if Nesih's and Keje's mill was still standing, or if it had burned down or later collapsed. All the houses in the village had been burned. He did not go to the village to see what happened when the mill and Kazim's house were burned. As muhtar his life was at risk from the PKK. He never asked about the mill, and did not see it, but he was sure that it was the PKK who burned it down. It had not been working after a flood.

97. No houses had been burned by the PKK before this. After this time, batches of houses were burned every 10-15 days until none were left in November 1994. He left Tur following an attack by the PKK in April 1994. The PKK (100-200) had assembled the people and put them in the mosque. They set fire to the houses (20 burned) and the people would have died if they had not escaped by breaking down the door to the mosque. The hamlet had 20 village guards but they were absent that day.

98. When asked why İsmet Asker and his wife said that it was soldiers who burned their house, he replied that he stated what he had seen and that he could not say now who set fire to it, the State or the terrorists or whoever. But it was not the soldiers. He did not see it with his own eyes but people told him that it was the terrorists. He saw no helicopter arriving around this time.

Mehmet Tevfik Karaaslan

99. The witness stated that he was born in 1953. He had moved to Kulp from İslamköy in 1994 because of terrorism. He had been elected muhtar in March 1994. He used to live in the hamlet of Gündoğmaz, 4-5 kilometres from İslamköy village. At the end of June 1993, he got up in the morning at about 05.30-6.00 hours and saw smoke coming from the centre of İslamköy. He walked there. By the time he arrived the fires had been put out. Two houses had been burned, those of İsmet Asker and Keje Selçuk. He did not see or speak to either that day. He spoke to Keje the next day (then said ten days later) and she said that there had been a raid during the night, when the terrorists had come and asked for help. The terrorists burned the houses apparently when İsmet and Keje did not give them help. The PKK were after Keje's son, the imam, and she was saying things out of fear. He did not see any soldiers in the village. He saw İsmet five to six days later and he said that the PKK had knocked on his door in the middle of the night, that he had refused to help them and they had burned his house.

100. This was the first occasion that houses had been burned. The PKK came mostly by night but sometimes the witness saw them during the day. They had taken one of Necmettin Korkmaz's nephews who was a teacher and killed him. Necmettin was in Istanbul at the time of the burning. He was frightened of the PKK who were after him. The PKK used the villagers and their animals to help transport provisions up the mountain. They used to make threats to the villagers not to go to the State authorities. They held a meeting once or twice. Because the

people did not obey them, the PKK abducted villagers: he referred to four persons being taken. Mines were laid on or near the road from the end of 1993 to 1995. Two of Kazim's children had been killed by a mine near the stream.

101. He did not know of any incident 10 days later but referred to a second raid occurring 20-25 days later. He knew of the mill but he did not see or hear that it burned and said that it had collapsed by itself three years previously. He did not see any helicopter coming to the village.

102. He knew Recep Cömert, the district gendarme commander,who used to come to the village once every two to three months. He had never been asked to make a statement about the incidents.

Celal Şeker

103. Celal Şeker stated that he was 43. Before moving to Kulp in September 1994, he used to live in Tur hamlet, one of the neighbourhoods of İslamköy about two and a half kilometres away from the centre. In the last week of June 1993, in the morning, at dawn when he went outside, he saw smoke. He thought it might be the PKK who were very active and at about 09-10.00 hours he went down to the village. There were no mines at that time and the PKK, who were active at night, cleared off before daybreak. He saw that nothing was left of two houses belonging to İsmet Asker and Keje Selçuk. İsmet Asker's house had collapsed completely and there was a little smoke rising. He saw Fatma Asker in tears and she told him that the PKK had burned her house. He saw Keje outside her house and she said that the PKK had set fire to her house. All the villagers said that it was the PKK who had set fire to the houses. Sait Memiş was in the village later that day but he did not see Karaaslan until two or three days later. There were no soldiers in the village.

104. There were six mills in the village. Some were carried away by the flood but the good mill was still standing and nothing had happened to it. The Selçuk mill was on the edge of the stream, water had made holes in the wall and it could have fallen down of its own accord. He did not recall when Kazim's house was burned down but thought it later with all the others. He knew Recep Cömert who was the district gendarmerie commander. He called at the village twice, three times while on operations. Ten or fifteen days after the incident, he came up to the village with lots of soldiers and walked around asking whether terrorists were coming to the village. He spoke to the witness who said that the terrorists took their animals to carry loads. He explained that terrorists used to bring provisions by lorry as far as the village. They coerced villagers into giving their mules to move provisions up the mountain to the deserted village of Yaylak or wherever they had their camps. The PKK seized food as well. They had held a meeting in the school and urged the villagers to help them.

105. He had never given a statement to the public prosecutor. Keje had a son who was the official imam but who had left the village. They blamed her for having a civil servant for a son. The PKK used to call meetings and tell people not to go to the Republic of Turkey but to

them. Maybe the PKK were sending İsmet and Fatma Asker and Keje Selçuk to make complaints: Asker was old and deaf. Maybe he wanted to obtain some benefit from the State.

106. The witness had previously been a village guard from 1987 to 1991. There were no mines on the road from Tur to the village in June 1993 only later. Necmettin Korkmaz had left the village and was in Diyarbakır; he usually did that in the spring, leaving his wife in the village. He was a good speaker and was under pressure from the PKK who wanted to persuade the villagers to give them, food and money and send their children to join them rather than do their military service. After the burning, he took his wife and left the village.

107. The witness said the villagers were obliged to leave the village in September 1994. There were mines on the village road, they could not tend their livestock and the terrorists would have taken all their food and left them hungry.

Şah Şimşek

108. The witness stated that he was born in 1994. Be4ore moving to Kulp at the end of 1994, he had lived in the central district of İslamköy village. When referred to events in 1993, he explained that he had sent his wife and children to Diyarbakır. At nightfall he did not stay in his house but hid in a vineyard or woodland. The village was the last stop on the road (for the PKK). Vehicles brought provisions on the road as far as the village and then the villagers were ordered to bring mules to be loaded and taken up the mountains. Because he was hiding that night, he saw nothing until dawn when he saw smoke. He followed the smoke and found that the houses of İsmet Asker and Keje Selçuk had been burned. He arrived there at about 04-5.00 hours. No houses had been burned previously. He saw İsmet and Fatma in tears by their house. All the villagers had gathered and were saying that it was the terrorists. While he did not see Sait Memiş there at that time, the muhtar was around the village and he spoke to him towards evening. he saw Mehmet Tevfik Karaaslan near İsmet Asker's house in the afternoon, not early in the morning. There were no soldiers in the village nor any helicopter that day. Soldiers and helicopters had come on other occasions.

109. He talked to Keje Selçuk later. She said that the PKK burned her house, that she did not understand why but wondered if they were angry at something her son the imam had said at a meeting. Asker had told him that the PKK were always knocking on his door and getting angry if he did not open up. It was known that he was pro-Government.

110. The witness had been a village guard from 1987 to 1991. They gave up being village guards when the area was evacuated and they were left on their own to face the raids. A village guard had been seized and they feared the same would happen again. They could see it was leading to a bad end. There had been a meeting, which he did not go to, where the people were gathered and told that they should send their sons to the PKK and regard the PKK as the State, not the Turkish authorities. The imam had refused to sign a paper agreeing with this on behalf of the villagers.

111. He had spoken 15-20 days ago to İsmet Asker who had explained that last year when he was on his way to ask for assistance from the authorities in City Hall, a fellow had talked to him and induced him to tell his story, saying that he would write it down in a petition. The petition had been written and Asker had been told to hand it in to some place. Asker told the witness that he could not read it and that the fellow had made it up in his own head.

112. He was told by the muhtar Karaaslan that he and the others were to come to Ankara to give evidence.

Recep Cömert

113. Recep Cömert stated that he was born in 1954 and was currently a senior sergeant on duty in the Muş gendarmerie. He had been in service for 24 years. From 15 July 1991 to 3 August 1993, when he was transferred, he was stationed as commander of the Central Kulp gendarmerie, in charge of 60-70 gendarmes. İslamköy was under his jurisdiction and he had visited the village on three occasions, no more, to attend meetings and carry out his duties to protect the villagers' lives and property. He knew İsmet Asker and most of the villagers. The area around İslamköy, 20 kilometres from Kulp, was under the influence of the PKK and they were very effective there.

114. He definitely did not go to the village during the month of June 1993 and had never conducted a military operation there. There would be logs recording any operations. The last time he was there was in May to organise a meeting. Until he left in August 1993, the village was inhabited and the mill still standing. He heard nothing about threats to the villagers to leave. He had never met General Aydin, who took up his duties there after the witness had left. He received no reports or information relating to the burning of any houses in June 1993.

115. The PKK used the villages of the area for shelter and food. He had no power to send troops for military operations or to evacuate villages. They sought to persuade villagers not to assist the PKK. If from intelligence sources they discovered the identity of any PKK supporters, they would determine their identities, capture them and hand them over to the judicial authorities. But they could not act on hearsay. If there was material evidence, such as a hideout, they could proceed to take a statement from the villagers. Neither he nor any subordinate during his time on duty had ever burned houses or witnessed such incidents. He had never participated in any joint large-scale operation with other units.

116. If there was a fire in a village, the muhtar or elders were unable to report it, since they would be targeted and killed by the PKK. Necmettin Korkmaz was not the muhtar during his time in the district: the muhtar was Sait Memiş. But Necmettin Korkmaz had the habit of visiting the witness regularly as well as the Governor, district gendarmerie commander and others in Kulp. He and the witness had good relations. Korkmaz was lying when he said that he saw the witness in the village in June. Since Necmettin Korkmaz had only seen him two or three times, he doubted the villager could recognise him.

117. When asked why İsmet Asker, his wife and Keje Selçuk said that he had burned their houses, the witness referred to a book "The PKK" by İsmet İmset, which mentions his name in connection with incidents. They must have thought that he was a good target as his reputation had been already damaged. He had no reason to burn their houses, or the mill, which was a dilapidated structure partly submerged in the creek and not in operation. The newspapers, Özgür Gündem and others, also carried stories making untrue allegations against him. The untrue stories started after he took up his duties at Kulp and resulted from the fact that he performed his duties effectively and impartially. His life was in danger as a result of the stories.

118. He had been called before a public prosecutor a few times to answer allegations about himself. He had never been subject to disciplinary proceedings nor been a defendant in a criminal trial.

C. Relevant domestic law and practice

119. The parties have made no separate submissions with regard to domestic law and practice. The Commission has incorporated its summary of the relevant domestic law and practice in the case of Akdivar and others v. Turkey (Eur. Court HR judgment of 16 September 1996 to be published in Reports 1996), which includes the provisions relied on by the Government and representatives of the applicant villagers (the applicants in this case adopt the same arguments for the purposes of this application).

120. The Government submit that the following provisions are relevant.

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

(translation)

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

The Administration shall be liable to indemnify any damage caused by its own acts and measures."

122. 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.

123. The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

124. 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 oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- to make an unlawful search of someone's home (Articles 193 and 194),
- to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382),
- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or
- to damage another's property intentionally (Article 526 et seq.).

125. 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.

126. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

127. 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.

128. 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.

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

130. Damage caused by terrorist violence may be compensated out of the Aid and Social Solidarity Fund.

131. The applicants point to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme (paras. 132-137 below):

132. Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

133. Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

134. Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

135. 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.

136. Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

> "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."

137. According to the applicants, this Article grants impunity to the Governors. Damage caused in the context of the fight against terrorism would be "with justification" and therefore immune from suit. Moreover, Decree 430 reinforces the powers of the Regional Governor to order the permanent or temporary evacuation of villages, to impose residence restrictions and to enforce the transfer of people to other areas. So the law, on the face of it, grants extraordinarily wide powers to the Regional Governor under the state of emergency and is subject to neither parliamentary nor judicial control. However, at the relevant time there was no decree providing for the rehousing of displaced persons or the payment of compensation.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

138. The Commission has declared admissible the applicants' complaints that in June 1993 State security forces burned their homes, destroyed their property and forced them to evacuate their village and that they had no access to court or remedy available to them in respect of these matters.

B. Points at issue

139. The points at issue in the present cases are as follows:

- whether there are valid applications pursuant to Article 25 of the Convention;

- whether there has been a violation of Article 8 of the Convention;

- whether there has been a violation of Article 1 of Protocol No. 1 to the Convention;

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

- in the case of İsmet Asker alone, whether there has been a violation of Article 2 of the Convention;

- whether there has been a violation of Article 5 para. 1 of the Convention;

- whether there has been a violation of Article 6 para. 1 of the Convention;

- whether there has been a violation of Article 13 of the Convention;

- whether there has been a violation of Article 14 of the Convention;

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

C. Concerning the existence of valid applications

140. The Government submit that the applications have not been submitted by the applicants. The evidence shows that they were ignorant of the contents of their applications and of what was purportedly being done on their behalf. They point to the fact that İsmet Asker stated before the Delegates that he did not know Sedat Aslantaş, who allegedly took his statement and submit that his description of how he was brought to sign a petition indicates that he was unaware of its purpose and destination. Similarly, Keje Selçuk said that she did not know Sedat Aslantaş who purportedly took her statement and the discrepancies contained in that written statement indicate that the petition was not hers but concocted by others. Significantly, they submit, the

application as initially introduced before the Commission identified Keje Selçuk as male. The applications are accordingly invalid, as being fabricated, produced by influence of the PKK and obtained by deception of the applicants.

141. The Commission notes that İsmet Asker did not recognise the name Sedat Aslantaş before the Delegates and that at one point he did not understand a reference made to the Human Rights Association. However, he confirmed that a person wrote a petition for him in an office and referred to choosing Osman as his lawyer. This was in reference to Osman Baydemir, a lawyer at the HRA present at the hearing before the Delegates as a representative for the applicants. He also stated that he knew Rozan Alıcıoğlu, who worked for the HRA. As regards Keje Selçuk, the Commission recalls that the applicant's lawyers from England, who are non-Turkish speaking, explained that the error concerning her sex, was a translation error of the materials sent to them from the HRA. While in answer to questions by the Government Agent, Keje Selçuk also failed to recognise Sedat Aslantaş and disowned certain parts of the statement written by the HRA as not according to what she had said, she confirmed that she went to the HRA to make a statement and that she spoke while they wrote.

142. The Commission considers that there is no basis for finding that the applicants did not freely go to the HRA or that the petitions submitted on their behalf do not validly reflect their complaints. Notwithstanding the discrepancies and apparent inaccuracies in the written petitions, the substance of the complaints - that security forces burned their homes and, in the case of Keje Selçuk, her mill, forcing them to leave the village - were maintained before the Delegates by the applicants, who showed no unwillingness or reluctance in participating in the proceedings, the purpose of which was explained to them by the Chairman of the Delegates.

143. Consequently, the Commission finds that the applications before it disclose a genuine and valid exercise of the applicants' right of individual petition under Article 25 of the Convention.

Decision

144. The Commission decides, unanimously, to pursue the examination of the applications introduced on behalf of the applicants.

D. <u>The evaluation of the evidence</u>

145. Before dealing with the applicants' 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 has been no published detailed investigation or judicial finding of facts on the domestic level as regards the events which occurred in İslamköy village and its surrounding hamlets in the period of June 1993 or subsequently. 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 this assessment 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 (in some cases via Kurdish and Turkish into English): 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 the written and oral evidence, the Commission has been aware that the cultural context of the applicants and witnesses has rendered inevitable a certain imprecision with regard to dates and other details (in particular, numerical matters) and does not consider that this by itself reflects on the credibility of the testimony.

iii. The Government have adverted to the vulnerable position of villagers from the South-East and to the considerable influence and intimidation exerted on them by the PKK, who aim to undermine the Turkish State and establish a separate state of their own and who do not baulk at kidnapping, torture and murder. The Commission, in light of its own increasing experience of the pressure exerted on villagers, who face often conflicting demands from terrorists and State authorities, sees no reason to doubt that this factor is a relevant concern and has taken it into account in its assessment of the evidence.

iv. 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 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 compelling powers as regards witnesses. In the present case, while 14 witnesses were summoned or called to appear, only 10 in fact gave evidence before the Commission's Delegates. Significantly, neither of two public prosecutors who were summoned appeared. At the taking of evidence, the Government explained that the public prosecutor from Lice had no connection with the application; they also informed the Delegates that the public prosecutor from Kulp did not intend to come since he had nothing to add to the material in the case-file. The Government have failed to provide, despite repeated requests by the Commission's Secretariat and the Commission's Delegates, complete documentary materials relating to records of operations and movement of security force personnel in the Kulp district in June 1993 (see paras. 16, 20-21). The Commission has therefore been faced with the difficult task of determining events in the absence of potentially significant testimony and evidence. 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. General background

146. The Commission notes that the village of İslamköy, a community of approximately 150 households scattered over a central area and outlying hamlets, was situated in a mountainous region which was subject to significant PKK terrorist activity over the period of events adverted to by witnesses in this case. It appears that the village, due to its geographical location, was on the route used by the PKK to bring supplies. The villagers were obliged to lend their mules, if not assist themselves, in carrying provisions brought by the road further up into the mountains. The PKK also held meetings, urging co-operation by the villagers and often called at night looking for food and contributions. There were a number of incidents in the region, including in or about 1992 the kidnapping and killing of a teacher who was the nephew of Necmettin Korkmaz, muhtar from the village. However, all the witnesses were agreed that no burning or attack on the village had taken place prior to June 1993. There had been village guards in the village but they had given up by 1991-92, apparently due to the increased pressure and threat from the PKK. While reference was made to mining of the roads near the village, in particular by M. Sait Memiş, it is not apparent that this was a problem in June 1993. Celal Şeker and Şah Şimşek stated that it was not a problem until later and no other witness mentioned any difficulties as regarded leaving or returning to the village at this time.

147. The district gendarmerie forces with responsibility for the village were based in Kulp, under the command at this time of Recep Cömert, a senior sergeant. He was well-known to all the villagers who gave evidence. It appears from their evidence that he came to the village with units of security forces on a number of occasions, either to question or search or while passing through on operations to be conducted elsewhere. As regards the frequency of his visits, Recep Cömert stated that during his period stationed in Kulp (15 July 1991 to 3 August 1993) he visited the village at most three times. This is contradicted by a number of the witnesses from the village: Fatma Asker (he had come many times before); Nesih Selçuk (regularly, once a week/fortnight); Tevfik Karaaslan (once every two-three months); Şah Simşek (his evidence, without mentioning Recep Cömert, gave the impression that security forces were often in the area). Only Celal Şeker stated that he had only seen Recep Cömert on operations twice, three times. The Commission, having regard to the difficulties of expression, is satisfied that Recep Cömert visited the village not infrequently and it is likely that he has understated the number of visits carried out over a period of more than two years. The Commission notes that Recep Cömert not only knew the muhtars of the village, Necmettin Korkmaz and Sait Memiş but admitted to knowing İsmet Asker and most of the villagers, which range of acquaintance in a 150 household village would seem remarkable if based on only a handful of visits.

2. Events in İslamköy on or about 16 June 1993

148. All the village witnesses were agreed that two houses, those belonging to the applicants, were burned down one day in June 1993. The evidence as to the circumstances in which this occurred, and in particular who was responsible, differed between two groups: İsmet

Asker, Fatma Asker, Keje Selçuk, Nesih Selçuk and Necmettin Korkmaz attributed responsibility to the security forces under the command of Recep Cömert, whereas Sait Memiş, Tevfik Karaaslan, Şah Şimşek and Celal Şeker stated that it was the PKK who carried out the burning.

149. The Commission has had regard to the Delegates' assessment of the witnesses who appeared before them. The applicants' testimony was on the whole consistent and credible, and supported in important details by the witnesses called on their behalf. Moreover, their demeanour and comportment were convincing and sincere.

150. The Government have pointed to apparent inconsistencies and contradictions in the written and oral evidence submitted by and on behalf of the applicants. For example, the list of burned property in the purported petition submitted by İsmet Asker did not accord with what he stated at the oral hearing and his oral description of how his house was set on fire varied: at one point, he stated that the house was on fire before he ran in to save his belongings; at another point, he said that it was set on fire when he was upstairs. While the written statements of the applicants by the HRA referred to soldiers beating people, they point out that İsmet and Fatma Asker and Keje Selçuk denied in their oral evidence that this occurred. The statement of Keje Selçuk taken by the HRA also stated that her children were in the house at the time of the incident whereas orally she explained that her children were grown up and lived elsewhere. In addition, Keje Selçuk did not understand Turkish but claimed to understand what was said to her by Recep Cömert when he burned her house. Her descriptions of events varied from the accounts given by Nesih Selçuk and Necmettin Korkmaz, in particular as to what occurred when the soldiers set fire to her house.

151. Further, the Government submit that the oral testimony of Nesih Selçuk and Necmettin Korkmaz was full of irreconcilable contradictions. Inter alia, both claimed to see General Bahtiyar Aydin arrive in a helicopter on an occasion when Recep Cömert was present. This was impossible since General Aydin took up his duties in the region on 20 August 1993, whereas Recep Cömert left on transfer on 3 August 1993. Necmettin Korkmaz also claimed, falsely, to still be the muhtar of the village whereas Sait Memiş had taken over the post by 1989. As regarded the alleged paper warning villagers to leave ten houses, Necmettin Korkmaz said that it was signed by Major Ali, then that it was signed by Recep Cömert. Crucially, he also did not reveal that in fact he was not in the village on the relevant day, but in Istanbul. These two witnesses in addition differed on important details of the alleged burning: Nesih Selçuk said that Recep ordered two privates to pour the gasoline on Keje's house while Necmettin Korkmaz stated that Recep did it himself.

152. The Commission has examined the points raised by the Government. As regards the differences between the written statements and the oral testimonies of the applicants, it has already had occasion to comment adversely on the accuracy of the written statements taken down in respect of applicant villagers (see eg. Mentes v. Turkey, No. 23186/94,

Comm. Rep. 7 March 1996 para. 145, pending before the Court and Kurt v. Turkey, No. 24276/94 Comm. Rep. 5.12.96). It considers that the differing details do not detract from the credibility of the applicants' oral evidence, which maintained the substance of their complaints against the security forces.

153. In relation to the alleged inconsistencies of the applicants' oral evidence, the Commission did not find the accounts given by the applicants to the Delegates to be fundamentally flawed by the points identified by the Government. As regards İsmet Asker's description of how his house was set on fire, having regard to his age and infirmity and the traumatic nature of the incident, it is not surprising that the exact course of events may have been confused in his mind or that he had difficulty in conveying what occurred. His evidence was, as regarded the central elements of his story, coherent and convincing and supported by the testimony of his wife in many details.

154. The Commission notes that Keje Selçuk was animated and voluble in reply to the Delegate's questions. It does not find that her claim to have understood the Turkish of the soldiers to be inconsistent. It is clear that she knew a few basic words, and was interpreting the gestures, tone and context of what was being said. It finds no material discrepancy between her account and those of Nesih Selçuk and Necmettin Korkmaz who also claimed to be on the scene. While Keje Selçuk and Necmettin Korkmaz stated that it was Recep Cömert who poured the gasoline whereas Nesih Selçuk stated that he gave the order to two soldiers to set fire to the house, it is not apparent that this is necessarily contradictory, the act of pouring gasoline and setting alight being possibly distinct. Having regard to the tenor of the evidence as a whole, the Commission finds that Keje Selçuk's testimony is not discredited as alleged by the Government.

155. In respect of Nesih Selçuk and Necmettin Korkmaz, the Commission considers that their testimony supports the applicants' complaints in significant respects. It recalls that the Delegates found them to impress as credible witnesses and that Necmettin Korkmaz was deeply affected by the hardship to which he and others in the village had fallen victim following this period. As regards the credibility of Necmettin Korkmaz which the Government particularly challenged, the Commission recalls that he was 79 years of age. Given that he was muhtar for 32 years, it sees no significance in his apparent claim still to be the muhtar in 1993. In relation to whether in fact he was present in the village, he explained that he left for Istanbul in 1993 one or two months after the incident. While Karaaslan claimed that Necmettin Korkmaz was in Istanbul at the time of the burning of the two houses, Şeker referred to the fact that at that time Necmettin had adopted a peripatetic lifestyle moving to and from Diyarbakır and that around the time of the burning, he took his family away. The Commission is not persuaded that the statements of these witnesses that Necmettin Korkmaz was absent are based on actual knowledge rather than assumption or a confusion of dates.

156. Necmettin Korkmaz claimed that he witnessed the visit of General Bahtiyar Aydin to the village on several occasions, and that one visit occurred around the time of the burning (he was not sure of the exact day) when Recep Cömert was also present. The Government have stated that this allegation is impossible, since, inter alia, Recep Cömert left his post in Kulp before the General took up his duties in the

area. The Commission requested documents and information relating to the posting of General Aydin. The Government have provided a career record which shows that the General, killed on active service in Lice in October 1993, officially took up his post in Diyarbakır province on 20 August 1993 and also copies of correspondence from the General dated 18 and 21 June 1993 from his official post in Ankara, where he was Commander of the Gendarmerie Schools. It would therefore appear unlikely that General Aydin was present in the village at the time immediately around the burning of the applicants' houses.

157. The Commission has given consideration to whether Necmettin Korkmaz's evidence on this point discloses an indication of unreliability. The Commission notes that Nesih Selçuk merely referred to a general, name unknown, arriving in the village on the same day as the burning of the applicants' houses, and that he was told that this was the general later killed in Lice. It is conceivable that Necmettin Korkmaz, who was unsure of the date, and Nesih Selcuk, who had no personal knowledge of the identity of the officer, are confusing the visit of another senior officer eg. his predecessor Brigadier General Uğur Çevik, to the village with later visits to the village by General Aydin. The question also arises whether it was at all possible for General Aydin to have been present in the village before Recep Cömert left the area, and for him to have been seen by Necmettin Korkmaz who left for Istanbul one or two months after the burning. The Commission observes that the fact that the General took up his post officially from 20 August 1993 does not exclude any possibility that he was involved in prior activities in the area in a transitional period of change of command. Nonetheless, the Commission finds the evidence of Necmettin Korkmaz, who described his alleged meetings with General Aydin in firm detail, poses some difficulties, which must be taken into account in the assessment of the evidence as a whole.

158. The evidence of the applicants and the witnesses called on their behalf was contradicted on many key points by the other witnesses from the village heard by the Delegates. The Commission however finds the testimony of the villager witnesses Memiş, Karaaslan, Simşek and Şeker and the gendarme officer Recep Cömert to be unpersuasive and unreliable.

159. The Commission refers to the following points:

- three of these villager witnesses were from outlying hamlets at some distance from the applicants' homes in the central village and they did not purport to witness the incident. They gave evidence to the effect that they saw smoke, that on visiting the village they found the houses were burned, that there were no soldiers and that the applicants and other villagers were blaming the PKK. The fourth, Simşek, lived in the central village but since he slept out, in hiding, he also did not claim to witness the burning of the house;

- the testimony of Sait Memiş, the muhtar in office, was to the effect that even though houses had been set on fire, he did not go down to the central area for two days: this was despite the duties incumbent on his office and the fact that this was the first incident of this kind. He explained this was due to a fear for his life. It nonetheless appeared that there was no particular risk from mines at that time as he alleged

(children in particular were crossing to and from the village without restriction) and other villagers - Şeker and Karaaslan - claimed that they went to have a look without concern, taking the view that the PKK were active at night and left at daybreak;

- the testimony of Sait Memiş, as regarded events in June 1993, appeared coloured by the traumatic events which he had experienced later on in or about April 1994, when the PKK attacked his hamlet Tur in considerable force, burning the houses and locking the people in the mosque from which they escaped by breaking down the door. He demonstrated an understandable antipathy for the PKK and was pre-occupied with threats to his own life and the effect on the villagers of the activities of the terrorists.

160. The Commission notes that the gendarme officer, Recep Cömert, named by the applicants and other witnesses as having personally ordered and participated in the burning of their homes and property, denied these allegations, stating that he was not in the village in June 1993. He also stated that his last visit to the village had been in May 1993, yet was able to give evidence that in August 1993 the mill was still standing. At another point he said that the mill was dilapidated, partly submerged in the creek and not in operation. Further, two witnesses, Sait Memiş and Celal Şeker, who otherwise supported his denial of involvement, stated that he had called at the village about ten days after the applicants' houses were burned and talked to villagers. He also stated that he had received no report or information about the burning of houses in the village, although Sait Memiş as the muhtar in office at the time stated that he made the journey to Kulp where he reported the incident to the district governor and that he reported the burning of the houses to the district gendarmes, and Recep Cömert in particular. When referred to the testimony of Necmettin Korkmaz, Recep Cömert stated at one point that the old muhtar had visited him frequently, informing him about the village and that they had a good relationship; later, he stated that Necmettin Korkmaz had only seen him on two or three occasions and he did not believe that Necmettin Korkmaz would recognise him. The Commission recalls Recep Cömert's apparent understatement as regards his contacts with the village (para. 147) and finds that his response to questioning was, to say the least, guarded and evasive. The extracts of the duty log of Kulp gendarme station provided by the Government, relating to routine duties, are not inconsistent with testimony of the applicants and their witnesses. The extracts do not establish that Recep Cömert was involved in other duties or in other locations on the dates on which the incidents in the village occurred. It is also unlikely that operations of the scale alleged would be recorded in the duty log but would be detailed in separate operation reports.

161. The Commission has considered the submissions of the Government, supported variously by the testimony of Recep Cömert, Sait Memiş, Karaaslan, Şeker and Simşek as to why the applicants and their witnesses would lie as regards the circumstances of the burning and why it must have been the PKK who in fact burned their property. It recalls that Recep Cömert alleged that he had become a target of PKK propaganda and had been blamed, falsely, for various outrages because of his role as an official of the State who carried out his duties effectively. It is also argued that Keje Selçuk was a target for the PKK since one of her sons is an imam, while İsmet Asker would have been punished by the terrorists because his son was doing his military service. Both

applicants, and their witnesses it is alleged, are under pressure from the PKK to lie to the Commission to support PKK propaganda about the State or are seeking to obtain financial benefits from their allegations.

162. The Commission does not doubt that the PKK are capable of retaliating against persons who appear to be co-operating with the State. Also, it is not disputed that the PKK did make attacks in the area, burning down about 20 houses in the Tur hamlet the following year. Nonetheless, İsmet Asker and Keje Selçuk, who are "pro-Government", have maintained that it was the security forces who burned their property in retaliation for alleged assistance to the PKK. In that regard, while both were reluctant to admit to have had any contact with the PKK who used to visit the village, the Commission recalls that İsmet Asker lived in an exposed position on the road used by the PKK at night and his wife admitted being compelled to give them any food which they asked for. The Commission finds no indication that their accusations against the security forces have been fabricated under fear or intimidation of this organisation, or for the purpose of obtaining compensation. It notes that İsmet Asker complained to the district governor in Kulp within ten days of the burning (see petition dated 25 June 1993) that his house and property had been destroyed in an operation, more detailed allegations being recorded in the HRA statement of 14 July 1993, less than a month later. Keje Selçuk's complaints against the security forces were also set down in a statement by the HRA on 14 July 1993, within a month of events. As regards İsmet Asker's petition to the Governor, the Commission recalls that the Government reject this as fabricated since there is no record of such petition being registered nor was İsmet Asker able to give a registration number. The Commission would comment, in light of other applications (see eg. Eur. Court HR Akdivar and others v. Turkey judgment 16.9.96 to be published in Reports 1996, para. 20), that it cannot be excluded that the district governor failed to process İsmet Asker's petition in any formal manner.

163. Having regard to the evidence as a whole, the Commission accepts the evidence of the applicants as regards its principal elements. It does not find the difficulties as regards certain details presented by the testimony of the applicants and their witnesses to materially undermine their credibility and reliability, which its Delegates assessed in generally positive terms. It finds the following facts to be established:

164. Early on the morning of 16 June 1993, a large force of gendarmes arrived in the village of İslamköy. A number of gendarmes, under the apparent command of Recep Cömert, went to İsmet Asker's house. The house was set on fire, causing the destruction of the property and most of its contents. İsmet Asker and his wife ran inside the house in an attempt to save some of their possessions: this occurred either just before or while the gendarmes were setting fire to the house by pouring petrol or gasoline on to it. It is not established that the house was set on fire after İsmet and Fatma Asker had gone into the house. İsmet and Fatma Asker were forced to leave the house due to the smoke and flames. Villagers came to see what was happening and were prevented from trying to put the fire out. A number of gendarmes, including Recep Cömert, proceeded to the house of Keje Selçuk. Despite her protests, gasoline was poured on her house, which was set on fire, by or under

the orders of Recep Cömert. Villagers, including Necmettin Korkmaz and Nesih Selçuk, were prevented from trying to put out the fire. Keje Selçuk's house and its contents were completely destroyed.

165. İsmet Asker and his wife left the village briefly and returned about 10 days later. Keje Selçuk had spent the night or several nights in the village and then left to stay in Diyarbakır with her daughter. On or about 26 June 1993, a force of gendarmes arrived in the village; they were seen on the road near the village and inside the village. The mill belonging to Keje Selçuk, Nesih Selçuk and others, which stood on a creek in the village, was set on fire and destroyed. Recep Cömert was seen with the gendarmes at the mill when this occurred. İsmet Asker complained of the destruction of his home to the district governor in Kulp, presenting a petition. No steps were taken in response to this petition.

166. Following these events, İsmet Asker and his wife moved to live permanently in Diyarbakır as did Keje Selçuk. The village itself was abandoned completely by the end of 1994 due to increased PKK activity.

E. As regards Article 8 of the Convention and Article 1 of Protocol No. 1

167. Article 8 of the Convention reads as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

168. Article 1 of Protocol No. 1 provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

169. The applicants allege that the destruction of their homes by the security forces and their arbitrary expulsion from their village constitute violations of the right to respect for their family life and home, ensured by Article 8 of the Convention, and disclosed an interference with the peaceful enjoyment of their possessions, contrary to Article 1 of Protocol No. 1.

170. The Government maintain that the applicants' allegations against the security forces are fabricated.

171. The Commission recalls its findings of fact above (para. 164 above) to the effect that the security forces deliberately destroyed the homes and property of the applicants, necessitating their moving away from their village. It finds that this discloses a very serious interference with the applicants' rights under the above provisions for which no justification has been given.

CONCLUSIONS

172. The Commission concludes, unanimously, that there has been a violation of Article 8 of the Convention.

173. The Commission concludes, unanimously, that there has been a violation of Article 1 of Protocol No. 1.

F. As regards Article 3 of the Convention

174. The Commission will now examine whether the interference with the applicants' home and private and family life was so serious that it also amounted to a violation of Article 3 of the Convention, which provides as follows:

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

175. The applicants allege that their forced expulsion from their village, inflicted in the circumstances surrounding the incident, caused them such severe physical and mental suffering as to constitute inhuman and degrading treatment contrary to Article 3 of the Convention. They refer to the systematic terrorising of villagers and destruction of villages as a form of collective punishment which is inhuman and degrading.

176. The Government contend that the allegation is wholly groundless on the facts, as there were no security operations in the village as alleged.

177. The Commission recalls its findings above (paras. 164-166). It considers that the burning of the applicants' homes in their presence constituted an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants who were deprived of most of their personal belongings and left without shelter and assistance and in circumstances which caused them anguish and suffering. It notes in particular the age and infirmity of the applicant İsmet Asker and the traumatic circumstances surrounding the burning, in which İsmet Asker and his wife were in danger from smoke and flames as they tried to save their belongings. It recalls that Keje Selçuk pleaded with the gendarmes, Recep Cömert responding insultingly and pushing her. The Commission has also had regard to the difficult personal situation in which the applicants subsequently found themselves, being deprived of their own homes in their village and the livelihood which they had been able to derive from their gardens and

fields, and in the case of Keje Selçuk, the mill of which she was a co-owner. It accordingly finds that the applicants have been subjected to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

CONCLUSION

178. The Commission concludes, by 27 votes to 1, that there has been a violation of Article 3 of the Convention.

G. As regards Article 2 of the Convention

179. The applicant İsmet Asker has invoked Article 2 in that the security forces knew that he was in the house when it was set on fire and that this is an indication of a reckless disregard for the protection of the right to life.

Article 2 of the Convention provides, in its first sentence:

"1. Everyone's right to life shall be protected by law."

180. The Commission recalls that it has not found it established that the security forces set fire to the house after the applicant had run inside (para. 164 above). It has adverted above in the context of Article 3 to the traumatic circumstances of the incident where İsmet Asker at risk from smoke and flames tried to save some of his possessions. It finds no separate element arising in the context of Article 2 of the Convention, there being no indication of any deliberate attempt on the life of İsmet Asker, or that he suffered any life-threatening injury as a result of any recklessness or careless disregard on the part of the security forces.

CONCLUSION

181. The Commission concludes, unanimously, that there has been no violation of Article 2 of the Convention in respect of the applicant İsmet Asker.

H. As regards Article 5 para. 1 of the Convention

182. Article 5 para. 1 of the Convention guarantees the right to liberty and security of person.

183. The applicants allege that they were compelled to abandon their homes and village in flagrant breach of the right to the exercise of liberty and the enjoyment of security of person.

184. The Government have not addressed this aspect of the case save insofar as they deny that any incident occurred.

185. The Commission recalls that the primary concern of Article 5 para. 1 of the Convention is protection from any arbitrary deprivation of liberty. The notion of security of person has not been given an independent interpretation (cf. Nos. 5573/72 and 5670/72, Dec. 16.7.76, D.R. 7 p. 8; No 4626/70 et al., East African Asians v. the United Kingdom, Dec. 6.3.78, D.R. 13 p. 5).

186. In the present case, neither of the applicants was arrested or detained, or otherwise deprived of his or her liberty. The Commission considers that their insecure personal circumstances arising from the loss of their homes does not fall within the notion of security of person as envisaged by Article 5 para. 1 of the Convention (see eg. Akdivar and others No. 21893/93 Comm. Rep. 26.10.95 to be published in Reports 1996).

CONCLUSION

187. The Commission concludes, unanimously, that there has been no violation of Article 5 para. 1 of the Convention.

I. As regards Articles 6 para. 1 and 13 of the Convention

188. Articles 6 para. 1 and 13 of the Convention provide as follows:

Article 6 para. 1

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ... ".

Article 13

"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."

189. The applicants allege that the arbitrary expulsion from their homes and village was a flagrant, direct interference with their civil rights within the meaning of Article 6 para. 1 of the Convention. They claim to have been denied an effective procedure to challenge or resist the deprivation of their possessions. They also claim to have had no effective domestic remedies for their various Convention claims, contrary to Article 13 of the Convention.

190. The Government contend that the applicants have failed to exhaust local remedies. They refer in particular to the administrative courts which have been created to deal with disputes between the individual and the State, and which may decide in favour of persons in the position of the applicants, awarding compensation. They have provided a large number of administrative court decisions illustrating the application of the principle of "social risk".

191. The Commission refers to its decision on admissibility in the application of Keje Selçuk No. 23184/94 (see Appendix I to this Report) where, in the context of Article 26 of the Convention, it found that the application raised identical issues to those considered by the Commission in the case of Akdivar and others (loc. cit., decision on admissibility, 19.10.94). In Akdivar, the Commission examined the remedies on which the Government relied as offering effective redress but concluded:

"...in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the present case,... that the applicants are absolved from the obligation to pursue them."

192. While there was domestic case-law referred to by the Government indicating that there might be a channel of complaint through the administrative courts which could award compensation to the individual against the State on the basis of the latter's liability to ensure the protection of citizens from various social risks, the Commission considered that this case-law was insufficient to demonstrate that compensation claims were effective remedies in the emergency regions of South-East Turkey for the destruction of homes and villages allegedly perpetrated by security forces. The Commission recalls that the Court, in rejecting the Government's preliminary objection in the Akdivar case, found that proceedings before the administrative courts would not be regarded as adequate and sufficient in respect of the applicant villagers' complaints of destruction of their homes. In this context, the Court referred, inter alia, to the fact that there were no examples of compensation being paid in respect of allegations that houses had been purposely destroyed by security forces and to the general reluctance of the authorities to admit that this type of behaviour occurred. The Court was further not satisfied that a determination could be made in the course of administrative proceedings concerning their claim that their property was destroyed by members of the gendarmerie (Eur. Court HR Akdivar and others v. Turkey judgment of 16 September 1996 to be published in Reports 1996).

193. The Commission recalls that Article 6 para. 1 of the Convention requires effective access to court for civil claims. This requirement must be entrenched not only in law but also in practice. The individual should have a clear, practical and effective opportunity to challenge an administrative act that is a direct interference with civil rights, as in the present case (mutatis mutandis, Eur. Court H.R., de Geouffre de la Pradelle judgment of 16 December 1992, Series A no. 253-B, p. 43, para. 34).

194. The Commission finds that there are undoubted practical difficulties and inhibitions in the way of persons like the present applicants who complain of village destruction in South-East Turkey, where broad emergency powers and immunities have been conferred on the Emergency Governors and their subordinates. It notes that there has been no example given to the Commission of compensation paid to a villager in respect of the destruction of a house by the security forces nor any example of a successful, or indeed any, prosecution brought against a member of the security forces for any such act.

195. In the present cases, the Commission recalls that an investigation was opened into the applicants' allegations pursuant to the communication to the Government of the applications. The Commission asked, on repeated occasions, for the investigation file to be provided. A relatively small number of documents was provided. On the basis of these, it appears that the investigation was limited and inconclusive. Enquiries were confined to taking statements from the applicants and enquiring from the gendarmerie if an operation had taken place in the village on 16 June 1993. No steps were taken to seek information from the alleged perpetrators of the burning or from other villagers who might have witnessed events. The investigation concluded

on 30 November 1994 with a decision of lack of jurisdiction. The text of the decision stated that the matter concerned allegations of damage to property occurring in the winter months of 1993 during an intensive clash between the security forces and the PKK, concluding that since it appeared that the security forces were involved in the course of their administrative duties, jurisdiction lay with the administrative council. Since neither applicant in their statements referred to a clash with the PKK and the date of the burning was indicated by them as being in the summer of 1993 and, further, no document in the file, or elsewhere, refers to any operations in the village leading to damage to property, the Commission finds this decision to be a remarkable document.

196. The Commission has not been informed of any outcome of the proceedings before the Administrative Council which had jurisdiction transferred to it more than three years ago. The Commission considers that the unsatisfactory nature of the investigation processes disclosed in these cases supports its finding that complaints that security forces have destroyed villagers' houses do not in practice receive the serious or detailed consideration necessary for any prosecution to be initiated. Where the allegations concern the security forces, which enjoy a special position in the emergency area in the south-east, the Commission considers that it is unrealistic to expect villagers, who are in a vulnerable and insecure position in the circumstances pertaining in that region, to pursue theoretical civil or administrative remedies in the absence of any positive findings of fact by the State investigatory mechanism.

197. In the light of these considerations, the Commission is of the opinion that the applicants did not have effective access to a tribunal that could have determined their civil rights within the meaning of Article 6 para. 1 of the Convention.

198. Some of the applicants' Convention claims do not necessarily involve their civil rights, and may not require a full court remedy, for example their claim concerning the alleged forcible evacuation of their village and relating to their subsequent personal difficulties. Positive State action to investigate the incidents promptly, to rehouse or financially assist these villagers, rather than passively awaiting administrative court intervention, may have been a more appropriate response to the applicants' plight. The question arises therefore under Article 13 of the Convention whether the applicants have been afforded effective domestic remedies for these claims notwithstanding that the violations have allegedly been "committed by persons acting in an official capacity". However, for the same reasons outlined above (paras. 194-196), the Commission considers that the applicants did not have other effective remedies at their disposal for their remaining Convention claims as required by Article 13 of the Convention.

CONCLUSIONS

199. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 6 para. 1 of the Convention.

200. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 13 of the Convention.

J. As regards Articles 14 and 18 of the Convention

201. Articles 14 and 18 of the Convention provide as follows:

Article 14

"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."

Article 18

"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."

202. The applicants maintain that because of their Kurdish origin the various alleged violations of their Convention rights were discriminatory, in breach of Article 14 of the Convention. They also claim that their experiences represented an authorised practice by the State in breach of Article 18 of the Convention.

203. The Government have not addressed these allegations beyond denying the factual basis of the substantive complaints.

204. The Commission has examined the applicants' allegations in the light of the evidence submitted to it, but considers them unsubstantiated.

CONCLUSIONS

205. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention.

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

K. Recapitulation

207. The Commission decides, unanimously, to pursue the examination of the applications introduced on behalf of the applicants (para. 144)

208. The Commission concludes, unanimously, that there has been a violation of Article 8 of the Convention (para. 172 above).

209. The Commission concludes, unanimously, that there has been a violation of Article 1 of Protocol No. 1 (para. 173 above).

210. The Commission concludes, by 27 votes to 1, that there has been a violation of Article 3 of the Convention (para. 178 above).

211. The Commission concludes, unanimously, that there has been no violation of Article 2 of the Convention in respect of the applicant İsmet Asker (para. 181 above).

212. The Commission concludes, unanimously, that there has been no violation of Article 5 para. 1 of the Convention (para. 187 above).

213. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 6 para. 1 of the Convention (para. 199 above).

214. The Commission concludes, by 26 votes to 2, that there has been a violation of Article 13 of the Convention (para. 200 above).

215. The Commission concludes, unanimously, that there has been no violation of Article 14 of the Convention (para. 205 above).

216. The Commission concludes, unanimously, that there has been no violation of Article 18 of the Convention (para. 206 above).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

PARTLY DISSENTING OPINION OF N. BRATZA

For substantially the reasons given in my separate opinions in other cases involving the destruction of villages in South-Eastern Turkey (notably Akdivar and Others and Mentes and Others) I see the essential problem in these cases is concerned not with the right of access to court but rather with the effectiveness of the remedies available (including court remedies) under domestic law in the particular circumstances prevailing in that part of Turkey. While thus agreeing with the essential reasoning of the majority of the Commission in paragraphs 194 - 196 of the Report, I voted in favour of a violation of Article 13 and not of Article 6 of the Convention.

(Or. français)

OPINION PARTIELLEMENT DISSIDENTE DE M. I. CABRAL BARRETO

A mon très grand regret, je ne puis partager l'avis de la majorité de la Commission en ce qui concerne la violation des articles 3 et 13 de la Convention, et cela pour les motifs suivants :

Article 3 - A l'instar des affaires Akdivar et Mentes, je reste persuadé que les mesures prises par les forces de sécurité, à savoir la destruction par le feu des habitations appartenant aux requérants, doivent être considérées dans le contexte de la situation prévalant dans la zone, la lutte contre les membres du PKK et la tentative "d'assécher l'eau du poisson".

Je considère ces mesures comme une sorte de sanction, les forces de sécurité étant convaincues de l'aide apportée par les requérants au PKK ; je note à cet égard que seules les maisons appartenant aux requérants ont été brûlées et non tout le village.

Je ne saurais donc souscrire qu'avec difficulté à l'opinion que les mesures en cause, quoique objectivement graves, visaient l'humiliation ou l'avilissement des requérants.

C'est pourquoi, je me borne à considérer qu'il y a eu violation des articles 8 de la Convention et 1 du Protocole N° 1.

Article 13 - Eu égard à la constatation de violation relative à l'article 6, je ne crois pas nécessaire de me placer de surcroît sur le terrain de l'article 13.

APPENDIX I

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 23184/94
by K.S.
against Turkey

The European Commission of Human Rights sitting in private on 3 April 1995, the following members being present:

MM. C.A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. ŠVÁBY

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 December 1993 by K.S. against Turkey and registered on 11 January 1994 under file No. 23184/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 27 September 1994 and the observations in reply submitted by the applicant on 23 November 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, born in 1939, lives in Diyarbakır. She is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant claims that the following events occurred.

The applicant resided at Islam village, Kulp District, Diyarbakır Province. On or about 16 June 1993, at around 07.00 or 08.00, approximately 400 soldiers under the control of the Kulp Gendarme Commander, Recep Cömert, made a raid on the 100 household village. First the house of H.I.A. was set on fire together with all his goods. The soldiers later came to the applicant's house and ejected her together with her two children. They gathered all the goods in one room, poured petrol over them and set them on fire. Recep Cömert, after having waited for the house to burn down completely, turned to the villagers who had gathered around the applicant's house and said: "if you don't leave this village we'll burn all your houses without blinking an eye, and we will make you perish inside them".

On or about 26 June 1993, the soldiers returned and burnt down other houses. They also burnt down the only mill of the village which was owned by the applicant and three other villagers. When the villagers tried to put out the fires they were beaten by the soldiers with clubs and truncheons. The applicant was not present on this occasion but was told of events by her partner in the mill.

Following the destruction of her house, the applicant was forced to move away from the village and is now living with a married daughter in Diyarbakır.

The Government indicate that on communication of the application by the Commission in April 1994 the public prosecutor of Kulp district initiated a preliminary investigation into the alleged raids, which investigation is still pending. On 21 June 1994, the applicant made a statement to the public prosecutor pursuant to his request.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(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."

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

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 oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- to make an unlawful search of someone's home (Articles 193 and 194),
- to commit arson (Articles 369, 370, 371, 372) or aggravated arson if human life is endangered (Article 382),
- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or
- to damage another's property intentionally (Article 526 et seq.).

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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons

concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

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 local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas 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.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"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 an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant alleges violations of Articles 3, 5, 6, 8 and 13 of the Convention, and Article 1 of Protocol N° 1, all combined with violations of Article 14 of the Convention. In addition, she alleges that the respondent Government is in violation of Article 18 of the Convention.

The applicant states that she has not sought to exhaust local remedies because the raid in question in this case was executed by the security forces and that on the facts as alleged by her no remedy could be effective or adequate for the purposes of Article 26 of the

Convention. She notes that H.I.A., another villager whose house has been burnt down, did make an application and complaint to the Kulp District Governor but his complaint has remained unanswered.

The applicant invokes and relies on the arguments in support of the claims of violations of the Convention advanced in Applications Nos. 21893/93, Akduvar v. Turkey, and 21895/93, Cagirga v. Turkey (both declared admissible on 19 October 1994). She also invokes and relies on the arguments made in these two applications concerning the question of domestic remedies and Article 26 of the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 15 December 1993 and registered on 11 January 1994.

On 5 April 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 27 September 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 23 November 1994.

On 8 December 1994, the Commission refused the Government's request to adjourn the examination of the case pending the investigation by the public prosecutor and requested them to submit any further observations which they might wish to make by 23 January 1995.

THE LAW

The applicant alleges that on or about 16 June 1993 State security forces attacked her village, destroying her house with its contents, and that on or about 26 June 1993 soldiers returned and destroyed other houses, including a mill owned by the applicant and other villagers. She further alleges that, in connection with these events, she and other villagers were forced to evacuate the village. She invokes Article 3 of the Convention (the prohibition on inhuman and degrading treatment), Article 5 (the right to liberty and security of person), Article 6 (the right of access to court), Article 8 (the right to respect for family life and the home), Article 13 (the right to effective national remedies for Convention breaches), Article 14 (prohibition against discrimination) and Article 18 (the prohibition on using authorised Convention restrictions for ulterior purposes), as well as Article 1 of Protocol No. 1 to the Convention (the right to property).

Exhaustion of domestic remedies

The Government submit that the applicant has failed to comply with the requirement under Article 26 of the Convention to exhaust domestic remedies before lodging an application with the Commission. They contend that the applicant has failed to complain to the competent judicial authorities and point out that there is a pending investigation before the public prosecutor of Kulp district.

The applicant maintains that there is no requirement that she pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. None of the remedies suggested by the Government could be regarded as effective, in the applicant's view, because the scale of destruction of villages, as well as the expulsion and creation of internal refugees, is so great in South-East Turkey that this must be considered high-level Government policy - an administrative practice - in regard to which all remedies are theoretical and irrelevant.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences if they pursue remedies; the lack of genuine investigations by public prosecutors and other competent authorities; the absence of any cases showing the payment of adequate compensation to villagers for the destruction of their homes and villages, or for their expulsion; and the lack of any prosecutions against members of the security forces for the alleged offences connected with the destruction of villages and forcible expulsions.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p.18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that she had at her disposal adequate remedies under the state of emergency to deal effectively with her complaints.

The Commission refers to its findings in Application No. 21893/93, Akduvar and others v. Turkey (Dec. 19.10.94) which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact that there has been destruction of villages in South-East Turkey with many people displaced as a result. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it significant that, although the destruction of houses and property had been a frequent occurrence in South-East Turkey, the Government had not provided a single example of compensation being awarded to villagers

for damage like that suffered by the applicants. Nor had relevant examples been given of successful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers.

The Commission considered that it seemed unlikely that such prosecutions could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to effect the permanent or temporary evacuation of villages, to impose residence prohibitions or to enforce the transfer of people to other areas. It further had regard to the vulnerability of dispossessed applicants, under pressure from both the security forces and the terrorist activities of the PKK and held that it could not be said at this stage that their fear of reprisal if they complained about acts of the security forces was wholly without foundation.

The Commission concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the present case, the Government have not provided any additional information which might lead the Commission to depart from the above conclusions. This application cannot, therefore, be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 of the Convention.

As regards the merits

The Government have not presented any observations on the merits of the case.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission unanimously

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

APPENDIX II

DECISION

AS TO THE ADMISSIBILITY OF

Application No. 23185/94
by İsmet ASKER
against Turkey

The European Commission of Human Rights sitting in private on 28 November 1994, the following members being present:

MM. C.A. NØRGAARD, President
A. WEITZEL
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
Mrs. G.H. THUNE
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. ŠVÁBY
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 15 December 1993 by İsmet Asker against Turkey and registered on 7 January 1994 under file No. 23185/94;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin, born in 1920 or 1933 and resident at Melikahmet Cd., Lülebey mh. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of the University of Essex.

The facts of the present case as submitted by the applicant may be summarised as follows.

The applicant was resident at Islam village, Kulp. In the winter of 1992, the security forces sent a list of names to ten families living in the hundred household village. They were told, "You will leave for good by the summer." At one point, the forces said that they would not burn down things after all. The applicant does not understand why that changed.

On the morning of 16 June 1993, at around 07.00-08.00 hours, about 400 soldiers organised a raid on Islam village on the orders of the Kulp District Gendarme station Commander, Recep Cömert. During the operation, the forces set fire to the applicant's two-storey, eight roomed house. They gave no grounds for doing so. Just before, a soldier had told the applicant to go and get his things out of his house. He and his wife went inside and started gathering up their things. They realised the house had been set on fire and they rushed out of the back door. They waited on the main road. In the meantime, the forces frightened villagers, who had come to try to put out the fire, with their firearms and they prevented them from putting out the fire. The forces waited until the house had completely burnt down. They then burnt down the house of K.S., a little further on, together with all the household effects. The forces then left.

On 25 June 1993, the applicant presented a petition to the Kulp District Governorship. Since the applicant does not speak Turkish, the District Governor asked him through an interpreter whether there was anyone he knew amongst the soldiers who came to the village. He said that he knew Captain Recep Cömert. The District Governor then said, "All right. I am receiving the petition. You can go." The applicant has heard nothing further about his petition. The petition indicated the losses suffered by the applicant.

Ten days after his house was burned down (i.e. on 26 June 1993), soldiers, again under the command of Captain Recep Cömert, organised another raid on the village. That time, the forces burnt down the homes of S.T., A. K.E. and K.S. and then burnt down the water-powered flour mill, run by N.E., N.S., K.S. and H.E. No one was taken into custody. Captain Recep turned to the villagers and showered them with threats, saying, "All of you will leave this village. Otherwise next time we come, we shall burn you all together with your houses." They then left the village.

It is believed that Captain Recep Cömert has been moved to Mersin. A transfer to a place on the coast and outside the area where there is fighting is usually seen as a reward for services rendered.

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of the First Protocol.

As to Article 2, the applicant complains of the life-threatening attack to which he was subjected by agents of the State, of the threat to life occasioned by gross recklessness on the part of agents of the State, of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3, he complains of an inhuman and degrading practice of clearing villages, a form of collective punishment, and of discrimination on grounds of race or ethnic origin.

As to Article 5, he complains of the complete lack of security of the person.

As to Article 6, he refers, on the one hand, to the impossibility of challenging the deprivation of property before it took place, which represents a denial of access to court for a determination of civil rights and, on the other hand, to the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the attacks and destruction, as a result of which he cannot bring civil proceedings arising out of these events, which is also a denial of effective access to a court.

As to Article 8, the applicant complains of the destruction of his home and family life.

As to Article 13, he refers to the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he considers that he has been subject to discrimination on account of race or ethnic origin in the enjoyment of his rights under Articles 2, 5, 6 and 8 of the Convention and Article 1 of the First Protocol.

As to Article 18, he alleges that the interferences in the exercise of his Convention rights were not designed to secure the ends permitted under the Convention.

As to Article 1 of the First Protocol, he complains of the destruction of his home and possessions.

As to the exhaustion of domestic remedies, the applicant considers that there is no requirement that he pursue alleged domestic remedies. In his opinion, any alleged remedy is illusory, inadequate and ineffective because

(a) the operation which led to the threat to life and destruction at issue in this case was officially organised, planned and executed by the agents of the State ;

(b) there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies (Article 13) ;

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress ;

(d) alternatively, the applicant has done everything he can do to exhaust domestic remedies by submitting a petition to the District Governor ; the fact that it has yielded no result confirms the ineffectiveness of any alleged remedy.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced before the Commission on 15 December 1993 and registered on 7 January 1994.

On 5 April 1994 the Commission decided to communicate the application to the Turkish Government who were invited to submit their observations on its admissibility and merits before 8 July 1994. At the Government's request, this time-limit was subsequently extended until 8 August 1994.

By letter of 6 September 1994 the Commission's Secretary pointed out to the Government that the period for the submission of the Government's observations had expired long ago and that no extension of that time-limit had been requested. It was added that the application was being considered for inclusion in the list of cases for examination by the Commission at its October or November session.

No observations have been submitted by the Turkish Government.

THE LAW

The applicant complains of violations of Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of the First Protocol in connection with a raid by security forces on the applicant's village, in the course of which the applicant's house was burned down.

The Government, which have been informed that the application was considered for inclusion in the agenda of the Commission at its present session, have submitted no observations on the admissibility or merits of the application.

It is the normal practice of the Commission, where a case has been communicated to the respondent Government, not to declare the application inadmissible for failure to exhaust domestic remedies, unless this matter has been raised by the Government in their observations. The Commission considers that the same principle should be applied where, as in the present case, the respondent Government have not submitted any observations at all.

It follows that the application cannot be rejected on the ground that the domestic remedies have not been exhausted.

Moreover, the Commission is of the opinion that the application raises important questions of fact and law which cannot be resolved at the stage of the admissibility but require an examination on the merits. The application cannot therefore be considered manifestly ill-founded within the meaning of Article 27 para. 2 of the Convention and no other ground for inadmissibility has been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)

EUROPEAN COURT OF HUMAN RIGHTS

CASE OF SELÇUK AND ASKER v. TURKEY

(12/1997/796/998-999)

JUDGMENT

STRASBOURG

24 April 1998

SUMMARY[fn1]

Judgment delivered by a Chamber

Turkey – alleged burning of houses by security forces in south-east Turkey

I. ESTABLISHMENT OF THE FACTS

Court, in line with constant case-law, accepts facts as found by Commission – established that security forces responsible for burning of applicants' property.

II. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-validity of applications

No cause to doubt applications to Commission were valid and genuine.

Conclusion: objection dismissed (unanimous).

B. Non-exhaustion of domestic remedies

Existence of effective and accessible domestic remedies for complaints such as applicants' not demonstrated with sufficient certainty – although second applicant presented petition of complaint to District Governor, no investigation opened until communication of applications by Commission to Government – special circumstances existed which dispensed applicants from obligation to exhaust domestic remedies.

Conclusion: objection dismissed (eight votes to one).

III. MERITS

A. Article 3 of the Convention

In view of manner in which applicants' homes destroyed and their personal circumstances, they must have been caused suffering of sufficient severity for acts of security forces to be categorised as inhuman treatment.

Conclusion: violation (eight votes to one).

B. Articles 2 and 5 § 1 of the Convention

Claims not pursued.

Conclusion: not necessary to examine (unanimous).

C. Article 8 of the Convention and Article 1 of Protocol No. 1

No doubt that burning of property constituted grave and unjustified interference with rights under these provisions.

Conclusion: violation (eight votes to one).

D. Articles 6 § 1 and 13 of the Convention

Given nature of complaint, and in line with case-law, not necessary to determine whether there has been violation of Article 6 § 1.

Respondent State has not carried out thorough and effective investigation into applicants' allegations, as required by Article 13.

Conclusion: not necessary to examine complaint under Article 6 § 1 (unanimous); violation of Article 13 (eight votes to one).

E. Articles 14 and 18 of the Convention

Acceptance of Commission's findings that allegations unsubstantiated.

Conclusion: no violation (unanimous).

IV. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary damage: claim allowed in part.

Non-pecuniary damage: claim allowed in part.

B. Costs and expenses

Claim allowed in full.

Conclusion: respondent State to pay specified sums to applicants (eight votes to one).

COURT'S CASE-LAW REFERRED TO

7.7.1989, Soering v. the United Kingdom; 16.9.1996, Akdivar and Others v. Turkey; 18.12.1996, Aksoy v. Turkey; 26.11.1997, Sakik and Others v. Turkey; 28.11.1997, Mentes and Others v. Turkey; 1.4.1998 Akdivar and Others v. Turkey (Article 50)

In the case of Selçuk and Asker v. Turkey[fn2] ,

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[fn3] , as a Chamber composed of the following judges:

Mr R. Bernhardt, *President*,
Mr F. Gölcüklü,
Mr A.N.Loizou,
Sir John Freeland,
Mr G. Mifsud Bonnici,
Mr J. Makarczyk,
Mr P. Jambrek,
Mr U. Lohmus,
Mr E. Levits,

and also of Mr H. Petzold, *Registrar*, and Mr P.J. Mahoney, *Deputy Registrar*,

Having deliberated in private on 2 February and 28 March 1998,

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 22 January 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in two applications (nos. 23184/94 and 23185/94) against the Republic of Turkey lodged with the Commission under Article 25 on 15 December 1993 by two Turkish citizens, Mrs Keje Selçuk and Mr Ismet Asker.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (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, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the President of the Court (Rule 21 § 4 (b)). On 21 February 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Macdonald, Mr A.N. Loizou, Mr G. Mifsud Bonnici, Mr J. Makarczyk, Mr P. Jambrek, Mr U. Lohmus and Mr E. Levits (Article 43 *in fine* of the Convention and Rule 21 § 5).

3. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government of Turkey ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence and to the Government's requests for a

postponement of the hearing and the Government's and applicants' requests for extensions of the time-limit for the filing of memorials, the Registrar received the Government's and the applicants' memorials on 28 October 1997.

4. On 13 November 1997 the Commission produced certain documents from the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. Subsequently Mr R Bernhardt replaced as President of the Chamber Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 § 4 (b) and 6).

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 26 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. Özmen, *Co-Agent*,
Mr A. Kaya,
Mr K. Alatas,
Miss A. Emüler,
Mr F. Polat,
Miss M. Anayaroglu, *Advisers*;

(b) *for the Commission*
Mr N. Bratza, *Delegate;*

(c) *for the applicants*
Ms F. Hampson, Barrister-at-Law,
Ms A. Reidy, Barrister-at-Law, *Counsel*,
Mr O. Baydemir, lawyer,
Mr K. Yildiz, Kurdish Human Rights Project, *Advisers*.

The Court heard addresses by Mr Bratza, Ms Reidy and Mr Özmen.

7. Subsequently Sir John Freeland, substitute judge, replaced as a full member of the Chamber Mr Macdonald, who was unable to take part in the further consideration of the case (Rule 22 § 1).

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

A. Introduction

8. The first applicant, Mrs Keje Selçuk, was born in 1939. She is a widow and the mother of five children. The second applicant, Mr Ismet Asker, was born in 1933. He is married to Mrs Fatma Asker and has seven children.

Until June 1993 both applicants, who are Turkish citizens of Kurdish origin, lived in the village of Islamköy, but they have since moved to Diyarbakir.

9. 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 so far, according to the most recent figures provided by the Government,

claimed the lives of 4,036 civilians and 3,884 members of the security forces.

At the time of the Court's consideration of the case, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule.

10. Islamköy, a scattered community of about 150 households, is situated in a mountainous region in the Kulp district, in the province of Diyarbakir in south-east Turkey, within the state of emergency region and near to a road that was used by members of the PKK.

The facts in this case are disputed.

B. Applicants' version of the facts

11. The applicants complain that soldiers from Kulp, under the command of Recep Cömert, the Commanding Officer of the Kulp gendarmerie ("CO"), deliberately burned their homes in Islamköy on 16 June 1993 and, ten days later, returned to burn the mill partly owned by Mrs Selçuk.

12. They state that, some months earlier, the villagers had been warned by security forces that certain of their houses would be destroyed, on the grounds that they were allegedly used by the PKK, if the villagers did not leave Islamköy, although they subsequently came to believe that this threat had been retracted.

13. Nonetheless, according to the applicants, on the morning of 16 June 1993 a large number of soldiers came to Islamköy, under the command of CO Cömert, whom they knew as "Recep" because he had come to the village on a number of previous occasions.

The soldiers went first to the house of Mr and Mrs Asker, which they forcibly entered and searched, telling the Askers to remove their possessions. However, while the latter were inside, trying to save their furniture and belongings, they realised that the soldiers had set fire to the house. Mr Asker told the Commission's Delegates (see paragraph 26 below) that, had he and his wife not been able to escape through a door to the barn at the back of the house, they would have been asphyxiated. Villagers who attempted to extinguish the fire were prevented from doing so by the soldiers. The house, barn and all of Mr Asker's property, including his food stocks and poplar trees, were destroyed.

14. The security forces then went to Mrs Selçuk's house. They ejected her and some neighbours' children who were staying with her, poured petrol on the house and set fire to it. Villagers were again prevented from assisting and CO Cömert pushed Mrs Selçuk, leading her to understand that she should leave the village. She stayed that night in a neighbour's house in Islamköy and the following day went to live with her daughter in Diyarbakir.

15. Approximately ten days later, on or about 25 June 1993, the soldiers returned to the village and burned down the mill co-owned by Mrs Selçuk and three others. Three other houses were set on fire in the village, two of them destroyed. Mrs Selçuk's brother-in-law, Mr Nesih Selçuk, telephoned her in Diyarbakir with the news.

16. Mr and Mrs Asker left Islamköy on or about 25 June 1993; they saw the smoke from the fires as they were leaving. They went initially to Kulp, where Mr Asker lodged a petition with the District Governor, setting out the losses caused by the security forces and naming "Recep" as commanding officer. The District Governor apparently accepted the petition and referred it to the police, but Mr Asker never received a response to it.

The headman *(muhtar)* of Islamköy at the time, Mr Sait Memis, also allegedly informed the District Governor approximately ten days after the incident that the houses had been burnt,

although he attributed the burning to the PKK.

C. Government's version of the facts

17. In his evidence to the Commission's Delegates (see paragraph 26 below), CO Cömert explained that he had been stationed as commander of the Central Kulp gendarmerie between 15 July 1991 and 3 August 1993. He had visited Islamköy on three occasions and knew Mr Asker and most of the other inhabitants. He did not, however, visit the village during the month of June 1993 and he had received no reports of any houses being burnt there at that time. When asked why he thought the applicants had named him, he told the Delegates that untrue allegations of this type had been made against him in the past in newspapers and a book.

18. The Government contended that the applicants' complaints were concocted by others and that they were acting under the influence of the PKK and/or with a view to obtaining money.

They submitted that the applicants' homes and possessions were destroyed by the PKK, which purported to replace the State in the region, as a punishment and a warning, since the villagers generally had good relations with the security forces. The two applicants in particular were law-abiding citizens with no history of anti-governmental activity. At the time of the events in question, Mr Asker's son was doing his military service, an activity which the PKK urged the people in the region to avoid, and Mrs Selçuk had one son in the army and another in the civil service.

19. The Government questioned whether Mrs Selçuk's mill was burned at all, but if it was, denied that this was done by security forces.

20. They further disputed that Mr Asker lodged any petition with the Kulp District Governor, since he could not produce any acknowledgement of receipt and no such petition was registered in the records.

D. Proceedings before the domestic authorities

21. Following the communication of the applications by the Commission to the Government on 15 April 1994, it appears that the Ministry of Justice (International Law and External Relations General Directorate) contacted the Chief Public Prosecutors' office in Diyarbakir, which in turn wrote to the Public Prosecutor's office in Kulp on 4 May 1994, enquiring whether the applicants had made any complaint and requesting that an investigation be initiated if they had not.

22. Since no petitions from the applicants could be traced, the Kulp Prosecutor opened investigation file 1994/57. On 11 May 1994, he requested the Kulp gendarmerie to ascertain the applicants' whereabouts and to invite them to come and see him as soon as possible and on 18 May 1994 he wrote to the District Governor asking whether any petition had been filed by Mr Asker. By letter dated 26 May 1994, Gendarme Captain Ali Ergulmez replied, on behalf of the District Governor, that an examination of the records disclosed that no complaint had been filed by Mr Asker.

23. Mr Asker made a statement to the Prosecutor on 20 June 1994 and Mrs Selçuk made one on 21 June 1994.

24. On 18 August 1994, the Prosecutor sent a request to the District Gendarmerie Commander for information to be given promptly as to whether an operation led by CO Cömert had been carried out at Islamköy on 16 June 1993 and whether the applicants' houses had been burned by those units.

No reply to this enquiry was included with the documents from the investigation file provided to

the Commission. Similarly, it appeared from that file that no statements were taken from the alleged perpetrators of the burnings or from other villagers who might have witnessed events.

25. On 30 November 1994, the Prosecutor, Mr Erdal Yatmis, issued a decision of non-jurisdiction, stating that the matter concerned allegations of damage to property occurring in the winter months of 1993 during an intensive clash between the security forces and the PKK, and that since the security forces were involved in the course of their administrative duties, jurisdiction lay with the Administrative Council (see paragraph 44 below). Pursuant to this decision, the file was transferred to the Kulp District Governor on 30 November 1995.

E. Commission's findings of fact

26. The Commission conducted an investigation with the assistance of the parties and accepted documentary evidence, including written witness statements and copies of the duty log of Kulp gendarmerie for the periods in question. Three Delegates of the Commission heard the oral evidence of ten witnesses, including the applicants, Mr Asker's wife and Mrs Selçuk's brother-in-law, and five other former inhabitants of Islamköy or its neighbouring hamlets (Necmettin Korkmaz, Tevfik Karaaslan, Sait Memis, Celal Seker and Sah Simsek), and Sergeant Cömert, in Ankara in February 1996. Four of the witnesses whose presence had been requested failed to attend the hearings, including the public prosecutors from Lice and Kulp (see paragraph 25 above). In addition, despite repeated requests from the Commission's secretariat and Delegates, the Government failed to provide the complete set of records relating to the activities of the security forces in the Kulp district in June 1993.

In relation to the oral evidence, the Commission was aware of the difficulties attached to assessing evidence obtained orally through interpreters (in some cases via Kurdish and Turkish into English). It therefore paid careful attention to the meaning and significance which should be attributed to the statements of witnesses appearing before its Delegates. In respect of both written and oral evidence, the Commission was aware that the cultural context of the applicants and the witnesses made it inevitable that dates and other details (in particular, numerical details) lacked precision and did not consider that this by itself impinged upon the credibility of the testimony.

The Commission's findings of fact can be summarised as follows.

27. Early in the morning of 16 June 1993, a large force of gendarmes arrived in the village of Islamköy. A number of them, under the apparent command of CO Cömert, went to Mr Asker's house. The house was set on fire, causing the destruction of the property and most of its contents. Mr and Mrs Asker ran inside the house in an attempt to save their possessions: this occurred either while the gendarmes were setting fire to the house by pouring petrol on to it, or just before; it was not established that the house was set on fire while the Askers were inside. Villagers came to see what was happening and were prevented from trying to put out the fire.

28. A number of gendarmes, including CO Cömert, then proceeded to Mrs Selçuk's house. Despite her protests, petrol was poured on her house, which was set on fire, by, or under the orders of, CO Cömert. Villagers, including two of those who gave evidence to the Commission's Delegates, were prevented from putting out the fire. Mrs Selçuk's house and its contents were completely destroyed.

29. Mr and Mrs Asker left the village briefly and returned about ten days later. Mrs Selçuk spent the night or several nights in the village and then left to stay in Diyarbakir with her daughter.

30. On or about 26 June 1993, a force of gendarmes arrived in Islamköy; they were seen on the road nearby and in the village itself. The mill belonging to Mrs Selçuk and others, which stood on a creek in Islamköy, was set on fire and destroyed. CO Cömert was seen with the gendarmes

at the mill when this occurred.

31. Mr Asker complained about the destruction of his home to the District Governor in Kulp, presenting a petition. No steps were taken in response to this.

32. Following these events, Mrs Selçuk and Mr and Mrs Asker moved to live permanently in Diyarbakir. Islamköy was abandoned completely by the end of 1994 due to increased PKK activity.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Administrative liability

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

> "All acts or decisions of the administration are subject to judicial review ...
>
> The administration shall be liable to indemnify any damage caused by its own acts and measures."

34. The above 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 responsibility is of an absolute, objective nature, based on a concept of collective liability and referred to as 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.

35. The principle of administrative liability is reflected in the additional Article 1 of Law no. 2935 of 25 October 1983 on the State of Emergency, which provides:

> "... actions for compensation in relation to the exercise of the powers conferred by this Law are to be brought against the administration before the administrative courts."

B. Criminal responsibility

36. 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 oblige an individual through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to make an unlawful search of an individual's home (Articles 193 and 194),

- to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382),

- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or

- to damage another's property intentionally (Articles 526 et seq.).

37. 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.

38. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (sections 93 and 95 of Law no. 353 on the Constitution and Procedure of Military Courts).

39. If the alleged author of a crime is an agent of the State, 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.

C. Provisions on compensation

40. 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.

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

42. Damage caused by terrorist violence may be compensated out of the Aid and Social Solidarity Fund.

D. Provisions on emergency measures

43. Extensive powers have been granted to the Regional Governor of the State of Emergency by decrees enacted under Law no. 2935 on the State of Emergency (25 October 1983), especially Decree no. 285, as amended by Decrees nos. 424 and 425, and Decree no. 430.

44. Decree no. 285 modifies the application of Law no. 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. According to the Commission, 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.

45. Article 8 of Decree no. 430 of 16 December 1990 provides as follows:

> "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."

According to the applicants, this Article grants impunity to the Governors and reinforces the powers of the Regional Governor to order the permanent or temporary evacuation of villages, to impose residence restrictions and to enforce the transfer of people to other areas. Damage caused in the context of the fight against terrorism would be "with justification" and therefore immune from suit.

PROCEEDINGS BEFORE THE COMMISSION

46. In their applications (nos. 23184/94 and 23185/94) to the Commission introduced on 15 December 1993, the applicants, relying on Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1, complained that their homes had been burnt by State security forces on or about 16 June 1993 and that they had therefore been forced to leave their village. The first applicant also complained that a mill partly owned by her was destroyed by security forces on or about 26 June 1993. The second applicant claimed in addition that his life had been endangered during the attack on his house, in violation of Article 2 of the Convention.

47. The Commission declared Mrs Selçuk's application admissible on 3 April 1995 and that of Mr Asker admissible on 28 November 1994. It joined the two applications on 8 March 1996. In its report of 28 November 1996 (Article 31), it expressed the following opinion:

(a) that there had been a violation of Article 8 of the Convention (unanimously);

(b) that there had been a violation of Article 1 of Protocol No. 1 (unanimously);

(c) that there had been a violation of Article 3 of the Convention (by twenty-seven votes to one);

(d) that there had been no violation of Article 2 in respect of the second applicant (unanimously);

(e) that there had been no violation of Article 5 § 1 (unanimously);

(f) that there had been a violation of Article 6 § 1 (by twenty-six votes to two);

(g) that there had been a violation of Article 13 (by twenty-six votes to two);

(h) that there had been no violation of Article 14 (unanimously);

(i) that there had been no violation of Article 18 (unanimously).

The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[fn4] .

FINAL SUBMISSIONS TO THE COURT

48. The Government, in their memorial, and at the oral hearing, asked the Court to find that the applications should have been declared inadmissible on the grounds that they were not validly brought and that domestic remedies had not been exhausted, or, in the alternative, that there had been no violation of the Convention in the present case since the evidence heard by the delegation of the Commission had not substantiated the applicants' allegations.

49. The applicants, for their part, asked the Court to find violations of Articles 3, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1, and to award them just satisfaction under Article 50 of the Convention.

AS TO THE LAW

I. ESTABLISHMENT OF THE FACTS

50. The Government challenged the Commission's findings of fact, particularly its assessment of the evidence heard by its Delegates in Ankara (see paragraph 26 above). In their submission, since Mr Asker and his wife and Mrs Selçuk and her brother-in-law not only stood to profit from any compensation awarded by the Court but also feared reprisals from the PKK, their testimony should be treated with great scepticism. They pointed out that the only witnesses who had no

material interest in the case were Mr Korkmaz, Mr Karaaslan, Mr Memis, Mr Seker and Mr Simsek. All of these, except Mr Korkmaz, whose testimony was full of contradictions and appeared unreliable, told the Delegates that the applicants' houses had been destroyed by the PKK and not by the State as claimed by the applicants. The Government further pointed out that the duty log of the Kulp gendarmerie for the dates in question, which they had given to the Commission, did not indicate any visits by gendarmes to the village.

51. The applicants submitted that the Government had been highly selective in the manner in which they had identified inconsistencies in the evidence given by the applicants and their witnesses. They reminded the Court that none of the four villagers who gave evidence that the PKK had burned down the houses had actually been in the village at the time of the events in question. Moreover, their testimony was inconsistent in other respects with that of the Government's fifth witness, Sergeant Cömert.

52. At the hearing, the Delegate emphasised that the Commission had addressed in its report all the evidential issues raised by the Government and, after a careful and detailed assessment, had come to the conclusion that the various facts found by it had been proved beyond reasonable doubt

53. The Court reiterates that under its case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area. Such exceptional circumstances may arise in particular if the Court, following a careful examination of the evidence on which the Commission has based its conclusions, finds that the facts have not been proved beyond reasonable doubt (see the Mentes and Others v. Turkey judgment of 28 November 1997, *Reports of Judgments and Decisions* 1997-..., p. ..., § 66).

54. The Court has examined the findings in the Commission's report and the evidence on which the latter based its conclusions, principally the transcripts of the hearings in Ankara (see paragraph 26 above), with a view to determining whether any such exceptional circumstances arise in the present case.

55. In this connection, it considers it to be of particular significance that the Commission's Delegates had the opportunity to see and hear the applicants and other witnesses give their testimony and answer questions put by the Delegates themselves and by lawyers for the Government and the applicants. It notes that the Commission found the applicants' demeanour and comportment to be convincing and sincere (see the Report of the Commission, § 149).

The Court is, moreover, satisfied that the Commission, in assessing the evidence, took due account of the difficulties inherent in its task, such as the barriers created by differences in language and culture and the absence of possibly important testimony and evidence (see paragraph 26 above).

56. The Court has had regard to the Government's allegations of inconsistencies and contradictions in the testimonies of the applicants and their witnesses. It notes that the Commission in its report addressed in turn each of the Government's concerns (see paragraphs 150-166 of the Commission's report). Having itself examined the evidence in the case, it finds the Commission's assessment and conclusions to be reasonable and credible, particularly bearing in mind that, as mentioned above, the Delegates had the advantage of hearing the oral testimony first-hand.

57. In the light of all the foregoing, the Court accepts the facts established by the Commission (see paragraphs 27-32 above), which it finds to have been proved beyond reasonable doubt.

II. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Non-validity of the applications

58. The Government contended that the applications to the Commission had not been brought freely and genuinely by Mrs Selçuk and Mr Asker, but instead by others for political motives. In support, they referred to the facts, *inter alia*, that Mrs Selçuk had told the Commission's Delegates that she did not go to the Human Rights Association in Diyarbakir ("HRA") to file a complaint, but only to get help, and that she did not recognise the name of the lawyer there who had supposedly taken her statement. Similar problems arose in relation to Mr Asker's statement for the HRA.

59. The applicants' representative observed that both of her clients had signed valid powers of attorney and had fully participated in the Strasbourg proceedings, including appearing before the Commission's Delegates to be cross-examined on their complaints.

60. The Commission found that the applications were valid and genuine, notwithstanding the discrepancies and apparent inaccuracies in the written petitions submitted by the HRA, in view of the fact that the applicants maintained the substance of their complaints before the Delegates and showed no unwillingness or reluctance in participating in the proceedings before it.

61. The Court notes the above finding of the Commission and observes, furthermore, that both applicants signed forms indicating that they wished to take part in the proceedings before the Court and appointing the lawyers who would represent them. In these circumstances, it finds no cause to doubt that the applications to the Commission were valid and genuine expressions of the right of individual petition under Article 25 of the Convention. It therefore dismisses this preliminary objection.

B. Non-exhaustion of domestic remedies

62. The Government contended that, despite Mr Asker's claims, he could not have made any petition to the District Governor because, had he done so, his petition would have been recorded and he would have been provided with a registry number and an acknowledgement of receipt, neither of which he had been able to produce. In truth, neither of the applicants had made any attempt to raise their Convention grievances before a domestic authority, despite the fact that both civil and criminal law remedies were available.

There were numerous decided cases to the effect that the State would be held liable for compensation where its agents had destroyed property. The Government cited by way of example the case of Nizamettin Agirtmis, who was awarded compensation by the Van Administrative Court following the burning of his abandoned house by soldiers (decision no. 1996/771 on file no. 1993/427, 27 December 1996).

It followed that the applicants had not done all that could be expected of them to exhaust domestic remedies as required by Article 26 of the Convention.

63. The applicants contended that both Mr Asker and Mr Memis had informed the District Governor approximately ten days after the houses had been burned down (see paragraph 15 above). Since Mr Asker's petition received no response, Mrs Selçuk did not think it worthwhile to submit a petition herself. Furthermore, they maintained that domestic remedies were generally ineffective in relation to complaints such as their own.

64. The Commission, in its decisions on admissibility (see paragraph 47 above) noted that the Government had not submitted any observations as to the admissibility of Mr Asker's application. According to its usual practice in these circumstances, the application could not therefore be declared inadmissible for non-exhaustion of domestic remedies.

In the case of Mrs Selçuk, the Commission determined that there were no effective remedies which she should be required to exhaust, on the basis that, while the Government had outlined a general scheme of remedies, they had produced no concrete examples of their working in cases comparable to those of the applicants.

65. The Court recalls that the rule of exhaustion of domestic remedies referred to in Article 26 of the Convention obliges those seeking to bring their case against the State before an international judicial or arbitral organ to use first the remedies provided by the national legal system. However, there is no obligation under Article 26 to have recourse to remedies which are inadequate or ineffective. In addition, according to the "generally recognised rules of international law", there may be special circumstances which absolve the applicant from the obligation to exhaust the domestic remedies at his disposal; one such reason being the failure of the national authorities to undertake an investigation or offer assistance in response to serious allegations of misconduct or infliction of harm by State agents (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210-1211 §§ 65-69, and the Mentes and Others judgment cited in paragraph 53 above, pp. ..., § 57).

66. The application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, the Court has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism. The rule is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each case. This means, amongst other things, that the Court must take realistic account of the general legal and political context in which the remedies operate, as well as the personal circumstances of the applicant or applicants (see the above-mentioned Mentes and Others judgment, p. .., § 58).

67. In this case, the Court is therefore required to have regard to the situation which existed in south-east Turkey at the time of the events complained of by the applicants characterised by violent confrontations between the security forces and members of the PKK (*ibid.*). In such a situation, as the Court has previously recognised, there may be obstacles to the proper functioning of the system of the administration of justice (see the above-mentioned Akdivar and Others judgment, pp. 1211–1212, § 70).

68. The Court recalls its observation in the above-mentioned Mentes and Others judgment (p. ..., § 59) that, despite the extent of the problem of village destruction, there appeared to be no example of compensation being awarded in respect of allegations that property had purposely been destroyed by members of the security forces or of prosecutions having been brought against them in respect of such allegations, and that there seemed to be a general reluctance on the part of the authorities to admit that this type of practice by members of the security forces had occurred.

In their pleadings in the present case, the Government have referred to the case of Nizamettin Agirtmis (see paragraph 62 above). In this connection, the Court observes that it has been provided with only a brief summary of the case, from which it appears that Mr Agirtmis received compensation in respect of the burning of his house by security forces after the house had been abandoned and the village evacuated. These facts would appear to distinguish the case from the instant complaints and, moreover, from the information available to the Court, it is not clear

whether Mr Agirtmis's case concerned an intentional act on the part of the security forces, such as that alleged by the applicants, or one of negligence.

In the light of the foregoing, the Court does not consider that this single case demonstrates with sufficient certainty the existence of effective and accessible domestic remedies for complaints such as the applicants' (see, *mutatis mutandis*, the Sakik and Others v. Turkey judgment of 26 November 1997, *Reports* 1997-..., p. ..., § 53).

69. Turning to the facts of the instant case which the Court finds to have been established (see paragraph 57 above), it recalls that Mr Asker presented a petition complaining about the destruction of his home to the District Governor in Kulp (see paragraph 31 above). Despite this, no investigation file was opened by the State authorities until May 1994, after the Commission had communicated the applications to the Government (see paragraphs 21-22 above). Furthermore, it would appear from the information available to the Court that the ensuing investigation has been extremely limited (see paragraphs 22-24) and has not yet been concluded.

70. The Court considers that it is understandable if the applicants formed the belief that, the petition to the District Governor having elicited no response, it was pointless for them to attempt to secure satisfaction through national legal channels (see, *mutatis mutandis*, the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2277, § 56). Their feelings of upheaval and insecurity following the destruction of their homes are also of some relevance in this connection (see the above-mentioned Mentes and Others judgment, p. ..., § 59).

71. The Court therefore concludes that there existed special circumstances which dispensed the applicants from the obligation to exhaust domestic remedies (see the above-mentioned Akdivar and Others judgment, pp. 1213-1214, §§ 76-77). It follows that the Government's preliminary objection on non-exhaustion must be dismissed.

As with the above-mentioned Akdivar judgment, this ruling is confined to the particular circumstances of the present case and is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from the obligation under Article 26 to have normal recourse to the system of remedies which are available and functioning.

III. MERITS

A. Alleged violation of Article 3 of the Convention

72. The applicants, referring to the circumstances of the destruction of their homes and their eviction from their village, maintained that there had been a breach of Article 3 of the Convention, which reads:

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

73. The Government denied that there had been any security operation in the village on the dates in question and submitted that the houses had been burned by PKK terrorists (see paragraphs 18 and 19 above). There had therefore been no violation of Article 3 imputable to the State.

74. The Commission found the burning of the applicants' homes in their presence to be acts of violence and deliberate destruction in utter disregard for their safety and welfare, depriving them of most of their personal belongings and leaving them without shelter and assistance. It noted in particular Mr Asker's age and infirmity and the traumatic circumstances surrounding the burning of his house, which put him and his wife in danger from smoke and flames as they tried to save their belongings, and the fact that Mrs Selçuk had been induced to plead with CO Cömert who

had insulted and pushed her. It accordingly found that the applicants had been subjected to inhuman and degrading treatment.

75. Article 3, as the Court has observed on many occasions, enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols Nos. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation (see *inter alia* the above-mentioned Aksoy judgment, p. 2278, § 62).

76. The Court recalls that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim (see, for example, the Soering v. the United Kingdom judgment of 7 July 1989, Series A no. 161, p. 39, § 100 and p. 43, §§ 108-109).

77. The Court refers to the facts which it finds to be established in the present case (see paragraphs 27, 28, 30 and 57 above). It recalls that Mrs Selçuk and Mr Asker were aged respectively 54 and 60 at the time and had lived in the village of Islamköy all their lives (see paragraph 8 above). Their homes and most of their property were destroyed by the security forces, depriving the applicants of their livelihoods and forcing them to leave their village. It would appear that the exercise was premeditated and carried out contemptuously and without respect for the feelings of the applicants. They were taken unprepared; they had to stand by and watch the burning of their homes; inadequate precautions were taken to secure the safety of Mr and Mrs Asker; Mrs Selçuk's protests were ignored, and no assistance was provided to them afterwards.

78. Bearing in mind in particular the manner in which the applicants' homes were destroyed (cf. the above-mentioned Akdivar and Others judgment, p. ..., § 91) and their personal circumstances, it is clear that they must have been caused suffering of sufficient severity for the acts of the security forces to be categorised as inhuman treatment within the meaning of Article 3.

79. The Court recalls that the Commission made no finding as regards the underlying motive for the destruction of the applicants' property. However, even if it were the case that the acts in question were carried out without any intention of punishing the applicants, but instead to prevent their homes being used by terrorists or as a discouragement to others, this would not provide a justification for the ill-treatment.

80. In conclusion, the Court finds that the particular circumstances of this case disclose a violation of Article 3.

B. Alleged violations of Articles 2 and 5 § 1 of the Convention

81. Before the Court, the applicants did not pursue their claims under Articles 2 and 5 § 1 of the Convention.

82. In these circumstances, the Court does not find it necessary to consider these complaints.

C. Alleged violations of Article 8 of the Convention and Article 1 of Protocol No. 1.

83. The applicants maintained that the destruction of their homes and of Mrs Selçuk's mill by

the security forces, and their expulsion from the village, constituted violations both of Article 8 of the Convention, which reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others",

and of Article 1 of Protocol No. 1 to the Convention, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

84. The Government denied that there had been any violation of these provisions, on the same grounds as those advanced in connection with Article 3 (see paragraph 73 above).

85. The Commission found that there had been a breach of these Articles.

86. The Court recalls that it finds it established that security forces deliberately destroyed the applicants' homes and household property, and the mill partly owned by Mrs Selçuk, obliging them to leave Islamköy (see paragraph 77 above). There can be no doubt that these acts, in addition to giving rise to violations of Article 3, constituted particularly grave and unjustified interferences with the applicants' rights to respect for their private and family lives and homes, and to the peaceful enjoyment of their possessions.

87. It follows that the Court finds violations of Article 8 of the Convention and Article 1 of Protocol No. 1.

D. Alleged violations of Articles 6 § 1 and 13 of the Convention

88. The applicants complained that they had been denied any effective remedy by which to challenge the destruction of their homes and possessions by the security forces and to seek compensation. This, they argued, gave rise to violations both of their rights to access to a court under Article 6 § 1 of the Convention which, insofar as is relevant, provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law..."

and their rights to an effective remedy under Article 13 of the Convention, which reads:

> "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."

1. Article 6 § 1 of the Convention

89. The Government accepted that the criminal investigation into the applicants' complaints had met with some setbacks, which might, however, have been avoided had the applicants contacted the public prosecutor immediately, when the evidence was clear and free of any doubt. Nonetheless, they maintained that, had the applicants commenced civil proceedings, they would have enjoyed effective access to a court; in this connection they referred once more to the

Agirtmis case (see paragraph 62 above).

90. The applicants contended that the failure of the authorities to conduct any thorough investigation into the burnings in Islamköy operated to deny them effective access to a court, since without such an investigation there was no chance of success in civil proceedings.

91. The Commission considered that the applicants did not have effective access to a tribunal that could have determined their civil rights, since it was unrealistic to expect villagers to pursue theoretical civil or administrative remedies in respect of allegations against security forces in the emergency region in the absence of any positive findings of fact by the State investigatory mechanism.

92. The Court notes that, for the reasons set out above (paragraph 70), the applicants did not attempt to make any application to the national courts. It is therefore impossible to determine whether the Turkish courts would have been able to adjudicate on the applicants' claims had they initiated proceedings.

In any event, the Court observes that the applicants complained essentially of the lack of a proper investigation into their allegation that the security forces had purposely destroyed their houses and possessions. It therefore finds it appropriate to examine this complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of alleged violations of the Convention (see, *mutatis mutandis,* the above-mentioned Mentes and Others judgment, pp. ..., §§ 86-88). It therefore does not find it necessary to determine whether there has been a violation of Article 6 § 1.

2. Article 13 of the Convention

93. In their pleadings to the Court, the Government addressed the complaints under Articles 6 § 1 and 13 together: their arguments are summarised in paragraph 89 above.

94. The applicants submitted that the obligation of the State under Article 13 to grant an effective remedy, where the acts in violation of the Convention are of a serious criminal nature, must entail the provision of an independent and effective investigative mechanism which could lead to the prosecution and punishment of those responsible. This had clearly not been provided in their case: although they had been able to identify Sergeant Cömert as the perpetrator, the latter told the Commission's Delegates that he had not hitherto been asked any questions about the events in Islamköy.

95. The Commission reported that, despite repeated requests to see the investigation file, only a few documents had been provided to it, from which it appeared that the investigation commenced in May 1994 (see paragraphs 21-25 above) had been limited and inconclusive. Enquiries had been confined to taking statements from the applicants and asking the gendarmerie if an operation had taken place in the village on 16 June 1993, and no steps had been taken to question the alleged perpetrators of the burnings or other villagers who might have witnessed events. The investigation had concluded on 30 November 1994 with a decision of lack of jurisdiction, the text of which the Commission found to be "remarkable" since its description of the case as concerning allegations of damage to property occurring in the winter months of 1993 during a clash between security forces and PKK terrorists bore little relation to the applicants' complaints. The Commission had not been informed of any outcome of the proceedings before the Administrative Council following this transfer of jurisdiction.

96. The Court considers that the nature and gravity of the violations complained of in the instant case under Articles 3 and 8 of the Convention and Article 1 of the Protocol No. 1 have implications for Article 13. It recalls that where an individual has an arguable claim that his or

her home and possessions have been purposely destroyed by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy available in the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure (see the above-mentioned Mentes and Others judgment, p. ..., § 89).

97. As already stated, the Court accepts that Mr Asker presented a petition of complaint to the District Governor shortly after the destruction of his house (see paragraphs 31 and 57 above). However, it was not until the Commission's communication of the applications to the respondent Government that the Kulp public prosecutor instigated a criminal investigation at the request of the Ministry of Justice (see paragraphs 21-22 above). The Court finds it striking that CO Cömert was not interviewed during the course of this investigation, despite the fact that the applicants had clearly named him as the officer in charge of the impugned operation in Islamköy. Furthermore, apart from the statements taken from the applicants, it does not appear that any attempt was made to establish the truth through questioning other villagers who might have witnessed the events under consideration. In November 1994 jurisdiction over the investigation was transferred to the Kulp Administrative Council (see paragraph 25 above). Over three years later, the Court has not been provided with any evidence to suggest that the latter body has taken any action in connection with it.

98. In these circumstances, it cannot be said that the respondent State has carried out a thorough and effective investigation as required by Article 13.

The Court therefore finds this provision to have been violated.

E. Alleged violations of Article 14 of the Convention in conjunction with Articles 6, 8 and 13 of the Convention and 1 of Protocol No. 1 and of Article 18 of the Convention

99. The applicants maintained that, because of their Kurdish origin, they had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 6, 8 and 13 of the Convention and 1 of Protocol No. 1. Article 14 reads:

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

Furthermore, in the light of the evidence adduced by the applicants of a systematic, cruel and ruthless policy of population displacement, they requested the Court also to find a breach of Article 18 of the Convention, which provides:

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

100. The Government did not address these allegations beyond denying the factual basis of the substantive complaints.

101. The Commission found the applicants' above allegations unsubstantiated.

102. For its part, the Court, on the basis of the facts as established by the Commission (see paragraphs 27-32), finds no violation of these provisions.

IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION

103. The applicants claimed just satisfaction pursuant to Article 50 of the Convention, which

provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

104. The applicants claimed pecuniary damage in respect of the loss of their houses, cultivated land, household property, livestock and, in the case of Mrs Selçuk, her mill. They also claimed that an award should be made in respect of the cost of alternative accommodation.

105. The Government argued that the applicants' allegations that their property had been destroyed by security forces had not been proved, and that there was therefore no requirement to award any compensation.

In the alternative, in the event that the Court did find it appropriate to award some compensation, they submitted that the assessment thereof should not be such as to cause any unjust enrichment. The amounts claimed as pecuniary damage were excessive and had not been substantiated, as they would have to be before a Turkish court. The Court should take into account the economic conditions in Turkey, where the minimum monthly wage amounted to 700 French francs ("FRF") and the net maximum monthly allowance of a senior judge amounted to FRF 7250.

106. The Court recalls its findings that the applicants' homes and household property, and Mrs Selçuk's mill, were destroyed by security forces (see paragraph 57 above). In view of this finding it is undoubtedly necessary to award compensation for pecuniary damage. However, since the applicants have not substantiated their claims as to the quantity and value of their lost property with any documentary or other evidence, the Government have not provided any detailed comments, and the Commission has made no findings of fact in this respect, the Court's assessment of the amounts to be awarded must, by necessity, be speculative and based on principles of equity.

1. Houses and other buildings

107. Mrs Selçuk claimed damages in respect of a two storey cement and stone house covering 250 square metres, which she valued at 1,250,000,000 Turkish liras ("TRL"), a one storey, 300 square metres, cement and stone stable, valued at TRL 1,500,000,000 and the three storey, 80 square metres, water mill, valued at TRL 580,000,000, which she co-owned with three others.

Mr Asker claimed in respect of a two storey, 300 square metres, cement and stone house, valued at TRL 1,500,000,000 and a one storey, 400 square metres, cement and stone stable, valued at TRL 2,000,000,000.

108. As it did in its Akdivar and Others v. Turkey (Article 50) judgment (1 April 1998, *Reports* 1998-..., p. ..., § 18), the Court observes that it has not been provided with decisive proof of the size of the properties destroyed. Against this background, and with reference to equitable considerations and the approach adopted in the above-mentioned Akdivar (Article 50) judgment, it awards, in respect of destroyed buildings, TRL 1,000,000,000 to each of the applicants.

2. Other property

109. The applicants submitted claims in respect of household goods, such as bedding, kilims, electrical goods and food and fuel stores, amounting to TRL 1,451,650,000 for Mrs Selçuk and

TRL 2,415,000,000 for Mr Asker. In addition, they claimed to have lost livestock worth in total

TRL 2,040,000,000 (Mrs Selçuk) and TRL 4,180,000,000 (Mr Asker). They also submitted claims in respect of fruit, poplar and other trees in their gardens, amounting to TRL 2,555,000,000 for Mrs Selçuk and TRL 1,035,000,000 for Mr Asker. In total, therefore, these claims amounted to TRL 6,046,650,000 (Mrs Selçuk) and TRL 7,630,000,000 (Mr Asker).

110. The Court notes in particular that the Commission found that the contents of the applicants' houses had been destroyed by fire, and that the applicants had been obliged to leave their village, which must have entailed some consequential loss.

In the absence of any independent evidence, and making its assessment on an equitable basis, it awards TRL 4,000,000,000 to Mrs Selçuk and TRL 5,000,000,000 to Mr Asker.

3. Loss of income

111. The applicants claimed compensation in respect of the loss of their income from farming and, in respect of Mrs Selçuk, from the mill which she co-owned with three others. They claimed for the period 16 June 1993 to 16 January 1999.

Mrs Selçuk stated her annual income to have been: TRL 90,000,000 from 30 acres of arable land, TRL 40,500,000 from 3 acres of oak groves, TRL 35,000,000 from 5 acres of orchards and TRL 80,000,000 from her quarter share of the mill.

Mr Asker stated his annual income to have been: TRL 15,000,000 from 5 acres of arable land and TRL 280,000,000 from 40 acres of orchards.

112. In the absence of independent evidence concerning the size of the applicants' land-holdings and income, and having regard to equitable considerations and the approach adopted in the above-mentioned Akdivar (Article 50) judgment, the Court awards under this head TRL 889,000,000 to Mrs Selçuk and TRL 1,475,000,000 to Mr Asker.

4. Alternative accomodation

113. Each of the applicants claimed the reimbursement of the rent averaging TRL 3,000,000 per month they paid in Diyarbakir.

114. The Court awards in respect of rent between July 1993 and March 1998, TRL 171,000,000 to each of the applicants.

5. Summary

115. Thus, in respect of pecuniary damages the Court awards in total TRL 6,060,000,000 (six thousand and sixty million Turkish liras) to Mrs Selçuk and TRL 7,646,000,000 (seven thousand, six hundred and forty-six million Turkish liras) to Mr Asker.

Having regard to the high rate of inflation in Turkey these amounts have been converted into pounds sterling in order to preserve their value, at the rate applicable on the date the applicants filed their claims under Article 50, namely 5 January 1998. At that date 1 pound sterling (GBP) was worth TRL 341,210. Consequently, Mrs Selçuk is to receive GBP 17,760.32 (seventeen thousand, seven hundred and sixty pounds sterling and thirty-two pence) and Mr Asker, GBP 22,408.48 (twenty-two thousand, four hundred and eight pounds sterling and forty-eight pence), these sums to be converted into Turkish liras at the rate applicable on the date of settlement.

B. Non-pecuniary damage

116. The applicants submitted that they should each be awarded GBP 20,000 in respect of non-pecuniary damage. They also claimed GBP 10,000 each for punitive damages and GBP 10,000 each for aggravated damages in respect of the violation of their Convention rights.

117. The Government contended that, in the event that the Court found a violation, this would be sufficient to offset any non-pecuniary damage suffered by the applicants. They strongly objected to the award of punitive or aggravated damages.

118. The Court considers that an award should be made in respect of non-pecuniary damage bearing in mind the seriousness of the violations which it has found in respect of Articles 3, 8 and 13 of the Convention and Article 1 of Protocol No. 1 (see paragraphs 80, 87 and 98 above).

It awards the applicants GBP 10,000 (ten thousand pounds sterling) each.

119. The Court rejects the claims for punitive and aggravated damages.

C. Costs and expenses

120. The applicants claimed a total of GBP 18,011.64 by way of costs and expenses. They requested the Court to order this award to be paid in sterling directly to their legal representatives in the United Kingdom.

121. The Government submitted that the Court should require every item under this head to be documented, and stated that "the amounts claimed in respect of legal work carried out in Turkey were irrelevant".

122. The Court is satisfied that the amounts claimed were necessarily incurred and reasonable as to quantum, and therefore awards them in full, less the amounts received by way of legal aid from the Council of Europe which have not already been taken into account in the claim, together with any value added tax which may be payable.

D. Request for restoration of rights

123. The applicants further submitted that they were entitled to be re-established in their village or, if this were not possible, to an equivalent monetary award.

124. The Government maintained that the restoration of the applicants' rights was not feasible due to the emergency conditions prevailing in the region.

125. The Court recalls that a judgment in which it finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they comply with a judgment in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard. It falls to the Committee of Ministers of the Council of Europe, acting under Article 54 of the Convention, to supervise compliance in this respect (see the above-mentioned Akdivar and Others (Article 50) judgment, p. ..., § 47).

E. Default interest

126. 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 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the preliminary objection concerning the non-validity of the applications;

2. *Dismisses* by eight votes to one the preliminary objection concerning non-exhaustion of domestic remedies;

3. *Holds* by eight votes to one that there has been a violation of Article 3 of the Convention;

4. *Holds* unanimously that it is not necessary to consider the complaints under Articles 2 and 5 § 1 of the Convention;

5. *Holds* by eight votes to one that there has been a violation of Article 8 of the Convention and of Article 1 of Protocol No. 1;

6. *Holds* unanimously that it is not necessary to consider the complaint under Article 6 § 1 of the Convention;

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

8. *Holds* unanimously that there has been no violation of Articles 14 or 18 of the Convention;

9. *Holds* by eight votes to one that the respondent State is to pay the applicants, within three months, the following sums to be converted into Turkish liras at the rate applicable on the date of settlement:

(a) in respect of pecuniary damage, GBP 17,760.32 (seventeen thousand, seven hundred and sixty pounds sterling and thirty-two pence) to Mrs Selçuk and GBP 22,408.48 (twenty-two thousand, four hundred and eight pounds sterling and forty-eight pence) to Mr Asker;

(b) in respect of non-pecuniary damage, GBP 10,000 (ten thousand pounds sterling) each;

10. *Holds* by eight votes to one that the respondent State is to pay the applicants, within three months, in respect of costs and expenses, GBP 18,011.64 (eighteen thousand and eleven pounds sterling and sixty-four pence), together with any value-added tax which may be payable, less FF 16,093 (sixteen thousand and ninety-three French francs) to be converted into pounds sterling at the rate of exchange applicable on the date of delivery of the present judgment;

11. *Holds* by eight votes to one that simple interest at an annual rate of 8% shall be payable on the above amounts from the expiry of the above-mentioned three months until settlement;

12. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 24 April 1998.

Signed: Rudolf Bernhardt
President

Signed: Herbert Petzold
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

Initialled: R. B.
Initialled: H. P.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(provisional translation)

I consider that in this case as in other similar cases concerning Turkey – like the Akdivar and Others case – the applicants have not exhausted existing domestic remedies and that those remedies are effective and sufficient. In that connection, I refer to my dissenting opinion in the principal judgment in the Akdivar and Others v. Turkey case. I wish to add another recent administrative court judgment as one more example of the existence of domestic remedies: the Van Administrative Court awarded compensation to Mr Nizamettin Agirtmis, whose house was burned by the military when it was abandoned during the evacuation of the village of Konalga, in the district of Bitlis in south-east Turkey, on 8 November 1991. The judgment in question makes it clear that the complainant's house was burned by soldiers after the evacuation of the village (Van Administrative Court, file no. 1993/427, decision no. 1996/771 of 27 December 1996).

The above considerations make it unnecessary for me to consider this case from the standpoint of the Convention's other provisions.

Footnotes

[fn1] . This summary by the registry does not bind the Court.(Back to FN1)

[fn2] . The case is numbered 12/1997/796/998-999. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.(Back to FN2)

[fn3] . Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.(Back to FN3)

[fn4] . *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.(Back to FN4)

COUNCIL OF EUROPE

CONSEIL DE L'EUROPE

Or. English

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22275/93

Ismet GÜNDEM

against

Turkey

Report of the Commission

(Adopted on 3 September 1996)

Strasbourg

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 22275/93

İsmet GÜNDEM

against

Turkey

REPORT OF THE COMMISSION

(adopted on 3 September 1996)

TABLE OF CONTENTS

Page

I. INTRODUCTION
(paras. 1-37) 1

A. The application
(paras. 2-4) 1

B. The proceedings
(paras. 5-32) 1

C. The present Report
(paras. 33-37) 4

II. ESTABLISHMENT OF THE FACTS
(paras. 38-142) 5

A. The particular circumstances of the case
(paras. 39-53) 5

B. The evidence before the Commission
(paras. 54-123) 7

1. Documentary evidence
(paras. 54-81) 7

2. Oral evidence
(paras. 82-123) 11

C. Relevant domestic law and practice
(paras. 124-142) 18

III. OPINION OF THE COMMISSION
(paras. 143-183) 21

A. Complaints declared admissible
(para. 143) 21

B. Points at issue
(para. 144) 21

C. The evaluation of the evidence
(paras. 145-153) 21

D. As regards Articles 3, 5 para. 1 and 8 of the Convention and Article 1 of Protocol No. 1
(paras. 154-163) 23

CONCLUSION
(para. 163) 24

E. As regards Articles 6 para. 1 and 13 of the Convention
(paras. 164-175) 25

CONCLUSIONS
(paras. 174-175) 26

TABLE OF CONTENTS

Page

F. As regards Article 18 of the Convention (paras. 176-179) 26

CONCLUSION (para. 179) 27

H. Recapitulation (paras. 180-183) 27

PARTLY DISSENTING OPINION OF MRS. G.H. THUNE AND MR. N. BRATZA 28

APPENDIX: DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF THE APPLICATION 29

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 who was resident in Kaniye Meheme, a neighbourhood of Sarıerik village in the Hazro district of the province of Diyarbakır. He was born in 1955. He was represented before the Commission by Mr. K. Boyle and Ms. F. Hampson, both teachers at the University of Essex, England.

3. The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. A. Gündüz.

4. The applicant alleges that his home and possessions were severely damaged in the course of attacks conducted by State security forces and village guards on 7 January and 13 February 1993 as a result of which he had to leave his home. The applicant invokes Articles 3, 5, 6, 8, 13 and 18 of the Convention and Article 1 of Protocol No. 1.

B. The proceedings

5. The application was introduced on 7 July 1993 and registered on 19 July 1993.

6. On 11 October 1993, 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.

7. The Government's observations were submitted on 10 March 1994 after an extension of the time-limit fixed for this purpose. The applicant replied on 4 May 1994. The applicant submitted further information on 14 September 1994.

8. On 9 January 1995, the Commission declared the application admissible.

9. On 16 January 1995, the Government submitted further information and observations.

10. The text of the Commission's decision on admissibility was sent to the parties on 19 January 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.

11. The Government submitted further observations on 29 March 1995 after an extension of the time-limit fixed for this purpose.

12. On 20 May 1995, the Commission decided to take oral evidence in respect of the applicant's allegations. It appointed three delegates for this purpose: Mr. H. Danelius, Mr. B. Conforti and Mr. J. Mucha. It notified the parties by letter of 22 May 1995, proposing certain witnesses and requesting the Government to identify a member of the security forces and a public prosecutor. The Government were also requested to provide the contents of the investigation file of the public prosecutor involved in investigating the alleged incidents.

13. By letters of 23 June 1995, the applicant's representatives submitted comments on the Government's further observations of 29 March 1994 and requested two further witnesses to be heard. They indicated that at the present time they were unable to provide the name of the second proposed witness.

14. By letter of 3 July 1995, the Commission's Secretariat requested the Government to provide the outstanding information with regard to the identities of the relevant witnesses and the contents of the investigation file. On the same date the applicant's representatives were requested to submit the name of the second witness proposed by them and the address of the applicant and the witnesses proposed by them.

15. The parties were reminded by letter of 31 July 1995 of the Commission's Secretariat of the information and documents still outstanding.

16. On 5 September 1995, the applicant's representatives informed the Commission of the applicant's address and stated that they had been unable to identify the second witness they had requested to be heard.

17. By letter dated 7 September 1995, the Commission's Secretariat urgently requested the Government to provide the outstanding documents and to identify two witnesses.

18. By letter dated 11 September 1995, the Government provided the name of the member of the security forces and the names of three public prosecutors who had been involved in the investigation of the alleged incidents.

19. On 15 September and 24 October 1995, the Commission's Secretariat again urgently requested the Government to provide the contents of the investigation file.

20. By letter dated 30 October 1995, the Government submitted a copy of the investigation file.

21. By letter dated 31 October 1995, the Government requested that two further witnesses be heard.

22. On 1 November 1995, the applicant's representatives notified the Commission that because of fear for reprisals the applicant did not find it possible to attend the hearing. They added that they had asked the applicant to provide an explanation for his absence in writing.

23. By letter dated 2 November 1995, the Government requested that three further witnesses be heard.

24. Evidence was heard by the Delegates of the Commission in Diyarbakır on 7 and 8 November 1995. For health reasons, one of the Delegates, Mr. Mucha, was not able to attend the hearing of all witnesses. Before the Delegates the Government were represented by Mr. A. Gündüz, Agent, assisted by Mr. T. Özkarol, Mr. A. Şölen, Mr. A. Kaya, Mr. A. Kurudal, Ms. N. Erdim and Mr. A. Kaya. The applicant, who did not appear himself, was represented by Mr. K. Boyle, counsel, assisted by Ms. A. Reidy, Mr. O. Baydemir and Ms. D. Deniz (interpreter).

25. On 2 December 1995, the Commission decided to take further evidence in the case in Strasbourg. The applicant would be heard on that occasion as well as other witnesses who had not appeared at the earlier hearing. The new hearing was to take place on 7 and 8 March 1996.

26. The parties were informed of the decision to hold a further hearing by letter of 12 December 1996. The applicant's representatives were requested to confirm in writing that the applicant would attend this hearing.

27. By letter of 10 January 1996, the applicant's representatives informed the Commission that the applicant would not attend the hearing since he did not have a passport and was being sought by police.

28. On 16 January 1996, the parties were requested to inform the Commission whether in view of these circumstances they nevertheless wished to hear the remaining witnesses.

29. On 20 January 1996, the Commission decided not to maintain the hearing of further witnesses if the parties had not responded to the request of 16 January 1996 before the expiry of the time-limit fixed for that purpose. It also decided that in that event the parties should be invited to present their written conclusions on the merits of the case.

30. No reply to the request of 16 January 1996 was received from the parties before the expiry of the time-limit.

31. On 11 March 1996, the applicant submitted his final observations on the merits. No final observations on the merits were received from the Government.

32. 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

33. 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:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
G. RESS
A. PERENIČ
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIŪNAS

34. The text of this Report was adopted on 3 September 1996 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.

35. 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.

36. The Commission's decision on the admissibility of the application is annexed hereto as an Appendix.

37. 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

38. The facts of the case, particularly concerning events in or about 7 January and 13 February 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 accepted written material, as well as oral testimony, which has been presented before Delegates. The Commission first presents a brief outline of the events, as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

1. Concerning the alleged events in the village of Sarıerik

a. *Facts as presented by the applicant*

39. 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 here.

40. The applicant lived in the Kaniye Meheme neighbourhood of the village of Sarıerik, in the Hazro district of the province of Diyarbakır in South-East Turkey. In this neighbourhood, which consisted of approximately fifteen households, the applicant's family owned eleven houses, seven of which were occupied at the relevant time. The incidents of which the applicant complains occurred at a time when the Sarıerik village did not have village guards, the applicant's family also having refused to become village guards.

41. In the first incident on 7 January 1993, soldiers and village guards from the villages of Kırmataş and Meşebağlar came and gathered villagers from the Kaniye Meheme neighbourhood together in one place. They beat some of the villagers and then searched the houses. When they entered the houses they destroyed some of the property and household goods inside and mixed up the winter provisions. When they left the houses they sprayed them with bullets, breaking the windows of the houses.

42. In the second incident, on 13 February 1993, the soldiers and village guards came to the neighbourhood and while the soldiers surrounded the neighbourhood the village guards shot at the houses for around twenty minutes. The applicant was able to hear the village guards and the soldiers communicating by walkie-talkie. They targeted the Gündem house in particular. During the attack the women and children were caught in the houses and had to lie down on the floor to take cover. The men had tried to hide outside the houses. During this attack the applicant's house was severely damaged.

43. The applicant and his family left the village soon after these events in the beginning of March 1993. They now live in Diyarbakır.

44. A number of houses belonging to the applicant's family in the Kaniye Meheme neighbourhood, but not his house, were subsequently destroyed by fire in the summer of 1993, apparently as a result of a

raid by the PKK. At that time, villagers in the main part of the village of Sarıerik had become village guards.

45. The targeting of the houses of the applicant's family is consistent with the State practice of evacuating those villages and hamlets where the villagers have refused to accept the village guard system.

b. *Facts as presented by the Government*

46. The Government have not presented any written submissions on the merits regarding the assessment of the oral evidence and other material before the Commission. In their observations on the admissibility of the application and in their further observations submitted on 29 March 1995, the Government stated as follows concerning the facts of the case.

47. Between 7 and 13 February 1993, security forces were in operation in the village of Sarıerik. The operations were aimed at impeding the activities of the militants from the PKK, maintaining order and protecting the villagers and their property.

48. A number of houses belonging to relatives of the applicant were burned in a terrorist attack six or seven months later than the incidents complained of. The day after this incident the security forces arrived at the village to investigate the attack.

2. Proceedings before the domestic authorities

49. Following the communication of this application by the Commission to the respondent Government on 11 October 1993, the Ministry of Justice (International Law and External Relations General Directorate) contacted the chief public prosecutor's office in Hazro through the chief public prosecutor's office in Diyarbakır on 17 December 1993, informing them of the complaints made by the applicant.

50. On 18 May 1994, a decision of non-jurisdiction was issued by a public prosecutor at Hazro, Ekrem Bakır, and the investigation was referred to the Hazro District Administrative Council in accordance with Article 15 para. 3 of the Prevention of Terrorism Act No. 3713.

51. By letter of 31 August 1994, the Ministry of Justice (International Law and External Relations General Directorate) requested the Diyarbakır Chief Public Prosecutor to proceed with the investigation since the provision on which the decision of non-jurisdiction of 18 May 1994 was based had been declared unconstitutional by the Constitutional Court on 31 March 1992. On 21 October 1994, the Hazro Administrative Council returned the investigation file to the chief public prosecutor's office in Hazro.

52. Having taken statements from five persons on 17 November 1994 (Kasım Tatlı, Esref Güç, İbrahim Türkoğuz, Musa Can and Yusuf Yaşa), a public prosecutor at Hazro, Muhittin Çiçek, on 2 February 1995, issued a decision of non-jurisdiction and referred the investigation to the Hazro District Administrative Council in accordance with Article 4 para. 3 sub (i) of the Decree No. 285.

53. It appears that the proceedings before the Hazro District Administrative Council have not yet been concluded.

B. The evidence before the Commission

1. Documentary evidence

54. The parties submitted various documents and newspaper articles to the Commission. The documents included the Human Rights Watch/Helsinki report "Forced Displacement of Ethnic Kurds from Southeastern Turkey" (October 1994), extracts from the Kurdish Human Rights Project report "Village Evacuations and Destructions in Southeast Turkey", and statements from the applicant and witnesses concerning their version of the events in the case.

55. The Commission had regard to the following documents:

a. *General reports and official documents*

i. Report entitled "Forced Displacement of Ethnic Kurds from Southeastern Turkey", Human Rights Watch/Helsinki, October 1994

56. This report indicates that the motive for the burning of villages described in the report was the refusal of the villagers to join the village guard system. It contains an interview with a villager who states that soldiers threatened to burn his village if its inhabitants did not become village guards.

ii. Extracts from the report entitled "Village Evacuations and Destructions in South East Turkey" and Appendix I "The Village Guards", Kurdish Human Rights Project, undated

57. The author describes the persecution of villagers and families who refuse to become village guards. Several incidents are reported where villages were evacuated as a result of the villagers' refusal to join the village guard system.

iii. Report of 22 June 1994 from the Hazro District Gendarme Command to the Office of the Hazro District Governor

58. This report appears to have been drawn up following a request for information from the Office of the Hazro District Governor of 31 May 1994.

59. It states that the Station Command did not carry out any operation on either 7 January or 13 February 1993 in Sarıerik village or the neighbourhood of Kaniye Meheme. The applicant and the other residents of the neighbourhood were not maltreated or told to evacuate.

60. According to the report, the applicant and his relatives regularly complained of the arrest and disappearance of the applicant's brother, İbrahim. However, custody records showed that the applicant's brother had not been in custody in September 1991. An investigation into these complaints had been conducted.

61. The report further states that the applicant had previously been imprisoned for having grown Indian hemp. Following his release on 5 August 1992, he left his village and had been in contact with the PKK terrorist organisation. He had been seen accompanying members of this organisation and had attended an ambush carried out by the PKK on Sarıerik village.

iv. Decision of non-jurisdiction of 2 February 1995

62. This decision, issued by a public prosecutor at Hazro, Muhittin Çiçek, lists the Hazro security forces and village guards as being suspected of ill-treatment and causing financial losses. It refers to the complaints made by the applicant that the security forces and village guards, on 7 January and 13 February 1993, had beaten up residents and damaged houses and belongings in the village of Sarıerik. It concludes that pursuant to Decree No. 285 the investigation should be referred to the Office of the Hazro District Governor.

b) *Statements by the applicant*

i. Statement dated 15 March 1993 taken by Abdullah Koç of the Diyarbakır branch of the Human Rights Association

63. On 7 January 1993, security forces and village guards carried out a raid on the fifteen household neighbourhood of Kaniye Meheme. The residents were beaten up and sworn at. The houses were shot at with heavy weapons, resulting in the breaking down of doors and the shattering of windows. All the winter provisions stored within the houses were mixed up, rendering them inedible. Many household goods were destroyed.

64. On 13 February 1993, security forces and village guards again carried out a raid on the neighbourhood, threatening the villagers with demolition of the village if they did not evacuate it.

65. The applicant's brother, İbrahim, has been missing since September 1991, when he was taken into custody at the headquarters of the Hazro gendarme station commander, Kenan Şahin.

ii. Statement made on 28 May 1994 and recorded on 31 May 1994 by Mahmut Şakar of the Diyarbakır branch of the Human Rights Association

66. The first raid, which was carried out by approximately 200 soldiers and 150 village guards, took place around 10.30 hours on 7 January 1993. During the raid, the security forces gathered the villagers in one place. They beat some of the villagers and verbally abused and swore at others, including children. They used heavy weapons to shoot at the houses. They broke down doors and windows and mixed up all the winter provisions, which became inedible. They also destroyed household goods in a number of houses. Before they left, they stated that if they found the villagers there when they came a second time they would burn the village.

67. The second raid commenced around 05.00 hours on 13 February 1993, when soldiers and village guards approached the village while shooting in the air. At the sound of the gunshots, the men went outside and hid near the houses. The applicant's family took care to hide the applicant

first, since he had previously made statements to the press and other organisations concerning the disappearance of his brother İbrahim in which he had accused the Gendarme Commander Kenan Şahin.

68. The soldiers did not enter the village but surrounded it. Approximately fifty village guards entered the village and fired at the houses for about twenty minutes. Most of the women and children, having been unable to flee, lay on the floor of the houses to protect themselves. When the village guards stopped firing, they took the women and children out of the houses which were then destroyed. Some of the women and children were beaten with fists and rifle butts.

69. The men who were hiding outside during the shooting were able to overhear the communications taking place by walkie-talkies between the village guards and the soldiers. From these conversations it appeared that the houses of the applicant's family were targeted in particular.

70. The doors and the windows of the applicant's house were broken and the interior destroyed. The damage could have been repaired but the applicant has been too afraid to return. Following their departure, it has been impossible for the villagers to harvest their vineyards and fields.

71. The Government dispute the authenticity of this statement since it does not bear the signature of the applicant.

c) *Statements by other persons*

i. Kasım Tatlı

Statement of 17 November 1994 taken by Muhittin Çiçek, Hazro public prosecutor

72. Tatlı is the mayor of Sarıerik village. Around the dates specified in the application, terrorists very often used to carry out ambushes. At that time, there were no village guards in Sarıerik. One day in the beginning of 1993, some 200 terrorists passed Sarıerik and headed towards Meşebağlar. They ambushed Meşebağlar in the evening and a clash with village guards ensued. The next day, some members of the Hazro security forces passed Sarıerik towards Meşebağlar in order to record the damage and capture the terrorists at large. The applicant's house was not burned on this occasion but about six to seven months later in June or July 1993 when terrorists again ambushed Meşebağlar. During the armed conflict which ensued fire and smoke had been seen to come out of the Kaniye Meheme neighbourhood and the next day it was discovered by the inhabitants of Sarıerik that three or four houses in Kaniye Meheme, all belonging to the applicant's family, had burned down.

73. The villages in the area were often ambushed and houses were burned down by terrorists to threaten the inhabitants. Tatlı has never seen or witnessed the security forces and the village guards damaging residential property.

ii. Esref Güç

Statement of 17 November 1994 taken by Muhittin Çiçek, Hazro public prosecutor

74. Güç is a member of the Sarıerik village council of elders and lives in the Kaniye Meheme neighbourhood. On the dates specified in the application, no houses were burned down in the neighbourhood. No ambush was carried out by security forces and village guards on Kaniye Meheme in January-February 1993. At that time, the village had no village guards. Güç has never seen or witnessed any of the security forces or village guards coming to the neighbourhood, burning the houses or beating up or intimidating the residents.

75. When he returned to the neighbourhood in June or July 1993, after having harvested his tobacco crop, he saw that three or four of the applicant's houses had burned down. He found out that an armed conflict had taken place in Meşebağlar and that the houses had been burned down in the course of this incident. The following day, security forces arrived in the neighbourhood to examine the incident.

iii. İbrahim Türkoğuz

Statement of 17 November 1994 taken by Muhittin Çiçek, Hazro public prosecutor

76. Türkoğuz was a member of the Sarıerik village council of elders on the dates specified in the application. He resides in the neighbourhood of Kaniye Meheme. He did not witness any activity carried out by the security forces or the village guards on the date claimed by the applicant or at any other time. The applicant's house was not burned at that time but about six or seven months later. One night, Türkoğuz heard shooting coming from outside. Being afraid of terrorists he did not go out. In the morning he saw that the applicant's and his brothers' houses were burning. He does not know who set the houses on fire. At that time, the village had no village guards but security forces and other village guards sometimes visited the village. The day following the burning of the houses, the security forces came to examine the incident.

iv. Musa Can

Statement of 17 November 1994 taken by Muhittin Çiçek, Hazro public prosecutor

77. Can resides in the neighbourhood of Kaniye Meheme. On the dates specified by the applicant, Sarıerik had no village guards. At that time, the security forces and the village guards did nothing of the sort suggested by the applicant. The applicant's houses were not burned at that time but in the summer months of 1993 when the applicant's relatives had already left the village. One night, three or four of the applicant's houses were burned down. Living at the outskirts of the neighbourhood, Can had not heard any weapons being fired. He does not know who burned the houses or for what reason. The following day, the security forces came to the neighbourhood to investigate the incident.

v. Yusuf Yaşa

Statement of 17 November 1994 taken by Muhittin Çiçek, Hazro public prosecutor

78. Yaşa was and still is residing in the neighbourhood of Kaniye Meheme. On the dates specified in the application, security forces and village guards did not carry out any activity as contended by the applicant. Security forces and village guards visited the village from time to time. The applicant's houses were burned in the summer of 1993. One night, Yaşa heard the sounds of weapons but, being afraid of terrorists, did not go out. The village had no village guards at that time. The following morning, he saw that a group of houses belonging to the applicant had been burned. He does not know who was responsible for this. The security forces came to investigate the incident.

vi. Mahmut Demir

Statement of 24 December 1992 taken by the Human Rights Association

79. On the morning of 22 December 1992, village guards from Kırmataş and Meşebağlar came to Demir's village of Tepecik in the Kocaköy district of Diyarbakır province and burned it completely.

vii. Mahmut Laçin

Undated statement taken by the Human Rights Association

80. On 17 December 1992, village guards from Kırmataş and Meşebağlar came to Laçin's village of Tepecik and started firing indiscriminately to revenge the death of another village guard which had occurred during a clash between them and PKK militants. This raid on Tepecik and a subsequent raid a few days later resulted in the loss of lives, injuries and the burning of most of the houses and household goods.

viii. Sıdık Yaşar

Statement of 24 December 1992 taken by the Human Rights Association

81. Yaşar was present during the second raid conducted on Tepecik village by village guards from Kırmataş and Meşebağlar in Hazro district on 22 December 1992. The village guards called in security forces and assistance teams made up of other village guards. The houses in the village were set alight, people beaten up and livestock shot. During a previous incident on 19 December 1992, village guards had killed, inter alia, Yaşar's wife and child.

2. Oral evidence

82. The applicant did not give evidence before the Commission's Delegates at the hearing in Diyarbakır nor was he willing to appear at a further hearing which the Delegates intended to be held in Strasbourg but which was cancelled after the Commission had been informed that the applicant would not appear. It was submitted on behalf of the applicant that he is afraid of possible reprisals should he give evidence before the Commission.

83. It did not prove possible to ensure the appearance of all the other persons summoned by the Delegates to be heard during the hearing in Diyarbakır. In particular, the public prosecutor at Hazro, Muhittin

Çiçek, who had taken statements from several villagers in the course of the investigation into the applicant's claims and who had issued a decision of non-jurisdiction (para. 52), was unavailable to give evidence.

84. Furthermore, the Government objected to the hearing of Mahmut Şakar as a witness. The Delegates nevertheless decided to hear Şakar, and since the Government refused to attend this part of the proceedings, Şakar was heard in the absence of the Government's representatives. In view of the fact that they dispute the authenticity of the statement made by the applicant on 28 May 1994 (cf. para. 71) the Government submit that the evidence given by Mahmut Şakar cannot be relied upon.

85. The evidence of seven witnesses heard by the Delegates may be summarised as follows:

i. Mahmut Şakar

86. Şakar said that he was born in 1966. He is a barrister working for the Diyarbakır Human Rights Association. He had met the applicant after having been requested by the applicant's representatives to put certain questions to him. Prior to that date he had not had any particular knowledge of the application.

87. He had initially attempted to contact the applicant by telephone. Subsequently, members of the applicant's family had come to the office of the Human Rights Association in Diyarbakır and had said that they would be able to answer the questions. However, he had insisted that he wanted to speak to the applicant. The applicant had come to see him on 28 May 1994, accompanied by members of his family. Since the applicant had indicated that he could only stay a short while, Şakar had made notes during the meeting and had prepared the written statement afterwards. It was for this reason, and also because the written statement did not contain a direct account related by the applicant, that it was not signed by the applicant himself.

ii. Kasım Tatlı

88. Tatlı stated that he was born in 1963 and that he had been the mayor of Sarıerik for about seven years. A terrorist group had first come to his village in 1992. At that stage the villagers had not known what terrorist organisations were but from then on the PKK had made the local people suffer enormously. They had wanted him to join their cause but he had always refused because he was in favour of the State who had never harmed him or his villagers. However, the terrorists had consistently wanted to punish him for his refusal to join them. To this end they had several times, in 1992, 1993 and 1994, abducted members of his family and had killed one of his cousins.

89. At some stage in 1993 he and other villagers had become village guards and had received arms, enabling them to retaliate against terrorist raids and to remove mines laid by the terrorists. Neither the Government nor village guards from neighbouring villages had pressured them into becoming village guards. The village had good relations with other villages, irrespective of whether or not the other villages had village guards.

90. He confirmed that he knew the applicant and his family. The applicant had been involved with the terrorists, acting as their guide. He had spoken directly to the applicant in an attempt to persuade him to stop terrorism, but to no avail. The applicant had furthermore served a prison sentence before 1993 in connection with a robbery and had always been involved in drug dealing and arms smuggling. For these reasons the security forces had come to the village looking for the applicant but they had never mistreated a single citizen.

91. He denied that on 7 January 1993 security forces numbering about 200, together with 150 village guards, had raided Kaniye Meheme as alleged by the applicant. In any event, the total number of village guards in the locality had been much smaller than 150. Asked whether any particular event had occurred on 7 January 1993, he said that he did not exactly remember the date but that a group of ten to twenty village guards had come to the village to ask the applicant to stop acting as a guide for terrorists who had conducted raids on their village.

92. He also denied that any raid by security forces and village guards had taken place on the village on 13 February 1993. In this respect he initially said that at a date which he did not exactly remember, terrorists had clashed with the security forces outside the village but that neither the security forces nor a single village guard had entered the village. He then went on to say that on 13 February 1993, at night, the terrorists had raided the village of Meşebağlar and that during the clash which had ensued one terrorist had been killed.

93. The applicant's house was still standing and intact, albeit in a poor state because of a lack of maintenance. Some other houses belonging to members of the applicant's family had been burned in the course of a clash following a terrorist raid on Meşebağlar in June or July 1993. Confronted with the statement of 17 November 1994, in which he had said that the applicant's house had not been burned in the beginning of 1993 but in June or July 1993 (para. 72), he denied that the applicant's house had been burned.

94. He confirmed that he had heard that the applicant's brother İbrahim had been abducted by terrorists.

iii. Esref Güç

95. Güç said that he was born in 1964. He had lived all his life in the Kaniye Meheme neighbourhood of Sarıerik village. He was one of the four members of the council of elders which was consulted when a problem occurred in the village. He knew the applicant and his family; they had four to five houses in Kaniye Meheme.

96. He denied that any raid by security forces or village guards on the village had taken place on 7 January or 13 February 1993 or on any other date. At that time, there had been a metre of snow and it had been impossible to reach the village. However, terrorists had caused damage to the village. Once, presumably in July or August 1993 when he had not been present in the village, three houses belonging to the applicant's family had been burned, probably by terrorists. He insisted that he had also told this to the public prosecutor who had questioned him on 17 November 1994 (paras. 74, 75). If the report of this statement said that the applicant's houses had been burned, he had

referred to the houses belonging to the applicant's family. The applicant's house was still standing and intact. It was not occupied as the applicant had left the village to work elsewhere. He knew that the applicant had contacts with the PKK. The applicant's father, Hacı Ahmet Gündem, had gone to Diyarbakır in March 1993 to find work.

97. It was the PKK who by their actions had forced the villagers to become village guards. He had never been a village guard himself. There was no enmity between villages with and villages without village guards.

iv. Ekrem Bakır

98. Bakır stated that he was born in 1966. He had worked as public prosecutor in Hazro from late 1993 until July 1994. He had initiated a preliminary investigation into the applicant's allegations following a request thereto made about a year after the alleged incidents by the Ministry of Justice through the Diyarbakır Chief Public Prosecution Department. He had received a copy of the applicant's statement to Abdullah Koç (paras. 63-65). Although it had been clear to him that the burning of houses as alleged by the applicant fell within the scope of the law on the prosecution of civil servants, he had issued instructions that the applicant be found in order for his statement to be taken. In his experience, a statement taken directly from a complainant might reveal other offences which might fall within his jurisdiction. Furthermore, he had wanted to find out from the applicant whether there had been any witnesses to the alleged events and whether there was any supporting documentation. However, it had been impossible to find the applicant.

99. When it was put to him that the applicant's statement to Abdullah Koç did not contain the allegation that the applicant's house had been burned, he said that there might have been some confusion with other incidents in which houses had been burned by terrorists.

100. Apart from his attempts to locate the applicant, his investigation had focused on the applicant's second allegation, i.e. the disappearance of the applicant's brother İbrahim for which the applicant had held the security forces responsible. As he had experienced that uniforms belonging to the security forces had been found among material discovered in terrorist shelters, he had looked into the possibility that the applicant's brother had been abducted by terrorists dressed in security force uniforms. During this investigation he had found out that this matter had already been investigated by the public prosecutor's office in 1992 and that it had indeed been terrorists disguised as security forces who had abducted the applicant's brother. The previous investigation had been referred to the public prosecutor at the State Security Court for reasons of lack of jurisdiction.

101. In view of the fact that the applicant could not be found and the second allegation had already been investigated, he had issued a decision of non-jurisdiction based on Article 15 para. 3 of the Prevention of Terrorism Act No. 3713 and had forwarded the file to the office of the District Governor. Some time later, when he had already been transferred elsewhere, an indication from the Ministry of Justice had been received to the effect that that particular provision had been declared unconstitutional and the investigation had been resumed by a

different public prosecutor, Muhittin Çiçek. Muhittin Çiçek had subsequently issued a new decision of non-jurisdiction but based on Article 4 para. 3 sub (i) of the Decree No. 285 and the file had again been transferred to the office of the District Governor.

102. He explained that the facilities at the disposal of the District Governor were better than those available to a public prosecutor. Furthermore, the gendarmerie and the police force were directly affiliated to the District Governorship. For this reason, the office of the District Governor was better equipped to conduct these investigations. An investigator would be appointed by the District Governor and, should evidence be found by this investigator, a decision to prosecute would be taken and the file would again be forwarded to the public prosecution department. A decision by the District Governor not to prosecute would be communicated to the person concerned who could lodge an appeal.

103. When shown the report of 22 June 1994 from the Hazro District Gendarme Command (paras. 58-61), he said that this most probably formed part of the investigation being conducted by the office of the District Governor following his referral of the file to that office.

104. He said that he had never investigated allegations of houses having been burned or destroyed by soldiers. In fact, he had never received any such complaints from civilians.

v. Aydın Tekin

105. Tekin said that he was born in 1966. He had worked as public prosecutor in Hazro from March 1993 until June 1994. Ekrem Bakır having been in charge of the investigation into the applicant's allegations, he would only have been involved in it when Bakır was on leave. However, due to the considerable lapse of time he did not remember much of what was done during the investigation. Furthermore, as a public prosecutor he was not in a position to testify in connection with an investigation that had been carried out. Information about this investigation could be obtained from the file.

vi. Hasan Çankaya

106. Çankaya stated that he was born in 1964. In the beginning of 1992, he had been appointed deputy commander at the Hazro central gendarme station. He had been put in charge of the gendarme station of Teknebaşı near Sarıerik in July 1993. This station had officially become operational on 21 September 1993.

107. He believed that the applicant's family had already left Kaniye Meheme when he had arrived in the region, i.e. in the beginning of 1992, although they might have left at a later date. He had never met any of the applicant's relatives in person. He remembered that one member of the applicant's family had been on the list of wanted persons for his membership of the PKK, but he could not remember the first name of this person.

108. Describing the security situation in the vicinity of Sarıerik, he said that initially only two villages in the Hazro district, Kırmataş and Meşebağlar, had had village guards. The mountain range north of Sarıerik and the areas on the Lice border had suffered from

intense terrorist activity in 1992 and 1993. At this time, terrorists had conducted raids on Kırmataş and Meşebağlar aimed at breaking down the village guard system almost every week. The Meşebağlar village guards had regularly gone to the area around Sarıerik to check on possible terrorist approaches, but he thought it impossible that these guards had conducted searches in Sarıerik as part of their monitoring and controlling activities.

109. Once the Teknebaşı gendarme station had become functional, Sarıerik and the village of Kavaklıboğaz had voluntarily applied to be included in the village guard system. To his knowledge, no pressure had been applied on the villagers in this respect. In order to eliminate this system before it had become established, terrorists had immediately started to attack Sarıerik and Kavaklıboğaz. Starting from the date he had taken up his duties there, i.e. from July 1993, there had been skirmishes every two weeks. After January 1994, when the terrorists had begun to experience serious losses, they had realised that they would not be able to take over and they had reduced the number of raids.

110. He had not heard of any operations conducted by 200 security force members and 150 village guards in the neighbourhood of Kaniye Meheme on 7 January and 13 February 1993. It appeared most unlikely to him that such a raid could have occurred, since the village had been considered as pro-Government which was borne out by the facts that it had adopted the village guard system and had not given up despite a large number of terrorist attacks. Therefore, a raid as alleged by the applicant would not have served any useful purpose. Furthermore, at that time there had only been 70 to 80 village guards in the whole of the Hazro district.

111. He stated that a terrorist raid had been carried out on Meşebağlar one evening in August 1993, several weeks after he had been posted to the area and before the Teknebaşı gendarme station had become operational. The security forces had been unable to intervene in the clash which ensued between the terrorists and the village guards of Meşebağlar and those of Kırmataş which had come to the assistance of the Meşebağlar guards. After four or five hours of fighting, the terrorists had begun to retreat to the north in the direction of Sarıerik and the Meşebağlar and Kırmataş village guards had pursued them. The conflict had continued around Sarıerik village for almost an hour before the terrorists had retreated altogether.

112. When he had gone to Kaniye Meheme the following day, he had found that the roofs of two houses and one barn belonging to the applicant's family had caught fire during the clash. Some other houses had also caught fire but since they had been occupied, the occupants had extinguished the fire themselves. As the houses belonging to the applicant's family had been empty, nobody had attended to them and they had partially burned down.

113. In his opinion, the burning of the houses belonging to the applicant's family had not been an incident of arson aimed specifically at those houses but had been a result of houses catching fire during the clash. He doubted that the burning of these houses had been caused by the terrorists, since he had had information from terrorists who had confessed to terrorist activities that the applicant's family had helped and supported the terrorists.

114. He said that village guards were not entitled to take decisions and implement them without prior permission of higher authorities. Only pursuits of terrorists by village guards during a clash might occur without authorisation having been given since such extraordinary circumstances did not allow for the asking and granting of permission.

vii. Hacı Ahmet Gündem

115. Hacı Ahmet Gündem said that he was born in 1934 and that he was the father of the applicant. He explained that the applicant had not appeared at the hearing since he had to work, was not aware of the hearing and was afraid that if he appeared the village guards and the Government would make him disappear like they had done with his brother İbrahim.

116. The whole family, including the applicant, had moved to Diyarbakır three years ago. Although he said that this move had taken place in 1992, he also said that the family had moved following the events of which his son complained before the Commission. The applicant's family had eleven houses in Kaniye Meheme, four of which had been unoccupied at the relevant time. The applicant had also had his own house, but he had been staying with his father.

117. He said that the PKK had never come to the village. Their houses had been raided more than ten times a year by soldiers and village guards from Meşebağlar and Kırmataş. During these raids the houses of the applicant's family had been singled out. He believed that the reason for this was a vendetta between his family and villagers from Meşebağlar which had started seventy to eighty years previously when his father had been involved in a fight with Meşebağlar villagers. Although no other fights had occurred since that time, after the Meşebağlar villagers had become village guards they had told the soldiers that the applicant's family supported the terrorists. The soldiers had believed them. However, the family had never assisted or supported the PKK. They had refused to become village guards and for this reason they had not been on good terms with the village mayor Kasım Tatlı.

118. He also said that it was because of the fact that the family had accused the First Lieutenant Kenan Şahin of having taken away his son İbrahim that the State had begun to pressurise the family.

119. Soldiers and village guards had searched the houses belonging to the family once a week for guns. During one or more of these searches they had mixed up foodstuffs and poked duvets and mattresses with skewers.

120. He remembered one occasion during a raid when he had overheard a walkie-talkie message from the First Lieutenant Kenan Şahin to the effect that the applicant had to be killed like his brother İbrahim.

121. Asked about the incident in which village guards had allegedly fired at the family's houses for twenty minutes, he said that four of the houses had been damaged during that attack, including the house of the applicant. It appeared that he was talking of the same incident when he said that when the residents had heard the soldiers and village guards approach they had sent the young children to the village above Kaniye Meheme. He had gone to a relative's house situated on a hill

opposite Kaniye Meheme from where he could see both soldiers and village guards shooting at the houses belonging to the family. He did not know whether the applicant had been at home or had run away at that time.

122. After this incident he had counted seventy bullets in front of his house. The houses belonging to the family had been marked by bullets fired inside and outside the houses. They had not repaired the houses but had left the village about twenty days to a month later.

123. He had since learned from fellow villagers visiting Diyarbakır that three of the family's houses had been burned down at a later date by the Meşebağlar and Kırmataş village guards. The applicant's house had not been burned down but the Sarıerik village guards had taken the doors from this house. When he had spoken to Esref Güç in Diyarbakır about this incident the latter had said that he was too afraid of the village guards to declare publicly that it had been they who had set the houses on fire.

C. Relevant domestic law and practice

124. The Government have submitted that the following domestic law is relevant to the case:

125. Article 13 of Law 2577 concerning administrative proceedings provides that any person who has suffered damage as a result of an act committed by the administration may request compensation from the administration within one year of the alleged acts. In case this request is completely or partially rejected or if no reply has been received within a time-limit of sixty days, the person involved may initiate administrative proceedings.

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

(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."

127. 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.

128. The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

129. The Turkish Criminal Code makes it a criminal offence:

- to oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to make an unlawful search of someone's home (Articles 193 and 194),

- to subject someone to torture or ill-treatment (Article 243 in respect of torture, and Article 245 in respect of ill-treatment, inflicted by civil servants), and

- to damage another person's property intentionally (Article 526 et seq.).

130. 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.

131. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

132. Furthermore, from the Commission's summary of the relevant domestic law and practice in the case Akdivar and others v. Turkey (No. 21893/93, Comm. Rep. 26.10.95, currently pending before the Court) the following information appears (paras. 133-135).

133. If the alleged author of a criminal offence is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

134. Any illegal act by civil servants, be it a criminal offence or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

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

136. The applicant points to certain legal provisions whose effect is to weaken the protection of the individual which might otherwise be afforded.

137. Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

138. Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

139. Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

140. 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. Contrary to the provisions contained in Law 3713, the constitutionality of Decree 285 may not be challenged.

141. Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"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 damages suffered by them without justification."

142. According to the applicant, this Article grants impunity to the Governors. Damage caused in the context of the fight against terrorism would be "with justification" and therefore immune from suit. Moreover, Decree 430 reinforces the powers of the Regional Governor to order the permanent or temporary evacuation of villages, to impose residence restrictions and to enforce the transfer of people to other areas. Consequently, the law, on the face of it, grants extraordinarily wide powers to the Regional Governor under the state of emergency and is subject to neither parliamentary nor judicial control. However, at the relevant time there was no decree providing for the rehousing of displaced persons or the payment of compensation.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

143. The Commission has declared admissible the applicant's complaints that on 7 January and 13 February 1993 village guards and State security forces carried out attacks on his home and property and that there were no effective domestic remedies at his disposal.

B. Points at issue

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

- whether there has been a violation of Articles 3, 5 para. 1 and 8 of the Convention and Article 1 of Protocol No. 1;

- whether there has been a violation of Article 6 para. 1 of the Convention;

- whether there has been a violation of Article 13 of the Convention;

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

C. The evaluation of the evidence

145. 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. The following general considerations are relevant in this context:

i. It is the Commission's task to establish the facts, and in doing so the Commission will be dependent on the co-operation of both parties. In cases, such as the present one, where the applicant claims to have been an eye-witness to the events of which he complains, he is also an important witness in his own case. However, the applicant did not appear before the Commission's Delegates to give evidence. Whatever the reasons for his failure to appear may have been, it is clear that his absence from the proceedings affects to a considerable extent the possibilities of the Commission to establish the facts beyond reasonable doubt.

ii. There has been no detailed investigation on the domestic level as regards the events which allegedly occurred in the Kaniye Meheme neighbourhood on 7 January and 13 February 1993. 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.

iii. In relation to the oral evidence, the Commission has been aware of the difficulties attached to assessing evidence obtained orally through interpreters (in one case via Kurdish and Turkish into English). 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 the witnesses has rendered inevitable a certain imprecision with regard to dates and other details (in particular, numerical matters) and does not consider that this by itself reflects on the credibility of the testimony.

146. The applicant alleges that security forces and village guards from Meşebağlar and Kırmataş severely damaged his house and property on 7 January and 13 February 1993 as part of a Government policy to burn and evacuate houses or villages whose inhabitants refuse to accept the village guard system. The Government deny that these events took place.

147. The Commission notes that the applicant's account of a Government policy in respect of villagers refusing to become village guards is supported by findings contained in the reports of Human Rights Watch/Helsinki and the Kurdish Human Rights Project (paras. 56, 57). The Commission further notes that other applications which have been brought before it also contain allegations of raids being conducted on villages and that statements have been invoked which refer to other raids by the Meşebağlar and Kırmataş village guards (paras. 79-81).

148. However, as regards the evidence obtained in respect of the specific events which are alleged to have happened in this case, it is only the oral testimony of the applicant's father, Hacı Ahmet Gündem, which provides support for the applicant's account of events, despite the fact that this testimony was rather unclear as to details and timing. However, Hacı Ahmet Gündem did not say that the houses belonging to the applicant's family were destroyed because the family members had refused to become village guards. He put forward two different reasons: firstly, there existed an old vendetta between the applicant's family and Meşebağlar villagers and the latter had told the security forces that the applicant's family supported the PKK (para. 117). Secondly, the applicant's family had accused a member of the gendarmerie of being responsible for the disappearance of the applicant's brother İbrahim (para. 118). The Commission finds that the applicant's appearance before the Delegates would have been required to clarify these matters.

149. Although the other evidence suggests that the area around Sarıerik was the scene of frequent clashes between terrorists and security forces or village guards, it offers no support for the applicant's allegations. On the contrary, several witnesses denied that any houses in Kaniye Meheme had been destroyed by security forces and village guards. In this respect the Commission recalls, inter alia, the statements of Kasım Tatlı and Esref Güç to a public prosecutor (Tatlı para. 73, Güç para. 74) and their oral testimony before the Delegates (Tatlı paras. 91, 92, Güç para. 96). A number of witnesses did agree that some houses belonging to the applicant's family had burned down following a clash which had started in Meşebağlar in the summer of 1993, but none of these witnesses suggested that this had occurred as

a result of a deliberate action by security forces or village guards. The Commission refers to the statements of Kasım Tatlı and Esref Güç to a public prosecutor (Tatlı para. 72, Güç para. 75), their oral testimony (Tatlı para. 93, Güç para. 96) and the oral testimony of Hasan Çankaya (paras. 111-113).

150. The Commission thus notes that it has been presented with diverging versions of whether and how the applicant's house and property were damaged. The applicant was summoned on two occasions to appear before the Commission's Delegates to give evidence. On the first occasion he failed to appear. On the second occasion he informed the Commission that he would not appear which resulted in the hearing being cancelled. He explained his failure to appear by referring to his fear of adverse consequences for himself if he should appear before the Delegates. The Commission feels concern about this explanation but is unable to determine whether or to what extent such fear may have been justified.

151. Whatever reason there may have been for the applicant's absence, the Commission finds that his failure to give evidence made it difficult to establish the facts. It would have been necessary, in order to make a reliable assessment of the situation, to hear the applicant in person in order to assess his general credibility and to put questions to him about various details, including the background of the events.

152. For these reasons the Commission is of the opinion that it has not been established beyond reasonable doubt that the applicant's house and property were damaged by security forces and village guards on 7 January and 13 February 1993.

153. On the basis of this finding the Commission will now proceed to examine the applicant's complaints under the various Articles of the Convention.

D. As regards Articles 3, 5 para. 1 and 8 of the Convention and Article 1 of Protocol No. 1

154. Article 3 of the Convention reads as follows:

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

155. The applicant complains that the deliberate targeting of him and his family and the actions carried out against them to force them to flee their homes constitutes inhuman and degrading statement.

156. Article 5 para. 1 of the Convention, insofar as relevant, reads as follows:

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

157. The applicant submits that the harassment and intimidation by agents of the State have resulted in the deprivation of his security of life. In this respect he recalls that his brother, İbrahim, has disappeared at, he believes, the hand of the State.

158. Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

159. The applicant submits that the two alleged attacks on his house represent separate violations of this provision. This violation is, in his view, aggravated by the fact that the village guards and security forces targeted the applicant and his family.

160. Article 1 of Protocol No. 1 reads as follows:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

161. The applicant alleges that the infliction of serious damage on his house and property represents an unjustifiable deprivation of his right to possession of property as well as a violation of his right to enjoyment of his property as guaranteed by Article 1 of Protocol No. 1. In addition, he argues that his rights under this provision are violated and continue to be violated as the incidents perpetrated by State forces amount to a constructive expulsion from his property.

162. The Commission recalls its finding above (para. 152) to the effect that, on the basis of the written and oral evidence before the Commission, it cannot be considered to have been established beyond reasonable doubt that the events as alleged by the applicant occurred. The Commission considers, therefore, that it has an insufficient factual basis on which to reach a conclusion that there has been a violation of Article 3, 5 or 8 of the Convention or of Article 1 of Protocol No. 1.

CONCLUSION

163. The Commission concludes, by 28 votes to 1, that there has been no violation of Articles 3, 5 para. 1 and 8 of the Convention and Article 1 of Protocol No. 1.

E. As regards Articles 6 para. 1 and 13 of the Convention

164. Articles 6 para. 1 and 13 of the Convention, insofar as relevant, read as follows:

Article 6 para. 1

"1. In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

Article 13

"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."

165. The applicant submits that he is unable to obtain an effective remedy for the violations he has suffered or to obtain a determination of his civil rights. He contends that the prosecution system in South East Turkey does not operate so as to investigate effectively complaints concerning human rights abuses by agents of the State.

166. The Government, in their observations on the admissibility of the application (see Annex I), submitted that the applicant had a number of remedies at his disposal but that he had tried none of them.

167. The Commission considers that the claims which would have required determination by a court in the present case included compensation for damage to the applicant's house and property and that the applicant's civil rights within the meaning of Article 6 para. 1 of the Convention were therefore at issue.

168. The Commission refers to its decision on admissibility in the present case (see appendix to this Report). In that decision, the Commission, in the context of Article 26 of the Convention, referred to its admissibility decision in the case of Akdivar and others v. Turkey (No. 21893/93, dec. 19.10.94) in which it was concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them. The Commission found that in the present case the Government had not provided any additional information which might lead the Commission to depart from this conclusion.

169. The Commission's view in the context of Article 26 was taken in the face of certain domestic case-law referred to by the Government indicating that there may be a channel of complaint through the administrative courts which could award compensation to the individual from the State on the basis of the latter's liability to assume the protection of citizens from various social risks. However, the Commission considers that this case-law is insufficient to demonstrate that compensation claims in the emergency regions of South-East Turkey for the destruction of homes allegedly perpetrated by security forces have been successful.

170. The Commission recalls that Article 6 para. 1 of the Convention requires effective access to a court for civil claims. This requirement must be entrenched not only in law but also in practice. The individual should have a clear, practical and effective opportunity to challenge an administrative act that is claimed to be a direct interference with property rights, as in the present case (cf. Eur. Court H.R., de Geouffre de la Pradelle judgment of 16 December 1992, Series A no. 253-B, p. 43, para. 34).

171. The Commission's decision on admissibility points to the undoubted practical difficulties and inhibitions confronting persons like the present applicant who complain of destruction of their homes and property in South-East Turkey, where broad emergency powers and immunities have been conferred on the Emergency Governors and their subordinates. These difficulties are further demonstrated by the evidence taken in the present case, which shows that no investigation into the events was undertaken until after the Commission had communicated the application to the Turkish Government and that the subsequent investigation by successive prosecutors, in which there have been two decisions of non-jurisdiction, cannot be considered to have been conducted in an efficient way.

172. In these circumstances, the Commission is of the opinion that the applicant did not have effective access to a tribunal that could have determined his civil rights within the meaning of Article 6 para. 1 of the Convention.

173. In the present case, the applicant has not specified in what way his complaints also relate to matters other than those which concern his civil rights. For this reason, the Commission, having found a violation of Article 6 para. 1 of the Convention, is of the opinion that no separate issue arises in regard to Article 13 of the Convention.

CONCLUSIONS

174. The Commission concludes, by 26 votes to 3, that there has been a violation of Article 6 para. 1 of the Convention.

175. The Commission concludes, by 26 votes to 3, that no separate issue arises in regard to Article 13 of the Convention.

F. As regards Article 18 of the Convention

176. Article 18 of the Convention reads 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."

177. The applicant claims that his experiences represented an authorised practice by the State in breach of Article 18 of the Convention.

178. The Commission recalls its finding above (para. 152) to the effect that it has not been established that the events as alleged by the applicant occurred. Consequently, no question of restrictions having been applied for improper purposes under Article 18 arises in regard to these events.

CONCLUSION

179. The Commission concludes, by 28 votes to 1, that there has been no violation of Article 18 of the Convention.

G. Recapitulation

180. The Commission concludes, by 28 votes to 1, that there has been no violation of Articles 3, 5 para. 1 and 8 of the Convention and Article 1 of Protocol No. 1 (para. 163 above).

181. The Commission concludes, by 26 votes to 3, that there has been a violation of Article 6 para. 1 of the Convention (para. 174 above).

182. The Commission concludes, by 26 votes to 3, that no separate issue arises in regard to Article 13 of the Convention (para. 175 above).

183. The Commission concludes, by 28 votes to 1, that there has been no violation of Article 18 of the Convention (para. 179 above).

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. English)

PARTLY DISSENTING OPINION OF MRS. G.H. THUNE AND MR. N. BRATZA

For substantially the same reasons as those set out in the separate opinion of Mr. Bratza in Application No. 21893/93, Akdivar and Others v. Turkey, we consider that there has been a violation of Article 13 and not of Article 6 in the present case. We emphasise again the particular importance which we attach to the role of Article 13 in the context of the events in South-East Turkey for the reasons given in the partly dissenting opinion of Mrs. Thune in Application No. 23178/94, Sükran Aydin v. Turkey.

In all other respects we agree with the conclusions and reasoning of the majority of the Commission.

APPENDIX

DECISION OF THE COMMISSION

AS TO THE ADMISSIBILITY OF

Application No. 22275/93
by İsmet GÜNDEM
against Turkey

The European Commission of Human Rights sitting in private on 9 January 1995, the following members being present:

MM. H. DANELIUS, Acting President
C.L. ROZAKIS
F. ERMACORA
E. BUSUTTIL
G. JÖRUNDSSON
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. M. DE SALVIA, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 July 1993 by İsmet GÜNDEM against Turkey and registered on 19 July 1993 under file No. 22275/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 10 March 1994 and the observations in reply submitted by the applicant on 4 May 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1955 and lives at Diyarbakır. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant claims that the following events occurred.

On 7 January 1993, at about 10.30h, the Turkish security forces, consisting of approximately 200 soldiers and 150 village protectors carried out the first of two raids, involving violence against property and persons in the hamlet of Kaniye Meheme, which is situated in Sarıerik village near Diyarbakır.

The applicant was present in the village during the attack on 7 January 1993. The village had 15 households in 14 of which were members of his extended family. During the raid, the security forces gathered the villagers in one place. They beat some of the villagers, verbally abused and swore at others, including children. They used heavy weapons to shoot at the houses. They broke down doors and windows and they "mixed up" all the winter provisions, so that they became inedible. They also destroyed household goods in a number of houses. Before they left, they stated that if they found the villagers there the second time they came they would burn the village.

On 13 February 1993, the security forces and village protectors returned to the village at about 05.00h. The forces attacked the village, firing their guns into the air. The soldiers did not enter the village but surrounded it. About 50 village protectors entered the village and fired at the houses for about 20 minutes. Women and children were taken from the houses which were then destroyed. Some of the women and children were beaten with fists and rifle butts. Threats were made that if the villagers did not leave the village within 24 hours, the village would be demolished.

Most of the houses were damaged and rendered unusable. The applicant's house was damaged with the doors and windows broken and everything inside destroyed.

In these circumstances, the applicant and the other villagers fled to Diyarbakır.

It is claimed by the applicant that over 1000 villages have been evacuated in a similar way and that many villages have been destroyed since 1990. Over 1 million people have been displaced without alternative accommodation or livelihood and without compensation.

The respondent Government acknowledge that Turkish security forces were in operation in the village of Sarıerik near Diyarbakır between 7 and 13 February 1993. They state that the operations conducted at that time were aimed at impeding the activities of the militants from the PKK (Workers' Party of Kurdistan - an armed

separatist movement), maintaining order and protecting the villagers and their property.

The applicant did not make any complaint to the authorities concerning the destruction of his home and property and the expulsion from the village, alleging a fear of reprisal. Following however the communication of the applicant's complaints to the Government by the Commission in October 1993, the public prosecutor of Hazro commenced an investigation into the events in question.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(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."

The Government assert that 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.

The principle of administrative liability is reflected in the additional Article 1 of Law 2935 of 25 October 1983 on the State of Emergency, which provides:

(translation)

"... actions for compensation in relation to the exercise of the powers conferred by this law are to be brought against the Administration before the administrative courts."

Proceedings before the administrative courts are in writing.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

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 oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to make an unlawful search of someone's home (Articles 193 and 194),

- to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382),

- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or

- to damage another's property intentionally (Article 526 et seq.).

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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

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 local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas 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.

Article 8 of Decree 430 of 16 December 1990 provides as follows:

(translation)

"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 an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant complains of violations of Articles 3, 5, 6, 8, 13 and 18 of the Convention and Article 1 of the First Protocol.

He states that, for fear of reprisals, he has been unable to seek to challenge or complain to the authorities about the measures taken against him. Furthermore, he considers that any domestic remedies are illusory, inadequate and ineffective.

As to the precise nature of his complaints and the reasons why he considers that there are no effective remedies, he refers to arguments presented in two other applications to the Commission (Nos. 21893/93 and 21895/93).

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 July 1993 and registered on 19 July 1993.

On 11 October 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 10 March 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 4 May 1994. The applicant submitted further information on 14 September 1994.

THE LAW

The applicant alleges that on 7 January 1993 and 13 February 1993 State security forces launched a gun attack on his village. He claims that the soldiers and village protectors shot at the villagers, damaged their homes, destroying the contents, and forced them to evacuate the

village. The applicant invokes Article 3 of the Convention (the prohibition on inhuman and degrading treatment), Article 5 (the right to liberty and security of person), Article 6 (the right of access to court), Article 8 (the right to respect for family life and the home), Article 13 (the right to effective national remedies for Convention breaches) and Article 18 (the prohibition on using authorised Convention restrictions for ulterior purposes), as well as Article 1 of Protocol No. 1 to the Convention (the right to property).

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition.

Exhaustion of domestic remedies

The Government submit that the applicant has failed to comply with the requirement under Article 26 of the Convention to exhaust domestic remedies before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

In respect of damage alleged to have been caused by the State, the Government submit that the applicant had the possibility of introducing an administrative action before the administrative courts for compensation in accordance with Article 125 of the Turkish Constitution. Claims for compensation could also have been lodged in the ordinary civil courts.

The Government also submit that the acts alleged by the applicant have no lawful authority under emergency legislation or decrees and would constitute punishable criminal offences under both criminal and military law, in respect of which complaints could be lodged with the competent civil and military authorities.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by the agents of the State. None of the remedies suggested by the Government could be regarded as effective, in the applicant's view, because the scale of destruction of villages, as well as the expulsion and creation of internal refugees, is so great in South-East Turkey that this must be considered high-level Government policy - an administrative practice - in regard to which all remedies are theoretical and irrelevant.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors and other competent authorities; the absence of any cases showing the payment of adequate compensation to villagers for the destruction of their homes and villages, or for their expulsion; and the lack of any prosecutions against members of the security forces for the alleged

offences connected with the destruction of villages and forcible expulsions.

The Commission recalls that Article 26 of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and van den Brink judgment of 22 May 1984, Series A no. 77, p.18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies under the state of emergency to deal effectively with his complaints.

The Commission refers to its findings in Application No. 21893/93, Akduvar and others v. Turkey (Dec. 19.10.94) which concerned similar allegations by the applicants of destruction of their village and forcible expulsion. In that case, the Commission noted that it was a known fact there has been destruction of villages in South-East Turkey with many people displaced as a result. While the Government had outlined a general scheme of remedies that would normally be available for complaints against the security forces, the Commission found it significant that, although the destruction of houses and property has been a frequent occurrence in South-East Turkey, the Government had not provided a single example of compensation being awarded to villagers for damage comparable to that suffered by the applicants. Nor had relevant examples been given of successful prosecutions against members of the security forces for the destruction of villages and the expulsion of villagers.

The Commission considered that it seemed unlikely that such prosecutions could follow from acts committed pursuant to the orders of the Regional Governor under the state of emergency to effect the permanent or temporary evacuation of villages, to impose residence prohibitions or to enforce the transfer of people to other areas. It further had regard to the vulnerability of dispossessed applicants, under pressure from both the security forces and the terrorist activities of the PKK and held that it could not be said at this stage that their fear of reprisal if they complained about acts of the security forces was wholly without foundation.

The Commission concluded that in the absence of clear examples that the remedies put forward by the Government would be effective in the circumstances of the case, the applicants were absolved from the obligation to pursue them.

In the present case, the Government have not provided any additional information which might lead the Commission to depart from the above conclusions. This application cannot, therefore, be rejected

for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 of the Convention.

Abuse of the right of petition

The Government maintain that the application, being devoid of any sound judicial basis, has been lodged for the purposes of political propaganda against the Turkish Government. Accordingly the application constitutes an abuse of the right of petition which discredits the legal nature of the Convention control mechanism.

The applicant rejects the Government's submission, contending that his complaints relate to alleged violations of the Convention, which have not formally been brought before the local instances for fear of reprisal.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government submit that, while security forces were in operation in the village between 7 and 13 February 1993, the operations conducted at that time were aimed at impeding the activities of the militants from the PKK, maintaining order and protecting the villagers and their property. The Government have not otherwise commented on the substance of the applicant's complaints which it states are now under investigation by the public prosecutor following the communication by the Commission of the application.

The applicant maintains his account of events.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded, within the meaning of Article 27 para. 2 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Deputy Secretary to the Commission — Acting President of the Commission

(M. DE SALVIA) — (H. DANELIUS)

CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

Case of Gündem v. Turkey

(139/1996/758/957)

Judgment

Strasbourg, 25 May 1998

CONSEIL DE L'EUROPE

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

CASE OF GÜNDEM v. TURKEY

(139/1996/758/957)

JUDGMENT

STRASBOURG

25 May 1998

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The Netherlands: B.V. Juridische Boekhandel & Antiquariaat A. Jongbloed & Zoon (Noordeinde 39, NL-2514 GC's-Gravenhage)

SUMMARY[1]

Judgment delivered by a Chamber

Turkey – alleged destruction of house and possessions by security forces and village guards and lack of remedies in south-east Turkey

I. GOVERNMENT'S PRELIMINARY OBJECTIONS

A. Invalidity or, alternatively, withdrawal or discontinuation of application

Nothing had prevented Government from raising at the admissibility stage of Commission proceedings their doubts as to authenticity of applicant's application and certain documents - at the subsequent stage during hearing before Commission Delegates the Government only challenged the authenticity of one document but not that of the initial application - nor did they at that stage suggest that it could be inferred from applicant's absence at the hearing that he wished to withdraw or discontinue the proceedings.

Conclusion: estoppel (unanimously).

B. Non-exhaustion of domestic remedies

Central question was whether applicant had demonstrated existence of special circumstances dispensing him from obligation under Article 26 to exhaust domestic remedies.

Court had regard to security situation in south-east Turkey at the time of the applicant's complaint and to the ensuing obstacles to the proper functioning of the system of the administration of justice in that region - despite the extent of the problem of village destruction, no example of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or of prosecutions having been brought against them - general reluctance on the part of the authorities to admit that this type of practice by members of the security forces had occurred - on the other hand, applicant had not himself raised his Convention grievances before a domestic authority before complaining to Strasbourg - Court attached particular significance to the manner in which authorities conducted their investigation into applicant's allegations, following communication of his application by Commission to respondent Government.

In this regard Court noted that, despite seriousness of applicant's complaints, the investigations carried out by prosecution authorities were not only protracted but also of limited nature - on the other hand, Government had sought to demonstrate that authorities had made sustained efforts to find applicant in order to be able to take evidence from him - facts of case did not disclose any shortcomings on their part in this respect - nor did they seem to exclude that protracted and limited character of investigations to some extent caused by applicant's failure to co-operate with authorities - furthermore, during investigations, village mayor and four villagers from applicant's neighbourhood had been interviewed, all of whom had denied that alleged events had taken place - it was

1. This summary by the registry does not bind the Court.

questionable whether it could be said that there existed such special circumstances as could dispense applicant at the time of the events complained of from obligation to exhaust domestic remedies - however, Government's preliminary objection raised issues which were closely linked to those raised by applicant under Article 13.

Conclusion: objection joined to the merits (fourteen votes to six).

II. MERITS OF THE APPLICANTS' COMPLAINTS

A. Articles 3, 5 § 1, 8 and 18 of the Convention and Article 1 of Protocol No. 1

Recalling that under its case-law the establishment and verification of the facts are primarily a matter for the Commission, Court saw no reason to depart from Commission's findings that it had not been established beyond reasonable doubt that the events as alleged by the applicant had occurred.

Conclusion: no violation (unanimously).

B. Articles 6 § 1 and 13 of the Convention

Since applicant did not attempt to make an application before the courts, not possible to determine whether Turkish courts would have been able to adjudicate on his claims had he initiated proceedings – in any event, applicant complained essentially of lack of a proper investigation – therefore appropriate to examine this complaint in relation to general obligation under Article 13.

Conclusion: not necessary to consider complaint under Article 6 § 1 (unanimously).

Article 13 applied only in respect of Convention grievances which were arguable - whether that was so in this case had to be decided in light of particular facts and nature of legal issues raised.

Court reiterated Commission's findings that it was only the oral testimony of applicant's father which provided support for applicant's account of specific events - testimony had been rather unclear and had differed from applicant's own account as to the reasons for the alleged damage to his house and property - several witnesses had denied that any houses in the neighbourhood had been destroyed by security forces and village guards - a number of witnesses had agreed that some houses belonging to applicant's family had burned down following a clash several months after the alleged events, but none had suggested that result of deliberate action by security forces or village guards - furthermore, applicant had failed to appear before the Commission's Delegates - Commission felt concern about his explanation that he feared adverse consequences but was unable to determine whether or to what extent such fear might have been justified - whatever the reason for applicant's absence, it had made it difficult to establish the facts.

Court considered that the evidence gave rise to serious doubts as to whether applicant had made out a factual basis for his allegation that his house and property had been purposely destroyed by the security forces - in the circumstances of the case, including the absence of an opportunity for the Commission to test directly with him his written statements, Court not satisfied that he had an arguable claim that the Convention had been violated.

Conclusion: no violation and not necessary to pursue examination of preliminary objection concerning exhaustion of domestic remedies (thirteen votes to seven).

COURT'S CASE-LAW REFERRED TO

21.6.1988, Plattform "Ärzte für das Leben" v. Austria; 27.4.1988, Boyle and Rice v. the United Kingdom; 9.12.1994, Stran Greek Refineries and Stratis Andreadis v. Greece; 16.9.1996, Akdivar and Others v. Turkey; 18.12.1996, Aksoy v. Turkey; 25.6.1997, Halford v. the United Kingdom; 27.8.1997, Anne-Marie Andersson v. Sweden; 28.11.1997, Menteş and Others v. Turkey; 19.2.1998, Kaya v. Turkey

In the case of Gündem v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr P. JAMBREK,
Mr U. LÕHMUS,
Mr E. LEVITS,
Mr J. CASADEVALL,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 30 January and 24 April 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 139/1996/758/957. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 28 October 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 22275/93) against the Republic of Turkey lodged with the Commission under Article 25 by Mr İsmet Gündem, who is a Turkish citizen, on 7 July 1993.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (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 3, 5 § 1, 8, 13 and 18 of the Convention, Article 1 of Protocol No. 1 and, in particular, Article 6 § 1 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30). On 18 March 1997 the President of the Chamber refused the applicant's request to provide for interpretation in an unofficial language at the public hearing having regard to the fact that two of her lawyers used one of the official languages (Rule 27).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 29 October 1996, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr R. Macdonald, Mr N. Valticos, Mrs E. Palm, Mr L Wildhaber, Mr P. Jambrek and Mr J. Casadevall (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr U. Lõhmus and Mr F. Matscher, the first and second substitute judges, replaced respectively Mrs Palm and Mr Macdonald, who were unable to take part in the further consideration of the case (Rules 22 § 1 and 24 § 1).

4. The President of the Chamber, acting through the Registrar, consulted the Agent of the Government of Turkey ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 6 March 1997, the Registrar received the Government's memorial on 13 June 1997 and the applicant's memorial on 18 June 1997. On 27 August 1997 the Secretary to the Commission indicated that the Delegate did not wish to reply in writing.

On 15 September 1997 the Commission supplied a number of documents from its case file, including the verbatim record of the hearing of witnesses before the Delegates in Diyarbakır, which the Registrar had requested on the instructions of the President of the Chamber.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 September 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A. GÜNDÜZ, Professor of International Law,
University of Marmara, *Agent*,
Mr M. ÖZMEN, Ministry of Foreign Affairs,
Mr A. KAYA, Ministry of Justice,
Ms A. EMÜLER, Ministry of Foreign Affairs,
Ms Y. RENDA, Ministry of Foreign Affairs,
Ms N. AYMAN, Ministry of the Interior,
Mr N. ALKAN, Ministry of the Interior, *Advisers*;

(b) *for the Commission*
Mr N. BRATZA, *Delegate*;

(c) *for the applicant*
Mr K. BOYLE, Barrister-at-Law, *Counsel*,
Mr O. BAYDEMIR, Advocate,
Ms A. REIDY, Barrister at Law
Ms C. NOLAN,
Mr J. JANSEN, *Advisers*.

The Court heard addresses by Mr Bratza, Mr Boyle and Mr Gündüz.

6. Following deliberations on 1 December 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 § 1).

7. The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, President of the Court, Mr Bernhardt, Vice-President of the Court, and the other members and substitute judges (namely Mr M. A. Lopes Rocha and Mr E. Levits), of the Chamber which had relinquished jurisdiction (Rule 51 § 2 (a) and (b)). On 2 December 1997, in the presence of the Registrar, the President drew by lot the names of the nine additional judges called on to complete the Grand Chamber, namely Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Pekkanen, Mr A. N. Loizou, Sir John Freeland, Mr A. B. Baka, Mr G. Mifsud Bonnici, Mr D. Gotchev and Mr B. Repik (Rule 51 § 2(c)).

Subsequently, Mr J. De Meyer replaced Mr Ryssdal, who was unable to take part in the further consideration of the case, following which Mr Bernhardt acted as President of the Grand Chamber (Rules 21 § 6, 22 § 1 and 24 § 1). On 9 March 1998 Mr Walsh died.

Having taken note of the opinions of the Agent of the Government, the applicant's representatives and the Delegate of the Commission, the Grand Chamber decided on 30 January 1998 that it was not necessary to hold a further hearing following the relinquishment of jurisdiction by the Chamber (Rule 38, taken together with Rule 51 § 6).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who was born in 1955, is a Turkish citizen. At the material time he lived in the Kaniye Meheme neighbourhood of the village of Sarıerik, in the Hazro district of the province of Diyarbakır in south-east Turkey.

9. Since approximately 1985, a violent confrontation has raged in the South-East of Turkey, between the members of the PKK (Workers' Party of Kurdistan) and the security forces. It has, according to the Government, claimed the lives of thousands of civilians and members of the security forces.

At the time of the events complained of, ten of the eleven provinces of south-eastern Turkey had since 1987 been subjected to emergency rule.

10. The facts of the case, particularly concerning events in or about 7 January and 13 February 1993, are in dispute between the parties.

A. Applicant's version of the facts

11. According to the applicant, in this neighbourhood of Kaniye Meheme, which consisted of approximately fifteen households, his family owned eleven houses, seven of which were occupied at the relevant time. The incidents of which the applicant complains occurred at a time when the Sarıerik village did not have village guards. The applicant's family had refused to become village guards.

12. In the first incident, on 7 January 1993, soldiers and village guards from the villages of Kırmataş and Meşebağlar came and gathered villagers from the Kaniye Meheme neighbourhood together in one place. They beat

some of the villagers and then searched the houses. When they entered the houses they destroyed some of the property and household goods inside and mixed up the winter provisions. When they left the houses they sprayed them with bullets, breaking the windows.

13. In the second incident, on 13 February 1993, the soldiers and village guards came to the neighbourhood. The soldiers surrounded the neighbourhood and the village guards fired shots at the houses for around twenty minutes. The applicant was able to hear the village guards and the soldiers communicating by walkie-talkie. They targeted the Gündem house in particular. During the attack the women and children were trapped in the houses and had to lie down on the floor to take cover. The men had tried to hide outside the houses. The applicant's house was severely damaged during this attack.

14. The applicant and his family left the village soon after these events at the beginning of March 1993. They now live in Diyarbakır.

15. A number of houses belonging to the applicant's family in the Kaniye Meheme neighbourhood, but not the applicant's own house, were subsequently destroyed by fire in the summer of 1993, apparently as a result of a raid by the PKK. At that time, villagers in the main part of the village of Sarıerik had become village guards.

16. According to the applicant, the targeting of the houses of his family is consistent with the State practice of evacuating those villages and hamlets where the villagers have refused to accept the village guard system.

B. Government's version of the facts

17. Between 7 and 13 February 1993, security forces were conducting operations in the village of Sarıerik. The operations were aimed at impeding the activities of PKK militants maintaining order and protecting the villagers and their property.

A number of houses belonging to relatives of the applicant were burned in a terrorist attack six or seven months later than the incidents complained of. The day after this incident the security forces arrived at the village to investigate the attack.

C. The Commission's findings of fact

18. The Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence. This included, amongst other material, two statements by the applicant dated 15 March 1993 and 31 May 1994, taken respectively by Abdullah Koç and Mahmut Şakar of the Diyarbakır branch of the Human Rights Association, five statements taken on 17 November 1994 by Muhittin Çiçek, Hazro public prosecutor, one from Kasım Tatlı, mayor of the Sarıerik village, and the others from Esref

Güç, İbrahim Türkoğuz, Musa Can and Yusuf Yaşa. The first two were members of the village council of elders and all four lived in the neighbourhood of Kaniye Meheme. Moreover two Delegates of the Commission, Mr H. Danelius and Mr B. Conforti took oral evidence in Diyarbakır on 7 and 8 November 1995, from seven witnesses, including Mr Şakar, Mr Tatlı and the five witnesses from the village and also the applicant's father, Mr Hacı Ahmet Gündem, but not the applicant himself.

19. The verbatim record of the hearing held on 7 November 1995 contained the following passages of relevance to the Government's preliminary objection as to the validity of the application and the alleged withdrawal of the applicant's complaints (see paragraph 52 below):

"Mr. DANELIUS: The hearing is resumed.

The original plan was to hear the applicant, Mr. Gündem, now but we have been informed that he will not be coming. Mr. Boyle, is there any explanation to be given for his absence?

Mr. BOYLE: The position is that the applicant, Mr. Gündem, fears to give his evidence. He wishes to maintain his application and in those circumstances it is proposed that the lawyer, Mahmut Şakar, who took his longer statement on 31 May 1994 (there are two statements on the file in the application) should be called and he can give a fuller explanation.

We would also wish to call and have heard by the Delegates, Mr. Gündem's father, Hacı Ahmet Gündem. He does not speak Turkish but Kurdish, and the proposal would be that he might be heard tomorrow when another witness, Mr. Tekin, who will also require translation will be giving evidence. I understand, Mr. Danelius, that is for tomorrow afternoon.

Mr. DANELIUS: Yes. The hearing of Mr. Hacı Mehmet Tekin is foreseen for tomorrow afternoon at 2.30 p.m.

Mr. BOYLE: There is just one further matter concerning the witnesses. The Government may be able to assist here. From our translation of the recent statements given to us on Sunday by the Government, it seems that the witness, Murat Fidan, who was to be called tomorrow at 10 o'clock appears to be involved in the Çetin case, not the Gündem case. Perhaps that could be clarified during the day because it may free space. It may be that the Government wish him to be called for a particular reason on that day although we have closed the Çetin case, or perhaps I have misunderstood what was in the statement.

Mr. DANELIUS: Thank you. Do you have any comments, Mr. Gündüz?

Mr. GÜNDÜZ: Thank you, Mr President. This is an extremely interesting case. It seems to be an almost unprecedented one. The applicant appears to have gone to the Human Rights Association one month after his alleged incident and to have given a statement there. Then, about 14 months later, many things he had not said there were taken down by a Mahmut Şakar, the seemingly then-president of the Human Rights Association.

Gündem's signature does not appear on what was written down 14 months later, which seems to be a 'scenario'. Only the Human Rights Association's President alleges that he heard these things from him. There are a number of details and lengthy accusations, apparently a "scenario", which were not included in the statement taken at the Human Rights Association a year ago.

On my way here this morning I assumed that I would see İsmet Gündem here and would clarify the issue with a lot of questions, so I waited eagerly for him to arrive. According to the evidence in our hands, İsmet Gündem's allegations are nothing but a 'scenario' and we shall prove it so.

We are opposed to the substitution for İsmet Gündem of someone who alleges to be the Human Rights Association's President. Thus we are confronted with another applicant. Unless the testimonies of both of them are put together, all that Mahmut Şakar will say will remain completely unfounded and will not go beyond propaganda and deception. We are in favour of listening to both of them together. The Government's view is that Mahmut Şakar has not witnessed this incident. In no way can he contribute to the case. He will relate whatever he claims to have heard. We would like to hear this from the complainant. We believe that information supplied here by someone who is being tried with charges of activities and propaganda against the State will mislead us. We do not want the Commission to hear him here today. If he is to be heard at all, he must be heard together with Gündem. Therefore, we absolutely object to this. We do not believe that the Commission will allow itself to be misled.

We raise no objections to the two other requests made by my honourable colleague, Professor Boyle. We shall of course listen to the witnesses. I will inform you of the situation concerning Murat Fidan later in the day after conferring with my colleagues.

Mr. DANELIUS: Mr. Boyle, please.

Mr. BOYLE: I would like to say to my honourable Friend, Mr. Gündüz, that, of course, it is not suggested that Mr. Şakar is a witness in the sense that he witnessed the incidents in January and February 1993 in this particular hamlet. But he is a competent witness in the sense that on my instructions he interviewed and made an extended note about the incident. It seems to me that he is perfectly competent to give evidence and it is for the Delegates to weigh what he has to say, both about why the applicant is not here and as to the taking of this record of the interview. I object to any suggestion that Mr. Şakar, who is a lawyer of good standing - whatever the State is prosecuting him for - will in any way be making propaganda. That is simply an unacceptable statement.

The reality is that the Delegates are taking evidence in circumstances where there are several languages involved, and at the end of the day it is for them to make a report. This is not a court case. It does not really matter very much what way, within reason, witnesses are heard. For reasons of convenience it is proposed to hear Mr. Gündem's father who will be available tomorrow whom we have met and who, having been sworn in, will be able to give evidence as to what happened because he was a witness on both occasions.

So, I would propose to the Delegates that we proceed with Mr. Şakar who will give an explanation as to the making of this note.

Mr. DANELIUS: Mr. Gündüz.

Mr. GÜNDÜZ: I omitted to mention one thing in my previous statement. It is said that he has not shown up because he is afraid. We absolutely do not believe that this is true. I am unable to understand the reason why the Government of the Republic of Turkey should frighten Mr. Gündem. The Çetin case that we heard here yesterday was slightly more serious. He said, "Soldiers arrived, broke the door with an axe and came in and burned down the house". His allegations were very serious. I cannot understand why Gündem should be frightened in a place where Çetin spoke quite comfortably. We absolutely do not accept this. We regard this as a slander. The Government of the Republic of Turkey will definitely not interfere in any manner with its citizens' speaking here. It will definitely not do anything wrong. Apparently my honourable colleague is being misinformed. Of course he relates to us what he has been told. We really insist on this.

Mr. DANELIUS: Mr. Özkarol.

Mr. ÖZKAROL: Kevin Boyle said that Mahmut Şakar was a good lawyer. A good lawyer would not have put only his signature at the foot of an almost four-page statement he had taken. Had he met with İsmet Gündem, he would have had him sign as well. It is therefore not possible for us to accept the signature of Mahmut Şakar appearing alone on that document presented to the Commission and to ourselves. That would be misleading. The "scenario" is set. As Professor Gündüz has said, it is not possible for us to accept Mahmut Şakar's testimony unless İsmet Gündem appears and testifies here.

Mr. DANELIUS: Since there is a formal objection on the part of the Government, the Delegates must discuss this matter before going any further.

The meeting is adjourned.

The hearing was adjourned at 9.20 a.m. and resumed at 9.30 a.m.

Mr. DANELIUS: The hearing is resumed.

The Delegates have discussed the matter and I would summarise our position in the following way.

First of all, the Delegates regret very much the absence of the applicant, Mr. Gündem, who would of course have been a very important witness in this case. As you know, we have no means of forcing him to come before us. We must note that he is absent and, in the evaluation of the evidence in this case, the appropriate conclusions will, of course, be drawn from that fact.

As to the hearing of Mr. Şakar, I would like to recall that in hearings of this kind, our policy has been very liberal. In previous cases we have heard lawyers who had taken statements from applicants or other persons. We have accepted that kind of indirect evidence and therefore have no objection of principle to hearing such evidence. It is, of course, clear that Mr. Şakar would in no way replace the

applicant. He would simply give evidence about what he has himself experienced in the case which is, of course, a sort of indirect evidence.

As I have said, that kind of evidence has been accepted in previous cases and we see no reason not to accept it in the present one. It is, of course, understood that Mr. Şakar is here to answer the questions that are put to him and not to make any other statements of his own.

This being said, the Delegates are prepared to listen to Mr. Şakar's evidence in this case.

Mr. Gündüz.

Mr. GÜNDÜZ: We insist that Mr. Şakar cannot be heard in the absence of the complainant. What he has said is closely linked to what the complainant has said. In our opinion, Şakar is saying what the complainant has not said. If the Commission does not intend to re-examine the situation, we shall not listen to Mr Şakar. You may listen to him in our absence.

Mr. DANELIUS: The Delegates have, as I said, taken this decision and we are prepared to listen to Mr. Şakar. Of course, we will evaluate his evidence taking into account all the circumstances of the case, but we will not refuse to hear his evidence in this case.

Mr. GÜNDÜZ: Despite all our respect for the Commission, we will not listen to him. Apparently the Commission will pose questions. You will proceed in our absence.

The Government delegation leaves the room and the witness enters"

20. In relation to the oral evidence, the Commission had been aware of the difficulties attached to assessing evidence obtained through interpreters (in one case via Kurdish and Turkish into English). 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 relation to both written and oral evidence, the Commission was aware that the cultural context of the applicant and the witnesses made it inevitable that dates and other details lacked precision (in particular, numerical matters) and did not consider that this by itself impinged on the credibility of the testimony.

The Commission's findings could be summarised as follows.

1. Proceedings before the domestic authorities

21. The applicant did not himself approach any domestic authority with his Convention grievances. On the other hand, following the communication of this application by the Commission to the respondent Government on 11 October 1993, the Ministry of Justice (International Law and External Relations General Directorate) contacted the chief public prosecutor's office

in Hazro through the chief public prosecutor's office in Diyarbakır on 17 December 1993, informing them of the complaints made by the applicant.

22. On 18 May 1994, a decision of non-jurisdiction was issued by a public prosecutor at Hazro, Ekrem Bakır, and the investigation was referred to the Hazro District Administrative Council ("the Administrative Council") in accordance with Article 15 paragraph 3 of the Prevention of Terrorism Act No. 3713.

23. By letter of 31 August 1994, the Ministry of Justice requested the Diyarbakır Chief Public Prosecutor to proceed with the investigation since the provision on which the decision of non-jurisdiction of 18 May 1994 was based had been declared unconstitutional by the Constitutional Court on 31 March 1992. On 21 October 1994, the Administrative Council returned the investigation file to the chief public prosecutor's office in Hazro.

24. Having taken statements from five persons on 17 November 1994 (Kasım Tatlı, Esref Güç, İbrahim Türkoğuz, Musa Can and Yusuf Yaşa), the public prosecutor at Hazro, Muhittin Çiçek, on 2 February 1995, issued a decision of non-jurisdiction and referred the investigation to the Administrative Council in accordance with Article 4 paragraph 3 sub-paragraph (i) of the Decree No. 285.

2. The alleged incidents on 7 January and 13 February 1993

25. The Commission noted that there had been no detailed investigation on the domestic level into the events which allegedly occurred in the Kaniye Meheme neighbourhood on 7 January and 13 February 1993. The Commission had accordingly based its findings on the evidence given orally before its Delegates or submitted in writing in the course of the proceedings. The Commission observed that in cases, such as the present one, where the applicant claimed to have been an eye-witness to the events of which he complained, he was also an important witness in his own case. However, the applicant had not appeared before the Commission's Delegates to give evidence.

26. The applicant's account of a Government policy in respect of villagers refusing to become village guards had been supported by findings contained in the reports of Human Rights Watch/Helsinki and the Kurdish Human Rights Project. The Commission further noted that other applications which had been brought before it had also contained allegations of raids being conducted on villages and that statements have been invoked which refer to other raids by the Meşebağlar and Kırmataş village guards.

27. As regards the evidence obtained in respect of the specific events alleged to have happened in this case, it was only the oral testimony of the applicant's father, Hacı Ahmet Gündem, which provided support for the applicant's account of events, although this testimony was rather unclear as to details and timing. However, Hacı Ahmet Gündem did not say that the

houses belonging to the applicant's family had been destroyed because the family members had refused to become village guards. He put forward two different reasons: firstly, there existed an old vendetta between the applicant's family and Meşebağlar villagers and the latter had told the security forces that the applicant's family supported the PKK. Secondly, the applicant's family had accused a member of the gendarmerie of being responsible for the disappearance of the applicant's brother İbrahim. The Commission found that the applicant's appearance before the Delegates would have been required to clarify these matters.

28. Although the other evidence suggested that the area around Sarıerik had been the scene of frequent clashes between terrorists and security forces or village guards, it offered no support for the applicant's allegations. On the contrary, several witnesses had denied that any houses in Kaniye Meheme had been destroyed by security forces and village guards. In this respect the Commission recalled, *inter alia*, the statements of Kasım Tatlı and Esref Güç to a public prosecutor and their oral testimony before the Delegates. A number of witnesses did agree that some houses belonging to the applicant's family had burned down following a clash which had started in Meşebağlar in the summer of 1993, but none of these witnesses suggested that this had occurred as a result of a deliberate action by security forces or village guards. The Commission referred to the statements of Kasım Tatlı and Esref Güç to a public prosecutor, their oral testimony and the oral testimony of Hasan Çankaya.

29. The Commission thus noted that it had been presented with diverging versions of whether and how the applicant's house and property were damaged. The applicant was summoned on two occasions to appear before the Commission's Delegates to give evidence. On the first occasion he failed to appear. On the second occasion he informed the Commission that he would not appear which resulted in the hearing being cancelled. He explained his failure to appear by referring to his fear of adverse consequences for himself if he were to appear before the Delegates. The Commission felt concern about this explanation but was unable to determine whether or to what extent such fear might have been justified.

Whatever reason there may have been for the applicant's absence, the Commission found that his failure to give evidence made it difficult to establish the facts. It would have been necessary, in order to make a reliable assessment of the situation, to hear the applicant in person in order to assess his general credibility and to put questions to him about various details, including the background of the events.

For these reasons the Commission was of the opinion that it had not been established beyond reasonable doubt that the applicant's house and property were damaged by security forces and village guards on 7 January and 13 February 1993.

D. Particulars submitted by the Government on the investigations conducted by the domestic authorities

30. In their memorial to the Court the Government provided additional information, together with supporting documents, about the investigations conducted by the Turkish prosecution authorities following the communication by the Commission to the respondent Government of the applicant's complaints. In as far as relevant to the Court's consideration of the case, these could be summarised as follows.

Immediately after becoming aware of the applicant's application to the Commission, the Public Prosecutor of Hazro started an investigation into the alleged events. Since the application indicated that the applicant resided at an address in Diyarbakır, the Hazro Prosecutor requested the Public Prosecutor in Diyarbakır to take a detailed statement from the applicant and to seek information from him as to whether there were other witnesses and evidence. In a letter of 20 December 1993, the latter authority asked the local police to visit the applicant at his address and to ensure that he came to the Diyarbakır Prosecutor for an interview. The police went to the address. The applicant's uncle, Abdullah Gündem, told the police that the applicant had moved to Istanbul and that he did not know his new address.

On being informed about the fact that the applicant was not found at the address in Diyarbakır, the Hazro Prosecutor requested the Hazro Gendarme Commander to find him so that he could interview him. After having contacted the mayor and the villagers of Sarıerik, the Hazro Gendarme Commander reported back that the applicant was not to be found. Thus, the Hazro Prosecutor was unable to meet the deadline for the investigations, set at 1 January 1994 by the Ministry of Justice. On 24 March 1994 the Chief Public Prosecutor of Hazro requested the local Prosecutor to complete the investigations and to report the results, following which the latter, on 18 May, issued a decision of non-jurisdiction.

31. The file was then transferred to the Office of the Governor of Hazro for investigation by the Administrative Council. The Governor himself took a statement from the Mayor of Sarıerik. He asked the Hazro Gendarme Commander to report back to him as to whether there had been any operation to Sarıerik on or around 7 January and 13 February 1993 and if so to give a list of the members of the security forces who participated in the operation.

Both the Mayor and the gendarme were categorical that there had been no operation on the said dates and that the alleged incidents did not take place. The gendarme had sent copies of its service book covering the stated dates.

Following the request by the Ministry of Justice for the reconsideration of the case, the Hazro Public Prosecutor restarted a full investigation. This time the prosecutor had changed. He wrote to the Hazro Gendarme

Commander to name the mayor and members of the elder council of Sarıerik and to indicate names of members of the security forces who had participated in the alleged operation, if there had been any. He also asked him to find the applicant so that he could be interviewed. The Gendarme Commander reported back that there had been no operation to Sarıerik on the stated dates, and that the applicant could not be found because he had moved from his village and his whereabouts were unknown. He gave the names of the mayor and the members of the elder council. He also asked the Governor to indicate whether Sarıerik had any village guards at the material time, and to give a list of village guards of Meşebağlar. The Governor provided a list of the village guards of Meşebağlar and stated that Sarıerik did not have any village guards at that time.

The Public Prosecutor heard the mayor and the members of the elder council, namely Kasım Tatlı, Esref Güç, Musa Can, İbrahim Türkoğuz, and Yusuf Yaşa. They all categorically stated that the alleged incidents had not taken place, that about 6 months after the alleged incidents between 3 and 4 houses belonging to the Gündem family had been burned after a clash between the security forces and terrorists. On the basis of the previous investigations by the former prosecutor and the Governor, the new public prosecutor came to the conclusion that he had no jurisdiction to proceed with the case and that it fell within the jurisdiction of the Hazro Administrative Council. In fact he could have taken a decision of non-prosecution but not having had the opportunity to hear the applicant personally he referred the application to the Office of the Governor for examination by the Administrative Council.

The Hazro Administrative Council first appointed an investigator who, after having made an investigation into the matter, prepared a report which was submitted to the Council for consideration and decision. The Council found that there was no evidence to support or substantiate Mr Gündem's allegations and decided on 17 August 1995 that there was no room for further prosecution. The Council's decision was unanimously approved by the Diyarbakır Administrative Court on 15 January 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Administrative liability

32. Article 13 of Law 2577 concerning administrative proceedings provides that any person who has suffered damage as a result of an act committed by the administration may request compensation from the administration within one year of the alleged acts. In case this request is

completely or partially rejected or if no reply has been received within a time-limit of sixty days, the person involved may initiate administrative proceedings.

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

> "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."

34. 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.

B. Criminal responsibility

35. The Turkish Criminal Code makes it a criminal offence:

- to oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- to make an unlawful search of someone's home (Articles 193 and 194),
- to subject someone to torture or ill-treatment (Article 243 in respect of torture, and Article 245 in respect of ill-treatment, inflicted by civil servants), and
- to damage another person's property intentionally (Article 526 et seq.).

36. 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.

37. If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal

Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

38. If the alleged author of a criminal offence is a State official or civil servant, permission to prosecute must be obtained from local administrative councils. The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

C. Provisions on compensation

39. Any illegal act by civil servants, be it a criminal offence or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

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

D. Constitutional provisions

41. Articles 13 to 15 of the Constitution provide for fundamental limitations on constitutional safeguards.

42. Provisional Article 15 of the Constitution provides that there can be no allegation of unconstitutionality in respect of measures taken under laws or decrees having the force of law and enacted between 12 September 1980 and 25 October 1983. That includes Law 2935 on the State of Emergency of 25 October 1983, under which decrees have been issued which are immune from judicial challenge.

E. Emergency measures

43. Extensive powers have been granted to the Regional Governor of the State of Emergency by such decrees, especially Decree 285, as amended by Decrees 424 and 425, and Decree 430.

44. Article 8 of Decree 430 of 16 December 1990 provides as follows:

> "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 damages suffered by them without justification."

45. According to the applicant, this Article grants impunity to the Governors. Damage caused in the context of the fight against terrorism would be "with justification" and therefore immune from suit. Moreover, Decree 430 reinforces the powers of the Regional Governor to order the permanent or temporary evacuation of villages, to impose residence restrictions and to enforce the transfer of people to other areas. Consequently, the law, on the face of it, grants extraordinarily wide powers to the Regional Governor under the state of emergency and is subject to neither parliamentary nor judicial control. However, at the relevant time there was no decree providing for the rehousing of displaced persons or the payment of compensation.

PROCEEDINGS BEFORE THE COMMISSION

46. In his application (no.22275/93) to the Commission introduced on 7 July 1993, the applicant, invoking Articles 3, 5, 6, 8, 13 and 18 of the Convention and Article 1 of Protocol No. 1, complained that his home and possessions had been severely damaged in the course of attacks conducted by State security forces and village guards on 7 January and 13 February 1993, as a result of which he had to leave his home.

47. The Commission declared the application admissible on 9 January 1995. In its report of 3 September 1996 (Article 31), it expressed the opinion that there had been no violation of Articles 3, 5 § 1, 8 and 18 of the Convention and Article 1 of Protocol No. 1 (by twenty-eight votes to one); that there had been a violation of Article 6 § 1 of the Convention (by twenty-six votes to three); and that no separate issue arose under Article 13 (by twenty-six votes to three). The full text of the Commission's opinion and of the partly dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

48. At the hearing on 23 September 1997 the Government, as they had done in their memorial, invited the Court to hold that the case should be declared inadmissible since the application was invalid or since the applicant had withdrawn his complaints. In addition they pleaded that the

1. ***Note by the Registrar.*** For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

applicant had failed to exhaust domestic remedies. Should the Court not uphold any of their preliminary objections, the Government requested it to hold that the events complained of had not occurred.

49. On the same occasion the applicant reiterated his request to the Court stated in his memorial to find a violation of Article 13 of the Convention or, in the alternative, of Article 6 and to award him just satisfaction under Article 50.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

50. Before the Court the Government raised two preliminary objections to the Court's jurisdiction. Firstly, the authenticity of the application was open to doubt or, alternatively, the applicant had withdrawn or discontinued the application; secondly, the applicant had failed to exhaust domestic remedies as required by Article 26 of the Convention.

51. The Court will take cognisance of these preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see the Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, p. 77, § 32).

A. The Government's first preliminary objection

52. In challenging the validity of the application the Government questioned the applicant's identity. They pointed out that the application had been constructed on a statement allegedly given by İsmet Gündem to Mahmut Şakar of the Human Rights Association in Diyarbakır, which was responsible for processing many false applications by exploiting the ignorance of many poor, illiterate peasants. The statement, which was apparently written by Mr Şakar rather than Mr Gündem himself, ostensibly bore the latter's signature, as did the power of attorney, unlike the statement of 31 May 1994 (see paragraph 18 above). In both instances the signature was nothing but an illegible scratch. Furthermore, the applicant had never appeared before the Commission; neither the Government nor the Commission had had the opportunity to verify the authenticity of the application or Mr Gündem's standing as an applicant. Having regard to the testimony given by Mahmut Şakar and Mr Gündem's father to the

Delegates of the Commission (see paragraph 18 above) it had to be concluded that Mr Gündem did not know about the application which had been introduced in his name.

In the alternative, the Government maintained that, even if it were to be accepted that Mr Gündem was initially an applicant in this case, he must be considered to have discontinued the application.

53. The Delegate of the Commission stressed that the Commission had treated the application as genuine. He invited the Court not to reject the application, either on the ground that it had never been lodged by İsmet Gündem or on the ground that it had been implicitly withdrawn. It was not disputed that a person called İsmet Gündem was registered in the birth registry and that at the material time he had owned a house and had lived with his extended family in the Kaniye Meheme neighbourhood. This was confirmed by his father who gave evidence before the Delegates (see paragraph 18 above). No reasons had been advanced for doubting that the signatures were those of Mr Gündem or that the statements taken by the Human Rights Association were a correct reflection of his complaints. There was nothing in the evidence of Mr Şakar to suggest that İsmet Gündem had not given the second statement or that he was unaware that an application had been lodged on his behalf. Still less was there anything to indicate a wish on his behalf to discontinue or withdraw the application.

54. The Court notes that it does not transpire from the material before it that the Government raised their objection to the validity of the application at the stage prior to the Commission's decision of 9 January 1995 declaring the application admissible. Rather, their submissions to the Court on this point were based on what had been stated during the oral hearing before the Delegates in November 1995 (see paragraph 19 above).

However, in the view of the Court, nothing had prevented the Government from raising at the admissibility stage their doubts, firstly, as to the nature of the signatures on the statement and power of attorney of 15 March 1993 and, secondly, as to the absence of any signature by the applicant on the initial application to the Commission of 7 July 1993 and the statement of 31 May 1994 prepared by Mr Şakar. Furthermore, it should be recalled, the Government did not challenge at the subsequent stage during the hearing before the Delegates the authenticity of the documents of 15 March 1993 or the initial application lodged on 7 July 1993. Nor did they at that stage suggest that it could be inferred from the applicant's absence at the hearing that he wished to withdraw or discontinue the proceedings. Their objections referred only to the more detailed statement prepared by Mr Şakar on 31 May 1994 and to the fact that he was to give oral evidence before the Delegates (see paragraph 19 above).

It follows that the Government are estopped from making a preliminary objection before the Court both as to the validity of the application and the alleged withdrawal of the applicant's complaints.

B. The Government's second preliminary objection

55. The Government, as they had done at the admissibility stage before the Commission, maintained that the applicant had failed to exhaust domestic remedies as required by Article 26 of the Convention since he had not sought to have his grievances determined by a domestic authority. Accordingly, the Court did not have jurisdiction to examine his complaints.

56. The Government pointed out that, if committed, the alleged acts complained of by the applicant before the Strasbourg institutions would indeed have been punishable under Turkish criminal law (see paragraphs 35-38 above). In the areas governed by public emergency rule the local public prosecutor carried out an initial investigation into accusations against members of the security forces in respect of offences committed during or in connection with the performance of their official duties. If there was *prima facie* evidence that a member of the security forces had been involved, the prosecutor would refer the file to the competent administrative council. The latter authority would then appoint an investigator whose findings it would consider before taking a decision as to whether criminal proceedings ought to be instituted against a member of the security forces. If the decision was in the negative, it could be appealed against to the Council of State. If it was in the affirmative, the file would be referred back to the local public prosecutor for the opening of criminal proceedings.

In the instant case, the Public Prosecutor of Hazro had learned about the applicant's claims only after the Commission had communicated his application to the Government (see paragraph 21 above). The Prosecutor had been hindered in the performance of his duties by the fact that the applicant's residence at that time – in Diyarbakır – had been outside his jurisdiction (see paragraph 30 above). Even in Diyarbakır the police could not trace him because he had moved to Istanbul without giving any hint as to his new residence. Thus, the attempts of the gendarmes and the police to trace the applicant had failed. Nevertheless, before taking a decision of non-jurisdiction he had carried out an investigation during which he had heard as witnesses five villagers, all of whom had categorically denied that the alleged incidents had taken place. Furthermore, he had obtained a copy of the gendarmes' service book for the relevant period, had queried whether the security forces had conducted any operations in Sarıerik on or around the dates in question and had requested a list of the military personnel involved. There was a categorical denial that any such operation had taken place (see paragraphs 30-31 above).

Likewise, the Administrative Council had made its own investigation, following which it had concluded that the alleged events had not taken place (see paragraph 30 above).

57. The Government further stressed that it would have been possible for the applicant to seek redress before the administrative courts (see paragraphs 32-34 above). Thus, if an administrative court had established, as alleged by the applicant, that about 200 gendarmes and 150 village guards came to search Sarıerik and shot at the houses and destroyed property, it could have ordered the State to provide *restitutio* or, at least, to pay compensation. The State's liability to pay compensation could have been engaged, firstly, where the agents of the State were at fault. The State could subsequently recover the compensation paid from those responsible. Secondly, State liability could have been based on the doctrine of social risk for damage caused by PKK terrorists or resulting from clashes between terrorists and the security forces, when the State could be said to have failed in its duty either to maintain public order and safety or to safeguard individual life and property.

In short, the State could not have escaped liability to pay compensation in respect of damage shown to have been caused by its agents or to have occurred in connection with the provision of security.

58. The applicant and the Delegate of the Commission requested the Court to reject the Government's preliminary objection of non-exhaustion of domestic remedies. In this connection they invoked mainly the same arguments as with regard to the applicant's complaints under Articles 6 and 13 of the Convention, summarised in paragraphs 71-73 below.

59. In examining the issue whether the requirement of exhaustion of domestic remedies under Article 26 had been fulfilled in the present case the Court will have regard to the principles set out in paragraphs 65 to 69 of the Akdivar and Others v. Turkey judgment of 16 September 1996 (*Reports of Judgments and Decisions* 1996-IV, pp. 1210-11), and also the Aksoy v. Turkey judgment of 18 December 1996 (*Reports* 1996-VI, pp. 2275-76, §§ 51-53) and the Menteş and Others v. Turkey judgment of 28 November 1997 (*Reports* 1997-VII, pp. 2706-07, §§ 57-58). As in those cases, the central question in the case at hand is whether the applicant has demonstrated the existence of special circumstances dispensing him from the obligation under that provision to exhaust domestic remedies.

In this connection it should be recalled that the general legal and political context of the operation of remedies in the present case is the same as that in the aforementioned cases. The Court will therefore have regard to the situation which existed in south-east Turkey at the time of the applicant's complaint – and which continues to exist, characterised by violent confrontations between members of the PKK and the security forces (see paragraph 9 above). As the Court held in the Akdivar and Others case:

> "In such a situation it must be recognised that there may be obstacles to the proper functioning of the system of the administration of justice. In particular, the difficulties in securing probative evidence for the purposes of domestic legal proceedings,

inherent in such a troubled situation, may make the pursuit of judicial remedies futile and the administrative inquiries on which such remedies depend may be prevented from taking place."(pp. 1211–12, § 70)

60. Moreover, the Court notes that, despite the extent of the problem of village destruction, there appears to be no example of compensation having been awarded in respect of allegations that property has been purposely destroyed by members of the security forces or of prosecutions having been brought against them as a result of such allegations. Furthermore, there seems to be a general reluctance on the part of the authorities to admit that this type of practice by members of the security forces has occurred.

61. On the other hand, although the applicant's father stated to the Delegates of the Commission that the family had made a complaint to the local gendarme, the applicant had not himself raised his Convention grievances before a domestic authority before complaining to Strasbourg, as was also the situation in the case of Menteş and Others. However, as in that case, the Court attaches particular significance for the purposes of exhaustion in the present case to the manner in which the authorities conducted their investigation into the applicant's allegations, following the communication of his application by the Commission to the respondent Government.

62. In this regard the Court notes that the investigations began shortly after 17 December 1993, when the Public Prosecutor in Hazro was informed of the applicant's complaint, and ended on 17 August 1995, when the Hazro Administrative Council decided not to pursue the matter (see paragraphs 21 and 31 above). During this period, the file was shuttled back and forth several times between the Public Prosecutor and the Administrative Council, apparently due to difficulties related to issues of competence (see paragraphs 21-24 above). Apart from seeking to trace the applicant, the Hazro Prosecutor did little in the direction of elucidating the facts complained of by the applicant before issuing the first decision of lack of jurisdiction on 18 May 1994 (see paragraph 30 above). It was not until 17 November 1994, during the second round of investigations, that the Hazro Prosecutor's Office heard witnesses. Moreover, the authorities made no attempts to interview members of the applicant's family, when efforts to trace him had failed, or to interrogate any members of the security forces. Thus, despite the seriousness of the applicant's complaints, the investigations carried out by the prosecution authorities were not only protracted but also of a limited nature.

63. On the other hand, in their memorial to the Court, the Government sought to demonstrate that the authorities had made sustained efforts to find the applicant in order to be able to take evidence from him (see paragraph 30 above). In the view of the Court, the evidence before it does not disclose any shortcomings on the part of the authorities in this respect.

Nor does it seem to exclude that the protracted and limited character of the investigations was to some extent caused by the applicant's failure to co-operate with the authorities.

Furthermore, it is to be noted that, during the investigations by the Hazro Public Prosecutor Office, the Mayor of Sarıerik and four villagers from the applicant's neighbourhood had been interviewed, all of whom denied that the alleged events had taken place. Moreover, the first time the case was referred for investigation by the Administrative Council, a statement was taken from the Mayor and certain information was sought and obtained from the Hazro Gendarme Commander as to whether an operation had been conducted by the security forces at the relevant times and place. Both the Mayor and the Hazro Gendarme affirmed that this had not been the case (see paragraph 31 above).

64. In the light of the above, the Court has doubts as to whether it could be said that there existed such special circumstances in the present case as could dispense the applicant at the time of the events complained of from the obligation to exhaust domestic remedies. However, the Court considers that the Government's second preliminary objection raises issues which are closely linked to those raised by the applicant's complaint under Article 13 of the Convention and therefore joins this plea to the merits.

II. THE MERITS OF THE APPLICANT'S COMPLAINTS

A. Alleged violations of Articles 3, 5 § 1, 8 and 18 of the Convention and Article 1 of Protocol No. 1

65. The applicant maintained before the Commission that the deliberate targeting of him and his family and the actions carried out against them to force them to flee their homes (see paragraphs 11-16 above) constitute inhuman and degrading treatment in breach of Article 3 of the Convention, which reads:

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

Furthermore, recalling the disappearance of his brother, İbrahim, the applicant complained that the harassment and intimidation by agents of the State had resulted in the deprivation of his security of life (see paragraphs 11-16 above). This had given rise to a violation of Article 5 § 1 of the Convention, which provides:

> "Everyone has the right to liberty and security of person. ..."

Moreover, the applicant maintained that the two alleged attacks on his house represented separate violations of Article 8 of the Convention, which

were aggravated by the fact that the village guards and security forces had targeted the applicant and his family (see paragraphs 11-16 above). This provision reads:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

In addition, the applicant alleged that the infliction of serious damage on his house and property (see paragraphs 11-16 above) constituted an unjustifiable deprivation of his right of possession as well as a violation of his right to enjoyment of his property as guaranteed by Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

The applicant also claimed that his experiences represented an authorised practice by the State in breach of Article 18 of the Convention, which states:

> "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."

66. The Commission did not find, on the basis of the written and oral evidence before it, that it could be said to have been established beyond reasonable doubt that the events as alleged by the applicant had occurred (see paragraphs 25-29 above). It considered, therefore, that it did not have a sufficient factual basis on which to reach a conclusion that there had been a violation of Article 3, 5, or 8 of the Convention or of Article 1 of Protocol No. 1. Nor could there be a question under Article 18 of the Convention of restrictions having been applied for improper purposes in regard to those events.

67. The Government invited the Court to uphold the Commission's findings on these points.

68. The Court notes that, in the proceedings before it, the applicant did not contest the findings of the Commission as to the facts. The Court sees no reason to depart from those findings, recalling that under its case-law the establishment and verification of the facts are primarily a matter for the

Commission (Articles 28 § 1 and 31 of the Convention) and that it is only in exceptional circumstances that it will exercise its powers in this area (see, *inter alia,* the above-mentioned Menteş and Others judgment, pp. 2709-10, § 66). Accordingly, the Court finds that there has been no violation of Articles 3, 5 § 1, 8 and 18 of the Convention and of Article 1 of Protocol No. 1.

B. Alleged violations of Articles 6 § 1 and 13 of the Convention

1. Arguments of those appearing before the Court

69. The applicant complained that he had been denied an effective judicial or other remedy with regard to his claim that the security forces had purposely destroyed his property and enabling him to seek compensation. He alleged that there had been a violation of Article 13 of the Convention, which reads:

> "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."

In the alternative, he maintained that there had been a breach of Article 6 § 1 of the Convention which, to the extent that it is relevant, provides:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ..."

70. The Government, relying essentially on the arguments summarised in paragraphs 55-57 above, stressed that, while effective court remedies existed in Turkey, the applicant had failed to use these. They requested the Court to conclude that there had been no violation of Articles 6 and 13.

71. The Commission considered that there had been a breach of Article 6 § 1 on the grounds that the applicant had not had effective access to a tribunal that could have determined his civil rights within the meaning of that provision. In the Commission's opinion, there were undoubted practical difficulties and inhibitions confronting persons like the present applicant who complain of destruction of their homes and property in south-east Turkey, where broad emergency powers and immunities had been conferred on the Emergency Governors and their subordinates (see paragraphs 43-45 above). These difficulties were further demonstrated by the evidence taken in the present case, which showed that no investigation into the events had been undertaken until after the Commission had communicated the application to the Turkish Government and that the subsequent investigation by successive prosecutors, which had given rise to two decisions of non-jurisdiction, could not be considered to have been conducted in an effective way (see paragraphs 21-24 above).

On the other hand, since the applicant had not specified in what way his complaints related to matters other than his civil rights, the Commission concluded that no separate issue arose under Article 13.

72. At the hearing before the Court, the Delegate of the Commission elaborated on the notion of "effective" remedy under the Convention, in the light of the Court's above-mentioned judgments in Akdivar and Others and Aksoy which post-dated the Commission's report in the present case. He stressed that it required not merely a remedy which would result in the payment of compensation to the victim but a finding of liability, or an acknowledgement of responsibility, for the acts complained of. Without such a finding or acknowledgement - or at least the possibility of such a finding by a court or tribunal - the award of compensation did not provide true reparation or redress to the victim and had no deterrent effect on the repetition of acts with devastating consequences for those living in south-east Turkey. Despite the major scale of village destruction in that region, the Government had not been able to point to any judgment where an administrative or civil court had granted compensation on the ground that it was established that the destruction of houses or other property in villages had been intentionally caused by the security forces or any examples of prosecution of a member of the security forces. The Government had failed to show that there existed any remedy which was in practice effective to provide redress for the applicant's arguable claim of the deliberate damage and destruction to his property.

73. The applicant asked the Court to take into account that the reason why he had not complained to a prosecutor about the alleged events and had not responded to the summons to appear before the Delegates of the Commission was his experiences and fear of the security forces. He claimed to have been badly beaten for having complained to the gendarme authorities about the abduction or disappearance of his brother İbrahim on 26 September 1991, some fifteen months before the first incident of January 1993, and for having named the responsible gendarme commander. He also maintained that the local gendarmes and village guards were looking for him and had threatened to kill him because he had accused the Hazro security forces.

The applicant further invited the Court to confirm the Commission's finding that the investigation carried out by the Turkish authorities following the communication of his complaints was wholly inadequate. He clearly had an arguable claim that his Convention rights had been violated. The Commission's conclusion that the alleged incidents had not been established to the standard required, proof beyond reasonable doubt, did not suggest that no facts were found by the Commission.

2. Court's assessment

74. The Court notes that the applicant did not dispute that he could in theory have his alleged civil rights determined by the administrative courts and the civil courts but claimed that he was deprived of a remedy which would have been effective in practice. In the absence of an attempt by the applicant to make an application before the courts (see paragraph 21 above), it is not possible for the Court to determine whether the Turkish courts would have been able to adjudicate on the applicant's claims had he initiated proceedings. In any event, the Court observes that the applicant complained essentially of the lack of a proper investigation into his allegation that the security forces had purposely destroyed his house and possessions.

In these circumstances, the Court, in accordance with its own case-law (see the above-mentioned Menteş and Others judgment, p. 2715, §§ 87-88), finds it appropriate to examine this complaint in relation to the more general obligation on States under Article 13 to provide an effective remedy in respect of alleged violations of the Convention. It does therefore not find it necessary to determine whether there has been a violation of Article 6 § 1.

75. Turning to the issue under Article 13, the Court recalls that this provision guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require 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, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The remedy 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 Aksoy judgment cited above, p. 2286, § 95, the above-mentioned Aydın judgment, pp. 1895-1896, § 103; and the Menteş and Others judgment, pp. 2715-16, § 89).

However, this provision applies only in respect of grievances under the Convention which are arguable (see, for instance, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52). Whether that was so in the case of the applicant's claims under various substantive Convention guarantees that his home and property had been purposely destroyed by the security forces has to be decided in the light of the particular facts and the nature of the legal issues raised.

76. In this connection, the Court reiterates the Commission's findings that, as regards the evidence obtained in respect of the specific events at issue, it was only the oral testimony of the applicant's father which provided support for the applicant's account of events. However, this testimony had been rather unclear as to details and timing and had differed from the

applicant's own account as to the reasons for the alleged damage to his house and property. Several witnesses had denied that any houses in Kaniye Meheme had been destroyed by security forces and village guards. A number of witnesses did agree that some houses belonging to the applicant's family had burned down following a clash which had started in Meşebağlar in the summer of 1993, but none of these witnesses suggested that this had occurred as a result of a deliberate action by security forces or village guards (see paragraphs 27-28 above).

77. Furthermore, the Court notes that the applicant was summoned on two occasions to appear before the Commission's Delegates to give evidence. On the first occasion he failed to appear. On the second occasion he informed the Commission that he would not appear which resulted in the hearing being cancelled. He explained his failure to appear by referring to his fear of adverse consequences for himself if he should appear before the Delegates. The Commission felt concern about this explanation but was unable to determine whether or to what extent such fear might have been justified (see paragraph 29 above).

Whatever reason there may have been for the applicant's absence, the Commission found that his failure to give evidence made it difficult to establish the facts. It would have been necessary, in order to make a reliable assessment of the situation, to hear the applicant in person in order to assess his general credibility and to put questions to him about various details, including the background of the events (ibidem).

78. The Court for its part considers that the evidence gives rise to serious doubts as to whether the applicant has made out a factual basis for his allegation that his house and property had been purposely destroyed by the security forces. In the circumstances of the case, including the absence of an opportunity for the Commission to test directly with him the statements taken by the Human Rights Association, the Court is not satisfied that he had an arguable claim that the Convention provisions invoked by him had been violated (see, for instance, the Plattform "Ärzte für das Leben" v. Austria judgment of 21 June 1988, Series A no. 139, p. 11, § 27; the Halford v. the United Kingdom judgment of 25 June 1997, *Reports* 1997-III, pp. 1021-1022, §§ 69-70; and the Anne-Marie Andersson v. Sweden judgment of 27 August 1997, *Reports* 1997-IV, p. 1418, §§ 41-42; cf. the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998, p..., § 107). Accordingly, the Court finds no violation of Article 13 in the present case.

79. In the light of the above conclusion, the Court does not deem it necessary to pursue the examination of the Government's preliminary objection concerning the exhaustion of domestic remedies (see paragraph 64 above).

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that the Government are estopped from making a preliminary objection as to the validity of the application and its alleged discontinuance;
2. *Decides* by fourteen votes to six to join the preliminary objection concerning the exhaustion of domestic remedies to the merits;
3. *Holds* unanimously that there has been no violation of Articles 3, 5 § 1, 8 and 18 of the Convention and Article 1 of Protocol No. 1;
4. *Holds* unanimously that it is not necessary to examine whether there has been a violation of Article 6 § 1 of the Convention;
5. *Holds* by thirteen votes to seven that there has been no violation of Article 13 of the Convention and that it is therefore not necessary to decide the Government's preliminary objection concerning the exhaustion of domestic remedies.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 May 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following opinions are annexed to this judgment:

(a) partly dissenting opinion of Mr De Meyer;
(b) joint partly dissenting opinion of Mr Valticos and Mr Casadevall;
(c) partly dissenting opinion of Mr Pekkanen, joined by Mr Pettitti, Mr Loizou, Mr Repik and Mr Lõhmus.

Initialled: R. B.
Initialled: H. P.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

The present case is very similar to the Menteş case[1]. It was referred to the Commission by the Diyarbakır Human Rights Association on behalf of an applicant who had not, at any time, complained of the alleged facts to any Turkish authority whatsoever, and no investigation was possible in Turkey before the case was already pending in Strasbourg[2].

As in the above-mentioned case, and for the same reasons[3], I therefore consider, firstly, that domestic remedies were not exhausted, and secondly that it is not possible to find a violation of the applicant's rights under Articles 6 and 13 of the Convention.

1. Judgment of 28 November 1997, *Reports* 1997-VIII, p. 2689
2. See § 21 of the present judgment.
3. *Reports* 1997-VIII, p. 2689

JOINT PARTLY DISSENTING OPINION OF JUDGES VALTICOS AND CASADEVALL

For the reasons stated by Judge Pekkanen in his partly dissenting opinion, we consider that there has been a violation of Article 13 of the Convention in the present case. It follows from this that we would also be of the view that there existed such special circumstances as could dispense the applicant from exhausting domestic remedies. However, we voted with the majority because the issue was left open.

PARTLY DISSENTING OPINION OF JUDGE PEKKANEN, JOINED BY JUDGES PETTITTI, LOIZOU, REPIK AND LÕHMUS

1. We are in agreement with the majority on all its conclusions, except those of joining to the merits the Government's preliminary objection on exhaustion of domestic remedies under Article 26 of the Convention and of holding that there has been no violation of Article 13 and that it is therefore unnecessary to determine the preliminary plea. We have concluded that the Government's objection under Article 26 should be dismissed and that there has been a violation of the applicant's right to an effective remedy under Article 13.

2. As regards the issue under Article 26, we consider for the reasons indicated in paragraph 4 below that there cannot be any doubt that the competent public prosecutors failed to carry out a meaningful investigation after becoming aware of the applicant's allegations. In this regard we see no material grounds for distinguishing the facts of the present case from those in Menteş and Others v. Turkey (judgment of 28 November 1997, Reports 1997, §§ 60-61, 90-91) and other comparable cases. Thus, unlike the majority, we find that it has been demonstrated that there existed special circumstances dispensing the applicant from the obligation to exhaust domestic remedies and that the Government's preliminary objection should therefore be dismissed.

3. As to the complaint under Article 13, we are of the view that the applicant's claims, at least those under Article 8 of the Convention and Article 1 of Protocol No. 1, could be said to have been arguable ones for the purposes of Article 13. It must be recalled that the Commission, which has the primary responsibility under the Convention of establishing and verifying the facts of cases brought to the Convention institutions, declared admissible the applicant's complaint that his home and property had been purposely destroyed by the security forces. Moreover, as it appears from the Government's own submissions, even the local prosecutor considered that the applicant had a *prima facie* case (see paragraph 56 above). Therefore, notwithstanding the elements of doubt referred to by the majority (see paragraphs 76-78), we found that there was a sufficient basis for considering that the applicant had an arguable claim bringing the guarantee of an effective remedy under Article 13 into play.

4. As to the further question whether the requirements of this provision had been complied with, we find it established that no thorough and effective investigation was conducted into the applicant's allegations and that this resulted in undermining the exercise of any remedies that he had at his disposal, including the pursuit of compensation before the courts.

Despite the seriousness of the applicant's complaints, the investigations carried out by the prosecution authorities were of a limited and protracted nature (see paragraphs 21-24 and 30-31 of the judgment). As also noted by the majority, apart from taking steps to trace the applicant, the Hazro Prosecutor made little effort in the direction of elucidating the facts complained of by the applicant before issuing the first decision of lack of jurisdiction on 18 May 1994. It was not until 17 November 1994, during the second round of investigations, that the Hazro Prosecutor's Office heard witnesses.

In addition, we attach particular weight to the fact that the authorities made no attempts to interview members of the applicant's family when efforts to trace him had failed. Nor did they interview any member of the security forces. These shortcomings cannot be excused by the difficulties in tracing the applicant. Nor can they be justified by the negative responses to the enquires made with the Mayor of Sarıerik and the Hazro Gendarme Command as to whether a security operation had been conducted by the security forces at the relevant time and place. There was, as also observed by the majority (see paragraph 60 of the judgment), a general reluctance on the part of the authorities to admit that this type of practice had occurred.

5. For these reasons, we cannot but conclude that there has been a breach of Article 13 of the Convention in the present case.

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 Britain. KHRP is a registered charity. It is committed to the protection of human rights of all persons living within the Kurdish areas, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include people of Kurdish and non-Kurdish origin.

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 Commission and 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