AS TO THE ADMISSIBILITY OF

Application No. 22492/93
by Cemil KILIÇ
against Turkey

The European Commission of Human Rights sitting in private on 9 January 1995, the following members being present:

MM. H. DANELIUS, Acting President
C.L. ROZAKIS
F. ERMACORA
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
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. ŠVÁBY
E. KONSTANTINOV
G. RESS

Mr. M. DE SALVIA, Deputy 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 13 August 1993 by Cemil KILIÇ against Turkey and registered on 20 August 1993 under file No. 22492/93;

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 10 March 1994 and the observations in reply submitted by the applicant on 11 May 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1960 and lives at Külünçe köyü - Şanlıkurfa.

The applicant is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both university teachers at the University of Essex.

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 brother Kemal Kıklıç had been a journalist at Urfa for two years. He was also the Urfa representative of the newspaper Özgür Gündem (Free Agenda). In addition, he was on the management board of the Urfa branch of the Human Rights Association.

The applicant's brother had received many death threats as a result of his work with Özgür Gündem. During the two months prior to his death, he was constantly followed. This led him to make an application for protection for himself and other employees of the newspaper to the Governor's Office on 23 December 1992. On 30 December 1992, the Assistant Governor rejected his request. At that time, Özgür Gündem could not be distributed in Urfa because of threats made to the Urfa sales representative of the United Press Distribution. As a result, they would not distribute or sell the paper. Some newsagents in the province had been set alight in arson attacks. On account of those attacks, the applicant's brother wrote a press statement calling upon the Governor's Office to carry out its duty. In response to this complaint, the Governor of Urfa (Ziyaeddin Akbulut) lodged a complaint with the prosecutor and the police of the security headquarters took the applicant's brother into custody and brought him before the prosecutor on 18 January 1993. Proceedings were commenced against him on 19 January 1993 for defamation in relation to the statements which he had made in relation to the Governor.

Ten days before he was killed, the applicant's brother was followed by a vehicle said to be exactly like the white Renault in which those who killed him escaped. Its registration number was 63 EO 443. The applicant's brother told those with him at the time that those following him were police from the National Intelligence Service.

On 18 February 1993 the applicant's brother left the newspaper office on Atatürk Caddesi to return home at 17.00. He boarded the Akçakale bus of Urfa Cesur Travel at the area known as Kuyubaşık and got off the bus at the turn-off for Külünçe village (about 13 km from Urfa), where he lived.

At about 18.20, a watchman for "Balaban" construction company noticed a white Renault car turn from the main road, from the Urfa direction, into the road leading to Külünçe village. At about 90 metres from the shelter which the watchman was making for himself to keep an eye on the construction company's bridge, the car was turned round, parked, stopped and the lights were turned off. The watchman, in his statement, says that he regards the turning round of the car as suspicious. About 15 minutes later the watchman noticed a man get off the S. Urfa Cesur bus and walk towards Külünçe village. The watchman heard the sounds of argument and voices. He looked in the direction of the car but because it was dark and the headlights had been turned off, he could not see anything. He then heard the cry "Help" and the sound of two shots from a pistol. The watchman believes that about 15 minutes elapsed between the applicant's brother disembarking from the bus and the sound of the shots. He squatted down where he was, in fear. Straight after this, the car drove off and turned into the main road, heading in the direction of Urfa. When he approached the scene of the incident with his torch, he found the body of the applicant's brother. He went to a petrol station in the vicinity and informed the gendarmes. The watchman's statement was taken by the police at Uçurlu Gendarme station.

On the basis of the evidence at the scene and of the autopsy report, the applicant states that the person(s) who detained his brother taped up his mouth, apparently in order to kidnap him. They seem to have wanted to bind his hands; they bit his left hand but were unable to bind his hands. The applicant's brother appears to have resisted, whereupon they seem to have pulled his jacket over his head and fired two shots into his head.

The applicant was told of the killing by villagers. It was not far away. When he reached the scene of the killing, gendarmes were there. They said that his brother had been killed between 18.00 and 18.20. The prosecutor reached the scene of the incident at 20.20.

The applicant states that the police handled evidence at the scene of the killing with great carelessness, without regard to the possibility of obtaining fingerprints. Two empty 9 mm cartridges were picked up and the tape was removed from his brother's mouth. The rope used in an attempt to bind his brother's hands was just placed in a carrier bag. The applicant noticed a small piece of paper but does not know what became of it. The statement from the police refers to a "bloodstained piece of paper, thought probably to be from a piece of newspaper, of dimensions 1 x 2 cm ...". It appears to have been submitted to the prosecutor.

The applicant states that the security forces are trying to define the killing of his brother as a common murder. The gendarmes called the applicant and his father to the police station five times. People have come from Ugurlu gendarmerie and security headquarters five or six times and searched their home. The applicant believes that his brother was killed because he was a journalist, a representative of Özgür Gündem and a reporter for Yeni Ülke. He also finds it interesting that his brother was killed exactly one month after he had been taken for questioning at Security Headquarters. The applicant

believes that the police and security forces are only going through the gestures of conducting an investigation, as evidenced by their carelessness in handling evidence at the scene of the killing and their apparent insistence on only treating the killing as common murder. The applicant states that his brother had no personal enemies and was, indeed, much liked.

According to a Helsinki Watch report, 12 journalists were assassinated in Turkey in 1992 while a further 4 were killed in the first seven months of 1993. These included 6 journalists from the Özgür Gündem: Musa Anter killed in 1992; Hafiz Akdemir who was shot on 8 June 1992 in Diyarbakir, Yahya Orhan who was shot and killed in the street in Gerçus near Batman on 31 July 1992, Hüseyin Deniz shot on 9 August 1992 in Ceylanpinar and died from injuries, Kemal Kiliç killed on 18 February 1993 and Ferhat Tepe, kidnapped by persons unknown and his body found on 3 August 1993 (Helsinki Watch "Free Expression in Turkey 1993: Killings, Convictions, Confiscations", August 1993, Vol. 5 Issue 17 and see also Amnesty International report "Turkey: walls of glass" November 1992, AI Index Eur 44/75/92).

The respondent Government state the following.

A preliminary investigation was commenced by the public prosecutor of Sanliurfa into the death of Kemal Kiliç. In the course of this investigation, a visit was made to the deceased's home, and all elements of the case were scrupulously examined. In this context, the allegation that the car seen at the incident belonged to the National Intelligence Service was established as being without foundation. The inquiry into the death is still in progress.

Concerning the allegations of a fire in a newspaper kiosk in Sanliurfa, the Government state that an investigation revealed that the cause of the fire was a failure to comply with the requisite electrical installation standards. The allegations by Kemal Kiliç that the State was responsible were found on inquiry to be based on no concrete proof. No complaints have been lodged by newspaper vendors with regard to the alleged incidents of intimidation.

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 asserts 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

The Turkish Criminal Code makes it a criminal offence to subject some-one 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).

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 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, 3, 6, 10, 13 and 14 of the Convention.

As to Article 2, he alleges that his brother was killed in circumstances suggesting that undercover agents of the State were involved or 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 refers to 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 killing of his brother, as a result of which he cannot bring civil proceedings arising out of the killing, which means that he is denied effective access to court.

As to Article 10, the applicant alleges that his brother was threatened and killed in order to deter the lawful exercise of freedom of expression. He also considers that there is an administrative practice of violation of Article 10, referring to the attacks made on journalists, distributors and sellers as well as raids and arson attacks on newspaper kiosks and editorial offices.

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

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

In support of his allegation that his brother was killed by undercover agents of the State, the applicant refers to the following elements:

- the fact that his brother had previously been under surveillance,
- the fact that he had asked for protection on 23 December 1992, a request which had been rejected on 30 December 1992,
- the fact that he was brought before the prosecutor on 18 January 1993 upon the complaint of the Governor, following a press statement calling upon the Governor's office to do its duty,
- the fact that the killers escaped in a white Renault car, such a car having been used in the surveillance of the applicant's brother,
- the carelessness with which the evidence at the scene of the incident was handled,
- the failure of the authorities to treat the killing as anything else than common murder,
- the fact that no one has been charged with the killing,
- the number of journalists from papers such as Özgür Gündem who have been killed in circumstances which have led Reporters Sans Frontières, in a very cautious and meticulous report, to conclude that they were attacked by the police or security forces.

The applicant considers that there is no requirement that he should pursue alleged domestic remedies, since any alleged remedy is illusory, inadequate and ineffective. He states in this respect that:

- there is an administrative practice of non-respect of the rule which requires the provision of effective domestic remedies (Article 13),
- there is an administrative practice of unlawful killing of journalists at the hands of the undercover forces of the Turkish 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,
- 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 13 August 1993 and registered on 20 August 1993.

On 11 October 1993, 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 10 March 1994 after one extension in the time-limit and the applicant's observations in reply were submitted on 11 May 1994.

THE LAW

The applicant complains that his brother was killed in circumstances which involve the responsibility of the State through the actions of their agents and/or a failure to protect his brother from the threat to his life. The applicant invokes Article 2 of the Convention (the right to life), Article 3 (the prohibition on inhuman and degrading treatment), Article 6 (the right of access to court), Article 10 (freedom of expression), Article 13 (the right to effective national remedies for Convention breaches) and Article 14 (the prohibition against discrimination).

The Government argue that the application is inadmissible for the following reasons:

i. the applicant failed to exhaust domestic remedies;

ii. the application is an abuse of the right of petition.

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 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 point out that there is an ongoing investigation by the public prosecutor of Sanliurfa into the death of the applicant's brother. If the public prosecutor

should reach a decision to close the investigation, the applicant would be able to challenge the decision within 15 days following the notification (Article 165 of the Code of Criminal Procedure). Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, in respect of damage or loss of life alleged to have been caused by or with the responsibility of the State or its agents, the Government submit that the applicant has the possibility of introducing an action against the administration for compensation in accordance with, inter alia, Article 125 of the Constitution or Article 8 of Decree 430.

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 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; 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 or torture.

In respect of the investigations by the public prosecutor of Sanliurfa referred to by the Government, the applicant submit that the prosecutor has had adequate time to complete his investigation and that the file is simply being left open with no ongoing inquiries being conducted.

The Commission recalls that Article 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 inquiry by the public prosecutor of Sanliurfa into the death of the applicant's brother on 18 February 1993, the Commission notes that the investigation has not been completed almost two years after the killing took place and the Commission has not been informed of any significant progress having been made. In view of the delays involved and taking into account the serious nature of the crime, the Commission is not satisfied that the inquiry could be considered as furnishing an effective remedy for the purposes of Article 26 of the Convention.

The Commission also considers that in the circumstances of this case the applicant was not required to pursue any legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, to be published in D.R.75). The applicant should therefore be considered to have complied with the domestic remedies rule laid down in Article 26 of the Convention and the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 of the Convention.

Abuse of the right of petition

The Government maintain that the application, being devoid of any sound judicial basis, has been lodged for purposes of political propaganda against the Turkish Government. Accordingly the application constitutes an abuse of the right of petition which discredits the legal nature of the Convention control mechanism.

The applicant rejects the Government's submission, contending that his complaints relate to alleged violations of the Convention.

The Commission considers that the Government's argument could only be accepted if it were clear that the application was based on untrue facts. However, this is far from clear at the present stage of the proceedings, and it is therefore impossible to reject the application on this ground.

As regards the merits

The Government have not commented on the substance of the applicant's complaints beyond asserting that they are under investigation by the public prosecutor of Sanliurfa.

The applicant maintains his account of events.

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 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.

Deputy Secretary to the Commission — Acting President of the Commission

(M. DE SALVIA) — (H. DANELIUS)