

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 21893/93

Hüseyin Akdivar
 Abdurrahman Akdivar
 Ahmet Akdivar
 Ali Akdivar
 Zülfükar Çiçek
 Ahmet Çiçek
 Abdurrahman Aktas
 Mehmet Karabulut

against

Turkey

REPORT OF THE COMMISSION

(adopted on 26 October 1995)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1-25)1
A. The application (paras. 2-4)1
B. The proceedings (paras. 5-20)1
C. The present Report (paras. 21-25)3
II. ESTABLISHMENT OF THE FACTS (paras. 26-173)4
A. The particular circumstances of the case (paras. 26-39)4
B. The evidence before the Commission (paras. 40-156)5
a) Documentary and audio-visual evidence (paras. 40-76)5
b) Oral evidence (paras. 77-156)	13
C. Relevant domestic law and practice (paras. 157-173)	22
III. OPINION OF THE COMMISSION (paras. 174-265)	25
A. Complaints declared admissible (para. 174)	25
B. Points at issue (para. 175)	25

C.	As regards the applicants (paras. 176-183)	25
	Decision (para. 183)	26
D.	The evaluation of the evidence (paras. 184-214)	27
E.	As regards Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention (paras. 215-220)	32
	Conclusions (paras. 219-220)	32

TABLE OF CONTENTS

	Page	
F.	As regards Article 3 of the Convention (paras. 221-225)	33
	Conclusion (para. 225)	33
G.	As regards Article 5 par. 1 of the Convention (paras. 226-231)	33
	Conclusion (para. 231)	34
H.	As regards Articles 6 par. 1 and 13 of the Convention (paras. 232-242)	34
	Conclusions (paras. 241-242)	35
I.	As regards Article 14 and 18 of the Convention (paras. 243-248)	36
	Conclusions (paras. 247-248)	36
J.	As regards Article 25 of the Convention (paras. 249-255)	36
	Conclusion (para. 255)	37
K.	Recapitulation (paras. 256-265)	37
	PARTLY DISSENTING OPINION OF MR. H. DANELIUS	39
	JOINED BY Mr. C.A. NØRGAARD ON THE ISSUE UNDER ARTICLE 25 OF THE CONVENTION	
	PARTLY DISSENTING OPINION OF MR. A.S. GÖZÜBÜYÜK AND	40
	MR. A. WEITZEL CONCERNING ARTICLES 3, 6 AND 13 OF THE CONVENTION	
	PARTLY DISSENTING OPINION OF MR. A.S. GÖZÜBÜYÜK CONCERNING	46
	ARTICLE 8 OF THE CONVENTION AND ARTICLE 1 OF PROTOCOL No. 1	

PARTLY DISSENTING OPINION OF MR. A. WEITZEL CONCERNING . . .	47
ARTICLE 25 OF THE CONVENTION	
PARTLY DISSENTING OPINION OF MRS. J. LIDDY	48
PARTLY DISSENTING OPINION OF MR. I. CABRAL BARRETO.	49
PARTLY DISSENTING OPINION OF MR. N. BRATZA.	50
JOINED ON THE WHOLE OPINION BY MR. H.G. SCHERMERS AND	
ON THE ISSUE UNDER ARTICLE 13 OF THE CONVENTION JOINED BY	
MR. C. A. NØRGAARD	
PARTLY DISSENTING OPINION OF MR. G. RESS.	52
APPENDIX : DECISION OF THE COMMISSION AS TO THE	
ADMISSIBILITY OF THE APPLICATION.	54

I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicants are Turkish citizens who were residents of the village of Kelekçi in the Dicle district of the province of Diyarbakir. They were represented before the Commission by Professor K. Boyle and Ms. F. Hampson, both teachers at the University of Essex.

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

4. The applicants allege that their homes were burnt and that they were forcibly and summarily expelled from their village by State security forces on 10 November 1992. They invoke Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention, as well as Article 1 of Protocol No. 1.

B. The proceedings

5. The application was introduced on 3 May 1993 and registered on 18 May 1993.

6. On 30 August 1993 the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 15 February 1994, after an extension of the time-limit fixed for this purpose. The applicants replied on 19 April 1994.

8. On 27 June 1994 the Commission decided to hold a hearing of the parties in Strasbourg on 18 October 1994, jointly with two other cases: No. 21894/93, Akkum and others v. Turkey, and No. 21987/93, Aksoy v. Turkey. Prior to the hearing, the parties submitted additional material: the applicants on 15 August, 23 September and 4 and 10 October 1994, the Government on 4 and 7 October 1994. The applicants were granted legal aid on 14 October 1994.

9. At the hearing on 18 October 1994, the Government were represented by Mr. B. Çağlar, Agent, Mr. S. Alpaslan, Mr. M. Özmen, Ms. D. Akçay and Mr. H. Golsong, all counsel, and Ms. i. Boivin,

Mr. i. Kovar, Mr. A. Kurudal, Mr. F. Erdogan, Mr. Y. Kizilkaya, Mr. C. Duatepe and Ms. S.B. Ersöz, all experts. The applicants were represented by Professor K. Boyle and Ms. F. Hampson, both counsel, Mr. S. Aslantas, legal adviser from the Diyarbakir Bar, and Mr. M. Yildiz, assistant.

10. On 19 October 1994 the Commission declared the application admissible.

11. On 7 December 1994 the Commission decided to take oral evidence in respect of the applicants' allegations. It appointed three delegates for this purpose: Mr. H. Danelius, Mr. I. Cabral Barreto and Mr. N. Bratza.

12. The text of the Commission's decision on admissibility was sent to the parties on 14 December 1994 and they were invited to submit such further information or observations on the merits as they wished. They were also invited to indicate the oral evidence they wished to put before the delegates. The Government submitted observations on 14 February 1995, after an extension of the time-limit fixed for this purpose. In those observations, the Government invited the Commission to declare the application inadmissible, pursuant to Article 29 of the Convention. Amongst the material submitted by the Government was an undated video of an interview with Hüseyin Akdivar and Ahmet Çiçek, who, it later appeared, was a cousin of the applicant with the same name. Further video material was submitted by the Government on 8 March 1995.

13. The parties indicated the names of possible witnesses: the applicants on 1 January, 13 February and 21 March 1995, the Government on 16 and 21 January and 5 April 1995.

14. Protests about alleged governmental intimidation of applicants, witnesses and local lawyers involved in the case, in violation of Article 25 of the Convention, were lodged with the Commission by the applicants' representatives on 1 January, 7, 8 and 9 March and 18 April 1995.

15. Evidence was heard by the delegation of the Commission in Diyarbakir on 13 and 14 March 1995, and in Ankara from 12 to 14 April 1995. At the first hearing the Government submitted further video material. Before the delegates the Government were represented by Mr. B. Çağlar, Agent, assisted by Mr. T. Özkarol, Mr. N. Akinci, Mr. A. Someren, Ms. B. Pekgöz, Mr. i. Kovar, Mr. A. Kurudal, Mr. F. Erdogan, Mr. Y. Kizilkaya and Mr. A. Kaya. The applicants were represented by Professor K. Boyle and Ms. F. Hampson, counsel, assisted by Ms. A. Reidy and Ms. J. Cunnison.

16. On 20 May 1995 the Commission decided to invite the parties to present their conclusions on the merits of the case at a hearing to be held in Strasbourg. A pre-hearing memorial on the merits was submitted by the applicants' representatives on 23 June 1995.

17. The hearing of conclusions was held on 3 July 1995, the case having been disjoined at this stage from those mentioned above (para. 8). The Government were represented by Mr. B. Çağlar, Agent, advised by Ms. D. Akçay, Mr. T. Özkarol, Mr. Y. Kizilkaya and Ms. i. Boivin. The applicants were represented by Professor K. Boyle and Ms. F. Hampson, counsel, assisted by Ms. A. Reidy.

18. Further documentary evidence was submitted by the applicants' representatives on 14 June 1995 and by the Government on 10 July 1995.

19. On 17 October 1995 the Commission decided that there was no basis

on which to apply Article 29 of the Convention.

20. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

21. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. S. TRECHSEL, President
 H. DANELIUS
 C.L. ROZAKIS
 C.A. NØRGAARD
 A.S. GÖZÜBÜYÜK
 A. WEITZEL
 J.-C. SOYER
 H.G. SCHERMERS
 Mrs. G.H. THUNE
 Mrs. J. LIDDY
 MM. M.P. PELLONPÄÄ
 M.A. NOWICKI
 I. CABRAL BARRETO
 B. CONFORTI
 N. BRATZA
 I. BÉKÉS
 J. MUCHA
 D. SVÁBY
 G. RESS

22. The text of this Report was adopted on 26 October 1995 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

23. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- (i) to establish the facts, and
- (ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

24. The Commission's decision on the admissibility of the application is attached hereto as an Appendix.

25. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

26. The facts of the case, particularly concerning events in November 1992, are disputed by the parties. For this reason, pursuant to Article 28 para. 1 (a) of the Convention, the Commission has conducted an investigation, with the assistance of the parties, and has accepted written material, as well as oral testimony, which has been submitted. The Commission first presents a brief outline of the events,

as claimed by the parties, and then a summary of the evidence submitted to it.

A. The particular circumstances of the case

27. The applicants, Turkish nationals, all lived in the village of Kelekçi, in the Dicle district of the province of Diyarbakir.

28. The applicants' village was attacked by the PKK, an armed terrorist group, on 17 or 18 July 1992. Three people died (the uncle and two cousins of the applicant Ahmet Çiçek), and three others were injured (the father, uncle and cousin of the applicant Abdurrahman Aktas).

29. On the night of 1 November 1992 between 100 and 150 PKK terrorists attacked the gendarme station at a neighbouring village, Bogazköy, with heavy weapons, killing a soldier and injuring eight others. The Bogazköy gendarme station collapsed under the bombardment and had to be evacuated.

30. Searches were then made of the surrounding area by the security forces in an attempt to find the terrorists concerned.

31. According to the applicants, on 10 November 1992, in the evening, soldiers entered their village. These forces included, in addition to regular military forces, a group of soldiers known as "special teams" who are trained for anti-terrorist operations.

32. The soldiers instructed Hüseyin Akdivar, who was the mayor of the village, to evacuate all the inhabitants immediately. According to the applicants, while the mayor attempted to call the people together, the soldiers set fire to a number of houses including those of the mayor, his son and other houses belonging to the applicants. A total of nine houses and their contents were burnt to the ground.

33. Following the destruction of the houses, many of the inhabitants left the village. Most went to the city of Diyarbakir. Some who had relatives there moved in with them. Others were homeless.

34. On 6 April 1993, after having been tipped off about an imminent PKK attack, the security forces returned to Kelekçi and set fire to the rest of the village.

35. Kelekçi has now been completely evacuated since most of the houses were destroyed, particularly during the further military attack on the village in April 1993.

36. The applicants are in difficulties, having received no compensation from the State, although some food and clothing were provided to villagers after these incidents.

37. According to the Government, after the PKK attack on the Kelekçi village in July 1992, the villagers began to evacuate their homes voluntarily as they felt insecure there. Three families later returned.

38. After the attack on Bogazköy gendarme station on 1 November 1992, the security forces made a search of the area and found several deserted terrorist shelters containing food and clothes. Originally it was stated that Kelekçi had been searched without any damage being caused. Subsequently, officers testified that no search had been made of Kelekçi and no troops had entered the village on 10 November 1992. Soldiers had merely stopped on the outskirts of the village around that date for a rest.

39. On 6 April 1993 the security forces searched Kelekçi without causing any damage. They noticed the return to the village of three families, as well as the collapse of several mud houses which had not resisted the effects of the winter climate in the absence of any maintenance. Later that night, after the security forces had left, terrorists returned to the village and set fire to the remaining houses.

B. The evidence before the Commission

a) Documentary and audio-visual evidence

40. The parties submitted various documents, photographs, sketches and video cassettes to the Commission. The documents included reports about Turkey, its judicial system and certain case-law, statistics concerning, inter alia, prosecutions of officials for allegedly unlawful acts, and affidavits from some of the applicants and witnesses concerning the authenticity of their applications to the Commission and their version of the events in the case.

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

aa) General reports

- (1) Report dated 23 September 1994 by Bekir Selçuk, Chief Public Prosecutor at the Diyarbakir State Security Court, to the Ministry of Justice

42. Bekir Selçuk reported that the PKK attacked Kelekçi on 17 July 1992, killing Adem Çiçek, Ahmet Çiçek and Ali Aktas, and wounding three other persons. They then attacked Bogazköy gendarme station, killing a gendarme and wounding eight others. This conflict spread to Kelekçi where subsequently nine houses were burnt and damaged in the clashes between the terrorists and the security forces. The village was abandoned as a result, the villagers being in fear of the PKK. The remaining abandoned houses at Kelekçi were burnt on 6 April 1993.

43. According to the report no application from the victims of these incidents has been made to the authorities, i.e. the District Council, the District Attorney or the Dicle courts.

44. Hüseyin Akdivar, mayor of Kelekçi, had denied to the authorities that he had applied to the Commission, and Abdurrahman Aktas and Ahmet Çiçek had stated that they were called to the Diyarbakir Human Rights Association and signed petitions, which had been prepared in advance and which they did not read, in order to receive compensation. They have since acknowledged that these petitions, which were forwarded to the Commission, were untrue.

- (2) Exploratory report dated 21 September 1994 by Bekir Selçuk and others

45. The report states that, in order to evaluate the existing evidence regarding the incidents of 1 November 1992 at Bogazköy and of 6 April 1993 at Kelekçi and to collect further evidence, an exploratory mission had been set up. A team composed of Bekir Selçuk, a photographer and Mehmet Nur Taranci, a construction engineer and expert of the Directorate of Public Works, had travelled to the area concerned by helicopter on 21 September 1994. The team landed at Bogazköy but not at Kelekçi. They noted, however, during low level flights that all the houses at Kelekçi had collapsed and that there were no inhabitants in the village.

46. In a special statement, Mehmet Nur Taranci declared that the collapse of the houses at Kelekçi was the result of a lack of maintenance. It was due to natural causes and to the material used in the construction of the houses.

- (3) Incident report dated 8 April 1993 by
Gendarmerie Officers Gürsel Demirtas, Tayfur Nur
and others, also signed by several inhabitants
of Kelekçi, including Hüseyin Akdivar and
Abdullah Karabulut

47. The report describes the events at Kelekçi on 6 April 1993. It states that on that day a military unit came to the village, completed their search activities by 13.00 hours and returned to their posts without causing any damage or destruction. After the military had left the village, unidentified armed members of a terrorist organisation had, according to certain accounts, arrived at the village at around 18.00 hours on the same day. This group had entered and spread around the village. They had then set fire to some of the houses. They had pressured the residents into claiming that the military had set fire to their houses. Various residents of the village had not been present at the time of the incident. Their houses were built of mud bricks, and during the winter these residents remained in Diyarbakir. They only returned and lived in the village for a short period during the summer.

bb) Statements by applicants

Hüseyin Akdivar

- (4) Statement dated 15 April 1993 by Hüseyin
Akdivar, mayor of Kelekçi, to gendarmes

48. Hüseyin Akdivar recounted that villagers had told him that Kelekçi had been burnt some 10 days before, but he did not know who had done it.

- (5) Statement dated 22 September 1994 of
Hüseyin Akdivar to the Chief Public Prosecutor
Bekir Selçuk and others

49. Hüseyin Akdivar confirmed the attack on Bogazköy gendarme station on 1 November 1992, and the subsequent burning of nine houses in Kelekçi. However, he had not seen who had committed this latter deed as he had been out with the security forces helping them with their searches. He had petitioned the President of the Republic, the Prime Minister and the state of emergency governor for the houses to be rebuilt and their losses compensated. He had not applied to the district authorities or the Commission.

- (6) A transcript dated 19 November 1994 of questions
and answers between Hüseyin Akdivar and officers
of the Operation and Security Section

50. In answer to the question whether he had applied to the Commission alleging that his village had been forcibly evacuated and houses burnt, Hüseyin Akdivar stated that he had applied to the gendarme station and the district mayor's office but to nobody else. The villagers had evacuated the village for security reasons. He had heard that terrorists had come to the village, as with all other villages, but he had never seen any.

Abdurrahman Akdivar

- (7) Statement dated 14 November 1992 of

Abdurrahman Akdivar, a Kelekçi villager, to the
Diyarbakir Human Rights Association

51. Abdurrahman Akdivar stated that on 10 November 1992 a military special team arrived at Kelekçi, ordered his father, the mayor, to gather the villagers together, and burnt down nine houses, including that of his family, without explanation. The households concerned had to migrate elsewhere or were homeless. They were financially and psychologically ruined.

Ahmet Çiçek

(8) Statement dated 16 April 1994 of Ahmet Çiçek (born in 1968), a Kelekçi villager, to the Diyarbakir Human Rights Association, witnessed by Mahmut Sakar

52. Ahmet Çiçek stated that he had witnessed soldiers burning houses at Kelekçi on 10 November 1992. Some villagers were beaten up. Thereafter, the villagers started leaving. On 5 April 1993 when he was in the vicinity of the village tending the vineyards, soldiers again burnt houses and beat up any one who spoke.

53. He did not ask the State for help with his financial difficulties because he knew it would be fruitless. He had heard that other villagers had been summoned by the Dicle District Governorship and District Gendarme Command and told they would get aid if they said that the village had not been burnt by State forces, but by terrorists. Villagers had signed statements to this effect without knowing their exact content, but had received no aid. He confirmed his application to the Commission.

Abdurrahman Aktas

(9) Statement (undated but probably around 20 April 1993) of Abdurrahman Aktas, a Kelekçi villager, to gendarmes

54. Abdurrahman Aktas stated that soldiers came to Kelekçi on 6 April 1993 and searched causing no damage. That evening terrorists came and burnt down the village. He recalled the incident in July 1992 when terrorists had come to the village, killed three people and injured three others. He asserted that the villagers always help the State and have always shown respect. They have never helped the terrorists. He wished for State help in the difficult circumstances that were being faced.

(10) Statement dated 22 September 1994 of Abdurrahman Aktas to the Chief Public Prosecutor Bekir Selçuk and others

55. Abdurrahman Aktas stated that he had left Kelekçi after his father had been killed during the PKK attack in July 1992. He had no knowledge of subsequent incidents. He was later called by the Diyarbakir Human Rights Association and promised compensation if he made an application. He confirmed his signature on the application made to the Commission.

cc) Statements by other persons

Ahmet Aksakal

(11) Statement dated 20 April 1993 of Ahmet Aksakal,

a Kelekçi villager, to gendarmes

56. Ahmet Aksakal stated that soldiers had come to the village 15-20 days earlier at about 11.00 hours. They searched the houses one by one and later left without doing any harm or causing any damage. On the same day in the evening a group of armed terrorists entered the village and started destroying it. These terrorists had already come to the village in July 1992. Then they had killed three people and disabled three others by injuring them. He added that the villagers have always been respectful and helpful to the State, and do not like to help those who rebel against the State. They wanted help from the State in their difficult conditions.

Ahmet Aktas

(12) Statement dated 20 April 1993 of Ahmet Aktas, a Kelekçi villager, to gendarmes

57. Ahmet Aktas stated that about 15 days earlier, around 11.00 hours, soldiers had come to the village for a search. After they had completed their search, they left the village without doing any harm. In the evening of the same day an armed group of terrorists came and set fire to the houses in the village and destroyed them. Then they left the village. Those terrorists had killed three people and wounded three others in July 1992. He pointed out that the villagers have always been respectful and helpful to the State. They have never helped terrorists, nor will they do so. They wanted the State to help them in their difficult situation.

(13) Statement dated 22 September 1994 of Ahmet Aktas to the Chief Public Prosecutor Bekir Selçuk and others

58. Ahmet Aktas stated that on 18 July 1992 the village was ambushed by members of the PKK. The ambush resulted in the loss of three lives, and three other persons were wounded. One of the dead was his brother Ali. Following the incident Ahmet Aktas left the village and moved to Diyarbakir. On 1 November 1992 and 6 April 1993 other incidents took place in the village, but, as he was then in Diyarbakir, he was not aware of the particulars. However, his house was burnt as a result of these incidents. He did not know if it was burnt in connection with the first or the second incident. Nor did he know how the fire began and who started it.

Fahri Akyüz

(14) Statement (apparently from April 1993) of Fahri Akyüz, a Kelekçi villager, to gendarmes

59. Fahri Akyüz stated that 15 days earlier at about 11.00 hours soldiers had come to the village for a search. They searched and left the village without any harm. In the evening of the same day a group of terrorists came to the village. They set fire to the houses and destroyed them. Those terrorists had come to the village in July 1992, had killed three people and wounded another three. He further stated that the villagers have always been respectful and helpful to the State. They were now under difficult conditions and wanted the Government to help them.

(15) Statement dated 23 September 1994 of Fahri Akyüz to the Chief Public Prosecutor Bekir Selçuk and others

60. Fahri Akyüz stated that he had not been present in the village

during the incidents concerned. However, his house had been burnt down, although he did not know how the fire started or who started it.

Ahmet Çiçek

(16) Statement dated 26 April 1993 of Ahmet Çiçek
(born in 1967), a Kelekçi villager, to gendarmes

61. Ahmet Çiçek stated that, about 20 days before, soldiers had harmlessly searched the village, but during the night armed terrorists had destroyed the village by fire. He recalled that those terrorists had also come to the village in July 1992, killed three persons and wounded three others. He stated that the villagers had always been respectful and helpful to their State. They have not helped the terrorists and will not do so. He sought Government support because of the very difficult conditions he and others were under.

(17) Statement dated 22 September 1994 of the same
Ahmet Çiçek, apparently to the Chief Public
Prosecutor Bekir Selçuk and others

62. Ahmet Çiçek stated that Kelekçi and Bogazköy had been attacked on 17 July 1992 and 1 November 1992 respectively, the latter conflict with security forces having extended to Kelekçi. He had left after three days of conflict and had heard that nine houses had been burnt. In the spring of 1993, when he had been tending the vineyards, the village was burnt completely and, as there were only soldiers present in the village then, he assumed that they had done it.

63. He had subsequently been called to the Diyarbakir Human Rights Association and denied that he had said to gendarmes that terrorists had set fire to the village. Consequently they typed a petition letter for him to the Commission.

(18) A transcript dated 19 November 1994 of questions
and answers between the same Ahmet Çiçek and
officers of the Operation and Security Section

64. Ahmet Çiçek stated that he had not made an application to the Diyarbakir Human Rights Association on 1 November 1992 declaring that his house had been burnt by security forces. However, he had been called by the Association in April 1993 about the burning that same month which he had supposed had been perpetrated by soldiers. He denied having applied to the Commission.

Mehmet Emin Çiçek

(19) Statement dated 20 April 1993 of Mehmet
Emin Çiçek, a Kelekçi villager, to gendarmes

65. Mehmet Emin Çiçek stated that, about 15-20 days before, soldiers had come to the village for a search at about 11.00 hours. They searched the houses one by one and left the village without harming the villagers. In the evening of the same day armed people came and set fire to the village. They burnt it down and destroyed it. Terrorists had already come to the village in July 1992 when they had killed three people and handicapped three others by injuries. He stated that the villagers have always been respectful and helpful to the State. They did not want to help those who rebel against the State. They wanted help from the State in their difficult conditions.

Abdullah Karabulut

(20) Statement dated 20 April 1993 of
Abdullah Karabulut, a Kelekçi villager, to
gendarmes

66. Abdullah Karabulut stated that the perpetrators of the fire in April 1993 were terrorists. He mentioned that in the attack in July 1992 the terrorists had killed three people and wounded three others. He asserted that the villagers were respectful and helpful to the State. They do not like those who are against the State and did not help them. They wished for State help in the difficult circumstances that were being faced.

(21) Statement dated 22 September 1994 of
Abdullah Karabulut to the Chief Public
Prosecutor Bekir Selçuk and others

67. Abdullah Karabulut stated that he had left the village after the PKK attack in July 1992. He heard from others that after the conflict in November 1992 villagers of both Bogazköy and Kelekçi had evacuated their homes. He returned to Kelekçi with his father in April 1993 to prune the vineyard. Then the village was set alight. As there were only soldiers in the village, he assumed that it was they who had started the fire.

Ahmet Önal

(22) Statement dated 15 April 1993 of Ahmet Önal, a
Kelekçi villager, to gendarmes

68. Ahmet Önal asserted that he had always helped the State and that the villagers have always been respectful of the State. They have always been against those who are against the State and certainly did not help them. In July 1992 terrorists had killed three people and wounded three others in Kelekçi. On another occasion at a time when the fields were being tended, armed men had set fire to houses in the village at night, so no one had seen them. He wished the State to help in the difficult circumstances they were facing.

(23) Statement dated 22 September 1994 of Ahmet Önal
to the Chief Public Prosecutor Bekir Selçuk and
others

69. Ahmet Önal stated that he had no knowledge of the events in Kelekçi on 18 July 1992 or 1 November 1992. In the spring of 1993 he had been in Kelekçi working in the vineyards when the village caught fire. Gendarmes were there already. He did not know who had started the fire and had lodged no complaint.

Bedri Özalp

(24) Statement (undated) of Bedri Özalp, a Kelekçi
villager, to the Diyarbakir Human Rights
Association

70. Bedri Özalp stated that on 10 November 1992 Kelekçi village was raided by a group of soldiers. They came to the village at around 13.00 hours, waited and, in the evening at around 17.30 hours, entered the village. They collected the villagers, and while some of the soldiers waited with the villagers, others went into the village to set houses alight. They burnt the homes of eleven families, including his home, and told the villagers to leave the village. On the following day the villagers evacuated the village. In March 1993 some villagers returned, but after the soldiers had burnt the rest of the houses, they

ejected all the villagers again. Bedri Özalp believes that the reason for the burning of the village was that there had previously been village protectors in the village since 1989, but that on 18 July 1992 these protectors had given up their functions.

Adil Simsek

(25) Statement dated 20 April 1993 of Adil Simsek, a Kelekçi villager, to gendarmes

71. Adil Simsek stated that he has always been helpful to the State. The village has always been respectful of the State and has never liked or helped those who harm the State. About 20 days before his statement was made, around 11.00 hours, soldiers had come to the village and searched the houses one by one, but had done no damage or harm to anything. After they had left, terrorists came in the evening and set the houses on fire and destroyed them. Adil Simsek was absent from the village. His house together with the things inside burnt down completely. He pointed out that the villagers are always against those people who rebel against the State. They wanted help from the State in their difficult conditions.

(26) Statement (undated) of Adil Simsek to the Chief Public Prosecutor Bekir Selçuk and others

72. Adil Simsek stated that on 18 July 1992 he was a temporary village protector at Kelekçi village when the PKK ambushed the village, killed three persons and wounded three others. Following this incident he abandoned the village and settled in Diyarbakir. Subsequently his house was burnt down, but he does not know how this happened or who set it on fire. After 1 November 1992 all the residents left the village.

Hüseyin Yavuz

(27) Statement dated 15 April 1993 of Hüseyin Yavuz, a Kelekçi villager, to gendarmes

73. Hüseyin Yavuz stated that about ten days earlier around 11.00 hours soldiers had come to the village to search. They searched the houses one by one and left the village without causing any harm. Later he heard that a few armed terrorists had come to the village in the evening of the same day, had set fire to houses and destroyed them. Afterwards they left the village. In July 1992 terrorists had killed three people and wounded three others in the village. The villagers have always been respectful of their State and people. They do not like those who are against the State and did not help them. They wanted Government help in their difficult conditions.

(28) Statement dated 22 September 1994 by Hüseyin Yavuz to the Chief Public Prosecutor Bekir Selçuk and others

74. Hüseyin Yavuz stated that he had no direct knowledge of the incidents which took place on 18 July 1992 and 1 November 1992. He received news, however, that his house was burnt, and when he went there, he saw that the house was actually burnt. He did not know how it was burnt or by whom.

Mehmet Yavuz

(29) Statement dated 15 April 1993 of Mehmet Yavuz, a Kelekçi villager, to gendarmes

75. Mehmet Yavuz stated that he was a member of the village council and that he had always helped the State. While he was in the village ten days ago, at about 11.00 hours, soldiers came to the village for a search. They searched the houses one by one and left the village without doing any harm. He heard that later on armed terrorists had come to the village in the evening, set fire to houses and then left. In July 1992 terrorists had killed three people and wounded three others in the village. He stated that the villagers have always been respectful of the State. They do not like those who are against the State and did not help them. They wanted Government help in their difficult situation.

(30) Statement dated 22 September 1994 of
Mehmet Yavuz to the Chief Public Prosecutor
Bekir Selçuk and others

76. Mehmet Yavuz stated that he was elected a member of the village council in 1989. At that time there were 14 temporary village protectors in the village. However there was enormous pressure by the terrorist organisation to give up their positions. The village was ambushed on 18 July 1992 by the PKK in order to suppress the village protectors and make them give up their positions. The result of the ambush was that three persons died and three others were wounded. After this incident the village protectors gave up their duties. On 1 November 1992, when Mehmet Yavuz was not in the village, the Bogazköy gendarmerie station was attacked by terrorists. He heard that this developed into a ten day struggle, and that the safety of the Kelekçi villagers was jeopardised. They collectively evacuated the village on 10 November 1992. Since Mehmet Yavuz never returned to the village, he had no knowledge of the incident which took place on 6 April 1993. He was only told that his house had burnt.

b) Oral evidence

77. The evidence of 14 witnesses heard by the Commission's delegation may be summarised as follows:

(1) Hüseyin Akdivar

78. Hüseyin Akdivar stated that he was born in 1943 and was the mayor of Kelekçi. He is the father of Abdurrahman Akdivar and the brother of Ahmet and Ali Akdivar.

79. He said that he had never made an application to the European Commission of Human Rights. When confronted with the power of attorney which had been submitted to the Commission, he denied that it had been signed by him. A sample of his signature which was compared with that on the power of attorney bore no resemblance to the latter signature. He did not recall a filmed interview in which he had declared that he had not made an application to the Commission, for on the day in question he had been ill.

80. He confirmed the terrorist attacks on Kelekçi and Bogazköy on 18 July 1992 and 1 November 1992 respectively.

81. He had not been in his home on 10 November 1992 when "special teams" came to Kelekçi. The security forces had asked him to assemble the villagers, which he did. After the forces had left, he heard, as he returned to his home, that his office was on fire along with other houses. He had not seen who had set it alight, although he heard differing versions of the cause. He had seen no strangers in the village that day.

82. A total of nine houses were destroyed, including his own and those

of Ahmet Akdivar, Abdurrahman Aktas and Mehmet Karabulut. He and the other villagers then left for Diyarbakir. He had never been back and had no explanation for an official document which was supposedly drawn up and signed by him at the village on 8 April 1993.

83. The State gave the villagers some food, oil, clothes and shoes, after they had applied to the Regional Emergency Governor, but he had not received compensation for the loss of his house. He had also petitioned the President of Turkey without result. However, he and his fellow villagers have suffered hardship since the destruction of Kelekçi. His present situation was quite bad, although others had had an even harder time.

(2) Ahmet Çiçek (born in 1967)

84. Ahmet Çiçek stated that he was born in 1967 and was from Kelekçi village. He has a cousin with the same name born in 1968, whose father is Zülfükar Çiçek.

85. He asserted that he had made an application to the Commission. However, it was not his signature on the power of attorney purportedly made in his name; nor was his signature on the legal aid application to the Commission. It was he who had signed a notary statement denying having made an application to the Commission and who, together with Hüseyin Akdivar in the winter of 1994, in a filmed interview with gendarmes, again denied having made an application. He alleged that these denials were made under pressure from the officials who frightened him.

86. The witness stated that Kelekçi had been attacked by terrorists on 18 July 1992 because it had appointed official village protectors. His father, brother and another close relative were killed. Three other people were injured.

87. He confirmed the attack on Bogazköy in November 1992, with gunfire continuing for three or four nights, so that people could not step outside. On the fourth night he and his family had left the village.

88. He heard from others that soldiers had burnt nine houses. His family had spent the winter in Diyarbakir.

89. In spring 1993, during the month of April, he returned to tend the vineyards. One day, when he was in the vineyards, he and his cousin saw the village burning and rushed back. However, soldiers prevented them from entering, and made them gather with other villagers some way off. He alleged that he was hit by a soldier.

90. After the soldiers left, he saw that his house had been destroyed. He accused the soldiers of having done this, there having been no other persons in the village.

91. He claimed to have made similar statements to the Human Rights Association in Diyarbakir and the prosecutor at the State Security Court. He refuted a signed statement to the authorities in which he had said that terrorists had caused the damage to the village in early April after the soldiers had left.

92. He insisted that his oral testimony to the delegates was the truth. He was neutral in these matters for he had denounced both the terrorists for their attacks in July 1992 and the State for setting fire to the village later.

(3) Ahmet Çiçek (born in 1968)

93. Ahmet Çiçek stated that he was born in 1968 and was a Kelekçi villager. His father is the applicant Zülfükar Çiçek; his brother is the applicant Mehmet Karabulut, and his cousin is the witness Ahmet Çiçek.

94. He confirmed that he had made an application to the Commission, it being his signature on the power of attorney and legal aid papers submitted to the Commission.

95. He also confirmed the terrorist attacks on Kelekçi and Bogazköy in July and November 1992. During the first attack his uncle and two cousins had been killed. After the second attack soldiers came to Kelekçi and set fire to his home and those of the other applicants. He then left the village and has never returned. He alleged that the Government forces had returned to the village in spring 1993 and set the remaining houses on fire after kicking villagers out, including his elder brother. He asserted his impartiality, the State having burnt the houses and the terrorists having killed people.

96. He had made an application for compensation through his mayor, Hüseyin Akdivar, but was told that his application had not been accepted. The Diyarbakir Human Rights Association, to whom he had spoken, had not informed him that his problems could be solved through the Turkish courts.

(4) Abdurrahman Aktas

97. Abdurrahman Aktas stated that, because of the village protectors, the PKK had attacked Kelekçi in 1992, killing three people and injuring his father, uncle and cousin. His father apparently died later, the responsibility for which the applicant attributes to the PKK.

98. Soldiers burnt his home at Kelekçi in November 1992 and again set light to the remaining houses in April 1993 (actual date unclear). He had not seen the second incident with his own eyes although he had been tending the vineyards then.

99. Recently he had received clothing, but otherwise no compensation had been provided. He wished for the restoration of his home and village. He had applied to the gendarme station and the Human Rights Association for help. The latter had not said anything about the use of Turkish courts.

(5) Mehmet Karabulut

100. Mehmet Karabulut stated that he was born in 1955 and is the brother of the applicant Ahmet Çiçek.

101. He confirmed the PKK attacks on Kelekçi in July and on Bogazköy in November 1992. The reason for the attack in July 1992 was that there were village protectors in Kelekçi.

102. Soldiers destroyed nine houses by fire in November 1992, including his home. A gendarme sergeant had said to him before the fire started that if he found anything suspicious in the village he would burn them. Mehmet Karabulut had replied that evidence of terrorists would be found because they had attacked the village. In April 1993 the village was again set on fire by soldiers. He saw everything with his own eyes.

103. A Sergeant Yüksel, commander of the Bogazköy station, had wished that he sign a statement, in return for State help, alleging that other people had set the village on fire, but he had refused to accept such

a statement.

104. He said that his situation since moving to Diyarbakir is miserable, and that he would like to move back to Kelekçi and rebuild his home, the thought of which broke his heart.

(6) Ahmet Önal

105. Ahmet Önal stated that he was born in 1939 and had lived in Kelekçi since his retirement in 1985.

106. He was not in the village during the incidents in 1992. He had heard that terrorists had attacked sometimes, although he did not know in which months. He had also heard that five houses had been burnt in November 1992.

107. He had returned to the village in April 1993 to tend to the vineyards when the village had been burnt. He had not seen who had started the fire. Except for the villagers themselves, only soldiers were in the village at that time. The soldiers gathered people away from the village for their protection, and later he had to go on foot to Dicle.

108. His present situation is poor, with a small pension and eight people dependent upon him.

(7) Abdullah Karabulut

109. Abdullah Karabulut stated that he was born in 1970 and was from the village of Kelekçi. He is the cousin of Mehmet Karabulut.

110. He had been in the village when it had been attacked by terrorists in July 1992, killing three villagers and wounding three others. The reason for the attack was that there were village protectors at Kelekçi, whom the terrorists wanted to eliminate. He had left a month later, but had heard from others that there had been an armed confrontation between Government forces and terrorists in November 1992. He had not heard that the village had been burnt.

111. He had returned to the village in April 1993 to help his father in the vineyards. The village had been burnt then when only soldiers were in the village. The soldiers gathered the people some way from the village and later told them to leave.

112. He generally confirmed his statement made before the Chief Public Prosecutor of the State Security Court, Bekir Selçuk, on 22 September 1994, and did not wish to say anything against the State that might harm his interests.

(8) Mahmut Sakar

113. Mahmut Sakar stated that he was born in 1966. He is a barrister and branch secretary of the Diyarbakir Human Rights Association (HRA). He is in custody awaiting trial for having published a report on systematic and widespread infringements of human rights in his region, to which supposed offence has apparently been added an accusation that he is a member of the PKK, a matter about which he has not been questioned. His imprisonment may have affected his memory concerning the detailed circumstances of the case.

114. He confirmed the statements he had taken from the applicant Ahmet Çiçek and another Kelekçi villager, Bedri Özalp, in particular that they had not voluntarily evacuated the village in November 1992

and that Ahmet Çiçek had stated that his home had been burnt down on 10 November 1992 by security forces.

115. He asserted that the applicants seen by the HRA had been advised that they should seek remedies within the domestic legal structure, such as petitions to the public prosecutor, police or gendarmes, failing which their cases could be referred to the Commission. However, the reality is, in his opinion, that in the emergency region domestic remedies do not work effectively in such cases.

116. People are threatened or persuaded not to pursue their claims. The HRA has been virtually closed down by arrests and intimidation.

117. As a member of the HRA he acted as an agent for Professor Boyle and Ms. Hampson in assisting the applicants in bringing their cases before the Commission.

(9) Bekir Selçuk

118. Bekir Selçuk stressed that he had not been an eye witness to the incidents of this case. His role had been that of Chief Public Prosecutor at the Diyarbakir State Security Court, responsible for investigations in eleven counties of crimes against the unity of the State, and offences involving arms, ammunition, drugs and the like. Ten of the counties within his jurisdiction are emergency areas. Human rights should be seen in a different context in such areas.

119. According to his files, there had been three incidents relevant to the case:

120. In the first, the PKK had ambushed Kelekçi village, killing three provisional village protectors. Subsequently, in a clash between State security forces and the PKK, nine houses had been damaged. The village was evacuated. There were "incident reports" stating the damage to the nine houses, but it was not possible to establish how it happened and who caused the damage. This could only be examined during subsequent investigations. When asked about a report dated 29 November 1993 from the gendarmerie, Bekir Selçuk stated that this was an introductory report on the incidents concerned and was one out of many regular reports by the gendarmerie concerning incidents in the region, the pursuit of perpetrators and arrests.

121. In the second incident, the PKK ambushed Bogazköy gendarme station and, in several days of armed clashes with the security forces, the station collapsed and the local people voluntarily abandoned the villages because of the lack of security.

122. The villagers have the possibility of applying for compensation in an action against the State before the Diyarbakir Administrative Court.

123. In the third incident, the evacuated houses were burnt down.

124. It is not an easy task to locate and capture PKK members. The local people hesitate to assist the security forces for fear of reprisals from the PKK. Deliberately distorted information is being traded and presented to the European Commission of Human Rights in this and similar cases. In his jurisdiction he uses the same investigative methods, but only the PKK applies to the Commission. The PKK issues propaganda, covering their acts by claims that they are the work of the security forces.

125. He could not understand the claim that the State had burnt down nine houses, given its duty to protect life and property. It is

illogical and impossible for the State to do such a thing. The claim that such a thing would happen was "laughable". Since the introduction of this case to the Commission, in-depth inquiries were started and continue, although investigations have been going on since the first incident in July 1992.

126. His report was based on accounts provided by the security force personnel involved and the residents of the region.

127. In clashes such as that which occurred in November 1992, it is impossible to establish whether it was State or terrorist gunfire which inflicted the damage. He had concluded however, on the basis of reports and statements received, that the PKK had burnt Kelekçi in April 1993.

(10) Sedat Aslantas

128. Sedat Aslantas stated that he was a lawyer by profession and, inter alia, vice-president of the Diyarbakir Human Rights Association (HRA). The task of the HRA is to promote human rights and democracy without violence. He is serving a three year prison sentence (currently under appeal) because of a speech he gave at a meeting of the HRA. All his colleagues from the HRA have also been detained and are accused of being members of a terrorist organisation because of a book they wrote on human rights violations in their region. Sedat Aslantas added that his imprisonment prevented him refreshing his memory concerning the detailed circumstances of the case now at issue.

129. He had visited Kelekçi on 8 April 1993, while it was still smouldering. He had been accompanied by representatives of other organisations and journalists, after the villagers, led by Hüseyin Akdivar, had complained to the HRA that soldiers had burnt Kelekçi. They had requested an on-site investigation. It could not have been the act of the PKK because they were observing a cease-fire at that time.

130. The HRA had thought a direct application to the Commission was the appropriate procedure in the circumstances. The Association acknowledged that for security reasons it may be necessary to evacuate villages, but not by the method used by security forces in Kelekçi. He considered domestic remedies, as regards unlawful acts of State officials in an emergency area, to be ineffective. Many such acts are immune from challenge, and others would take too long with little prospects of success in such areas, unlike remedies in Ankara. Human rights violations are an "administrative practice" in that region.

131. Sedat Aslantas vaguely recalled the villagers mentioning previous incidents in the village, but he had not witnessed these events.

(11) Ersan Topaloglu

132. Ersan Topaloglu said that at the material time he was the Commander of the District Gendarmerie Forces in the Dicle District of Diyarbakir. His duties included the protection of life and property in rural areas.

133. The PKK terrorist organisation had sought the control or evacuation of the Bogazköy, Kelekçi and surrounding villages since 1986, by instilling fear in the local population. They took shelter in the villages and forced the inhabitants to provide them with food and other basic supplies. They brainwashed and coerced some of the youngsters into joining them. The terrain in that region is mountainous and highly suitable for terrorist occupation and operation. As a result, there is a state of emergency in the region.

134. On 1 November 1992 about 150 PKK terrorists heavily attacked Bogazköy gendarme station, killing a gendarme and injuring eight others. The next day, with reinforcements, the gendarmes began searching the vicinity for the perpetrators, who had moved on to attack other villages, including Kelekçi. During the search of the area 14 PKK shelters containing food, arms and other supplies were found. Skirmishes and the search continued for 10 days. Many citizens left the area out of fear, but the poorer villagers had to stay.

135. No security forces actually entered Kelekçi at that time. They only stopped for a short time at its outskirts for a rest and to have some tea, cigarettes and water. The villagers may have accused security forces of causing damage because of PKK threats or coercion. Take men like the Çiçeks who are under much pressure, members of their family having been killed by the PKK. However the witness categorically denied the allegation against the security forces. Such a thing cannot and did not happen. Only the PKK performs such brutal acts. If there have been petitions to that effect, they have been prepared by people with ulterior motives, who are partisan.

136. As a result of information received about terrorist operations, gendarmes returned to the area around 5 or 6 April 1993. When they arrived at Kelekçi, a search was conducted in the presence of villagers, pursuant to sections 45 and 81 of the Gendarme Organisation and Powers Law No. 2803. The villagers confirmed that no damage had been caused by the soldiers, who left around midday. The witness was not present at Kelekçi, but was conducting operations by radio.

137. That evening terrorists returned to the village and, in the face of the villagers' refusal to provide food, set alight or blew up some of the houses. The soldiers returned to a smouldering village, some nine or ten houses having been burnt. Damage to other houses from neglect or severe winter conditions was noted. The gendarmes forwarded their report to the Dicle District Chief Prosecutor's Office and to their own authorities.

138. A few days later the villagers made another application on this subject, and their statements were taken by other commanders of gendarme stations. Such documents concerning the gendarme investigations were forwarded to the Chief Public Prosecutor's Office, the Dicle District Governor's Office, the Diyarbakir Gendarme Headquarters and the Diyarbakir Provincial Governor's Office, to be forwarded to the Emergency Area Governor's Office.

139. Villagers have now completely evacuated the area because of the impossibility of meeting the brutal demands of the PKK and the lack of security there.

140. The witness doubted whether Sedat Aslantas and others had actually gone to Kelekçi on 8 April 1993 as claimed. They would not have been able to get past security check points without his knowledge, and there is only one road leading into that area. He challenged the motives of Sedat Aslantas in this case.

(12) Hüseyin Bakir

141. Hüseyin Bakir said that at the relevant time he was a commando company commander at Kelekçi. He was not actually in the village during the events of early November 1992 because he was manning a strategic point 12 or 13 kilometres away in order to secure the arrival of reinforcements. He had, therefore, no relevant information to give about these events.

142. Following orders, he did conduct a search of Kelekçi in April

1993. Nothing was found and the villagers confirmed that no loss or damage had been caused. He returned there a couple of days later after complaints had been made by the villagers that terrorists had set fire to the place. His role that time was only to secure the safety of the Unit Commander who recorded the state of the village. He himself was not actually in the village on that occasion.

143. It was impossible for security forces to have burnt any of the Kelekçi houses. No such thing happened. He could not understand why the villagers would have confirmed in writing that the gendarmes had caused no damage if this were not true. Perhaps villagers made such allegations later in order to claim compensation from the State, but he would not really know.

144. He could not confirm that the PKK was observing a cease-fire at that time, such matters being the concern of higher authorities and politicians, not of officers like him.

145. He did confirm that the Governor of a state of emergency region had power to order the evacuation of villages, which would be less costly than organising a military operation for that purpose. The latter operation would be inconsistent with the former power.

146. He stressed that the area is very difficult and dangerous. He has been under terrorist attack, sometimes twice in one day and has seen his men killed and injured.

(13) Gürsel Demirtas

147. At the material time, Gürsel Demirtas was the Commander of Bogazköy gendarme station.

148. He was on holiday when the station was attacked and destroyed by the PKK on 1 November 1992. He immediately returned there on 2 November and accompanied reinforcement gendarmes in their search of the area for the perpetrators. Several deserted PKK shelters were found containing food and clothing. He was unaware of houses having been burnt in Kelekçi on 10 November 1992. The security forces had not been in the village, other than to stop at the outskirts for a rest. However in April 1993 he had gone there to investigate the villagers' claim that the PKK had burnt the village. The PKK had told the villagers to accuse the gendarmes of causing the fire.

149. It is unthinkable that soldiers would set fire to houses. No soldiers were involved in this matter. The weapons used and identified by the villagers are not the ones used by his forces. He had a close relationship with the local inhabitants. The mayor had never made allegations to him about any unlawful acts by the security forces, even though he saw him regularly when the mayor came to collect his monthly salary.

150. In the individual statements that he took at the time, the villagers had accused the PKK of the deed. He had taken their statements individually and their similarity may have occurred because the villagers would have discussed it beforehand. The statements were made voluntarily. No statements were taken from gendarmes because he had been there throughout in April 1993 and they had all come and gone together.

151. He did not recall the villagers asking for compensation. Anyway he had no competence in such matters.

152. He confirmed that terrorists had been known to dress in soldiers' uniforms when attacking villages.

153. As regards the PKK attack on the village in July 1992, he stated that he had had to transport the dead and injured on that occasion.

(14) Tayfur Nur

154. Tayfur Nur said that at the relevant time he was assistant to the commander at Bogazköy gendarme station. He was there during the terrible attack which destroyed the station on 1 November 1992. Eight soldiers were injured by exploding hand grenades and another soldier killed. It was a horrendous experience.

155. He then participated in the ensuing searches of the area. There were skirmishes, and by the third day he was depressed and was granted leave for a month. He did not see or hear of any incident in Kelekçi on 10 November 1992, but it was possible that the PKK had burnt houses then because it was a village constantly under attack.

156. He went to Kelekçi twice at short intervals in April 1993. On the second occasion he saw that terrorists had burnt the houses, which were still smouldering. He had not participated in the investigation, but had stood guard. He could not recall clearly, but he thought that the villagers' statements had been taken because of their claim for compensation, after filing a petition with the mayor or the public prosecutor. The villagers were questioned one by one, giving more or less the same information voluntarily. He had not heard whether they had received any compensation as he was posted in West Turkey three months later.

C. Relevant domestic law and practice

157. The Government have submitted that the following domestic law is relevant to the case:

Article 125 of the Turkish Constitution provides as follows:

(translation)

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

The Administration shall be liable for damage caused by its own acts and measures."

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

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

(translation)

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

160. The Turkish Criminal Code makes it a criminal offence

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),
- to oblige someone through force or threats to commit or not to commit an act (Article 188),
- to issue threats (Article 191),
- to make an unlawful search of someone's home (Articles 193 and 194),
- to commit arson (Articles 369, 370, 371, 372), or aggravated arson if human life is endangered (Article 382),
- to commit arson unintentionally by carelessness, negligence or inexperience (Article 383), or
- to damage another's property intentionally (Article 526 et seq.).

161. 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.

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

163. If the alleged author of a crime is a State official or civil servant, permission to prosecute must be obtained from local administrative councils (the Executive Committee of the Provincial Assembly). The local council decisions may be appealed to the Council of State; a refusal to prosecute is subject to an automatic appeal of this kind.

164. 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.

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

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

167. The applicants point to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme (paras. 168-173 below):

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

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

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

171. Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas which are subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils. These councils are made up of civil servants and have been criticised for their lack of legal knowledge, as well as for being easily influenced by the Regional Governor or Provincial Governors, who also head the security forces.

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

(translation)

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

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

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

174. The Commission has declared admissible the applicants' complaints that on 10 November 1992 State security forces allegedly launched an attack on their village of Kelekçi, destroying their homes and forcing them to evacuate the village.

B. Points at issue

175. The points at issue in the present case are as follows:

- who are the authentic applicants in the case;
- whether there has been a violation of Article 8 (Art. 8) of the Convention;

- whether there has been a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention;
- whether there has been a violation of Article 3 (Art. 3) of the Convention;
- whether there has been a violation of Article 5 para. 1 (Art. 5-1) of the Convention;
- whether there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention;
- whether there has been a violation of Article 13 (Art. 13) of the Convention;
- whether there has been a violation of Article 14 (Art. 14) of the Convention;
- whether there has been a violation of Article 18 (Art. 18) of the Convention; and
- whether Turkey failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention.

C. As regards the applicants

176. Applications were filed with the Commission in the names of Hüseyin Akdivar, Abdurrahman Akdivar, Ahmet Akdivar, Ali Akdivar, Zülfükar Çiçek, Ahmet Çiçek, Abdurrahman Aktas and Mehmet Karabulut. Letters of authority were submitted, purportedly signed by these persons, for the representation of their case by Professor Boyle and Ms. Hampson.

177. The Government contend, in the light of the evidence before the Commission, that Hüseyin Akdivar never made such an application, and that the cases of Ahmet Çiçek and Abdurrahman Aktas were fabricated by the Diyarbakir Human Rights Association, which promised them compensation if they signed an application to the Commission.

178. The applicant's representatives made no comment on Hüseyin Akdivar's situation, but maintained the applications of Ahmet Çiçek and Abdurrahman Aktas.

a) Hüseyin Akdivar

179. The Commission recalls that Hüseyin Akdivar, who appeared before the Commission's delegates as a witness, was specifically asked whether he had signed the power of attorney submitted to the Commission in his name. He denied having signed this document and gave the delegates a specimen of his normal signature, which indeed differed considerably from the signature on the power of attorney. The Commission considers that in view of Hüseyin Akdivar's clear statement that the power of attorney does not bear his signature and that he has neither made nor wished to make an application to the Commission, he can no longer be considered to be an applicant in the present case.

180. In these circumstances the Commission is of the view that the complaints brought in the name of Hüseyin Akdivar should not be considered.

b) Ahmet Çiçek

181. The Commission has the oral testimony of two persons named Ahmet

Çiçek before it. They are two cousins, both claiming to have made valid applications to the Commission. However, having examined the signature on the power of attorney submitted with the application, the Commission is satisfied that the authentic applicant is Ahmet Çiçek born in 1968. Moreover, the latter confirmed before the delegates his intention to pursue and maintain his application before the Commission. Consequently, the Commission will continue its examination of the application insofar as this applicant is concerned.

c) Abdurrahman Aktas

182. The Commission is satisfied from the oral testimony presented to the delegates by Abdurrahman Aktas that he submitted a valid power of attorney when lodging his application and that it has been his intention to pursue this application. Consequently, the Commission will also continue its examination of the case as regards this applicant.

Decision

183. The Commission decides, by a unanimous vote,

- not to consider the complaints brought in the name of Hüseyin Akdivar;
- to pursue the examination of the application, insofar as all the other applicants are concerned.

D. The evaluation of the evidence

184. Before dealing with the applicants' allegations under specific Articles of the Convention, the Commission considers it appropriate first to assess the evidence and attempt to establish the facts, pursuant to Article 28 para. 1 (a) (Art. 28-1-a) of the Convention.

a) General background

185. The Commission notes that the applicants' village of Kelekçi and the surrounding areas have been the centre of intense PKK terrorist activity.

186. It is undisputed that the PKK launched serious attacks on Kelekçi on 17 or 18 July 1992, and the neighbouring village of Bogazköy on 1 November 1992. As a result of the first attack, three Kelekçi villagers were killed and three others wounded. The second attack on 1 November 1992 was aimed at the Bogazköy gendarmerie station, which was destroyed, with one gendarme being killed and eight others injured. Thereafter security forces were reinforced in the area and extensive searches carried out for terrorists.

187. It further appears that on 6 April 1993 houses in Kelekçi were set on fire and that the village was then almost completely destroyed. It is disputed, however, whether this destruction was caused by terrorists or by security forces. The applicants' complaints do not directly relate to this incident. Nevertheless, what happened on 6 April 1993 and the inquiry which was carried out afterwards have a certain relevance in the overall assessment of the present case (paras. 196-198 below).

188. The applicants allege that on 10 November 1992 State security forces launched an attack on their village of Kelekçi, burnt nine houses, including their homes, and forced the immediate evacuation of the entire village. The Government categorically deny these allegations. Initially they contended that the village had merely been

searched, causing no damage. Subsequently, there was testimony that no soldiers had entered Kelekçi on 10 November 1992, and, if they had been in the vicinity, it was merely on the outskirts of the village where they had rested.

189. The Commission must therefore examine the evidence before it concerning the destruction of the nine houses and the subsequent evacuation of the Kelekçi village.

190. The applicants' allegation that on 10 November 1992 - or at least around that date - nine houses in the village were destroyed is confirmed by a number of witnesses who have been heard by the Commission's delegates (paras. 81, 88, 95, 98, 102, 106 and 114 above) or whose written statements have been submitted to the Commission (see paras. 62, 70, 72, 74 and 76 above). The official report of 23 September 1994 by the Chief Public Prosecutor Bekir Selçuk also refers to the fact that after the attack on the Bogazköy gendarme station the unrest spread to Kelekçi where nine houses were burnt and damaged (para. 42 above). Also in his oral testimony Bekir Selçuk referred to nine houses which had been damaged (para. 120 above).

191. The Commission therefore finds it established that nine houses, including those of the applicants, were destroyed or seriously damaged by fire not long after the attack on the Bogazköy gendarme station on 1 November 1992. Although there could be some uncertainty as to the exact date when the nine houses were burnt, the Commission accepts that this occurred, as stated by the applicants, on 10 November 1992. The question then remains as to who set the houses on fire.

b) Inquiries at domestic level

192. It appears that no proper investigation was carried out at the domestic level regarding the destruction of the nine houses at Kelekçi on 10 November 1992. The inhabitants of the village do not seem to have been heard about the incident, and the Commission is not aware of any report on the matter drawn up in the period after the event. Bekir Selçuk, in his oral statement, referred in very general terms to "incident reports" having been submitted, and he confirmed that a gendarmerie report of 29 November 1993 dealt with events at Kelekçi (para. 120 above). Nevertheless, it is clear that those reports, insofar as they concerned the destruction of the nine houses, did not result in any investigation of the facts and no attempt was made to establish responsibility for the destruction.

193. Moreover, although the applicants had lost their homes, no one seems to have given proper advice to them or, apparently, to the other displaced Kelekçi villagers, on how to obtain compensation for the loss of their homes or other assistance. It is clear that petitions were made by the mayor, Hüseyin Akdivar, and statements were given to several State officials of different denominations, but no authority took up the applicants' problems or referred them to the competent body. There is evidence that, during the proceedings before the Commission, certain applicants, or people who were believed to be applicants like Hüseyin Akdivar and Ahmet Çiçek born in 1967, have been questioned by State authorities about their applications to the Commission, rather than about the losses they had suffered.

194. The investigation reports and the recorded statements by villagers which have been submitted to the Commission (paras. 42-46 above) are from September 1994, i.e. almost two years after the destruction of the nine houses. At that time, a number of villagers were also heard about events at Kelekçi (paras. 49, 55, 58, 60, 62, 67, 69, 72, 74 and 76 above). This inquiry took place at a time when the village had been further damaged in April 1993, after the Commission

had communicated the present application to the Government and decided to hold an oral hearing in the case (cf. paras. 6 and 8 above).

195. It appears that the reports of September 1994 were based on an exploratory mission undertaken by helicopter on 21 September 1994. During this mission, the investigating team did not land at Kelekçi but only observed the village during low level flights. They noted that all the houses at Kelekçi had collapsed and there were no inhabitants in the village (para. 45 above). However, since this mission took place after the village had been more extensively damaged in April 1993, the findings must be of very limited value for establishing what had happened on 10 November 1992. It is nevertheless noticeable that one of the experts on the investigating team found that the collapse of the houses in the village was the result of the lack of maintenance and had natural causes (para. 46 above), although it is undisputed that considerable destruction by fire had taken place on 6 April 1993.

196. As to the events on 6 April 1993, the Commission notes that a team of gendarmes heard various villagers in April 1993. However, in the recorded statements no reference is made by the villagers to the incident of 10 November 1992. The Commission has therefore studied these statements in order to find out whether they should affect the Commission's findings in the present case.

197. In this respect, it is striking that the various statements by the villagers are drafted in a stereotyped form and have on the whole the same contents (paras. 54, 56, 57, 59, 61, 65, 66, 68, 71, 73 and 75). Most of them describe the events of 6 April 1993 in an almost identical manner. In the recorded statements the villagers refer to the fact that the terrorists had made a previous attack on the village during which three persons had been killed and three others injured, this general formula being used even in the statements of the applicants Ahmet Çiçek and Abdurrahman Aktas whose close relatives, including the latter's father, had been killed on that occasion. The statements also contain a declaration about the villagers' respect for the State and their willingness to help the State. All in all, the recorded statements give the impression of having been drafted in a uniform manner by the gendarmes rather than reflecting spontaneous declarations by the villagers. This may also explain why some of these statements are in complete contradiction to what the same persons have stated on other occasions (see Ahmet Çiçek's statements referred to in paras. 61 and 89-90 above, Abdurrahman Aktas's statements referred to in paras. 54 and 98 above, Abdullah Karabulut's statements referred to in paras. 66, 67 and 111 above). Thus it seems highly doubtful whether the recorded statements to the gendarmes can be said to reflect the information that the villagers intended to convey in regard to the events at issue.

198. The Commission therefore attaches no particular weight to the statements of the villagers in April 1993. It notes the inadequacy of any real investigations at domestic level which could be of assistance in elucidating the events on 10 November 1992. The absence of any such investigations is in itself a disturbing element in regard to a serious matter such as the destruction of the homes of a considerable number of persons.

c) Individual statements and the evaluation of the evidence

199. In the absence of any relevant investigations at the domestic level, the Commission must base its findings on the evidence which has been given orally by various persons or submitted in writing in the course of the proceedings before the Commission. The evaluation of this evidence is not an altogether easy task in view of the conflicting statements of villagers and officials.

200. Nevertheless, the Commission considers that there is sufficient evidence before it to enable certain conclusions to be drawn.

201. The Commission first notes the difficult task of members of the security forces who have been working in the area of Kelekçi, combating terrorism and risking their lives. The Commission considers, however, that the intensity of this fight may have blinkered their objectivity towards the local villagers. Villagers became caught up in this fight, being pressured into providing food and shelter for terrorists on pain of deadly reprisals, and at the same time having to assist the security forces. They seem to have been in the impossible position of fearing both sides. This may explain, to some extent, the fact that statements by villagers to the Diyarbakir Human Rights Association differ from those made to State authorities. They have been in urgent need of help which may have influenced their statements. Moreover it must have been difficult for them in their vulnerable position to make direct accusations against the security forces when being heard by State officials. The manner in which some of the State officials who were heard by the Commission's delegates reacted to the very idea of the security forces being responsible for destruction in villages makes it easy to understand that such suggestions are not well received and could entail harmful consequences for those who make them.

202. As to the possible motives for destroying houses in a village like Kelekçi, the Commission finds it difficult to see what benefit the PKK would have derived from the evacuation of Kelekçi. As long as the villagers stayed on, the PKK could hope to coerce them into providing shelter, food and other basic provisions to sustain their terrorist activities. In contrast, however, the security forces could well have an interest in evacuating law-abiding citizens from the area, both to remove the PKK's logistical support and to simplify the identification of the enemy.

203. Reference has also been made to the fact that some of the villagers at Kelekçi had been village protectors, which had provoked the PKK attack on the village in July 1992 and that, after that attack, some village protectors had given up their positions (paras. 70, 72, 76, 86, 97, 101 and 110 above). This may have been interpreted by the security forces as an unfriendly act.

204. The Commission can also understand that feelings were running high amongst the security forces after the destruction of the Bogazköy gendarme station on 1 November 1992, with the death of one of their colleagues and the injury of eight others. They would have been under serious stress and strain, as shown in the case of Mr. Tayfur Nur (para. 155 above), in the ensuing search for the terrorist perpetrators of these deeds.

205. The general impression created by the villagers' oral testimony before the delegates is one of simplicity, sincerity and courage. Most of their statements were well balanced and in no way one-sided. They unequivocally accused the terrorists of having perpetrated the attack on their village in July 1992, in the course of which three close relatives of the applicant Ahmet Çiçek had been killed and three close relatives of the applicant Abdurrahman Aktas had been injured. There is no indication that the villagers were in any way hostile to the military or the public authorities. Generally speaking, the Commission is therefore satisfied that the villagers who gave evidence told the delegates what they considered to be the true facts of the incident on 10 November 1992.

206. Against this background the Commission attaches particular weight to the fact that those who were in the village on 10 November 1992 -

the applicants Ahmet Çiçek, Abdurrahman Aktas and Mehmet Karabulut - all testified that soldiers had burnt their homes, and those of the other applicants, on that day.

207. The village mayor Hüseyin Akdivar - who when giving evidence before the delegates expressed himself in a very cautious manner and appeared anxious not to make any statements which could be harmful to the Government - stated that he had been at Kelekçi on 10 November 1992, but not at the scene of the fire. He confirmed that security forces had been in the village and that he had not seen any other strangers there. After the soldiers had left, he heard, as he returned home, that his office was on fire along with other houses. However, he had not seen who had set fire to the houses (para. 81 above).

208. Ahmet Çiçek (born in 1967), who had not been in the village then, had heard from others that soldiers had burnt nine houses (para. 88 above).

209. Two of the written statements convey the same kind of information. The applicant Abdurrahman Akdivar stated that on 10 November 1992 a military special team had arrived at Kelekçi, had ordered his father, the mayor, to gather the villagers and had then burnt down nine houses without any explanation (para. 51 above). The villager Bedri Özalp stated that on 10 November 1992 the soldiers entered the village in the evening and burnt the homes of eleven families, including that of Bedri Özalp himself (para. 70 above).

210. There is no evidence of any conspiracy between the villagers to accuse the State of these events in order to obtain compensation or for any other purpose.

211. The Commission further notes that, while there is evidence that security forces were in the village, none of the witnesses stated that any stranger had been seen at Kelekçi on 10 November 1992. It would indeed appear unlikely that terrorists would have set fire to nine houses in the village without anyone having noted their presence. Nor is there any other evidence showing that terrorists had been at Kelekçi on that day.

212. In contrast to the oral evidence of the applicants and certain villagers, the Commission considers that the testimony given by officials was generally evasive. There was some official acknowledgement that the security forces had been in the vicinity on or about that day, albeit on the outskirts of the village. Ersan Topaloglu and Gürsel Demirtas testified to this effect, albeit categorically denying that they or their colleagues could have or had set fire to the houses (paras. 135 and 148-149 above). The views of all officials, including the Chief Public Prosecutor Bekir Selçuk, expressed almost in outrage, were that such allegations against the security forces were incredible, illogical and impossible. Bekir Selçuk described the claim that such a thing could happen as "laughable" (para. 125 above). Their statements rather showed that the possibility that the military could be responsible for such acts was so remote that it could be discarded at once, and that allegations about such abuses by the security forces did not even have to be examined seriously.

213. In the light of the above, the Commission finds it convincingly shown that security forces - presumably under the strain of intense terrorist activity in the area - were responsible for the burning of the nine Kelekçi houses on 10 November 1992. It has not been shown that the applicants were forcibly expelled from Kelekçi, but the loss of their homes caused them to abandon the village and move elsewhere.

214. On the basis of these findings the Commission will now proceed to examine the applicants' complaints under the various Articles of the Convention.

E. As regards Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention

215. Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention read as follows:

Article 8 (Art. 8)

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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

Article 1 of Protocol No. 1 (P1-1)

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

216. The applicants allege that the destruction of their homes by the security forces and their arbitrary expulsion from their village constitute two separate violations of the right to respect for their family life and home, ensured by Article 8 (Art. 8) of the Convention. The applicants further allege that they have thereby been deprived of their possessions, contrary to Article 1 of Protocol No. 1 (P1-1) to the Convention.

217. The Government maintain that there is no evidence to substantiate the applicants' allegations against the security forces.

218. The Commission is of the opinion that, in the light of its findings of fact above (para. 213 above), there has been a very serious interference with the applicants' rights under Article 8 (Art. 8) of the Convention and Article 1 of Protocol No. 1 (P1-1) to the Convention by State security forces, for which no justification has been given.

Conclusions

219. The Commission concludes, by 18 votes to 1, that there has been a violation of Article 8 (Art. 8) of the Convention.

220. The Commission concludes, by 18 votes to 1, that there has been a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention.

F. As regards Article 3 (Art. 3) of the Convention

221. The Commission will now examine whether the interference with the applicants' home and property rights was so serious that it also amounted to a violation of Article 3 (Art. 3) of the Convention, which provides as follows:

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

222. The applicants allege that the forced and immediate expulsion of the entire village of Kelekçi, including themselves, on 10 November 1992, represents a form of collective punishment and the most manifest and deliberate infliction of inhuman and degrading treatment, contrary to Article 3 (Art. 3) of the Convention.

223. The Government contend that the allegation is wholly groundless on the facts, as there were no State forces at Kelekçi on that day and any damage to the village was caused by PKK terrorists. The voluntary departures from the village occurred after the PKK attacks and in accordance with the usual pattern of winter migration towards Diyarbakir.

224. The Commission is of the opinion that the applicants' allegations here are somewhat exaggerated. Nevertheless, in view of the findings of fact above (para. 213 above), the Commission considers that the burning of the applicants' homes by security forces, resulting in their migration to Diyarbakir, and dire personal circumstances, little State assistance having been forthcoming, amounts to inhuman and degrading treatment within the meaning of Article 3 (Art. 3) of the Convention.

Conclusion

225. The Commission concludes, by 14 votes to 5, that there has been a violation of Article 3 (Art. 3) of the Convention.

G. As regards Article 5 para. 1 (Art. 5-1) of the Convention

226. Article 5 para. 1 (Art. 5-1) of the Convention guarantees the right to liberty and security of person.

227. The applicants allege that they, along with all the other Kelekçi villagers, were compelled to abandon their homes and village on 10 November 1992, in flagrant breach of the right to the exercise of liberty and the enjoyment of security of person.

228. The Government consider that Article 5 para. 1 (Art. 5-1) of the Convention has no relevance in the present case and, if it did, refer to their derogation under Article 15 (Art. 15) of the Convention since 6 August 1990, suspending the applicability of this Convention provision in the area concerned.

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

230. In the present case, none of the applicants were arrested or detained, or otherwise deprived of their liberty. The Commission considers that their insecure personal circumstances arising from the loss of their homes does not fall within the notion of security of person as envisaged by Article 5 para. 1 (Art. 5-1) of the Convention.

Conclusion

231. The Commission concludes, by a unanimous vote, that there has been no violation of Article 5 para. 1 (Art. 5-1) of the Convention.

H. As regards Articles 6 para. 1 (Art. 6-1) and 13 (Art. 13) of the Convention

232. Articles 6 para. 1 (Art. 6-1) and 13 (Art. 13) of the Convention provide as follows:

Article 6 para. 1 (Art. 6-1)

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

Article 13 (Art. 13)

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

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

234. The Government contend that there are several effective domestic remedies at the applicants' disposal, but that they tried none of them.

235. The Commission refers to its decision on admissibility in the present case (see appendix to this Report) where, in the context of Article 26 (Art. 26) of the Convention, it held that:

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

236. This view was taken in the face of certain domestic case-law referred to by the Government indicating that there may be a channel of complaint through the administrative courts which could award compensation to the individual against the State on the basis of the latter's liability to assume the protection of citizens from various social risks. However, the Commission considers that this case-law is insufficient to demonstrate that compensation claims in the emergency regions of South-East Turkey for the destruction of homes and villages allegedly perpetrated by security forces have been successful.

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

238. The Commission's decision on admissibility points to the

undoubted practical difficulties and inhibitions in the way of persons like the present applicants who complain of village destruction in South-East Turkey, where broad emergency powers and immunities have been conferred on the Emergency Governors and their subordinates. These difficulties are demonstrated by the evidence taken in the present case, which shows that despite the various petitions made by the Kelekçi villagers, particularly by the mayor Hüseyin Akdivar, no State authority took up the plight of these villagers or referred them to a competent authority. It seems unrealistic to expect such villagers to pursue theoretical administrative court or other remedies when the investigatory mechanism in this emergency area was apparently deaf to allegations concerning the security forces and assumed that all brutal acts were the work of the PKK (cf. the testimony of Bekir Selçuk, paras. 124-125 above and Ersan Topaloglu, para. 135 above).

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

240. Some of the applicants' Convention claims do not necessarily involve their civil rights, and may not require a full court remedy, for example their claim concerning the alleged forcible evacuation of their village. Positive State action to investigate the incidents promptly, to rehouse or financially assist these villagers, rather than passively awaiting administrative court intervention, may have been a more appropriate response to the applicants' plight. The question arises therefore under Article 13 (Art. 13) of the Convention whether the applicants have been afforded effective domestic remedies for these claims notwithstanding that the violations have allegedly been "committed by persons acting in an official capacity". However, for the same reasons outlined above (para. 238), the Commission considers that the applicants did not have other effective remedies at their disposal for their remaining Convention claims as required by Article 13 (Art. 13) of the Convention.

Conclusions

241. The Commission concludes, by 12 votes to 7, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

242. The Commission concludes, by 12 votes to 7, that there has been a violation of Article 13 (Art. 13) of the Convention.

I. As regards Articles 14 and 18 (Art. 14,18) of the Convention

243. Articles 14 and 18 (Art. 14, 18) of the Convention provide as follows:

Article 14 (Art. 14)

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

Article 18 (Art. 18)

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

244. The applicants maintain that because of their Kurdish origin the

various alleged violations of their Convention rights were discriminatory, in breach of Article 14 (Art. 14) of the Convention. They also claim that their experiences represented an authorised practice by the State in breach of Article 18 (Art. 18) of the Convention.

245. The Government refute these allegations and affirm that all Turkish citizens, whatever their ethnic origin, enjoy Convention rights without discrimination. Moreover, there is no evidence of any abuse of power by the State contrary to Article 18 (Art. 18) of the Convention.

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

Conclusions

247. The Commission concludes, by a unanimous vote, that there has been no violation of Article 14 (Art. 14) of the Convention.

248. The Commission concludes, by a unanimous vote, that there has been no violation of Article 18 (Art. 18) of the Convention.

J. As regards Article 25 (Art. 25) of the Convention

249. Article 25 (Art. 25) of the Convention envisages the right of individual petition to the Commission without hindrance by any State authority.

250. Since the introduction of their application to the Commission, the applicants allege that they and witnesses have suffered intimidation by State officials.

251. The Government deny this allegation and submit that any inquiries that have been made of applicants or witnesses have been for the purpose of the Government's investigation into the facts of the case, which prior to the application had not been brought to the attention of the authorities.

252. The Commission notes with concern that applicants, or people thought to be applicants like Hüseyin Akdivar and Ahmet Çiçek (born in 1967), have been directly asked about their applications to the Commission and have been presented with statements to sign declaring in effect that no such applications have been brought. The most extraordinary and disquieting example of this procedure involved a filmed interview of Hüseyin Akdivar and Ahmet Çiçek on this subject.

253. The Commission considers it inappropriate for the domestic authorities to approach applicants, or purported applicants, and question them about their applications to the Commission in the absence of their legal representatives. This is particularly so where, as in the present case, the applicants are in a difficult and vulnerable position and where any such initiatives by the authorities could easily be understood as attempts to discourage them from pursuing their complaints made in the exercise of their right under Article 25 (Art. 25) of the Convention to bring alleged violations of the Convention to the attention of the Commission. The sensitivity of the matter is increased even further where, as in the present case, lawyers who have assisted applicants have been arrested and detained (paras. 113 and 128 above).

254. The Commission is of the opinion that the Turkish authorities, in behaving in this manner, made the exercise of the applicants' right of

individual petition under Article 25 (Art. 25) of the Convention more difficult. They thereby hindered the effective exercise of the applicants' right under this provision.

Conclusion

255. The Commission concludes, by 12 votes to 7, that Turkey failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention.

K. Recapitulation

256. The Commission decides, by a unanimous vote,

- not to consider the complaints brought in the name of Hüseyin Akdivar;

- to pursue the examination of the application, insofar as all the other applicants are concerned (para. 183 above).

257. The Commission concludes, by 18 votes to 1, that there has been a violation of Article 8 (Art. 8) of the Convention (para. 219 above).

258. The Commission concludes, by 18 votes to 1, that there has been a violation of Article 1 of Protocol No. 1 (P1-1) to the Convention (para. 220 above).

259. The Commission concludes, by 14 votes to 5, that there has been a violation of Article 3 (Art. 3) of the Convention (para. 225 above).

260. The Commission concludes, by a unanimous vote, that there has been no violation of Article 5 para. 1 (Art. 5-1) of the Convention (para. 231 above).

261. The Commission concludes, by 12 votes to 7, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention (para. 241 above).

262. The Commission concludes, by 12 votes to 7, that there has been a violation of Article 13 (Art. 13) of the Convention (para. 242 above).

263. The Commission concludes, by a unanimous vote, that there has been no violation of Article 14 (Art. 14) of the Convention (para. 247 above).

264. The Commission concludes, by a unanimous vote, that there has been no violation of Article 18 (Art. 18) of the Convention (para. 248 above).

265. The Commission concludes, by 12 votes to 7, that Turkey failed to comply with its obligations under Article 25 para. 1 (Art. 25-1) of the Convention (para. 255 above).

Secretary to the Commission

President of the Commission

(H.C. KRÜGER)

(S. TRECHSEL)

(Or. English)

PARTLY DISSENTING OPINION OF MR. H. DANELIUS
JOINED BY Mr. C.A. NØRGAARD
ON THE ISSUE UNDER ARTICLE 25 OF THE CONVENTION

I have voted against the Commission's conclusions in paras. 242 (regarding Article 13 of the Convention) and 255 (regarding Article 25 of the Convention) of the Report.

As regards Article 13, I interpret the applicants' complaints regarding the absence of legal remedies as relating, at least essentially, to their main complaints regarding violations of their rights to respect for their family life and home and their property rights, which are "civil rights" within the meaning of Article 6 of the Convention. Consequently, I consider that, in view of the finding of a violation of Article 6, no separate issue arises under Article 13.

As regards Article 25, I agree with the general remarks in paras. 252 and 253 of the Report. However, when considering whether there has been an interference with the applicants' right of individual petition, I note that Hüseyin Akdivar and Ahmet Çiçek (born in 1967), who were asked questions about applications to the Commission and were requested to sign statements in this regard, were both found not to be applicants (see paras. 179 and 181 of the Report). As regards the persons who did lodge the present application, there is no evidence of any interference with their right of individual petition. In these circumstances, I cannot find that in the present case Turkey has failed to comply with its obligations under Article 25.

(Or. French)

JOINT DISSENTING OPINION OF MR. GÖZÜBÜYÜK AND MR. WEITZEL
ON THE ISSUES UNDER ARTICLES 3, 6 AND 13 OF THE CONVENTION

On 19 October 1994 the Commission unanimously declared the present application admissible. As to whether domestic remedies have been exhausted, the Commission considered in this case and on the basis of information before it regarding the possibility of bringing an administrative action, that the Government had failed to provide a single example of compensation being awarded to villagers for damage comparable to that suffered by the applicants. As regards the possibility of bringing criminal proceedings, the Commission found that, given the circumstances of the case, a prosecution would have been wholly ineffective.

The respondent Government subsequently reiterated their argument that domestic remedies had not been exhausted in this case and requested the application of Article 29 of the Convention.

We feel it important to specify from the outset that two of the complaints concern the alleged lack of effective remedies and that the applicants rely on Articles 6 and 13 of the Convention to support their submissions.

Certain facts of the case have been elucidated by the Commission's investigation. In particular, the witness statements obtained in the course of that investigation show that during the investigation conducted by the Chief Public Prosecutor at Diyarbakir State Security Court, the applicants, and moreover the other villagers, were unable to identify any member of the security forces as the perpetrator of the alleged offence. The difficulties encountered by the judicial authorities in charge of this investigation were largely due to the lack of evidence against the security forces.

In view of these additional factors, which came to light when the Commission investigated the case, we believe that there was an effective remedy which the applicants failed to use, namely an administrative action and that, consequently, the Government's

application under Article 29 of the Convention should have been granted.

We feel it important to recall that the rule of exhaustion of domestic remedies dispenses States from answering before an international body for their acts before they have had an opportunity to put matters right through their own legal system (Eur. Court H.R., De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 29, para. 50) on condition, however, that such remedies are effective and sufficient, i.e. capable of providing redress for the applicants' complaints.

As has been proved by the investigation of the case, the criminal proceedings brought by the prosecution on the applicants' instigation came to nothing owing to the lack of probative evidence. Having regard to the nature of the complaints, which centre mainly on the destruction of houses, allegedly by the security forces, it is quite clear that in the absence of even the slightest shred of evidence, the prosecution was bound to fail. This is unsurprising, as the rules governing criminal responsibility are inspired by the same principles in all the member States of the Council of Europe.

However, as shown by the ample documentation already submitted by the Government, which will have to be studied more attentively, and the numerous judgments of which we have obtained copies, there was an effective remedy available to the applicants which was sufficiently certain both in theory and in practice. This body of case-law shows that other Turkish citizens faced with problems which were, ultimately, very similar to those faced by the applicants (the destruction of houses and various items of property) were able in a relatively short time to obtain satisfaction in the form of financial compensation.

The applicants did not take any such steps, however. They merely wrote letters to certain authorities asking for compensation. This point is worth emphasizing, as it proves that the aim pursued by the applicants was indeed to obtain financial compensation. As has been said, they could have brought an administrative action to obtain this, but omitted to take that step. Instead of pursuing that course of action, they chose the most precarious option in the circumstances, i.e. to bring criminal proceedings.

*
* *
*

We should emphasise here that the situation would have been entirely different if the applicants had chosen to bring an administrative action. The victim of an administrative act may in the first instance complain of non-pecuniary or pecuniary damage by filing a preliminary application with the authorities. The authorities must then reply within 60 days. Should they fail to reply within that period, the application is deemed to be dismissed. The plaintiff can then bring an administrative action by filing a simple application with the Administrative Court.

Applicants merely have to prove before the administrative courts that they have suffered damage in order to obtain compensation; they do not have to prove that the authorities have made an administrative error. Once the Administrative Court has established that the victim has suffered loss, it determines the amount of compensation to be paid to him or her.

It should be recalled that the Council of State applies the criterion of "objective liability of the authorities". On the basis of that criterion, which has been applied by the administrative courts

since 1965, the authorities are liable according to the principle that the burden of difficulties facing a nation should be shared by all citizens. It is not necessary to prove fault on the part of the Government's agents. It is sufficient to prove that damage has occurred as a result of the act complained of. The fact that the act in question has been committed by the authorities or by a third party does not prevent compensation from being awarded.

For example, where a vehicle was destroyed by shots fired by fighter aircraft, the Council of State, in its "Mizgin Yilmaz v/Ministry of the Defence" judgment of 21.03.1995 (E. No. 1994/5656, K. No. 1995/1262), found that "even if the authorities have not been negligent, the plaintiff must be awarded compensation in accordance with the principle that all citizens must share equally the burden of any constraints arising from tasks assumed by the State in the public interest and that such compensation is a necessary consequence of the "social" nature of the State ... Semdinli District Court's finding of damage and the expert report ordered by the Administrative Court show that the amount of compensation sought by the applicant is reasonable".

In a case in which the driver of a car was killed by police officers when he refused to stop at a checkpoint, Diyarbakir Administrative Court, in its "Sabriye Kara v/Ministry of the Interior" judgment of 27 January 1994 (E. No. 1990/870 and K. No. 1994/31), held that "the authorities had a duty to compensate the damage, whether or not they were at fault or had acted negligently. Moreover, there does not have to be a causal link between the damage and the authorities' acts. Where the authorities cannot avoid the adverse consequences of terrorist activities, they must pay the victims compensation in accordance with the "social" responsibility assumed by the State, given that such damage results from a *social risk`".

The Administrative Court has delivered a plethora of decisions to the effect that the authorities have "objective liability" (i.e. not fault-based). These show that the case-law in this area is consistent. We shall quote the following decisions as examples:

- Decision of the Council of State of 6.6.1995 in the Osman KAYA and Cemil KAYA v/Ministry of the Interior case: this concerned the destruction of the plaintiffs' house, loft, stable and all moveable property during fighting between the security forces and terrorists. The Council of State upheld Diyarbakir Administrative Court's judgment ordering the authorities to compensate the plaintiffs in accordance with the theory of "social risk". The Administrative Court held that the concept of the authorities' liability should not be limited to an administrative error or objective liability related to strict conditions, but should also comprise the so-called "social risk" principle.

- Judgment of Diyarbakir Administrative Court of 10.12.1991 in the Behiye TOPRAK v/Ministry of the Interior case; decision of the Council of State of 13 October 1993 in the same case: the plaintiff's husband was killed by terrorists while travelling in his minibus. The plaintiff complained of "loss of bread-winner" and claimed pecuniary and non-pecuniary damages. The Administrative Court found against the State on the basis of the theory of social risk. It held that the authorities were obliged to compensate damage caused by third parties which they were unable to prevent despite their duty to do so, even if they were not responsible for that damage. The Council of State upheld that judgment.

- Judgment of Diyarbakir Administrative Court of 28.04.1994 in the Münire TEMEL v/Ministry of the Interior case: the plaintiff's son was kidnapped and murdered by the PKK. Diyarbakir Administrative Court

ordered the authorities to compensate the plaintiff for pecuniary and non-pecuniary loss on grounds of their objective liability. It held that "all Turkish citizens have ... the right to a decent standard of living ... and to material and spiritual prosperity...". The Court held that it would be contrary to the principle of equality if the State were to compensate damage suffered as a result of public services provided by its own bodies (agents), but remained indifferent to damage suffered by its citizens. The Administrative Court delivered this judgment after its preliminary ruling had been quashed by the Council of State. The preliminary ruling had granted the plaintiff compensation for non-pecuniary damage but not for pecuniary damage.

- Judgment of Diyarbakir Administrative Court of 8.3.1994 in the Cüneyt ALPHAN v/Ministry of the Interior case: the plaintiff's house was burnt down during fighting between terrorists and security forces. The applicant claimed damages. Diyarbakir Administrative Court held that even where the authorities had not made an administrative error, they had to pay the applicant compensation on grounds of their "strict liability".

- Judgment of Diyarbakir Administrative Court of 25 January 1994 in the Hüsna KARA and Others v/Ministry of the Interior case: the plaintiff's husband was killed by unknown persons. The applicant sued the authorities for damages. The Administrative Court ordered the authorities to compensate the plaintiff on the basis of the theory of social risk, holding that as the plaintiff had had no part in any terrorist activity, her loss was not caused by her own negligence, but by difficult circumstances facing society.

- Judgment of Diyarbakir Administrative Court of 21.6.1994 in the Guli AKKUS v/Ministry of the Interior case: the plaintiff's common-law husband was killed by security forces during an illegal demonstration. The Administrative Court ordered the authorities to compensate the plaintiff's loss. The Council of State quashed that judgment on the ground that the applicant and her common-law husband were not legally married. The Administrative Court upheld its own decision, however, and ordered the authorities to compensate the plaintiff. It held that the plaintiff and her common-law husband had been living together as man and wife. It held further that the authorities should compensate damage caused by their agents, even if that damage had been caused by negligence.

*
* *
*

The foregoing case-law shows that if the applicants had applied to the administrative courts, they could have obtained an order against the authorities for compensation of their loss on grounds of objective liability. The administrative courts would not have needed to establish that the soldiers had unlawfully and negligently destroyed the houses in question. They would merely have had to establish the damage and to determine the amount of compensation to be awarded.

One should not lose sight of the fact that the applicants, like all the other villagers whose houses were damaged, were seeking to obtain compensation (see paragraphs 54, 55, 56, 57, 61, 65, 66, 68, 69, 71, 73, 75).

We note here that the continuing activities of the security forces did not in any way prevent the applicants from applying to the courts for compensation. Admittedly, the PKK was very active in the area in which the applicants' village was situated. However, the applicants went to Diyarbakir after the events of November 1992.

Once the applicants and villagers arrived at Diyarbakir, they applied to certain public authorities, including Government authorities i.e. the Regional Governor and the President of the Republic, for compensation (see, for example, paras. 83 and 99).

These applications cannot, however, be considered to be legal proceedings under Turkish law. The applicants merely needed to consult a lawyer to learn of the possibility of bringing an action for damages before the Administrative Court (see para. 122).

We note also, in this respect, that it has not been established before the Commission that the Administrative Court judges do not rule impartially in cases in which actions of the security forces are challenged. Nor has it been proved that there is a general lack of confidence in the remedies available under administrative law in the region in question.

The evidence obtained by the Commission during its investigation into whether the complaints were founded shows that the members of Diyarbakir Human Rights Association failed to inform the applicants properly of the possibility of applying to the administrative courts (see para. 96) or misinformed them as to the appropriate national authorities to which they should apply (see para. 115). In any event, they advised the applicants to lodge an application directly with the Commission (para. 130).

It also transpires from the witness statements obtained by the Commission that the real aim of the members of Diyarbakir Human Rights Association in lodging several individual applications was to argue before the international courts that domestic remedies were ineffective in an area which had been declared to be in a state of emergency (see paras. 115 and 130) and that they gave the applicants bad advice.

Consequently, we believe we have shown that the applicants had an effective remedy in Turkish law in that they could have submitted to the administrative courts the complaints which they now raise before the Commission. Although the financial compensation which they stood to gain flowed from the principle of the State's objective liability for acts allegedly committed by the security forces, such compensation cannot be paid until the administrative courts have established that damage has been caused due to the State's failure to comply with its duty to strike a fair balance between individual rights and the legitimate rights of the general public. Such a finding would have been sufficient compensation for the non-pecuniary loss suffered by the interested parties, especially as, in this case, they confined their claims to compensation for the losses suffered.

For the reasons set out above, we do not find that there has been a violation of Article 6 and 13 of the Convention.

As regards the complaint under Article 3 of the Convention, it is our opinion that in the light of the additional evidence obtained during the investigation and on the basis of all the considerations which we have set out here, the Commission cannot examine the merits of the case, as domestic remedies have not been exhausted.

DISSENTING OPINION OF Mr. GÖZÜBÜYÜK
ON THE ISSUES UNDER ARTICLE 8 OF THE CONVENTION
AND ARTICLE 1 OF PROTOCOL No. 1

I refer to the dissenting opinion which I share with Mr. Weitzel on the issues under Articles 3, 6 and 13 of the Convention. For the reasons set out in that opinion, my view is that the Commission cannot examine the merits of the complaints under Article 8 of the Convention

and Article 1 of Protocol No. 1 in this case, as domestic remedies have not been exhausted.

DISSENTING OPINION OF Mr. WEITZEL
ON THE ISSUE UNDER ARTICLE 25 PARA. 1 OF THE CONVENTION

For the same reasons as those set out in Mr. Danelius' dissenting opinion, my view is that Turkey cannot be considered to have failed to comply with its obligations under Article 25 para 1 of the Convention.

(Or. English)

PARTLY DISSENTING OPINION OF MRS. J. LIDDY

I agree with the conclusions and reasoning of the majority of the Commission in this Report, except in relation to Article 3 of the Convention. The violations of Article 8 of the Convention and Article 1 of Protocol No. 1 were serious, but there is insufficient evidence that the acts in question were carried out in such a manner and resulted in such suffering for each of the seven applicants concerned as to constitute inhuman or degrading treatment, having regard to the minimum level of severity required by the case-law of the Convention organs.

(Or. French)

PARTLY DISSENTING OPINION OF Mr. I. CABRAL BARRETO

Much to my regret, I cannot share the opinion of the majority of the Commission regarding the violations of Articles 3, 13 and 25 of the Convention, for the following reasons:

As regards Article 3 of the Convention, I consider that the measures taken by the security forces, i.e. burning the applicants' houses and obliging them to leave their village and gather in Diyarbakir, must be examined in the context of the general situation prevailing in the area, i.e. the fight against the members of the PKK and attempts to "strand the fish".

I find it difficult to accept that the measures in question, although objectively speaking they were serious, were designed to humiliate or degrade the Kelekkçi villagers.

In my view there has been a violation only of Article 8 of the Convention and Article 1 of Protocol No. 1 to the Convention.

As regards Articles 13 and 25 of the Convention, I share the partly dissenting opinion of my colleague, Mr. Hans Danelius.

(Or. English)

PARTLY DISSENTING OPINION OF MR. N. BRATZA
JOINED ON THE WHOLE OPINION BY MR. H.G. SCHERMERS
AND ON THE ISSUE UNDER ARTICLE 13 OF THE CONVENTION
JOINED BY MR. C. A. NØRGAARD

I agree with the conclusion and reasoning of the majority of the Commission in respect of the issues under Articles 3, 5, 8, 14, 18 and 25 of the Convention and under Article 1 of Protocol No. 1. However, on the question of remedies, I see the principal issue as one of the effectiveness of the remedies available in the applicants' case (thereby giving rise to problems under Article 13 of the Convention), rather than of access to a court under Article 6.

Article 6 of the Convention guarantees, inter alia, a right of effective access to a court for the determination of civil rights and obligations and further lays down certain procedural safeguards to ensure the fair determination of disputes concerning such rights and obligations. The Article, as interpreted by the Court, protects against unjustified restrictions of a substantive or procedural nature on effective access to Court. But it is not primarily designed to guarantee the effectiveness of the remedies available in the domestic legal system. Further, it is well established that the right of access to a court guaranteed by the Article cannot be interpreted as conferring a right to bring criminal proceedings, or to have criminal proceedings brought, against a third person.

Article 13, on the other hand, is specifically designed to ensure that persons with an arguable claim to be victims of a violation of the rights guaranteed by the Convention are provided by a national authority with a remedy which is an effective remedy. Such remedies include but are not limited to Court remedies.

In the present case the Government have set out in detail the various remedies which it is claimed were at all times open to the applicants, including in particular an action in the Administrative Court for compensation under Article 125 of the Turkish Constitution, as reflected in additional Article 1 of the Law 2935 of 25 October 1983. The applicants have not disputed the general scheme of the remedies described by the Government or the theoretical existence of a right of action under Article 125; nor do they dispute that it was in principle open to them to bring such an action. Their complaint is rather that neither this nor any of the other suggested remedies was an effective remedy in the special circumstances of the destruction of villages and the expulsion of villagers by the security forces in South-East Turkey.

It was similarly the lack of effectiveness of the available remedies which was at the heart of the Commission's admissibility decision, rejecting the Government's submission that the applicants had failed to exhaust their domestic remedies. The Commission in its decision placed special reliance on two factors which in its view cast doubt on whether the remedies were effective remedies: the fact that, although the destruction of homes and property had been a frequent occurrence in South-East Turkey, no example had been given of compensation being awarded to villagers for damage in circumstances directly similar to those in the present case; and the fact that no significant examples had been given of the successful prosecution of members of the security forces for the destruction of villages and the expulsion of villagers.

In paragraphs 235-238 of its Report, the Commission not only confirms this opinion but notes that it has been reinforced by the evidence taken in the present case which demonstrates that, despite the various petitions made by the Kelecki villagers, no State authority took up the plight of the villagers or referred them to a competent authority. This in the view of the Commission made it unrealistic to expect the villagers to pursue theoretical Administrative Court or other remedies, when the investigating mechanism in the emergency area was deaf to allegations concerning the security forces.

I entirely agree with this view. But while the conclusion to be drawn from this is in the view of the majority that the applicants did not have effective access to a tribunal, I prefer to see it rather as a case where the remedies which were in theory available under domestic law, including court remedies, were in the circumstances of the case illusory and ineffective.

For these reasons I have voted in favour of a violation of Article 13 and not Article 6 of the Convention in the present case.

(Or. English)

PARTLY DISSENTING OPINION OF MR. G. RESS

I am not in agreement with the majority of the Commission on the question of whether there has been a violation of Articles 3 and 6 of the Convention. Moreover, my reasons for finding a violation of Article 13 of the Convention differ from those of the majority.

As regards Article 3 of the Convention, I share the views expressed by Ms. Liddy and Mr. Cabral Barreto that the measures taken in this case, did not so severely disregard the situation of the seven applicants that they can be considered as inhuman or degrading treatment. Certainly more careful measures could have been adopted in the situation, but leaving the applicants without any help when their houses were destroyed cannot be regarded as treatment coming within the scope of Article 3.

Concerning the application of Articles 6 or 13 of the Convention, I share the views of MM Bratza, Schermers and Nørgaard. One point should be added:

The Government have tried to demonstrate that actions in the administrative courts for compensation on the basis of the doctrine of "social risk" were open to the applicants. However, they have not shown any specific case realistically comparable to the situation of destruction of villages perpetrated by armed forces of either the State or unknown denomination. One would normally expect that, having in mind the events which took place in South East Turkey in the last years during the fight against terrorism, a multitude of actions in the administrative courts for compensation should either be pending or already decided. One would furthermore expect that the Government, who do not deny that the destruction of the applicants' houses occurred, would, on the basis of their own contentions, and on the basis of the doctrine of "social risk", not contest the objective responsibility of the State to grant compensation in these cases.

Whether the PKK or the security forces destroyed the houses seems to be irrelevant in the light of the doctrine of "social risk", since there seems to be a general obligation for the State to prevent such events by adequate measures wherever they arise. If they occur nevertheless, be it with or without fault on the part of the State authorities, then the State is responsible and liable for not having taken adequate measures to prevent them. The Council of State established this responsibility even in a case of damage caused by an unidentified aircraft. Therefore it seems even the more surprising that there is no substantial evidence of an administrative court practice for such situations in South East Turkey.

This can probably only be explained by the fact that people fear to seize the courts, or that they are discouraged to do so by local authorities. It might be a question of the whole climate which creates a difficult situation for both the State and its citizens, where the mere existence of these remedies is not sufficient for their effectiveness. Furthermore, it strikes me in this context, that the Government have not themselves proposed specific compensation in cases like those of the applicants, where the responsibility of the State to pay compensation according to the doctrine of "social risk" seems to be evident even on the basis of the Government's contentions. This is another element which makes it rather difficult to conclude that the remedies provided by the administrative courts are effective even

conceding that there is a difference between possible court actions and their outcome and the ex ante acceptance of potential claims by the Government.