AS TO THE ADMISSIBILITY OF

Application No. 22676/93
by Mehmet GÜL
against Turkey

The European Commission of Human Rights sitting in private on 3 April 1995, the following members being present:

MM. C. A. NØRGAARD, President
H. DANELIUS
C.L. ROZAKIS
S. TRECHSEL
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H.G. SCHERMERS
Mr. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES
J.-C. GEUS
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
E. KONSTANTINOV
D. SVÁBY

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 25 August 1993 by Mehmet GÜL against Turkey and registered on 23 September 1993 under file No. 22676/93;

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 28 April 1994 and the observations in reply submitted by the applicant on 5 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1944 and resides at Bozova in the Province of Sanliurfa.

The applicant 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 brings the application on his own behalf and on behalf of his deceased son Mehmet Gül.

The facts as submitted by the parties may be summarised as follows.

A. The particular circumstances of the case

The applicant claims that the following events occurred.

The applicant's son, Mehmet Gül, was killed in his home, situated at Sanayi Caddesi No. 27 at Bozova, in the morning of 8 March 1993, when he was repeatedly shot through his apartment front door by security forces. He sustained a total of 61 bullet wounds and died on his way to hospital. The circumstances of the killing were as follows:

A number of searches were being conducted by a combined group of police from the town of Bozova and special teams of police. Houses next to the applicant's were searched without incident several hours earlier in the evening of 7 March 1993. The search of the applicant's son's residence began about 01.00 on 8 March 1993. A team of police surrounded the house, others approached the entrance door, switched off the electricity from outside the apartment, and banged on the door calling on it to be opened.

While the victim, who had gone to bed, was asking from behind the locked door who was there, firearms were fired from outside penetrating the door. The victim was hit by the bullets. It appears from photographic evidence that after he had been shot he attempted to find a light switch and also attempted to open the door. It is then claimed that the police continued to fire spraying him with bullets. Three fingers were broken off in the shooting and his hand remained stuck to the door post.

The applicant, who slept in the apartment above, woke up at the sounds of the shootings. As he tried to go downstairs the police turned their guns on him and threatened to shoot. The applicant said:

> "What do you think you are doing ? I am Mehmet Gül, I have no connections with anything illegal. Everybody knows me, from the Sanliurfa Governor to the police in Bozova and they know I am on the side of the State."

The police in front of the door, whom the applicant identifies as special team officers, said that his son was not opening the door. He shouted inside to his son asking why he was not opening the door. His son's wife screamed back that his son was lying in a pool of blood and sprayed with bullets from the police outside. The door had jammed as a result of the shooting and the applicant helped to kick it free. He found his son wounded and bleeding inside.

When, with the help of his other son Mustafa, he carried his wounded son on his back to the hospital, the applicant states that none of the assembled police or military personnel surrounding the apartment and in its vicinity (whom he estimates numbered some 150-200) offered to help in any way. His son died on the way to the hospital.

The official account released by the Governor's office to the media stated:

> "A terrorist by the name of Mehmet Gül was killed in a clash with security forces in Bozova and two illegal pistols were seized."

The applicant states that the two guns were planted in the house by the police when the applicant and his family were taking his son to hospital. When the police entered the house, they also removed most of the spent bullets and gold belonging to the victim's wife. However, some of the cartridges and bullet pieces were not found by the police and were later photographed.

A number of photographs were taken after the killing. Eighteen photographs have been submitted to the Commission. Each photograph is

numbered with a handwritten explanation on the reverse side.

Some photographs show the inside and outside of the door through which the victim was killed. Other photographs show clearly the entrance hall way in which the applicant had been standing bearing the full force of sustained fire through the closed door. Others show his attempts while wounded to turn on lighting which had been cut off from the outside by the police. The photographs offer vivid evidence of the indiscriminate nature and the intensity of the firing from outside the apartment.

AAccording to neighbours, after the applicant had left for the hospital with his son, police left the house and a gun shot was heard before they re-entered again. The applicant believes that the police fired a round from one of the planted guns. This was done in order that one of the guns claimed by them to have been fired from within the house, would be found to have been recently fired. He maintains that there were no weapons in the house prior to the incident.

The autopsy report dated 8 March 1993 referred to the death of the applicant as the result of an accident in an operation carried out jointly by gendarmes and police.

The Government state the following.

In response to information received that the applicant's sons Mehmet and Mustafa Gül were connected with the PKK (the Kurdish Workers' Party - an armed separatist movement), the security authorities sent a team to search their homes on 7 March 1993 at about 20.30. When the officers arrived outside the door, they demanded, loudly, for the doors to be opened. They were fired upon. The officers then fired at the door around the lock in order to gain entry to the house. The applicant's son, Mehmet Gül, died as a result of this fire.

The public prosecutor of the Bozova district instituted a preliminary investigation. On 17 March 1993, he issued the decision that he had no jurisdiction and referred the file to the Administrative Board of the Province as the competent body. The investigation has yet to be concluded by the Board.

B. Relevant domestic law and practice

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 a civil servant, 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. Damage caused by terrorist violence may be compensated out of the Social Help and Solidarity Fund.

Criminal procedures

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 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 or Departmental Administrative and District Administrative Councils). The local council decisions may be appealed to the State Council; a refusal to prosecute is subject to an automatic appeal of this kind.

Emergency measures

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

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

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

Decree 285 modifies the application of Law 3713, the Anti-Terror Law (1981), in those areas subject to the state of emergency, with the effect that the decision to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.

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

(translation)

"No criminal, financial or legal responsibility may be claimed against the State of Emergency Regional Governor or a Provincial Governor within a state of emergency region in respect of their decisions or acts connected with the exercise of the powers entrusted to them by this decree, and no application shall be

made to any judicial authority to this end. This is without prejudice to the rights of an individual to claim indemnity from the State for damages suffered by them without justification."

COMPLAINTS

The applicant complains of violations of Articles 2, 6 and 13 of the Convention.

As to Article 2, the applicant alleges that his son was a victim of the indiscriminate use of lethal force by the security forces of the State and that he was killed in circumstances where no justification existed under Article 2.

As to Articles 6 and 13, the applicant alleges that the police sought to pervert the course of justice by planting two guns after the killing in order to claim that his son had fired at the police from inside the house. This rendered his son a victim of a violation of Articles 6 and 13.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 25 August 1993 and registered on 23 September 1993.

On 10 January 1994, 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 28 April 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 5 July 1994.

On 8 December 1994, the Commission refused the Government's request to adjourn the examination of the case pending the investigation by the public prosecutor and requested them to submit any further observations which they might wish to make by 23 January 1995.

THE LAW

The applicant complains that his son was the victim of an unjustifiable use of lethal force by the police. The applicant invokes Article 2 (Art. 2) of the Convention (the right to life), Article 6 (Art. 6) (the right of access to court) and Article 13 (Art. 13) (the right to effective national remedies for Convention breaches).

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.

The Government point out that there is an ongoing investigation by the Administrative Board of the Province. If the Board deems the officers involved to be culpable, it may authorise criminal proceedings in which the applicant could intervene. If the Board however issued a decision of dismissal, the applicant could lodge an objection with the State Council. Since the inquiry has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, independently of any criminal proceedings, the Government submit that the applicant has the possibility of introducing an action against the administration for compensation for the loss of life of his son in accordance with the provisions of Turkish law which render the administration responsible for the loss and damages caused

by the acts of its agents.

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 the agents of the State. He refers to an administrative practice of unlawful killings and 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 if they pursue remedies; 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 extra-judicial killings.

In respect of the investigation by the Administrative Board of the Province, the applicant submits that no progress is apparent despite all the material evidence being in the possession of the Government.

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 under the state of emergency to deal effectively with his complaints.

While the Government refers to the pending investigation by the Administrative Board of the Province, the Commission notes that the investigation has made no apparent progress almost two years later. The Commission is not satisfied in view of the delays involved 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 be easily accessible to the authorities and no explanation has been given as to any obstacles in the way of bringing the investigation to a conclusion.

The Commission also considers that it cannot be said at this stage that the applicant's fear of reprisal if he pursues his complaints before the authorities more vigorously is wholly without foundation.

The Commission finds therefore that in the circumstances of this case the applicant is not required to pursue any legal remedy separate to the investigation commenced by the public prosecutor and referred to the Administrative Board (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R.75). The Commission concludes that the applicant may

be said to have complied with the domestic remedies' rule laid down in Article 26 (Art. 26) of the Convention and 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 merits

The Government have asserted that the applicant's son was killed at about 20.30 on 7 March 1993 when police returned fire in an operation undertaken to search his house in light of information that he was involved with the PKK. They have not otherwise commented on the substance of the applicant's complaints beyond asserting that they are under investigation by the Administrative Board of the Province.

The applicant maintains his account of events and refutes the assertion that his son was involved with the PKK or that the police came under fire as alleged by the Government.

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)