AS TO THE ADMISSIBILITY OF

Application No. 31893/96
by Tevfik GÜNES
against Turkey

The European Commission of Human Rights (Second Chamber) sitting in private on 2 July 1997, the following members being present:

Mrs. G.H. THUNE, President
MM. J.-C. GEUS
G. JÖRUNDSSON
A. GÖZÜBÜYÜK
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
M.A. NOWICKI
I. CABRAL BARRETO
J. MUCHA
D. SVÁBY
P. LORENZEN
E. BIELIUNAS
E.A. ALKEMA
A. ARABADJIEV

Ms. M.-T. SCHOEPFER, Secretary to the Chamber

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

Having regard to the application introduced on 21 May 1996 by Tevfik Günes against Turkey and registered on 13 June 1996 under file No. 31893/96;

Having regard to the report provided for in Rule 47 of the Rules of Procedure of the Commission;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen born in 1961, resides in Ankara. He is represented before the Commission by Oya Ataman, a lawyer practising in Ankara.

The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant, accused of being a member of the organisation Dev-Yol (Revolutionary Way), was taken into police custody in Ankara on 11 March 1981 and was subsequently detained on remand following a decision of the Ankara Court-Martial on 11 May 1981. He was released on 22 July 1991.

On 26 February 1982 the military prosecutor filed a bill of indictment in the Court-Martial against altogether 723 defendants including the present applicant.

It was alleged that the applicant was a member of an illegal

organisation whose aim was to undermine the constitutional order and replace it with a Marxist-Leninist regime. In addition it was alleged that he had instigated a number of violent acts such as the killing of S.Z., K.U. and R.G., the wounding of F.G., acting as an armed look-out in the wounding of C.V. and entering an armed confrontation. The prosecution called for the applicant to be sentenced pursuant to Article 146 of the Turkish Criminal Code.

On 10 April 1981 the applicant in his statement made to the police confessed his illegal activities related to the organisation. However, during his questioning by the Public Prosecutor and at the court hearings he denied his statement and alleged that it had been made under duress.

After martial law was lifted, the Ankara Court-Martial took the name of Court-Martial attached to the 4th army corps. It continued to deal with this case even after lifting of martial law, until 27 December 1993, pursuant to a provision in Article 23 of the Martial Law Act (no. 1402) of May 1971, amanded on 19 September 1982.

In a judgment of 19 July 1989, the Court-Martial found the applicant guilty of the offences as charged. The court rejected the applicant's objection that his statement made to police was made under duress. It concluded that the applicant's activities had been corroborated by the statements of the other accused. The court further referred to the fact that the applicant was arrested with a false identity card which confirmed his illegal activities. The court sentenced him to the death penalty.

The case was automatically referred to the Military Court of Cassation under the provision of Article 305 of the Turkish Code of Criminal Procedure which stipulates that there is an automatic appeal where the sentence passed at first instance exceeds fifteen years' imprisonment.

Pursuant to a law promulgated on 27 December 1993, the case-file was transferred to the non-military criminal court, the Court of Cassation, by Act No. 3953. On 27 December 1995 the Court of Cassation upheld the first instance court's decision.

COMPLAINTS

1. The applicant complains under Article 5 para. 3 of the Convention that his detention on remand was prolonged beyond a reasonable time.

2. The applicant further complains that the criminal proceedings brought against him were not concluded within a "reasonable time" as required by Article 6 para. 1 of the Convention.

3. He also complains that he did not have a fair trial as the courts based their reasoning on statements which he had made to the police under duress, which is contrary to Article 6 para. 1 of the Convention.

4. He complains that his case was not heard by an independent and impartial tribunal, as required by Article 6 para. 1 of the Convention. He explains that the Court-Martial was composed of five members: two military judges, two civil judges and one army officer with no legal training and fully accountable to the military commander of the state of martial law.

5. He further complains that his case was not heard by a tribunal established by law within the meaning of Article 6 para. 1 of the Convention. Although martial law was lifted in Ankara on 19 July 1985, Courts-Martial continued to deal with cases pending before them.

6. He lastly complains under Article 6 para. 2 of the Convention

that owing to its excessive length his detention on remand could no longer be considered as a provisional measure, but constituted an anticipatory sentence.

THE LAW

1. The applicant complains that his detention on remand exceeded a reasonable time within the meaning of Article 5 para. 3 (Art. 5-3) of the Convention. He also complains that because of its excessive length it could not be considered as a provisional measure, but constituted an anticipatory sentence, infringing the presumption of innocence under Article 6 para. 2 (Art. 6-2) of the Convention.

The Commission recalls that the declaration made by Turkey on 28 January 1987, pursuant to Article 25 (Art. 25) of the Convention, by which Turkey recognised the Commission's competence to examine individual petitions, extends only to facts and judgments based on events occurring after that date. The Commission notes that the above complaints concern a period which is prior to 28 January 1987.

It follows that the applicant's complaints in this respect must be rejected as falling outside the competence ratione temporis of the Commission and therefore as being incompatible with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2).

Consequently, this part of the application must be dismissed as manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

2. The applicant further complains that his case was not heard by a tribunal established by law within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention. In this context he explains that although martial law was lifted in Ankara on 19 July 1985, Courts-Martial continued to deal with cases pending before them.

The Commission observes that the Court-Martial remained competent to deal with this case even after the lifting of martial law, until 27 December 1993, pursuant to a provision in Article 23 of the Martial Law Act (no. 1402) of 13 May 1971, amended on 19 September 1982. This provision was repealed by Act No. 3953 of 27 December 1993, amending Act No. 1402, and the case-file was transferred to the non-military criminal courts.

The Commission futher considers that in this case, the applicant was prosecuted and convicted on the basis of legal provisions empowering a Court-Martial to decide, even in peacetime, cases against civilians suspected of having committed offences designed to undermine the constitutional system.

It follows that the Court-Martial, which tried and convicted the applicant, may be considered to be a tribunal "established by law" within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention (Mitap and Müftüoglu v. Turkey, Comm. Report 8 December 1994, para. 86, to be published in Reports of Judgments and Decisions, 1996).

3. The applicant complains that the criminal proceedings brought against him were not concluded within a "reasonable time" as required by Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant further complains that he did not have a fair trial as the courts based their reasoning on statements which he had made to the police under duress, which is contrary to Article 6 para. 1 (Art. 6-1) of the Convention.

The applicant also complains that his case was not heard by an independent and impartial tribunal, as required by Article 6 para. 1

(Art. 6-1) of the Convention. He explains that the Court-Martial was composed of five members: two military judges, two civil judges and one army officer with no legal training and fully accountable to the military commander of the state of martial law.

The Commission considers that it cannot, on the basis of the file, determine the admissibility of these complaints and that it is therefore necessary, in accordance with Rule 48 para. 2 (b) of the Rules of Procedure, to give notice of these complaints to the respondent Government.

For these reasons, the Commission,

DECIDES TO ADJOURN the examination of the applicant's complaints concerning the length and fairness of the criminal proceedings instituted against him and his complaint concerning the independence and impartiality of the court,

unanimously,
DECLARES THE REMAINDER OF THE APPLICATION INADMISSIBLE.

M.-T. SCHOEPFER
Secretary
to the Second Chamber

G.H. THUNE
President
of the Second Chamber