AS TO THE ADMISSIBILITY OF

Application No. 22497/93
by izzet ASLAN
against Turkey

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

MM. C. A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYUK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mrs. G.H. THUNE
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
E. KONSTANTINOV
G. RESS

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 12 August 1993 by izzet ASLAN against Turkey and registered on 20 August 1993 under file No. 22497/93;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations submitted by the respondent Government on 22 April 1994 and the observations in reply submitted by the applicant on 27 June 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1947 and lives at Çinarönü Köyü/ Savur/Mardin. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex. The applicant states that he is bringing the application on his own behalf and on behalf of of his son Özcan Aslan, his nephew Serif Aslan and his brother Ömer Aslan.

The facts as submitted by the parties may be summarised as

follows.

A. The particular circumstances of the case

The applicant states that the following occurred:

On 13 February 1993 at about sunset, about 300 soldiers and special teams (state security forces with the status of police), under the command of non-commissioned officers and a first sergeant from Çinar Gendarme Post and special team commissioners connected to Çinar security police station, entered his village Çinarönü. They forced the men of the village, including the applicant, his six nephews, his three brothers in law and his three brothers, to gather in the village square and to lie down in the snow, and to remain lying there all night until about 6.00 or 7.00 the following morning.

Those forced to lie in the snow included the village imam. The soldiers threatened to take off his socks, to burn his feet and set fire to his beard, but the village mayor said:"Either you kill us all, or you leave the imam alone".

As the men lay in the square, they were beaten by the soldiers and special teams with truncheons, wooden beams and rifle butts. The soldiers and special teams threatened the men, using words such as:"You are assisting the terrorists, if we eliminate all of you, they can die of hunger", and also abused the men, calling them "children of whores".

The women of the village including the applicant's wife, his three sisters and his nieces, who witnessed what was done to the men, were also subjected to abuse by the soldiers and special teams, who used such words as: "We shall rape you all".

Soldiers collected the goods of the applicant's brother, Ömer Aslan, into one room of his house, poured petrol over them, and set fire to the house. As they did this, they beat him with rifle butts, and used words such as:"We set fire to your house this time, if you continue to assist the terrorists, we shall set you alight next time". Ömer Aslan was also forced to lie in the square with the other men.

The soldiers and special teams left the village at about 7.00 on 14 February 1993 and split into groups.

At about 12.00 on 14 February 1993 a group of about 50 soldiers encountered two boys, the applicant's son Özcan Aslan and his nephew Serif Aslan, watching over sheep in the mountains about 1 or 2 kilometres outside the village. They stripped Özcan Aslan and Serif Aslan completely naked in the snow, and insulted them. They wanted to rape Özcan Aslan and, when he resisted, beat him severely. Özcan Aslan suffered severe bruising and still suffers from chronic bronchitis as a result of his experience. He was taken by the applicant to see a doctor, but he had been appointed to another post and could not be traced; it has not been possible to obtain a medical report.

The respondent Government state that on 13 February 1993 security forces attached to the Gendarmes Command at Çinar carried out a search at the applicant's village with the purpose of preventing activities of the PKK (Kurdish Workers' Party: an armed separatist movement). The operation was in the context of maintaining peace and protecting the lives and property of ordinary citizens. Following the communication of the application to the Government, the public prosecutor of Savur has treated it as a "denunciation" and initiated a preliminary investigation.

B. Relevant domestic law and practice

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),

- to oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- to make an unlawful search of someone's home (Articles 193 and 194),

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

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

- to damage another's property intentionally (Article 526 et seq.).

The Turkish Criminal Code makes it a criminal offence to subject someone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment, inflicted by civil servants).

For criminal offences, complaints may be lodged, pursuant to Articles 151 and 153 of the Code of Criminal Procedure, with the public prosecutor or the local administrative authorities. The public prosecutor and the police have a duty to investigate crimes reported to them, the former deciding whether a prosecution should be initiated, pursuant to Article 148 of the Code of Criminal Procedure. A complainant may appeal against the decision of the public prosecutor not to institute criminal proceedings within fifteen days of being notified (Article 165 of the Code of Criminal Procedure).

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

Civil and administrative procedures

Article 125 of the Turkish Constitution provides as follows:

(translation)

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

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

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

and property.

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

(translation)

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

Proceedings before the administrative courts are in writing.

Any illegal act by civil servants, be it a crime or tort, which causes material or moral damage may be the subject of a claim for compensation before the ordinary civil courts and the administrative courts.

COMPLAINTS

The applicant complains of violations of Articles 3, 5, 6, 8, 13, 14 and 18 of the Convention and Article 1 of Protocol No. 1.

As to Article 3 he complains of torture and inhuman and degrading treatment, including treatment amounting to collective punishment, of the applicant and his relatives, including a son, brother and nephew.

As to Article 5 he refers to a breach of his right and that of his relatives to the exercise of liberty and the enjoyment of security of the person, by virtue of their being forced to spend a night lying in the snow.

As to Article 6 he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for torture, inhuman and degrading treatment and destruction of property, or to make effective provision for access to the courts, as a result of which the applicant cannot bring civil proceedings arising out of those events.

As to Article 8 the applicant refers to a violation of his right to family life and respect for his home by reason of the collective punishment applied to him, his relatives and the other villagers, and by reason of the destruction of his brother's home.

As to Article 13 he alleges that there is a lack of any independent authority before which his complaints can be brought with any prospect of success.

As to Article 14 the applicant alleges that he and his relatives have been discriminated against on the ground of their Kurdish origin in the enjoyment of their rights under Articles 3, 5, 6, 8 and 13 of the Convention and Article 1 of the First Protocol, and he refers to an administrative practice of discrimination on grounds of race.

As to Article 18 he refers to the destruction of his brother's home and property for purposes incompatible with the Convention.

As to Article 1 of Protocol No. 1 he again refers to the destruction of his brother's home and property.

The applicant maintains that there is no requirement that he pursue domestic remedies, on grounds which have been set out in another application (No 21895/93). He adds that he believes, on good grounds, that since the State perpetrated the incidents which he has described, he would face persecution if he made a complaint to a State body.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 12 August 1994 and registered on 20 August 1993.

On 11 October 1993, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the application.

The Government's observations were submitted on 22 April 1994 after two extensions in the time-limit. The applicant submitted further information and observations in reply on 27 June 1994.

THE LAW

The applicant alleges that his son, brother, nephew and himself were subject to torture by security forces who raided their village. He invokes Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 5 (right to liberty), Article 6 (Art. 6) (the right of access to court), Article 8 (Art. 8) (respect for family life and home), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition on discrimination) and Article 18 (prohibition on using authorised Convention restrictions for ulterior purposes), as well as Article 1 of Protocol No. 1 (P1-1) to the Convention (the right to property).

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition.

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

In respect of damage alleged to have been caused by the State, the Government submit that the applicant had the possibility of introducing an administrative action before the administrative courts for compensation in accordance with Article 125 of the Turkish Constitution. Claims for compensation could also have been lodged in the ordinary civil courts.

The Government submit also that the acts alleged by the applicant have no lawful authority under emergency legislation or decrees and would constitute punishable criminal offences under both criminal and military law, in respect of which complaints could be lodged with the competent civil and military authorities.

The Government further point out that there is an ongoing investigation by the public prosecutor of Savur into the applicant's allegations. Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

The applicant maintains that there is no requirement that he pursue domestic remedies. Any purported remedy is illusory, inadequate and ineffective since, inter alia, the operation in question in this case was officially organised, planned and executed by agents of the State. He refers to an administrative practice of not respecting the requirement under the Convention of the provision of effective domestic remedies.

Further, the applicant submits that, whether or not there is an administrative practice, domestic remedies are ineffective in this case having regard, inter alia, to the situation in South-East Turkey which is such that potential applicants have a well-founded fear of the consequences; the lack of genuine investigations by public prosecutors and other competent authorities; positive discouragement of those attempting to pursue remedies; an official attitude of legal unaccountability towards the security forces; and the lack of any prosecutions against members of the security forces for alleged ill-treatment and torture or examples of compensation paid to villagers in the situation of the applicant.

In respect of the investigation by the public prosecutor of Savur, the applicant submits that it is not apparent what is being done and that the investigation may have been initiated for appearances' sake.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies which relate to the breaches of the Convention alleged and at the same time can provide effective and sufficient redress. An applicant does not need to exercise remedies which, although theoretically of a nature to constitute remedies, do not in reality offer any chance of redressing the alleged breach. It is furthermore established that the burden of proving the existence of available and sufficient domestic remedies lies upon the State invoking the rule (cf. Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, p. 18, para. 36, and Nos. 14116/88 and 14117/88, Sargin and Yagci v. Turkey, Dec. 11.05.89, D.R. 61 p. 250, 262).

The Commission does not deem it necessary to determine whether there exists an administrative practice on the part of Turkish authorities tolerating abuses of human rights of the kind alleged by the applicant, because it agrees with the applicant that it has not been established that he had at his disposal adequate remedies to deal effectively with his complaints.

While the Government refer to the pending inquiry by the public prosecutor into the applicant's complaints, the Commission notes that more than a year has elapsed since it was initiated but that it is not apparent that any significant progress has been made. In view of the delays involved and the serious nature of the crimes alleged, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

The Commission also notes its findings in previous cases (Akduvar and others v. Turkey, No. 21893/93 and Cagirge v. Turkey, No. 21895/93, Dec. 19.10.94) to the effect that it could not be said at this stage that a fear of reprisal if complaints are pursued more vigorously is wholly without foundation.

The Commission considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75). The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 (Art. 26) of the Convention. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

Abuse of the right of petition

The Government maintain that the application, being devoid of any sound judicial basis, has been lodged for purposes of political

propaganda against the Turkish Government. Accordingly the application constitutes an abuse of the right of petition which discredits the legal nature of the Convention control mechanism.

The applicant rejects the Government's submission, contending that his complaints relate to alleged violations of the Convention, which have not formally been brought before the local instances for fear of reprisals.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government have made no comment on the merits beyond stating that the security forces on 13 February 1993 carried out an operation in the applicant's village to prevent activities by the PKK and to safeguard the peace, security and the lives and possessions of ordinary citizens.

The applicant maintains his account of events.

The Commission considers, in the light of the parties' submissions, that the case raises complex issues of law and fact under the Convention, the determination of which should depend on an examination of the merits of the application as a whole. The Commission concludes, therefore, that the application is not manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, unanimously,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)