AS TO THE ADMISSIBILITY OF

Application No. 27244/95
by Isak TEPE
against Turkey

The European Commission of Human Rights sitting in private on 25 November 1996, 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
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ

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 28 March 1995 by Isak Tepe against Turkey and registered on 4 May 1995 under file No. 27244/95;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;
- the Commission's decision of 11 September 1995 to communicate the application ;

- the observations submitted by the respondent Government on 19 February 1996 and the observations in reply submitted by the applicant on 4 April 1996 ;

Having deliberated;

Decides as follows:

THE FACTS

The applicant, a Turkish citizen of Kurdish origin, was born in 1943 and resides in Bitlis. He is represented before the Commission by

Professor Kevin Boyle and Ms. Francoise Hampson, both university teachers at the University of Essex.

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

A. Particular circumstances of the case

The applicant claims that the following events occurred.

In the beginning of July 1993 K.T., the Tatvan 6th Armed Brigade Commander, invited all provincial leaders of the political parties to a meeting at the army residences. The applicant attended the meeting as the provincial leader of the DEP (Democratic Party) and spoke in support of the cultural and democratic rights of the people of Kurdish origin in Turkey.

In the afternoon of 10 July 1993, the applicant's son, Ferhat Tepe, born in 1974 and working as a reporter for "Özgür Gündem" in Bitlis, was taken into police custody. He was released the same afternoon without any explanation as to why he had been arrested. There were four other people in the room where Ferhat Tepe was kept in confinement at the police station.

On 28 July 1993 two policemen visited the apartment where Ferhat Tepe lived with his family and made inquiries about his whereabouts.

Later that day at around 7.00 p.m., while Ferhat Tepe was in the schoolyard of the Semsi Bitlis primary school, a tall bearded man who was known in the area to be a policeman took him by the arm, put him in a car and drove him away. Their car was followed by a white Renault car, registration number 65 AD 095. There were two people inside the white Renault, which was seen later that day parked next to Mahallebasi police station.

On 29 July 1993 at around 6.00 a.m. the applicant received a telephone call from a person claiming to be from the "Ottoman Turkish Revenge Brigade". The man on the telephone said that Ferhat Tepe was in their hands and would be killed unless he would close the DEP Bitlis Branch, release four French tourists in the hands of the PKK and pay 1 billion Turkish Lira. The applicant said he could close the DEP in Bitlis and could try to find 1 billion Lira but had no power to procure the release of the French tourists as he had no connection with the PKK.

On the same day at 8.00 a.m. the applicant went with his wife and daughter to the Bitlis Security Directorate where he told the Security Director and the Provincial Governor that he suspected that Ferhat Tepe had been abducted by contraguerrillas within the state security forces. The Governor and the Security Director denied the existence of contraguerrillas in Turkey and said that the State did not commit murder.

On the same day the applicant applied to the Public Prosecutor of Bitlis and asked that his home and office telephones be tapped in order to trace, in case of another call, the number from which the calls were being made. He also requested that the necessary action be taken to rescue his son.

On 30 July 1993 the applicant sent telegrams to the Prime Minister, the Minister of the Interior and the Regional Governor of the State Emergency Regime asking for their assistance to rescue his son.

Subsequently, the applicant informed the Security Director that F.O. and A.K. had been eye witnesses to Ferhat Tepe's abduction and that according to them the people who had taken Ferhat Tepe away were policemen. The applicant also informed the Security Director that

there was evidence that the white Renault which had followed the car in which Ferhat Tepe was abducted belonged to the security forces.

On 4 August 1993 the applicant received a second phone call. The conversation that followed was recorded. The person on the telephone asked the applicant to bring 1 billion Turkish Lira to an address in Elazig. After listening to the recording, the Security Director told the applicant that the state could give him special banknotes, whose serial numbers had been noted by the police. He told him to come back later for the banknotes. Later on the same day, when the applicant called again, the Security Director told him that he had difficulty in finding the banknotes.

On the same day the applicant together with four policemen and four of his relatives, went to the address in Elazig indicated by the anonymous person during the telephone conversation, but could not find anyone.

Still on 4 August 1993 Ferhat Tepe's dead body was found by a civil servant at Hazar Lake, Karakem. On the same day the body was examined by the Public Prosecutor and an expert doctor. The report of their findings concluded that the cause of death was drowning and that there was no need for a systematic autopsy. It also stated that there were no signs of blows or force on the whole body nor signs of friction on the wrists and ankles.

On 5 August 1993 the applicant, who had not yet been informed of the death of Ferhat Tepe, applied to the Public Prosecutor inquiring whether the telephone number from which he was being called had been traced. His application remained unanswered.

On 8 August 1993 the applicant received another anonymous telephone call in which he was told that Ferhat Tepe's body was at the morgue at Elazig. Later that day the applicant discovered that the body had been buried on 5 August 1993 in the Elazig Cemetery for Persons with no Relatives. Ferhat Tepe's body was exhumed and, in preparation for the funeral ceremony, the applicant washed the body himself. He saw marks on the testicles and breast. There were also deep wounds on the wrists and ankles showing that Ferhat Tepe had been bound hand and foot.

The applicant alleges that according to eye witnesses M.C., O.A., B.E., M.Y., M.K., T.S., E.D., U.P., and R.D. who had been apprehended and questioned at the relevant time in Diyarbakir Recruiting Office, Ferhat Tepe had been held there and tortured by members of the security forces between 28 July and 4 August 1993.

M.C. allegedly gave a statement in this sense, but withdrew it after the police had threatened him.

On 9 August 1993 the Public Prosecutor of Sivrice gave a decision of non-jurisdiction referring the file to the Bitlis Public Prosecutor.

At the funeral procession in Bitlis on 10 August 1993, there was a strong police presence. The police filmed the persons who had attended, checked their identification and arrested fifteen persons. Later on the same day the applicant's house was searched by the police.

On 12 August 1993, the Bitlis Public Prosecutor issued a decision that he had no jurisdiction and referred the case to the Elazig Public Prosecutor.

On 19 October 1993 the applicant sent a letter to the Unknown Perpetrators' Murders Committee of the Turkish Parliament alleging that his son had been killed by secret forces within the state security forces.

On 2 November 1993 the applicant filed a petition with the Ministry of Justice, alleging that the abduction and the killing of Ferhat Tepe were the act of state forces and requesting an investigation on the matter.

On 16 March 1994 the applicant went to the Public Prosecutor of Bitlis and asked whether any inquiry had been opened into the killing of Ferhat Tepe. The Public Prosecutor told him there were some obstacles which he could not get past. On the same day the applicant went to the Bitlis Provincial Security Directorate and asked the Assistant Director why no investigation had been carried out. The Assistant Director said he did not have to explain anything to the applicant.

On 28 September 1994 the applicant applied again to the Ministry of Justice asserting that certain state security forces were responsible for the abduction and death of his son. He requested that his allegations be investigated.

On 15 November 1994 the Chief Public Prosecutor of Elazig issued a permanent search warrant.

The applicant's family has been under intense pressure from the state authorities in relation to his political activities and the investigations into the killing of his son that he is carrying out himself : the applicant's daughter was remanded in custody in December 1993; his son was remanded in custody in 1994 for four months and is being tried for an offence which carries the death sentence; another of the applicant's daughters was taken into custody in April 1994; four of the applicant's nephews were remanded in custody in 1994, one of whom is being tried for an offence which carries the death sentence; the applicant's brother was taken into custody in April 1994 and the applicant's cousin has been in Elazig prison since 1994.

On 4 March 1996 the applicant was allegedly taken into custody in Bitlis on charges of aiding the PKK. He was released on an unspecified date, after being interrogated.

The respondent Government state as follows.

The applicant's son Ferhat Tepe had been arrested on two occasions in 1991, as he was suspected of acting as a courier for the PKK.

The Government submit that, according to various witnesses, on 28 July 1993 Ferhat Tepe met someone in the schoolyard and left with him of his own free will.

The anonymous telephone call on 4 August 1993 was tapped by the authorities, at the request of the applicant. Although a raid was made at the address mentioned in the telephone conversation, the house had been vacated. The authorities of the Ministry of the Interior established nevertheless that the persons whose house was searched were reporters from the newspaper "Özgür Gündem" in Elazig province and concluded that the death of the applicant's son was the work of the PKK.

A report of 24 September 1993 from the Ministry of the Interior to the Ministry of Foreign Affairs, as well a letter of 16 November 1995 from the Governor of the Bitlis province, indicate that the death of the applicant's son was the work of the terrorist organisation, the PKK.

In a letter of 10 November 1995 the Chief Public Prosecutor of Elazig province, charged with investigating Ferhat Tepe's death, informed the Ministry of Justice that there was no indication or record of Ferhat Tepe being taken into custody. Moreover, the custody record

of Bitlis Security Directorate contained no mention of Ferhat Tepe.

B. Relevant domestic law and practice

Civil and administrative procedures

Article 125 of the Turkish Constitution provides :

< 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 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 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). Provisions also cover 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 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 Decree 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 decision 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 :

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"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 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, 10, 13, 14 and 18 of the Convention.

As to Article 2, he alleges that his son was unlawfully killed during his detention by agents of the state. He also alleges a violation on account 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 alleges that his son was tortured by agents of the state. He further complains that his inability to discover the circumstances in which his son was tortured and killed constitutes a violation of this Article.

As to Article 5, he alleges that his son was unlawfully arrested and detained.

As to Article 10, he alleges a violation on account of torture and killing designed to deter the lawful exercise of freedom of expression.

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

As to Article 14, he complains of discrimination in the enjoyment of his rights under Articles 2, 3, 5, 8, 10, 13 and 18 of the Convention. He also refers to an administrative practice of discrimination on account of race or ethnic origin.

As to Article 18, he alleges that the restrictions on his rights and freedoms set forth in the Convention are applied for purposes not permitted under the Convention.

As regards the domestic remedies, the applicant maintains that there is no requirement that he pursue domestic remedies, if any. He asserts that any remedy would be illusory, inadequate and ineffective because:

- the torture and killing of his son was carried out by agents of the state and there is strong evidence that such acts have been

repeated and received official tolerance;

- in these circumstances there is an administrative practice giving rise to a presumption that the local remedies, if any, are not effective;

- 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 any redress and the failure of the authorities to make any substantial attempt to bring the persons responsible for the abduction and killing of his son to justice.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 28 March 1995 and registered on 4 May 1995.

On 11 September 1995 the Commission decided to communicate the application to the respondent Government and to ask for written observations on the admissibility and the merits of the case.

The Government's written observations were submitted on 19 February 1996. The applicant submitted observations in reply on 4 April 1996.

THE LAW

The applicant complains about the taking into custody and subsequent killing of his son. He invokes Article 2 (Art. 2) (the right to life), Article 3 (Art. 3) (the prohibition on torture), Article 5 (Art. 5) (the right to liberty and security of person), Article 10 (Art. 10) (the right to freedom of expression), Article 13 (Art. 13) (the right to effective national remedies for breaches of the Convention), Article 14 (Art. 14) (the prohibition on discrimination) and Article 18 (Art. 18) (the prohibition on using authorised Convention restrictions for ulterior purposes) of the Convention.

Exhaustion of domestic remedies

The Government contend that the applicant failed to exhaust domestic remedies available to him. In particular, the Government point out that the applicant could have asked for compensation based on the absolute liability of the administration for failure to protect citizens.

The applicant responds that he filed a petition with the competent prosecutor and made every attempt to have an investigation initiated in the case. He refers to the length of the time which the investigation is taking.

The Commission recalls that Article 26 (Art. 26) of the Convention requires only 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 v. the Netherlands 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, pp. 250, 262).

The Commission notes that the incident occurred on 28 July 1993 and the Chief Public Prosecutor of Elazig province has apparently been in charge of an investigation regarding Ferhat Tepe's death. It seems that the Chief Public Prosecutor issued a permanent search warrant on

15 November 1994. The Commission has not been informed of any findings made as a result of this investigation.

The Commission considers that in the circumstances of this case the applicant is not required to pursue any legal remedy separate from the investigation commenced by the public prosecutor (see eg. No. 19092/91, Yagiz v. Turkey, Dec. 11.10.93, D.R. 75, p. 207). The Commission concludes that the applicant may 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.

Six-month rule

The Government submit that the application was not filed within the period of six months laid down in Article 26 (Art. 26) of the Convention. They point out that the disappearance occurred on 28 July 1993, whereas the application was filed on 28 March 1995.

The applicant responds that he filed a petition with the Bitlis Public Prosecutor on 29 July 1993. On 15 November 1994 the Chief Public Prosecutor of Elazig issued a permanent search warrant. However, since that date, no progress has been made in the investigation. He submits that he filed his application with the Commission when he saw that the investigation was not being completed in an effective and adequate manner.

The Commission considers that the applicant was in principle justified in awaiting the results of the domestic investigation before complaining to the Commission. On the other hand, once it had appeared that that investigation was unlikely to give him redress, he should lodge his application within a period of six months. There is no basis for considering that in the present case the six months period started to run before 28 September 1994.

In these circumstances, the Commission considers that the relevant date for the purposes of the six-month time-limit should not be considered to be a date earlier than November 1994.

It follows that the applicant's complaints have been introduced within the six-month time-limit imposed by Article 26 (Art. 26) of the Convention.

As regards the merits

The Government deny that the applicant's son was in custody and refer to the reports of 24 September 1993 and 16 November 1995 concluding that the death of Ferhat Tepe was the result of a dispute within the PKK.

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 (Art. 27-2) of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Commission, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

H.C. KRÜGER
Secretary
to the Commission

S. TRECHSEL
President
of the Commission