



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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SUMMARY¹

Judgment delivered by a Grand 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 cooperate 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 this was the 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

27.4.1988, Boyle and Rice v. the United Kingdom; 21.6.1988, Plattform "Ärzte für das Leben" v. Austria; 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; 25.9.1997, Aydın v. Turkey; 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 A², 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. LÖHMUS,
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:

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

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 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.

for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in an application (no. 22275/93) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr İsmet Gündem, 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 § 3 (d) 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 his 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. Löhmus 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. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government (“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,	<i>Agent,</i>
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,	<i>Advisers;</i>

(b) *for the Commission*

Mr N. BRATZA,	<i>Delegate;</i>
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(c) *for the applicant*

Mr K. BOYLE, Barrister-at-Law,	<i>Counsel,</i>
Mr O. BAYDEMİR, Advocate,	
Ms A. REIDY, Barrister at Law	
Ms C. NOLAN,	
Mr J. JANSEN,	<i>Advisers.</i>

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, the President of the Court, and Mr Bernhardt, the Vice-President, together with the other members and the two substitutes of the original Chamber, the latter being Mr M.A. Lopes Rocha and Mr E. Levits (Rule 51 § 2 (a) and (b)). On 2 December 1997 the President, in the presence of the Registrar, drew by lot the names of the nine additional judges needed 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, 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 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. The 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 village of Sarıerik 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. The 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, the Hazro public prosecutor, one from Kasım Tatlı, mayor of Sarıerik, 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, Mr 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 fourteen 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 fourteen 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 Özkaraol.

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 environment 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 may 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 Principal Public Prosecutor's office

in Hazro through the Principal 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 section 15(3) of the Prevention of Terrorism Act (Law no. 3713).

23. By letter of 31 August 1994, the Ministry of Justice requested the Diyarbakır Principal 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 Principal 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 § 3 (i) of 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 eyewitness 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 Sarierik 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 public 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 public 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 public prosecutor requested the Hazro gendarmerie commander to find him so that he could interview him. After having contacted the mayor and the villagers of Sarierik, the Hazro gendarmerie commander reported back that the applicant was not to be found. Thus, the Hazro public 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 Principal Public Prosecutor of Hazro requested the local public 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 Sarierik. He asked the Hazro gendarmerie commander to report back to him as to whether there had been any operation at Sarierik 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 gendarmerie were categorical that there had been no operation on the said dates and that the alleged incidents did not take place. The gendarmerie 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 public prosecutor had changed. He wrote to the Hazro gendarmerie commander to name the mayor and members of the council of elders of Sarierik 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 gendarmerie commander reported back that there had been no operation at Sarierik 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 council of elders. He also asked the Governor to indicate whether Sarierik had any village guards at the material time, and to give a list of the village guards of Meşebağlar. The Governor provided a list of the village guards of Meşebağlar and stated that Sarierik did not have any village guards at that time.

The public prosecutor heard the mayor and the members of the council of elders, 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 six months after the alleged incidents between three and four 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 public 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 investigating 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. Section 13 of Law no. 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 to indemnify any 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 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 subject an individual 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’s property intentionally (Articles 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 (sections 93 and 95 of Law no. 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 Supreme Administrative Court; 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 Aid and Social 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 no. 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 no. 285, as amended by Decrees nos. 424 and 425, and Decree no. 430.

44. 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 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 no. 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 judgment¹.

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 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 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 were *prima facie* evidence that a member of the security forces had been involved, the public 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 Supreme Administrative Court. If it were 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 public 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 address. 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 Sarierik 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 Sarierik 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 in 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-VIII, 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 gendarmes, 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 public prosecutor did little towards 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 public 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 cooperate with the authorities.

Furthermore, it is to be noted that, during the investigations by the Hazro public prosecutor's office, the mayor of Sarierik 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 gendarmerie 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 gendarmerie 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 [the] 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 Articles 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 or 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 an 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 complained 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 public 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 acknowledgment of responsibility, for the acts complained of. Without such a finding or acknowledgment – 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 public 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 gendarmes 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 gendarmerie 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 mean that no facts were found by the Commission.

2. *The 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 not therefore 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 *Aydın v. Turkey* judgment of 25 September 1997, *Reports* 1997-VI, pp. 1895–96, § 103; and the *Menteş and Others* judgment cited above, 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 (*ibid.*).

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. 1021–22, §§ 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-I, pp. 330–31, § 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 separate 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 Pettiti, Mr Loizou, Mr Repik and Mr Löhmus.

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

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

(Translation)

The present case is very similar to the *Menteş and Others v. Turkey* case¹. 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 Strasbourg².

As in the above-mentioned case, and for the same reasons³, 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 of Judgments and Decisions* 1997-VIII, p. 2689.

2. See paragraph 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 PETTITI, LOIZOU, REPIK AND
LÖHMUS

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 public prosecutors concerned 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 of Judgments and Decisions* 1997-VIII, pp. 2707–08, §§ 60–61, p. 2716, §§ 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 public prosecutor considered that the applicant had a *prima facie* case (see paragraph 56 of the judgment). 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 public 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 public prosecutor's office heard witnesses.

In addition, we attach particular weight to the fact that the authorities made no attempt 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 Sarierik and the Hazro gendarmerie commander 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 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.