AS TO THE ADMISSIBILITY OF

Application No. 22277/93
by Nasir iLHAN
against Turkey

The European Commission of Human Rights sitting in private on 22 May 1995, the following members being present:

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

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 24 June 1993 by Nasir iLHAN against Turkey and registered on 20 July 1993 under file No. 22277/93; 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 20 May 1994 and the information and observations in reply submitted by the applicant on 3 July and 9 August 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin born in 1950, lives in the village of Isiklar, Urfa (Turkey). 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 brings the application in the name of his

brother, Abdullatif ilhan, who is paralysed and has authorised the applicant to act on his behalf.

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:

The reconstruction of the alleged events are based on the statement of I.K., who was present with the applicant's brother during the incident.

Abdullatif ilhan, the applicant's brother, is 32 years old and father of six children. His home was in the village of Kaynak but about ten months before the incident complained of, his village was burnt down by the security forces. At the time of the incident, Abdullatif ilhan and I.K. were living in the village of Aytepe.

Three or four months before the date of the incident, soldiers had raided the village of Aytepe and beaten I.K. and other villagers.

On 26 December 1992 the Aytepe village was raided by soldiers at about 07.30h.. The soldiers who carried out the operation were the soldiers on duty at the Mardin Province and the Konak village (Mardin province) military stations. Incidents in the village of Aytepe were generally dealt with by the Konak station.

When the soldiers came to the village, Abdullatif ilhan and I.K. hid in a garden because they thought that during such operations people are ill-treated and detained.

Soldiers came to where they were hiding and without asking any questions started to beat the two men with rifle butts and to kick them. This continued for a long time. Abdullatif ilhan lost consciousness. The soldiers grabbed him by the jacket and dragged him through the snow for about 20-30 metres, until they reached I.K.. The soldiers plunged Abdullatif ilhan into water several times to restore him to consciousness. I.K. was told to carry Abdullatif ilhan on his back and they walked towards the houses. I.K. was told to leave Abdullatif ilhan on the ground and to show them Abdullatif ilhan's and I.K.'s houses. The soldiers searched the houses and found nothing.

After the house searches, a military commander asked Abdullatif ilhan, who had been left outside, what had happened to him. He answered that he had been beaten up by soldiers. The soldiers said that he was lying and that he had fallen over.

The military commander told I.K. to put Abdullatif ilhan on his back. I.K. carried Abdullatif ilhan for about 1 km. to the village of Ahmetti, where they got a mule, on which they put Abdullatif ilhan. They then went to the village of Konak, where the station was, about 6 or 7 km. from Ahmetti. They left the village of Aytepe at about 08.30h and reached the station at about 13.00h. Abdullatif ilhan was still half-conscious.

After leaving Abdullatif ilhan in the station canteen, I.K. was put into a small cell. About two hours later, I.K. and Abdullatif ilhan were put in a military vehicle and, after stopping at two villages, they reached Mardin city in the evening of 26 December 1992.

They were detained in Mardin city centre military station until the evening of 27 December 1992. Whilst detained, Abdullatif ilhan was again tortured (the applicant claims that no further details can be given at the moment about the torture in detention and that further information will be provided in the future).

The statements of the two men were taken and then they were released. At no time in that period did Abdullatif ilhan see a doctor or receive medical treatment. After his release, 36 hours after he was first injured, he was taken at his own instigation to Diyarbakir State hospital where he remained for 18 days. He made frequent visits to the hospital after he was discharged. His last visit was in June 1993 when he was informed that the hospital could do nothing more for him. He is currently paralysed and unable to work to support himself and his family.

About three days after Abdullatif ilhan's discharge from hospital, when he had returned to Aytepe, a raid was carried out on the village by gendarmes from the Mardin Gendarme Central Commander H.Q. and Konakli station. The villagers were gathered in the village square and the Commander, while talking to them, asked where Abdullatif ilhan was. The gendarmes, a non-commissioned officer, a first sergeant and two others, then sought him out where he was confined to bed in his house. The non-commissioned officer referred to his injuries as having occurred when he fell over a wall and the first sergeant asked whether it was true that he had made complaints to members of parliament and to the Human Rights Association. From fear, Abdullatif ilhan denied having made any applications.

The respondent Government state as follows.

On receipt of information that PKK terrorists had sheltered in the village of Aytepe, security forces arrived on 26 December 1992. They found Abdullatif ilhan, I.K. and V.A. sheltering behind bushes as if keeping watch for the terrorists. The three men failed to surrender as required and were pursued. In the course of this pursuit, Abdullatif ilhan slipped and fell down a rocky hillock. He was taken to the nearest State hospital in Mardin and then transferred to the better-equipped Diyarbakir State hospital. There is a report dated 27 December 1992 by the neurosurgeon at that hospital. The Government have provided a copy of a statement allegedly signed by the applicant's brother on 26 December 1992 in which it is stated that he ran away, did not stop when told to do so and was taken into custody. The applicant submits in reply to this last point that his brother was unable to sign the statement as he is illiterate and his hand was severely injured as a result of the severe torture which he suffered.

The Government also refer to the statement of 26 December 1992 taken by the gendarmes from I.K. which allegedly indicates that from time to time PKK terrorists did come to his house and that he had been instructed not to talk to soldiers.

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). As regards unlawful killings, there are provisions dealing with unintentional homicide (Articles 452, 459), intentional homicide (Article 448) and murder (Article 450).

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).

Article 235 of the Code of Criminal Procedure provides:

(translation)

"If a civil servant omits to inform or delays in informing the competent authorities of an unlawful/criminal act which would necessitate a criminal investigation and which has come to his knowledge in the course of his duties, he is liable to a term of imprisonment from four months to two years. Moreover, he may be excluded from public service, permanently or for a period of time, depending on the seriousness of the crime which has come to his knowledge. If he is a member of the criminal investigation department of the police, the sentence may not be less that one year of imprisonment and he is, in any event, permanently excluded from public service."

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 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 2, 3, 6, 13 and 14 of the Convention.

As to Article 2, he refers to the life-threatening attack to which his brother was subjected, in violation of the State's obligation to protect his right to life. He also complains of a life-threatening denial of access to medical services and treatment for a considerable period after the attack and, in general, of the lack of any effective system for ensuring protection of the right to life.

As to Article 3, he maintains that the brutal attack to which his brother was subjected constitutes torture. He also refers to the ill-treatment to which his brother was subjected after the attack, which was aggravated on account of his condition at the time. He also complains of the denial of access to medical services and medical treatment for a considerable period of time after the life-threatening attack 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 life-threatening attack and torture, as a result of which his brother cannot bring civil proceedings arising out of the attack and torture.

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

As to Article 14, he alleges discrimination on the ground of race and/or ethnic origin in the enjoyment of his rights under Articles 2, 6 and 13 of the Convention.

As regards Article 26, the applicant claims that there is no requirement that he pursue domestic remedies because, according to him, any alleged remedy is illusory, inadequate and ineffective for the following reasons:

- there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies;

- there is an administrative practice of torture at the hands of the Turkish police and security forces in South-East Turkey;

- 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; and

- whether or not there is an administrative practice, the situation in the south-east of 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 24 June 1993 and registered on 2O July 1993.

On 28 February 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 20 May 1994 after one extension in the time-limit. The applicant submitted further information and observations in reply on 3 July and 9 August 1994.

THE LAW

The applicant complains that his brother was beaten and severely injured by the security forces and that in custody he received further ill-treatment and was denied medical treatment. 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) of the Convention.

Identity of the applicant

The applicant as named in the application form is Nasir ilhan, who states that he is bringing the application on behalf of his brother, Abdullatif ilhan.

The Government have contested that Nasir ilhan can claim to be an injured party under the Convention and have submitted that the application brought by him must be rejected as incompatible ratione

personae with the Convention.

The applicant has explained that he acts on behalf of his brother since his brother's injuries render it impossible for him to act on his own behalf.

The Commission recalls that its practice is generally only to accept the applications of those who may claim to be victims of a violation of the Convention, pursuant to Article 25 (Art. 25) of the Convention, but that exceptions are made where it is not possible for the victim to act for himself or herself, in particular, in those cases where the victim has died or is severely injured or ill, in which case the application may be brought by the relevant next-of-kin or other appropriate person.

The Commission notes that the applicant does not claim himself to be a victim of a violation of any provisions of the Convention, but expressly complains on behalf of his brother, who has signed with his thumbprint a letter of authority for him to act in view of his continuing paralysis. In view of the special circumstances of this case, in particular, the incapacity of the applicant's brother, the Commission finds that the applicant was entitled to bring the application in his own name.

Exhaustion of domestic remedies

The Government argue that the application is inadmissible since Abdullatif ilhan 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 he has failed to lodge a complaint with a competent public prosecutor or to file an action for indemnification.

The applicant maintains that there is no requirement that his brother 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 ill-treatment and torture 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; 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 real attempt to prosecute those allegedly responsible for violations of the European Convention on Human Rights or Turkish law.

In respect of the possibility of complaint to the authorities, the applicant also submits that his brother is in fear of reprisals.

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 notes that the acts of which the applicant complains, the alleged severe ill-treatment of his brother which resulted in his paralysis, are prohibited by the Turkish Criminal Code and that it is not in dispute that, if such acts took place, this would have been in contravention of the criminal law to which the security forces 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.

While in the present case there is no indication, as the Government submit, that the alleged ill-treatment has been the subject of any complaint to the public prosecutor competent to proceed to an investigation of the matter, the Commission notes the applicant's statement that his brother, when questioned in the village by the commander of the gendarmes, complained to him that he had been beaten up. Pursuant to the provisions of the Criminal Code, the Commission recalls that civil servants, which includes officers in the gendarmerie, are under an obligation to report to the competent authorities any alleged crime which comes to their knowledge in the course of their duties.

The Commission notes also that it is alleged that on his return from hospital the applicant's brother, while confined to bed in his house, was visited by gendarmes who questioned him about applications which they heard that he had made. Given the severity of the injury suffered by the applicant's brother and the fact that it allegedly resulted from severe ill-treatment at the hands of gendarmes, the Commission considers that the applicant's brother could reasonably fear that he might be exposed to harassment if he pursued domestic remedies.

Having regard in particular to the extreme vulnerability of the applicant's brother, the Commission finds that in the circumstances of this case he was not required to pursue further any legal remedy concerning his injuries (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75).

The Commission concludes that this application cannot be rejected for non-exhaustion of domestic remedies under Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As regards the merits

The Government state that the applicant's brother either voluntarily or under duress was acting as look-out for the PKK and that he received his injuries falling when he attempted to escape from the security forces who came to the village. They submit that he did receive medical care for his injuries.

The applicant maintains his version of events.

The Commission considers, in 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 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 by a majority

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)