CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 33646/96
by Zahide ÇAÇAN
against Turkey

The European Court of Human Rights (First Section), sitting on 28 March 2000 as a Chamber composed of

Mrs E. Palm, *President*,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr B. Zupančič,
Mr T. Panţîru,
Mr R. Maruste, *judges*,
Mr F. Gölcüklü, ad hoc *judge,*
and Mr E. Fribergh, *Section Registrar*,

Having regard to the above application introduced with the European Commission of Human Rights on 16 September 1996 and registered on 4 November 1996,

Having regard to Article 5 § 2 of Protocol No. 11 to the Convention, by which the competence to examine the application was transferred to the Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, born in 1952, is a Turkish citizen of Kurdish origin resident in Istanbul. She is represented before the Commission by Ms Naciye Kaplan, Ms Bedia Bulak, Ms Filiz Köstak and Mr Talat Tepe, lawyers practising in Istanbul.

A. Particular circumstances of the case

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

1. The applicant's version of the facts

Before the events at issue the applicant was living in the Düzcealan village attached to the district of Tatvan in Bitlis province.

In October 1993 a group of 500 or 600 plain-clothes security forces, known as "the special team", surrounded the applicant's village at about midnight with armoured military vehicles. They first broke into the house of the applicant's uncle who was the *muhtar* of the village and beat his daughter. Thereafter, the special team soldiers entered the applicant's house, pointed a gun towards her, beat and insulted her, her two daughters and son.

On the same day, the special team arrested 13 villagers including the applicant's son and her daughter. After having been kept in the refugee camp in Tatvan for eight days they were released. They were not brought before a judge or a public prosecutor and were all tortured and insulted during the time they were kept in the camp.

On 20 December 1993 the security forces again entered the applicant's village. They threatened the villagers and the applicant's brother-in-law, Kazım Çaçan, saying that they would burn down their village if they refused to be village guards.

On 27 December 1993 a bus was set on fire on the Van-Bitlis road one kilometre away from the Düzcealan village. On the same day at about 3.30 p.m., armoured military vehicles and civil cars surrounded the village. They discharged gunfire towards the village and destroyed some of the houses with mortars. This attack lasted 3 or 4 hours. At about 9 p.m., 3 masked men with white oil drums burnt the house of the applicant's cousin and then the applicant's.

At the same time, as the applicant's brother-in-law, Kazım Çaçan, tried to enter the applicant's house, 3 masked men captured him. They tied him to a military vehicle and dragged him 500 metres. They hit him with a lever and broke his arm. They gouged out his eyes, removed his brain after breaking his skull and skewered his stomach. All the family members and the villagers witnessed this event.

The burning of the village continued until 8 a.m. on 28 December 1993. The soldiers killed all the animals and destroyed all the villagers' possessions. All the villagers were beaten including the women and the children.

The Gendarmerie Brigade Commander, Korkmaz Tağma accused the villagers of helping and sheltering the PKK. He said "I made Şırnak a blood pool, I will do the same here".

In January 1994 the applicant's daughter joined the PKK.

After their village burnt down the villagers sought shelter in the neighbouring villages. After having stayed with her relatives in Van for almost two weeks the applicant moved to İzmir with her family.

The applicant and her family were occasionally threatened in İzmir. As a result of these threats the family decided to move to Istanbul.

After the applicant's family left their village they were subjected to threats, ill-treatment and torture. The applicant's daughter committed suicide with the explosives she was carrying when the police surrounded her. Her son and her other daughter were taken into custody and were tortured.

On 5 September 1996 the applicant filed a petition with the office of the public prosecutor in Tatvan. She complained of the compulsory evacuation of her village and destruction of her house and property as well as her brother-in-law's murder by the security forces.

On 22 May 1997, at about 10.15 p.m., the plain-clothes police officers came to the applicant's house in Istanbul. The police officers beat the applicant's younger son and tried to strangle the applicant. They threatened to burn her house and said that it would be the second time for her that her house would be burnt. They stayed in her house for three days and destroyed her furniture.

In a report titled "Weapons Transfers and Violations of the Laws in Turkey" published by the Human Rights Watch it is stated that according to a witness interviewed by Human Rights Watch on 29 July 1995 in İzmir security forces raided the village of Düzcealan, located in the Tatvan district of Bitlis province on 26 December 1993, destroying seven homes with heavy weapons and summarily executing one male villager, namely Necmi Çaçan.

The applicant is currently being intimidated and her younger son was hospitalised due to physiological complications.

2. The Government's version of the facts

On 29 December 1993, between 3.45 and 4.00 p.m., a group of PKK terrorists attacked and burnt a bus and a truck on the Van-Tatvan road. On the same day at 23.00 hours the same group of terrorists went to the Düzcealan village. The terrorists shot a villager, Necmi Çaçan, as a result of the conflict between the villagers and the terrorist organisation. They burnt down the houses of Hikmet Kılıçarslan, Mehmet İşbulan, Sebahattin Çaçan, Hayrettin Çaçan, Feyzullah Kılıçarslan and the harvests of Sait Adar, Abdülmecit Çaçan, Mehmet İşbulan, Necmi Çaçan, Hikmet Kılıçarslan. The terrorists continued shooting until 2.00 a.m. and left the village via the Katıdede River. The security forces found one cartridge and 94 empty cartridges, 4 of which were near Necmi Çaçan's body. These events were cited by non-commissioned officer (*assubay*) Yavuz Gürbüz in an on-sight report and sketch maps.

On 30 December 1993 an autopsy was carried out on Necmi Çaçan. The estimated time of death was indicted to be 8 or 10 hours before the autopsy was carried out. In the course of the autopsy it was observed that his left arm was broken and there was blood on his nose.

The report recorded the following injuries: one bullet entry wound in the temple; one bullet exit wound at the back of the head; one bullet entry wound above the waist; one bullet exit wound on the chest; one bullet entry wound on the leg and one bullet exit wound on the kneecap. The existence of a hole in the skull of 5-8 centimetres allowing the brain to flow out of the skull was also noted. It was concluded that Necmi Çaçan died as a result of gunshot wounds.

On 12 December 1995 Mehmet Durman, Mehmet Şirin Mete, Alattin Çaçan, Mehmet Sait Adar, who all used to reside in the Düzcealan village before April 1994, gave statements to the non-commissioned officer Erdoğan Kara. They stated that they left the village in April 1994 due to pressure from the terrorist organisation. They indicated the names of the persons from their village who joined the PKK.

On 24 July 1996 Mehmet Durman, a former resident of Çamaltı hamlet attached to the Düzcealan village, gave a statement to the non-commissioned officer Erdoğan Kara, which reads as follows:

> "I used to reside in the Çamaltı hamlet attached to the Düzcealan village. In April 1994 all the inhabitants left the village and the hamlet. The reason [for leaving the village] was the activities of the terrorist organisation in the region of our village and hamlet. The members of the terrorist organisation were asking us to supply them with food, clothes and weapons. Moreover they wanted to persuade our children to go to the mountains. The security forces never forced us to abandon our villages. We left our villages of our own motion because the terrorist organisation was threatening and putting pressure on us. Our houses were burnt down by the PKK after we left. They burnt down the houses because we were not helping them."

On 9 October 1996 the public prosecutor in Tatvan issued a decision of lack of jurisdiction (*görevsizlik kararı*) concerning the applicant's allegations. The prosecutor decided to transfer the case file to the office of the State Security Court public prosecutor in Diyarbakır, on the ground that the complaint fell within the jurisdiction of the Diyarbakır State Security Court pursuant to Law no. 2845 and 3713.

On 30 October 1996 the public prosecutor attached to the Diyarbakır State Security Court issued a decision of lack of jurisdiction (*görevsizlik kararı*) after the case file concerning the applicant's allegations was sent to him. The prosecutor stated that the alleged crime did not fall within the jurisdiction of his office pursuant to Article 9 of Law no. 2845. The prosecutor decided to transfer the case file to the public prosecutor in Tatvan.

On 11 November 1996 the public prosecutor in Tatvan issued a decision of lack of jurisdiction (*görevsizlik kararı*). The prosecutor decided that there existed no evidence to support the allegation that the accused members of the security forces committed the alleged crimes in performance of their judicial or military duty. The prosecutor further decided that the accused members of the security forces committed the alleged crimes within framework of their preventive, deterrent, regulatory and protective role. The prosecutor decided to transfer the case file to the Office of the Provincial Authorities in Bitlis (*Bitlis Valiliği*) pursuant to the Act on Prosecution of Civil Servants (*Memurin Muhakemati Kanunu*).

On 6 December 1996 Alattin Çaçan gave a statement in the proceedings initiated after the applicant lodged an application with the office of the public prosecutor in Tatvan.

> "I permanently resided in the Düzcealan village until April 1994. I was the *muhtar* of the village for three years. The PKK terrorists occasionally came to our village until April 1994. They were making

propaganda and were asking food, clothes and shelter. Furthermore, they were persuading the young villagers to join the PKK. From our village ... [1] had joined the PKK. The terrorists conducted a raid on our village on the night of 29 December 1993 [which continued until 30 December 1993]. They cruelly killed Necmi Çaçan who was called Kazım by the villagers. They burned the houses and the harvests of ...[2]. In the [applicant's] petition it is stated that her house had been burnt down. Her house was definitely not burned down at that time. It was burned down by the terrorists after we abandoned our village. We left our village of our own motion. No one from the village joined the PKK after we left the village. The purpose for leaving the village was to avoid the further participation of the young people in the PKK. The security forces never forced us to abandon our village. When Zahide Çaçan's house was burnt our village was empty."

In a letter dated 24 December 1996 the Bitlis Provincial Security Commander (*Bitlis İl Güvenlik Komutanı*), A. Cengiz Aycan, informed the Tatvan District Gendermerie Command with reference to the investigation conducted by the Bitlis Provincial Gendermerie Command, Provincial Investigation Council (*İl İdare Soruşturma Muhakikliği*) that according to their records no military operation was conducted either in October 1993 and on 27 December 1993 or after a bus had been burnt out on Van Tatvan road on 27 December 1993 in the Düzcealan village. The commander also informed the District Command that the alleged commander of the military operation, Korkmaz Tağma, retired on 30 August 1996 and his domicile was unknown. The commander concluded that there existed no documents confirming that a military operation had been conducted in the Düzcealan village after the incident of bus burning and the killing of Kazım Çaçan.

In a letter dated 3 January 1997 the Tatvan District Gendermerie Commander Hasan Koçyiğit informed the Bitlis Provincial Gendermerie Command, Provincial Investigation Council (*İl İdare Soruşturma Muhakikliği*) that, contrary to the applicant's allegations, an evaluation of the relevant documents indicated that no military operations had been conducted in October 1993 or one week before 27 December 1993 in the Düzcealan village. The PKK terrorists fled to the Düzcealan village and asked for food from the villagers after burning a bus 1 kilometre away from the village on 29 December 1993. The terrorists killed Necmi Çaçan who was called Kazım by the villagers. Their aim was to frighten the villagers. Following the incident, security forces from the Yelkenli Gendermerie Command, commanded by the non-commissioned officer Yavuz Gürbüz, arrived in the village. The houses and harvests were burnt by the PKK terrorists because the villagers refused to give the terrorists food and accommodation. Contrary to the allegations, no villagers were taken into custody in October 1993.

On 8 January 1997 the Bitlis Security Directorate (*Bitlis Emniyet Müdürlüğü*) replied to the letter of 7 January 1997of Mustafa Çankal, an investigator (*muhakik*) in the Provincial Investigation Council. The letter of reply stated that no security forces from the Bitlis Security Directorate participated in an operation on 27 December 1993 in the Düzcealan village.

On 13 February 1997 Alattin Çaçan gave another statement before Sabri Dikici, an investigator (*muhakik*) in the Provincial Investigation Council. He repeated his account of the events in his statement of 6 December 1996.

On 13 February 1997 Sabri Dikici conducted an on-sight investigation in the Düzcealan village. He stated in a report that the houses in the village were destroyed because they were

[1] The names of these villagers were cited in the on-sight report of 30 December 1993.
[2] The names of the villagers whose houses and harvests were burnt cited in the on-sight report of 30 December 1993.

disused. There was no evidence to suggest that the houses were destroyed as a result of shooting or bombings.

On 14 February 1997 Şemseddin Demir, the *muhtar* of the Kolbaşı village, gave a statement before Sabri Dikici. In his statement he reiterated the submissions of Alattin Çaçan.

On 26 February 1997 the Bitlis Provincial Security Command replied to the letter of the Bitlis Provincial Office dated 20 February 1997 inquiring whether or not a military operation had been conducted in the Düzcealan village on 27 February 1993 and, if so, whether any security forces or members of the special team, from the Bitlis or Tatvan Security Directorates had taken part in the operation. The command observed that no military operations were conducted in the Düzcealan village on 27 February 1993.

On 25 April 1997 non-commissioned officer Yavuz Gürbüz gave a statement. The statement read:

> "I was the gendarmerie commander in Yelkenli attached to Tatvan in Bitlis province between 1991 and 1994. The Düzcealan village referred to in the [applicant's] petition was one of the 15 villages in the region that was attached to my command. I do not remember the exact date of the incident. As stated in the [applicant's] petition, in the afternoon of 27 December 1993 the terrorists attacked a bus on Tatvan Van road. The road is 1 kilometre from the village and 10 kilometres from the Command. ... I saw a fire on the road. I immediately informed the Tatvan District Gendermerie Command and the Road Security Patrol. ... I was informed that the terrorists had burned a bus on the road and when they realised the Road Security Patrol (*Yol Emniyet Devriyesi*) was approaching them they tried to flee through the Düzcealan village, shooting at the Patrol and setting fire in 5 or 6 places in the village. I reported this to the Tatvan Gendermerie Command via wireless. The Patrol informed me that "the terrorists are fleeing through the village, we are unable to fire because we are afraid to harm the villagers". The terrorists fled benefiting from the darkness and the steep nature of the area. The following day at around 6.00 a.m. I went to the scene of the incident with a security team from the command. I drafted a sketch map of the burned out bus. The security forces conducting a search in the area informed me that there was a male corps. ... The Tatvan public prosecutor and a doctor arrived and requested me to draft the on sight report. Korkmaz Tağma was the Bitlis Provincial Security Commander at the time of the events. ... He was informed about the events via wireless. ... The villagers in Düzcealan abandoned their village of their own motion due to pressure from the terrorists."

In May 1997 the investigator, Sabri Dikici, concluded an investigation report into the applicant's allegations. It was stated in this report that, having regard to the statements taken from the villagers and the relevant military reports and documents, the allegation as to the destruction of the applicant's village and the forced evacuation of the village by the security forces was untrue. The security forces in fact conducted an operation in the village. However, no houses were destroyed and none of the villagers was ill-treated or taken into custody. Necmi Çaçan was killed by the terrorists. No villagers were threatened or frightened by the Bitlis Provincial Security Commander Korkmaz Tağma. The statement of Korkmaz Tağma could not be taken as he retired on 30 August 1996 and his domicile could not be determined. The villagers left their village of their own motion in April 1994. The applicant's allegations were baseless having regard to the fact that the village was burnt down by the terrorists after April 1994 and that the applicant lived in her house with her family until April 1994. The security forces had no involvement in the alleged crimes. The case file was therefore sent to the Diyarbakir State Security Court as the perpetrators of the alleged crimes were unidentified. This report recommended that the case be dismissed by the competent authority.

In a letter from the Bitlis Provincial Administrative Council to the Provincial Office in Bitlis dated 20 May 1997, it was stated that having regard to the investigation conducted by

Sabri Dikici it was concluded that no military operations were conducted in the Düzcealan village on 27 December 1993 and that the security forces from the Provincial Gendermerie Command in Bitlis did not take part in such an operation. The request was made to have the case struck out by the Provincial Office in Bitlis.

On 30 July 1998 İsmail Çaçan and Şemsettin Demir gave statements regarding the applicant's application to the European Commission of Human Rights. They maintained their account of the events set out in their previous submissions.

B. Relevant domestic law and practice

i. *Criminal law and procedure*

Under the Turkish Criminal Code (*Türk Ceza Kanunu*) unlawful deprivation of liberty (Article 179 generally, Article 181 in respect of civil servants), coercion through force or threats (Article 188), arson (Articles 369-372), aggravated arson if human life is endangered (Article 382), unintentional arson by carelessness, negligence or inexperience (Article 383), all forms of intentional homicide (Articles 448-455), unintentional homicide (Articles 452 and 459), intentional infliction of damage to someone's property (Articles 516 and 517) and to harm or kill arbitrarily another person's animal (Article 521**)** constitute criminal offences.

For all these offences complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure (*Ceza Muhakemeleri Usulü Kanunu*), with the public prosecutor or the local administrative authorities. Under Article 235 of the Criminal Code, any public official who fails to report to the police or a public prosecutor's office an offence of which he has become aware in the course of his duty is liable to imprisonment. 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 a suspect is a member of the armed forces, the applicable law is determined by the nature of the offence. If it concerns a "military offence" under the Military Criminal Code (Law no. 1632), the criminal proceedings are in principle conducted in accordance with Law no. 353 on the establishment of courts martial and the pertaining rules of criminal procedure. Where a member of the armed forces has been accused of an ordinary offence, it is normally the provisions of the Code of Criminal Procedure which apply (see Article 145 § 1 of the Constitution and sections 9-14 of Law no. 353).

ii. *State of Emergency*

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

Two principal decrees relating to the south-eastern region have been made under the Law on the State of Emergency (Law no. 2935, 25 October 1983). The first, Decree no. 285 (10 July 1987), established a State of Emergency Regional Governorate in ten of the eleven provinces of south-eastern Turkey, including the Province of Tunceli. Under Article 4(b) and

(d) of the Decree, all private and public security forces and the Gendarme Public Peace Command are at the disposal of the Regional Governor.

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

<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 damage suffered by them without justification."

iii. *Prosecution for terrorist offences and offences allegedly committed by members of the security forces*

Under section 3 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), the offence defined in Article 168 of the Criminal Code is classified as a "terrorist act". Under section 4, the offence defined in Article 169 of the same Code is classified in the category of "acts committed to further the purposes of terrorism".

Pursuant to section 9 (a) of Law no. 2845 on the Procedure in the State Security Courts, public prosecutors are deprived of jurisdiction in cases of alleged terrorist offences in favour of a separate system of State Security prosecutors and courts established throughout Turkey. Only these courts are competent to try cases involving the offences defined in Articles 168 and 169 of the Criminal Code.

Public prosecutors are also deprived of jurisdiction with regard to offences alleged against members of the security forces in the State of Emergency Region. Article 4 § 1 of the Decree no. 285 provides that all security forces under the command of the Regional Governor shall be subject, in respect of acts performed in the course of their duties, to the Law on Proceedings on the Prosecution of Civil Servants.

Thus, any prosecutor who receives a complaint alleging a criminal act by a member of the security forces must issue a decision of non-jurisdiction and, depending on the suspect's status, transfer the file to either the District or the Provincial Administrative Council (*İlçe* or *İl idare kurulu*). These councils are made up of civil servants and are chaired by the District or Provincial Governor. They conduct the preliminary investigation and decide whether or not to prosecute. These councils have been criticised for their lack of legal knowledge, as well as for being easily influenced by the District or Provincial Governors, who also head the security forces.

An appeal against a decision by a District Administrative Council lies with the Regional Administrative Court (*Bölge İdare Mahkemesi*). If a decision not to prosecute is taken, the case is automatically referred to that court. An appeal against a decision taken by a Provincial Administrative Council lies with the Council of State (*Danıştay*). If a decision not to prosecute is taken, the case is automatically referred to the Council of State.

If a decision to prosecute has been taken, the case is referred to the public prosecutor for further action.

iv. *Constitutional provisions on administrative liability*

Article 125 of the Turkish Constitution provides as follows:

<Translation>

"All acts and decisions of the Administration are subject to judicial review ... The Administration shall be liable for damage caused by its own acts and measures."

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

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

v. *Civil law provisions*

Any illegal act by civil servants, be it a crime or a tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts. Pursuant to Article 41 of the Code of Civil Obligations (*Borçlar Kanunu*), an injured person may file a claim for compensation against an alleged perpetrator who has caused damage in an unlawful manner whether wilfully, negligently or imprudently. Pecuniary loss may be compensated by the civil courts pursuant to Article 46 of the Code of Civil Obligations and non-pecuniary or moral damages awarded under Article 47 of this Code. The civil courts are not bound by the findings of a criminal court as to a defendant's liability (Article 53).

However, under section 13 of Law no. 657 on State employees, anyone who has sustained loss as a result of the exercise of official duties by a civil servant may, in principle, only bring an action against the public authority in whose service the civil servant concerned works and not directly against the civil servant (Article 129 § 5 of the Constitution and Articles 55 and 100 of the Code of Civil Obligations). If, however, the act is found to be illegal or tortious and, consequently, is no longer considered as an "administrative" act or deed, the civil courts may allow a claim for damages against the official concerned, without prejudice to the victim's right to bring an action against the authority on the basis of its joint liability as the official's employer (Article 50 of the Code of Civil Obligations).

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

The applicant complains under Article 2 of the Convention that her brother-in-law, Necmi Çaçan, was killed by the security forces after having been tortured.

The applicant complains under Article 1 of Protocol No.1 to the Convention that she was deprived of the right to enjoy her property peacefully and freely.

The applicant complains under Article 3 of the Convention that during the evacuation of the Düzcealan village she beaten and insulted by the security forces.

The applicant complains under Article 5 of the Convention that the fact that she was forced to evacuate her village and prevented from returning constitute a violation of her right to liberty and security.

The applicant complains under Article 6 of the Convention that there are no effective remedies in domestic law to enable her to obtain compensation for her losses caused by the burning of her property.

The applicant complains under Article 8 of the Convention that her right to respect for her private and family life was violated because of the arbitrary evacuation of her village.

The applicant complains under Article 13 of the Convention that there are no effective remedies in domestic law in respect of the matters complained of.

The applicant complains under Article 14 of the Convention in conjunction with the above-mentioned Articles that she was discriminated on the ground of her Kurdish origin.

PROCEDURE

The application was introduced on 16 September 1996 and registered on 4 November 1996.

On 18 May 1998 the European Commission of Human Rights decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 3 November 1998, after an extension of the time-limit fixed for that purpose. The applicant replied on 2 February 1999, also after an extension of the time-limit.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

The applicant complains of the forced evacuation of her and her family from their village, the destruction and burning of her home and possessions and the killing of her brother-in-law by the security forces. She invokes Articles 2, 3, 5, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

A. Article 34 of the Convention

The Government submit that it is doubtful whether the applicant can claim to be a victim within the meaning of Article 34 of the Convention. The Government point out that the applicant's allegation that the security forces killed her brother-in-law did not directly and personally harm her.

The Court notes that the term "victim" in Article 34 of the Convention denotes the person directly affected by the act or omission which is at issue (cf. Eur. Court H.R., Eckle judgment of 15 July 1982, Series A no. 51, p. 30, § 66).

The Court further notes that it has examined applications brought by applicants who claimed to be victims of violations of Article 2 of the Convention (cf. Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2431, § 7; Kaya v. Turkey judgment of 19 February 1998, § 7; Çakıcı v. Turkey judgment of 8 July 1999, § 8). In those applications the applicants had indicated their intention of bringing their applications on their own behalf and on behalf of their deceased close relatives.

In the instant case, however, the applicant has not indicated that she had been bringing her application concerning Article 2 of the Convention on behalf of her deceased brother-in-law.

Furthermore, the applicant did not substantiate in her application the reason why any close relatives of her deceased brother-in-law (such as his wife or his children) had refrained to lodge applications with the Court.

The Court concludes that the remoteness of the relationship between the applicant and her brother-in-law, as regards the alleged killing of the latter, suffices to show that the applicant did not feel personally concerned by the alleged incident.

The Court, therefore, is of the opinion that the applicant cannot claim to be a victim within the meaning of Article 34 of the Convention regarding to her complaint under Article 2 of the Convention.

B. Article 35 of the Convention

The Government submit that the applicant failed to exhaust domestic remedies available to her within the meaning of Article 35 § 1 of the Convention.

The Government observe that the application to the Commission was lodged on 16 September 1996 while the investigation into the applicant's allegation was still being carried out by the national authorities. The Government infer from this that the domestic remedies had not been exhausted when the application was made and that, consequently, the Court should declare the application inadmissible.

The Government contend that it would have been possible for the applicant to seek redress before the administrative courts under Article 125 of the Constitution and Law no. 2935 and legislative Decree no. 435. Under Turkish administrative law the State's liability to pay compensation can be engaged, firstly, where the agents of the State are at fault. The State can subsequently recover the compensation paid from those responsible for

the harm caused. Secondly, the State cannot escape 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. In this regard, with reference to numerous decided cases, the Government demonstrated that the administrative courts had awarded compensation in many cases involving death, injury or damage to property.

The Government submit in the alternative that the applicant could also have lodged a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of the State's agents.

The Government further point out that, if committed, the alleged acts complained of by the applicant before the Court would indeed have been punishable under Turkish criminal law (see relevant domestic law above). In this connection the applicant should have lodged criminal complaints either with the office of the public prosecutor or with the local administrative authorities pursuant to Articles 151, 152 and 153 of the Code on Criminal Procedure. Furthermore, if the acts complained of were committed by military personnel, the latter would be prosecuted under Articles 86 and 87 of the Military Criminal Code for placing the human life at risk, causing damage to property and non-compliance with orders.

The Government finally submit that the application was lodged out of time in that the applicant alleges that her house was burnt on 29 December 1993 whereas she filed her application with the Court on 16 September 1996, which is almost three years after the alleged events took place.

The applicant submits that she was not required to exhaust domestic remedies since there is an administrative practice of failure to provide an effective remedy for abuses carried out by the security forces and an administrative practice of destruction of villages.

The applicant argues that the national authorities should have launched an *ex officio* investigation into her allegations, as those allegations constitute criminal offences under Turkish Law. However, the national authorities failed to investigate her allegations until she lodged a complaint with the office of the public prosecutor.

The applicant further argues that she does not have to avail herself of the other remedies mentioned by the Government since these remedies would also have been futile. She maintains that the remedies suggested by the Government are ineffective and illusory due to existence of an administrative practice of village destruction in south-east of Turkey.

In reply to the Government's argument that she failed to comply with the six months rule, the applicant submits that she was unable to introduce her application to the Court within six months after the events took place because the security forces were constantly threatening her and her family after she left her village. She concludes that she could not have been expected to lodge an application with the Court within six months under such circumstances.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 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 35 § 1 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 of Judgments and Decisions* 1996-IV, pp. 1210-11, §§ 65-69, and the Menteş and Others v. Turkey judgment of 28 November 1997, *Reports* 1997-VIII, p. 2706, § 57).

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 35 § 1 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 Menteş and Others judgment, p. 2707, § 58).

In this regard, the Court notes that Turkish law provides civil, administrative and criminal remedies against illegal acts attributable to the State or its agents.

As regards a civil action for redress for damage sustained through illegal acts or patently unlawful conduct on the part of State agents, the Court recalls that a plaintiff must, in addition to establishing a causal link between the tort and the damage he has sustained, identify the person believed to have committed the tort (see the Yaşa v. Turkey judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2431, § 73). In the instant case, however, those responsible for the destruction of the applicant's property are still unknown.

With respect to an action in administrative law under Article 125 of the Turkish Constitution based on the authorities' strict liability, the Court reiterates that the remedy indicated by the Government must be sufficiently certain, in practice as well as in theory (see, among other authorities, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 17, § 42). In this connection the Court notes that the Government referred to many cases which concerned the award of compensation by the administrative courts to plaintiffs who brought actions as a result of damage or injury they had suffered due to terrorist incidents in the state of emergency region. Undoubtedly these decisions illustrate the real possibility of obtaining compensation before these courts in respect of injuries or damage to property arising out of the disturbances or acts of terrorism.

However, as the Court has constantly held in similar cases, despite the extent of village destruction in the state of emergency region, there appears to be no example of compensation having been awarded in respect of allegations that property has been deliberately destroyed by members of the security forces or of prosecutions having been brought against them as a result of such allegations (see the Selçuk & Asker v. Turkey judgment of 24 April 1998, *Reports* 1998-II, p. 907, § 68 and the Gündem v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1131, § 60). On that account, the Court points out that in the cases referred to by the Government, the administrative courts awarded compensation on the basis of the doctrine of social risk, which is not dependent on proof of

fault. Thus, under Turkish law an administrative law action is a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification is not, by definition, a prerequisite to bringing an action of this nature.

For the Court, however, when an individual formulates an arguable claim in respect of destruction of property, torture or killing involving the responsibility of the State, the notion of an "effective remedy", in the sense of Article 13 of the Convention, entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access by the complainant to the investigative procedure (see the above-mentioned Menteş and Others judgment, p. 2715, § 89; the Aksoy v. Turkey judgment of 28 December 1996, *Reports* 1996-VI, p. 2288, § 98; and the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, p. 330, § 107). Otherwise, if an action based on the State's strict liability were to be considered a legal action that had to be exhausted in respect of complaints under Articles 2 and 8 of the Convention or Article 1 of Protocol No. 1 thereof, the State's obligation to pursue those guilty of such serious breaches might thereby disappear.

Accordingly, the Court does not consider that a remedy before the civil or administrative courts can be regarded as adequate and effective in respect of the applicant's complaints, since it is not satisfied that a determination can be made in the course of such proceedings concerning the allegations that property destroyed by members of the security forces.

On the other hand, the Court considers that a complaint to the public prosecutor could in principle provide redress for the kind of violations alleged by the applicant. The Court notes in this connection that the criminal investigation into the destruction and evacuation of the applicant's village was in fact opened after the applicant lodged an application with the office of the public prosecutor in Tatvan on 5 September 1996 which is three years after the events complained of. These proceedings were concluded on 20 May 1997 by the domestic authorities. The Court is therefore of the opinion that the applicant was not required to make a further explicit request to this effect by filing a criminal complaint as this would not lead to any different results.

As regards to the Government's submission that the applicant failed to await the result of the proceedings before the national authorities the Court recalls its Ringeisen judgment of 16 July 1971, where it held that "it must be left open to the Commission to accept the fact that the last stage of such remedies may be reached shortly after the lodging of the application but before the Commission is called upon to pronounce itself on admissibility" (Ringeisen v. Austria, judgment of 16 July 1971, § 91).

The Court points out that the proceedings concerning the applicant's allegations were concluded on 20 May 1997, which is before the Court has delivered its decision on admissibility.

In these circumstances, the Court rejects the Government's argument that the application was lodged out of time and concludes that the application was introduced within six months as required by the Convention.

In the light of the foregoing, the Court concludes that the applicant can be considered to have exhausted domestic remedies.

C. As regards the substance of the applicant's complaints

The Government submit that the applicant's allegation that the security forces were responsible for the burning of her home and possessions is wholly unsubstantiated. Witnesses have stated that the houses in the village were burnt by the terrorists and that the applicant did not leave the village until April 1994. Witnesses also stated that the houses in the village were burnt after the village was abandoned. The Government submit that there is no evidence whatsoever to support the applicant's assertions having regard to the outcome of the investigation conducted by the domestic authorities. The Government finally point out that it is clearly established that the members of the applicant's family are involved in the activities of the PKK.

The applicant submits that the evidence relied on by the Government is contradictory. There is sufficient evidence which indicates that the security forces burnt the houses in her village. Furthermore, after she left her village she and her family were threatened by the security forces.

As regards the applicant's complaints concerning the burning of her house, the Court 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 Court concludes, therefore, that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits, the applicant's complaints under Articles 3, 5, 6, 8, 13 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention; and

DECLARES INADMISSIBLE the reminder of the application.

Erik Fribergh
Registrar

Elisabeth Palm
President