AS TO THE ADMISSIBILITY OF

Application No. 25657/94
by Behçet AVSAR
against Turkey

The European Commission of Human Rights sitting in private on 14 October 1996, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

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 10 October 1994 by Behçet Avsar against Turkey and registered on 14 November 1994 under file No. 25657/94;

Having regard to :

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

- the Commission's decision of 20 February 1995 to communicate the application ;

- the observations submitted by the respondent Government on 14 June 1995 and the observations in reply submitted by the applicant on 31 August 1995 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1960 and lives in Köln, Germany. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

A. Particular circumstances of the case

The facts of the present case have not been agreed upon by the parties.

The applicant claims that the following events have occurred:

Serif Avsar was the brother of the applicant, Behçet Avsar, who is the European representative of the Kurdish opposition daily newspaper "Özgür Gündem". Behçet Avsar lives in Köln, Germany. Although a businessman who was not politically active, Serif Avsar had previously been detained and interrogated several times, apparently due to his brother's political activities and their joint involvement in the newspaper.

On Friday 22 April 1994 at about 11 am, five men came into the shop owned by the Avsar family in Diyarbakir. The men said they were policemen and Serif Avsar spoke to them first. They said they wanted him to go with them and give a statement on behalf of another brother of the applicant, Abdül Kerim, who was then in custody in the Diyarbakir prison. Serif Avsar claimed that he did not know who they were, as they had not identified themselves and he did not recognise them. Serif Avsar further stated that if a statement was needed, then uniformed policemen should come and get it from him; he would be happy to go with them to provide it. There was then an argument between the five men and the Avsar family members in the shop (mentioned thereafter as "the witnesses") over whether they should take Serif Avsar. The five persons then said that they would call the police station in order to identify themselves. As a result of their telephone conversation it became clear to the witnesses that the men were in fact "village guards". Two more people then appeared and claimed to be policemen. Serif Avsar asked them their identities. They showed two cards but the witnesses could not ascertain whether the cards indeed identified them as policemen.

The argument continued until one of the last two men to arrive pulled out a gun. All of the other men then pulled out their guns. Serif Avsar believed that they were going to shoot the other Avsar family members in the shop, and so agreed to go with them. The witnesses saw them all get into a white Renault (Registration Number 21 AF 989) and drive away. There were five people in the car, including Serif Avsar. The remaining three got into a taxi (Registration Number 21T 1127) and drove off after them. The witnesses then jumped into their car and followed the men to the Gendarme Headquarters in Saraykapi. The witnesses could not get inside the Headquarters as they were in a normal car as only official vehicles and taxis were allowed in. They could, however, see the three men who they had identified as "village guards" outside the building. The witnesses asked one of the guards where their brother was. The guard denied any knowledge of him. The witnesses pointed out to the Duty Officer the man who had brought Serif Avsar to the building. The witnesses then saw one of the two men who had arrived at the Avsars' shop last driving off in a navy blue Renault 21 (Registration Number 06C DE35).

The witnesses returned to their shop and called the police, informing them that their brother had been kidnapped. The police said their brother had not been kidnapped but was in fact at the Gendarme station. The witnesses said that the Gendarmes had just denied that. The policemen on the other end of the phone did not respond to this and hung up the phone. At 4.30 pm on the same day, the witnesses received

a telephone call to their home and an unidentified person told them "We have dealt with your brother, we have killed him and you are all in the queue".

On 24 April 1994, Serif Avsar's father spoke to the Minister for Human Rights who said that he had spoken to the Governor and the Minister of Interior Affairs about Mr. Avsar's disappearance. They had told the Minister that Serif Avsar was in the hands of the Special Unit and if they could get there in time they would save him. The witnesses were told that the Minister of Interior Affairs said the same on 25 April 1994, to Mr. Kamil Genç, the social democratic party MP for Tunceli.

The Avsar family subsequently made written petitions to the State of Emergency Regional Governor, the State Security Court Prosecutor, and the Judicial Prosecutor. All denied that Serif Avsar had ever been in the custody of the authorities. The applicant's family undertook an intensive campaign to ascertain the whereabouts of Serif Avsar, with the help of Amnesty International, the PEN centres in numerous countries, the International Federation of Journalists, and other organisations. The Turkish officials all denied that Serif Avsar was being held.

On 7 May 1994, the Avsar family was asked by telephone to go to the university hospital in Diyarbakir to identify a body found in a wasteland area near the village of Toprakli, in the district of Silvan in south-east Turkey. The Avsar family confirmed that the body was that of Serif Avsar. Mr. Avsar had been shot twice in the head, and an autopsy reportedly established that he had been killed some 10 days earlier, five days after his abduction.

On 16 May 1994, Osman Yavuzalp, Third Secretary of the Turkish Embassy in Brussels, sent a reply to the International Federation of Journalists' request for information on the Avsar case, stating (in translation) as follows:

"Avsar was abducted by provisional village guards at about 11.30 am on 22 April 1994. According to the witnesses the abductors of Mr. Avsar could be identified. They were Ömer Güngör, Yasar Günbam, Zeyyat Aksin, Feyzi Gökçen, Aziz Erbey and Mesut Mehmetoglu. They were placed in detention on 5 May 1994 and claimed to have taken and killed Mr. Avsar in a vendetta. The body of Mr. Avsar was found in a field by the side of a national road which linked the towns of Silvan and Diyarbakir. The Public Prosecutor is informed of the affair. The suspects have been arrested and the investigation is in process".

However, according to a spokesman of the Gendarme Headquarters in Diyarbakir-Saraykapi, the five militiamen involved have been put under "police supervision". No action appears to have been undertaken to ascertain the identity of the two plain-clothes officers involved in the abduction and murder. One source has suggested that the men in plain-clothes were members of the gendarmerie intelligence service JITEM attached to the Hazro Gendarmerie (Amnesty International Urgent Action).

Serif Avsar's family has been under intense pressure to drop their campaign for justice in Mr. Avsar's abduction and murder. They receive almost daily anonymous telephone calls threatening them with death, and policemen have repeatedly visited the family home issuing threats. On 3 April 1994, two policemen visited the premises of the Avsar family business, accompanied by two members of the political party MHP (National Movement Party). The four men questioned the action undertaken by the family to ascertain the whereabouts of Mr. Avsar, and issued threats such as: "Why have you created such a fuss? You confuse everything. This will not do you any good!"

On 18 June 1994, the abduction of two cousins of the applicant

has been attempted in the town of Bismil. After a chase, one of the cousins was taken into custody. However, due to the other cousin's escape, and the Avsar family's discovery that the car used in the attack belonged to one of the corporals in the Gendarmes, the detained cousin was released the next day.

On 5 July 1994, six people accused of the kidnapping and killing of Serif Avsar were put on trial in Diyarbakir. Five of the defendants - Ömer Güngör, Fevzi Gökçen, Yasar Günbam, Aziz Erbey and Zeyyat Aksin - are village guards, and the sixth defendant, Mesut Mehmetoglu, is a government informant. The State Prosecutor has requested the death penalty in each case.

The Prosecution's case against the village guards is, in each case, based on the guard's confessions, which they have said in court were extracted under pressure, and which contain contradictory evidence about the role of the government informant, Mesut Mehmetoglu, in ordering Serif Avsar's murder. According to an article in the Turkish Daily News of 7 July 1994, Yasar Günbam said "We cannot talk very much about the incident. The government authorises us to take some people and we do it. We are blamed for it. If we had not obeyed the orders we would have been fired."

The Government claim that the following events have occurred :

On 21 April 1994 four village guards were ordered by the gendarme commandant of Hazro District to drive some suspects to the Diyarbakir Gendarme Station in a private car (Registration Number 21 AF 989). On their way to Diyarbakir, they were asked to give a lift to ÖG, another village guard. After having transferred the suspects to the Diyarbakir Gendarme Station, the five village guards spent the night in Diyarbakir.

On 22 April 1994, as the five village guards were sitting in a cafe in Diyarbakir, ÖG explained to the others that his brother had been kidnapped and killed by the PKK and that his body had never been found. He also said that Mehmet Serif Avsar, who had some links with the PKK, could tell them where the body was if they took him to the Gendarme post for interrogation. The four other village guards accepted this proposal and all together they went to the shop of the Avsar family. When Serif Avsar questioned their identity, one of the village guards got out of the shop and asked a policeman whom he knew and who happened to be passing by (MM), to confirm that all five were village guards. Finally the four village guards got into the car with Serif Avsar and one village guard and MM got into a taxi. MM got out of the taxi before arriving at the Gendarme Command in Saraykapi. The car stopped for a while in front of the Saraykapi Gendarme Command. ÖG told the others that he intended to take Serif Avsar to the Lice gendarme headquarters. The four other village guards accepted this and the group left for Lice. However, after a while, the four village guards renounced to go to Lice without the permission of their commander. ÖG and Serif Avsar got out of the car. ÖG asked the others to send a taxi from the city.

As they were alone, ÖG asked Serif Avsar where the body of his deceased brother was. They argued for a while and ÖG shot Serif Avsar to death.

The four village guards came back and took ÖG into their car. They went to Hazro and left the car in front of the Gendarme headquarters.

The applicant complained of the death of his brother and the village guards were identified and arrested. ÖG claimed to have killed Serif Avsar and explained that the body of Serif Avsar could be found on the Diyarbakir-Lice road. Autopsy reports established that he had been killed 10 or 20 days earlier.

The proceedings are still pending before the Criminal Court in Diyarbakir, which has held several hearings in order to take and examine evidence, but has not yet pronounced its judgment.

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 10 and 14 of the Convention.

As to Article 2 he alleges that the intentional deprivation of the life of his brother was not attributable to any of the exhaustive purposes listed in para. 2 of the Convention, was not proportionate to any ground on which force that might result in death could be used and was not absolutely necessary to achieve any legitimate purpose. He also refers to the inadequate protection for the right to life in domestic law.

As to Article 3 he complains of discrimination on grounds of language and ethnic origin.

As to Article 10 he maintains that the murder of his brother and the continuing pattern of intimidation experienced by his relatives in South-East Turkey has the purpose of preventing him from practising his journalism.

As to Article 14 the applicant refers to discrimination on the ground of the Kurdish origin of his brother and himself in the enjoyment of their rights under Articles 2, 3 and 10 of the Convention.

The applicant maintains that there is no requirement that he pursue alleged domestic remedies.

According to him any alleged remedy is illusory, inadequate and ineffective because:

a) the operation which led to the killings in this case was officially organised, planned and executed by the agents of the Government;

b) there is an administrative practice of not respecting the rule which requires the provision of effective domestic remedies;

c) whether or not there is an administrative practice, the situation for Kurdish people in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they invoke alleged remedies;

d) the applicant has done everything possible to exhaust domestic remedies by appealing to local, regional and national officials regarding Serif Avsar's disappearance and subsequent murder.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 10 November 1994 and registered on 14 November 1994.

On 20 February 1995, the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's written observations were submitted on 14 June 1995. The applicant replied on 31 August 1995.

On 20 March 1996, the Government informed the Commission of the state of proceedings before the national jurisdictions.

On 23 April 1996 the Government were requested to provide, not later than 10 June 1996, further information on the state of proceedings before the national jurisdictions. No information has been submitted by the Turkish Government.

THE LAW

The applicant complains of kidnapping and killing of his brother by State officials. He invokes Articles 2 (Art. 2) (right to life), 3 (Art. 3) (freedom from inhuman treatment), 10 (Art. 10) (freedom of expression) and 14 (Art. 14) (freedom from discrimination in respect of protected rights) of the Convention.

Exhaustion of domestic remedies

The Government argue that the applicant has failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention since the proceedings before the Criminal Court at Diyarbakir are still pending.

The applicant refers to the length of time which the investigation is taking. He also disputes the efficacy of an investigation which is being carried out by the body which is alleged to be responsible for the violation.

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).

While the Government refer to the pending proceedings before the Criminal Court at Diyarbakir, the Commission notes that the incident occurred on 22 April 1994 and the investigation has not yet been concluded more than two and a half years later. The Commission is not satisfied in view of the delays and the serious nature of the alleged crime that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention, in particular having regard to the circumstances of this case where the relevant evidence would appear to easily accessible to the authorities. No explanation has been given as to any obstacles in the way of bringing the investigation to a conclusion.

The Commission finds also that in the circumstances of this case the applicant is not required to pursue any legal remedy separate to the proceedings before the Criminal Court of Diyarbakir (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75, p. 207). The Commission concludes that the applicant may 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.

As regards the substance of the applicant's complaints

The Government state that the applicant's brother was killed as a result of personal vendetta by ÖG acting by himself and without the authority of the State. They also state that the victim never entered to the buildings at the Gendarme Command, therefore Gendarmes were not

involved in the killing of the applicant's brother and the village guards were not acting under orders of the State.

The applicant points out disputes that the facts as provided by the Government are different from those provided by the eyewitness accounts of the brothers of the victim. He refers to some witness accounts that there were two persons claiming to be security force members, a policemen and a gendarme officer, who came into the shop to help the village guards. He states that the presence of these two persons supports his claim that the abduction of his brother was conducted on the orders of agents of the State.

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.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission