AS TO THE ADMISSIBILITY OF

Application No. 25656/94
by Salih ORHAN
against Turkey

The European Commission of Human Rights sitting in private on 7 April 1997, the following members being present:

Mr. S. TRECHSEL, President
Mrs. G.H. THUNE
Mrs. J. LIDDY
MM. E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
B. MARXER
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs. M. HION
MM. R. NICOLINI
A. ARABADJIEV

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 November 1994 by Salih Orhan against Turkey and registered on 30 November 1994 under file No. 25656/94;

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

Having deliberated;

Decides as follows:

FACTS

The applicant, a Turkish national of Kurdish origin, was born in 1955. He lives in the village of Adrok, in the Kulp district of Diyarbakir. He is represented before the Commission by Mr. Kevin Boyle and Ms. Françoise Hampson, both university teachers at 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 prior to the introduction of the application

The applicant makes the following submissions:

On 20 April 1994 a detachment of the Turkish security forces numbering between three and four hundred men with over one hundred vehicles pitched camp near the village of Adrok. On 6 May 1994 at around 6 a.m. a number of the soldiers entered the village. The village imam announced that the Unit Commander of the security forces required the villagers to assemble in front of the mosque, which they did.

The Commander then announced that the village was to be burnt down but that he would allow the villagers to remove their possessions. The applicant returned to his house and started to remove his possessions. He was unable to complete this task before the soldiers moved in and burnt his house down. Having completed the burning the soldiers moved on.

On the following day the applicant, together with other villagers, went to the town of Kulp to report this incident to the gendarmerie and seek permission to stay in the area long enough to at least harvest the crops. The applicant was told that the soldiers in question had come from Bolu and that it would be alright for him and the other villagers to remain until the harvest.

On 24 May 1994 more soldiers were seen in the vicinity of the village. All except three of the men from the village hid. These three men were Salih Orhan and Hasan Orhan, the applicant's two brothers, and Cezayir Orhan, the applicant's son. They were in the process of rebuilding the houses in the village and did not notice the arrival of the soldiers. Each of the three men was taken into custody by the soldiers. One of the arresting soldiers explained the arrest in the following terms : "The Commander wants to see you. We don't know the way. You can come back to the village after showing us the way."

At around 4.30 p.m. the same day, the soldiers and the applicant's brothers and son were seen in Gümüssuyu village. The three men were smoking cigarettes with the soldiers and were fine. They went from there to Kulp. None of the three men has been seen or heard of since, although the applicant has taken the following steps in attempting to locate them:

On 25 May 1994 he went to Zeyrek police station and enquired about their whereabouts. A certain Mr. A.P. told him that the three men had been taken to Kulp.

The applicant accordingly applied to the Commander of the Gendarmerie in Kulp and, after gaining no satisfactory answers, made formal applications for assistance to the Kulp Prosecutor, the State Security Court Prosecutor for Diyarbakir, the State of Emergency Regional Governor and the Public Order High Command in Diyarbakir.

Approximately one month after their disappearance the applicant was informed that his two brothers had been held at a school taken over by the security forces in Lice. The information came from Ramazan Ayçiçek, himself a detainee at Lice prison. Ayçiçek stated that prior to his transfer to the prison he had himself been detained at the school and it was then that he had seen the applicant's three relatives. He told the applicant that all of them appeared to be "in a bad way".

No news of any of the three men has been received since and there

has been no response to the complaint made in respect of the burning of the applicant's house.

The respondent Government make the following submissions:

The State Security Court Prosecutor for Diyarbakir carried out an investigation into the applicant's allegations concerning the detention of his relatives by the security forces. The investigation concluded that Salih Orhan, Hasan Orhan and Cezayir Orhan were not taken into custody by the security forces during an operation of 14 May 1994. The Government refer to the letters dated 22 July 1994 and 20 October 1994 from the Commander of the Gendarmerie in Kulp and the Diyarbakir Chief of Police, respectively. These letters, which were addressed to the Kulp Prosecutor, state that the persons in question were not taken into custody by these security units.

It was only after the Commission decided to communicate the application that the Public Prosecutor was for the first time informed about the applicant's allegations concerning the destruction of his property.

The Public Prosecutor's investigation is still pending.

2. Events subsequent to the introduction of the application

On 11 August 1995 the respondent Government enclosed a statement made by the applicant to the Diyarbakir Public Prosecutor on 2 May 1995. The statement contained, inter alia, the facts which the applicant had submitted to the Commission in relation to the burning of his house and the disappearance of his relatives. According to the statement, the applicant did not want to bring his allegations before an international authority. He was seeking redress from the Turkish authorities. He never intended to issue a letter of authorisation for his legal representatives to bring his case before the Commission. He had been made to sign the letter of authorisation in the Diyarbakir Branch of the Human Rights Association without any explanation as to the nature of this document.

In response the applicant's legal representatives made the following contentions:

- The above-mentioned statement was made under pressure;

- No communication has been received from the applicant to the effect that he did not wish to pursue his application;

- The applicant has given oral instructions that he wishes to continue with his application before the Commission.

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 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."

Any illegal act by civil servants, be it a crime or a tort, which causes material or non-material 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 by the Social Help and Solidarity Fund.

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). There are also provisions covering threats (Article 191), unlawful deprivation of liberty (Article 179 in general and Article 181 for civil servants), obliging someone through force or threats to commit or not to commit an act (Article 188).

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 not to institute criminal proceedings.

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 legislative decrees and enacted between 12 September 1980 and 25 October 1983. That includes Law no. 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 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 which are subject to the state of emergency, with the effect that the power to prosecute members of the security forces is removed from the public prosecutor and conferred on local administrative councils.

Article 8 of Decree 403 of 16 December 1990 provides as follows :

<translation >

"No proceedings on grounds of criminal, financial or legal responsibility may be brought 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 individuals to claim compensation from the State for damage suffered by them without justification."

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 8, 13, 14 and 18 of the Convention and Article 1 of the First Protocol.

As to Article 2, he refers to the substantial risk that his two brothers and son have been secretly detained by agents of the state, and to the high incidence of deaths in custody, some as a result of torture. He also complains of the lack of any effective state system for ensuring protection of the right to life.

As to Article 3, he refers to his inability to discover what has happened to his son and his brothers. He also complains of discrimination on grounds of ethnic origin.

As to Article 5, he refers to the unlawful detention of his two brothers and son, the failure to inform him of the reasons for their detention, and the failure to bring them before a judicial authority within a reasonable time and the inability to bring proceedings to determine the lawfulness of their detention.

As to Article 8, he complains that the destruction of his property represents a clear infringement of his rights to private life, his home and correspondence.

As to Article 13, he alleges that there is no independent national authority before which his complaints can be brought with any prospect of success.

As to Article 14, the applicant alleges that he, his brothers and his son have been discriminated against on the ground of their Kurdish origin in the enjoyment of their rights under Articles 2, 3, 5 and 8 of the Convention and Article 1 of the First Protocol.

As to Article 18, he alleges that the interferences with the exercise of his Convention rights referred to above were not designed to secure the ends permitted under the Convention.

As to Article 1 of the First Protocol, the applicant refers to the destruction of his home and property.

The applicant maintains that there is no requirement that he pursue alleged domestic remedies.

According to him, any alleged remedy is illusory, inadequate and ineffective because:

a) there is strong evidence that disappearances in custody are frequent and that they have received official tolerance ;

b) there is an administrative practice of not respecting the rule under Article 13 of the Convention which requires the provision of effective domestic remedies;

c) whether or not there is an administrative practice, domestic remedies are ineffective in this case, both as regards the destruction of his house and the disappearance of his brothers and son, owing to the failure of the legal system to provide redress;

d) he has done everything possible to exhaust domestic remedies by submitting petitions and requests.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 24 November 1994 and registered on 30 November 1994.

On 27 February 1995 the Commission decided to communicate the application to the Government and request written observations on the admissibility and merits of the application.

The Government's observations were submitted on 13 June 1995. The applicant submitted observations in reply on 7 August 1995. The Government provided further information on 11 August 1995 and the applicant replied on 3 January 1996.

THE LAW

The applicant alleges that on 6 May 1994 State Security forces attacked his village, destroying his house and its contents, and that on 24 May 1994 the soldiers returned to the village and took the applicant's two brothers and son into custody, after which his brothers and son have disappeared. He invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 5 (Art. 5) (the right to liberty and security of person), Article 8 (Art. 8) (the right to respect for private and family life, home and correspondence), 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) (the prohibition on using authorised Convention restrictions for ulterior purposes) as well as Article 1 of the First Protocol (P1-1) to the Convention (the right to property).

Alleged abuse of the right of petition

The Government submit that the applicant did not intend to file an application before the Commission. They claim that the Diyarbakir Human Rights Association is taking advantage of the illiteracy of the applicant and other potential applicants. They allege that the Association is collecting statements with a view to substantiating compensation claims against the State and that these statements are in fact being sent to the Kurdistan Human Rights Project which is transforming them into applications before the Commission.

The applicant's lawyers deny this allegation. They state that the applicant has given them oral instructions that he wishes to continue with his application before the Commission.

The Commission notes that the applicant is aware that an application has been lodged on his behalf before the Commission and that no evidence has been received from the applicant confirming that he wishes to discontinue his application. In the circumstances, there are no grounds for rejecting the application at this stage of the proceedings, as constituting an abuse of the right of petition within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention.

Exhaustion of domestic remedies

The Government submit that the application is inadmissible since the applicant failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention before lodging an application with the Commission.

The Government point out that after receiving the information transmitted by the Governmental authorities following the applicant's application to the Commission, the Diyarbakir Public Prosecutor started a preliminary investigation into his allegations. In this context, on 2 May 1995 the applicant made a statement to the Diyarbakir Public Prosecutor. The file was transferred to the Kulp Public Prosecutor and

the investigation is still pending.

The applicant submits that he has brought his allegations to the attention of the public prosecutor and that no action has been taken. In light of the outright denial that his brothers and son have been taken into custody or removed, he submits that any further action would be ineffective. He claims that any nationally available remedies are generally ineffective having regard, inter alia, to the lack of genuine and thorough investigations, no real attempt to prosecute those allegedly responsible for violations of the Convention or Turkish law and the attitude of legal unaccountability of the security forces. He also states that he is frightened of the consequences of initiating legal proceedings in South-East Turkey.

The Commission recalls that Article 26 (Art. 26) of the Convention only requires the exhaustion of such remedies as 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, Eur. Court H.R., Akdivar judgment of 16 September 1996, p. 16, para. 68, 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 the applicant's statement that in the present case he applied to a number of public authorities complaining that his relatives had been taken into custody and disappeared. In particular, he approached the Chief Prosecutor in the State Security Court at Diyarbakir who carried out an investigation concluding that the applicant's relatives had not been taken into custody by the security forces during an operation of 14 May 1994. The Commission considers that, as regards the detention and disappearance of the applicant's brothers and son, the applicant was not required to take any further action in order to comply with Article 26 (Art. 26) of the Convention.

As regards the destruction of property complaint, the Government submit that the application is inadmissible since the applicant failed to exhaust domestic remedies as required by Article 26 (Art. 26) of the Convention before lodging an application with the Commission. They point out that in a state of emergency the State have a discretion to grant homes to the victims of terrorist attacks and those who have left their domicile in the south-east region. Pursuant to the above the Government state that the applicant requested a home and that these proceedings are still pending.

The applicant maintain that the purported remedies are ineffective for the following reasons:

- the Government are imprecise as to the stage reached in the investigation;

- they make no statement as to the potential outcome of, or remedy available from, any such investigation.

The Commission notes that, while there is apparently a scheme for providing dispossessed persons in the south-east region with homes, the applicant has not benefited from this scheme, although a considerable time has elapsed since the events in May 1994. The Commission leaves it open whether or not an application under this emergency scheme could in certain circumstances be regarded as a remedy within the meaning of Article 26 (Art. 26) of the Convention, since in any case it does not appear that it was effective in the present case.

The Commission further refers to the Court's judgment in the case of Akdivar v. Turkey (judgment of 16 September 1996) and considers that, for the same reasons as in that case, the applicant's complaint of the destruction of his home and property cannot be rejected for non-exhaustion of domestic remedies.

The Commission concludes that the applicant should be considered to have complied with the domestic remedies rule laid down in Article 26 (Art. 26) of the Convention and that, consequently, the application cannot be rejected under Article 27 para. 3 (Art. 27-3) of the Convention.

As regards the substance of applicant's complaints

The Government, referring to a military operation on 14 May 1994, state that the applicant's brothers and son were not taken into custody on that occasion. They submit that the complaints represent nothing more than an attempt at propaganda coordinated by the Kurdistan Human Rights Project.

The applicant maintains his account of events which he states is supported by direct evidence and information given by eye witnesses.

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.

H.C. KRÜGER	S. TRECHSEL
Secretary	President
to the Commission	of the Commission