CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF MENTEŞ AND OTHERS v. TURKEY

(58/1996/677/867)

JUDGMENT

STRASBOURG

28 November 1997

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SUMMARY[1]

Judgment delivered by a Grand Chamber

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

I. GOVERNMENT'S PRELIMINARY OBJECTION (non-exhaustion of domestic remedies)

Preliminary objection resolved in light of principles enunciated in the Akdivar and Others judgment and of the security situation in south-east Turkey and ensuing obstacles to proper functioning of system of administration of justice in that region – despite extent of problem of village destruction, no example of compensation being awarded in respect of allegations that property purposely destroyed by members of security forces or of prosecutions being brought against them – general reluctance of the authorities to admit that this type of practice had occurred – unlike Akdivar and Others, present applicants had not themselves approached any domestic authority with their Convention grievances – however, the competent public prosecutors had failed to carry out any meaningful investigation after becoming aware of their allegations – insecurity and vulnerability of the applicants' position following destruction of their homes also borne in mind – in the exceptional circumstances, not shown that remedies before administrative and civil courts were adequate and sufficient in respect of applicants' complaint that their homes had been destroyed by security forces – this ruling not to be interpreted as a general statement that remedies are ineffective in this area of Turkey.

Conclusion: objection dismissed (fifteen votes to six).

II. MERITS OF THE APPLICANTS' COMPLAINTS

A. Establishment of the facts

The Commission had reached its findings of fact on the basis of an investigation, in the course of which documentary evidence, including written statements, was submitted and oral evidence of eleven witnesses was taken by three delegates at hearings in Ankara – witnesses were questioned and cross-examined in detail by all sides and confronted with inconsistencies and weaknesses in their evidence – the delegates were thus in a position to observe the witnesses' reactions and demeanour and, hence, to assess the veracity and probative value of the evidence of both sides – the establishment of the facts by the Commission had been based on the appropriate evidentiary requirement, namely proof beyond reasonable doubt – it had had regard to the inconsistencies and contradictions in the evidence, notably differences between the written and oral statements, and for reasons which appeared convincing, attached more weight to latter – also bore in mind cultural and linguistic context, as well as the Government's uncooperative conduct – the Court, having

1. This summary by the registry does not bind the Court.

itself carefully examined the evidence gathered by Commission, satisfied that facts as established by the latter were proved beyond reasonable doubt as far as concerned the first three applicants' allegations, but not those of the fourth applicant.

B. Complaints of the first three applicants

1. Article 8 of the Convention

No reason to distinguish between the first applicant and the second and third applicants – given her strong family connection and the nature of her residence, first applicant's occupation of house fell within scope of Article 8 of the Convention – furthermore the facts established by Commission and which Court had accepted disclosed a particularly grave interference with the first three applicants' right to respect for private life, family life and home, as guaranteed by Article 8 and that the measure was devoid of justification.

Conclusion: violation (sixteen votes to five).

2. Article 3 of the Convention

In view of specific circumstances of case and finding of violation of Article 8, complaint not examined further.

Conclusion: complaint not examined further (twenty votes to one).

3. *Article 5 § 1 of the Convention*

Complaint not pursued before the Court.

Conclusion: not necessary to examine complaint (unanimously).

4. Articles 6 § 1 and 13 of the Convention

(a) Article 6 § 1 of the Convention

Since applicants did not attempt to make an application before the courts, not possible to determine whether Turkish courts would have been able to adjudicate on their claims had they initiated proceedings – in any event, applicants 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 (unanimously).

(b) Article 13 of the Convention

Although applicants had not approached any domestic authority before bringing their application to Strasbourg, manner in which investigations conducted, following the Commission's communication of the application to the respondent Government, could be taken into account in examination of the applicants' initial complaint that they did not dispose of an effective remedy – no thorough and effective investigation had been conducted into the applicants' allegations and this had resulted in undermining the exercise of any remedies at their disposal, including the pursuit of compensation before the courts.

Conclusion: violation (sixteen votes to five).

5. Articles 14 and 18 of the Convention

Complaints not sustained by facts as established by Commission.

Conclusion: no violation (unanimously).

6. Alleged administrative practice of violating the Convention

Evidence established by Commission insufficient to allow conclusion as to the existence of any administrative practice of the violation of Articles 8 and 13.

C. Complaints of the fourth applicant

Fourth applicant accepted before Court that no facts had been established with respect to her specific complaints under Articles 2, 3, 5, 6, 8, 13, 14 and 18.

Conclusion: no violation (unanimously).

III. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary and non-pecuniary damage: not ready for decision – question reserved (twenty votes to one).

B. Costs and expenses

Costs and expenses: awarded in part (sixteen votes to five).

COURT'S CASE-LAW REFERRED TO

18.1.1978, Ireland v. the United Kingdom; 16.9.1996, Akdivar and Others v. Turkey; 18.12.1996, Aksoy v. Turkey; 25.9.1997, Aydın v. Turkey

In the case of Menteş and Others v. Turkey[1],

The European Court of Human Rights, sitting in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr B. WALSH,
Mr C. RUSSO,
Mr A. SPIELMANN,
Mr J. DE MEYER,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Mr A.B. BAKA,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr P. KŪRIS,
Mr U. LŌHMUS,
Mr E. LEVITS,
Mr V. BUTKEVYCH,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 21 March, 27 June and 22 October 1997,

Delivers the following judgment, which was adopted on the last-mentioned date:

Notes by the Registrar

1. The case is numbered 58/1996/677/867. 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.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 17 April 1996, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 23186/94) against the Republic of Turkey lodged with the Commission under Article 25 by Ms Azize Menteş, Ms Mahile Turhallı and Ms Sulhiye Turhallı and Ms Sariye Uvat, who are Turkish citizens, on 20 December 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 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30). The President granted leave, pursuant to Rule 30 § 1, to Ms F. Hampson, Reader in Law at the University of Essex, to act as one of the applicants' representatives.

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 27 April 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 F. Matscher, Mr B. Walsh, Mr N. Valticos, Mr R. Pekkanen, Mr J.M. Morenilla, Mr G. Mifsud Bonnici and Mr P. Kūris (Article 43 *in fine* of the Convention and Rule 21 § 5).

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 applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence, the Registrar received the applicants' memorial on 13 November 1996 and the Government's memorial on 19 November 1996. On 10 January 1997, the Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

5. On 20 June 1996 the President refused the applicants' request under Rule 27 for interpretation in an unofficial language at the oral hearing, having regard to the fact that two of the applicants' representatives used one of the official languages of the Court.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 22 January 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A. GÜNDÜZ, Professor of International Law,
University of Marmara, *Agent*,
Mr A. S. AKAY, Ministry of Foreign Affairs,
Mr M. ÖZMEN, Ministry of Foreign Affairs,
Ms M. GÜLŞEN, Ministry of Foreign Affairs,
Ms. A. EMÜLER, Ministry of Foreign Affairs,
Mr A. KAYA, Ministry of Justice,
Mr A. KURUDAL, Ministry of the Interior,
Mr O. SEVER, Ministry of the Interior, *Advisers*;

(b) *for the Commission*
Mrs G.H. THUNE, *Delegate*;

(c) *for the applicants*
Mr K. BOYLE, Barrister-at-Law, *Counsel*,
Ms F. HAMPSON, University of Essex,
Mr O. BAYDEMIR,
Ms A. REIDY,
Mr N. STEWART QC,
Mr K. YILDIZ, Kurdish Human Rights Project, *Advisers*.

The Court heard addresses by Mrs Thune, Mr Boyle, Mr Gündüz and Mr Özmen, and also their replies to questions put by some of its members.

7. Following deliberations on 19 February 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51 § 1).

8. The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr Bernhardt, the Vice-President, togother with the other members and the four substitutes of the original Chamber, the latter being Mr A. Spielmann, Mr P. Jambrek, Mr C. Russo and Mr I. Foighel (Rule 51 § 2 (a) and (b)). On 28 January 1997, the President, in the presence of the Registrar, drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr J. De Meyer, Mr A.N. Loizou,

Mr A.B. Baka, Mr D. Gotchev, Mr U. Lõhmus, Mr E. Levits and Mr V. Butkevych (Rule 51 § 2 (c)).

9. On 29 January and 11 February 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 Ankara, which the Registrar had requested on the instructions of the President of the initial Chamber.

10. Having taken note of the opinions of the Agent of the Government, the applicants' representatives and the Delegate of the Commission, the Grand Chamber decided on 21 March 1997 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. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Introduction

11. The applicants, Ms Azize Menteş, Ms Mahile Turhallı and Ms Sulhiye Turhallı and Ms Sariye Uvat are Turkish citizens of Kurdish origin from the village of Sağgöz (which is the official Turkish name) or Riz (which is the older, Kurdish or Ottoman name) in the Genç district in the province of Bingöl in south-east Turkey. At present they live in Diyarbakır.

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

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

13. Sağgöz is situated in a mountainous area which was subject to significant PKK terrorist activity. Due to the events in the region in 1993 and 1994, many of the villages in the district have been evacuated by the villagers and the houses destroyed. By the summer of 1994, the village of Sağgöz and its surrounding hamlets were deserted, the villagers having left for Diyarbakır, Genç and other places, and the houses ruined.

14. The Sağgöz village was evacuated as a whole by the villagers in or about October 1993, following pressure from the PKK in the area. Some of the villagers in the outer hamlets stayed beyond October 1993 but had all left by summer 1994 due to PKK presence. Shortly after the villagers began leaving, the PKK moved into the empty houses. Clashes with security forces ensued, one in October or November 1993, another in April/May 1994. It is probable that houses in the village were burned or destroyed in the course of these clashes, including possibly through bombing from helicopters. However, whether the PKK or the security forces set fire to the houses intentionally or accidentally is not established.

15. The facts in this case are disputed.

B. The applicants' version of the facts

16. According to the applicants their houses were burned in the course of an operation by the security forces in June 1993. Their version of the events could be summarised as follows.

17. The applicants all lived in hamlets of the village of Sağgöz. Azize Menteş, Mahile Turhallı and Sulhiye Turhallı lived in the lower neighbourhood in Sağgöz village and Sariye Uvat lived in Piroz, a separate hamlet of the village.

18. On 23 June 1993, an attack was carried out by the PKK on Üçdamlar gendarme station. On the evening of the same day, the security forces stopped a minibus belonging to Naif Akgül, which regularly took people between Diyarbakır and the Lice area, as it approached the gendarme station. The security forces set fire to the minibus. They subsequently carried out a follow-up operation in pursuit of the PKK who had attacked the station. On 24 June 1993, security forces came to Pecar (Güldiken) village and burned some of the houses.

19. On the evening of 24 June 1993, security forces arrived in the area surrounding Sağgöz village by helicopter. On the morning of 25 June 1993, gendarmes entered the village and gathered people from the upper neighbourhood in the area in front of the school. Gendarmes in the lower area carried out a search and then proceeded to burn houses in the lower neighbourhood of Sağgöz village. Villagers pleaded with the gendarmes not to burn their houses but were told to remain quiet or they would be thrown on the flames. When asked why they were burning the houses, the gendarmes told the villagers that it was a punishment for helping the PKK.

20. The house where Azize Menteş lived was burned completely, along with her furniture, firewood, barn and a shed with winter feed for the animals. Mahile Turhallı's house was burned and the gendarmes threatened to throw

her into the burning house if she tried to retrieve some of her children's clothes. Sulhiye Turhallı's house was burned, after she and her children had been thrown out and she had been kicked, cursed at and a gun put to her face. In all, ten to thirteen houses in the lower neighbourhood were destroyed. The soldiers told the applicants that they were burning their houses because they helped the terrorists.

21. The intention of the gendarmes in Sağgöz village appeared to have been to burn the whole village in revenge for the attack by the PKK on the gendarme station. However, the arrival of a commanding officer at midday, a colonel who ordered the burning to stop, saved the upper village.

The house of the applicant Sariye Uvat in the hamlet of Piroz was burned by the security forces in a separate incident.

The applicants were forced to leave Sağgöz.

22. Later, in the autumn of 1993, the remaining population of the village left and in March 1994 the remainder of the village was burned down. By this date in 1994, the entire area seems to have been burned, devastated and depopulated.

23. The burning of the applicants' homes is consistent with a practice of burning houses as part of the policy by the security forces to combat the PKK, especially where the authorities view villages as giving support to the PKK.

C. The Government's version of the facts

24. Since 1983 the PKK has sought to use the applicants' village as a place of shelter and supply base. The villagers were forced by virtue of the incursions of the terrorists to leave the village. The terrorists used the houses from time to time and when the security forces took action against them, the terrorists fled setting the houses on fire.

25. There were no operations by the security forces in the area on 25 June 1993. In fact, the applicants had been absent from the village for six to seven years by that point. They were the close relatives of six named individuals who are suspected of being members of the mountains branch of the PKK. They also had relatives who had been detained on charges alleging, *inter alia*, that they have aided and abetted the PKK terrorist organisation. Other members of the applicants' families were working for the PKK in rural areas. It was not unlikely that the applicants had been subjected to pressure by their relatives who aid and abet and work for the PKK.

D. The Commission's findings of fact

26. The Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence, including written statements, and oral evidence of eleven witnesses taken by three delegates of the Commission in Ankara from 10 to 12 July 1995. This included two local public prosecutors and four villagers whom they had investigated in connection with the applicants' allegations (see paragraphs 27–30 below); another villager; the first three applicants; and the commander of the gendarmerie of the Bingöl province who had taken up his duties after the alleged events.

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

It assessed the evidence and its findings could be summarised as follows.

1. Investigations at domestic level

27. Two investigations into the events at Sağgöz had been carried out by the two public prosecutors at Genç, the first by Mr Ata Köycü and the second by Mr Kadir Karaca, both of which had ended in decisions, on 25 April and 30 May 1994 respectively, not to prosecute.

28. The first investigation had been in response to a letter from the Ministry of Justice, apparently motivated by information received when the applicants' complaints had been communicated by the Commission to the Turkish Government on 15 April 1994 (date of letter). In reconstructing the investigation, the Commission's delegates had received little assistance from the public prosecutor who had also been handicapped in not having a copy of his file for reference.

His decision not to prosecute, which concluded that no incident had occurred on 25 June 1993, must have been taken less than two weeks from his receipt of the first notification of the complaints. It seemed likely that the applicants' names were not known to him at that stage. This decision had

been taken solely on the basis of brief statements from four villagers, from different hamlets, distinct from Sağgöz, which appeared mainly directed at refuting specific allegations: the bombing by helicopters in June 1993 (not in fact alleged in the applicants' original application) and the tying up or beating of the old men. All had referred to terrorist clashes with security forces leading to the villagers' departure from Sağgöz; only one had attributed the burning of houses to the PKK.

According to Mr Karaca, the witnesses had been selected at random, but Ekrem Yarar, *muhtar* of Sağgöz, had said that he had been invited to make a statement and to bring other "reliable witnesses" from the village.

29. Also the second investigation had been in response to another letter from the Ministry of Justice. Mr Karaca had based himself on the investigation of his colleague. He referred to the previous four statements and summoned the four villagers concerned. His decision not to prosecute concluded that the PKK burned the houses in the village, that the alleged incident had not taken place in June 1993 and that the applicants were close relatives of members of the PKK.

30. No other steps were taken to establish the facts of what occurred, either by enquiring from the gendarmes as to whether any operation might have taken place or by seeking to question villagers from the upper or lower neighbourhoods of Sağgöz itself. Further, it appeared that, while the names of the applicants were known at the time of the second investigation, no attempt had been made either to find out their addresses or to contact them with a view to inviting them to provide statements as to the factual circumstances of the case. The addresses of the applicants were in fact known to the authorities in Ankara who had been in contact with the police in Diyarbakır.

2. Concerning the alleged events of 25 June 1993

31. The Commission observed that there had been no detailed investigation at the domestic level of the events in Sağgöz village and its surrounding hamlets over the period June 1993 to summer 1994. It had accordingly based its findings on the evidence given orally before its delegates or submitted in writing in the course of the proceedings.

It further noted that the Government, despite repeated requests by the Commission's Secretariat and the Commission's delegates, had failed to provide documentary materials, in particular the contents of the investigation files of the two public prosecutors who carried out investigations into the alleged incident in Sağgöz village. At the taking of evidence in July 1995, the Government had failed to identify and serve with the Commission's summons the gendarme commander for the area on 25 June 1993, his successor, Mr Tuna, appearing instead. No explanation had been

forthcoming for this. In this respect, the Commission had had regard to the principle that, in assessing the evidence in a case the conduct of the parties may be taken into account (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 161 *in fine*).

32. The Commission was not persuaded by the Government's suggestion that the applicants' complaints were fabrications resulting from pressure exerted by their relatives in the PKK. The Commission found it regrettable that the response from the domestic authorities and the Government's allegations made in this case had given the appearance of being directed more at emphasising the PKK links with the applicants' families than at dealing with the substance of the applicants' grievances.

33. In establishing the facts, the Commission had regard to the inconsistencies and contradictions in the evidence.

As to the evidence given by the four villagers to the public prosecutors, the Commission observed that its tenor had been dogmatic, including blanket denials of any alleged cruelty or burning ever having been committed by Turkish soldiers. It had also given some support to the applicants' allegation that there was a certain animosity between the other villagers and themselves, which might have encouraged them to give statements contradicting the applicants' account. Moreover, the Commission noted that the village *muhtar* had been instructed by the prosecutor to bring some "reliable witnesses". In view of the manner of selection of witnesses by the prosecutor, the Commission found it unsafe to rely on their written statements in so far as they were unsupported by other evidence.

The Commission further noted that there were material differences between the statements of the first three applicants, Ms Azize Menteş, Ms Mahile Turhallı and Ms Sulhiye Turhallı, as recorded by the Human Rights Association and their oral statements to the delegates. However, the Commission found that the three applicants' oral evidence, which was supported in material points by a villager – Ms Aysel Gündoğan – was on the whole consistent and credible. The fact that they had gone to the Human Rights Association in Diyarbakır to complain in July 1993 was a strong factor weighing heavily in favour of the credibility of their central complaint. On the other hand, the Commission considered that it could not rely on the written statements since it had serious doubts as to the manner in which the association took statements and the extent to which care had been taken to record accurately each individual complaint without contamination from information gathered elsewhere.

34. The Commission was satisfied that Sulhiye and Mahile Turhallı were still living in their houses in the lower neighbourhood of the village of Sağgöz in the summer of 1993 and were present on 25 June 1993. However, as appeared to be a not uncommon pattern of life in this region, these two applicants left the village in the winter for Diyarbakır and returned in the summer to tend to their gardens and crops. As regards Azize Menteş, while she probably did not own a house herself, she lived in the house of her father-in-law when she returned in the summer months to the village. The Commission found that on the balance of the evidence, she was also living in the lower neighbourhood on 25 June 1993.

As regards the events in Sağgöz the Commission accepted in its principal elements the oral evidence of Azize Menteş, Mahile Turhallı and Sulhiye Turhallı. Considering that their oral evidence was more consistent, more credible and more convincing than the evidence given by the four villagers, it found as follows.

On the evening of 24 June 1993, a large force of gendarmes had arrived in the vicinity of Sağgöz village. On 25 June 1993, the gendarmes had entered both upper and lower neighbourhoods and carried out searches. At some point, the villagers in the upper neighbourhood (with the exception of the younger men who were out working) had been gathered in front of the school, probably to be questioned about the PKK in the area. In the lower neighbourhood, the women, including the applicants, had been required by the soldiers to leave their houses and their houses had been set on fire, with all their belongings and property inside, including the clothing and footwear of children. The burning had been restricted to the lower neighbourhood. Around midday, a helicopter had arrived in the village in the upper neighbourhood, probably bringing a senior officer, a colonel, and his arrival had been associated by the applicants and some of the other villagers with an order to cease the burning. The gendarmes left that day. Shortly afterwards, the three applicants, with their children or other members of their family, had to walk for up to ten hours to the Lice-Diyarbakır road from where they were given rides in vehicles into Diyarbakır.

35. As to the alleged operation by security forces in which the house of the fourth applicant, Sariye Uvat, was burned along with others in the hamlet of Piroz, no facts have been established in relation to this applicant's complaints. Due to ill-health she did not appear at the hearings before the Commission delegates, unlike the first three applicants.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Administrative liability

36. 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."

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

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

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

B. Criminal responsibility

39. The Turkish Criminal Code makes it a criminal offence

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

– to oblige an individual through force or threats to commit or not to commit an act (Article 188);

– to issue threats (Article 191);

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

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

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

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

40. 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.

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

42. If the alleged author of a crime is an agent of the State, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal of this kind.

C. Provisions on compensation

43. 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.

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

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

D. Provisions on emergency measures

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

47. 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.

48. 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.

49. Decree no. 285 modifies the application of Law no. 3713, the Anti-Terror Law (1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. According to the Commission, these councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors who also head the security forces.

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

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

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

PROCEEDINGS BEFORE THE COMMISSION

52. In their application (no. 23186/94) to the Commission introduced on 20 December 1993, the applicants, relying on Articles 3, 5, 6, 8, 13, 14, and 18 of the Convention, complained that their homes had been burnt and that they had been forcibly and summarily expelled from their village by State security forces on 25 June 1993. The fourth applicant, Sariye Uvat, invoked Article 2 in relation to the death of her twins who were born prematurely after her expulsion from her home.

The Commission declared the application admissible on 9 January 1995. In its report of 7 March 1996 (Article 31), it expressed, with respect to the first three applicants, the opinion
(a) that there had been a violation of Article 8 (by twenty-seven votes to one);
(b) that there had been a violation of Article 3 (by twenty-six votes to two);
(c) that there had been no violation of Article 5 (unanimously);
(d) that there had been a violation of Article 6 (by twenty-six votes to two);
(e) that there had been a violation of Article 13 (by twenty-six votes to two);
(f) that there had been no violation of Article 14 (unanimously);
(g) that there had been no violation of Article 18 (unanimously).

As regards the fourth applicant, the Commission concluded that there had been no violation of Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention (unanimously).

The full text of the Commission's opinion and of the three separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

53. At the hearing of 22 January 1997 the Government, as they had done in their memorial, invited the Court to hold that the applicants had failed to exhaust domestic remedies or, in the alternative, that there had been no violation of the Convention in the present case since the applicants had not substantiated their allegations.

54. On the same occasion the first three applicants reiterated their request to the Court stated in their memorial to find violations of Articles 3, 6, 8, 13, 14 and 18 of the Convention and to award them just satisfaction under Article 50 of the Convention. The fourth applicant accepted the Commission's finding that no facts had been established with respect to her complaints.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

55. The Government, as they had done at the admissibility stage before the Commission, stressed that in the absence of any attempts by the applicants to raise their Convention grievances before a domestic authority they could

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* 1997), but a copy of the Commission's report is obtainable from the registry.

not be regarded as having exhausted domestic remedies as required by Article 26 of the Convention. The Court had therefore no jurisdiction to entertain the applicants' complaints.

In the first place, it would have been open to the applicants to bring criminal proceedings and claim compensation (see paragraphs 39–45 above). In fact, on learning about the applicants' allegations, the local public prosecutor's office had carried out criminal investigations (see paragraphs 27–29 above). During those investigations the applicants could not be reached and the four villagers who had been questioned had all categorically denied that any houses were burned in the Sağgöz village on 25 June 1993. On the basis of the evidence available, it was decided not to prosecute. Had the applicants cooperated the outcome could have been quite different.

Secondly, it would have been possible for the applicants to seek compensation in the administrative courts by invoking the objective responsibility of the State for damage caused by terrorist violence (see paragraphs 36–38 above). It was clear in view of the circumstances that a claim that the security forces had been responsible would have been rejected. However, there were a number of administrative court decisions to show that the applicants would have stood a very great chance of success had they claimed that the houses had been burned by members of the PKK or during clashes between them and the security forces.

56. The applicants and the Delegate of the Commission requested the Court to dismiss the Government's preliminary objection of non-exhaustion for the reasons which led it to reject a similar objection in the Akdivar and Others v. Turkey case (judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, pp. 1210–13, §§ 65–76).

57. In applying Article 26 of the Convention to the facts of the present case, the Court will have regard to the principles enunciated in paragraphs 65 to 69 of the above-mentioned Akdivar and Others judgment (see also the Aksoy v. Turkey judgment of 18 December 1996, Reports 1996-VI, pp. 2275–76, §§ 51–53). It reiterates that there is no obligation 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. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the

Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.

58. Furthermore, the application of the rule of exhaustion must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, the Court has recognised that Article 26 must be applied with some degree of flexibility and without excessive formalism. The rule is neither absolute nor capable of being applied automatically. In reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual 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 (see the above-cited Akdivar and Others judgment, p. 1211, § 69; and the above-mentioned Aksoy judgment, p. 2276, § 53). It will thus have regard to the situation which existed in south-east Turkey at the time of the applicants' complaint – and which continues to exist, characterised by violent confrontations between the security forces and members of the PKK. As the Court held in Akdivar and Others:

> "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)

59. The Court notes that, despite the extent of the problem of village destruction, there appears to be 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 in respect 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.

It is true that, unlike Akdivar and Others, the applicants in the present case had not themselves approached any domestic authority with their Convention grievances. However, the Court attaches particular weight to the fact that,

after becoming aware of their allegations, the competent public prosecutors did not, for the reasons elaborated on in paragraphs 90–92 below, carry out any meaningful investigation into the matter (see paragraphs 27–30 above).

The insecurity and vulnerability of the applicants' position following the destruction of their homes should also be borne in mind.

60. In the absence of any convincing explanations from the Government in rebuttal, the applicants have demonstrated the existence of special circumstances which dispensed them at the time of the events complained of from the obligation to exhaust domestic remedies. In the exceptional circumstances of this case, the Court is not satisfied that remedies before the administrative and civil courts were adequate and sufficient in respect of the applicants' complaint that their homes had been destroyed by the security forces.

61. In the light of the foregoing, the Court concludes that the Government's preliminary objection of non-exhaustion must be dismissed.

This ruling is confined to the exceptional circumstances of the present case and is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey or that applicants are absolved from the obligation under Article 26 to have normal recourse to the system of remedies which are available and functioning.

II. THE MERITS OF THE APPLICANTS' COMPLAINTS

A. Establishment of the facts

62. Before the Court the Government vigorously challenged the findings of fact by the Commission. In their submission, whilst the latter had accepted the applicants' version of the events – apparently on the basis of the oral evidence given by the first three applicants and by Ms Gündoğan, there were serious inconsistencies and contradictions in their evidence. In this connection the Government maintained, *inter alia*, the following.

Ms Azize Menteş, who clearly did not own any house in the village, lied on an essential point when she said that she had a house there which was burned by the security forces. Moreover the applicants lied when they stated that they did not know the four villagers who appeared before the prosecutors. They were in fact neighbours and the applicants knew them very well. That their account of the events was fabricated was also illustrated by their statement that there were hills between their hamlet and those of the four villagers.

Furthermore, the Government pointed to a number of inconsistencies between written statements of the applicants taken by the Human Rights

Association and their oral evidence before the delegates of the Commission. Whilst they all had said to the Human Rights Association that the soldiers had gathered people in front of the school and made them lie there for five hours, they had subsequently retracted this allegation before the delegates. One of the applicants had stated to the association that her husband had been among those gathered in front of the school; however she had later told the delegates that he had been away on that day. Moreover, the applicants had previously stated that the men had fled the area because of fear before the soldiers arrived; however they had stated before the delegates that the men were outside the village. There were also inconsistencies in their written and oral statements as to the manner in which the soldiers allegedly set fire to their houses – petrol, "dust" (meaning powder), flame throwers and matches had all been mentioned. There were contradictory accounts as to when the soldiers left the village – the same day or the next day or, as one of them had stated to the Human Rights Association, after three days. Although the statements taken by the Human Rights Association bore different dates, the applicants had testified to the delegates that they had all gone to the association on the same date.

In the Government's view, the above inconsistencies combined to prove that the applicants' version of the events could not be relied upon and that they had failed to prove beyond reasonable doubt that on 25 June 1993 the security forces deliberately burned their houses.

63. In this connection, the Government stressed that the applicants and one of the witnesses, Ms Gündoğan, were all closely related to each other and had a common interest in the outcome of the case.

64. The Government further emphasised that the Commission had disregarded the witness statements of the four villagers who had all categorically denied that any houses had been burned on the material date. The villagers would have been able to see smoke from their neighbouring hamlets as there were no hills in between. Some of them had even said that they had been visiting the village on the relevant date. Their testimonies should therefore have carried considerable weight.

Moreover, in concluding that the manner of selection of the witnesses had been tainted with bias, the Commission had misinterpreted the first public prosecutor's request to the *muhtar* to find "reliable witnesses" as meaning witnesses favourable to the Government (see paragraphs 28 and 33 above). The public prosecutor must have meant trustworthy witnesses who could relate the truth. In any event, the Commission had attached too much weight to this factor.

65. The applicants and the Commission's Delegate invited the Court to accept the facts as established by the Commission.

The Delegate reiterated the difficulties encountered by the Commission in gathering the evidence. She stressed that the Commission had indeed in its

own establishment of the facts had regard to the inconsistencies in the evidence. She recalled that, under the Convention system, the establishment and verification of the facts was primarily the task of the Commission. Should the Court in the instant case decide not to rely on the Commission's findings of fact, it would give rise to certain practical difficulties.

In the applicants' submission the Government had been highly selective in the manner in which they had pointed to inconsistencies in the evidence and had failed to mention that the Commission did not rely on the statements taken by the Human Rights Association.

66. The Court reiterates that under its case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention). While the Court is not bound by the Commission's findings of fact and remains free to make its own appreciation in the light of all the material before it, it is only in exceptional circumstances that it will exercise its powers in this area (see, *inter alia*, the above-mentioned Aksoy judgment, p. 2272, § 38). Such exceptional circumstances may arise in particular if the Court, following a careful examination of the evidence on which the Commission has based its facts, finds that those facts have not been proved beyond reasonable doubt (see the Aydın v. Turkey judgment of 25 September 1997, Reports 1997-VI, pp. 1888–89, § 70). In this connection it is recalled that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64–65, § 161; and the above-cited Aydın judgment, p. 1889 , § 73).

67. In the case under consideration the Commission reached its findings of fact on the basis of an investigation, in the course of which documentary evidence, including written statements, was submitted and oral evidence of eleven witnesses was taken by three delegates at hearings in Ankara from 10 to 12 July 1995. The witnesses included the two public prosecutors who had investigated the matter, the four villagers whom they had heard, another villager and the first three applicants (see paragraph 26 above).

In the course of the above-mentioned adversarial hearings the witnesses were questioned and cross-examined in detail by all sides and confronted with the inconsistencies and weaknesses in their evidence. The delegates were thus in a position to observe the witnesses' reactions and demeanour and, hence, to assess the veracity and probative value of the evidence of both sides.

68. The establishment of the facts by the Commission was based on the appropriate evidentiary requirement, namely proof beyond reasonable doubt. In reaching its conclusions, the Commission had regard to the inconsistencies and contradictions in the evidence, notably differences between the written

and oral statements, and for reasons which appear convincing (see paragraph 33 above), attached more weight to the latter. After hearing the witnesses, the Commission accepted in its principal elements the oral evidence of the first three applicants. This was supported in its essential aspects by that of Ms Gündoğan and was in the Commission's view more consistent and convincing and therefore more credible than that of the four villagers supporting the Government's version of the events (see paragraph 34 above). The Commission also bore in mind the cultural and linguistic context, as well as the Government's uncooperative conduct when failing to provide certain documentary material requested by it and to identify and serve a summons on a key witness whom the delegates sought to question (see paragraphs 26 and 31 above).

69. The Court, having itself carefully examined the evidence gathered by the Commission, is satisfied that the facts as established by the latter (see paragraph 33 above) were proved beyond reasonable doubt as far as concerns the first three applicants' allegations, but not those of the fourth applicant.

B. Complaints by Azize Menteş, Mahile Turhallı and Sulhiye Turhallı

1. Alleged violation of Article 8 of the Convention

70. The first three applicants, Azize Menteş, Mahile Turhallı and Sulhiye Turhallı, maintained that the destruction of their homes by the security forces and their expulsion from their village constituted violations of Article 8 of the Convention, which reads:

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

71. The Government denied that there had been any security operation in the village on 25 June 1993. They submitted that damage to the village had been caused after that date by PKK terrorists. There was no evidence to substantiate the applicants' allegations against the security forces. There had therefore been no violation of Article 8 of the Convention.

72. The Commission considered that there had been a breach of this provision in respect of the first three applicants.

73. The Court sees no reason to distinguish between the first applicant, Ms Azize Menteş, and the second and third applicants. While it was in all probability her father-in-law and not she who owned the house in question, the first applicant did live there for significant periods on an annual basis when she visited the village (see paragraph 34 above). Given her strong family connection and the nature of her residence, her occupation of the house on 25 June 1993 falls within the scope of the protection guaranteed by Article 8 of the Convention.

Furthermore, the Court observes that the facts established by the Commission (see paragraph 34 above) and which it has accepted disclose a particularly grave interference with the first three applicants' right to respect for private life, family life and home, as guaranteed by Article 8 and that the measure was devoid of justification.

In these circumstances the Court finds that there has been a breach of Article 8 of the Convention with respect to the first three applicants.

2. Alleged violation of Article 3 of the Convention

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

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

75. The Government disputed the above allegation as being unsubstantiated on the facts.

76. The Commission considered that the burning of the first three applicants' homes constituted an act of violence and deliberate destruction in utter disregard of the safety and welfare of the applicants and their children who were left without shelter and assistance and in circumstances which caused them anguish and suffering. It noted in particular the traumatic circumstances in which the applicants were prevented from saving their personal belongings and the dire personal situation in which they subsequently found themselves, being deprived of their own homes in their village and the livelihood which they had been able to derive from their gardens and fields. In the Commission's opinion, the first three applicants had been subjected to inhuman and degrading treatment within the meaning of Article 3 of the Convention.

77. In view of the specific circumstances of the case and its finding of a violation of their rights under Article 8 of the Convention (see paragraphs 34 and 72 above), the Court does not propose to examine further this allegation.

3. Alleged violation of Article 5 § 1 of the Convention

78. Before the Commission the applicants alleged that they had been compelled to abandon their homes and village on 25 June 1993 in flagrant breach of their right to liberty and the enjoyment of security of the person as guaranteed by Article 5 § 1 of the Convention, which reads to the extent relevant:

> "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 …"

79. The Commission found that none of the applicants had been arrested or detained or otherwise deprived of their liberty. The insecurity of their personal circumstances arising from the loss of their homes did not fall within the notion of "security of person" for the purpose of Article 5 § 1 of the Convention.

80. The Government did not comment save in so far as they denied that the alleged incident occurred.

Before the Court, the applicants stated that they did not wish to pursue this complaint.

81. Against this background the Court does not find it necessary to deal with the matter of its own motion.

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

(a) Arguments of those appearing before the Court

82. The first three applicants complained that they had been denied an effective judicial or other remedy enabling them to challenge the destruction of their homes and possessions by the security forces and to seek compensation. This gave rise to a violation of Article 6 § 1 of the Convention which, in so far as is relevant, provides:

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

In addition, they maintained 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."

83. The Government disputed the above contentions, emphasising that there were both administrative and civil remedies (see paragraphs 36–45 above), of which the applicants had failed to avail themselves.

84. In the applicants' submission, the administrative remedy applied essentially to acts by the public authorities causing damage to individuals. Where the acts had exceeded the legal boundaries of administrative powers, a claim for damages had to be pursued in the civil courts.

The acts complained of by the applicants were deliberate acts committed by members of the security forces. However, none of the court decisions referred to by the Government dealt with a claim that the security forces had purposely destroyed the houses of the claimants concerned. The social risk theory employed by the administrative courts as a ground for awarding compensation was therefore irrelevant and would necessarily mask the truth of the circumstances of the burning of their houses and possessions. A remedy which consisted merely of monetary compensation and which ignored the responsibility of the security forces was wholly unacceptable.

Moreover, the applicants stressed that in the absence of criminal proceedings against those responsible, a civil claim for damages would be doomed to failure. The criminal investigation conducted into their allegations had been wholly inadequate.

In addition, the applicants alleged that the system of redress in south-east Turkey did not operate to afford them an effective remedy. In particular, they were deprived of an effective remedy as a result of (a) the widespread powers and immunities granted to the authorities in the region (see paragraphs 48–51 above); (b) the attitude of the authorities to the complaints of the applicants (see paragraphs 27–31 above); and (c) the existence of a policy of village destruction which rendered any remedy for the complaints ineffective.

85. The Commission found that there were undoubted practical difficulties and inhibitions in the way of persons like the applicants who complained of village destruction in south-east Turkey, where broad emergency powers and immunities have been conferred on the Emergency Governors and their subordinates. There had been no example given of compensation paid to a villager in respect of the destruction of a house by the security forces nor any example of a successful, or indeed any, prosecution brought against the security forces for any such act. In this connection, the Commission referred to the evidence taken in the present case. The applicants had not in fact made any petition to the public prosecutors but the Ministry of Justice in Ankara had instigated the investigation when the Commission had communicated the application to the Government. As this investigation indicated, complaints that the security forces had destroyed villagers' houses did not in practice receive the serious and detailed consideration necessary for any prosecution to be initiated. In fact, no investigation had taken place to

verify what occurred in the village and the hamlets (see paragraphs 27–30 above). Where the allegations concerned the security forces, which enjoyed a special protection in the south-east region, it was unrealistic to expect villagers to pursue theoretical civil or administrative remedies in the absence of any positive findings of fact by the State investigative mechanism.

In light of the above considerations, the Commission was of the opinion that, in breach of Article 6 § 1, the applicants did not enjoy an effective access to a tribunal for the determination of their "civil rights". Nor did they, in violation of Article 13, have an effective remedy with respect to any of their Convention grievances not covered by the expression "civil rights" in Article 6 § 1, and for this reason falling outside the scope of applicability of that provision. This was the case as regards, for example, their claims relating to the forcible evacuation of their village and their subsequent personal difficulties. State action to investigate the incidents promptly, to rehouse or financially assist the villagers, rather than passively awaiting administrative court intervention, may have been a more appropriate response to the applicants' plight.

(b) The Court's assessment

(i) Article 6 § 1 of the Convention

86. The Court reiterates that the right of access to a court in civil matters constitutes one aspect of the "right to a court" embodied in Article 6 § 1 (see, amongst many authorities, the above-mentioned Aksoy judgment, p. 2285, § 92). This provision undoubtedly applies to a civil claim for compensation for the destruction of homes and possessions allegedly committed by agents of the State.

87. The applicants did not dispute that they could in theory have their civil rights determined by the administrative courts and the civil courts. However, for the reasons set out above (see paragraph 84) they did not attempt to make an application before the courts. It is therefore not possible for the Court to determine whether the Turkish courts would have been able to adjudicate on the applicants' claims had they initiated proceedings.

In any event, the Court observes that the applicants complained essentially of the lack of a proper investigation into their allegation that the security forces had purposely destroyed their houses and possessions.

88. In view of the above, the Court 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 violations of the Convention. It does therefore not find it necessary to determine whether there has been a violation of Article 6 § 1.

(ii) Article 13 of the Convention

89. The Court reiterates that Article 13 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, and the above-mentioned Aydın judgment, pp. 1895–96, § 103).

Furthermore, the nature and gravity of the interference complained of under Article 8 of the Convention in the instant case has implications for Article 13. The provision imposes, without prejudice to any other remedy available under the domestic system, an obligation on the respondent State to carry out a thorough and effective investigation of allegations brought to its attention of deliberate destruction by its agents of the homes and possessions of individuals.

Accordingly, where an individual has an arguable claim that his or her home and possessions have been purposely destroyed by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigative procedure.

90. As already noted, the applicants in this case did not approach any domestic authority with their Convention grievances before bringing their application before the Strasbourg institutions. However, following the Commission's communication of the application to the respondent Government, the Ministry of Justice instigated criminal investigations by the office of the public prosecutor in Genç (see paragraph 28 above). In the Court's view, the manner in which these investigations were conducted may be taken into account in its examination of the applicants' initial complaint that they did not dispose of an effective remedy as required by Article 13.

91. In this regard, the Court notes that the first investigation was terminated on 25 April 1994, which must have been less than a fortnight after the prosecutor was notified of the applicants' complaints to Strasbourg. He was apparently unaware of the applicants' names at the time. His decision not to prosecute was based solely on the brief statements from the four villagers who had been selected in a manner giving rise to certain misgivings and who lived in separate hamlets about one hour's walking distance from the applicants' neighbourhood. The second investigation consisted merely of a rehearing of the same four witnesses by another prosecutor. Although at that stage the public prosecutor knew the applicants' names and the authorities in Ankara were aware of their addresses, no measures were taken to invite the applicants to make statements. Nor were any attempts made to hear other witnesses from the village or to enquire into the activities of the security forces at the material time and place (see paragraphs 28 to 30 above).

92. The Court concludes that no thorough and effective investigation was conducted into the applicants' allegations and this resulted in undermining the exercise of any remedies the applicants had at their disposal, including the pursuit of compensation before the courts. There has therefore been a breach of Article 13 in respect of the first three applicants.

5. Alleged violations of Articles 14 and 18 of the Convention

93. The applicants maintained that, because of their Kurdish origin, they had been subjected to discrimination in breach of Article 14 of the Convention, in conjunction with Articles 3, 6, 8 and 13. Article 14 reads:

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

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

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

94. The Government did not address those allegations beyond denying the factual basis of the substantive complaints.

95. The Commission found the applicants' above allegations unsubstantiated and that there had thus been no violation of Article 14 or Article 18.

96. For its part the Court, on the basis of the facts as established by the Commission (see paragraphs 27–30 and 34 above), finds no violation of these provisions.

6. Alleged administrative practice of violating the Convention

97. In addition to finding individual violations of Articles 3, 6, 8 and 13 of the Convention, the first three applicants requested the Court to find that they had been the victims of aggravated violations of these Articles on account of the existence of an administrative practice of village burning and forced evacuations and displacement of Kurds.

98. Having regard to its conclusions with respect to Articles 3 and 6 of the Convention (see paragraphs 77 and 88 above), the Court will confine its examination to the alleged aggravated violations with respect to Articles 8 and 13. It is of the view that the evidence established by the Commission (see paragraphs 27–30 and 34 above) is insufficient to allow it to reach a conclusion concerning the existence of any administrative practice of the violation of these Articles of the Convention.

C. Complaints by Sariye Uvat

99. Before the Commission, the fourth applicant, Sariye Uvat, complained of violations of the same provisions of the Convention as the first three applicants and, in addition, of Article 2 of the Convention, which provides:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;
>
> (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
>
> (c) in action lawfully taken for the purpose of quelling a riot or insurrection."

In this respect, she complained that after she left the village her twin boys died after premature delivery.

100. The Commission recalled its finding that no facts had been established in relation to this applicant's complaints (see paragraph 35 above). In the absence of any further substantiation of her written statement to the Human Rights Association, it considered that there was an insufficient factual basis on which to find a violation of any of the Convention Articles relied on by her.

101. The Court notes that in the proceedings before it the fourth applicant accepted that no facts had been established with respect to her specific complaints. In these circumstances the Court finds that there has been no violation of the Convention provisions relied on by this applicant.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

102. The applicants sought just satisfaction under Article 50 of the Convention, which provides:

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

A. Damage

103. The applicants claimed compensation for pecuniary and non-pecuniary damage, punitive damages and also aggravated damages.

104. However, this matter is, in the Court's view, not ready for decision. The question must therefore be reserved and the future procedure fixed with due regard to the possibility of agreement being reached between the Government and the applicants concerned.

B. Costs and expenses

105. The applicants further sought costs and expenses amounting to a total of 31,795 pounds sterling (GBP) from which the amounts already received in legal aid from the Council of Europe should be deducted. Their claim included the following items:

(a) GBP 19,000 (190 hours at GBP 100 per hour) in legal fees for work by Mr Boyle;

(b) GBP 3,750 (75 hours at GBP 50 per hour) in fees for work by Ms Reidy;

(c) GBP 2,400 (96 hours at GBP 25 per hour) in fees for work by Mr Sakar and Mr Baydemir;

(d) GBP 4,000 (100 hours at GBP 40 per hour) for legal assistance by the Kurdish Human Rights Project;

(e) GBP 1,655 in expenses for interpretation and translation;

(f) GBP 115 for photocopying and GBP 875 for telephone and postage.

The above fees covered the period up to and including the hearing of 22 January 1997.

106. The Government maintained that in the absence of any supporting evidence, the above claims must be rejected as unsubstantiated and, in any event, were unnecessarily incurred and excessive. As regards items (a), (b), (e) and (f), the Government vigorously contested the need for the applicants

to use United Kingdom-based lawyers, whose fees were incomparably higher than those of Turkish lawyers, and whose appointment had had the effect of inflating expenses for travel, communication, interpretation and translation. Furthermore, the Government objected to any award being made in respect of item (d) on the ground that the organisation had not represented the applicants or played any other procedural role.

107. The Court sees no reason to doubt that the above costs and expenses indicated in items (a) to (c) and (e) and (f) were actually and necessarily incurred and were reasonable as to quantum. Deciding on an equitable basis, it awards the first three applicants the entirety of the amounts claimed, together with any value-added tax that may be chargeable, less the amount received by way of legal aid from the Council of Europe. As to the costs claimed by the Kurdish Human Rights Project, the Court is not persuaded that that association's involvement in the proceedings justifies the making of any award. It therefore dismisses their claim.

C. Default interest

108. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by fifteen votes to six the preliminary objection concerning the exhaustion of domestic remedies;

2. *Holds* by sixteen votes to five that there has been a violation of Article 8 of the Convention with respect to the first three applicants;

3. *Holds* by twenty votes to one that it does not propose to examine further whether there has been a violation of Article 3 of the Convention with respect to the first three applicants;

4. *Holds* unanimously that it is not necessary to examine the first three applicants' complaints under Article 5 § 1 of the Convention;

5. *Holds* unanimously that it is not necessary to consider whether there has been a violation of Article 6 § 1 of the Convention with respect to the first three applicants;

6. *Holds* by sixteen votes to five that there has been a violation of Article 13 of the Convention with respect to the first three applicants;

7. *Holds* unanimously that there has been no violation of Articles 14 and 18 of the Convention with respect to the first three applicants;

8. *Holds* unanimously that there has been no violation of Articles 2, 3, 5, 6, 8, 13, 14 and 18 of the Convention with regard to the fourth applicant;

9. *Holds* by sixteen votes to five
(a) that the respondent State is to pay directly to the first three applicants' United Kingdom-based representatives, within three months, in respect of items (a) to (c), (e) and (f) of the claim for costs and expenses 27,795 (twenty-seven thousand seven hundred and ninety five) pounds sterling together with any value-added tax that may be chargeable, less 13,295 (thirteen thousand two hundred and ninety-five) French francs to be converted into pounds sterling at the rate applicable on the date of judgment;
(b) that simple interest at an annual rate of 8% shall be payable from the expiry of the above-mentioned three months until settlement;

10. *Dismisses* unanimously the remainder of the applicants' claim for costs and expenses;

11. *Holds* by twenty votes to one that the question of the application of Article 50 of the Convention as regards the claim for pecuniary and non-pecuniary damage is not ready for decision; and consequently,
(a) *reserves* the said question;
(b) *invites* the Government and the first three applicants to submit, within the forthcoming three months, their written observations on the matter and, in particular, to notify the Court of any agreement they may reach;
(c) *reserves* the further procedure and *delegates* to the President of the Grand Chamber the power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 November 1997.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following opinions are annexed to this judgment:

(a) joint partly dissenting opinion of Mr Gölcüklü and Mr Matscher;
(b) partly dissenting opinion of Mr Gölcüklü;
(c) partly dissenting opinion of Mr Russo;
(d) partly dissenting opinion of Mr De Meyer;
(e) partly dissenting opinion of Mr Mifsud Bonnici;
(f) partly dissenting opinion of Mr Gotchev;
(g) partly dissenting opinion of Mr Jambrek.

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

JOINT PARTLY DISSENTING OPINION OF JUDGES GÖLCÜKLÜ AND MATSCHER

(Translation)

I. Exhaustion of domestic remedies

In our opinion, it cannot seriously be said that domestic remedies have been exhausted where the applicants have not made the slightest effort to bring their alleged complaints before the national authorities.

In that respect, we consider that there is – as the Delegate of the Commission expressly acknowledged at the hearing on 22 June 1997 (page 7 of the verbatim record) – a fundamental difference between this case and the Akdivar and Others (and Aydın) cases[1], to which the Court refers (paragraph 59 of the judgment). The applicants in those cases had instituted proceedings before the national authorities. The fact that the authorities did not examine their complaints enabled the Court to find that domestic remedies had been exhausted. But, faced with repeated assertions, supported by a number of examples, that Turkish legislation does provide remedies, even if their effectiveness remains in doubt, it is being too simplistic to say that domestic remedies do not exist in cases such as the present one and for that reason applicants are *de plano* relieved of the obligation to exercise them.

The Diyarbakır Human Rights Association (DHRA) would better serve the interests of applicants if, instead of confining itself to fabricating dubious applications to the Convention institutions, it were to suggest to applicants that they (also) refer their complaints to the national authorities. But the impression can be gained that that would run counter to the aims pursued by the association.

II. The merits

(a) General observations

There is no doubt that if the alleged events had been convincingly proved they would have constituted a blatant violation of the Convention Articles relied on. In our opinion, however, the evidence was far from convincing.

We would begin by saying that four years after the alleged events it is extremely difficult, if not impossible, to discover the whole truth about what really happened in the village of Sağgöz at the material time. We also recognise that the delegates of the Commission who took evidence from the witnesses in Ankara had a difficult task, especially because, as the

1. Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, and Aydın v. Turkey judgment of 25 September 1997, Reports 1997-VI.

Commission noted, the Turkish authorities were far from cooperative. In addition, the fact that interpretation facilities from Kurdish into Turkish, Turkish into English and vice versa were needed to enable the witnesses and the delegates to communicate also contributed to the latter's difficulties.

On studying the Commission documents, one has the marked impression that the general approach of the delegates was to treat as prima facie reliable the version of events given by the witnesses for the applicants, but not to so treat the version of the respondent State and its witnesses. The Commission accepted the delegates' findings without putting forward any convincing reasons.

Admittedly, there are inconsistencies in the evidence of the witnesses for the Government, but there are equally serious, if not more serious, inconsistencies in the depositions of the applicants' witnesses (with which we will deal below). The Commission appears to have ignored the latter as though they were unimportant.

After all, the applicants and their witnesses were all related and belonged to families of which certain members were PKK activists and in some cases terrorists. There is accordingly no reason to suppose that the applicants had any less interest in lying than the villagers (witnesses for the Government) whose primary concern was, so it would appear, to live in peace in their country.

Admittedly, the Government carried out their investigation in a very superficial manner. They say that the complaints concerning the alleged incidents of June1993 were not made to them until after the application to the Commission was served on them in April 1994, in other words when it had become more difficult to obtain reliable information. However, given the seriousness of the alleged violations, the investigative measures taken by the national authorities could not be considered to constitute effective cooperation with the Convention institutions.

We do not attach any importance to the inconsistencies, inaccuracies or exaggerations concerning dates, distances and numbers of people. They may to a large extent be due to defective memories, misunderstandings, misconstructions or to the exaggerations and boasting that tends to be common among people from a certain background.

But there are other inconsistencies and discrepancies in the statements that amount to clear contradictions which cannot be ignored. If they had been examined in detail they might even have totally undermined the version of events put forward by the applicants and accepted by the Commission. To our regret, the delegates did not make the slightest attempt to resolve these inconsistencies and discrepancies, although they could have done so easily enough and it would have been perfectly usual for any "investigating judge", acting professionally, to have done so.

The quality of the documents produced by the DHRA, on which the application is based, is so poor that even the Commission was very concerned

and consequently attached most importance to the depositions taken by the delegates.

(b) Specific observations

According to the four applicants, the Turkish security forces had deliberately burned down their houses.

Several witnesses have confirmed, and their testimony does not appear to have been disputed, that Azize Menteş did not own the house concerned. That also appears to have been the case with Mahile Turhallı. Moreover, we question whether Sulhiye Turhallı and Sariye Uvat were the owners of the other houses concerned.

We accept that for the purposes of Article 8 of the Convention, there is no requirement that the alleged victim be the owner of the "home". But why did the owners of the houses in the present case not join in the applicants' complaints and why did they not allege that there had been a violation of Article 1 of Protocol No. 1, a provision that has been relied on in similar cases against Turkey?

Sariye Uvat, too, alleged that on the same day (25 June 1993) soldiers set fire to all the houses in the hamlet of Piroz in Sağgöz, including hers. She made her statement to the DHRA three weeks after the other applicants.

She claimed that she had been unable to attend the taking of evidence by the delegates between 10 and 12 July 1995, because of her age and medical condition. The Commission considered that there was insufficient evidence for her application to be declared admissible. However, to our mind, it is not good enough to dismiss a complaint merely because there is insufficient evidence for it to be declared admissible without having regard to the contradictions it contains while going on to examine the complaints of the other applicants, which contain similar contradictions. Does that not suggest that the Commission should have carried out a more detailed investigation into all the other complaints?

Mahile Turhallı and Sulhiye Turhallı said in their statements to the DHRA that the soldiers took the old men from the village, including Mahile Turhallı's husband, to the school playground where they were made to lie face down in the sun for five hours during which they were beaten and insulted.

In her testimony, Mahile Turhallı told the delegates that her husband was not in the village, as he was in hospital that day; she swore on the Koran that she did not know what had happened to the old men and that she had not said anything to the DHRA about their treatment.

Sulhiye Turhallı told the delegates that the soldiers had tortured people: "the soldiers hit us with knotted sticks; they beat us continually; they kicked me; they hit the old people". On the other hand she said that she had not witnessed this personally, but had heard others speak about it.

That raises the question why the persons who were allegedly ill-treated did not lodge a complaint under Article 3 of the Convention. As for the Commission, it made no mention of these allegations in either its findings of fact or in its consideration of the applicant's complaints under Article 3.

The Commission does not appear to have made any serious attempt to clear up these major divergences and contradictions. In these circumstances, we wonder whether it would be appropriate simply to disregard the statements – which are untenable and were in part contradicted before the delegates – made before the DHRA and to rely solely on the witnesses' testimony before the delegates, without considering what weight should be attached and what conclusions drawn from such a change in attitude by the persons concerned? Yet any investigating judge wanting to provide a solid basis for his findings of fact would have done so. In our view, what has been said above strongly suggests that the whole basis of the application is highly doubtful.

We have disregarded certain discrepancies and inconsistencies concerning: the number of hours the soldiers spent in the village; the number of helicopters (six or seven or even thirty-one); whether certain villagers were present or not on the day of the alleged incident; the dates the applicants left the village; whether the houses were set on fire with matches, incendiary devices or by other means; how the applicants and the soldiers managed to hold conversations or discussions (whose content was reported in detail by the Commission) when the applicants could speak hardly any Turkish and the soldiers hardly any Kurdish; what happened to the owners of the other thirteen houses at the bottom of the village all burned down the same day; whether there were real political differences between the applicants and the village headman (*muhtar*); whether there were any clashes between the security forces and the terrorists in the period preceding the alleged incident; how the witnesses were summoned to appear before the prosecutor, etc.

But there were serious contradictions which should have been resolved; let us give a few examples:

(a) Mahile Turhallı and Sulhiye Turhallı said that they did not know the witnesses Selahattin Can and Omer Yarasir, who lived in another part of the same village. Yet Selahattin Can and Omer Yarasir said that they knew Mahile Turhallı and Sulhiye Turhallı well as they were neighbours.

(b) Astonishingly, Mahile Turhallı said that she did not know her uncle on her father's side, Mehmet Turhallı.

(c) Ekrem Yarar, the village *muhtar* said that Sulhiye Turhallı came to see him about a week after the alleged incident and stayed with him that night; she did not mention either the incident or that houses had been burned down; they saw each other once or twice a year. When she had come to see him again in January/February 1995, he had spoken to her about the complaint, about which he had been questioned by the public prosecutor; she had sworn that she had not lodged any such complaint and said that perhaps other people had done so using her name.

Faced with a contradiction as important as this last one, a diligent "investigating judge" would have felt obliged to organise a confrontation between the two witnesses. It is hardly convincing to find, as the Commission did, that Ekrem Yarar's testimony was unreliable because he was a witness for the Government and that Sulhiye Turhallı's allegation was to be accepted at face value.

Even if certain inconsistencies not relevant to the case are disregarded, it is inconceivable that the serious inconsistencies and manifest contradictions to which we have referred be ignored.

In these circumstances, we are far from being convinced "beyond all reasonable doubt" (see the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 64–65, § 161) that the alleged breaches of the Convention, as accepted by the Commission and the Court, actually occurred. To our mind, there is insufficient basis in this case for finding of a violation by the Government.

For that reason we felt obliged to vote against a finding of a breach of Article 8.

III. Article 13

Where – as we find in this case (see Section I above) – domestic remedies have not been exhausted and the applicants have not made the least attempt to bring their complaints before the national authorities, it seems to us impossible to hold that there has been a violation of Article 13.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In addition to what is said in the joint dissenting opinion of Judge Matscher and myself, I wish to add, as ancillary points, the following:

1. Although as a result of what is said in the joint dissenting opinion there is no need for me to consider the case under either Article 6 or Article 13, I wish to state that there has been no violation of those Articles, since the relevant Turkish legislation contains domestic remedies that are both adequate and effective. In that regard, I would refer to my dissenting opinions in the cases of Akdivar and Others v. Turkey and Aydın v. Turkey where I explained the Turkish practice and system and gave a number of examples extracted from judgments of the national courts.

2. In paragraph 58 of the judgment in the present case, the Court, quoting from the Akdivar and Others judgment, said: "... 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 ...". In the light of that statement it may be wondered whether securing "probative evidence" is any less difficult and any easier for an international court.

3. In paragraph 59 of its judgment, the Court was at pains to note that "... despite the extent of the problem of village destruction, there appears to be no example of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces ...". I wish to stress that that is untrue. During the proceedings before the Court the respondent State brought to the Court's attention the fact that the Turkish State had paid millions of Turkish liras for the reconstruction of villages allegedly destroyed by the armed forces irrespective of the cause of destruction. On that subject, I refer once more to my dissenting opinion in the case of Akdivar and Others.

4. Lastly, the applicants' lawyers expressly asked that reimbursement of the legal costs and lawyers' fees be made not to the applicants, but directly to them, the legal representatives, in pounds sterling and in the United Kingdom.

Without giving any reasons the Court granted that request.

I am of the opinion that the costs and expenses and lawyers' fees were incurred by the applicants (that would appear to be logical) and that it is they, the applicants, who must be reimbursed. As to the award of legal costs, that is solely a matter for the judicial body and any express request one way or the other by the representatives cannot alter the situation.

I imagine that it was the applicants who chose their representatives and the applicants who paid the costs. Therefore, it is to the applicants that the costs and expenses claimed should be awarded.

Is the claim for reimbursement directly to the lawyers and not to the applicants yet not another indication that there were no real applicants in the present case?

PARTLY DISSENTING OPINION OF JUDGE RUSSO

(*Translation*)

For the reasons stated by Judge De Meyer in his partly dissenting opinion, I cannot agree with the conclusions of the majority that the Government's preliminary objection concerning the exhaustion of domestic remedies should be dismissed and that there has been a violation of Article 13 of the Convention with respect to the first three applicants (points 1 and 6 of the operative provisions of the judgment). On the remainder of the points I have voted along with the majority.

PARTLY DISSENTING OPINION OF JUDGE DE MEYER

(*Translation*)

I. Exhaustion of domestic remedies

As the Court notes in paragraphs 59 and 90 of its judgment, the applicants had not approached any domestic authority with their Convention grievances. They referred to the Diyarbakır Human Rights Association, which made an application on their behalf directly to the Commission on 20 December 1993[1].

That way of proceeding cannot be justified *a posteriori* by the summary and inadequate nature of the investigations conducted at the behest of the Ministry of Justice by the public prosecutors – Mr Köycü and Mr Karaca in April and May 1994 and Mr Sözen at the beginning of 1995 – when the case was already pending in Strasbourg[2].

Nor can it be justified by the "insecurity and vulnerability of the applicants' position"[3], as the association referred to above, which had greater self-assurance and was less vulnerable than the applicants, had from the outset agreed to represent them.

It is true that the conflictual background to the case was not conducive to the exercise of domestic remedies[4], but the applicants should at least have made some attempt to use them.

II. The factual position in the case of the first three applicants

The present case provides yet a further illustration of the difficulty that can arise in establishing the truth "beyond all reasonable doubt" of allegations concerning situations such as the one that has led to the conflict between the Turkish State and the Kurdish insurgents.

The Turkish authorities carried out investigations in the instant case only after several months had elapsed since the alleged incidents. Those investigations were clearly unsatisfactory[5]. Moreover, the limited information

1. Paragraph 5 of the Commission's report.
2. Paragraphs 27 to 30 and 59 of the judgment; paragraphs 41–44 of the Commission's report.
3. Paragraph 59 of the judgment.
4. Paragraph 58 of the judgment.
5. Paragraph 91 of the judgment.

thereby obtained and the information obtained by the Diyarbakır Human Rights Association is not particularly reliable[1].

The Commission attempted to find out exactly what happened. It is perfectly possible and even relatively likely that events took place more or less as described in its report. But does that suffice?

It seems to have been established that soldiers raided Sağgöz towards the end of June 1993. On that point the statements of Azize Menteş, Mahile Turhallı and Sulhiye Turhallı have been confirmed, not only by Azize Menteş's sister-in-law, Aysel Gündoğan[2], but also by two other witnesses who said that they were at the scene at that time, Selahattin Can and Omer Yarasir[3].

But the three applicants' affirmation that during the raid the soldiers burnt down several houses in the lower part of the village, including the applicants', was confirmed only by the sister-in-law[4]. That affirmation was contradicted by Can and Yarasir, who say that the village or the houses were only burnt down in clashes that took place several months later, after the inhabitants had left[5].

On this essential point, the only evidence on file is thus the accusations made against the security forces by four people who were closely related by blood or marriage, not only to each other, but also to persons suspected of or charged with being members of the PKK[6]; there is no independent confirmation.

That is scant proof that the soldiers set the houses on fire, but is sufficient to enable a "reasonable doubt" to subsist.

III. As to the law

As a result of this doubt, I do not believe that it is possible to find, in respect of the first three applicants, a violation by the Turkish State of the rights guaranteed by Article 8 of the Convention.

1. Paragraph 145 of the Commission's report.
2. ibid., paragraphs 89–94.
3. ibid., paragraphs 95–104.
4. ibid., paragraphs 90–91.
5. ibid., paragraphs 96, 97, 101 and 102.
6. ibid., paragraph 48.

Furthermore, the conduct of the Diyarbakır Human Rights Association, which applied to the Commission six months after the alleged incidents occurred, without even having attempted to exercise any of the domestic remedies, prevents me from finding that there has been a violation of the applicants' rights guaranteed by Articles 6 and 13 of the Convention.

It also follows from the above that the award of compensation under Article 50 does not appear justified in the instant case.

PARTLY DISSENTING OPINION OF JUDGE MIFSUD BONNICI

I. Alleged violation of Article 3 of the Convention

1. In the case of Akdivar and Others v. Turkey (judgment of 16 September 1996), the applicants had claimed that they had been "subjected to … inhuman or degrading treatment" in breach of Article 3 of the Convention in that their houses had been destroyed by the Turkish security forces.

The majority of the Court decided not to examine whether the alleged violation had in fact occurred. I did not agree with this procedure and I expressed my dissent in these terms.

> "This dissent is limited to the procedural point which, to my mind, is raised by the decision arrived at with regard to the claim by the applicants of violations of Article 3 of the Convention through the burning of their houses. In point 4 of the operative part of its judgment, the Court reached the conclusion that 'it will not examine further whether there has been a violation of Article 3 of the Convention'.
>
> The reasons for this are set out in paragraph 91, namely (a) the absence of precise evidence concerning the specific circumstances in which nine houses, including those of the applicants, were destroyed (see paragraph 18); and (b) the finding of a violation of the applicants' rights under Article 8 of the Convention and Article 1 of Protocol No. 1.
>
> I am of the opinion that since the findings of violations of both the Articles mentioned stem from the salient fact that the applicants' houses were destroyed, it is procedurally proper to examine the major claim first and abstain from examining a minor one later if the first is deemed to practically absorb the latter. A hierarchical approach is more appropriate to attain the aim of guiding Contracting States as to the scope of their obligations under the Convention and its Protocols.
>
> I therefore conclude that the claim under Article 3 should have been examined further by the Court."

2. In the instant case, the first three applicants likewise referred to the circumstances surrounding the destruction of their homes and their evacuation from their village (see paragraph 74 of the judgment in the present case) maintaining that they had therefore suffered a violation of their rights guaranteed by Article 3 of the Convention.

3. Once again the majority followed a similar process of reasoning as in the Akdivar and Others judgment:

> "In view of the specific circumstances of the case and its finding of a violation of their rights under Article 8 of the Convention (paragraphs 34 and 72 above) the Court does not propose to examine further this allegation."

4. In the present case, however, the Court could not repeat that it "does not propose to examine further this allegation" because it had accepted the following facts as established by the Commission:

> "In the lower neighbourhood, the women, including the applicants, had been required by the soldiers to leave their houses and their houses had been set on fire, with all their belongings and property inside, including the clothing and footwear of children." (see paragraph 34 of the judgment)

5. In view of those findings, I do not think that there is any justification for the procedural approach adopted by the majority to omit examining whether the facts concerned revealed that the applicants had been subjected to inhuman or degrading treatment.

I consider that the rights protected by Article 3 are as important, if not more so, than those protected by Article 8 and therefore the *non liquet* position adopted by the majority does not seem to me to be valid.

II. Costs and expenses

6. In point 9 of the operative provision of the judgment, the Court has ordered the respondent State "to pay directly to the … applicants' United Kingdom-based representatives" the sums specified therein by way of costs and expenses.

In my opinion, those representatives were not parties to the case. Therefore there is no legal relationship between them and the respondent State justifying the State being ordered to pay monies direct to them. This is a dangerous precedent.

PARTLY DISSENTING OPINION OF JUDGE GOTCHEV

To my regret, I am unable to agree with the majority's view that the Government's preliminary objection should be dismissed. A careful analysis of the relevant judgments of the Turkish administrative courts does in my opinion show that the remedies alluded to by the Government were adequate and sufficient in respect of the matters complained of by the applicants. Therefore, in line with the view I expressed in the case of Akdivar and Others v. Turkey, I consider in the instant case too that the applicants failed to fulfil the requirement of exhaustion of domestic remedies in Article 26 of the Convention and that the Court does not have jurisdiction to entertain their complaints.

The importance of the exhaustion rule for the operation of the Convention system of protection cannot be overemphasised, for two reasons.

In the first place, as is not disputed, Article 26 of the Convention constitutes a crucial element in the relationship between the national courts and the Strasbourg institutions. Whilst it is first and foremost for the competent authorities in the Contracting States to secure compliance with the Convention guarantees, the role of the Strasbourg institutions comes into play only after the national authorities have had an opportunity to address the alleged Convention grievance. It is only by following this approach consistently that the Strasbourg institutions may encourage the national authorities to take their primary responsibility in securing compliance with the Convention rules seriously.

The above considerations have gained particular importance in the light of the recent expansion of the Convention community and the resultant need to establish a relationship of cooperation between the Strasbourg Court and the courts in the Contracting States which have recently acceded to the Convention.

Secondly, it is important to bear in mind the tremendous practical difficulties with which the Court will be faced, especially the future single Court to be established next year under Protocol No. 11, if the requirements of Article 26 were to be systematically dispensed with in all cases arising in the particular security situation obtaining in south-east Turkey. Having regard to the gravity of the human rights problems in that area, it would be more helpful if the Court were to encourage the domestic courts in providing proper redress in cases of allegations of violations of the Convention.

PARTLY DISSENTING OPINION OF JUDGE JAMBREK

1. In the present case I am not prepared to dismiss the preliminary objection of the respondent Government on exhaustion of domestic remedies. Nor, for this reason and after considering the merits of the applicants' complaints as established by the Commission and evaluated by the Court, do I find that there has been a violation of Article 8 of the Convention with respect to the first three applicants. As to the remainder of the judgment I agree with the majority.

2. The system of human rights protection under the Convention is based on a division of roles between the domestic authorities and the Strasbourg institutions. The Contracting States have primary responsibility for securing to everyone within their jurisdiction the Convention rights and freedoms (Article 1). The machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Strasbourg review plays a role only as a system for dispute settlement that operates once all effective domestic remedies have been exhausted and the respondent State has been afforded a proper opportunity to put right the matter complained of under the Convention (Article 26) (see, amongst other authorities, the Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24, p. 22, § 48; and the Van Oosterwijk v. Belgium judgment of 6 November 1980, Series A no. 40, p. 17, § 34). It follows that the exhaustion rule and the subsidiary nature of the Strasbourg review serve not only to protect the interests of the Contracting State but also those of individuals within its jurisdiction.

3. Like the majority in this case and in the case of Akdivar and Others v. Turkey, I too consider that there may have been obstacles to the proper functioning of the system of the administration of justice because of the situation in south-east Turkey at the time of the applicants' complaints. In particular, there are difficulties in securing probative evidence and administrative inquiries, on which such remedies depend, may be prevented from taking place. However, in my view, such difficulties affect not only domestic administrative inquiries and legal proceedings but also, and maybe even more so, the international judge's ability to establish and evaluate the facts of a case.

4. In the instant case a number of reasons militate in favour of exempting the applicants from the requirement of exhaustion of domestic remedies. However, granting exemption has the unfortunate consequence of putting an extra burden on the Strasbourg institutions, namely the task of acting as the

primary fact-finder in cases concerning Convention complaints, which they are neither designed nor equipped to perform. Under the Convention system that role is to be exercised primarily by the national authorities, notably the courts. An international tribunal is incapable of assuming that protective role alone but must be able to rely on the domestic system of human rights protection. It is therefore preferable to encourage the domestic system in becoming more effective and efficient, even if that system suffers from certain weaknesses in the specific circumstances.

5. In view of the above considerations, I consider that the applicants should have at least tried to approach the domestic system for the protection of their rights before lodging a complaint with the Strasbourg institutions; but they failed to do so.

6. By following such an approach, which implies a stricter application of the requirements of Article 26 of the Convention than the one adopted by the majority, the Court could pinpoint defects in the proper functioning of the domestic administration of justice, instead of confining its findings to the individual case. In other words, a hungry man would be better served by being trained to catch fish rather than merely being given fish.

7. As to the alleged violations of Article 8 of the Convention, it is difficult to ascertain the full truth about what really happened in the village of Sağgöz at the relevant time. It is understandable that a number of inconsistencies may be noted in the evidence, whether for the applicants or the Government. However, I cannot agree with the majority's view that the facts as established by the Commission have been proved beyond reasonable doubt as far as the first three applicants' allegations are concerned. The description of the decisive events in paragraph 175 of the Commission's report appears to be a legal construction of a social reality which may or may not correspond to what really happened.

On the other hand, the deficiencies in the establishment and assessment of the facts in this case are not, in my view, to be attributed to any shortcomings on the part of the Strasbourg institutions, but to the inherent inability of those institutions to investigate facts in the manner of a domestic "first instance" tribunal.

8. Otherwise, with the exception of the issue raised under Article 13, I subscribe to most of the arguments put forward by Judges Matscher and De Meyer in their respective opinions.