CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

SECOND SECTION

DECISION

AS TO THE ADMISSIBILITY OF

Application no. 36217/97
by Abdullah MENTEŞE and Others
against Turkey

The European Court of Human Rights (Second Section), sitting on 23 March 2004 as a Chamber composed of:

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr K. JUNGWIERT,
Mr V. BUTKEVYCH,
Mrs W. THOMASSEN,
Mr M. UGREKHELIDZE, *judges*,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,
and Mr T.L. EARLY, *Deputy Section Registrar*,

Having regard to the above application lodged with the European Commission of Human Rights on 12 November 1994,

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 applicants,

Having deliberated, decides as follows:

THE FACTS

The applicants, whose names appear in the appendix, are Turkish nationals. They are represented before the Court by Mr T. Otty, a lawyer practising in London.

A. The circumstances of the case

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

1. Facts as presented by the applicants

On the night of 12 May 1994 and in the early hours of 13 May 1994 the applicants heard gun shots coming from outside their village of Yolçatı (Siti), located in the administrative jurisdiction of the district of Lice within the province of Diyarbakır. The firing continued until approximately 5 a.m. Subsequently, soldiers entered the village and told all the villagers to gather at the village mosque.

The applicants alleged that the following took place:

Case of Abdullah Menteşe

On 12 May 1994 the applicant was at home with his family. During the night he heard gun shots coming from outside the village. In the early hours of 13 May 1994 his son, Kamil Menteşe, set out to take the livestock out of the village. The soldiers stopped his son, checked his identity card and released him.

The soldiers then entered the village, gathered all the villagers near the village mosque, asked the villagers whether there were any PKK members in the area and whether they had been giving them food. Thereafter, the soldiers started to burn the houses in the village. At that time, the applicant's son returned to the village and was taken away by the soldiers together with three other villagers. The applicant heard no further news about his son despite his inquiries to the Lice prosecutor. On 17 May 1994, five days after the incident, the corpses of twenty-six persons were found near the village. The corpse of the applicant's son was found five hundred metres away from the other corpses. The body was taken to the Lice Health Centre and was buried in the Lice cemetery.

Case of Zora Bozkuş

The applicant and his family lived in the hamlet of Beğendik (Henyat) in Yolçatı village. On the night of 12 May 1994 the applicant was at home with his family. At about 11 p.m. they heard gun shots near their house. The firing continued until 5 a.m. In the morning of 13 May 1994, the applicant's

brother in-law, Yusuf Bozkuş, led the animals towards Yolçatı village. At the same time, the applicant and his children tried to leave the hamlet. However, they were not able to go very far as the area was surrounded by soldiers. From a distance, he saw his house catch fire. On the evening of 13 May 1994 the applicant and his children stayed in the forest and saw smoke rising from the surrounding hamlets and villages. Early in the morning of 14 May 1994, they headed towards Lice.

On 15 May 1994 the applicant heard from his neighbours that his brother-in-law, Yusuf Bozkus, had been arrested by the security forces near Yolçatı village. Upon receiving this information, the applicant attempted to search for Yusuf. However as the roads were blocked by panzer tanks, he could not go back to the village. When he returned to Lice, his children told him that Yusuf's body had been found and had been identified by a relative called Hasan Bozkuş. According to Hasan Bozkuş, Yusuf's skull was completely shattered and there were five bullet holes in his chest.

The applicant went back to the village one month later and saw that his house had been burnt down.

Case of Hatun Demirhan

The applicant and her children were in the village on the evening of 12 May 1994. They heard gun shots throughout the night. On 13 May 1994, at 6 a.m., soldiers arrived in the village and told the villagers to gather around the mosque. The commander then ordered the soldiers to start burning the houses. The applicant's house was burnt down along with the other houses. Subsequently, all men who were under 60 years old were asked to leave the village with a soldier. The applicant saw Sabri Akdoğan, Vahap Maço, Reşit Demirhan and Kamil leave the village with the soldiers. After some time she heard gun shots and then saw the soldiers coming back to the village from that direction.

Case of Mustafa Demirhan

The applicant was in the village of Yolçatı on the night of 12 May 1994. In the early hours of 13 May 1994, the village was surrounded by soldiers. The villagers were ordered to gather around the mosque and they were interrogated about PKK activities. The soldiers then began burning down the houses. The village men who were under 60 years old were asked to leave the village with the soldiers. Upon this order, the applicant's son Resit Demirhan as well as Sabri Akdoğan and Vahap Maço were taken away by the soldiers. The applicant was sent to Lice with the remaining villagers. The applicant tried to get information as to the whereabouts of his son. However, the soldiers did not allow him to look for him. After two days, the applicant returned to the village. The following day, some villagers went to the Lice public prosecutor to obtain information about the missing villagers.

The body of the applicant's son was subsequently found near the village. The applicant heard that there were twenty-six bodies at the scene of incident. The body of the applicant's son was buried on 16 May 1994 in Diyarbakır.

Case of Ayşe Harman

The applicant lived in the village of Yolçatı. When the firing stopped at 5 a.m on 13 May 1994, the applicant fled from the village. While running away, the applicant saw a helicopter land in the village. She saw smoke rising from the village. Two weeks later when she returned to the village, she saw that her house had been burnt down.

Case of Süleyman Maço

The applicant and his family lived in a hamlet of Yolçatı village. On the night of 12 May 1994 they heard gun shots. The firing continued until 5 a.m. When the firing stopped, the applicant and his family tried to go to Lice. While they were passing near Yolçatı village, they were stopped by soldiers and the applicant's son Vahap Maço was taken away by soldiers. The applicant and the rest of the family members continued towards Lice. On 15 May 1994 the applicant was informed by some villagers that his son, Vahap Maço, was found dead together with other villagers. The applicant subsequently went to the Lice public prosecutor and the leader of the Council. When the applicant received permission to collect his son's body, he went back to the village. He saw that the village had been burnt. He then found the corpse of his son behind some rocks. There were several bullet marks on his body.

2. Facts as presented by the Government

The Government submitted that an armed clash had taken place on 13 and 14 May 1994 between the security forces and terrorists near the village of Yolçatı. Two soldiers had been killed during the clash.

The Government further maintained that an investigation was initiated to find the perpetrators of the killings of the applicants' relatives. During the course of this investigation, three villagers living in Yolçatı village were questioned. However, the accounts obtained from these villagers did not confirm the applicants' allegations.

The Government also stated that autopsies had been carried out on the bodies of Vahap Maço, Reşit Demirhan, Yusuf Bozkuş and Kamil Menteşe.

The Government also referred to the correspondence between the investigating soldiers and the Lice prosecutor and maintained that it had not been possible to find the perpetrators of the killings and that the investigations were still continuing.

B. Relevant Domestic Law and Practice

In respect of relevant domestic legislation, the Court refers to *Yöyler v. Turkey*, no. 26973/95, §§ 37- 49, 24 July 2003.

COMPLAINTS

The first, second, fourth and sixth applicants complained under Article 2 of the Convention that their relatives had been intentionally killed by the security forces. They also complained that the State had failed to investigate and prosecute their relatives' killers. These applicants finally submitted that the intentional killing of their relatives, the failure of the State to control the actions of its agents and the failure to implement proper investigative procedures, coupled with the lack of proper accountability, created an aggravated violation of Article 2 of the Convention as there was an administrative practice of non-respect for the protection of life in south-east Turkey.

Invoking Article 3 of the Convention, the applicants complained that they were subjected to inhuman and degrading treatment on account of their forced eviction from their village, the killing of their relatives and the destruction of their houses.

Under Article 5 of the Convention the applicants complained that they were deprived of their right to liberty and security due to their forced eviction from their village by members of the security forces.

The applicants alleged that the impossibility of challenging the destruction of their family homes and possessions represented a denial of their right of access to a court for a determination of their civil rights, within the meaning of Article 6 of the Convention.

They further alleged under Article 8 of the Convention that their right to respect for their family life and home was violated on account of the intentional killing of their relatives and the unjustified destruction of their houses and possessions.

The applicants complained that, contrary to Article 13 of the Convention, there was a lack of effective remedies to challenge the killing of their relatives and the destruction of their houses.

Invoking Article 18 of the Convention, they submitted that the interferences referred to above with the exercise of their Convention rights were not designed to secure permitted Convention purposes.

Under Article 1 of Protocol No. 1 to the Convention, the applicants complained that they were deprived of their right to the peaceful enjoyment of their possessions on account of the destructions of their houses and possessions by security forces.

Finally, invoking Article 14 of the Convention, the applicants complained that they were discriminated against on the ground of their Kurdish origin in the enjoyment of their rights under the above-mentioned Articles.

THE LAW

The applicants complained of violations of Articles 2, 3, 5, 13, 14 and 18 of the Convention and Article 1 of Protocol No.1 in connection with the death of their relatives and the destruction of their homes. The relevant parts of these provisions provide as follows:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

..."

Article 3

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

Article 5

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court;

...

c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

..."

Article 13

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

Article 14

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

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

Article 18

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

Article 1 of Protocol No. 1

"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."

A. The Government's preliminary objections

The Government submit that the applicants have failed to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention.

In this regard, the Government first contend that the applicants failed to file a criminal complaint with the public prosecutor's office concerning their allegations. The Government further maintain that it would have been possible for the applicants to seek redress before the administrative courts under Article 125 of the Constitution. Under Turkish administrative law, the State's liability to pay compensation can be engaged, firstly, where the agents of the State are at fault. In that event, 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 connection, the Government indicated that the administrative courts have awarded compensation in many cases involving death, injury or damage to property. In the alternative, the Government submit that the applicants could also have lodged a civil action in order to seek redress for damage sustained through illegal acts or patently unlawful conduct on the part of the State's agents. The Government finally point out that there was a pending investigation before the Lice public prosecutor's office into the death of Kamil Menteşe, Yusuf Bozkuş, Raşit Demirkan and Vahap Maço. According to the Government, the applicants lodged the application with the Court before awaiting the results of this investigation and therefore have failed to exhaust domestic remedies.

The applicants submit that they were not required to exhaust domestic remedies since these remedies were inadequate and ineffective. The applicants maintain that a remedy which consisted merely of monetary compensation and which ignored the responsibility of the security forces was wholly unacceptable. Furthermore, they assert that the criminal investigation into the circumstances of their cases was ineffective in many respects.

The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 of the Convention obliges applicants to use the remedies that are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. Article 35 also requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic body, at least in substance and in compliance with the formal requirements laid down in domestic law, but not that recourse should be had to remedies which are inadequate or ineffective (see the *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2431, § 71).

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 to such an action 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, cited above, § 73). In the instant case, however, those responsible for the death of the applicants' relatives and the destruction of their property are still unknown.

As to an action in administrative law under Article 125 of the Constitution, the Court notes that this was a remedy based on the strict liability of the State, in particular for the illegal acts of its agents, whose identification was not, by definition, a prerequisite to bringing such an action. However, the investigations which the Contracting States were obliged by Articles 2 and 3 of the Convention to conduct in cases of fatal assault or allegations of torture had to be capable of leading to the identification and punishment of those responsible. That obligation accordingly could not be satisfied merely by awarding damages. Otherwise, if an action based on the State's strict liability were to be considered a legal remedy that had to be exhausted in respect of complaints under Articles 2 and 3, the State's obligation to seek out those guilty of fatal assault might thereby disappear (see, *Oğur v. Turkey* [GC], no. 21594/93, § 66, ECHR

1999-III and the *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports* 1998-VIII, p. 3290, § 102). In respect of the Government's reference to sample case-law delivered by the administrative courts, the Court refers to its case-law in similar cases and notes that despite the extent of village destruction in the state of emergency region, there appears to be no example of compensation having been awarded at the relevant time 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 and Asker v. Turkey*, judgment of 24 April 1998, *Reports* 1998-II, p. 907, § 68 and the *Gündem v. Turkey*, judgment of 25 May 1998, 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.

Consequently, the Court is of the opinion that the applicants were not required to bring the civil and administrative proceedings suggested by the Government.

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 applicants. The Court notes that, under Turkish law, filing a criminal complaint with the public prosecutor is not a condition *sine qua non* for the opening of a criminal investigation. It appears that in the present case a criminal investigation was in fact opened *ex officio* by the Lice public prosecutor. The Court is therefore of the opinion that the applicants were not required to make a further explicit request to this effect by filing a criminal complaint as this would not have led to any different result.

The question arises whether or not the criminal investigation at issue can be regarded as effective for the purposes of the Convention. The Court considers that this question cannot be answered at this stage of the proceedings, it being closely linked to the substance of the applicants' complaints.

Consequently, the Court dismisses the Government's preliminary objection in so far as it relates to the civil and administrative remedies relied on. It joins the preliminary objection concerning remedies in criminal law to the merits.

B. Merits

The applicants maintain that their account of the events is accurate.

The Government have not made any comments on the merits of the case.

As regards the substance of the applicants' complaints, 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 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

Joins to the merits the Government's preliminary objection based on non-exhaustion in so far as it relates to the criminal investigation carried out into the applicants' complaints;

Declares the application admissible, without prejudging the merits.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President

APPENDIX

1. Abdullah MENTEŞE, who was born in 1912, resides in Diyarbakır.
2. Zora BOZKUŞ, resides in Diyarbakır.
3. Hatun DEMİRHAN resides in Diyarbakır.
4. Mustafa DEMİRHAN, who was born in 1918, resides in Diyarbakır.
5. Ayşe HARMAN, resides in İzmit.
6. Süleyman MAÇO, resides in Diyarbakır.