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

CASE OF ERGİ v. TURKEY

(66/1997/850/1057)

JUDGMENT

STRASBOURG

28 July 1998

In the case of Ergi v. Turkey[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr F. GÖLCÜKLÜ,
Mr A.N. LOIZOU,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr B. REPIK,
Mr E. LEVITS,
Mr V. TOUMANOV,

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

Having deliberated in private on 27 April and 27 June 1998,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 9 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 23818/94) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr Muharrem Ergi, on 25 March 1994. The application was brought on his own behalf, on behalf of his deceased sister Havva Ergi as well as on behalf of his niece.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46). The object of the request was to obtain a decision as to

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Notes by the Registrar

1. The case is numbered 66/1997/850/1057. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 2, 8, 13, 14, 18 and 25 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyers who would represent him (Rule 30).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Ryssdal, the then President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr A.N. Loizou, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr G. Mifsud Bonnici, Mr B. Repik, Mr E. Levits and Mr V. Toumanov (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently, on 9 February 1998, Mr R. Bernhardt, the then Vice-President of the Court, replaced Mr Ryssdal, who was unable to take part in the further consideration of the case (Rule 21 § 6, second sub-paragraph).

4. As President of the Chamber (Rule 21 § 6), Mr Ryssdal, acting through the Registrar, had consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 § 1 and 38). Pursuant to the orders made in consequence, the Registrar received the applicant's and the Government's memorials on 12 and 20 February 1998 respectively. On 9 April 1998 the Secretary to the Commission indicated that the Delegate would submit her observations at the hearing.

On 15 April 1998 the Commission supplied a number of documents from its case file, including the verbatim record of the hearing of witnesses before the delegates in Ankara, which the Registrar had requested on the instructions of the President of the Chamber.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 21 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mrs D. AKÇAY, Ministry of Foreign Affairs, *Co-Agent*,
Mr E. GENEL,
Ms A. EMÜLER,
Ms M. GÜLŞEN,
Ms A. GÜNYAKTI,
Mrs N. AYMA, *Advisers*;

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

(c) *for the applicant*
Ms F. HAMPSON, Barrister-at-Law,
Mr K. BOYLE, Barrister-at-Law,
Ms A. REIDY, Barrister-at-Law, *Counsel*.
The Court heard addresses by Mrs Thune, Ms Hampson, and Mrs Akçay.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

6. The applicant, Mr Muharrem Ergi, a Turkish citizen of Kurdish origin, was born in 1954 and lives at Incirliova, Aydın.

7. The application was brought on behalf of the applicant himself, his deceased sister, Havva Ergi, and her young daughter. It concerns complaints relating to an incident on 29 September 1993 in which Havva Ergi was killed.

The village in which the events took place has two names: an old Kurdish name of Gisgis and an official Turkish name of Kesentaş. The latter name has been used below.

8. The facts in this case are disputed.

A. The applicant's version of the facts

9. A week before the incident on 29 September 1993 in the applicant's village of Kesentaş, Cuma Bali, one of two "collaborators" in the village had been killed by the PKK (Workers Party of Kurdistan). The day before the incident, Ibrahim Halil, the other "collaborator" had moved, under the protection of Ziyaret village guards and apparently with the assistance of gendarmes, from the applicant's village to Ziyaret, a village five kilometres away. A "collaborator" is described by the applicant as someone spying for the State as distinct from members of the village guards.

10. On 29 September 1993, the security forces set up an ambush in the vicinity of the village purportedly to capture members of the PKK. They consisted, *inter alia*, of a commando unit and village guards from Ziyaret. Security forces were located in or near a cemetery 600 metres

north-west and south of the village near the asphalt road. The security forces opened fire. The shooting lasted for about one hour and consisted of indiscriminate bombardment of civilian houses. It led to the death of the applicant's sister, Havva. No members of the PKK were killed or captured.

11. The applicant's house was in the middle of the village. At the time of the incident, his father and his sister Havva were sleeping on the balcony, on the upper part of the house. As soon as the firing started, Havva and his father took shelter inside the house, but Havva went out on the veranda to collect something. She was hit in the head by a bullet when she was on the threshold and died immediately.

12. On the following morning, the applicant's uncle Hasan Ergi informed the Ergani gendarmerie commander, possibly by telephone, that the applicant's sister had been killed. The commander was surprised to learn that only one person had died and stated that he expected at least twenty people to have died. The applicant's uncle told the commander that he would apply to the public prosecutor. However, the commander told him to go home and said that he would himself inform the public prosecutor.

13. Towards noon, the public prosecutor, a doctor and some soldiers came to the applicant's house and an autopsy was carried out. While the autopsy was being undertaken inside the applicant's house, the applicant's brother, Seyit Battal Ergi, asked the soldiers why his family were being persecuted in this way. A non-commissioned officer replied that, if the villagers accepted to become village guards, the persecution would stop and the reason why they shot at the village was that they saw terrorists at its entrance and that the indiscriminate firing at the entire village was to be explained by the clumsiness of the troops. The doctor, after completing the autopsy, said nothing except to present his condolences. He also issued a burial certificate. The applicant and his family were not asked by the public prosecutor about their version of the circumstances of the shooting. The gendarmerie officer İsa Gündoğdu, drew up the incident report without interviewing or seeking any statements from the villagers or members of the commando unit involved. No cartridges were found by the gendarmes in the area in which the PKK were said to be located during the incident. There is no evidence that the PKK were in fact present in the vicinity during the incident.

14. The bullet which killed the applicant's sister was described in the ballistics report as a standard NATO 7.62 which was used by the Turkish security forces as well as by many other forces. The shot could not have been fired from the east since it would have been blocked by the walls of

the houses. It could only have been fired from the south or south-east from higher ground, which was where the security forces were stationed on a hillside.

15. There had been no communication between the public prosecutor and the family since the day of the autopsy. He and his family remained in the dark as to the official view of the incident and did not know whether there had been any investigation or prosecution in respect of the shooting. He stated that the village of 200 households had now been reduced to twenty families, the rest having abandoned their homes as a result of military incidents such as the one which led to his sister's death.

B. The Government's version of the facts

16. The security forces carried out an ambush operation in the vicinity of the village to catch the PKK members who were active in the area. Units were concealed in the north-west and engaged in an armed clash with the PKK at a point to the south-east of the village, near the cemetery. Their position was 100 metres above the PKK. There were no units positioned to the south and there would have been no point in having men there since the PKK would not come from the south. The security forces could not therefore have fired the shot from the south which killed the applicant's sister.

17. During the clash, only a few houses were slightly damaged, which does not support the allegations of prolonged, indiscriminate firing by the security forces.

C. Proceedings before the domestic authorities

18. A preliminary investigation into the incident was opened by the public prosecutor of the Ergani district. An autopsy was carried out on the applicant's sister on 30 September 1993 in his father's house. According to the medical examiner's report of that date, an external examination disclosed a bullet wound to the head, probably an entry wound. The skull was opened and a 7.62 mm bullet found in the right parietal lobe and removed. Time of death was estimated at about ten to twelve hours prior to the examination.

19. In a letter dated 7 October 1993 addressed to the Ergani public prosecutor, gendarmerie major Ahmet Kuzu reported that the security forces had carried out an ambush at the entrance of Kesentaş village. The security forces opened fire on terrorists, who fled towards the northerly part of the village and a search party was sent in that direction without making

any contact. He stated that it was reported that a telephone call had been made to the district gendarmerie headquarters at Ergani at 8 a.m. on 30 September 1993, informing the latter that Havva Ergi had been killed in the clash. An investigation took place at 10 a.m. that day in the presence of the public prosecutor. Copies of the incident report and a sketch of the location were enclosed with the letter.

20. On 12 December 1993, the Ergani public prosecutor, Mustafa Yüce, considering that the matter lay outside his jurisdiction, transferred the file to the relevant public prosecutor attached to the Diyarbakır National Security Court where the matter is still pending. The decision of lack of jurisdiction named the defendants as "members of the illegal PKK organisation" and the offence as engaging in armed combat with the security forces and homicide. It indicated that Havva Ergi had died as a result of gunfire occurring in the course of an armed clash which broke out between members of the security forces who were carrying out an ambush operation on the outskirts of Kesentaş village and members of the PKK who were approaching the village.

21. On 1 April 1994, the regional criminal police laboratory issued its expert ballistics report. It found that the bullet was 7.62 mm calibre and fired by a weapon with a barrel containing four ridges which rotated clockwise.

22. In a letter dated 8 December 1994 from the Principal Public Prosecutor's Office at the Diyarbakır National Security Court to the Ministry of Justice, it was reported that during the ambush operation clashes spread to the village and as a result a bullet hit the doorframe of a house, ricocheted and hit Havva Ergi who was standing near the door. The investigations into her death were still under way. A ballistics examination revealed that the bullet was misshapen and no material information could be obtained which could lead to a conclusion as to the weapon used. No empty cartridges were found at the scene. Thus, there was no information in the file on the weapon which had caused the death. Since the fighting started at 9.30 p.m. and continued into the night, there was no eyewitness evidence as to what was seen or heard. Proceedings were continuing with a view to apprehending the members of the PKK involved in the armed clash but since they did not return to the scenes of clashes for a long time it would take time to identify and arrest them. As regards the allegations made in the applicant's statement of 9 October 1993 taken by the Human Rights Association ("the HRA"), the claim that the security forces opened harassing fire on the village was false and was intended to denigrate the security forces involved in the fight against terrorism. It was the duty of security forces to maintain order and protect the population so there could

be no question of them opening harassing fire on the village. The incident in Kesentaş resulted from the type of ambush operation commonly carried out by the security forces on roads leading into and out of villages.

23. By letter dated 26 December 1994, the Ministry of the Interior informed the Ministry of Foreign Affairs that on 29 September 1993 the security forces had come to the village with the purpose of apprehending terrorists whom they had heard were coming to the village. The security forces were attacked by the PKK. Village guards from Ziyaret were not involved in the operation. No raid was carried out on the village which was due to have village guards of its own. Although villagers had applied for posts as village guards they had not in fact been recruited since no suitable posts were available. At the time of the incident there were 150 households, not 200 as alleged by the applicant (see paragraph 15 above), and currently there were 180 households living there, not twenty, as alleged by the applicant (ibid.).

D. The Commission's findings of fact

24. Since the facts of the case are disputed, particularly concerning the events in or around June 1993, the Commission conducted an investigation, with the assistance of the parties, and accepted documentary evidence, including written statements, and oral evidence taken from four witnesses by three delegates at a hearing in Ankara on 7–8 February 1996.

25. As regards written evidence, the Commission had particular regard to a statement by the applicant dated 9 October 1993 taken by the HRA in Diyarbakır, and an incident report of 30 September 1993, drawn up by İsa Gündoğdu, commander of the Ergani central gendarmerie, and signed by other gendarmes. The report concluded that Havva Ergi must have been killed accidentally as a result of shots fired by members of the PKK in the course of clashes with members of the security forces. Furthermore, the Commission had regard to a sketch map of the incident location dated 30 September 1993, drawn up and signed by İsa Gündoğdu. It indicated, *inter alia* by numbers, the location of the deceased's body, the terrorists' firing position (no. 7), the security forces' firing position (no. 9), the road and the village slopes.

26. In addition, the Commission had regard to two statements dated respectively 30 October and 3 November 1995.

The first statement, signed by the applicant and by officers of the anti-terrorism department, was set out in the form of questions and answers. The applicant was referred to his declaration of means and confirmed his signature. He was asked whether he had made an application to the

European human rights association or in Turkey and if so, to provide further explanations. He stated that he had applied to the HRA regarding his sister, that he had not applied to the Kurdish Human Rights Project and that he had applied to the European Commission of Human Rights indirectly through the HRA. He gave details of his finacial position.

The second, signed by the applicant and by a public prosecutor, indicated that the applicant had been shown his declaration of means and that he confirmed that it looked like his. He had explained that he had made an application in 1993 to the HRA and to the European Commission of Human Rights. His application had not concerned anything else and he had not wished to add anything.

27. The oral evidence included statements by the applicant himself, Ahmet Kuzu (gendarmerie commander in the district of Ergani), İsa Gündoğdu and Mustafa Yüce (Ergani public prosecutor). The following witnesses had also been summoned but they did not appear: Bekir Selçuk (Principal Public Prosecutor at the National Security Court, Diyarbakır), Senai Baran (*muhtar*), Ibrahim Halil Ergi (father of Havva Ergi), Seyit Battal Ergi (brother of Havva Ergi), Hasan Ergi (uncle of Havva Ergi) and Hacere Ergi (mother of Havva Ergi).

28. The verbatim record of the hearing held on 7–8 February 1996 contained the following passages of relevance to the Government's preliminary objection as to the validity of the application (see paragraph 60 below):

> "Mr GÜNDÜZ: We have your petition before us. It bears your signature. Muharrem Ergi, isn't it:
>
> Mr Muharrem ERGI: Yes.
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> Mr GÜNDÜZ: Mr Ergi, do you know about the application that was written later on your behalf? Did you see the application that was submitted to the Human Rights Commission?
>
> Mr Muharrem ERGI: Yes.
>
> Mr GÜNDÜZ: Certainly you don't speak English, do you?
>
> Mr Muharrem ERGI: No, not much.
>
> Mr GÜNDÜZ: Again there is a mistake. You are referred to as a woman. Of course, the name Muharrem is not so usual and that is why. This is your signature. You said, 'We went together with my father and mother', didn't you?
>
> Mr Muharrem ERGI: Yes."

Mustafa Yüce had stated to the delegates that he had been convinced that the incident report had been accurate in concluding that the PKK had been responsible and that no other allegation to the contrary had been made. There had been no reason to think that the record drawn up by the security forces had not been accurate. If an allegation had been made that Havva Ergi had been killed by gunfire from the security forces, he would have been obliged to go to the village. He believed that he would have received a complaint if the security forces had been responsible.

29. In relation to the oral evidence, the Commission had been aware of the difficulties attached to assessing evidence obtained orally through interpreters. It therefore paid careful attention to the meaning and significance which should be attributed to the statements made by witnesses appearing before its delegates.

In a case where there were contradictory and conflicting factual accounts of events, the Commission particularly regretted the absence of a thorough domestic judicial examination or other independent investigation of the events in question. It was aware of its own limitations as a first-instance tribunal of fact. In addition to the problems of language adverted to above there was also an inevitable lack of detailed and direct familiarity with the conditions pertaining in the region. Moreover, the Commission had no power to compel witnesses to appear and testify. In the present case, while ten witnesses had been summoned to appear, only four in fact had given evidence before the Commission's delegates. Significantly, only one of two public prosecutors who were summoned had appeared and, despite repeated requests by the Commission, the Government had not identified any officers who had participated in the operation for the purpose of giving evidence before its delegates. The Government also had not provided complete documentary materials relating to the operation. The Commission had therefore been faced with the difficult task of determining events in the absence of potentially significant testimony and evidence.

The Commission's findings can be summarised as follows.

1. General background

30. Kesentaş village was located on a slope, the northern part higher than the southern, with steep mountains behind to the north. There were vineyards around the village; a road running east-west through the village which continues north-east between the mountains; a wider main road to the south of the village running roughly east-west and to the south of this road the ground slopes upwards again. The village accordingly lay in a depression. The terrain to the north was rough and steep, with a river bed running down to the village from a north/north-eastern direction.

31. The Commission found from the evidence of the witnesses that PKK activity in the area around the village in or around 1993 had been significant. There had been at least two incidents involving the village shortly before the operation on 29 September 1993. In one incident, a villager ,Cuma Bali, had been shot dead and in the other, another villager, Ibrahim Halil, and his father had left the village under gendarmerie protection after his house had been shot at and moved to Ziyaret where they joined the village guards. Halil had been in the mountains with the PKK and had returned of his own free will. The timing of the latter incident had not been established. The applicant's written statement to the HRA referred to the move from the village taking place the day before the incident, whereas it had appeared from the applicant's oral testimony that he had been absent from the village and he had had no real recollection of what he might have been told by others. Major Kuzu, who had remembered helping the family move, did not specify the date.

32. The PKK had tended to arrive from the north of the village under cover of the terrain, requiring the villagers to provide food and medicine. There had been no village guards in the village and no permanent security presence in the vicinity. The main road to the south of the village had been patrolled from time to time.

33. At Ergani, about 17 kilometres to the east, there was a central gendarmerie headquarters under the command of İsa Gündoğdu, a non-commissioned officer ("NCO"). There was also a district gendarmerie headquarters, under the command of Major Kuzu, and a separate commando unit. Major Kuzu was in overall command of the district and central gendarmerie and had frequently been absent in his additional capacity as commander of a commando unit which had often been in the field.

2. Events in Kesentaş on 29 September 1993

34. The Commission observed that there had been no detailed investigation or judicial finding of facts on the domestic level as regards the events which occurred in the village of Kesentaş on 29 September 1993. The Commission had accordingly based its findings on the evidence given orally before its delegates or submitted in writing in the course of the proceedings; in this assessment the co-existence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact and in addition the conduct of the parties when evidence is being obtained may be taken into account (see, *mutatis mutandis*, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 65, § 161).

35. The Commission noted that the two gendarmes had stated in evidence that they had not in fact been at the village when the clash had occurred. Major Kuzu had stated that he was in an operation elsewhere

with commandos. NCO İsa Gündoğdu had arrived after the firing had stopped and, although he followed in the direction of the allegedly fleeing PKK, he had seen no sign of them. The Commission had requested the Government on two occasions prior to the hearing in Ankara to identify, for the purpose of taking evidence, gendarmerie officers who had been present during the operation. The Government had not responded. The Commission recalled that the applicant had not been in the village either and his testimony concerning the events of that night had been based on what he had remembered being told by members of his family or villagers. Members of the applicant's family present during the clash had not appeared as witnesses although summoned by the delegates. There had therefore been no direct eyewitness evidence before the Commission as to what had occurred, which was regrettable.

36. Further, the documentary evidence had also been of second-hand quality. The incident report and sketch had been drawn up by İsa Gündoğdu, not by any gendarmerie officer involved in the operation and, from İsa Gündoğdu's testimony before the delegates, it is not apparent that he questioned the security forces on the spot in any detail. Indeed his contact with them appeared to have been limited to radio contact, by way of coded transmissions. The Government had failed to comply with the Commission's request to be informed of the name and of the unit of the commanding officer of the unit involved in the operation and to be provided with the copy of the logbook entry, register or field report which recorded the operation.

37. The Commission accordingly had little direct evidence as to what had occurred on the night of 29 September 1993. As to whether a clash had in fact taken place, the Commission noted that it had been alleged by the applicant that an indiscriminate bombardment of the village had been carried out in retaliation for the incidents in the village in which "collaborators" were, in one case, shot and, in the other, forced to leave. The Commission recalled that Major Kuzu had been directly involved in the move of the threatened villager and that he did not consider that the PKK had shot at the villager, but that it had been the other villagers who would have killed him as they wanted to know why he had left the organisation. İsa Gündoğdu commented that a great many people in the village had joined the organisation. The applicant's allegation that the bombardment of the village could have been motivated by a desire to teach the village a lesson was not totally without substance.

38. The Commission noted several puzzling features. Major Kuzu had been the district gendarmerie commander but had had no apparent knowledge of, or role in, an operation within his jurisdiction, though he had felt able to give firm opinions as to what must have occurred. The night the

incident occurred, İsa Gündoğdu of the central gendarmerie had had to borrow an armoured personnel carrier from the police because those belonging to the gendarmerie were being used in a mission. İsa Gündoğdu had stated that the firing at the village had only lasted about five minutes whereas the letter from the public prosecutor at the Diyarbakır National Security Court dated 8 December 1994 referred to fighting that had started at 9.30 p.m. and continued into the night, which appeared to corroborate the applicant's version of events, derived from his family, that the firing had continued for over an hour. The applicant had stated that, as might be expected from sustained shooting, there was widespread damage to the village. He had gone round the village, noting damage to about a hundred houses and had taken a few photographs which indeed revealed bullet marks on two houses. İsa Gündoğdu who had also been in the village the next day had stated that there was damage only to two or three houses and to a car, from at most fifteen bullets. This is another area which could have been elucidated by further information provided by the Government. İsa Gündoğdu stated that photographs of the village had been taken by the public prosecutor. These had not been provided by the Government, which had stated that no photographs had been taken.

39. As regards the details of the clash which had been given, the Commission was again hampered by a lack of direct information. It had initially been provided with a blurred copy of the sketch map by İsa Gündoğdu with the bottom section omitted. This copy showed a key indicating the positions of the terrorists (no. 7) and the security forces (no. 9). A no. 7 had clearly appeared to the east of the village. A no. 9 had appeared to the north-west. There had also been a squiggle in the south not dissimilar to that portraying the security forces' position to the north-west and which contained a blurred figure. This figure had seemed to be a 9. İsa Gündoğdu when questioned stated that the terrorists were to the south and indicated on the sketch that they would have been close to the position marked with the blurred figure. If the blurred figure had been a 9, this had been a mistake. Major Kuzu had also been adamant that there would be no security forces in the south. In brief, there would be no point: the terrain had not been favourable and they had known the PKK would come from the north and would flee in that direction. Since Major Kuzu had not been present during the clash, on his own testimony, the Commission felt unable to give his evidence much weight. İsa Gündoğdu had based his sketch on what he had heard from the units involved – apparently a brief radio contact. It was strange that at the time he appeared to have marked the security forces as having been present in the south yet was now certain that this must have been a mistake. Many months after the hearing of the witnesses, the

Commission was provided with a clearer copy of the sketch map in which the blurred figure to the south of the village had, identifiably, been a 9, which represented the security forces.

40. The Commission agreed with the submissions of the applicant that, given the south-facing position of the balcony and the position of the neighbouring houses, in particular a high wall to the east, it was probable that the bullet which killed Havva Ergi was fired from the south or south-east. The Government had not contested this.

41. Having regard to the failure of the Government to provide the documents and information referred to above, the Commission found that strong inferences could be drawn supporting the applicant's allegations that the security forces had opened fire around the village for some time and that units of the security forces had been present towards the south. There was nonetheless insufficient material before the Commission to support a finding that the operation of 29 September 1993 had not been an ambush which led to a clash as alleged but a mission of retaliatory punishment. The Commission was unable to find it established that the bullet which had killed Havva Ergi had been fired by the security forces. It did find however that there was significant evidence indicating that it may have been.

3. Investigation by the authorities

42. The death of the applicant's sister had been reported to the authorities at about 8 a.m. on 30 September 1993. The public prosecutor accompanied by İsa Gündoğdu and a number of gendarmes arrived at the village. An autopsy had been carried out in the Ergi house and a bullet removed which had later been sent for forensic examination. The public prosecutor had talked to a number of persons. However, while İsa Gündoğdu had referred to the prosecutor conducting interviews, he had confirmed that he had not incorporated any such information in his own incident report and it had not been apparent that he had in fact witnessed any statements being taken. On the instructions of the prosecutor, İsa Gündoğdu had looked for cartridges in a number of locations, particularly to the south. None had been recorded as having been found.

43. Another public prosecutor, Mustafa Yüce, had taken over the investigation on his return from leave. On 12 December 1993, he had issued a decision of lack of jurisdiction indicating that the PKK were the suspects for the killing. He had based his decision on the incident report and sketch by İsa Gündoğdu. He had not conducted any interviews of family members, villagers or military personnel. No statements had been taken from such persons by any other public prosecutor.

It had not been apparent from the incident report in question that it was the PKK who had fired the bullet which killed the applicant's sister. Furthermore, the sketch map accompanying the report appeared to place security forces to the south and north-west and terrorists to the east but there had been no plan of the Ergi house and neighbouring houses which clarified from which direction the bullet was likely to have been fired. Nor had there been any explanation in the text of the report as to the location of the security forces.

44. Following the decision of lack of jurisdiction, the file had been transferred to the public prosecutor's office at the Diyarbakır National Security Court. Except for the ballistics report issued on 1 April 1994, no documents had been provided relating to any investigatory measures since that date.

45. Major Kuzu had stated to the delegates that there was a fundamental principle in the planning of military operations that these be not moved into civilian areas. In this incident, the plan had been to restrict the activity in the north of the village but the PKK had not approached them from the expected side. No military inquiry or investigation had been carried out as to the conduct of the operation. Major Kuzu, having seen the incident report and sketch by İsa Gündoğdu, forwarded them to the public prosecutor and took no further action.

II. RELEVANT DOMESTIC LAW

46. Article 125 of the Turkish Constitution provides as follows:

> "All acts or decisions of the administration are subject to judicial review...
>
> The administration shall be liable to indemnify any damage caused by its own acts and measures."

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

48. The Criminal Code contains provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450). In respect of these offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Turkish 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 (Article 153), 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 (Article 165).

49. 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 Article 89 of the Military Criminal Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the relevant authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (sections 93 and 95 of Law no. 353 on the Constitution and Procedure of Military Courts).

50. 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 Supreme Administrative Court; a refusal to prosecute is subject to an automatic appeal of this kind.

51. Proceedings may be brought against the administration before the administrative courts in respect of fault committed in the performance of official duties. Other illegal acts or omissions by civil servants, be it a crime or a tort, which result in material or moral damage may be the subject of a claim for compensation before the ordinary civil courts.

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

53. The applicant's representatives have previously pointed to certain legal provisions which in themselves weaken the protection of the individual which might otherwise have been afforded by the above general scheme.

PROCEEDINGS BEFORE THE COMMISSION

54. In his application (no. 23818/94) to the Commission introduced on 25 March 1994 Mr Ergi, relying on Articles 2, 8, 13, 14 and 18 of the Convention, complained of the unlawful killing of his sister by soldiers.

55. The Commission declared the application admissible on 2 March 1995. In its report of 20 May 1997 (Article 31), it decided to pursue its examination of the application (unanimously) and expressed the opinion that there had been a violation of Article 2 on account of the planning and

conduct of the security forces' operation and the failure to carry out an effective investigation into the death of the applicant's sister (unanimously), that no separate issue arose under Article 8 (unanimously) or under Article 13 (twenty-two votes to nine); that there had been no violation of Article 14 or Article 18 (unanimously); and that Turkey had failed to comply with its obligations under Article 25 (thirty votes to one). The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

56. At the hearing on 21 April 1998 the Government, as they had done in their memorial, invited the Court to hold that the case should be declared inadmissible since the application was invalid or, in the alternative, since the applicant had failed to exhaust domestic remedies. Should the Court not uphold any of their preliminary objections, the Government requested it to hold that there had been no violation of Articles 2, 8, 13, 14, and 18 of the Convention and that there had been no failure on the part of the respondent State to comply with its obligations under Article 25 of the Convention.

57. On the same occasion the applicant reiterated his request to the Court stated in his memorial to find violations of Articles 2, 13, 14 and 18 of the Convention, that Turkey had failed to comply with Article 25 and to award just satisfaction under Article 50 of the Convention.

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

58. The Government raised two preliminary objections to the Court's jurisdiction. In the first place, they had serious doubts that Muharrem Ergi was the real applicant in the present case. Secondly, he had failed to exhaust domestic remedies as required by Article 26 of the Convention.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

59. The Court recalls that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see the Stran Greek Refineries and Stratis Andreadis v. Greece judgment of 9 December 1994, Series A no. 301-B, p. 77, § 32)

A. The Government's first preliminary objection

60. In contesting the validity of the application, the Government submitted that there was no resemblance between the clearly vertical and tight handwriting of the signature in the statements taken by the Turkish authorities on 30 October and 3 November 1995 (see paragraph 26 above) and the clumsy and round handwriting of the signatures appearing on the statements taken by the Diyarbakır Human Rights Association on 9 October 1993 (see paragraph 25 above) and the power of attorney of the same date. Besides, the writing which appeared on the Diyarbakır case file bore a strange resemblance to that in other case files when so-called statements had been taken. This was an important matter which the Government should be able to raise at any stage of the proceedings, having regard to the proper administration of justice.

61. The Commission noted no striking dissimilarity in the signatures referred to by the Government. In any event Muharrem Ergi had clearly testified before its delegates (see paragraph 28 above) that he had gone to the Human Rights Association in Diyarbakır with his parents to complain and that he had signed the statement. His testimony had also clearly shown that it was his intention to pursue those complaints. Thus, the Commission found that there was no doubt that the application before it disclosed a genuine and valid exercise of the applicant's right of individual petition under Article 25 of the Convention.

62. The Court observes that it was the alleged differences between, on the one hand, the signature on the statements taken by the anti-terrorism department and the public prosecutor on 30 October and 3 November 1995 (see paragraph 26 above) and, on the other hand, those appearing on the statement of 9 October 1993 (see paragraph 25 above) and the power of attorney of the same date, which had prompted the Government to contest the validity of the application. Therefore, they could not be expected to have raised their objection in this regard before the Commission took its decision of 2 March 1995 declaring the application admissible (see paragraph 55 above).

It notes that the Government did touch upon the matter at the hearing before the delegates on 7 and 8 February 1996, when their Agent asked Muharrem Ergi whether he was the person who had signed the application, noting that he had mistakenly been referred to as a woman (see paragraph 28 above). More importantly, in their final observations to the Commission of 30 July 1996, the Government, referring to the above-mentioned differences in signature, expressed doubts as to whether Muharrem Ergi was the real applicant in this case.

In these circumstances, the Government cannot be considered to be estopped from raising before the Court their objection as to the validity of the application.

63. However, as to the merits of the objection, the Court notes that it is not contested that a person named Muharrem Ergi appeared before the Commission's delegates at the above-mentioned hearing, who were in a position to observe his reactions and demeanour and, hence, to assess the veracity and probative value of his evidence. Mr Ergi replied in the affirmative to the question put by the Government Agent as to whether he was the person who had signed the application (see paragraph 28 above). The Commission, after having assessed the evidence, found no reason to doubt that the application before it disclosed a genuine and valid exercise of the applicant's right of individual petition under Article 25 of the Convention and decided to pursue its examination of the application (see paragraph 55 above).

64. The Court sees no reason for departing from those findings, recalling that under its case-law the establishment and verification of the facts are primarily a matter for the Commission (Articles 28 § 1 and 31 of the Convention) and that it is only in exceptional circumstances that it will exercise its powers in this area (see*, inter alia,* the Menteş and Others v. Turkey judgment of 28 November 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2709–10, § 66). The Court, accordingly, dismisses the Government's preliminary objection as to the validity of the application.

B. The Government's second preliminary objection

65. The Government further requested the Court to uphold their preliminary objection that the applicant had failed to exhaust domestic remedies as required by Article 26 of the Convention, as he had not used the effective remedies available to him under Turkish law (see paragraphs 46-53 above).

While the Commission had held in its admissibility decision of 2 March 1995 that no observations had been submitted by the Government, the latter had, by letter of 4 November 1994, asked the Commission to postpone its examination of the application until completion of the investigation by the national authorities. The Government had stated that the Ergani public

prosecutor had initiated a preliminary investigation into the death of Havva Ergi and that the investigation file had been referred to the Diyarbakır National Security Court.

66. The Delegate of the Commission stressed that the Government had failed to raise this objection before the Commission declared the application admissible. Their letter of 4 November 1994 contained a request to adjourn the proceedings pending the preliminary national investigation but did not contain any objection to admissibility on the grounds of non-exhaustion, let alone any details concerning remedies allegedly available to the applicant. On 5 December 1994 the Commission had rejected the request for an adjournment and had invited the Government to reply to questions on admissibility, including a specific question as to whether the applicant had fulfilled the requirement to exhaust domestic remedies, or was exempted from doing so. However, the Government had not commented until after the Commission had taken its decision to declare the application admissible. They should therefore be estopped from raising their preliminary plea of non-exhaustion of domestic remedies.

67. The Court, sharing the views of the Delegate, notes that the Government were in fact granted an extended time-limit by which to comment on the issue of admissibility. Notwithstanding this they failed to submit any observations at the admissibility stage. Accordingly, the Court concludes that they are estopped from raising their second preliminary objection (see the Aydın v. Turkey judgment of 25 September 1997, *Reports* 1997-VI, p. 1885, § 58).

II. THE MERITS OF THE APPLICANT'S COMPLAINTS

A. Alleged violation of Article 2 of the Convention

68. The applicant, on his own behalf, on behalf of his deceased sister, Havva Ergi, and of his niece, complained that his sister had been killed by the security forces in violation of Article 2 of the Convention (see paragraphs 9-15 above), which provision reads:

> "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
>
> 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
>
> (a) in defence of any person from unlawful violence;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) in action lawfully taken for the purpose of quelling a riot or insurrection."

69. The Government contested the applicant's allegation (see paragraphs 16-17 above), whereas the Commission considered that there had been a breach of this provision on account of the defects in the planning and conduct of the ambush operation and the lack of an effective investigation.

1. Arguments of those appearing before the Court

(a) The Commission

70. The Commission, referring to its findings on the evidence (see paragraphs 24–45 above), concluded that it was not established on the material before it that the bullet which killed Havva Ergi had been fired by the security forces, though there were strong indications that it may have been. Nor was it established that the operation had not been a genuine ambush directed against the PKK approaching the village such that the firing at the village could be said to have been an intentional infliction of injury on its occupants (see paragraph 41 above).

On the other hand, the Commission was not satisfied on the evidence that the ambush operation carried out close to the village of Kesentaş had been implemented with the requisite care for the lives of the civilian population. In addition, it found that the Turkish authorities had failed to carry out an adequate and effective investigation into the death of Havva Ergi. There had accordingly been a violation of Article 2 of the Convention.

(b) The applicant

71. In the applicant's principal submission, given that there was no evidence of any PKK presence in the vicinity of Kesentaş on the night of the operation, the security forces had, in violation of Article 2 of the Convention, opened fire without any lawful justification (see paragraphs 9-11 above). The intention had presumably been to punish the villagers for the fact that a Government "collaborator" in the village had been killed by the PKK (see paragraph 9 above). It was for the Government to substantiate their claim that the PKK had been present (see paragraph 16 above). Since the Government had failed to adduce such evidence, the applicant must be regarded as having proved his assertion beyond reasonable doubt. Such an approach had been followed by other human rights bodies faced with a similar problem, as

illustrated by the cases of Godinez Cruz v. Honduras (judgment of 20 January 1989, paragraphs 136, 140–41) before the Inter-American Court of Human Rights and Bleir v. Uruguay before the United Nations Human Rights Committee (Doc. A/37/40, p. 130, § 13.3).

72. In the alternative, the applicant maintained that if there had been a clash between the PKK and the security forces, the latter must be regarded as having carried out an ambush which had not been planned and conducted with the requisite care to protect the civilian population. The evidence described in the Commission's report showed that the security forces which, according to the official view, should have been firing in a north north-easterly or north-easterly direction had been firing in a north-westerly direction, between 60 and 90 degrees away from the only legitimate target. Havva Ergi could only have been killed by a shot fired from that direction. Many shots had been fired by the security forces south of the village into the centre of the village. The applicant's sister had been killed as a result of random and indiscriminate firing by the security forces, which had repeatedly fired in a direction significantly different from the source of the alleged threat.

Therefore, the applicant asked the Court to confirm the Commission's finding that his sister had been killed as a result of an operation which had neither been planned nor implemented with the requisite care for the lives of the civilian population.

73. Furthermore, the applicant asked the Court to confirm the Commission's finding that there was no adequate and effective investigation into the killing of his sister. He maintained that the procedural requirements of Article 2 had been violated in four respects. Firstly, the respondent State had failed in its duty to carry out effective investigations, both at the judicial level, by the public prosecutor, and at the internal level, by the gendarmerie. Secondly, the National Security Court prosecutor had taken no action to have the Ergani public prosecutor disciplined or punished for dereliction of duty, having submitted an inadequate report or to have the deficiencies in the case file remedied. Thirdly, the district gendarmerie commander had not carried out any investigation either. Fourthly, the rules of engagement and the training of the security forces had not been adequate to prevent random and indiscriminate firing in violation of Article 2.

(c) The Government

74. The Government submitted that the security forces had been deployed so as not to cause damage to the village and that the bullet which had killed Havva Ergi had not been fired by the security forces (see paragraphs 16–17 above). While not contesting that there had been an ambush operation, they stressed that this had not been directed against the applicant's sister or the village. An ambush in this region afflicted with PKK terrorism was a routine operation designed to safeguard villagers'

safety. The death of Havva Ergi had been caused during a clash with terrorists occurring in the course of lawful acts taken by the State to protect the lives of its citizens from terrorism. This could in no manner disclose a violation of its obligations under Article 2 of the Convention.

75. In the Government's view, the Commission had wrongly applied to the present case the principles enunciated by the Court in the McCann and Others v. the United Kingdom judgment (27 September 1995, Series A no. 324). Unlike the present case, the British case had concerned a security operation organised and deliberately directed against three terrorists suspected of preparing a bomb attack and it had been an established fact that the persons concerned had been killed by the security forces. In that case, the authorities had been well informed in advance of the identity of the terrorists and the nature of the suspected crime, which they expected to be committed within a precise and limited area outside the British metropolitan territory. This had not been the situation in the instant case. Thus, whilst a review by the Court of the planning and control of the operation may have been called for in the British case, that was not so in the case at hand.

76. Moreover, the Government contested the establishment of facts made by the Commission. It had failed to take into account the number of lies and inconsistencies and the general uncertainty on which the whole case had been based. This had been brought to light during the hearing before the delegates, as had the applicant's bad faith. In this connection the Government stressed the following.

Whereas the applicant's purported statement to the Human Rights Association had referred to continuous fire by the security forces, he had sought to impress the Commission's delegates in his oral testimony by using the word "bombardment". In fact, only three spent cartridges had been found in the village itself, which in turn showed that the exchange of fire had not taken place inside or against the village and certainly had not been on the scale alleged. Mr Ergi had also stated that the fifteen cartridges he had allegedly found were situated at about 700 metres from his house. The physical distance involved was in complete contradiction with the theory that clashes had occurred within the village.

Of even greater detriment to the applicant's case and to add weight to this allegation, up until the hearing of 7 February 1996 Muharrem Ergi had clearly and firmly claimed that he was an eyewitness to the incident on 29 September 1993. However, it appeared from his observations submitted to the Commission a year after the admissibility decision that he had not been present during the incident (see paragraph 35 above). In another attempt by the applicant to impress members of the Commission he claimed in his initial application that, prior to the so-called "bombardment", about 200 families had lived in the village and that the number had subsequently

decreased to twenty (see paragraph 15 above). In contrast, Mr Ergi himself, the real Mr Ergi, had stated to the delegates that between 150 and 200 families were living in the village. There could then be no question of, as asserted by the applicant, hasty and forced evacuation of villagers following indiscriminate and arbitrary bombardment of the village (see paragraph 37 above).

Furthermore, the speculation over the contents of the so-called declarations and statements by the Ergani gendarmerie commander also proved to be incorrect. No member of the Ergi family had gone to Ergani on 29 or 30 September 1993. As was clearly established during the hearing in February 1996, the Ergani gendarmerie had heard of Havva Ergi's death by telephone.

2. The Court's assessment

(a) As to the alleged unlawful killing of the applicant's sister

77. The Court observes that there are divergent versions as to the circumstances which led to the killing of the applicant's sister. While the applicant maintained that it was the result of a retaliatory operation by the security forces against the village, the Government asserted that there had been a clash between those forces and the PKK around the village and that the bullet which had killed her had not originated from the military side (see paragraphs 9–17 above).

The Commission considered that there was insufficient material before it to support a finding that the operation of 29 September 1993 had not been an ambush leading to a clash but an act of retaliation and was also unable to find it established that the bullet which had killed Havva Ergi had been fired by the security forces. The Commission considered that it had little direct evidence as to what had occurred on the night in question. None of the four witnesses, including the applicant, who had appeared at the hearing before the delegates, had directly witnessed the alleged event (see paragraph 35 above). The village *muhtar* and a number of members of the applicant's family summoned by the Commission had failed to appear (see paragraph 27 above). Furthermore, the Commission found that the documentary evidence presented to it had been of second-hand quality (see paragraph 36 above).

78. The Court notes that, in challenging the Commission's findings, the applicant laid much stress on the inferences that could be drawn from the Government's failure to provide evidence. However, having regard to the Commission's fact-finding and to its own careful examination of the evidence, the Court considers that there are legitimate doubts as to the origin of the bullet which killed Havva Ergi and the context of the firing. It

is thus not persuaded that there exist any exceptional circumstances compelling it to reach a different conclusion from that of the Commission which, as already indicated, has the primary task of establishment and verification of the facts. Accordingly, the Court too considers that there is an insufficient factual and evidentiary basis on which to conclude that the applicant's sister was, beyond reasonable doubt, intentionally killed by the security forces in the circumstances alleged by the applicant.

(b) Alleged failure to comply with other requirements of Article 2

(i) As to the planning and conduct of the operation

79. At the outset, the Court notes that, on the Government's own account, the security forces had carried out an ambush operation and had engaged in an armed clash with the PKK in the vicinity of the village (see paragraphs 16–17 above). As mentioned above, they disputed, and the Court has not found it established, that the bullet which killed Havva Ergi was fired by the security forces. However, the Court is not convinced by the Government's submission that it is inappropriate for the Court to review whether the planning and conduct of the operation was consistent with Article 2 of the Convention.

In this regard, it is to be recalled that the text of this provision (see paragraph 68 above), read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of the term "absolutely necessary" suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraph 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see the above-mentioned McCann and Others judgment, p. 46, §§ 148–50).

Furthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to "secure" an effective enjoyment of the right to life.

In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to

circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.

Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.

80. Turning to the particular circumstances of the case, the Court observes, on the one hand, that the Commission stated that its ability to make an assessment of how the operation had been planned and executed had been limited due to the lack of information provided by the Government. It had no information as to who took part in the operation, in what circumstances the security forces had opened fire and what steps had been taken by the security forces once the clash had developed (see paragraphs 35–37 above).

On the other hand, the gendarmerie officers' testimonies to the Commission had suggested that the ambush was organised in the north-west of the village without the distance between the village and the ambush being known. It was to be anticipated that PKK terrorists could have approached the village either following the path from the north or proceeding down the river bed to the north-east and in the latter event, they would have been able to penetrate to the edge of the village without being seen by the security forces to the north-west.

The Commission found on the evidence that security forces had been present in the south (see paragraph 41 above). In these circumstances, the villagers had been placed at considerable risk of being caught in cross-fire between security forces and any PKK terrorists who had approached from the north or north-east. Even if it might be assumed that the security forces would have responded with due care for the civilian population in returning fire against terrorists caught in the approaches to the village, it could not be assumed that the terrorists would have responded with such restraint. There was no information to indicate that any steps or precautions had been taken to protect the villagers from being caught up in the conflict.

Accordingly, in the absence of evidence from gendarmes involved in the planning and conduct of the operation, the Commission was not satisfied that the ambush operation carried out close to Kesentaş village had been implemented with the requisite care for the lives of the civilian population.

81. The Court, having regard to the Commission's findings (see paragraphs 34–41 above) and to its own assessment, considers that it was probable that the bullet which killed Havva Ergi had been fired from the south or south-east, that the security forces had been present in the south and that there had been a real risk to the lives of the civilian population through being exposed to cross-fire between the security forces and the PKK. In the light of the failure of the authorities of the respondent State to adduce direct evidence on the planning and conduct of the ambush operation, the Court, in agreement with the Commission, finds that it can reasonably be inferred that insufficient precautions had been taken to protect the lives of the civilian population.

(ii) As to the alleged inadequacy of the investigation

82. In addition, the Court has attached particular weight to the procedural requirement implicit in Article 2 of the Convention. It recalls that, according to its case-law, the obligation to protect the right to life under Article 2, read in conjunction with the State's general duty under Article 1 to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, *inter alios*, agents of the State (see the above-mentioned McCann and Others judgment, p. 49, § 161; and also the Kaya v. Turkey judgment of 19 February 1998, *Reports* 1998-I, pp. 322, 324, §§ 78, 86). Thus, contrary to what is asserted by the Government (see paragraph 75 above), this obligation is not confined to cases where it has been established that the killing was caused by an agent of the State. Nor is it decisive whether members of the deceased's family or others have lodged a formal complaint about the killing with the relevant investigatory authority. In the case under consideration, the mere knowledge of the killing on the part of the authorities gave rise *ipso facto* to an obligation under Article 2 of the Convention to carry out an effective investigation into the circumstances surrounding the death.

83. However, the Court is struck by the heavy reliance placed by Mustafa Yüce, the public prosecutor who had the obligation to carry out an investigation into Havva Ergi's death, on the conclusion of the gendarmerie incident report that it was the PKK which had shot the applicant's sister (see paragraph 43 above). The prosecutor had explained to the delegates that only if there had been any elements contradicting this conclusion would he have considered that any other investigatory measures would have been necessary (see paragraph 28 above). He also seemed to consider that the onus was on the deceased's relatives to alert him to any suspicion of wrongdoing on the part of the security forces and they had not approached him in this case (ibid.). In the absence of any such elements of suspicion, he had issued a decision of lack of jurisdiction indicating that the PKK was

suspected of the killing, without having taken statements from members of the victim's family, villagers or any military personnel present during the operation (see paragraphs 28–43 above).

This being so, it had not been apparent from the incident report in question or the sketch map that it was the PKK which had fired the bullet which killed the applicant's sister.

In addition, the report itself had been drafted by a gendarmerie commander, İsa Gündoğdu, who had not himself been present during the clash (see paragraph 35 above) and who had stated that he was unaware of the identity of any of the officers or units involved and that his information as to what occurred was derived from apparently brief coded radio transmissions (see paragraph 36 above). However, the public prosecutor had not investigated the circumstances surrounding the killing of Havva Ergi and for that reason could not have been apprised of these documents.

84. Nor was any detailed consideration given by either the district gendarmerie commander or the public prosecutor to verifying whether the security forces had conducted the operation in a proper manner. Although Ahmet Kuzu had stated to the delegates that the operations should as far as possible not be planned in or about civilian areas and that in the instant case the plan had been to restrict the activity to the north of the village, it would appear that no inquiry was conducted into whether the plan and its implementation had been inadequate in the circumstances of the case (see paragraph 45 above).

85. In the light of the foregoing, the Court, like the Commission, finds that the authorities failed to carry out an effective investigation into the circumstances surrounding Havva Ergi's death. It is mindful, as indicated in previous judgments concerning Turkey, of the fact that loss of life is a tragic and frequent occurrence in the security situation in south-east Turkey (see, for instance, the above-mentioned Aydın and Kaya judgments, respectively at paragraphs 14 and 91). However, neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases such as the present where the circumstances are in many respects unclear (ibid.).

(iii) Overall conclusion

86. Having regard to the above considerations, the Court finds that the Turkish authorities failed to protect Havva Ergi's right to life on account of the defects in the planning and conduct of the security forces' operation and the lack of an adequate and effective investigation. Accordingly, there has been a violation of Article 2 of the Convention.

B. Alleged violation of Article 8 of the Convention

87. Before the Commission the applicant alleged on behalf of Havva Ergi's daughter that the killing of her mother had entailed a violation of Article 8 of the Convention, which provides:

> "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."

However, he did not pursue this complaint before the Court.

88. The Commission was of the opinion that, notwithstanding the tragic consequences for the child, no separate issue arose from its conclusion that there had been a failure to protect the right to life of Havva Ergi in violation of Article 2 (see paragraph 86 above).

89. The Government too considered that no separate issue arose under Article 8 of the Convention.

90. The Court does not deem it necessary to examine the matter of its own motion.

C. Alleged violation of Article 13 of the Convention

91. The applicant in addition complained that he and his niece had been victims of a breach of Article 13 of the Convention, which provides:

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

92. The Government contested this allegation. They stressed that the criminal and administrative courts would have offered effective remedies but the applicant had failed to avail himself of such remedies (see paragraphs 46–53 above). They drew attention to a number of judgments substantially extending the range of legal grounds for engaging State liability beyond that of strict liability based on the social risk theory so as to cover administrative fault. This new generation of judgments was interesting also in that they linked criminal and administrative justice. Thus,

where State officials had been tried in criminal courts, the administrative courts were empowered to award compensation for damages, irrespective of whether the official concerned had been convicted or acquitted.

Some of these judgments had concerned cases brought by the families of police officers and teachers killed by the PKK where it had not been possible to identify the authors and where the administrative courts had nevertheless made awards for damages to the families. In a number of cases, victims of bomb attacks had obtained damages from the administrative courts. Many of these judgments had concerned loss of life in circumstances comparable to those in the case under consideration. All of these rulings had been in the claimants' favour.

93. The Commission recalled its finding that the absence of any adequate and effective investigation into the killing of Havva Ergi constituted a breach of Article 2 of the Convention (see paragraph 70 above). Since this matter also underlay the applicant's complaints under Article 13 of the Convention, it found it unnecessary to examine them separately.

94. The applicant, disputing the Commission's conclusion, maintained that the duty of a State under Article 2 to carry out an effective investigation into an unlawful killing was not conterminous with the right to an effective remedy under Article 13. While under Article 2 the effectiveness of the investigation was considered in the context of the right to life, under Article 13 it was considered in connection with the right to an effective remedy. The scope of the Article 2 obligation was limited to what had occurred whereas that under Article 13 required not only an effective investigation but also that the system of securing the remedy be effective.

95. As to the case-law referred to by the Government, the applicant pointed out that only four of the new administrative court decisions, namely Yıldırım, Uçoş, Demirkıran and Curabaz, raised an issue even remotely similar to the present case, since only those four concerned complaints about actions involving the security forces. In those cases, although the claimants had been awarded compensation, the events in issue were never the subject of any criminal investigation.

96. The Court recalls that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law, in

particular in the sense that its exercise must not be unjustifiably hindered by the acts or the omissions of the authorities of the respondent State (see the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, p. 2286, § 95, and the above-mentioned Aydın and Menteş and Others judgments at pp. 1895–96, § 103, and p. 2715, § 89, respectively).

However, Article 13 applies only in respect of grievances under the Convention which are arguable (see, for instance, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 23, § 52). Whether that was so in the case of the applicant's claims under Article 2 has to be decided in the light of the particular facts and the nature of the legal issues raised.

97. In this regard, the Court notes that the Commission agreed with the submissions of the applicant that, given the south-facing position of the balcony and the position of the neighbouring houses, in particular a high wall to the east, it had been probable that the bullet which killed Havva Ergi had been fired from the south or south-east (see paragraph 40 above). The Government had not contested this. Furthermore, having regard to the failure of the Government to provide requested documents and information, the Commission had found that strong inferences could be drawn supporting the applicant's allegations that the security forces had opened fire around the village for some time and that units of the security forces had been present towards the south. The Commission also found that there was significant evidence indicating that the bullet may have been fired by the security forces (see paragraph 41 above). In view of the foregoing considerations, the Court finds that there can be no doubt that the applicant had an arguable claim for the purposes of Article 13.

98. As to the further question whether the requirements of this provision were complied with, the Court recalls that the nature of the right which the authorities were alleged to have violated in the instant case, one of the most fundamental in the scheme of the Convention, must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure (see, *mutatis mutandis*, the above-mentioned Aksoy and Aydın judgments at p. 2287, § 98, and pp. 1895–96, § 103, respectively). Seen in these terms the requirements of Article 13 are broader than a Contracting State's procedural obligation under Article 2 to conduct an effective investigation (see paragraph 82 above).

Against this background, the Court recalls its findings above that the authorities failed to carry out an effective investigation into the circumstances surrounding the death of Havva Ergi. In the view of the

Court, this failure undermined the exercise of any remedies the applicant and his niece had at their disposal under Turkish law.

Accordingly, it finds that there has been a violation of Article 13 of the Convention.

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

99. The applicant submitted that the attack on the village illustrated the discriminatory policy pursued by the State against ordinary Kurdish citizens and the existence of an authorised practice in violation of Articles 14 and 18 of the Convention. Article 14 reads:

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

Article 18 provides:

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

100. The Commission, finding that these allegations were unsubstantiated, concluded that there had been no violation of the above provisions. The Government were of the same view.

101. The Court, on the basis of the facts as established by the Commission, finds no violation of these provisions either.

E. Alleged violation of Article 25 § 1 of the Convention

102. Finally, the applicant complained that the authorities of the respondent State had hindered him in the exercise of his right to present and pursue his complaints with the Commission (see paragraph 26 above), in breach of Article 25 § 1 of the Convention, which provides:

> "The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in [the] Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

103. The Commission considered that, when questioning the applicant about his declaration of means in support of his legal-aid request to the Commission, the authorities had subjected him to pressure and this had constituted a hindrance in the exercise of his right of individual petition as

guaranteed under Article 25 § 1 (see paragraph 26 above). The respondent State had therefore failed to comply with its obligations under this provision.

104. The Government strongly contested the Commission's conclusion. In the first place, they maintained that the allegations of pressure had arisen for the first time after statements had been taken on 30 October and 3 November 1995 (see paragraph 26 above), which was approximately a year and a half after the introduction of the application and seven months after the Commission's decision on admissibility (see paragraphs 1 and 55 above).

Furthermore, the Government emphasised that the Turkish authorities had to interview the applicant on his request for legal aid before the Commission. Thus, its Secretary had in fact invited the Government to comment on the request. The object of the interview was to verify his declaration of means. At no point was the applicant subjected to any direct or indirect pressure to force him to abandon his application or to deprive him of his status in the proceedings before the Commission. There was a contradiction in the Commission's stance in that it had first asked the Government to cooperate and then sanctioned them after they had reported their findings and conclusions.

105. The Court observes from the outset that the timing of the applicant's complaint under Article 25 does not give rise to any issue of admissibility under the Convention. The Government's arguments on this point must be rejected.

As to the merits of the complaint, it is to be noted that, as appears from the records of the statements (see paragraph 26 above), these were not confined to matters regarding the applicant's declaration of means. He was asked about the subject matter of his application to the Commission and to provide an explanation concerning any application he might have made. Also, the Court sees no plausible reason as to why the applicant was heard twice by the authorities and why the questioning had been conducted by the anti-terrorism department of the police and the public prosecutor. In view of this, the Court, like the Commission, considers that the applicant must have felt intimidated as a result of his contact with the authorities on these occasions in a manner which unduly interfered with his petition to the Commission. In this connection, the Court recalls that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 25 of the Convention that an applicant be able to communicate freely with the Commission, without any form of pressure from the authorities to withdraw or modify his or her complaints, (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1219, § 105; and the above-mentioned Aksoy judgment, p. 2288, § 105). The facts of the present case disclose that the respondent

State failed to comply with its obligations under this provision. There has thus been a violation of Article 25 § 1 of the Convention.

II. APPLICATION OF ARTICLE 50 OF THE CONVENTION

106. In respect of the death of Havva Ergi, the applicant claimed compensation under Article 50 of the Convention, which reads:

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

A. Non-pecuniary damage

107. The applicant submitted that he, his deceased sister and the latter's daughter had been the victims both of individual violations and of a practice of such violations. He claimed 30,000 pounds sterling (GBP) in compensation for non-pecuniary damage. In addition, he sought GBP 10,000 for aggravated damages resulting from the existence of a practice of violation of Article 2 and of a denial of effective remedies in south-east Turkey in aggravated violation of Article 13.

108. The Government considered the amount of the claim to be excessive. In this connection they invited the Court to take due account of the social and economic conditions prevailing in Turkey, where the minimum wage was approximately 600 French francs (FRF) per month and that of a judge at the end of his career FRF 4,700 per month. They further disputed that an award should be made in respect of the niece, who was not an applicant and had not taken part in the proceedings.

109. The Delegate of the Commission did not offer any comments on the applicant's claims.

110. The Court observes from the outset that the initial application to the Commission was brought by the applicant not only on his own and his sister's behalf but also on behalf of his niece, Havva Ergi's daughter. The Court considers that they must have suffered non-pecuniary damage which cannot be compensated solely by the findings of violations. Having regard to the gravity of the violations (see paragraphs 86 and 98 above) and to equitable considerations, it awards the applicant GBP 1,000 and Havva Ergi's daughter GBP 5,000, which amount is to be paid to the applicant's niece or her guardian to be held on her behalf.

111. On the other hand, it dismisses the claim for aggravated damages.

B. Costs and expenses

112. The applicant further requested the reimbursement of GBP 20,624.60 for legal costs and expenses incurred in the preparation and advancement of the case before the Convention institutions. Having deducted the amounts received from the Council of Europe by way of legal aid, he sought:

(a) GBP 16,450.24 in fees for the work carried out by his United Kingdom-based representatives;

(b) GBP 1,625 for the work carried out by his Turkish representatives;

(c) GBP 306.66 for miscellaneous administrative costs;

(d) GBP 1,230 for research and support incurred by the Kurdish Human Rights Project (KHRP);

(e) GBP 250 for a ballistics research report;

(f) GBP 417.70 for the costs of travel and subsistence and interpretation in connection with the hearings in Turkey;

(g) GBP 345 for other interpretation and translation costs.

The applicant stated that the amount awarded by the Court should be paid directly to the applicant's United Kingdom-based legal representatives in sterling into a named bank account, and that the rate of default interest be set at 8% per annum.

113. The Government invited the Court to dismiss the claim since it had not been substantiated and was in any event excessive. The Government disputed the need for the applicant to have recourse to United Kingdom-based lawyers and strongly objected to any sum being awarded for costs and expenses incurred by the KHRP.

114. The Delegate of the Commission did not comment on the amounts claimed by the applicant.

115. The Court is not persuaded that the amounts claimed in respect of costs incurred by the KHRP were necessarily incurred and therefore dismisses this claim. As to the remainder of the claim for costs and expenses, the Court, deciding on an equitable basis and having regard to the details of the claims submitted by the applicant, awards him the sum of GBP 12,000 together with any value-added tax that may be chargeable, less the 9,995 French francs which the applicant has received by way of legal aid from the Council of Europe in respect of the fees and expenses in question.

C. Default interest

116. According to the information available to the Court, the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment is 7.5% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objection as to the validity of the application;

2. *Holds* unanimously that the Government are estopped from making a preliminary objection concerning the exhaustion of domestic remedies;

3. *Holds* unanimously that it has not been established that the applicant's sister was killed by the security forces in breach of Article 2 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 2 of the Convention on account of the planning and conduct of the security forces' operation and in respect of the failure of the authorities of the respondent State to conduct an adequate and effective investigation into the circumstances surrounding the death of the applicant's sister;

5. *Holds* unanimously that it is not necessary to examine the complaint made under Article 8 of the Convention;

6. *Holds* by eight votes to one that there has been a violation of Article 13 of the Convention in respect of the applicant and his niece;

7. *Holds* unanimously that there has been no violation of Articles 14 and 18 of the Convention;

8. *Holds* by eight votes to one that there has been a violation of Article 25 § 1 of the Convention;

9. *Holds* by eight votes to one that the respondent State is to pay, within three months, in respect of non-pecuniary damage, 1,000 (one thousand) pounds sterling to the applicant, to be converted into Turkish liras at the rate applicable on the date of settlement;

10. *Holds* unanimously that the respondent State is to pay, within three months, in respect of non-pecuniary damage, 5,000 (five thousand) pounds sterling to the applicant's niece or her guardian to be held on her behalf, to be converted into Turkish liras at the rate applicable on the date of settlement;

11. *Holds* unanimously that the respondent State is to pay the applicant, within three months, in respect of costs and expenses, 12,000 (twelve thousand) pounds sterling together with any value-added tax that may be

chargeable less 9,995 (nine thousand nine hundred and ninety-five) French francs to be converted into pounds sterling at the rate applicable on the date of judgment;

12. *Holds* unanimously that simple interest at an annual rate of 7.5% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;

13. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 28 July 1998.

Signed: Rudolf BERNHARDT
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.

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

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I cannot agree on certain points with the opinion of the majority in the case of Ergi v. Turkey, for the following reasons.

1. The Court having reached the conclusion that there has been a breach of Article 2 of the Convention on the ground that no effective inquiry was conducted into the death complained of, I consider, like the Commission, that no separate issue arises under Article 13, because the fact that there was no satisfactory and effective inquiry into the death forms the basis of the applicant's complaints under both Article 2 and Article 13. In that connection, I refer to my dissenting opinion in the Kaya v. Turkey case and the opinion expressed by a large majority of the Commission on the question (see Aytekin v. Turkey, application no. 22880/93, 18 September 1997; Ergi v. Turkey, application no. 23818/94, 20 May 1997; Yaşa v. Turkey, application no. 22495/93, 8 April 1997).

2. The Court has also reached the conclusion, by interpreting certain unproved allegations contested by the Government, that there has been a breach of Article 25 of the Convention. Admittedly, the respondent Government tried to contact the applicant on a number of occasions when the application was communicated to them. That step was useful and necessary, firstly in order to ascertain the details of the applicant's allegations, and secondly to explore the possibility of reaching a friendly settlement, which is the first step under the Convention system towards solving the problem. When a complainant is invited to meet a national authority to discuss an application to the Commission, the person in question may feel some disquiet. But to interpret that psychological state as pressure exerted to prevent the applicant from continuing the proceedings before the Strasbourg institutions is in my opinion the result of either bad faith or a political machination to discredit the respondent Government. To my mind, the Court should ask itself whether the applicant was not rather under pressure from the Diyarbakır Human Rights Association, which acts in such cases by means of a kind of *actio popularis* which is not authorised by Article 25; and these applications, originating in Diyarbakır, all follow the same course – London (the Kurdish Human Rights Project) and Strasbourg.