AS TO THE ADMISSIBILITY OF

Application No. 24276/94
by Koceri KURT
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 11 May 1994 by Koceri KURT against Turkey and registered on 6 June 1994 under file No. 24276/94;

Having regard to:

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the observations and information submitted by the respondent Government on 23 January, 9 February, 7 March and 10 April 1995 and the observations in reply and information submitted by the applicant on 23 January, 27 March, 2 April and 5 May 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen of Kurdish origin, born in 1927 and resident at the Agilli village. She is represented before the Commission by Professor Kevin Boyle and Ms. Françoise Hampson, both of

the University of Essex, England.

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

A. Particular circumstances of the case

1. Events relating to the alleged disappearance of the applicant's son

The applicant submits as follows.

The applicant is the mother of Üzeyir Kurt, aged 35, who has disappeared after being taken into custody by soldiers on 24 November 1993. Eyewitness accounts received by Amnesty International and confirmed by the applicant indicate that the disappearance occurred in the following circumstances.

At approximately 18.00h on the evening prior to the disappearance, soldiers surrounded the village of Agilli near Dicle in Diyarbakir province. They opened fire on the village with small arms and rocket launchers and then entered the village the following morning. All houses in the village were burnt down save for a few which were kept for use by the soldiers.

When the soldiers had entered the village, Üzeyir Kurt was staying at the home of his aunt, Mevlude, along with three other members of his family. That morning the soldiers stood outside the house and ordered everyone to leave it. All did so except Üzeyir Kurt. He remained inside since his elder brother, Abdulkadir Kurt, had been killed by torture two years previously while in the custody of the authorities.

The soldiers then asked Üzeyir's eldest child Aynur, aged 15, where her father was, and she told them where he was. They then returned to the house with members of the applicant's family, including Üzeyir's brother Davut. The soldiers told Davut to get his brother from the house, and one of the soldiers added that "if your brother has a firearm, I'm going to kill him, if not I'll let him go".

Davut persuaded Üzeyir to leave the house with his hands up. He was taken to the house of Hasan Kilic, where he was detained that night. The following morning, 25 November 1993, the applicant went to see her son, bringing to him clothing and a packet of cigarettes that one of the soldiers had given her for him. She continues:

> "When I got to Hasan Kilic's house, my son Üzeyir was in the yard. Eight to nine soldiers were keeping guard on him. ... I saw swellings around my son's eyes, they had tortured him. He was also shivering from the cold. ... The soldiers drove me away ... saying 'Go away from here before the Commander comes'. I have not seen my son Üzeyir since that day."

On 29 November 1993, the applicant wrote to the State Prosecutor of Bismil that her son had been taken into custody by officers and applied for information. The request was referred to the Bismil District Gendarme Unit Command for information about his whereabouts. On 30 November 1993 they replied that he had not been taken into custody by themselves and that "it is supposed that the individual in question may have been kidnapped by the PKK". She then received a letter from the Bismil Provincial Gendarme Command saying the same.

On 14 December 1993 the applicant wrote to the Office of the Chief Prosecutor of the State Security Court, asking for information about her son's whereabouts following his being taken into custody by gendarmes. The reply from the office of the same day was that they had no information regarding him in their custody records.

Finally, on 15 December 1993 the applicant wrote to the Bismil State Prosecutor's Office asking for information about her son's whereabouts. On the same day that office wrote to the Gendarme Unit Command, authorising such information to be given, but nothing has been forthcoming.

The Government state as follows.

Following the receipt of information on 23 November 1993 by the Bismil Gendarmerie to the effect that PKK terrorists had arrived in the village of Agilli (Birik) to extort money and supplies, an operation was carried out in the village. An armed confrontation began during the search of the village when the security forces came under fire from terrorists hidden in the village and from persons outside the village. The conflict continued into the night and several houses and barns were hit by fire, some of which caught fire. A sergeant had died in the opening shot of the incident and a terrorist was also killed.

On 24 November 1993, persons suspected of involvement were gathered by the security forces in the village school for identification but all were released. A number of arms were found and confiscated and a further two terrorists were found dead in a barn.

After the completion of the search, a contingent of the security forces remained behind in the village to protect the villagers. Twelve persons detained for questioning, including the applicant's son, were released on 25 November 1993.

On 25 November 1993, the security forces left the village. Following intensified pressure by the PKK, which blamed the villagers for the death of their members, the villagers left their village but continued to work their fields under the protection of the security forces.

When, a considerable time after the events, the applicant applied for information about her son to the commander of the gendarmerie, investigations disclosed that there was no record that her son had continued to be held in custody. The Government refer to statements made by members of the applicant's family and other villagers as, inter alia, refuting the allegation that the applicant's son was taken away by the security forces.

The Government state that the evidence indicates that the applicant's son had been taken away from the village by the PKK.

2. Events subsequent to the introduction of the application

On 23 January 1995, the applicant's representatives wrote to the Commission stating that on 7 December 1994 two relatives of the applicant, the 16 year old sister of Üzeyir and his sister-in-law, had been taken into custody as had two other persons named in the applicant's statement to the Commission. Raids were carried out on the homes of Hasan Kilic (named in the application) and Üzeyir's elder brother. The applicant's representatives stated that following these events the applicant sent a new statement to the Human Rights Association, dated 9 December 1994, revoking all petitions and complaints which she made. They stated that they were very concerned for the safety of the applicant and her relatives and asked the Commission to give these serious developments its most urgent attention. They submitted a statement from Mr. Mahmut Sakar, a lawyer in the Human Rights Association in Diyarbakir, who stated that he had spoken to the applicant who said that she had withdrawn her petition since the gendarmes had threatened that her two other sons would face the same fate as Üzeyir, and that her new house would be burned down.

By letter dated 9 February 1995, the Turkish Government enclosed

a deposition made by the applicant before a notary dated 6 January 1995, which expressed the applicant's wish to revoke all petitions made in her name to the Commission and complaining that her requests for information concerning the fate of her son had been distorted and exploited without her knowledge or consent for the purposes of PKK propaganda. They submitted a letter by the applicant dated 9 December 1994 to the Ministry of Foreign Affairs to the same effect.

By letter submitted on 10 April 1995, the Government denied that the persons referred to by the applicant's representatives had been detained by the gendarmerie in Bismil and stated that 11 persons, including the applicant, members of her family and villagers, had given their statements at the gendarmerie on 7 December 1994 and had afterwards left the building. The Government explained that these persons had been summoned to give their statements pursuant to the request made by the Ministry of Justice and gendarme authorities for the applicant's allegations to the Commission to be investigated.

The applicant's representatives by letter dated 5 May 1995 submitted two statements dated 12 April 1995 by persons who had talked to the applicant. One statement alleged two further raids had been carried out on the applicant's house in April and the second reported that the applicant was being intimidated by State forces but wished her application to continue.

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."

Article 8 of Decree 430 of 16 December 1990, which was promulgated pursuant to powers granted under the state of emergency, 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."

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.

Criminal procedures

The Turkish Criminal Code makes it a criminal offence:

- to deprive someone unlawfully of his or her liberty (Article 179 generally, Article 181 in respect of civil servants),

- to oblige someone through force or threats to commit or not to commit an act (Article 188),

- to issue threats (Article 191),

- 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 intentional homicide (Articles 456 et seq.).

In general, in respect of 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.

If the suspected authors of the contested acts are military personnel, they may also be prosecuted for causing extensive damage, endangering human lives or damaging property, if they have not followed orders in conformity with Articles 86 and 87 of the Military Code. Proceedings in these circumstances may be initiated by the persons concerned (non-military) before the competent authority under the Code of Criminal Procedure, or before the suspected persons' hierarchical superior (Articles 93 and 95 of Law 353 on the Constitution and the Procedure of Military Courts).

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 13, 14 and 18 of the Convention.

As to Article 2 she refers to the life-threatening nature of the unacknowledged detention in the hands of the State in South-East Turkey, such detention amounting to a life-threatening act on account of the administrative practice of torture and the high incidence of deaths in custody. She further refers to the lack of any effective system for ensuring protection of the right to life and to the inadequate protection of the right to life in domestic law.

As to Article 3 she refers to her inability to discover what has happened to her son and to discrimination against both her and her son on grounds of race or ethnic origin. She also refers to evidence

showing that her son had been beaten while in custody which, like his disappearance, constitutes inhuman treatment. She also refers to the suffering to which she has been exposed as a result of her son's disappearance and her fruitless search for him.

As to Article 5 she complains of her son's unlawful detention, of her son not being informed of the reasons for his arrest, not being brought before a judicial authority within a reasonable time and not being able to bring proceedings to determine the lawfulness of his detention, these being violations which result in a complete lack of security of the person.

As to Article 13 she 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 in conjunction with Articles 2, 3 and 5 she complains of an administrative practice of discrimination on grounds of race or ethnic origin.

As to Article 18 she alleges that the interferences in the exercise of the Convention rights were not designed to secure the ends permitted under the Convention.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 11 May 1994 and registered on 6 June 1994.

On 30 August 1994, the Commission decided to communicate the application to the Government and to ask for written observations on the admissibility and merits of the case.

The Government's observations were submitted on 23 January 1995, after the expiry on 11 December 1994 of an extension in the time-limit. The applicant submitted her observations in reply on 27 March 1995.

Following the receipt of further information from the applicant dated 23 January 1995 and the Government dated 9 February 1995, the Commission on 2 March 1995 considered the state of proceedings in the application. It decided to request the parties to answer specific questions concerning developments in the case.

Further information was provided by the Government on 7 March and 10 April 1995, and by the applicant on 2 April and 5 May 1995.

THE LAW

The applicant complains that her son was taken into detention and that he has now disappeared. She invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 5 (Art. 5) (right of liberty and security of person), Article 13 (Art. 13) (the right to effective national remedies for Convention breaches), Article 14 (Art. 14) (prohibition on discrimination) and Article 18 (Art. 18) (prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention.

Article 25 (Art. 25): existence of a valid petition

The Government contend that the applicant in her letter of 9 December 1994 and statement of 6 January 1995 to a notary public has clearly expressed her rejection of the complaints made in her name and has withdrawn the application. The Commission therefore should discontinue its examination of the case, the application being a nullity from the beginning.

The applicant's representatives submit that the applicant and her family have been subject to intimidation by the authorities. They submit that, given the cost involved, it is unlikely that the applicant would go of her own accord to a notary and they rely on the reports from persons who have spoken to the applicant that she wishes her application to continue.

The Commission notes that the application submitted to it contains a power of attorney in favour of the applicant's representatives and a statement of facts and complaints, both of which have the applicant's thumbprint as signature. It further notes that the applicant does not deny that she signed these documents. While the statement to the notary and the letters relied on by the Government refer in general terms to misuse of her petition for the purposes of propaganda there is no clear retraction as regards the central factual elements of the application, namely, that her son was taken into custody by security forces and has since disappeared. The Commission accordingly concludes that the application lodged in her name by her authorised representatives is a valid exercise of the right of individual petition under Article 25 (Art. 25) of the Convention and that the Commission has competence to examine it.

Article 30 (Art. 30): as to the continued examination of the application

The Commission has also considered whether, notwithstanding the above finding, the statements which refer to the applicant's wish to discontinue the application disclose a ground on which the application should be struck from its list of cases. It recalls that pursuant to Article 30 para. 1 (a) (Art. 30-1-a) of the Convention it may proceed to strike a case from its list where circumstances lead to the conclusion that the applicant does not wish to pursue his or her petition.

The Commission has had regard to the serious nature of the complaints made in this application with regard to the disappearance of the applicant's son. It has also examined with concern the grave allegations made by the applicant's representatives in regard to intimidation of the applicant and members of her family. It notes the Government's denial of these allegations. It considers however that where there exists a doubt as to the voluntariness of a withdrawal of an application it would run counter to the efficacy of the system of protection of human rights set up under the European Convention of Human Rights for the Commission to discontinue its examination of the case. In the current state of the application, the Commission finds that elements exist which raise such a doubt.

Having regard therefore to Article 30 para. 1 (Art. 30-1) in fine, which provides that the Commission shall continue the examination of a petition if respect for human rights as defined in the Convention so require, the Commission does not find it appropriate to strike the case from the list of its cases at the present time.

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 she has failed to lodge a complaint with a competent public prosecutor or to apply to the appropriate military authority in respect of any alleged wrongdoers who are subject to military jurisdiction. Further, the applicant has not availed herself of the possibility of filing an action for indemnification before the civil courts.

The applicant maintains that there is no requirement that she 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. She 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 and the lack of genuine investigations by public prosecutors and other competent authorities. Alternatively, the applicant has done everything that can reasonably be expected of her in applying to the military and judicial authorities.

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 in the present case the applicant has petitioned a number of authorities, judicial and military, complaining that her son has been taken into custody and applying for information. It notes in particular that, according to the information which she has provided, she has applied twice to the Bismil State Prosecutor who brought the matter to the attention of the District Gendarme Unit Command and the Bismil Provincial Gendarme Command, and that she also applied to the Office of the Chief Prosecutor of the State Security Court.

Further, the Commission considers that it cannot be said at this stage that the applicant's fear of reprisal if she pursues her complaints more vigorously is wholly without foundation.

Consequently, the Commission is satisfied that in the circumstances of this case the applicant can be regarded as having brought her complaints before relevant and competent authorities and that accordingly she is not required under Article 26 (Art. 26) of the Convention to pursue any other legal remedy in this regard (cf. Nos. 16311/90, 16312/90 and 16313/90, N.H., G.H. and R.A. v. Turkey, Dec. 11.10.91, unpublished, and No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75).

The Commission concludes that the applicant may therefore 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 under Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the merits

The Government deny that the applicant's son was kept in detention after the 25 November 1993 and state that there is evidence suggesting that he was taken away from the village by the PKK.

The applicant maintains her 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 (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)