The European Court of Human Rights has examined 16 cases against Turkey which dealt with terrorism directly. The admissibility decisions in relation to the applications and the fact-finding of the Commission in these cases were very considerable exceptions to the pre-existing case-law of the Commission and the Court. It should be stated that the Court’s and the Commission’s reasons in the Turkish cases dealing with terrorism were mainly persuasive both in procedure and substance. Nonetheless, the gravity of allegations should not prevent us from arguing very crucial problems. In this article, common procedural issues in these cases will be examined.

1 Exhaustion of Local Remedies under Article 35 (1) of the European Convention on Human Rights

Prior to examining the problem of exhaustion of local remedies, a concise rehearsal of the background to the “South-East cases” would be helpful.

Grave disturbances have taken place in the South-East of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan) for more than fifteen years. It is believed that this conflict has claimed the lives of approximately 30,000 people, mostly civilians. In addition, more than 1,000 villages have been evacuated and destroyed, and many civilians have been subjected to vicious violations of human rights including torture. Since 1987, ten of the eleven

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* Research Student, Centre for Criminal Justice Studies, Department of Law, University of Leeds.
1 The cases of the Socialist Party v. Turkey; 25.5.1998, 1998-III Reports of Judgements and Decisions (RJD) 1233; Zana v. Turkey, 25.11.1997, 1997-VII RJD 2533; United Communist Party of Turkey and Others v. Turkey, 30.1.1998, 1998-I RJD 1; Sürek v. Turkey (No.1,2,3,4); Arslan v. Turkey; Baskaya and Okçuoglu v. Turkey; Ceylan v. Turkey; Erdogdu and Ince v. Turkey; Gerger v. Turkey; Karatas v. Turkey; Okçuoglu v. Turkey; Polat v. Turkey; Sürek and Özdemir v. Turkey, 8.7.1999 were also related to terrorism. However, these cases are more “indirectly” relevant, since the acts of government in these cases (outlawing political parties and imprisoning journalists, editors, authors and politicians) were the oblique consequence of terrorism in South-East Turkey.
2 This was Article 26 before the reforms implemented by Protocol 11 (ETS No. 155, 1994).
provinces of south-eastern Turkey have been subjected to emergency rule, which was in force when the applicants submitted the cases discussed in this paper. More than 2,000 cases against Turkey are in process at the Court and roughly half of them are based on grievances that arise from the activities of security forces at the South-East part of Turkey. It is alleged that this environment has hindered the proper administration of justice.³

In almost all the cases relating to terrorism, the Turkish Government put forward the argument that the applicants had not exhausted local remedies. However, in almost all the cases the Commission and the Court found that the applications could not be rejected for failure to exhaust local remedies. Despite the Court stating that “it is not to be interpreted as a general statement that remedies are ineffective in this area of Turkey”⁴, the non-exhaustion of domestic remedies seems the rule for “South-East” cases.

The following table may shed light on the issue:

<table>
<thead>
<tr>
<th>Case</th>
<th>Domestic authority approached by the applicant</th>
<th>Domestic status at the time of the Court judgement</th>
<th>Court’s Assessments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Akdivar and Others (Alleged burning of houses by security forces)</td>
<td>No application in domestic sphere (NADS)</td>
<td>Unfinished investigation that commenced after the applicants had lodged the petition</td>
<td>Special circumstances dispensed applicant(s) from obligation to exhaust local remedies. (SC)</td>
</tr>
<tr>
<td>Aksoy (Alleged that the applicant was tortured while he was in the custody)</td>
<td>NADS, yet Alleged that the applicant was seen by the Public Prosecutor after he had been tortured</td>
<td>No criminal or civil proceedings have been brought in Turkish Courts</td>
<td>SC</td>
</tr>
<tr>
<td>Kaya (Alleged unlawful killing by security forces)</td>
<td>Public Prosecutor made an on-site investigation</td>
<td>No criminal or civil proceedings have been brought in Turkish Courts</td>
<td>SC</td>
</tr>
<tr>
<td>Selcuk and Asker (Alleged burning of houses by security forces)</td>
<td>Second applicant asserted that he had applied to District Governor, but there is Following the application, an investigation was opened. Prosecutor</td>
<td>SC</td>
<td></td>
</tr>
</tbody>
</table>


⁴ Ibid, para. 77. This statement was not reiterated in last judgements.
<table>
<thead>
<tr>
<th>Case Title</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Yasa</strong> (Alleged threat of assassination to applicant and his relative by the police)</td>
<td>Applicant gave a statement to police at the hospital. Still pending before prosecutor. Partly examined in merits.</td>
</tr>
<tr>
<td><strong>Mentes</strong> and Others (Alleged burning of houses by security forces)</td>
<td>NADS. Following application two separate prosecutors decided not to prosecute. SC.</td>
</tr>
<tr>
<td><strong>Ergi</strong> (Alleged unlawful killing by security forces)</td>
<td>NADS. Investigation is still pending with a view to apprehending the members of the PKK. Estoppel (If the defendant government failed to raise their preliminary objection at the stage of admissibility, they would be estopped from raising their preliminary objection before the Court at the final stage).</td>
</tr>
<tr>
<td><strong>Gundem</strong> (Alleged destruction of house and possessions by security forces)</td>
<td>NADS. Following application an investigation commenced, it is pending before Administrative Council. Examined with Article 13.</td>
</tr>
<tr>
<td><strong>Demir and Others</strong> (Length of detention in police custody)</td>
<td>Criminal case against the applicants. They did not invoke art. 5 § 3 of Convention. There is no decision on the issue. Estoppel.</td>
</tr>
<tr>
<td><strong>Aytekin</strong> (Alleged unlawful killing of applicant’s husband by a soldier at a checkpoint)</td>
<td>Applicant joined the proceedings as a civil party. Accused was convicted for causing death unintentionally. The appeal is pending before Court of Cassation. Objection of government accepted by the Court.</td>
</tr>
<tr>
<td><strong>Gulec</strong> (Alleged unlawful killing by the security forces during demonstrations)</td>
<td>Applicant lodged a criminal complaint against responsible. Discontinuation order by Administrative Council was upheld by Supreme Administrative Court. Estoppel.</td>
</tr>
<tr>
<td><strong>Kurt</strong> (Alleged disappearance of the applicant’s son)</td>
<td>Applicant applied several times to prosecutors and courts. File is still pending before Diyarbakir National Security Court. Dismissed according to Rule 48§1 of Rules of Court A. SC.</td>
</tr>
<tr>
<td><strong>Tekin</strong> (Alleged ill-treatment in police custody)</td>
<td>Government did not raise any question.</td>
</tr>
<tr>
<td><strong>Ogur</strong> (Alleged unlawful killing by security forces)</td>
<td>Criminal process was initiated by the petition of victim’s employer. Discontinuation order by Administrative Council was upheld by Supreme Administrative Court. The Court dismissed the preliminary objection.</td>
</tr>
<tr>
<td><strong>Çakici</strong> (Alleged disappearance of the victim)</td>
<td>Victim’s father applied to State Security Court. Case file stating that the victim was killed in</td>
</tr>
</tbody>
</table>

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Before examining the Court’s reasoning, a brief exploration of remedies in Turkish law would be beneficial.

### 1.1 Remedies in Turkish Law:

There are three possibilities in Turkish law for applicants who assert that they have suffered from a violation of ECHR; criminal, civil and administrative remedies. As all of the cases were related to crimes which were allegedly committed by state agents, all of these three remedies were at stake.

In respect of criminal remedies, complaints may be lodged with a public prosecutor or local administrative authorities pursuant to Code of Criminal Procedure, sections 151 and 153. The Public Prosecutor may commence investigations without any application whenever he/she gets information which requires to be investigated. The complainant may appeal against a decision not to institute criminal proceedings. (CCP, section 165)

Nevertheless, there exists a very significant obstacle to the effective pursuit of this process. If the suspected offender is a civil servant and if the offence was committed during the performance of his duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants. This restricts the public prosecutor’s jurisdiction ratione personae at that stage of the proceedings. In such cases it is for the relevant local Administrative Council (for the district or province, depending on the suspect’s status), which is chaired by the governor, to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case. An appeal to the Supreme Administrative Court...

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In Aksoy v. Turkey case the applicant asserted that he was forced to sign a statement before public prosecutor. He was not able to sign the document because he could not have moved his arms. (para. 18). According to European Court, even if it were accepted that the applicant made no complaint to the public prosecutor of ill-treatment in police custody, the injuries he had sustained must have been clearly visible during their meeting. Aksoy v. Turkey, 26.11.1996, 1996-VI RJD 2260, para. 56.
lies against a decision of the Council. If a decision not to prosecute is taken, the case is automatically referred to that court.\textsuperscript{7}

Before the administration courts, the complainant is not required to prove that there exists a fault on the part of the administration when his security could not be provided. The administration may also indemnify people who suffered damages from the attacks of terrorists. This approach, which places objective liability on the administration, is based on a concept of collective liability and is referred to as “social risk” theory.

Extensive powers were granted to South East Regional Governors in the state of emergency by decrees.\textsuperscript{8} It is required to quote two of them here.

Decree no. 285 modifies the application of Law no. 3713, the Anti-Terror Law (1981), in those areas which are subjects to the state of emergency. The effect is that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.\textsuperscript{9}

In pursuance of section 8 of Decree no. 430; no criminal, financial or legal responsibility may be claimed against a State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respects of acts connected with the powers entrusted them by this decree, and no application shall be made to any judicial authority.\textsuperscript{10}

\textsuperscript{7} See inter alia, Ogar v. Turkey, 20.5.1999, paras. 52-53. The Law of 1914 was repealed by the Act no. 4483 on the Prosecution of Civil Servants which entered into force on 2 December 1999. The new Act authorizes the relevant competent authorities to permit or dismiss the investigation of alleged acts of civil servants upon the inspectors’ report. Both parties can apply to Council of State upon his/her decision. (Sections 5-9). Official Gazette, 4.12.1999, no. 23896.

\textsuperscript{8} Decrees no. 285, 424, 425 and 430. Some of the provisions of these decrees were examined by the Turkish Constitutional Court previously. Decree no. 424 was repealed by the Decree no. 430 on 16 December 1990. Decree no. 425 entered into force on 10 May 1990.

\textsuperscript{9} Decree no. 285 promulgated on 14 July 1987 entered into force on 19 July 1987. Official Gazette, 14.7.1987, no. 19517. See above for the details of this procedure. According to the Section 16 of the Act no. 4483 (supra note 5), new procedure will be applied to the security forces. Thus, a wide discretion is conferred upon the relevant competent authorities (governors in the cases examined in these paper) to dismiss the case. However, the public prosecutor or the complainant may appeal to the Council of State upon this decision.

\textsuperscript{10} Decree no. 430 promulgated on 16 December 1990 and entered into force on the same date. Official Gazette, 16.12.1990, no. 20727. A demand to cancel this provision on the account of its unconstitutionality was dismissed by the Constitutional Court.
1.2 Reasons of the Court to Dismiss Objections to Non-Exhaustion of Local Remedies

1.2.1 General Comments

General principles relating to the exhaustion of local remedies were clarified by the Court in the *Akdivar and Others* case and reiterated in other cases. The general comments of the Court can be summarised as follows:

“The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness....

In the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden of proof has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement. One such reason may be constituted by the national authorities remaining totally passive in the face of serious allegations of misconduct or infliction of harm by State agents, for example where they have failed to undertake investigations or offer assistance. In such circumstances it can be said that the burden of proof shifts once again, so that it becomes incumbent on the respondent Government to show what they have done in response to the scale and seriousness of the matters complained of.”


13 Robertson, viewed this process not as a shifting. In his opinion, the legal burden of persuasion on the exhaustion of local remedies is placed upon the plaintiff but that the respondent State bears an evidential burden of demonstrating that remedies exist to be exhausted. In other words, both parties bear different duties at the outset of the procedure, thus there is no shifting at this point. Bernard Robertson, *Exhaustion of Local Remedies in International Human Rights Litigation-The Burden of Proof Reconsidered*, 39 *ICLQ* 193 (1990).

14 *Akdivar and Others v. Turkey*, supra note. 2, para. 68. see also, *inter alia*, the Commission's decision on the admissibility of application no. 788/60, Italy, 11.1.1961, *Yearbook*, vol. 4, pp. 166-168; application no. 5577-5583/72, *Donnelly and Others v. the United Kingdom* (first decision), 5.4.1973, *Yearbook*, vol. 16, p. 264; also the judgment of 26 June 1987 of the Inter-American Court of Human Rights in the Velasquez Rodríguez case, Preliminary Objections, Series C no. 1, para. 88, and that Court's Advisory Opinion of 10 August 1990 on “Exceptions to the Exhaustion of Domestic Remedies” (Article 46 (1), 46 (2) (a) and 46 (2) (b) of the American Convention on Human Rights), Series A no. 11, p. 32, para. 41).
1.2.2 Application of Article 26 to the Facts

Even though the general principles of the Court seem undisputed, application of these principles to concrete facts may prompt very serious debates. However, before discussing these, it is essential to remind the reader of some determinations of the Court in which it emphasized the level of the domestic remedies required in the allegations of heinous violations of human rights. It is contended that these determinations are wholly acceptable.

In the opinion of the Court, the mere satisfaction of the applicants by the means of compensation from administrative courts is inadequate and ineffective, since these courts may compensate the victims without determining the responsible for damage, torture, murder¹⁵ and other breaches of rights.¹⁶

Another important point which can be deduced from the Court’s assessment is, in view of the seriousness of the acts, administrative authorities should have commenced an investigation of their own accord. Indeed, after a village destruction, there is no need to receive an application to prompt a detailed investigation. Furthermore, taking into consideration the seriousness of applicants’ allegations, investigations carried out by the authorities should not be of a limited or tardy nature. Yet, it is not so simple to reach the same conclusion when a prosecutor stays inactive on a torture allegation. His personal fault could be corrected by the other authorities.¹⁷ There is no doubt that these principles were applied effectively in most of the cases that is examined in this article. For instance, in the Çakici case, in the face of very significant allegations, namely disappearance and torture, the authorities did not produce a convincing investigation. The Court, rightly marked this inactivity as inertia.¹⁸

Next, though not expressly stated, lack of co-operation on the part of the respondent state may play a major role in rejecting preliminary objections. The

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¹⁵ “However, the investigations which the Contracting States are obliged by Articles 2 and 13 of the Convention to conduct in cases of fatal assault must be able to lead to the identification and punishment of those responsible”. Yasa v. Turkey, 2.9.1998,1998-VI RJD 2411, para. 74.
¹⁶ Nevertheless, the commission has held in respect of alleged ill-treatment contrary to Art. 3, that raising criminal charges against the official concerned or filing a civil action for compensation are effective remedies to be examined pursuant to Article 26. Application no. 10078/82, M. v. France, 41 DR 103; App. no. 11208/84, McQuistion v. UK, 46 DR 182; Ribitsch v. Austria, 74 DR 129.
¹⁷ Compare, Aksoy v. Turkey, supra note. 5, para. 56.
¹⁸ Çakici v. Turkey, 8.7.1999, para. 80. This case is not the only one, but perhaps the most striking one in respect of inactivity.
Commission, only in two cases concerning terrorism, explicitly found Turkey to have fallen short of their obligations to furnish all necessary facilities in its task of establishing the facts. The lack of co-operation, however, impinged on the Commission’s and the Court’s findings profoundly in the other cases.

On the other hand, other findings of the Court should be subjected to criticism. Firstly, in the opinion of the Court, clashes which occur in the South-East of Turkey may impede the proper functioning of the system of the administration of justice. Furthermore, the difficulties in securing probative evidence may make the domestic legal proceedings futile. Three main inferences can be drawn from this determination. First, the Court should dispense applicant(s) from their normal obligation to exhaust local remedies when terrorist attacks cause significant civil strife. But does this mean that an applicant who suffered from terrorism in Northern Ireland or the Basque country would not need to exhaust local remedies?

Secondly, wouldn’t it mean that a state can likewise be excused because of the shortcomings caused by terrorism? Last but not least, should the situation impede the domestic process, how could the European Commission have conducted an investigation and reached a conclusion very easily in all of the cases?

Secondly, the Court underlined that it can not exclude from its considerations the risk of reprisals against the applicants or their lawyers if they bring a domestic case against the security forces alleging that they are responsible for the litigants’ sufferings. This seems just an assumption not based on concrete evidence.

19 Ibid, para. 43; Tanrikulu v. Turkey, 8.9.1999, para. 39.
21 Judge Gölcüklü, explained this point as follows: “...what is going on in South-East Turkey is no different from what has been happening for years in other Council of Europe Countries ... and there are not two kinds of terrorism.” Akdivar and Others v. Turkey, supra note 2, para. 11 of Judge Gölcüklü’s dissenting opinion.
22 Judge Jambrek, in Mentes and Others v. Turkey case, asked the same question: “... such difficulties affect not only domestic administrative inquiries and legal proceedings but also, and maybe even more so, the international judge’s ability to establish and evaluate the facts of a case.” Supra note 19.
23 Ibid, para. 74. For the meaningless of this assumption, see. Kaya v. Turkey, 19.2.1998, 28 EHRR 1 (1999) para. 2 and 57, infra no. 28.
24 In the subsequent cases, the Commission and the Court encountered with the examples of this risk. Tanrikulu v. Turkey, supra note 18, paras. 126-133; Kurt v. Turkey, 25.5.1998, 1998-III RJD 1152, paras. 21-24. However, the Akdivar case was the very first case relating to problem and the Court put forward this argument without any concrete evidence. This statement is particularly important, because the Court refrained from finding administrative practice of violations whenever it was alleged. See. inter alia, Kurt v. Turkey, supra note 23, paras. 166-169. It is odd to note that the Court did not accept this request after serial severe violations. In an
Moreover, it is hard to understand the difference between seeking local and international remedies in respect to risk.

Thirdly, the Court did not accept the sample cases submitted by the government in *Akdivar and Others* and the *Mentes and Others* on the ground that none of them had accepted the responsibility of the state servants. The Court rightly stated that “despite the extent of the problem of village destruction, there appears to be no example of compensation being awarded in respect of allegations that property has been purposely destroyed by members of the security forces or of prosecutions having been brought against them in respect of such allegations”\(^{25}\).

However, despite the government submitting in case of *Selcuk and Asker* a sample judgement in which the litigant had received compensation in respect of the burning of his house, the Court did not accept the government’s evidence arguing that the case pending was different from the precedents on the account of it having been abandoned and villages been evacuated.\(^{26}\) The Court could have assessed this sample as inadequate and requested more examples. However, to expect a judgement which was decided completely in same conditions seems very exacting. As stated by van Dijk and van Hoof on this point:

“For a given local remedy to be considered adequate and effective it is, of course, not required that the claim in question would actually have been recognised by the national court”\(^{27}\).

Finally, besides all these, as Judge Gotchev pointed out in *Mentes and Others* case, the new Court will be confronted with a tremendous burden of work as a consequence of the Court’s approach in “South-East” cases.

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\(^{25}\) *Akdivar and Others v. Turkey*, supra note 2, para. 71; *Mentes and Others v. Turkey*, supra note 19, para. 59.

\(^{26}\) *Selcuk and Asker v. Turkey*, supra note 19, para. 68.

2 Authenticity and the Intention of the Applicants

2.1 Role of the Human Rights Association and the Kurdish Human Rights Project

Two NGO’s (the Turkish Human Rights Association and the Kurdish Human Rights Project) role in the process in the cases against Turkey is worthy of examination. In 13 cases decided by the Court, relating to terrorism, the Human Rights Association had applied to the European Commission on behalf of the applicant. 28

Applicants approached the Association after they had either contacted the Turkish authorities or had even not attempted to obtain any satisfaction from Turkish authorities. Nevertheless, the Association did not attempt to solve the problem in the domestic sphere, and it preferred to bring the applications to international institutions, after it had taken statements. Although this fact alone would not harm the credibility of the applications submitted 29, it contradicts the subsidiary character of the Convention system and more importantly the main aim of the Convention, that is to say, to provide sufficient guarantees in order to protect rights enshrined in the Convention when domestic law fails.

Furthermore, the Turkish government assertion that the Association had prepared the cases without the real participation of the applicant was not examined fastidiously. In Ergi v. Turkey, the government disputed the validity of the signature of the applicant in the original application, asserting that it was different from the signature which he had signed before state authorities. The Court did not investigate the allegation, saying that pursuing the case before the Commission was sufficient to verify the veracity of application. 30 One may wonder whether it is possible to infer that an application would be valid when it had been submitted with a counterfeit signature before six months passed after exhaustion of local remedies and pursued by the applicant after six months expired. We may also speculate on another possibility;

28 In the cases Akdivar and Others v. Turkey, supra note 2; Aksoy v. Turkey, supra note 5; Ergi v. Turkey, 28.7.1998, 1998-VI RJD 1751; Gundem v. Turkey, 25.5.1998, 1998-III RJD 1109; Kaya v. Turkey, supra note 22; Mentes and Others v. Turkey, supra note 19; Selcuk and Asker v. Turkey, supra note 19; Yasa v. Turkey, supra note 14, Aytekin v. Turkey, 23.9.1998; Kurt v. Turkey, supra note 23; Tekin v. Turkey, 9.6.1998, 1998-IV RJD 1504; Çakici v. Turkey, supra note 17; Tanrikulu v. Turkey, supra note 18.

if the applicant had not appeared before the Commission -because of the fear of reprisal- like the other cases discussed below, would the Court have dismissed the objection?

According to Turkish delegates, these NGOs’ manifest aims were to distort the cases and to spread anti-Turkish propaganda. In the case of Kurt v. Turkey, the Commission clearly criticised the manipulation of the Association:

“...the statement to the Diyarbakir Human Rights Association needed to be treated with caution, having regard to previous criticism which the Commission had made of the accuracy of the statements taken by that association from applicants in other cases.”

Nonetheless, it seems that the Commission accepted the facts submitted by the applicant without hesitation. Despite material differences between the statements taken by the Association and the statements taken orally by the Delegates of Commission, the Commission found the latter convincing.

2.2 Role of the Applicants

Asserting that the applications had been prepared to spread anti-Turkish propaganda, the Turkish Government objected to the applications on the account that, in reality, either no victims went the Association or that their intentions were not to apply to the Commission.

In respect of former, the Gundem v. Turkey case provides a very controversial example. At the hearing before the Commission in Diyarbakir, one of the representatives of the applicant demanded that since the applicant was under pressure from the government, Mr. Mahmut Sakar, lawyer, head of Diyarbakir Branch of Human Rights Association, who had taken the statement of applicant should be called on behalf of Mr. Gundem. Head of Turkish Delegate disclosed the delegation suspicions about the authenticity of application as follows:

“This is an extremely interesting case. It seems to be an almost unprecedented one. The applicant appears to have gone to the Human Rights Association one month after his alleged incident and to have given a statement there. Then, about fourteen

30 Ergi v. Turkey, supra note 27, para. 63-64.
31 See. Judge Golcuklu’s dissenting opinion in the Case of Akdivar v. Turkey, supra note 2.
32 Kurt v. Turkey, supra note 23, para. 50.
33 In Selcuk and Asker v. Turkey case, notwithstanding the discrepancies and apparent inaccuracies in the written petitions submitted by the Association, the Commission held the applications were valid and genuine. Supra note 19, para. 60.
34 Mentes and Others v. Turkey, supra note 19, para. 33.
months later, many things he had not said there were taken down by a Mahmut Sakar, the seemingly then-president of the Human Rights Association.

Gündem’s signature does not appear on what was written down fourteen months later, which seems to be a ‘scenario’. Only the Human Rights Association’s President alleges that he heard these things from him. There are a number of details and lengthy accusations, apparently a ‘scenario’, which were not included in the statement taken at the Human Rights Association a year ago.”

Turkish delegates left the hearing on the ground that Mr. Sakar could not be heard on behalf of the applicant. The Commission expressed the opinion that Article 6 § 1 had been violated. Astonishingly, the Court stated that the government is estopped from making a preliminary objection, as they had not challenged the authenticity of applicant at the hearing. Similarly in the case of Kaya v. Turkey, neither the domestic nor the international institutions were faced with the applicant. The Court, again rejected Turkish objection on the ground that it was estopped.

The Court’s assessment on this point is open to criticism. In both of the mentioned cases, the government was found to be estopped. Yet, first, the purpose of the Turkish delegate in the Gundem case is clear, namely, to show that the applicant does not exist. This should be considered as a challenge. Secondly, it is suggested that non-existence of the applicant can be claimed in any stage of the procedure, because, the existence of the applicant is a sine qua non condition of a viable case. Furthermore, how can a state object to authenticity of an application at the admissibility stage whereas the latter did not approach any domestic authority? In other words, it seems very implausible to expect from the governments to investigate all the applicants who lodged petition against it.

On the other hand, the Turkish authorities’ approach in Kurt v. Turkey gave support to the allegations which had been made against them in previous cases. In this case, after lodging a petition with the Commission, the applicant was called by the public prosecutor for testimony. She denied her statements which had been taken by  

35 See the verbatim record of hearing, Gundem v. Turkey, supra note 27, para. 19.
36 On the contrary in Application no. 22057/93, (Siyamet Kapan v. Turkey, decision of 13 January 1997, Decisions and Reports 88-A, p. 17.) the Commission stated that, applicants bear the responsibility to cooperate with Commission. Commission struck out of the case from the list, in the view her failure to appear before Commission and the inability of his representatives to provide a handwritten and signed statement of his intentions”. See also, Ireland v. the United Kingdom, 18. 1, 1978, Series A. no. 25, p. 65, para. 161.
37 Gundem v. Turkey, supra note 27, para. 54.
38 Mr. Kaya refrained from cross-examination on the account of fear of reprisals from state agents. However, this allegation was completely meaningless, because the applicant had been already in prison at that time. supra note 22, para. 2 and 57.
the Association. Subsequently, she sent a letter to the Association and Foreign Ministry that her statements were taken by PKK for the propaganda. Moreover, she went (or was brought) to a notary twice where she stated that an ill-founded petition had been prepared by PKK in her name and intended to withdraw her petition.\textsuperscript{40} Rightly, neither the Commission nor the Court was convinced by the assertions of the Government that she had pursued all this process by her own initiative.\textsuperscript{41} Naturally, the Court dismissed the government’s evidence with regard to applicant’s statements. However, these facts should not be taken as persuasive evidence in other cases.

### 3 Fact Finding of the Commission

The applicants’ failure to apply initially to domestic authorities entailed the Commission investigating grievances as a “first instance” court. The Commission did not have many opportunities, however, to obtain evidence. In addition to the written statements submitted by the parties\textsuperscript{42}, it arranged hearings and took statements from various persons.\textsuperscript{43} Since it did not have a power to compel witnesses to appear before it\textsuperscript{44}, the investigations sustained by it were full of shortcomings.\textsuperscript{45} Neither did it make an on-site exploration, nor did it hear any experts on the very complex complaints. The Commission found three or four witnesses sufficient to reach a conclusion. However, it is submitted that their evidence was not enough to hold the government responsible in some of the cases. Here are some examples.

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\textsuperscript{39} *Ibid.*, para. 60.

\textsuperscript{40} *Kurt v. Turkey*, supra note 23, para. 21-24.

\textsuperscript{41} Both the Commission and Court found a violation of Article 25 § 1 which provides, inter alia, an obligation not to hinder in any way the effective exercise of right to application. *Ibid.*, para. 158 et seq. See also *Tanrikulu v. Turkey*, supra note 18, paras. 126-133, for the violation of former Art. 25 of the Convention.

\textsuperscript{42} In *Yasa v. Turkey*, Commission based its findings on written materials, noting that would not be easily amenable to clarification from oral testimony. *Supra* note 14, para. 32.

\textsuperscript{43} For instance; *Selcuk and Asker v. Turkey*, supra note 19; *Gundem v. Turkey*, supra note 27.

\textsuperscript{44} In *Kurt v. Turkey* case, only 6 person of 13 who had been summoned, appeared and witnessed before Commission. *Supra* note 23.

\textsuperscript{45} The Commission confessed its shortcomings in factfinding as follows: “... It was aware of its own limitations as a first-instance tribunal of fact. In addition to the problem 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.” *Çakici v. Turkey*, supra note 17, para. 44.
In the case of *Mentes and Others*\(^\text{46}\), the government was said to have failed to provide investigation files concerning alleged burning of houses. Four villagers who had been presented by the government as eyewitnesses of the incidents, were found unreliable by the Commission. The only evidence on file was the accusations made against the security forces by four people who were closely related by blood or marriage, not only to each other, but also to persons suspected of or charged with being members of the PKK.\(^\text{47}\) Despite material discrepancies in the applicants’ statements, the Commission found them credible and based its findings on them.

In *Kurt v. Turkey*, despite the fact that all other witnesses denied the applicant’s allegation that the soldiers had arrested her son, the Commission accepted “applicant’s genuine and honestly held belief” without any clear reason.

Finally, in *Tekin v. Turkey*, the applicant, though lacking a doctor’s report, asserted that he had been tortured in police custody. The Commission based its findings on the applicant’s and his father’s testimony while it rejected all other testimonies as unreliable.\(^\text{48}\)

In the *Aytekin* case, the Commission did not in fact have the benefit of the full file when assessing the evidence surrounding the allegation (a killing), since the Government’s submissions had been misplaced as a result of a clerical error.\(^\text{49}\) It seems that the Commission did not request the same file again. It was satisfied with the present documents, which remained as a basis for reaching a conclusion.

The *Kaya v. Turkey* case demonstrates a very significant example in respect of interpretation of its convincing reasons. In this case, the Commission gave very detailed reasons for its findings.\(^\text{50}\) Since the government had not rebutted these allegations, the facts were proven beyond reasonable doubts.\(^\text{51}\)

\(^{46}\) *Mentes and Others v. Turkey*, supra note 19, para. 33-34.

\(^{47}\) Judge De Meyer’s dissenting opinion, *ibid*.

\(^{48}\) para. 35 et seq. Judge De Meyer criticised this fact-finding as follows: “These statements were even less capable of sufficing in the instant case as the applicant had not even taken the trouble to have himself examined by a doctor after his release, which is difficult to understand on the part of a journalist inclined to be a militant”.

\(^{49}\) *Aytekin v. Turkey*, supra note 27, para. 39.

\(^{50}\) “There were however a number of factors which gave reason to doubt the Government’s account of the events: there was only one casualty despite the number of soldiers (50–60) and PKK terrorists (20–35) engaged in the gun battle which reportedly lasted between thirty and sixty minutes; the extent and severity of the bullet wounds to the deceased’s body having regard to the range of the soldiers’ weapons (400–600 metres) and the firing distance between the soldiers and their attackers (300–1,000 metres); the fact that there were bullet wounds to all parts of the body suggested that the deceased must have been fully exposed to gunfire whereas neither he nor any of the other terrorists had actually been
Although it would be implausible to expect the same level of proof in every application, the decision should consist of evidence other than the applicant’s statements when they are controversial. But the Commission recognised that proving their case was not a burden for applicants. On the contrary, it was incumbent on the government to rebut applicants’ allegations. This was a reverse of normal Strasbourg process. Essentially, even in allegations of gross human rights violations, the applicants should establish the validity of their argument. However, in certain exceptions the burden of proof might shift and be imposed on the respondent state. The criterion applied to this issue was laid down in the Aksoy case:

“where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the state to provide a plausible explanation as to the causing of the injury.”

As to the allegation of having been tortured in detention in the Cakici case, the Commission stated that in cases of unacknowledged detention and disappearance independent, objective medical evidence or eyewitness testimony was unlikely to be forthcoming and that to require either as a prerequisite of a finding of a violation of Article 3 would undermine the protection afforded by that provision. Nevertheless, one must not overlook that in that case not only was there supporting evidence but also several discrepancies which could not be cleared by the State, such as custody records.

In other words, unlike the Tekin case, there should be some facts to be rebutted by the State. In any case, regardless of severity of alleged acts there is supposed to be some persuasive evidence in order to shift the burden of proof. Alternatively, it could be stated by the Court that there is a positive obligation imposed upon states that requires them to provide effective guarantees in torture and disappearance cases even in the absence of an application. For instance, a medical report requirement could be demanded for every detention. Failure to fulfil these guarantees might enough to find seen during the clash; the deceased’s clothing was not typical of PKK mountain apparel; the body was handed over to three unknown villagers even though he was considered to have been an active terrorist; and the absence of any forensic evidence linking the deceased to the weapon found beside his body.”

Kaya v. Turkey, supra note 22, para. 39

51 Gulec v. Turkey, 1998-IV RJD 1698, para. 14-48; Çakici v. Turkey (supra note 17) cases are the other convincing examples as to evaluation of the evidences.

52 see, inter alia, Hippin v. Austria, application no. 18764/91, 79-A DR 23 at 29.

53 Aksoy v. Turkey, supra note 5, para. 61; Selmouni v. France, 28 July 1999, para. 87.

54 Cakici v. Turkey, supra note 17, para. 91.

55 Ibid, inter alia, para. 49. See also Selmouni v. France, supra no. 52.
a violation. However, without such an interpretation, reliable statements of applicants should not be enough to change the onus under the light of the Court’s case-law.

Admittedly, in evaluating the issue, governments’ cooperation can be taken into account. Lack of cooperation on the part of respondent government may facilitate a shift in the burden of proof. In fact, in some of the cases\textsuperscript{56}, the Commission was at ease in holding the government responsible because of its insufficient cooperation.

4 Conclusions

The South East cases relating to terrorism embody several very interesting aspects that the European Court of Human Rights has not faced before. The alleged breaches in these applications have been the most brutal in the Court’s history, and unfortunately many of them reflected the true situation.

In response, the Court’s jurisdiction has provided useful tools to fight against terrorism, whether inflicted by the State or otherwise. Nevertheless, such a grave terrorist conflict cannot be solved by the sole efforts of international institutions. The protection of human rights must be achieved primarily with effective domestic remedies. Hence, international monitoring institutions should encourage victims to exhaust local remedies. This would coerce governments to scrutinise and amend their domestic procedures so as to comply with international standards. Certainly, in some of the cases examined in this article, applicants should have been absolved from the duty to exhaust local remedies, but this is not true for all of them. Therefore, the European Commission and the Court should have given Turkish authorities the chance first to solve the problems in domestic sphere. In other words, absolving some of the applicants from the duty to exhaust local remedies should have remained as an exception based on extraordinary facts and not be transformed into a general rule. This stance would have been in conformity with the subsidiary character of the Convention. Unfortunately, the Commission’s approach will not increase but decrease the effectiveness of domestic remedies. Due to the acceptance of the cases in the international sphere regardless of whether they could have been successful in the

\textsuperscript{56} Although the government was not helpful in most of the cases, the Commission merely in two cases held that the Government had fallen short of their obligations under former Article 28 § 1 (a) of the Convention to furnish all the necessary facilities to the Commission in its task of establishing the facts. \textit{Cakici v. Turkey}, supra note 17, para. 43; \textit{Tanrikulu v. Turkey}, supra note 18, para. 39.
domestic domain, it becomes highly implausible that victims will mount their cases before domestic authorities, and so domestic courts will not be able to rectify their previous deficiencies. This is regrettable since victims of human rights violations in state of emergency need effective domestic remedies even more urgently than international law backstops.

Having regard to the fact-finding in the South East cases, we might say that the facts became clear neither at domestic nor at the international sphere. This result, doubtless, weakens the value of the judgments. The Commission should have been more energetic in obtaining evidence. It could have tried to arrange on-site investigations as the Committee of Torture had done several times in Turkey. However, as one of the Commissioners pointed out thirty years ago, the structure of the Strasbourg organs is not suitable for investigation task:

“The European Commission of Human Rights has not been established in the form and with the powers it requires to deal with certain very extensive cases like the present …

Working without assistants other than administrative staff, it is impossible for it, with seven members (in the case of Sub-Commission) or even with sixteen members (as in the case of the Commission) to deal with an inquiry involving the hearing of evidence from hundreds of witnesses…”

Thirty years later, this opinion seemingly was shared by all of the members of the Commission:

“It (the Commission) was aware of its own limitations as a first-instance tribunal of fact. In addition to the problem 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 seventeen witnesses had been summoned to appear, only eleven gave evidence.”

As the burden of work of the new European Court increases, it seems ever more problematic for it to pursue an effective examination in the cases of state of emergency. Unfortunately, ethnic conflicts and terrorism are not confined to Turkey but have threatened States newly committed to democracy and human rights in Eastern Europe.

It is suggested that it is impossible for the Court, even as remodelled under Protocol 11, to cope with these serious allegations in a proper way for two reasons.

58 Cakici v. Turkey, supra note 17, para. 44
First, the fact-finding of these cases is more difficult than a typical Western European case about freedom of speech or fair trials. Most will require lengthy on-site investigations and hearings. Secondly, the factual allegations put forward in these cases are so ferociously disputed that the international institutions should scrutinise them comprehensively. There is insufficient evidence that the Court as presently constituted is willing to face up to these obstacles. Perhaps a specialised chamber of the Court or even a new, more inquisitorial organ could examine this kind of application more appropriately. It remains to be seen whether either the level of judicial business arising from conflicts in Eastern Europe or alternatively the hostile reactions of member States such as Turkey, outraged by the Court’s findings, will force further reforms along these lines.

59 see. The Rt Hon Lord Lloyd of Berwick, Inquiry into Legislation Against Terrorism, Cm. 3420, vol. II, pp. 39-44.