AS TO THE ADMISSIBILITY OF

Application No. 22680/93
by I.S.
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
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 27 August 1993 by I.S. against Turkey and registered on 23 September 1993 under file No. 22680/93;

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 1 June 1994 and the observations in reply submitted by the applicant on 19 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1970 and resides at Cizre, Inci Koyu. He is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

A. The particular circumstances of the case

The facts as submitted by the applicant may be summarised as follows:

The applicant's father had been the mayor of the village of

Sugeldi in Çatak for 23-24 years. Since the village did not want to accept the so-called "protection" system, there was harassment and persecution of the village generally and of the applicant's father in particular. Security officers repeatedly threatened the mayor with "Either you become a protector or you leave the village". In the summer of 1990, the applicant's father was taken into custody and subjected to torture for 14 days at Van Province Gendarme Headquarters. He was tried at Diyarbakir State Security Court and acquitted. The persecution of the village and of the mayor continued. In August 1991, the applicant's father was taken into custody and subjected to torture for 8 days at Van Province Gendarme Headquarters. A case was again opened against the applicant's father at Diyarbakir State Security Court and, again, he was acquitted.

After the acquittal, the applicant's father and the village were again subject to intense pressure to make them accept "protection". About once a month, village meetings were held in which the mayor of Çatak district and the Gendarme Commander participated. As a result of the pressure put on villagers at these meetings, two villagers (Idris Sancar and Suphi Isnas) agreed to become "protectors". As a consequence of their decision, PKK guerrillas organised an armed attack on those villagers who had agreed to become "protectors". Eight people from the families of the two "protectors" and two PKK activists were killed in the attack.

The families of the "protectors" claimed that the applicant's father collaborated in the attack and that Semsettin Saday, the applicant's brother who lived in Cizre, was actually involved in the incident. In fact, the applicant's father was in Çatak town on business that night and his brother was able to prove that he had been in an examination for his primary school certificate at the time.

The day after the attack, the applicant's father returned from Çatak to take part in the funerals of the families of the "protectors". The "protectors", however, held him responsible for the incident and threatened him. During the funeral ceremony, Idris Sancar gave his son a firearm and told him to kill the mayor. The weapon was taken from the child by force by a captain. Thereupon the applicant's father left the village and returned to Çatak. He stayed there for nearly two weeks. Whilst there, he went to the office of the prosecutor every day to tell them that he had not left the town because he was under surveillance.

The applicant's father received word from Major Murat (the applicant does not know his surname), serving in the intelligence service at Van Province Gendarme Headquarters, asking him to report to the Regiment's Headquarters. On 20 October 1992, the applicant's father went to the Headquarters, together with Musa (the applicant does not know his surname), the mayor of Dalbasti village. A co-villager by the name of Selim Kiyag and ten youths from Karabogaz village were also there being interrogated. They report that the applicant's father was tortured more intensively than they were.

On 25 October 1992, soldiers went to the applicant's village and took his uncle, Ekrem Bilban, to Van Province Gendarme Headquarters and handed over the body of the applicant's father to him. On 26 October 1992, the applicant applied to the office of the Public Prosecutor in Van to discover the cause of his father's death. The Public Prosecutor stated that he had taken samples of the blood of the applicant's father and sent them to the Forensic Institute and that, until he had received the results, the cause of death was not clear. From then until now, the applicant has been unable to learn anything about the cause of death.

The applicant states that his father had had no serious disease. He believes that his father was killed under torture. When he applied to the Van Province Gendarme Headquarters, he was told orally that his

father had died of a heart attack. The applicant did not see the body of his father but relatives who saw it said that there were bruises on various parts of his body and blood coming out of his mouth. The dead man was buried in Çatak district cemetery. His family informed the press but the security forces did not allow representatives of the press to see his body.

The newspaper Özgür Gündem reported on 25 November 1992 that the Van Doctors' Society and the Human Rights Association were investigating the death. The Van Branch Secretary of the Human Rights Association, Nazmi Gür, was reported as saying that "We have come to the conclusion from the statements of eye-witnesses and villagers and the burial certificate obtained that Saday died under torture". The Turkish Doctors' Association asked the Van Branch of the Turkish Doctors' Society and the Human Rights Association to investigate the death.

The report of the Human Rights Association cites the applicant as stating that the autopsy did not reflect the facts. Eye-witnesses had seen the marks of torture on the mayor's body. His back was black and blue and covered in bruises. The report contains the statement of the villager who received the body. He was taken to Major Murat, who told him that he was to collect a body. They took him to the body of the mayor. All he had on were his pyjamas. The Prosecutor said to him, "There are no wounds or bruises. Look well". The relative saw that there was blood in the nose and mouth. The Prosecutor answered, "This man was ill". The relative, who had known the mayor for many years, said that he had no illness. He saw bruises on his back and arms. The Prosecutor said to the taxi driver who was with the relative, "Come and look too". The taxi driver said the same thing. The Prosecutor then called two doctors. They "opened the chest" and carried out the autopsy. They wrote a report and made the relative sign it, even though he is illiterate. When he said to the Prosecutor that the mayor had been killed as a result of torture, the Prosecutor said to him, "Don't talk too much or I'll put you inside. Get out". The relative believes that the intention behind the killing of the mayor was either to force the remaining three hamlets in the village, that did not accept "protection", to take arms or else to evacuate the village. On the basis of the statements of a variety of people, the Human Rights Association concluded that the applicant's father died as a result of torture.

After the death of his father, most of the one hundred or so households in the village, other than those of the "protectors", left the village. The applicant's family left the village too. They now live in the district of Cizre in Sirnak. The villagers report that 32 villages and hamlets in the area have been forcibly evacuated or deserted as a result of the type of pressure to which they were subjected.

The respondent Government state as follows.

Following the receipt of anonymous letters and complaints to the effect that the applicant's father and others had been involved in the terrorist attack on the Sugeldi village, the Çatak gendarmes on 16 October 1992 requested permission from the Çatak Public Prosecutor to interrogate persons from the village who were suspected of being supporters of the PKK. The Prosecutor granted permission on 19 October 1992 for a ten day period of interrogation in respect of three persons including the applicant's father.

On 20 October 1992, the gendarmes sent the applicant's father to Van Gendarme headquarters. Notice was sent from the headquarters to the State of Emergency Headquarters that the applicant's father was held in detention for interrogation. On the same day the applicant's father was sent to Van state hospital for a medical examination. Dr. Sari reported at 14.15 that there were no traces of bodily injury or

beatings.

On 24 October 1992, the applicant's father was taken to the Headquarters doctor complaining of nausea. He was examined and treated with medicine by the doctor who recommended that he be sent to the state hospital.

On 25 October 1992, the applicant's father was admitted to the military hospital emergency service. The report of Dr. Onat indicated that his blood pressure was very low and his heart beat also very low. He received a heart massage but did not revive.

The autopsy was conducted by a military doctor and a doctor from the state hospital in the presence of a relative. The report referred to blood accumulation in the mouth but found no traces of mistreatment or torture. The cause of death reported to the Ministry of Justice by the Van Public Prosecutor was "possible heart attack" or "cerebral bleeding". The body was released for burial.

The investigation into the death of the applicant's father commenced on 26 October 1992 on which date the Public Prosecutor signed the applicant's complaint. A preliminary investigation file was opened on 27 October 1992 the complainant being stated as the applicant and the suspects as the personnel at the Van Gendarme Headquarters.

The Public Prosecutor summoned and questioned Major Murat Çakmak and other personnel from the headquarters. They testified to the effect that the applicant's father's health deteriorated on the Sunday when the detainees were in a cell waiting for interrogation and that no cases of torture were authorised.

Body parts extracted from the appplicant's father were examined by the Forensic Medicine Directorate in Istanbul. The first report of 23 December 1992 was inconclusive, stating that the exact cause of death had not been determined. The Director of Forensic Medicine requested the Van Public Prosecutor for permission to re-open the grave and to remove the the skullbones for further investigation into the cause of death. Permission was granted and on 13 June 1993 the grave was an exhumation of the applicant's father's body and body samples sent for forensic examination.

In its report dated 21 July 1993, the Forensic Medicine Directorate found the applicant's father could have died of bleeding in the brain due to a bloodvessel disorder. It found no traumatic traces.

The Prosecutor dismissed the investigation on 18 August 1993 with a decision not to prosecute under Article 164 of the Code of Criminal Procedure.

B. Relevant domestic law and practice

Criminal procedures

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).

Where a court is satisfied that an appeal is well-founded, it will order the opening of a public prosecution, which will be executed by the Public Prosecutor pursuant to Article 168 para. 2 of the Code of Criminal Procedure.

Civil action for damages

Pursuant to Article 41 of the Civil Code, an injured person may file a claim for compensation against the alleged perpetrator:

> "every person who causes damage to another in an unlawful manner, be it wilfully or be it negligently or imprudently, is liable for compensation."

Pursuant to Article 46, any victim of an assault may claim material damages:

> "The person who has been injured is entitled to compensation for the expenses as well as for the losses resulting from total or partial disability to work due regard being had to the detriment inflicted on the economic future of the injured party."

Moral damages may also be claimed under Article 47:

> "...the court may, taking into consideration the particular circumstances, award adequate general damages to the injured..."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he complains of the death of his father in custody, in circumstances suggesting that he died under or as a result of torture. Alternatively he complains of the killing of his father in violation of the State's obligation to protect his right to life. He also complains of the lack of any effective system for ensuring protection of the right to life and of the inadequate protection of the right to life in domestic law.

As to Article 3, he complains of the torture to which his father was subjected and of the applicant's own inability to discover what had happened to his father. He further complains of having been forced to leave his home and livelihood, as a result of threats and intimidation by the "protectors" and security forces and of discrimination on grounds of race or ethnic origin.

As to Article 6, he complains of the failure to initiate proceedings before an independent and impartial tribunal against those responsible for the torture and killing, as a result of which he cannot bring civil proceedings arising out of the killing. He is therefore denied effective access to court.

As to Article 13, he complains of the lack of any independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, he complains of discrimination on the grounds of race and/or ethnic origin in the enjoyment of the rights under Articles 2, 3, 6, 10 and 13 of the Convention.

As regards the exhaustion of domestic remedies, the applicant states that he is not required to exhaust any such remedy, since they are all illusory, inadequate and ineffective. He states that

(a) there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies (Article 13);

(b) there is an administrative practice of torture in custody, which not infrequently results in death, at the hands of the Turkish Gendarmerie in South-East Turkey;

(c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, owing to the failure of the legal system to provide redress;

(d) whether or not there is an administrative practice, the situation in South-East Turkey is such that potential applicants have a well-founded fear of the consequences, should they pursue alleged remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 27 August 1993 and registered on 23 September 1993.

On 29 November 1993, the Commission decided to communicate the application to the respondent Government.

The Government's written observations were submitted on 1 June 1994, after an extension of the time-limit fixed for that purpose which expired on 11 April 1994. The applicant replied on 17 July 1994.

THE LAW

The applicant alleges that his father was tortured and killed in circumstances for which the State is responsible. He invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 6 (Art. 6) (the right of access to court), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches) and Article 14 (Art. 14) (prohibition on discrimination).

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.

The Government refer to the applicant's failure to appeal against the Public Prosecutor's decision not to prosecute pursuant to Article 165 of the Code of Criminal Procedure. They also submit that he has not pursued the remedy of damages pursuant to Articles 41, 46 and 47 of the Turkish Civil Code.

The applicant maintains that there is no requirement that he pursue domestic remedies. He refers to the widespread practice of torture of persons in police and the existence of an administrative practice of ineffective remedies. He makes reference in this regard to the Public Statement of the European Commission for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (15 December 1992) and the 1993 and 1994 Reports of the United Nations Special Rapporteur on Extra-judicial Summary or Arbitrary Executions (E/CN.4/1993/46 and E/CN.41994/7). He contends that the investigation into his father's death was inadequate given the lack of independence and effectiveness of public prosecutors and states that to prove the effectiveness of the alleged remedies, the Government would have to point to more than the occasional prosecution and give examples of convictions and compensation being obtained on a regular basis. He

refers also to the intimidation faced by lawyers who seek to pursue such cases. It would, in the applicant's view, have been pointless to appeal the Public Prosecutor's decision not to prosecute since in any event the failure to institute proper independent investigation or to initiate a prosecution discloses a violation of the Convention.

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. A mere doubt as to the prospect of success however is not sufficient to exempt an applicant from submitting a complaint to the competent court (see eg. No. 20357/92, Dec. 7.3.94, D.R. 76-A p. 80). 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 notes that the acts of which the applicant complains, the alleged torture of his father which resulted in his death, are prohibited by the Turkish Criminal Code and that it is not in dispute that if such acts took place, it would have been in contravention of the criminal law to which the gendarmes are subject. The Turkish legal system provides in such instances for investigation to be carried out by the Public Prosecutor who takes the decision whether or not to initiate a prosecution against the alleged perpetrators. In the event, as in this case, a decision not to prosecute is issued, there is the possibility under Article 165 of the Code of Criminal Procedure of appealing to a court.

As regards the applicant's argument that he was not required to pursue any remedies since there is an administrative practice in South-East Turkey which makes any remedies illusory, inadequate and ineffective, the Commission notes that the applicant did in fact pursue a remedy by requesting the office of the Public Prosecutor to make an investigation to establish the cause of his father's death. Moreover, if there were no effective remedies, the applicant would have been required under Article 26 (Art. 26) of the Convention to lodge his application within six months from the date on which he learnt of his father's death. He did not do this, and the Commission will therefore proceed from the assumption that the application to the Public Prosecutor was a relevant domestic remedy.

The Commission has had regard to the applicant's arguments as to the insufficiency of the Public Prosecutor's investigation and as to why he did not pursue an appeal. It recalls however that the Public Prosecutor questioned the gendarmes, including Major Murat Çakmak, and that the step was taken of exhuming the body of the applicant's father and sending samples for further forensic examination. In these circumstances, the Commission is not satisfied that there was any suspicious omission in the investigation which could call into question its genuineness or support the applicant's contention that the investigation was a merely formal exercise. To the extent that the Public Prosecutor's decision could be argued as not being justified by the available evidence, it was open to the applicant to appeal to a court which could on examination of the evidence, including witness statements and medical reports, have directed that a prosecution or other investigatory measures be carried out. The Commission cannot find it established that such an appeal would have been devoid of any chance of success.

Further, the applicant has not given any indication that he has been subject to intimidation or referred to any specific facts

indicating that he would have risked reprisals or intimidation if he had taken the step of appealing.

Consequently, the Commission finds that in the circumstances of this case the applicant cannot be considered as having complied with the exhaustion of domestic remedies rule laid down in Article 26 (Art. 26) of the Convention.

The application must therefore be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) of the Convention.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION INADMISSIBLE.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (C.A. NØRGAARD)