COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

CASE OF SÜREK AND ÖZDEMIR v. TURKEY

(applications nos. 23927/94 and 24277/94)

JUDGMENT

STRASBOURG

8 July 1999

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In the case of Sürek and Özdemir v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1] and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 3 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date.

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 27 April 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in applications (nos. 23927/94 and 24277/94) against the Republic of Turkey lodged with the Commission under former Article 25 by two

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Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

Turkish nationals, Mr Kamil Tekin Sürek and Mr Yücel Özdemir, on 25 February 1994 and 4 May 1994 respectively.

The Commission's request referred to former Articles 44 and 48 of the Convention and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (former Article 46). The object of the request was to obtain a decision as to whether the facts of the cases disclosed a breach by the respondent State of its obligations under Articles 6 § 1, 10 and 18 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicants' lawyer to use the Turkish language in the written procedure (Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicants' lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the Government's and the applicants' memorials on 16 September and 13 October 1998 respectively. On 29 September 1998 the Government filed with the Registry additional information in support of their memorial and on 14 October 1998 the applicants filed details of their claims for just satisfaction. On 26 February 1999 the first applicant, Mr Sürek, filed further details of his claims for just satisfaction. On 1 March 1999 the Government filed their observations in rely to both applicants' claims for just satisfaction.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24146/94);

1. *Note by the Registry*: Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Sürek v. Turkey no. 1 (no. 26682/95), Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste, and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

Subsequently, Mr K. Traja replaced Mrs Botoucharova who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the registry.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek v. Turkey no. 2. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN, *Agent*,
Mrs D. AKÇAY, *Co-Agent*,
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,

Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicants*
Mr S. MUTLU, of the Istanbul Bar, *Advocate*.

The Court heard addresses by Mr Mutlu and Mr Tezcan.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

8. At the material time, the first applicant, Mr Kamil Tekin Sürek was the major shareholder in *Deniz Basın Yayın Sanayi ve Ticaret Organizasyon*, a Turkish company which owns a weekly review entitled *Haberde Yorumda Gerçek* (The Truth of News and Comments), published in Istanbul. The second applicant, Mr Yücel Özdemir was the editor-in-chief of the review.

B. The impugned publications

9. In the 31 May 1992 and 7 June 1992 issues of the review, an interview with a leader of the Kurdistan Workers' Party ("the PKK"), an illegal organisation, was published in two parts. In the edition of 31 May 1992 a joint declaration by four socialist organisations was published.

10. The relevant parts of these publications read as follows (translation):

1. Interview with Mr C.B., the PKK second-in-command (Part 1)

"Q: What do you mean when you say [the elections present] dangers?

A: The US say: 'The Kurds are oppressed. Saddam is slaughtering them. We are protecting the Kurds against Saddam's massacres. Their survival is in our safekeeping.' But it is quite obvious that this is a big swindle. If they were really protecting the Kurds against massacre as they claim, they ought to be protecting them against the Turkish State, too. Since the massacre which the Turkish State is carrying out against our people in the North is as horrible as that of Saddam. In fact, there are practices which are much more extreme than those of Saddam. So the US ought to be doing the same thing against Turkey. The double standard is clear for all to see. The

US take action against Saddam, but support Turkey's massacres against the Kurdish people in both the North and the South. There have been many signs of this and our people are aware of it. They want to make the Kurds an instrument for gaining their own ends. Their aim in the elections is both to contain the positive developments in the South through the organisations they want to promote and to block the fight for independence and freedom which is developing in Kurdistan in general. They want to bring all the Kurdish movements under the control of those two organisations already controlled by them [the US]. So that is why they all present a danger for the Kurdish people.

Q: Laws will be enacted once a parliament has been established in Southern Kurdistan. Treaties will be signed, on the one hand with neighbours, i.e. Turkey and Iraq, and, on the other hand, with the US. Turkey can have only one demand from these countries, that the PKK be excluded. If Kurdish parties take part in such an environment, what would be the PKK's attitude?

A: It is a well-known fact that Turkey and/or imperialism wants to divert our people from its national identity and struggle. But we want to achieve our identity as a nation and have a fatherland. That is what we are fighting for. They want to uproot us and drive us out of our territory; they want to annihilate us or force us to change. But we fight to live in freedom in our own territory. If either the US or Turkey or any other power which claims to be acting in the name of Kurdish identity attempts to force us out of any part of our country, we will fight in order to stay where we are. That is what we are fighting for right now. The Turkish State wants to oust us from our territory. It is driving people out of their villages. It wants Kurdistan to become a totally uninhabited area. But we are resisting. No one can tell us or ask us to get out. We are not on anyone else's territory; we are on our own territory. No one can tell us to leave our own territory. We make no distinction between the North and the South; we are in Kurdistan. We are amongst our own people. If they want us to leave our territory, they must know that we will never agree to it. We are a people who have lost everything we had and who are fighting to regain what we have lost. That is the purpose of our action. We have nothing to lose. We shrink from nobody and are afraid of no one. All we can lose is our slavery. That is why we act without fear.

Q: It is said that broadcasting programmes in Kurdish on Turkish State television would be interpreted as making a concession to the PKK. Could that be true? It is also rumoured that the PKK is going to set up a TV station. Is that right?

A: It is not true that the PKK is going to broadcast on television. We have no such facilities. Television broadcasting either by satellite or through any other channel is not an issue for the PKK. It was Turgut Özal who brought up the issue of Kurdish TV in Turkey when he went to the US. That is what is being debated. A very small fraction of people say that Özal was right, but a very large proportion are against it. Those who are suggesting Kurdish TV are doing so deliberately. The aim is supposedly to influence and win over the masses and thus to isolate the PKK. That is what the idea is. But even if Kurdish TV became a reality, it would do them no service. That is why they are against it. The purpose of those who want to create Kurdish TV is to isolate the PKK. For there is no mention of any argument such as 'Here is a people who have their own language and we must broadcast in their language. There is need for respect for that people. It is wrong to ban a people's language, that also harms the Turkish people.' Far from it. The debate has revealed the real intentions: 'How can we wipe out the influence of the PKK? How can we isolate

the PKK? How can we pull the wool over the Kurdish people's eyes?' It is a tactical approach. It is a trick. But no matter what steps they take, they will be working to the advantage of the PKK. The Turkish State has now lost Kurdistan. That is a fact. Any move the State makes in Kurdistan after this will turn out to the advantage of the PKK and to the disadvantage of the Turkish State ... .The Turkish press has no principles. We consider that there is no longer any point in communicating with that unethical press. We shall not be satisfied with abstaining from any contact with the press; we shall endeavour to stop the press from entering Kurdistan.

Q: A different tactic was applied in the Uludere attack. Previously, attacks were always carried out at night. But this time, the attack was carried out during the day and the clashes continued throughout the day. It is said that this entails more risk for the guerrillas. What was the reason for it?

A: What they say is right. Our combat has reached a certain level. Tactics have to be developed which match that level, because it is a mistake to wage war with less developed tactics. Progress can be achieved in the war by using tactics in keeping with the level of warfare which has now been reached. That is why an action of that nature was planned. The idea was to attack in the morning and hold our ground, continuing the clashes throughout the day – and it was successful in the end. It was an experiment. From our point of view there are conclusions to be drawn from it. We are studying the matter. We shall benefit from that in the actions we carry out in the future."

2. Interview with Mr C.B., the PKK second-in-command (Part 2)

"Q: What do you think about the assassinations by unknown perpetrators in Kurdistan and the actions ascribed to the 'Hizbi-contra'?

A: It is true that there is an organisation known as Hizbullah. But it is a weak organisation. It is not that organisation which is carrying out the massacres, contrary to what is being said. Since the organisation is weak, the Republic of Turkey has captured its members in many places. Many massacres are carried out in the name of that organisation, but it is actually the Turkish State itself which is doing the killings. We say this to the members of Hizbullah: 'If you are really Muslims, [you should know that] the Islamic faith is against repression and injustice and advocates what is right and just.' It is a well-known fact that the Turkish State is repressive and carries out massacres and inhuman actions. They [the Hizbullah] must respect those who oppose these acts. If they want to wage war, they must join forces with them. That is what we are asking of them. We warn them as friends that they must throw out the contra-guerrillas who infiltrate their ranks. For unless they do that, they will come to grief. We have not, as yet, reacted more seriously, we have just warned them. We say that that phenomenon has served the Turkish State and we have received a favourable response from certain quarters. They have said that Hizbullah people or Muslims have not in fact been involved in that sort of action and that the acts have not been carried out by Hizbullah people. That is favourable as far as we are concerned. But it [the State] is still carrying out massacres in some places in Hizbullah's name...

Q: On what lines will the struggle be carried out from now on?

A: The climate does affect a war, although the effects are not decisive. The 1991-92 winter was very hard and that affected our movements, the capacity for combat and caused several difficulties – both for us and for the Turkish State. But they have the advantage of using technology and they used that advantage to the full. To no avail, however. They intended to deal us murderous blows last winter. They thought they would have overthrown us and ousted us by the spring. But they did not achieve what they wanted. Our capacity for movement was reduced by the hard winter conditions and, as a result, steps could only be taken late as compared to previous years. The season is gradually becoming more suitable, however. There is still snow on the ground in many places, but it is presenting less and less of an obstacle. 1992 will be more different compared to other years, but we never say: 'Let us improve our armed combat, let us expand it further.' If we continue the war, we do so because we have to. Because there is no possibility of achieving a different life and developing. All roads have been blocked for us. We are waging war because we are forced to. Any further expansion of the war will depend on the attitude of the Turkish State. The State is intensifying the war. So we have to extend the war to that degree. The war will escalate. Before the PKK, there was a one-sided war being waged in Kurdistan. In the last few years that war has begun to be a two-sided war. In the old days, the Turkish State used to achieve whatever ends it intended to achieve in the war it was waging, and the Kurdish people was being rapidly wiped out as a result. But the Kurdish people have begun to say 'Stop!'. They began to resist in order to avoid annihilation. It was the State which started the war and the ending of the war will also depend on the Turkish State. We did not start the war. We developed a defensive war against the war of annihilation that was being waged on us. This war will continue as long as the Turkish State refuses to accept the will of the people of Kurdistan: there will be not one single step backwards. The war will go on until there is only one single individual left on our side. …

The State colonialist authority has completely disappeared in some places … As the government of war we want the people's will, which makes itself increasingly known, to be able to express itself officially. We shall make our way towards that objective one step at a time. We shall reach it by destroying or weakening the sovereignty of the State different ways and in various forms, by setting up a popular regime in certain places and favouring a dualistic regime in others. That is what we call the power of the people, the government of war. …

The PKK encounters all kinds of problems and resolves them. No questions are put to the Turkish State. No one speaks to it. Everyone speaks to the ERNK Committee or the local ERNK official. The ERNK is considered competent. For the moment, we are in the process of electing the representatives of the people."

3. Call "to unite forces" – Joint Statement of TDKP, TKEP, TKKKÖ and TKP-ML Hareketi

"The Central Committees of the Revolutionary Communist Party of Turkey (TDKP), the Communist Labour Party of Turkey (TKEP), the Turkish Organisation for the Liberation of Northern Kurdistan (TKKKÖ) and the Communist Party/Marxist-Leninist Movement of Turkey (TKP/ML Hareketi) have called on all revolutionaries and democrats to unite forces.

'Let us unite against State terrorism, against the repression and oppression of the Kurdish people, against the massacres, the street killings, the dismissals and unemployment; let us unite and step up our efforts for freedom, democracy and socialism!' Such is the heading of the appeal in which it is stated that the only means of action for the ruling classes is that of force and violence. And the 'democratisation' initiatives of the DYP and SHP government are described as a manoeuvre, purely a means of concealing their attacks."

The appeal goes on to state the following views:

"Workers, labourers and young people of the Kurdish and Turkish nation!

It is possible and perfectly feasible for us to drive back the attacks levelled on us by imperialism and the collaborating ruling classes and to obtain our economic and political rights and freedoms. To do so we must rally our forces around our common demands and join battle. Aware of its historic revolutionary role, the working class must take action, must lead that action, must call the bluff of the trade union bosses of every camp and smash the barriers they have put up to curb our movement and must develop the fight and action.

- The Turkish army must withdraw from Kurdistan. Action must be taken to put an end to the double standards in the legal system and all Kurdish prisoners must be released.

- The Turkish parliament must end its authority over Kurdistan. Kurdish people must be free to determine their own destiny, including the establishment of a separate State.

- The State terrorism and street executions, carried out by MİT [State Intelligence Organisation] agents, contra-guerrillas and special squads, must stop immediately and they must be called upon to account for the massacres and murders.

- The servicing of external debts to imperialists must be stopped, and those resources must be used for the benefit of the proletariat.

- Dismissals must be stopped and sacked workers must be given their jobs back. All the obstacles which have been placed in the way of trade union organisation must be removed and the right to organise without restriction must be granted.

- Measures must be taken to prevent the State Economic Enterprises, which are the resources of the country and of the people, from being sold for a song to imperialists. Labour sub-contracting, which is a means of eliminating trade union coverage, must be stopped immediately.

- The strike bans must be lifted and lockout must be prohibited. The right to hold general strikes, political strikes, strikes to obtain rights and sympathy strikes must be recognised. And all the bans on freedom of assembly, freedom to demonstrate, freedom of opinion and of the press must be ended.

- Act no. 657 pertaining to civil servants must be repealed and all working people must be granted the right to join a trade union with the right to strike and to conclude collective agreements.

- All working people must have insurance coverage; all workers must be granted unemployment insurance and the facilities must be provided for free health services and health care for everyone.

- The discrimination based on sex which prevails in working and social life and the pressure exerted on working women must be ended.

- The YÖK [High Council for Education] must be done away with and young people in higher education must be allowed to have a say and to participate in decision-making in university administration. All the obstacles that have been placed on youth organisations must be removed and education and training must be free of charge at every level.

- Education boards must be given full autonomy; textbooks must meet contemporary requirements and must be re-written with democratic contents.

- All debts owed to the State by the peasantry must be cancelled and the rural population must be allowed to set the minimum prices of products."

C. The measures taken by the authorities

1. The seizure of the review

11. On 1 June 1992 the Istanbul National Security Court (*Istanbul Devlet Güvenlik Mahkemesi*) ordered the seizure of all copies of the 31 May 1992 issue of the review, since it allegedly contained a declaration by terrorist organisations and disseminated separatist propaganda.

2. The charges against the applicants

12. In an indictment dated 16 June 1992 the Public Prosecutor at the Istanbul National Security Court charged the applicants with having disseminated propaganda against the indivisibility of the State by publishing an interview with a PKK leader and a declaration made by four terrorist organisations. The charges were brought under sections 6 and 8 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act": see paragraph 23 below).

13. In another indictment dated 30 June 1992, the applicants were further charged on account of having published the second part of the interview in the issue of 7 June 1992 with disseminating propaganda against the indivisibility of the State. The charges were brought under section 8 of 1991 Act.

14. On 4 February 1993 the criminal proceedings were joined in view of the fact that the incriminated articles were considered to constitute a single interview published in two parts.

3. The proceedings before the Istanbul National Security Court

15. In the proceedings before the Istanbul National Security Court, the applicants denied the charges. They pleaded that the interview had been published with the aim of providing the public with information within the scope of journalism and the freedom of the press. As regards his freedom of expression, the first applicant referred to the Convention and the case-law of the Commission and the Court. He stated that pluralism of opinion was essential in a democratic society including opinions which shock or offend. He argued that the provisions of sections 6 and 8 of the 1991 Act restricted freedom of expression in contravention of the Turkish Constitution and the criteria laid down in the case-law of the Commission and the Court.

4. The applicants' conviction

16. In a judgment dated 27 May 1993 the Istanbul National Security Court found the applicants guilty of offences under sections 6 and 8 of the 1991 Act. The first applicant was sentenced under section 6 to a fine of 100,000,000 Turkish liras and under section 8 to a further fine of 200,000,000 Turkish liras. The second applicant was sentenced under section 6 to a fine of 50,000,000 Turkish liras and under section 8 to six months' imprisonment and a further fine of 100,000,000 Turkish liras.

17. In its reasoning, the court held that the interview with the PKK leader was published in the form of a news commentary. It further held that the interviewee had referred to a certain part of Turkish territory as "Kurdistan", had asserted that certain Turkish citizens who are of Kurdish origin form a separate society and that the Republic of Turkey expels Kurdish people from their villages and massacres them. The court further considered that the interviewee had praised Kurdish terrorist activities and had claimed that the Kurds should form a separate State. On these grounds, the court found that the interview, as a whole, disseminated propaganda against the indivisibility of the State. The court further held that another page of the review contained a declaration by terrorist organisations and its publication constituted a separate offence under section 6 of the 1991 Act.

5. The applicants' appeal

18. The applicants appealed against their conviction. In addition to the defence which they invoked before the Istanbul National Security Court, their legal representative emphasised that in a democratic society opinions must be freely expressed and debated. Noting that there had been no prosecutions for the publication of other interviews with the leaders of the PKK in other newspapers or magazines, the applicants' representative asserted that the applicants had not been convicted for having published the incriminated interview, but for publishing a Marxist review.

19. On 4 November 1993 the Court of Cassation dismissed the appeal. It upheld the Istanbul National Security Court's assessment of the evidence and its reasons for rejecting the applicants' defence.

6. Further developments

20. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraph 24 below) the Istanbul National Security Court *ex officio* re-examined the applicants' cases. The court confirmed the sentences imposed on them.

II. RELEVANT DOMESTIC LAW

A. The criminal law

21. The relevant provisions of the Criminal Code read as follows:

1. The Criminal Code (Law no. 765)

Article 2 § 2

"Where the legislative provisions in force at the time when a crime is committed are different from those of a later law, the provisions most favourable to the offender shall be applied."

Article 19

"The term 'heavy fine' shall mean payment to the Treasury of from twenty thousand to one hundred million Turkish liras, as the judge shall decide..."

Article 36 § 1

"In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence…"

Article 142
(repealed by Law no. 3713 of 12 April 1991[1] on the Prevention of Terrorism)

"Harmful propaganda

1. A person who by any means whatsoever spreads propaganda with a view to establishing the domination of one social class over the others, annihilating a social class, overturning the fundamental social or economic order established in Turkey or

1. See paragraph 23 below.

the political or legal order of the State shall, on conviction, be liable to a term of imprisonment of from five to ten years.

2. A person who by any means whatsoever spreads propaganda in favour of the State's being governed by a single person or social group to the detriment of the underlying principles of the Republic and democracy shall, on conviction, be liable to a term of imprisonment of from five to ten years.

3. A person who, prompted by racial considerations, by any means whatsoever spreads propaganda aimed at abolishing in whole or in part public-law rights guaranteed by the Constitution or undermining or destroying patriotic sentiment shall, on conviction, be liable to a term of imprisonment of from five to ten years.

…"

Article 311 § 2

"Public incitement to commit an offence

Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled…"

Article 312[1]

"Non-public incitement to commit an offence

A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months' and two years' imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years' imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

1. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to parliament (Law no. 2839, section 11(f3)). In addition, if the sentence imposed exceeds six months' imprisonment, the convicted person is debarred from entering the civil service, except where the offence has been committed unintentionally (Law no. 657, section 48(5)).

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2."

2. The Press Act (Law no. 5680 of 15 July 1950)

22. The relevant provisions of the Press Act 1950 read as follows:

Section 3

"For the purposes of the present Law, the term 'periodicals' shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

'Publication' shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful."

Additional section 4(1)

"Where distribution of the printed matter whose distribution constitutes the offence is prevented … by a court injunction or, in an emergency, by order of the principal public prosecutor … the penalty imposed shall be reduced to one third of that laid down by law for the offence concerned."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

23. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.

…

Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8
(before amendment by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8
(as amended by Law no. 4126 of 27 October 1995)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a re-offender may not be commuted to a fine.

1-2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras…

…"

Section 13
(before amendment by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve."

Section 13
(as amended by Law no. 4126 of 27 October 1995)

"The penalties for the offences contemplated in the present Law may not be commuted to a fine or any other measure, nor may they be accompanied by a reprieve.

However, the provisions of this section shall not apply to convictions pursuant to section 8[1]."

Section 17

"Persons convicted of the offences contemplated in the present law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

…

The first and second paragraphs of section 19[2] … of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

1. See the relevant provision of Law no. 4126, reproduced below.
2. See paragraph 26 below.

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

24. The following amendments were made to the Prevention of Terrorism Act 1991 following the enactment of Law no. 4126 of 27 October 1995:

Temporary provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment … to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4^1 and 6^2 of Law no. 647 of 13 July 1965."

5. Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997

25. The following provisions are relevant to sentences in respect of offences under the Press Law:

Section 1

"The execution of sentences passed on those who were convicted under Press Law no. 5680 or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where no proceedings against the editor have not yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
2. This provision concerns reprieves.

The part of the postponed conviction which was served by the responsible editor until the date on which this Law enters into force shall be deducted from the sentence to be served as indicated in section 1. The provisions concerning conditional release are reserved.

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

6. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

26. The Execution of Sentences Act provides *inter alia*:

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years…"

Section 19(1)

"… persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct..."

7. The Code of Criminal Procedure (Law no. 1412)

27. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[1].”

Article 308

“Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

…”

B. Criminal law cases submitted by the Government

28. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 23 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor’s decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

29. Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 19 November (no. 1996/428) and 27 December 1996 (no. 1996/519); 6 March (no. 1997/33), 3 June (no. 1997/102), 17 October (no. 1997/527), 24 October (no. 1997/541) and 23 December 1997 (no. 1997/606); 21 January (no. 1998/8), 3 February (no. 1998/14), 19 March (no. 1998/56), 21 April 1998 (no. 1998/87) and 17 June 1998 (no. 1998/133).

30. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases have reached their decisions on the basis of the absence of the element

1. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term “legal rule” refers to any written source of law, to custom and to principles deduced from the spirit of the law.

of "propaganda", an element of the offence, or on account of the objective nature of the incriminated parts.

C. The National Security Courts[1]

1. The Constitution

31. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution…"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

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1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

The president, one of the regular members, one of the substitutes and the prosecutor, shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

Presidents, regular members and substitute members ... of National Security Courts shall be appointed for a renewable period of four years.

Appeal against decisions of National Security Courts shall lie to the Court of Cassation.

..."

Article 145 § 4

"Military legal proceedings

The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law..."

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts[1]

32. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts provide as follows:

Section 1

"In the capitals of the provinces of … National Security Courts shall be established to try persons accused of offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free, democratic system of government and offences directly affecting the State's internal or external security."

Section 3

"The National Security Courts shall be composed of a president, two other regular members and two substitute members."

1. These provisions are based on Article 143 of the Constitution, to the application of which they refer.

Section 5

"The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank…"

Section 6(2) and (6)

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years…

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves … may be changed in accordance with the procedure laid down in that legislation."

Section 9(1)(a)

"National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 … of the Turkish Criminal Code,

…

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free, democratic system of government and offences directly affecting the State's internal or external security.

…"

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession…

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court…"

3. The Military Legal Service Act (Law no. 357)

33. The relevant provisions of the Military Legal Service Act provide as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence…"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces…

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors…"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file…"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts…"

4. Article 112 of the Military Code (of 22 May 1930)

34. Article 112 of the Military Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

5. Law no. 1602 of 4 July 1972 on the Supreme Military Administrative Court

35. Under section 22, the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

36. Mr Kamil Tekin Sürek, the first applicant, and Mr Yücel Özdemir, the second applicant, applied to the Commission on 25 February and 4 May 1994 respectively. The first applicant relied on Articles 10 and 6 § 1 of the Convention, arguing that his conviction resulting from the publication of material in his periodical unjustifiably interfered with his right to freedom of expression and that he had not received a fair hearing before an independent and impartial tribunal. He also complained about the length of the criminal proceedings brought against him. The second applicant also relied on Articles 10 and 6 § 1 of the Convention in respect of similar complaints. In addition he alleged that, contrary to Article 18 of the Convention, the restrictions imposed on his right to freedom of expression were inconsistent with the legitimate aims set out in Article 10 § 2.

37. The Commission declared the applications (nos. 23927/94 and 24277/94) admissible on 2 September 1996 with the exception of the complaints under Article 6 § 1 relating to the length of the criminal proceedings brought against the applicants. On the same date the Commission decided to join the applications. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been a violation of Article 10 of the Convention (17 votes to 15); that no separate issue arose in regard to the second applicant's complaint under Article 18 of the Convention (unanimously); and that there had been a violation of Article 6 § 1 of the Convention (31 votes to 1). The full text of the Commission's opinion and of the separate opinions contained in the report is reproduced as an annex to this judgment[1].

1. *Note by the Registrar*. For practical reasons this annex will appear only with the final printed version of the judgment (in the official reports of selected judgments and decisions of the Court), but a copy of the Commission's report is obtainable from the Registry.

FINAL SUBMISSIONS TO THE COURT

38. The applicants requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award them just satisfaction under Article 41.

39. The Government for their part requested the Court to reject the applicants' allegations.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

40. The applicants alleged that the authorities had unjustifiably interfered with their right to freedom of expression guaranteed under Article 10 of the Convention, which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

41. The Government maintained that the interferences with the applicants' right to freedom of expression were justified under the provisions of the second paragraph of Article 10. The Commission on the other hand accepted the applicants' allegations.

A. Existence of an interference

42. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicants' right to freedom of expression on account of their conviction and sentence under sections 6 and 8 of the Prevention of Terrorism Act 1991 (the "1991 Act").

B. Justification of the interference

43. The above-mentioned interferences contravened Article 10 unless they were "prescribed by law ", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and were "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

44. The applicants did not comment on whether there had been compliance with this requirement.

45. The Government pointed out that the measures taken against the applicants were based on sections 6 and 8 of the 1991 Act.

46. The Commission accepted the Government's view and concluded that the interferences were prescribed by law.

47. The Court, like the Commission, accepts that since the applicants' convictions were based on sections 6 and 8 of the 1991 Act, the resultant interferences with their right to freedom of expression could be regarded as "prescribed by law", all the more so given that the applicants have not disputed this.

2. Legitimate aim

48. The applicants did not make any submissions on this issue, other than disputing generally the lawfulness of the interferences with their right to freedom of expression.

49. The Government reiterated that the measures taken against the applicants were based on sections 6 and 8 of the 1991 Act. Those provisions were aimed at protecting interests such as territorial integrity, national unity, national security and the prevention of crime and disorder. The applicants were convicted in pursuance of these legitimate aims since they had disseminated separatist propaganda vindicating the acts of the PKK, a terrorist organisation, which threatened these interests.

50. The Commission concluded that the applicants' convictions were part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

51. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicants can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in

south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicants

52. The applicants stressed that neither they nor the review had any links with the PKK. They contended that the impugned interviews did not praise that organisation or comment favourably on it. They were written and published with complete objectivity in accordance with the principles of objective journalism. The interviews were published in order to inform the public about the PKK, a topical subject, and the interviews neither promoted terrorism nor threatened public order.

53. The first applicant, Mr Sürek, pleaded that as the owner of the review he had no editorial responsibility for its content and on that account he should not have been convicted and fined heavily. The second applicant, Mr Özdemir, the editor-in-chief of the review, complained that he was given a six-month prison sentence and made to pay a substantial fine on account of his decision to carry the interviews in the review. Both applicants maintained that the measures taken against them amounted to a disproportionate interference with their Article 10 right.

(ii) The Government

54. The Government replied that the applicants were found guilty of disseminating separatist propaganda given that the impugned interview and joint statement encouraged violence against the State and overtly promoted the cause of a terrorist organisation. In support of their argument the Government highlighted several extracts from the interview with the senior PKK leader which, in their view, openly encouraged violence and provoked hostility and hatred among the different groups in Turkish society. As to the joint statement, the Government observed that it contained words designed to support the interview with the PKK leader which was published in the same edition. In their submission it was significant that, given the PKK's declared hostility to the press, the PKK leader volunteered an interview to the applicants' review.

55. Having regard to the PKK's history of terrorism, the Government argued that the applicants had been rightly convicted under sections 6 and 8 of 1991 Act and that the measures taken against them properly fell within

the authorities' margin of appreciation in this area. The interferences were accordingly justified under Article 10 § 2 of the Convention.

(iii) The Commission

56. The Commission found that the interferences with the applicants' right under Article 10 could not be justified with reference to the second paragraph of that Article. In reaching this conclusion, the Commission considered that the replies given by the PKK leader in the interview, as with the tone of the joint statement, could not be seen as inciting to further violence and that the elements of the interview identified by the Istanbul National Security Court did not justify the applicants' conviction (see paragraph 17 above). In the Commission's view the effect of the measures taken against the applicants was to deter public discussion on important political issues. For these reasons in particular the Commission found that there had been a violation of Article 10 of the Convention.

(b) The Court's assessment

57. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (cited above, pp. 2547-48, § 51) and in its Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-, p. …, § 45).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was

"proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

58. Since the applicants were convicted of publishing declarations of terrorist organisations and disseminating separatist propaganda through the medium of the review of which they were the owner and editor respectively (see paragraph 8 above), the impugned interferences must also be seen in the context of the essential role of the press in ensuring the proper functioning of political democracy (see, among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no.103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p …., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26, §§ 41-42).

59. The Court notes that the review published two interviews with a senior figure in the PKK as well as a joint statement issued on behalf of four political organisations, which, like the PKK, were illegal under the law of the respondent State. In the interviews, the PKK figure criticised what he considered to be double standards on the part of the United States of America with respect to the position of the Kurdish people in south-east Turkey and condemned the policies of the authorities of the respondent State in that region, which he described as being directed at driving the Kurds out of their territory and breaking their resistance. He claimed in the second interview that the war being waged by the PKK on behalf of the Kurdish people will continue *"until there is only one single individual left on our side"* (see paragraph 10 above). As to the joint statement, the sponsors appeal to working class solidarity in the face of a range of perceived injustices. They plead, *inter alia*, in favour of recognising the right of the Kurdish people to self-determination and the withdrawal of the Turkish army from Kurdistan (see paragraph 10 above).

The Istanbul National Security Court found that the charges against both applicants brought under sections 6 and 8 of the 1991 Act were proven (see paragraphs 16 and 17 above). The court considered, *inter alia*, that the PKK official in the interviews had accused the authorities of massacres and expulsions of Kurds living in "Kurdistan", praised Kurdish terrorist

activities and had argued in favour of the creation of a separate State for the Kurdish people. Furthermore, the court found that the publication of the joint statement gave rise to a separate offence under section 6 of the 1991 Act.

60. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 57 and 58), the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Moreover, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Furthermore, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

61. The Court will have particular regard to the words used in the interviews and the joint statement and to the context in which they were published. In this latter respect it will take into account the background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the above-mentioned Incal v. Turkey judgment p. 1568, § 58).

It notes in the first place that the fact that the impugned interviews were given by a leading member of a proscribed organisation cannot in itself justify an interference with the applicants' right to freedom of expression; equally so the fact that the interviews contained hard-hitting criticism of official policy and communicated a one-sided view of the origin of and responsibility for the disturbances in south-east Turkey. While it is clear from the words used in the interviews that the message was one of intransigence and a refusal to compromise with the authorities as long as the objectives of the PKK had not been secured, the texts taken as a whole cannot be considered to incite to violence or hatred. The Court has had close regard to the passages of the interviews which, in the view of the Government, can be construed in this sense. For the Court, however,

expressions such as *" If they want us to leave our territory, they must know that we will never agree to it"*. or "*The war will go on until there is only one single individual left on our side*". or "*The Turkish State wants to oust us from our territory. It is driving people out of their villages*". or "*They want to annihilate us*". are a reflection of the resolve of the opposing side to pursue its goals and of the implacable attitudes of its leaders in this regard. Seen in this vein, the interviews had a newsworthy content which allowed the public both to have an insight into the psychology of those who are the driving force behind the opposition to official policy in south-east Turkey and to assess the stakes involved in the conflict. The Court is naturally aware of the concern of the authorities about words or deeds which have the potential to exacerbate the security situation in the region, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the above-mentioned Zana judgment, p. 2539, § 10). However, it would appear to the Court that the domestic authorities in the instant case failed to have sufficient regard to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. As noted previously, the views expressed in the interviews could not be read as an incitement to violence; nor could they be construed as liable to incite to violence. In the Court's view the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants, although relevant, cannot be considered sufficient for justifying the interferences with their right to freedom of expression (see paragraph 17 above). This conclusion holds true for the applicants' separate conviction under section 6 of the 1991 Act in respect of the publication of the joint statement since it would appear to the Court that there are no elements in that text which could be construed as an incitement to violence.

62. The Court also observes that Mr Sürek was ordered to pay a substantial fine and Mr Özdemir was both fined and sentenced to a six-month term of imprisonment (see paragraph 16 above). Furthermore, the copies of the reviews in which the impugned publications appeared were seized by the authorities (see paragraph 11 above). The Court notes in this connection that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of the interference.

63. The Court stresses that the "duties and responsibilities" which accompany the exercise of the right to freedom of expression by media professionals assume special significance in situations of conflict and tension. Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort

to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.

64. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention in the particular circumstances of this case.

II. ALLEGED VIOLATION OF ARTICLE 18 OF THE CONVENTION

65. The Court notes that the Commission declared inadmissible the complaint of the second applicant, Mr Özdemir, under Article 18 of the Convention, finding that it raised no separate issue in relation to his complaint under Article 10. Article 18 provides:

> "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed."

66. The Court observes that the second applicant has not pursued this complaint in the proceedings before it, either in his memorial or at the oral hearing. In these circumstances the Court does not propose to examine the complaint of its own motion.

III. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

67. The applicants submitted that they had been denied a fair hearing in breach of Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the Istanbul National Security Court which tried and convicted them. Article 6 § 1 provides as relevant:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law…"

68. The Government raised an objection to the admissibility of this complaint and contended in the alternative that there had been no breach of Article 6 § 1. The Commission agreed with the applicants' allegation.

A. The Government's preliminary objection – non-exhaustion of domestic remedies

69. The Government maintained that the applicants at no stage of the domestic proceedings claimed that their trial was unfair on account of the participation of a military judge in the proceedings. For this reason the applicants' complaint should be rejected for failure to exhaust domestic remedies within the meaning of Article 35 § 1 of the Convention. They relied on the Court's Sadık v. Greece judgment of 15 November 1996 in support of their contention (*Reports* 1996-V, p. 1638).

70. The Court observes that the Government did not raise this objection before the Commission, when the admissibility of the application was being considered. Their observations on this issue related solely to the fact that the applicants had not disputed the independence and impartiality of the Court of Cassation. The applicants' complaint on the other hand is that the Istanbul National Security Court lacked these very qualities. The Government are therefore estopped from raising their objection at this stage of the proceedings (see, among other authorities, the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2546, § 44; the Nikolova v. Bulgaria judgment of 25 March 1999, *Reports* 1999, p. …, § 44).

B. Merits

71. In the applicants' submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. Furthermore, their commanding officers were responsible for their professional assessment and promotion. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicants further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position against the will of their commanding officers in view of their dependence on the latter for their career.

72. The applicants stated that these considerations impaired the independence and impartiality of the Istanbul National Security Court and prevented them from receiving a fair trial, in violation of Article 6 § 1.

73. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of

independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicants' argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 34 above). Secondly, the assessment reports referred to by the applicants related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 35 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

74. The Government further averred that the fairness of the applicants' trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicants' convictions had been reviewed on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned by the applicants.

75. The Government also impressed upon the Court the need to have particular regard to the security context in which the decision to establish National Security Courts was taken pursuant to Article 143 of the Constitution. In view of the experience of the armed forces in the anti-terrorism campaign the authorities had considered it necessary to strengthen these courts by including a military judge in order to provide them with the necessary expertise and knowledge to deal with threats to the security and integrity of the State.

76. The Commission concluded that the Istanbul National Security Court could not be considered an independent and impartial tribunal for the purposes of Article 6 § 1 of the Convention. The Commission referred in this respect to its opinion in the Incal v. Turkey case in its Article 31 report adopted on 25 February 1997 and to the reasons supporting that opinion.

77. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (*Reports* 1998-IV, p. 1547) and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-, p. …) the Court had to address arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the above Incal judgment, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (*ibidem*, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; the

fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 32-35 above).

78. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed the applicants' right to a fair trial, in particular whether, viewed objectively, they had a legitimate reason to fear that the court which tried them lacked independence and impartiality (see the above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çıraklar judgment, p. …, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicants, were civilians. It is understandable that the applicants – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 33 above). On that account they could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of their cases. In other words, the applicants' fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

79. For these reasons the Court finds that there has been a breach of Article 6 § 1.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention stipulates in this respect:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

81. Mr Sürek claimed the sum of 200,000 French francs (FRF) to compensate him for the fine which he had to pay. Mr Özdemir for his part claimed FRF 100,000 by way of compensation for the fine imposed on him.

The applicants stated that the amounts which they claimed in French francs were equivalent in today's terms to the fines imposed in 1992 and took account of the high rate of inflation in the respondent State since that date.

82. The Government maintained that the sums claimed by the applicants were exorbitant having regard to the amount of the fines in question. They added that Mr Sürek was allowed to pay off his fine in monthly instalments and since Mr Özdemir fled the jurisdiction before sentence was passed no sanction has ever been applied to him. Furthermore, according to Law no. 4304 the sentence imposed on Mr Özdemir is now taken to be suspended (see paragraph 25 above).

83. The Court considers that the first applicant, Mr Sürek, who alone paid the fine imposed on him, should be compensated. Deciding on an equitable basis, it awards him the sum of FRF 8,000.

B. Non-pecuniary damage

84. The applicants each claimed FRF 80,000 in compensation for moral damage without specifying its nature.

85. The Government contended that the claim should be rejected. In the alternative they argued that should the Court be minded to find a violation of any of the Articles invoked by the applicants that in itself would constitute sufficient just satisfaction.

86. The Court considers that the applicants can be considered to have suffered a certain amount of distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards each of the applicants in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

87. The applicants claimed reimbursement of their legal costs and expenses, which they assessed at FRF 50,000 each, a total of FRF 100,000. Mr Sürek submitted to the Court in support of his claim the contract which he had drawn up with his lawyer for the payment of legal fees in connection with this and three other cases he had lodged with the Convention institutions.

88. The Government stated that the amounts claimed were exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified. The case was simple and had not required much effort on the part of the applicants' lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

89. The Court notes that the applicants' lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, the above-mentioned Nikolova v. Bulgaria judgment p. …, § 79), the Court awards each of the applicants the sum of FRF 15,000.

D. Default interest

90. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment which, according to the information available to it, is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been a violation of Article 10 of the Convention;

2. *Holds* unanimously that it is not necessary to examine the second applicant's complaint under Article 18 of the Convention;

3. *Dismisses* unanimously the Government's preliminary objection under Article 6 § 1 of the Convention;

4. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicants, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) 8,000 (eight thousand) French francs to the first applicant, Mr Sürek, in respect of pecuniary damage;
(ii) 30,000 (thirty thousand) French francs to each applicant in respect of non-pecuniary damage;
(iii) 15,000 (fifteen thousand) French francs to each applicant in respect of costs and expenses;

(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

6. *Dismisses* unanimously the remainder of both applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Signed: Luzius WILDHABER
President

Signed: PAUL MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:

(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;
(b) concurring opinion of Mr Bonello;
(c) joint partly dissenting opinion of Mr Wildhaber, Mr Kūris, Mrs Strážnická, Mr Baka and Mr Traja;
(d) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P.J. M.

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in Judge Palm's partly dissenting opinion in the case of Sürek v. Turkey (no. 1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicants' freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicants supported or instigated the use of violence, then their conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[4].

1. Justice Oliver Wendell Holmes in *Abrahams v. United States,* 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

It is not manifest to me that any of the words with which the applicants were charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[1]

1. Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.

JOINT PARTLY DISSENTING OPINION OF JUDGES WILDHABER, KŪRIS, STRÁŽNICKÁ, BAKA AND TRAJA

In freedom of expression cases the Court is called upon to decide whether the alleged interference has a sufficient basis in domestic law, pursues a legitimate aim and is justifiable in a democratic society. This flows not only from the clear wording of the second paragraph of Article 10, but also from the extensive case-law on that provision. Freedom of expression under the Convention is not absolute. Although the protection of Article 10 extends to information and ideas that "offend, shock or disturb the State or any section of the Community" (see Handyside v. United Kingdom, 7.12.1976, Series A n° 24, § 49; Castells v. Spain, 23.4.1992, Series A n° 236, § 42; Jersild v. Denmark, 23.9.1994, Series A no. 298, § 37; Fressoz & Roire v. France, 21.1.1999, § 45), this is always subject to paragraph 2. Those invoking Article 10 must not overstep certain bounds.

In the assessment of whether restrictive measures are necessary in a democratic society, due deference will be accorded to the State's margin of appreciation; the democratic legitimacy of measures taken by democratically elected Governments commands a degree of judicial self-restraint. The margin of appreciation will vary: it will be narrow for instance where the speech interfered with is political speech because this type of expression is the essence of democracy and interference with it undermines democracy. On the other hand, where it is the nature of speech itself that creates a danger of undermining democracy, the margin of appreciation will be correspondingly wider.

Where there are competing Convention interests the Court will have to engage in a weighing exercise to establish the priority of one interest over the other. Where the opposing interest is the right to life or physical integrity, the scales will tilt away from freedom of expression (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2533, §§ 51, 55 and 61).

It will therefore normally be relatively easy to establish that it is necessary in a democratic society to restrict speech which constitutes incitement to violence. Violence as a means of political expression being the antithesis of democracy, irrespective of the ends to which it is directed, incitement to it will tend to undermine democracy. In the case of United Communist Party of Turkey v. Turkey (30.1.1998, *Reports* 1998-I p. 1, § 57) the Court refers to democracy as the only political model contemplated by the Convention and notes that "one of the principal

characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence". Violence is intrinsically inimical to the Convention. Unlike the advocacy of opinions on the free marketplace of ideas, incitement to violence is the denial of a dialogue, the rejection of the testing of different thoughts and theories in favour of a clash of might and power. It should not fall under the ambit of Article 10.

In the instant case, we acknowledge that the four left-wing organisations in question are illegal under Turkish law. However, we consider the tone of the joint statement published by them to be relatively moderate. These opinions could not justify an interference with the applicants' right to freedom of expression.

As regards the interview with the PKK's second-in-command, we would stress at the outset that it must be possible for a leader of an illegal organisation to express his views on a given political situation. It may also be legitimate to interview a leader of such an organisation. This does not mean however that it is legitimate to publish all of his views, in particular given the sensitivity of the political and security situation in south-east Turkey.

The published interview contains words and expressions such as "the war will go on until there is only one single individual left on our side", "there will be no single step backwards", "the war will escalate", "our combat has reached a certain level. Tactics have to be developed which match that level". The interview also refers to the tactics which the PKK would use to combat the State. It is very difficult not to view these sentences as an encouragement to further violence. The author's language is direct and clear and its meaning – that there will be no compromise even if the war escalates – was likely to be understood by the public at large. In this respect we consider that some of the wording is very similar to that used in the articles in Sürek v. Turkey (no. 1) case, where the Court found no violation of Article 10.

Given this assessment of the facts of the case before us, we feel that the majority of the Court should have followed § 60 of the judgment, in which it is explained that "where remarks incite to violence ..., the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression". The Court's decision in fact largely disavows the clear statement in § 60. We cannot follow the majority in this respect. We therefore consider that the interference with the

applicants' freedom of expression was, in the circumstances of the case, proportionate to the legitimate aims relied on by the Government and accepted by the Court.

In the present case we accordingly cannot agree with the opinion of the majority of the Court that there has been a violation of Article 10 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench.

The general principles which emerge from the judgment of 25 November 1995 in the case of Zana v. Turkey and which I recall in my dissenting opinion annexed to the Gerger v. Turkey judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Sürek and Özdemir v. Turkey is indistinguishable, if not in form, at least in content, from the Zana and Gerger cases. Indeed, the European Commission of Human Rights concluded that there had been a violation of Article 10 only with a very small majority (by 17 votes to 15). I entirely agree with the dissenting opinion of the minority (Mr S. Trechsel, Me E. Busuttil, Mr G. Jörundsson, Mr A.S. Gözübüyük, Mr A. Weitzel, Mrs J. Liddy, Mr I. Cabral Barreto, Mr N. Bratza, Mr D. Šváby, Mr G. Ress, Mr A. Perenič, Mr C. Bîrsan, Mr K. Herndl, Mr E. Bieliūnas and Mr E.A. Alkema) who considered that there had been no violation of that provision. May I therefore be permitted to reproduce that opinion at length as if it were my own dissenting opinion.

> "We regret that we are unable to share the view of the majority of the Commission that there has been a violation of Article 10 of the Convention in the present case.
>
> While we agree that the published declaration by four socialist organisations was not such as to justify an interference with the applicants' right to freedom of expression, we take a different view of the interview with C.B. which was published in two parts in the 31 May and 7 June 1992 editions of the applicants' weekly review.
>
> We attach special significance to the fact that C.B. was at the time of the interview the second-in-command of the P.K.K., an armed terrorist organisation which was and is engaged in violent terrorist acts. Like the majority of the Commission, we do not consider that the mere fact of publication of an interview with a leading member of the P.K.K. would be sufficient to justify an interference with freedom of expression. Thus, for example, an interview with a terrorist leader which contained a factual analysis of the development of the conflict or which put forward suggestions for bringing about its peaceful solution would not in our view of itself justify action against the publisher.

However, it is in our view incumbent on those who publish such interviews to take special care to ensure that they do not contain anything which can fairly be interpreted as an encouragement to further violent acts.

The majority of the Commission conclude that the replies of C.B., while including a clear prediction of continued armed action from the Turkish State as well as from the P.K.K., can hardly be interpreted as an incitement to further violence. We cannot agree. There are in our view a number of passages in the interview which can only be interpreted as an encouragement to further terrorist violence. In particular, we draw attention to the following replies: "Our combat has reached a certain level. Tactics have to be developed which match that level, because it is a mistake to wage war with less developed tactics. Progress can be achieved in the war by using tactics in keeping with the level of warfare which has now been reached. That is why an action of that nature was planned. The idea was to attack in the morning and hold our ground, continuing the clashes throughout the day - and it was successful in the end. It was an experiment. From our point of view there are conclusions to be drawn from it. We are studying the matter. We shall benefit from that in the actions we carry out in the future. ... This war will continue as long as the Turkish State refuses to accept the will of the people of Kurdistan. There will be not one single step backwards. The war will go on until there is only one single individual left on our side."

The Commission has previously drawn attention to the particular difficulty in striking a fair balance between the requirements of protecting freedom of information and the imperatives of protecting the State and the public against armed conspiracies seeking to overthrow the democratic order, in a situation where the advocates of this violence seek access to the media for publicity purposes (see eg., No. 15404/89, Dec. 16.4.91, D.R. 70, p. 262).

In the present case we consider that the national authorities did not exceed their margin of appreciation in taking measures against the publications and that such measures may be regarded as necessary in a democratic society to achieve the aims of national security and public safety."

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thór Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I remain convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member

of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.