AS TO THE ADMISSIBILITY OF

Application No. 22496/93
by Salih TEKiN
against Turkey

The European Commission of Human Rights sitting in private on 20 February 1995, the following members being present:

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

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 14 July 1993 by Salih TEKiN against Turkey and registered on 20 August 1993 under file No. 22496/93;

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 22 April 1994 and the observations in reply submitted by the applicant on 12 July 1994;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1964 and lives at Diyarbakir. He 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 states that the following occurred:

The applicant is a journalist. Since 30 May 1992 he has worked for the newspaper Özgür Gündem.

On 12 February 1993 he travelled to Yassitepe hamlet at Derinsu village in the Derik district for a holiday and to visit his family who lives there. He was not there to write or to investigate stories, but he carried his press card with him.

On 15 February 1993 the Gendarme Commanders of Derinsu and Dumluca villages, accompanied by soldiers, raided his father's house where he was staying and arrested him. His father Haci Mehmet and his three brothers Arif, Fethi and Abdulkadir were also arrested. They were brought to the Derinsu Gendarme Station. The applicant was taken to a detention cell and the others left with the soldiers in a canteen.

At about midnight all were taken in turn, blindfolded to an interrogation room. This was organised by the station commander whose first name was Harun. The applicant was questioned about alleged threats he and the others had made to village protectors locally. The applicant denied all such allegations but was threatened continually during the interrogation including with death. He was also physically assaulted a number of times. The other members of the family were not ill-treated during questioning and were released at 1.00 on 16 February 1993, on condition that they stayed in the village.

The applicant was held for four days in a cell, where the temperature was far below zero. He was not given any blankets, which he requested. Nor was he given any food during these days. He was subject to constant abuse from his interrogators over this period. In order not to freeze to death he had to keep himself awake throughout this time. He informed the police that he had only one functioning kidney but they ignored it. This experience is expressed in the applicant's own words as follows:

<Translation>

> "In order not to freeze I was forced to pass 2 days and 2 nights without sleeping as I was held for 4 days in weather of -30 degrees, starved and left thirsty without being given a blanket or heating equipment of any shape or form. I should also state that although one of my kidneys does not function and I told them this, they gave me nothing at all to warm myself up."

On 19 February 1993 he was taken from Derinsu Gendarme station to the Derik Gendarme station. He was again blindfolded and he remained blindfolded throughout his interrogation. He told his interrogators that he was a journalist, but was nevertheless subject to a brutal questioning. He was again accused of threatening village protectors and of having written propaganda for the PKK. His interrogators wanted him to admit these accusations. He refused since they were untrue. He was also accused of having written critical reports about the security forces and the protectors in this region for his newspaper.

He was stripped naked and hosed with cold water at sub-zero temperatures. Throughout this procedure he was truncheoned on the back, buttocks and ankles until he passed out. He recalls regaining consciousness and finding soldiers trying to dress him and revive him. He was later taken up two floors, where he was required to stand in the room of the Gendarme Commander, whom he could recognise as Commander Musa Çitil. The Commander said: "you write reports about Derik and Metina near Derik (an area where there are many protectors) and disturb us. And you threaten village protectors. If you come to this area again I shall open two bullet holes in your head."

He recalls that he was brought back again to the lower floor, where despite his denials he was forced to sign a statement that the police had prepared. At some point he was brought before the public prosecutor of Derik. He informed the prosecutor that the accusations were false and that he had been forced to sign the statement. He pointed to the blindfold still around his neck which his interrogators had overlooked to remove which was still wet, as proof of the hosing torture he had been subjected to. The prosecutor wrote down what the applicant said including his allegations of torture and his complaint against the Commander of the police, Musa Çitil. He was soon after released by the authority of the prosecutor. The applicant is not aware of any further action taken by the prosecutor over his complaints and he himself has not been arraigned on the basis of his statement to the Derik gendarme. At no point during his detention did he have access to a doctor or a lawyer.

On 26 October 1993, the newspaper Özgür Gündem reported that the applicant's family had been threatened by the security forces to the effect that they should leave their village or their houses would be demolished and they would be killed.

On 19 August 1993, the applicant was arrested by the security forces and remanded in custody on charges of separatism under the Anti-Terrorism Law. He was detained for a period of 22 days and interrogated over 15 days. During this time, the applicant was kept naked and subjected to torture. When brought before the public prosecutor in Cirnak, he denied the allegations and claimed that he was being tortured because of his reporting for his newspaper. On 18 November 1993, the applicant was released on bail. Following four hearings, the applicant was acquitted of the charges against him on 23 June 1994.

While released on bail pending trial, the applicant was arrested on 28 January 1994 at the office of Özgür Gündem in Diyarbakir. Following torture by the gendarmes, the applicant was forced to sign a statement of admission. On 28 June 1994, the applicant was arrested for membership of the PKK and remanded in custody pending his trial.

The respondent Government state as follows.

The applicant was detained by Derik Gendarme Commander Units upon intelligence reports that he was visiting village protectors and threatening that they should join the PKK or they would be killed. On 19 February 1993, he was taken by the Gendarme Commander before the Derik public prosecutor to whom were submitted three written intelligence reports and the applicant's testimony signed by him on that date in which he denied the allegations of making threats. The applicant appeared before the public prosecutor on a second occasion on the same day when he again denied the allegations and this time complained that he had been severely ill-treated. The Government state that no reliable evidence of ill-treatment was given. The applicant was then taken before a justice of the peace. After questioning, the applicant was released on the ground of inadequate evidence.

The Derik public prosecutor ceded jurisdiction in the matter to the prosecutor attached to the Diyarbakir State Security Court where the applicant was indicted but later acquitted on 2 August 1993 of having made threats (Articles 188-191 of the Criminal Code).

B. Relevant domestic law and practice

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.

Civil action for damages

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

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

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

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

Moral damages may also be claimed under Article 47:

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

COMPLAINTS

The applicant complains of violations of Articles 2, 3, 5, 6, 10, 13, 14 and 18 of the Convention. He states that there is an administrative practice of violation of each of these provisions of the Convention at the highest levels of the security forces.

As to Article 2 he claims that the threats to his life by agents of the State constitute violations of that Article.

As to Article 3 he refers to the treatment to which he was exposed, which in his opinion constituted torture.

As to Article 5 he states that he was never informed of the legal basis for his arrest, contrary to paragraph 2 of that Article. He considers that the fact that Turkey has made a derogation under Article 15 of the Convention with regard to Article 5 does not remove the Commission's competence to scrutinise the facts of the applicant's arrest and detention, in particular in view of the absence of safeguards against abuses such as torture. His own experiences during his detention were such as to render that detention a violation of Article 5 notwithstanding any claim as to the derogation under Article 15.

As to Article 6 he refers to the fact that there seems to have

been no effort to pursue his complaints which were recorded by a prosecutor prior to his release. The failure to act to vindicate his rights represents, in his opinion, a denial of justice and of access to court contrary to Article 6.

As to Article 10 the applicant states that the treatment to which he was subjected was because of his profession as a journalist. Consequently, his right and duty to seek, receive and impart information was repudiated.

As to Article 13 he alleges that he has been denied the possibility of remedies against the arbitrary use of power by the security forces. His detention and torture demonstrate the absence of effective legal safeguards or constraints in that part of Turkey, an absence of the rule of law which extends beyond the police and military to paralyse the prosecution and judicial authorities.

As to Article 14 the applicant complains of a systematic denial of the protection of the rule of law in south-eastern Turkey against persons of Kurdish identity and origin. He considers that he has been a victim of a violation of Article 14 in conjunction with each substantive right he alleges to have been violated and that the ground of discrimination has been that of his ethnic origin.

As to Article 18 he claims that the Turkish Government have as a matter of policy restricted his rights for purposes which are incompatible with the guarantees of the Convention. In fact the Government and their law enforcement agencies are combating the violent actions of the PKK in a manner which ignores the State's obligations under the Convention.

The applicant submits that adequate and effective remedies are unavailable to him. The prosecutor present in Derik Gendarme station, who recorded his statement of complaint, has failed to act to vindicate his rights, and he is not in a position under Turkish law to pursue a civil claim until the prosecutor has commenced criminal proceedings. The Emergency Laws prevent any accountability of the security forces, and the reality of officially sanctioned violations of his rights at the level of senior command in the security forces renders inoperable any conceivable domestic remedies.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 14 July 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 22 April 1994 after two extensions in the time-limit. The applicant submitted further information on 16 December 1993 and observations in reply on 12 July 1994 after one extension in the time-limit.

THE LAW

The applicant makes complaints in respect of his arrest and detention, alleging, inter alia, that he was tortured. He invokes Article 2 (Art. 2) (right to life), Article 3 (Art. 3) (prohibition on inhuman and degrading treatment), Article 5 (Art. 5) (right to liberty), Article 6 (Art. 6) (right of access to court), Article 10 (Art. 10) (right to receive and impart information), Article 13 (Art. 13) (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).

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 (Art. 26) of the Convention before lodging an application with the Commission. They contend that the applicant had a number of remedies at his disposal which he did not try.

The Government note that the applicant failed to take any steps to secure a medical examination to certify the alleged ill-treatment, by for example requesting the public prosecutor to refer him to a forensic medical centre. They also point out that there is an ongoing investigation by the Derik public prosecutor into the allegations. Since the investigation has yet to be completed, the Government submit that internal domestic remedies have not been exhausted in this regard.

Further, the Government submit that the applicant has the possibility of introducing an action in the civil courts if the perpetrators of the alleged ill-treatment are found.

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 investigation by the public prosecutor of Derik, the applicant submits that he had already made complaint of torture to that official on 19 February 1993 but that no step such as providing for medical examination was taken. He calls in question the efficacy of entrusting the investigation to the prosecutor who had already failed to take any action on his complaints.

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 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 to deal effectively with his complaints.

The Commission first notes that the Government accept that the applicant complained of torture when he appeared before the public prosecutor on 19 February 1993 and that no steps were taken in response to this complaint.

Furthermore, while the Government refer to the inquiry now pending before the same public prosecutor, the Commission notes that about two years have elapsed since the actual event and the Commission has not been informed of any significant progress having been made in the investigation. In view of the delays involved and the serious nature of the applicant's allegations, the Commission is not satisfied that this inquiry can be considered as furnishing an effective remedy for the purposes of Article 26 (Art. 26) of the Convention.

The Commission further considers that in the circumstances of this case the applicant is not required to pursue any other legal remedy in addition to the public prosecutor's inquiry (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75). 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. Consequently, the application cannot be rejected for non-exhaustion of domestic remedies under Article 27 para. 3 (Art. 27-3) 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, which have not formally been brought before the local instances for fear of reprisals.

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 refer to the intense campaign of terrorism which has been conducted in Turkey and which threatens the integrity and indivisibility of the State. They consider that the applicant's statements are inconsistent since he refers to being obliged to sign a statement after torture whereas in the written statement of the applicant dated 19 February 1993 denies the allegations that he had made threats or operated on behalf of the PKK. They point out that the ill-treatment alleged would have left visible signs but that he did not attempt to obtain medical examination of his physical condition. They submit that the applicant's acquittal on the charges of making threats six months after his arrest indicates that the judicial system is functioning effectively.

The applicant maintains his account of events. He refers to having drawn the public prosecutor's attention to the soaking blindfold

round his neck but that the prosecutor took no steps to have him medically examined. As regards the statement referred to by the Government, he points out that a copy has not been provided and that it is likely that in addition to the admission which he recalls being required to sign there is a further statement which truthfully records his testimony to the questioning.

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)