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

CASE OF GERGER v. TURKEY

(Application no. 24919/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Gerger 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. 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 1 March 1999 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 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24919/94) against the Republic of Turkey

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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.

lodged with the Commission under former Article 25 by a Turkish national, Mr Haluk Gerger, on 22 June 1994.

The Commission's request referred to former Articles 44 and 48(a) of the Convention and to Rule 32 § 2 of Rules of former Court A[1]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 and Article 10 of the Convention, and under Article 14 taken together with Article 5 § 1.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of former Court A, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (former Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's 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 R. Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure (former Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial and the applicant's memorials on 24 and 25 August 1998 respectively. On 29 September the Government produced documents as appendices to their memorial.

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); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey (nos. 23927/94 and 24277/94); Sürek v. Turkey no. 1 (no. 26682/95); 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).

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1. 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 bound by that Protocol.

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, Mr M. Fischbach and Mr J.-P. Costa, 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 (Rules 24 §§ 3 and 5 (a) and 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 Mrs Botoucharova, who was unable to take part in the further consideration of the case, was replaced by Mr K. Traja (Rule 24 § 5 (b)).

6. At the invitation of the Court (Rule 99 § 1) the Commission delegated one of its members, Mr D. Šváby, to participate in the proceedings before the Grand Chamber.

7. On 1 March 1999 the Government lodged observations on the applicant's claims under Article 41 of the Convention and Mr Gerger's lawyer produced documentary evidence relating to part of his costs.

8. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with the case of Erdoğdu and İnce v. Turkey. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr D. TEZCAN,
Mr ÖZMEN, *Co-Agents,*
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 Commission*
Mr D. ŠVÁBY, *Delegate*;

(c) *for the applicant*
Mr E. SANSAL, of the Ankara Bar, *Counsel*.

The Court heard addresses by Mr Šváby, Mr Sansal, Mr Tezcan and Mr Özmen and also Mr Sansal's reply to a question put by one of its members.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. Mr Haluk Gerger is a Turkish national and was born in 1950. He lives in Ankara and works as a journalist.

10. On 23 May 1993 a memorial ceremony was held in Ankara for Denis Gezmiş and two of his friends, Yusuf Aslan and Hüseyin İnan. Together, they had started an extreme left-wing movement among university students at the end of the 1960s. They were sentenced to death for seeking to destroy the constitutional order by violence and executed in May 1972.

The applicant was invited to speak at the ceremony, but was unable to attend and sent the organising committee the following message to be read out in public:

> "Dear friends,
>
> Though ill health has prevented me from being with you, I did not want to miss this opportunity to salute you and to express my solidarity with the revolutionary cause.
>
> *The Turkish Republic is based on negation of the rights of workers and Kurds. Within the geographical boundaries of this country, any hint of human action, any aspiration for freedom, any claim to assert the rights of the workers and the Kurds has always met with a reaction on the part of the rulers that has been ruthless in its denial and destruction. It has to be said that*, because of their origins and historic traditions, *the rulers have always distinguished themselves through a cruel militarism that is the product* of their mediocrity, backwardness, and thirst for ever more money and, lastly, *of the fundamental nature of the Republic and its subservience to imperialism*. The more the structural crisis of the established order deepened, the more the ruling classes resorted to imperialism and militarism in their desire to bring it to an end.
>
> The rulers, who had condemned the political and social lands of the country to sterile aridity and, in order to break any resistance and stifle any revolt by the masses, had put a chain of dependence around society's neck and imposed oppressive uniformity upon it, succeeded for many long years in keeping our people in the deep gloom of silence.

However, the 1960s revival, the action organised by dynamic social strata previously excluded from the political life of the country such as the workers, the intelligentsia and young people and, lastly, the revolutionary democratic resistance movement of the early 1970s have helped to transform the history of the nation, and their profound influence can still be felt today.

A red hope is nascent in the tired barren hearts of the workers. A legend is born in the long history of defeat of the oppressed.

From now on, nothing and no-one will be the same!

In the face of the longstanding crisis of the established order, the quest for independence and freedom which at that time became ingrained in society's conscience, in the collective memory of the toiling masses, in the memory of the young and the intelligentsia and in the conscience of the workers henceforth constitutes a refuge for society. The spirit of resistance and revolt of those heroic years, a nightmare for the rulers, has been with the country for more than twenty years. The socialist flag, which was borne aloft at the time and is representative of the only system capable of replacing the incumbent capitalist system, is still flying. *From the seeds of liberation of the Kurdish people sown in those days the guerrilla campaign in the mountains of Kurdistan was born.*

As for us, the rivers, streams, torrents and waterfalls that emerged from the sweeping waters of those years, we are now flowing on toward the final release of mankind, across the plains formed by our class, our people and democracy into the ocean of liberty of a classless society. Like many Denizes [a reference to Deniz Gezmiş, whose first name means "the sea" in Turkish], we head towards the seas of freedom.

Today, before the Ocean of Liberation, on these fertile alluvia formed of our solidarity and unity in the struggle, we hail those who have been invited to the heavenly feast.

Hail, friends!

Hail to those who are marching 'Towards Future Times, Like many Denizes'!

Hail to you,

the rose Deniz, the rose Yusuf, the rose Hüseyin...
the three roses of Karşıkaya
planted on the branch of my heart
the three roses of Karşıkaya
planted in the spring of my tears
with all their flowers of blood."

11. On 6 August 1993 the Public Prosecutor at the Ankara National Security Court ("National Security Court") accused the applicant of disseminating propaganda against the unity of the Turkish nation and the territorial integrity of the State. In order to request the application of section 8(1) of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 19 above), he relied on passages from Mr Gerger's message, which had been recorded when read out at the memorial ceremony (these are the passages that appear in italics in paragraph 10 above).

12. Mr Gerger pleaded not guilty before the National Security Court, which sat as a chamber of three judges, including a military judge. He did not dispute having drafted the message, but maintained that he had never intended to promote separatism.

13. On 9 December 1993 the National Security Court found the applicant guilty of the offence under section 8(1) of Law no. 3713 and sentenced him to one year, eight months' imprisonment and a fine of 208,333,333 Turkish liras (TRL).

The judgment was delivered by a majority of two to one, the military judge dissenting. The latter explained in his dissenting opinion that, in his view, the offence of disseminating separatist propaganda under section 8(1) of Law no. 3713 had not been made out, but that there had been non-public incitement to commit a crime and, consequently, Article 312 § 2 of the Criminal Code (see paragraph 18 below) should have been applied.

The other two members of the chamber found that passages such as: "... From the seeds of liberation of the Kurdish people sown in those days the guerrilla in the mountains of Kurdistan was born... As for us, the rivers, streams, torrents and waterfalls that emerged from the sweeping waters of those years, we are now flowing on ... across the plains formed by our class, our people and democracy..." (see paragraph 10 above), amounted to separatist propaganda against the unity of the Turkish nation and the territorial integrity of the State. In their view, the applicant's conviction was justified by the message – whose wording was not in issue – taken as a whole.

14. In a judgment of 22 April 1994, the Court of Cassation dismissed an appeal by the applicant.

15. On 23 September 1995 the applicant completed his prison sentence. However, as he had not paid the fine that had been imposed, he was kept in detention pursuant to section 5 of the Execution of Sentences Act (Law no. 647), being required to serve an additional day's imprisonment for every TRL 10,000 due (see paragraph 21 below).

On 26 October 1995 Mr Gerger paid the balance of the fine and was released.

16. On 30 October 1995 Law no. 4126 of 27 October 1995 came into force. *Inter alia*, it reduced the length of prison sentences that could be imposed under section 8 of Law no. 3713 while increasing the level of fines (see paragraph 19 below). In a transitional provision relating to section 2, Law no. 4126 provided that sentences imposed pursuant to section 8 of Law no. 3713 would be automatically reviewed (see paragraph 20 below).

17. Consequently, the National Security Court reviewed the applicant's case on the merits. On 17 November 1995 it imposed an additional fine of TRL 84,833,333, with payment suspended. That decision became final on 15 March 1996.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

18. Article 312 of the Criminal Code reads as follows:

"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 ... 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.

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 Prevention of Terrorism Act (Law no. 3713)

19. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), has been amended by Law no 4126 of 27 October 1995, which came into force on 30 October 1995. Sections 8 and 13 read as follows:

Former section 8 § 1

"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."

New section 8 § 1

"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 reoffender may not be commuted to a fine."

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 … of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

3. Law no. 4126 of 27 October 1995 amending Law no. 3713

20. The Law of 27 October 1995 contains a "transitional provision relating to section 2" that applies to the amendments which that law makes to the sentencing provisions of section 8 of Law no. 3713. That transitional provision provides:

"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 and 6 of Law no. 647 of 13 July 1965."

4. The Execution of Sentence Act (Law no. 647 of 13 July 1965)

21. Law no. 647 prescribes rules through, *inter alia*, the following provisions, regarding the collection of fines and automatic parole.

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..."

5. The Code of Criminal Procedure

22. The relevant provisions of the Code of Criminal Procedure concerning the grounds on which defendants may appeal on points of law against judgments of courts of first instance read as follows:

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."

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. Case-law

23. 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 – see paragraph 18 above), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 19 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.

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 judgments of 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).

As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence.

C. The National Security Courts

24. 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."

The composition and functioning of the National Security Courts are subject to the following rules.

1. The Constitution

25. The constitutional provisions governing judicial organisation 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.

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

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

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."

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, 3 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

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

…

(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, when 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)

27. The relevant provisions of the Military Legal Service Act are worded 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. The Military Criminal Code

28. Article 112 of the Military Criminal 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

29. Under section 22 of Law no. 1602 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

30. Mr Gerger applied to the Commission on 22 June 1994. In his initial application of the same day and his additional application of 5 August – which he amended on 25 October 1994 –, he said that his conviction constituted a violation of Articles 9 and 10 of the Convention. He further submitted that, by failing to give adequate reasons in its judgment, the National Security Court had denied him a fair hearing within the meaning of Article 6 § 1. Lastly, he complained that he had been discriminated against contrary to Article 14 taken together with Articles 5 § 1 and 6 § 1, in that the conditions for obtaining automatic parole under Law no. 3713 were stricter than those under the general law.

31. The Commission declared the application (no. 24919/94) admissible on 14 October 1996. In its report of 11 December 1997 (former Article 31), it expressed the opinion that:

(i) there had been a violation of Article 10 of the Convention, considered jointly with Article 9 (30 votes to 2);

(ii) there had been no violation of Article 14 taken together with Article 5 § 1(a) only, Article 6 § 1 not being relevant here (unanimously);

(iii) there had been a violation of Article 6 § 1 in that the applicant's case had not been heard by an independent and impartial tribunal; accordingly, it was unnecessary to examine separately the complaint that the National Security Court had given inadequate reasons in its judgment (31 votes to 1);

The full text of the Commission's opinion and of the partly dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

32. In their memorial the Government invited the Court to hold that the applicant's conviction did not constitute a violation of Articles 6 § 1, 9, 10 or 14 of the Convention.

1. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1999), but a copy of the Commission's report is obtainable from the registry.

33. Referring to the Commission's report of 11 December 1997, Mr Gerger requested the Court to hold that there had been a violation of Articles 6 § 1 and 10 of the Convention and of Article 14 taken together with Article 5 § 1, and to have regard in that connection to the fact that he had been punished twice for the same offence. He also sought just satisfaction under Article 41 of the Convention.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

34. In his application Mr Gerger submitted that his conviction pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) had breached Articles 9 and 10 of the Convention.

The Court considers however that, as the Government and the Commission have proposed, this complaint should be considered from the standpoint of Article 10 alone (see, among other authorities, the Incal v. Turkey judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-.., p. .., § 60), 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."

A. Existence of an interference

35. Those appearing before the Court agreed that the applicant's conviction following the reading out of the message at the ceremony on 23 May 1993 (see paragraph 10 above) amounted to an interference with the exercise of his right to freedom of expression. Such an interference breaches Article 10 unless it satisfies the requirements of the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed

by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aims concerned.

B. Justification for the interference

1. "Prescribed by law"

36. The applicant submitted that the notion of the indivisibility of the State, as set out in section 8 of the Prevention of Terrorism Act (Law no. 3713), was so vague as to make his conviction under that provision unforeseeable.

37. The Government contested that submission.

38. In this instance, the Court intends to adopt the Commission's approach of examining the case on the basis that the section did satisfy the foreseeability requirements inherent in the notion of "law".

2. Legitimate aim

39. The applicant asserted that his conviction did not pursue any of the aims that are legitimate under the second paragraph of Article 10.

40. The Commission considered that the interference was aimed at maintaining "national security" and preventing "[public] disorder".

41. The Government submitted that it had also been intended to preserve "territorial integrity" and national unity.

42. 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 applicant 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 applicant

43. The applicant submitted that by associating the opinions expressed in his message with terrorist crime and by convicting him the National Security Court had hindered free discussion on the Kurdish problem and

criticism of the official ideology. In addition, the National Security Court had not shown that the message was an incitement to violence or set out in its judgment the objective criteria on which it had relied in finding that the applicant's opinions might threaten the "indivisibility of the State". Lastly, the applicant complained that he had been punished twice for the same offence, following the amendments made by Law no. 4126 to Law no. 3713.

(ii) The Government

44. The Government emphasised the fact that the ceremony on 23 May 1993 had been held in memory of people who had taken part in acts of terrorism at the end of the 1960s. They quoted passages from the applicant's message which they said were intended to incite citizens of Kurdish origin to engage in armed combat against the Turkish State, supported separatist violence and glorified the Kurdish independence movement. The message was no mere analysis of the situation or even a criticism of the Turkish authorities but an encouragement for Kurdish terrorism and the activities of the PKK.

Article 10 left Contracting States a particularly broad margin of appreciation in cases where their territorial integrity was threatened by terrorism. What is more, when confronted with the situation in Turkey – where the PKK systematically carried out massacres of women, children, schoolteachers and conscripts – the Turkish authorities had a duty to prohibit all separatist propaganda, which could only incite violence and hostility between society's various component groups and thus endanger human rights and democracy.

Lastly the Government submitted that, since the message had been read out at a time when, taking advantage of the disorder created on the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-east Turkey, the applicant's conviction had by no means been disproportionate to the aims pursued.

(iii) The Commission

45. The Commission adverted to the "duties and responsibilities" mentioned in the second paragraph of Article 10, which made it important for people expressing an opinion in public on sensitive political issues to ensure that they did not condone "unlawful political violence". Freedom of expression nevertheless included the right to engage in open discussion of difficult problems like those with which Turkey was confronted with a view to analysing, for example, the historical causes of the situation or to expressing opinions on possible solutions.

The Commission noted that in his message the applicant had accused the Turkish State of denying the Kurds their basic rights; he had been particularly robust in his criticism of Turkey and had alluded to the liberation of the Kurds. It nonetheless considered that that was not sufficient to justify the criminal penalty imposed on him. It noted in particular that although the message referred to the guerrilla in the mountains of Kurdistan, it did so solely as a "factual element", without inciting others to violent action. The applicant's conviction therefore constituted a form of censorship, which was incompatible with the requirements of Article 10.

(b) The Court's assessment

46. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, the Zana v. Turkey judgment (cited above, p. 2547-48, § 51) and the 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.

47. The Court observes that the message addressed by Mr Gerger to those who attended the ceremony on 23 May 1993 sought to vindicate the acts of Deniz Gezmiş, Yusuf Aslan and Hüseyin İnan, who at the end of the 1960s had founded an extreme left-wing movement and had in May 1972 been executed after receiving the death sentence for using violence with the aim of destroying the constitutional order.

Using words with Marxist overtones, the applicant asserted, in particular, that the Turkish Republic was "based on negation of the rights of workers and Kurds" and that its leaders had "always distinguished themselves through a cruel militarism that [was] the product of their mediocrity, backwardness, and thirst for ever more money". He added that the revival in the 1960s of "dynamic social strata previously excluded from the political life of the country" and the "revolutionary democratic resistance movement" of the early 1970s had helped to "transform the history of the nation" and instilled in society a "spirit of resistance and revolt". He stated that socialism was the only system capable of replacing capitalism and proclaimed that "[f]rom the seeds of liberation of the Kurdish people sown in those days were born the guerrilla in the mountains of Kurdistan" (see paragraph 10 above).

The Government took such comments to mean that the applicant accepted the legitimacy of the Kurdish independentist cause. The Court does not share that view: it considers that the applicant's comments constituted political criticism of the Turkish authorities, to which the use of words such as "revolt" and "oppression" added a certain virulence.

48. The Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Furthermore, 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. Moreover, 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 constitute an incitement 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.

49. The Court takes into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned Incal judgment, p. 1568, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years (see paragraph 42 above).

Nonetheless, it is not persuaded by the Government's contention that special weight should be attached in the instant case to the fact that the message was delivered at a time when, taking advantage of the disorder created at the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-east Turkey. Indeed, the events in the present case took place long after that conflict had ended.

50. Furthermore, the Court observes that the applicant's message was read out only to a group of people attending a commemorative ceremony, which considerably restricted its potential impact on "national security", public "order" or "territorial integrity". In addition, even though it contained words such as "resistance", "struggle" and "liberation", it did not constitute an incitement to violence, armed resistance or an uprising; in the Court's view, this is a factor which it is essential to take into consideration.

51. Lastly, the Court is struck by the severity of the penalty imposed on the applicant. He was sentenced by the National Security Court on 9 December 1993 to one year, eight months' imprisonment and a fine of 208,333,333 Turkish liras (TRL). After completing his sentence, he was detained from 23 September to 26 October 1995 pursuant to section 5 of the Execution of Sentences Act (Law no. 647) before being ordered to pay an additional fine of TRL 84,833,333 for the same offence (see paragraphs 13-17 above).

The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference.

52. In conclusion, Mr Gerger's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

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

53. The applicant maintained that the Ankara National Security Court was not an "independent and impartial tribunal" and had not given sufficient reasons for its decision in his case. He therefore argued that he had been the victim of a violation of Article 6 § 1, which provides:

> "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..."

A. Whether the Ankara National Security Court was independent and impartial

1. The Government's preliminary objections

54. The Government contended that domestic remedies had not been exhausted and that the Court had no jurisdiction *ratione materiae* to examine the issue of the independence and impartiality of the Ankara National Security Court. They submitted that the applicant had not raised this complaint before either the national courts or the Commission and that the latter had considered it of its own motion without having jurisdiction.

55. Both the applicant and the Commission contested those arguments.

56. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, among other authorities, the Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII, p. …, § 77).

In the instant case, the Court observes that although the applicant did not allege a lack of impartiality or independence on the part of the Ankara National Security Court in his application to the Commission, he did, in his memorial lodged with the Court, make a general reference to the report of the Commission, which had concluded that the complaint was founded. In addition, when communicating the application, the Commission invited the Government (on 27 February 1995) to indicate whether "the applicant had had a fair trial before an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention". In their observations in reply, the Government did not address that point and raised no objection to the Commission considering it of its own motion. Furthermore, on 31 October 1996 the Commission sent the Government its decision regarding the admissibility of the application and invited the Government to lodge

additional observations. Despite the fact that is was clear from the wording of the admissibility decision that the Commission had considered the complaint of its own motion, the Government did not reply.

It follows from the foregoing that the Government are estopped from raising the objections at this stage of the proceedings.

2. Merits of the complaint

57. In the applicant's submission, the Ankara National Security Court could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1, as one of its members was a military judge.

58. 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 applicant's 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. Secondly, when acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

The Government said that the National Security Courts were not special courts but specialised criminal courts. The Turkish authorities had judged it necessary to include a military judge on the bench because of the situation that had prevailed in Turkey for a number of years and the armed forces' experience in combating terrorism.

The Government added that in the present case neither the superiors of the military judge who had sat in the applicant's case, nor the public authorities which had appointed him had had any interest in the proceedings or the outcome of the case. Indeed, the dissenting opinion of the military judge showed that his view of the case had been more favourable to Mr Gerger than the views of the other two judges. Furthermore, the judgment of the National Security Court had been upheld by the Court of Cassation, in which only civil judges sat.

59. The Commission concluded that the Ankara National Security Court could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention. It referred in that connection to the opinion and reasoning set out in its report of 25 February 1997 in the Incal v. Turkey case.

60. 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 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-mentioned 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 (ibid., § 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 25-29 above).

61. 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 Ankara National Security Court functioned infringed Mr Gerger's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him 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 applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court of disseminating propaganda aimed at undermining the territorial integrity of the State and national unity - should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service. On that account he could legitimately fear that the Ankara National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's 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*).

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

B. Alleged absence of reasoning in the judgment of the Ankara National Security Court

63. The applicant maintained that the Ankara National Security Court had not given sufficient reasons for its decision, and had thereby infringed his right to a fair trial.

64. The Government argued that that complaint was unfounded.

65. Like the Commission, the Court holds that in view of its finding of a violation of Mr Gerger's right to be tried by an independent and impartial tribunal (see paragraph 62 above), it is unnecessary to examine this complaint.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN TOGETHER WITH ARTICLE 5 § 1

66. The applicant said that the fact that he had been sentenced to a term of imprisonment under Law no. 3713 meant that he had not been entitled to automatic parole until he had served three quarters of his sentence, unlike prisoners sentenced under the ordinary criminal law, who were entitled to parole after serving half their sentence. He considered that that difference constituted unlawful discrimination under Article 14 of the Convention, which provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

67. The Court considers that this question relates to "the lawful detention of a person after conviction by a competent court" and should therefore be examined under Article 14 taken together with Article 5 § 1 (a) of the Convention. The latter provision provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;"

68. The Government submitted that Article 5 § 1 (a) did not secure convicted prisoners a right to automatic parole. They added that in any event the restrictions on entitlement to parole imposed on persons convicted of an offence under the Prevention of Terrorism Act were warranted by the intrinsic seriousness of such offences.

69. The Court considers, firstly, that, although Article 5 § 1 (a) of the Convention does not guarantee a right to automatic parole, an issue may arise under that provision taken together with Article 14 of the Convention if a settled sentencing policy affects individuals in a discriminatory manner.

The Court notes that in principle the aim of Law no. 3713 is to penalise people who commit terrorist offences and that anyone convicted under that law will be treated less favourably with regard to automatic parole than persons convicted under the ordinary law. It deduces from that fact that the distinction is made not between different groups of people, but between different types of offence, according to the legislature's view of their gravity. The Court sees no ground for concluding that that practice amounts to a form of "discrimination" that is contrary to the Convention. Consequently, there has been no violation of Article 14 taken together with Article 5 § 1 (a) of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. The applicant sought just satisfaction under Article 41, which provides:

> "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. Damage

71. Without supplying any details, Mr Gerger sought reparation for damage which he put at 1,000,000 French francs (FRF).

72. The Government replied that there was no causal link between the alleged violation of the Convention and any pecuniary damage. Any non-pecuniary damage would be sufficiently compensated for by a finding of a violation of the Convention.

73. The Court considers that the applicant must have suffered distress on account of the facts of the case. Ruling on an equitable basis, it consequently awards him FRF 40,000 for non-pecuniary damage.

The Court notes that if it was Mr Gerger's intention to claim pecuniary damage also, he has not supplied any evidence in support of such a claim; accordingly, it makes no award under that head.

B. Costs and expenses

74. The applicant sought payment of FRF 250,000 for his costs and expenses.

75. The Government said the claim was "exorbitant" and argued that the applicant had not produced any supporting evidence.

76. On the basis of the information in its possession, the Court considers it reasonable to award the applicant FRF 20,000 by way of reimbursement of his costs and expenses for the proceedings before the national courts and before the Commission and the Court.

C. Default interest

77. 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 16 votes to 1 that there has been a breach of Article 10 of the Convention;

2. *Dismisses* unanimously the Government's preliminary objections relating to the complaint that the Ankara National Security Court was not "independent and impartial" within the meaning of Article 6 § 1 of the Convention;

3. *Holds* by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention in that the Ankara National Security Court was not "independent and impartial";

4. *Holds* unanimously that it is unnecessary to examine the applicant's other complaint under Article 6 § 1 of the Convention;

5. *Holds* unanimously that there has been no violation of Article 14 of the Convention taken together with Article 5 § 1;

6. *Holds* by 16 votes to 1
   (a) that the respondent Government is to pay the applicant, within three months, the following amounts to be converted into Turkish liras at the rate applicable at the date of payment:
      (i) 40,000 (forty thousand) French francs for non-pecuniary damage;
      (ii) 20,000 (twenty thousand) French francs for costs and expenses;
   (b) that simple interest at an annual rate of 3.47% shall be payable from the expiry of the above-mentioned three months until settlement;

7. *Dismisses* unanimously the remainder of the applicant's' 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 the 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) 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 the dissenting opinion of Judge Palm and Judge Greve 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].

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[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.

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[1].

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".[2]

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[1]. *Whitney v. California* 274 U.S. 357 (1927) at 376.

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

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.

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.

Allow me to explain.

1. In the Zana case (judgment of 25 November 1997) the comments concerned, which the applicant when interviewed by journalists, were as follows:

> "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake …"

That statement was published in the national daily newspaper Cumhuriyet.

2 The backdrop to the case (and to a number of similar cases) is the situation in the south-east of Turkey, which was described by the Court in its Zana judgment:

> "Since approximately 1985, serious disturbances have raged in the south-east of Turkey between the security forces and the members of the PKK (Workers' Party of Kurdistan). This confrontation has so far, according to the Government, claimed the lives of 4,036 civilians and 3,884 members of the security forces." (see § 10)

(see § 10). That figure was approximately 30,000 in 1999.

3. The PKK is recognised by the Court (see Zana, § 58) and international institutions as being a Kurdish terrorist organisation.

4. In the Zana judgment, the Court once again reiterated (§ 51 of the judgment) the fundamental principles which emerge from its judgments relating to Article 10:

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society...
>
> (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...
>
> (iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them..."

5. In paragraph 55 of its judgment the Court said that the above principles applied "also appl[ied] to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism..."

6. Thus, in the aforementioned case, the Court felt bound to assess whether Mr Zana's conviction met an "pressing social need" and was "proportionate to the legitimate aim pursued". To that end, it considered it important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time. (see § 56).

7. The Court said that Mr Zana's words "could be interpreted in several ways but, at all events, they are both contradictory and ambiguous. They are contradictory because it would seem difficult simultaneously to support the PKK, a terrorist organisation which resorts to violence to achieve its ends, and to declare oneself opposed to massacres; they are ambiguous because whilst Mr Zana disapproves of the massacres of women and children, he at the same time describes them as "mistakes" that anybody could make." (see § 58).

8. After considering these factors, the Court concluded (-ibid. §§59-62):

> "The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier (see paragraph 50 above), the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time...
>
> In those circumstances the support given to the PKK – described as a 'national liberation movement' – by [Mr Zana], ... had to be regarded as likely to exacerbate an already explosive situation in that region.

> The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a 'pressing social need' and that the reasons adduced by the national authorities are 'relevant and sufficient'...
>
> Having regard to all these factors and to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention."

9. In my opinion, this reasoning and these grounds should have acted as the guiding principle in similar cases and avoided any abstract assessment of the remarks concerned, an assessment that I find unrealistic and to be based on a misconception of what is meant by freedom of expression and democracy.

10. The case of Gerger v. Turkey is indistinguishable, if not in form, at least in content, from the Zana case. In his message, dispatched and read out at a time when PKK terrorism was raging not just in south-east Turkey but in the whole country, the applicant spoke of:

(i) his "solidarity with the revolutionary cause";

(ii) the Turkish Republic which he said was "based on negation of the fundamental rights of workers and Kurds", though the latter had nothing to do and no connection with the memorial ceremony that had been organised;

(iii) the rulers, whose aim had been to eradicate social and political activity in the country and to weigh society down with the yoke of non-pluralism and dependence in order to "break any resistance and stifle any revolt by the masses";

(iv) "the spirit of resistance and revolt of those heroic years, a nightmare for the rulers, has been with the country for more than twenty years";

(v) "the seeds of liberation of the Kurdish people sown in those days [from which] the [current] guerrilla campaign in the mountains of Kurdistan was born"

(vi) their national democratic fight and the war of the "classes";

(vii) their "solidarity and unity in the struggle".

11. These statements clearly incite and condone "violence" and constitute a public invitation to hatred and action. The Court itself accepted (see paragraph 42 of the judgment) that the applicant's conviction pursued "legitimate aims" within the meaning of Article 10 § 2 of the Convention, namely maintenance of "national security", prevention of "[public] disorder" and preservation of "territorial integrity" and added that that was "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".

12. In the light of the foregoing, and having regard to the State's margin of appreciation in this sphere, it is my view that the restriction on the applicant's freedom of expression was proportionate to the legitimate aims pursued and, accordingly, could reasonably be considered as necessary in a democratic society to achieve them.

13. Secondly, the majority found that there has been a violation of Article 6 § 1 in that the National Security Courts do not the provide guarantees of "independence and impartiality" required by that provision of the Convention.

14. In the dissenting opinion which I expressed jointly with those eminent judges Mr Thor 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 my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I explained why 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 from which an appeal lies to the Court of Cassation. So as to avoid repetition, I refer to my aforementioned dissenting opinions.

15. I remain firmly of the opinion 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.