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

**CASE OF INCAL v. TURKEY**

**(41/1997/825/1031)**

JUDGMENT

STRASBOURG

9 June 1998

**In the case of Incal v. Turkey**[1],

The European Court of Human Rights, sitting, in accordance with Rule 51 of Rules of Court A[2], as a Grand Chamber composed of the following judges:

Mr R. BERNHARDT, *President*,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr I. FOIGHEL,
Mr A.N. LOIZOU,
Mr J.M. MORENILLA,
Sir John FREELAND,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr D. GOTCHEV,
Mr B. REPIK,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,
Mr T. PANTIRU,
Mr M. VOICU,
Mr V. TOUMANOV,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 28 February and 18 May 1998,

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

## PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 16 April 1997, within the three-

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*Notes by the Registrar*

1. The case is numbered 41/1997/825/1031. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

2. Rules of Court A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and thereafter only to cases concerning States not bound by that Protocol. They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

month period laid down by Article 32 § 1 and Article 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). It originated in an application (no. 22678/93) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr İbrahim Incal, on 7 September 1993.

The Commission's request referred to Articles 44 and 48 (a) of the Convention and to Rule 32 of Rules of Court A. 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 Articles 6 § 1 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d), the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the Turkish language for the proceedings before the Court (Rule 27 § 3).

3. The Chamber to be constituted included *ex officio* Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 28 April 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr F. Matscher, Mr B. Walsh, Mr A. Spielmann, Mr J.M. Morenilla, Mr D. Gotchev, Mr T. Pantiru and Mr M. Voicu (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr 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 proceedings (Rules 37 § 1 and 38). Pursuant to the order made in consequence on 28 May 1997, the Registrar received the applicant's and the Government's memorials on 7 August and 26 September 1997 respectively.

5. On 29 September 1997 the President gave Article 19 and Interights, two London-based human rights organisations, leave to submit written comments in accordance with Rule 37 § 2. These were received at the registry on 22 December.

6. On 27 November 1997 the Chamber decided to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51). The Grand Chamber to be constituted included *ex officio* Mr Ryssdal, the President of the Court, and Mr. Bernhardt, the Vice-President, together with the other members and the four substitutes of the original Chamber, the latter being Mr Thór Vilhjálmsson, Mr B. Repik, Mr M.A. Lopes Rocha and Mrs E. Palm (Rule 51 § 2 (a) and (b)). On the same day, the President, in the presence of the Registrar, drew by lot the names of the seven additional judges needed to complete the Grand Chamber, namely Mr N. Valticos, Mr I. Foighel,

Sir John Freeland, Mr L. Wildhaber, Mr P. Kūris, Mr J. Casadevall and Mr V. Toumanov (Rule 51 § 2 (c)).

Subsequently Mr Bernhardt replaced, as President of the Grand Chamber, Mr Ryssdal, who was unable to take part in the further consideration of the case, and Mr R. Macdonald, substitute judge, became a full member; subsequently Mr Macdonald and Mrs Palm, being likewise unable to take part in the further consideration of the case, were replaced by Mr A.N. Loizou and Mr E. Levits respectively (Rules 21 § 6, 24 § 1 and 51 § 6).

7. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 25 February 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr M. ÖZMEN, *co-Agent*,
Mr A. KAYA,
Mr S. ÇAYCI,
Mrs S. EMINAĞAOĞLU,
Mrs M. GÜLŞEN,
Ms A. EMÜLER,
Ms A. GÜNYAKTI, *Advisers*;

(b) *for the Commission*
M. G. RESS, *Delegate*;

(c) *for the applicant*
Mr İ. INCAL, *Applicant*,
Mr G. DINÇ, of the İzmir Bar, *Counsel*.

The Court heard addresses by Mr Ress, Mr Dinç, Mr Incal, Mr Özmen and Mr Çaycı.

8. Mr Walsh died on 9 March 1998.

# AS TO THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

9. Mr İbrahim Incal, a Turkish national born in 1953, lives in İzmir. A lawyer by profession, he was at the material time a member of the executive committee of the İzmir section of the People's Labour Party ("the HEP").

That party, which was represented in the National Assembly, was dissolved by the Constitutional Court on 14 July 1993.

10. On 1 July 1992 the executive committee decided to distribute in the İzmir constituency a leaflet criticising the measures taken by the local authorities, in particular against small-scale illegal trading and the sprawl of squatters' camps around the city.

The title of the leaflet, of which ten thousand copies were printed, was "To all democratic patriots!", and the text read as follows:

> "In the last few days a campaign aimed at 'DRIVING THE KURDS OUT OF THE CITIES' has been launched in İzmir against the Kurdish population by a combination of prefecture, security police and town hall. In this campaign İzmir has been designated a pilot-city. The first stage was the operation [against] street traders, stallkeepers and mussel sellers, whom they tried to hide away on the ground that it was necessary to smarten up the city and ease traffic congestion. The purpose of this operation was to impose an 'economic blockade' on our, mainly Kurdish, fellow citizens who make their living through these activities, condemning them to destitution and starvation. In this way the masses were to be frightened, oppressed and compelled to return to their province of origin.
>
> Before the 'DRIVING THE KURDS OUT' campaign began the organisational and psychological ground had already been prepared by leaflets signed by 'Patriotic inhabitants of İzmir' and handed out in large numbers for weeks by 'obscure forces'. These leaflets incited hostility against the Kurdish population in particular and stirred up anti-Kurdish feelings. This led to racist and chauvinistic anti-Kurdish attitudes through propaganda saying: 'Don't give employment or housing to the Kurds. Don't speak to them, don't let your daughters marry them and don't marry one yourself. Smash the Kurds.' That is how the psychological foundations were laid down, the preparations for the future offensives. Although these leaflets were handed out in broad daylight, those responsible – and nobody knows why – were never arrested.
>
> But the campaign was by no means limited to the operation against street traders, stallkeepers and mussel sellers. The second prong was 'Operation shantytown'. The same combination of prefecture, security police and town hall launched the demolition of the squatters' camps. It began in Yamanlar and Şemikler and continued in Gaziemir, [all] shantytown districts inhabited mainly by Kurds, who, before the elections, were regarded by the parties in favour of the status quo as a source of votes. Those who had encouraged the mushrooming of the shantytowns by dishonestly promising freedom to build in exchange for votes and those who, with the local mafia, had appropriated public land this time set about the ferocious destruction of these huts to oppress and intimidate the Kurds and force them to go back home.
>
> The Kurdish and Turkish proletarian people suddenly and without any warning saw the huts they had run into debt to build, with so many sacrifices made by cutting down on their children's food, collapsing about their ears. That is how they are trying to oppress the Kurdish and Turkish people and drive them into distress and despair.
>
> IT'S STATE TERROR AGAINST TURKISH AND KURDISH PROLETARIANS!
>
> It is certain that these demolitions, which began in Yamanlar and are still continuing in Gaziemir, will soon spread to İzmir's other shantytowns. The State is testing the people's reactions and will to resist by causing various kinds of destruction. Passivity

as a form of defence against this devastation has encouraged the State to commit further kinds of destruction.

In conclusion: The 'Driving-the-Kurds-Out policy' forms part of the SPECIAL WAR being conducted in the country at present against the Kurdish people. It is one of the mechanisms of that war, the way it impinges on the cities. Because the methods used are the same, namely enslavement, violence, terror and oppression through compulsion. It is a psychological war.

While, in the country, they are trying to oppress and silence the people through counter-insurgency tactics, special patrols, village guards, the SS[1] decree and every [other] form of State terror, in İzmir they want to achieve the same aim by depriving our fellow citizens of their means of subsistence and in the end by knocking their houses down about their ears. The methods used, although different in form, are in the final analysis mechanisms serving the purposes of the special war. It is the urban form of the special war.

TO ALL DEMOCRATIC PATRIOTS!

The way to nullify these insults to the cities is to set up NEIGHBOURHOOD COMMITTEES BASED ON THE PEOPLE'S OWN STRENGTH.

We call on all Kurdish and Turkish democratic patriots to assume their responsibilities and oppose this special war being waged against the proletarian people.

LONG LIVE THE BROTHERHOOD OF NATIONS!

STOP THE SPECIAL WAR BEING SPREAD INTO THE CITIES!"

11. By a letter of 2 July 1992, accompanied by a copy of the leaflet in question, the president of the HEP informed the İzmir prefecture of the executive committee's decision (see paragraph 10 above) and asked for permission to implement it.

12. The İzmir security police, to whom this request had been referred, considered that the leaflet contained separatist propaganda capable of inciting the people to resist the government and commit criminal offences.

On 3 July 1992 they asked the Principal Public Prosecutor attached to the İzmir National Security Court ("the public prosecutor", "the National Security Court") to state his opinion as to whether the contents of the leaflet contravened the law.

13. On the same day, at the request of the public prosecutor's office, a substitute judge of the National Security Court issued an injunction ordering the seizure of the leaflets and prohibiting their distribution.

The police searched the HEP's premises in İzmir, first at the headquarters, where the party leaders handed over, without demur, nine

1. Initials of the words "*sansür*" (censorship) and "*sürgün*" (banishment); an allusion to the terms used by the media when referring to the legislative decrees declaring a state of emergency in certain regions of Turkey.

thousand copies of the leaflet which were still parcelled up, and then at the Buca district office, where the thousand remaining copies were seized.

14. Still on 3 July 1992 the public prosecutor's office opened a criminal investigation against the HEP's local leaders and the members of its executive committee, including the applicant.

15. On 27 July 1992 the public prosecutor instituted criminal proceedings in the National Security Court against the applicant and the other eight members of the HEP committee who had taken part in the decision of 1 July 1992 (see paragraph 10 above). Citing the text of the leaflet, he accused them of attempting to incite hatred and hostility through racist words and asked the court to apply Articles 312 §§ 2 and 3 of the Criminal Code, section 5 of the Prevention of Terrorism Act (Law no. 3713) and additional section 4 of the Press Act (Law no. 5680) (see paragraphs 21, 23 and 24 below). He also asked the court to order confiscation of the leaflets.

16. On 9 February 1993 the National Security Court, composed of three judges, one of whom was a member of the Military Legal Service, found the applicant guilty of the offences charged and sentenced him to six months and twenty days' imprisonment and a fine of 55,555 Turkish liras. It also ordered the confiscation of the leaflets and disqualified him from driving for fifteen days.

In its interpretation of the wording of the leaflet, the National Security Court accepted the public prosecutor's oral submissions entirely, except for that part which related to the applicability of the Prevention of Terrorism Act (Law no. 3713). It noted in particular that the leaflet suggested recourse to resistance against the police and the establishment of "neighbourhood committees", which it held to be illegal forms of protest. It further held that the offence had been intentionally committed, since the accused had not contested either the existence or wording of the text on which the charge was based.

With regard to the severity of the sentence, it observed that although commission of the offence through the medium of print was an aggravating circumstance, it was necessary to take into account the accused's good faith and the fact that the authorities had been able to lay hands on the leaflets before they had been distributed.

17. On 9 March 1993 the applicant and the other convicted persons appealed to the Court of Cassation. In their notice of appeal they asked for a public hearing to be held and challenged the National Security Court's interpretation of the leaflet and its refusal to commute the prison sentence to a fine.

18. On 20 May the Principal Public Prosecutor attached to the Court of Cassation forwarded the case file together with an opinion couched in a standard form of words – which was not communicated to Mr Incal – asking the court to uphold the judgment.

19. In a judgment of 6 July 1993 the Court of Cassation upheld all the operative provisions of the impugned judgment, after observing that, regard being had to the nature and length of the sentence imposed at first instance, it was not necessary to hold a hearing.

20. On 23 August 1993 the prosecuting authorities decided, at the applicant's request, to stay execution of the prison sentence for four months.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. Criminal law

#### *1. The Criminal Code*

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

**Article 311 § 2**

"Public incitement to commit an offence

Where the incitement [to commit an offence] is done by means of mass communication, of whatever type, 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**

"Non-public incitement to commit an offence

Whosoever expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall be sentenced to between six months' and two years' imprisonment and a … fine of between six thousand and thirty thousand liras.

Whosoever expressly arouses hatred and hostility in society on the basis of a distinction between social classes, races or religions, or one based on allegiance to a particular denomination or region, shall be sentenced to between one and three years' imprisonment and a fine of between nine thousand and thirty-six thousand liras. If this incitement is done in a manner likely to endanger public safety, the sentence shall be increased [by one third to one half].

The penalties to be imposed on those who have committed the above-mentioned offences by the means listed in Article 311 § 2 shall be doubled."

22. A conviction under 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 section 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, provided that the offence has been committed intentionally (Law no. 657, section 48(5)).

*2. The Press Act (Law no. 5680)*

23. Additional section 4(1) of the Press Act (Law no. 5680) provides:

> "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, to be confirmed by a court, … the penalty imposed shall be one-third of that laid down by law for the offence concerned."

*3. The Prevention of Terrorism Act (Law no. 3713)*

24. Law no. 3713 of 12 April 1991, 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. However, the act punishable pursuant to Article 312 of the Criminal Code (see paragraph 21 above) is not among them.

*4. The Code of Criminal Procedure*

25. Article 318 of the Code of Criminal Procedure provides for the holding of a public hearing in proceedings before the Court of Cassation only where the impugned judgment concerns offences classified as "serious", such as those punishable by the death penalty or a term of imprisonment of more than ten years. The Court of Cassation's jurisdiction, according to Article 307 of the Code, is limited to questions concerning the lawfulness and procedural regularity of the first-instance judgment.

## B. The National Security Courts

26. 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 [thus] 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*

27. 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, officer or other 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 § 4**

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

**Article 145 § 4**

"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 as regards 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*

28. 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 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 3**

"The National Security Courts shall be composed of a president and two other regular members. In addition, there shall sit at each National Security Court two substitute members."

**Section 5**

"The president of a National Security Court, one of the other regular members and one of the substitutes shall be civilian … judges, the other members, whether full 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 special legislation [concerning those posts].

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 presidents and regular or substitute members of the National Security Courts conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of a military judge, the duty station of that judge or his duties [themselves] … may be changed in accordance with the procedure laid down in that legislation."

**Section 9(1)(a)**

"The National Security Courts shall try persons accused of the offences defined in

(a) [Article] 312 § 2 … of the Turkish Criminal Code…"

**Section 27(1)**

"The Court of Cassation shall hear appeals from 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 professions…

The observations of the Court of Cassation and the assessment reports drawn up by Ministry of Justice assessors on judges of the Military Legal Service … and the files on any investigations conducted against 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)*

29. 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 Act and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The immediate superior competent to carry out assessment and draw up assessment reports for military judges, whether full 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 legal advisor of the General Staff, the personnel director and 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 immediate 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 Criminal Code*

30. 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 [public] official in order to influence the military courts."

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

31. 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 promotion and professional advancement.

## C. Case-law

*1. The Supreme Military Administrative Court*

32. The Government produced several judgments of the First Division of the Supreme Military Administrative Court setting aside decisions concerning the appointment and promotion of military judges or disciplinary sanctions applied to them. These were the judgments of 31 May 1988 (no. 1988/185), 14 December 1993 (no. 1993/1116), 22 December 1993 (no. 1993/1119), 19 November 1996 (no. 1996/950), 1 April 1997 (no. 1997/262), 27 May 1997 (no. 1997/405) and 3 July 1997 (no. 1997/62).

It appears from these judgments that in setting aside the transfer decisions concerned, the First Division gave as its grounds either lack of consent on the part of the person concerned or abuse of the military authorities' discretionary power. In connection with assessment reports, failure to state reasons or a lack of objectivity on the part of the immediate superior was taken into account. Lastly, in connection with a disciplinary sanction, against which in principle no appeal lies, the First Division held that the acts of which the person concerned stood accused had been incorrectly established and that the sanction was accordingly null and void.

*2. The National Security Courts*

33. The Government also submitted a number of judgments rendered by National Security Courts relevant to the impartiality of military judges sitting as members of such courts. These were the judgments of 12 September 1995 (no. 1995/171), 27 February 1996 (no. 1996/38), 7 March 1996 (no. 1996/55), 21 March 1996 (no. 1996/70), 2 April 1996 (no. 1996/102), 9 April 1996 (no. 1996/112), 2 May 1996 (no. 1996/141), 9 May 1996 (no. 1996/150), 19 August 1996 (no. 1996/250), 12 September 1996 (no. 1996/258), 19 September 1996 (no. 1996/263), 1 October 1996 (no. 1996/270), 3 October 1996 (no. 1996/273), 8 October 1996 (no. 1996/278), 12 June 1997 (no. 1997/128) and 15 July 1997 (no. 1997/393).

Most of these decisions declared the accused guilty but also contained separate opinions by military judges adopting a dissenting opinion with

regard to the establishment and classification of the facts, the way sentence was determined or the finding of guilt itself.

## PROCEEDINGS BEFORE THE COMMISSION

34. Mr Incal applied to the Commission on 7 September 1993. He asserted that he had not had a fair trial in the National Security Court, firstly because it could not be regarded as an independent tribunal, and secondly because it had refused to commute his sentence of imprisonment into a fine on account of his political opinions (Article 6 § 1 of the Convention taken separately and in conjunction with Article 14). He also submitted that by rejecting his request for leave to appear and by omitting to send him a copy of the Principal Public Prosecutor's opinion on his appeal on points of law the Court of Cassation had breached Article 6 §§ 1 and 3 (b). He further alleged that his conviction for helping to prepare a political leaflet constituted a breach of Articles 9 and 10 and that his temporary disqualification from driving was a degrading punishment contrary to Article 3.

35. On 16 October 1995 the Commission declared inadmissible the complaint relating to the applicant's disqualification from driving and declared the remainder of the application (no. 22678/93) admissible. In its report of 25 February 1997 (Article 31), it expressed the opinion

(a) that there had been a violation of Article 10 (unanimously);

(b) that, contrary to Article 6 § 1, the applicant had not had a fair hearing by an independent and impartial tribunal (unanimously);

(c) that there had been no violation of Article 6 § 1 taken in conjunction with Article 14 (unanimously);

(d) that the fact that the applicant had been unable to reply to the public prosecutor's opinion had breached Article 6 § 1 (twenty-six votes to five); and

(e) that there had been no violation of Article 6 § 1 on account of the fact that the applicant had not appeared in the Court of Cassation (twenty-six votes to five).

The full text of the Commission's opinion and of the partly dissenting opinion 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 printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

# FINAL SUBMISSIONS TO THE COURT

36. In their memorial, and later at the hearing, the Government asked the Court to hold that the proceedings complained of had not infringed the rights secured to the applicant by Articles 6, 10 and 14 of the Convention.

37. The applicant asked the Court to hold that Article 6 § 1, Article 9 and Article 10 of the Convention had been breached and to award him just satisfaction under Article 50.

# AS TO THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. Mr Incal submitted that his criminal conviction on account of his contribution to preparation of the leaflet in issue had infringed his right to freedom of expression guaranteed by 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."

The Commission accepted this argument, which the Government contested.

### A. Existence of an interference

39. The participants in the proceedings agreed that the applicant's conviction amounted to an interference with the exercise of his right to freedom of expression. That is also the Court's opinion.

## B. Justification of the interference

40. Such interference breaches Article 10 except where it is "prescribed by law", is directed towards one or more of the legitimate aims set out in Article 10 § 2 and is "necessary in a democratic society" to achieve the aim or aims concerned.

### *1. "Prescribed by law"*

41. The participants in the proceedings all accepted that the interference was "prescribed by law", as the applicant's conviction had been based on Article 312 §§ 2 and 3 of the Criminal Code and additional section 4(1) of the Press Act (Law no. 5680) (see paragraphs 21 and 23 above).

### *2. Legitimate aim*

42. The Court notes that no argument was presented on this point by the parties to the case. The Commission took the view that in applying Article 312 of the Criminal Code the Turkish courts' aim in the present case had been to prevent disorder.

The Court considers that Mr Incal's conviction pursued at least one of the legitimate aims set out in Article 10, namely "the prevention of disorder".

### *3. "Necessary in a democratic society"*

#### (a) Arguments of the participants

##### *(i) The applicant*

43. The applicant submitted that in a pluralist democratic system political parties such as his ought to be able to express their views on the country's social and political problems. The opinions expressed in the leaflet in issue were based on actual events and were limited to criticism of the discriminatory administrative and economic pressure brought to bear on citizens of Kurdish origin. The authors of the leaflet, of whom he was one, had never intended to advocate separatism and did not seek to foment disorder.

Contrary to the findings of the judges at his trial, it was not a factual description of the situation in a country which provoked hatred and hostility but the fact that it was not possible for reactions to problems of general interest to be submitted to the public by the political parties.

Mr Incal challenged the necessity of the interference and emphasised the fact that the leaflets in question had not been distributed. In any event, the penalty had been completely disproportionate, especially as his conviction had led to his being permanently debarred from the civil service and from

certain activities within associations, trade unions or political organisations, in the latter case in the capacity of leader, founder member, parliamentary candidate, mayor or town councillor.

*(ii) The Government*

44. The Government asserted that, despite the anger expressed in the leaflet concerned, the operations aimed at closing down booths unlawfully erected on land belonging to others and driving out street traders met the requirements of the relevant legislation and regulations, which had no other purpose than the prevention of disorder and the protection of the rights of others. However, in the racial perspective of the leaflet prepared by the applicant, who was then a member of the HEP, a party working in favour of Kurdish separatism, the measures thus taken were presented as the destruction of Kurdish citizens' houses with a view to depriving them of all means of subsistence.

Through its aggressive and provocative language the leaflet in question had been likely to incite citizens of "Kurdish" origin to believe that they suffered from discrimination and that, as victims of a "special war", they were justified in acting in self-defence against the authorities by setting up "neighbourhood committees". In addition, the population of İzmir in general, and its shopkeepers in particular might have been tempted to think that those who were truly responsible for their social and economic troubles were their "Kurdish" fellow-citizens and that the street traders – all "Kurdish" according to the leaflet – might endanger their well-being. Such a message was not consistent with the calls to "brotherhood", which were designed only to enable the leaflet's authors to evade their criminal responsibility.

With reference to the analysis of the situation in Turkey made by the Court in the Zana v. Turkey judgment of 25 November 1997 (*Reports of Judgments and Decisions* 1997-VII), the Government observed that in the present case the National Security Court had noted a dangerous tendency in İzmir, which had the potential to create an explosive situation, as in south-eastern Turkey, where there had been an intolerable increase in terrorism in the years 1992 and 1993. In such a case the wide limits of criticism acceptable in political debate and the high level of protection enshrined by the Court's case-law on the question were completely without relevance.

In that context, Mr Incal, who was a lawyer by profession, had overstepped the normal limits of political controversy by disregarding his "duties" and "responsibilities". He had tried to incite an ethnic group to rise against the officials and authorities of the State at a time when the PKK, a terrorist separatist organisation, had intensified its atrocities prompted by racial hatred. In such a social climate, which made it extremely easy to stir up internal dissent, or even civil strife, the Turkish authorities had had no

other choice than to seize the leaflets in issue and to punish the applicant as one of those responsible.

*(iii) The Commission*

45. The Commission agreed for the most part with the applicant's arguments. It emphasised that the leaflet in issue only drew attention in general terms to the existence of a "Kurdish problem" and did not contain any element of incitement to violence. Considering that an opponent of official ideas and positions must be able to find a place in the political arena, it expressed the opinion that Mr Incal's conviction had not been necessary in a democratic society.

**(b) The Court's assessment**

46. As the Court has often observed, the freedom of expression enshrined in Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2, 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" (see, among many other authorities, the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 22, § 42, and the Vogt v. Germany judgment of 26 September 1995, Series A no. 323, p. 25, § 52).

While precious to all, freedom of expression is particularly important for political parties and their active members (see, *mutatis mutandis*, the United Communist Party of Turkey and Others v. Turkey judgment of 30 January 1998, *Reports* 1998-I, p. 22, § 46). They represent their electorate, draw attention to their preoccupations and defend their interests. Accordingly, interferences with the freedom of expression of a politician who is a member of an opposition party, like the applicant, call for the closest scrutiny on the Court's part (see the Castells judgment cited above, ibid.)

47. In the present case the İzmir National Security Court based its decision to convict Mr Incal on a leaflet which it held to make out the offence defined in Article 312 of the Criminal Code, namely non-public incitement to commit an offence (see paragraph 21 above).

48. In the light of the above considerations, the Court must now consider the leaflet's content in order to determine whether it justified Mr Incal's conviction.

In that connection, the Court reiterates that its task, in exercising its supervisory jurisdiction, is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable

assessment of the relevant facts (see, *mutatis mutandis*, the Vogt judgment cited above, p. 26, § 52).

49. The National Security Court held that, by describing the State as terrorist, by drawing a distinction between citizens even though all of them were of Turkish nationality and by criticising certain municipal measures as operations in a special war, the authors of the leaflet had knowingly incited the people to hatred and hostility and, to that end, had urged them to have recourse to illegal methods.

50. The Court notes that the relevant passages in the leaflet criticised certain administrative and municipal measures taken by the authorities, in particular against street traders. They thus reported actual events which were of some interest to the people of İzmir.

The leaflet began by complaining of an atmosphere of hostility towards citizens of Kurdish origin in İzmir and suggested that the measures concerned were directed against them in particular, to force them to leave the city. The text contained a number of virulent remarks about the policy of the Turkish government and made serious accusations, holding them responsible for the situation. Appealing to "all democratic patriots", it described the authorities' actions as "terror" and as part of a "special war" being conducted "in the country" against "the Kurdish people". It called on citizens to "oppose" this situation, in particular by means of "neighbourhood committees" (see paragraph 10 above).

The Court certainly sees in these phrases appeals to, among others, the population of Kurdish origin, urging them to band together to raise certain political demands. Although the reference to "neighbourhood committees" appears unclear, those appeals cannot, however, if read in context, be taken as incitement to the use of violence, hostility or hatred between citizens.

51. Admittedly, as the Court has already noted in other circumstances (see, *mutatis mutandis*, the United Communist Party of Turkey and Others judgment cited above, p. 27, § 58), it cannot be ruled out that such a text may conceal objectives and intentions different from the ones it proclaims. However, as there is no evidence of any concrete action which might belie the sincerity of the aim declared by the leaflet's authors, the Court sees no reason to doubt it.

52. There remains, therefore, the question whether, in the light of the foregoing considerations, the applicant's criminal conviction can be regarded as necessary in a democratic society, that is to say whether it met a "pressing social need" and was "proportionate to the legitimate aim pursued".

53. The freedom of political debate is undoubtedly not absolute in nature. A Contracting State may make it subject to certain "restrictions" or "penalties", but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in the Convention (see the Castells judgment cited above, p. 23, § 46).

In the present case the Government pleaded the "duties" and "responsibilities" with which Article 10 links exercise of the freedom of expression (see paragraph 44 above). However, these do not dispense with the obligation to ensure that an interference satisfies the requirements of paragraph 2 (see, *mutatis mutandis*, the Thorgeir Thorgeirson v. Iceland judgment of 25 June 1992, Series A no. 239, p. 27, § 64).

54. 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 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 Castells judgment cited above, p. 23, § 46).

55. In the present case the İzmir executive committee of the HEP submitted one copy of the leaflet to the İzmir prefecture on 2 July 1992 with an application for permission to distribute it (see paragraph 11 above). The security police, who were then asked to study its content, considered that the leaflet could be regarded as separatist propaganda (see paragraph 12 above). At that stage the authorities were accordingly in a position to require changes to the text. However, the day after this application was lodged at the prefecture the leaflets were seized and prosecutions brought against its authors, including Mr Incal, under Article 312 of the Criminal Code, among other provisions (see paragraph 21 above).

56. The Court notes the radical nature of the interference in question. Its preventive aspect by itself raises problems under Article 10 (see, among other authorities, the Vereniging Weekblad *Bluf!* v. the Netherlands judgment of 9 February 1995, Series A no. 306-A, p. 16, §§ 45 and 46, and, *mutatis mutandis*, the Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria judgment of 19 December 1994, Series A no. 302, pp. 18–19, § 40).

In addition, the İzmir National Security Court sentenced the applicant to six months and twenty days' imprisonment and a fine of 55,555 Turkish liras and disqualified him from driving for fifteen days (see paragraph 16 above).

Furthermore, as a result of his conviction of a "public order" offence, Mr Incal was debarred from the civil service and forbidden to take part in a number of activities within political organisations, associations or trade unions (see paragraph 22 above).

57. In order to demonstrate the existence of a "pressing social need" which would justify the finding that the interference complained of was "proportionate to the legitimate aim pursued", the representative of the Government asserted at the hearing before the Court that "it was apparent from the wording of the leaflets … that they were intended to foment an insurrection by one ethnic group against the State authorities". It had therefore been the State's "duty to forestall any attempt to promote terrorist activities by means of incitement to hatred", given that "the interest in combating and crushing terrorism takes precedence in a democratic society". Certain armed groups such as the PKK increased their effectiveness by putting out propaganda cloaked by the freedom of expression.

58. The Court is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see, among other authorities, the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, pp. 9 et seq., §§ 11 et seq.; the Aksoy v. Turkey judgment of 18 December 1996, *Reports* 1996-VI, pp. 2281 and 2284, §§ 70 and 84; the Zana judgment cited above, p. 2549, §§ 59 and 60; and, most recently, the United Communist Party of Turkey and Others judgment cited above, p. 27, § 59). It observes, however, that the circumstances of the present case are not comparable to those found in the Zana case (ibid.). Here the Court does not discern anything which would warrant the conclusion that Mr Incal was in any way responsible for the problems of terrorism in Turkey, and more specifically in İzmir. It should be pointed out in that connection that not even the National Security Court upheld the public prosecutor's submission that the Prevention of Terrorism Act (Law no. 3713) should be applied to the applicant (see paragraphs 15, 16 and 24 above).

59. In conclusion, Mr Incal's conviction was disproportionate to the aim pursued, and therefore unnecessary in a democratic society.

There has accordingly been a breach of Article 10 of the Convention.

60. The applicant further complained of an infringement of his right to freedom of thought, guaranteed by Article 9 of the Convention. Like the Commission, the Court considers that this complaint is subsumed by the complaint under Article 10 and that it is not necessary to examine it separately.

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

61. Mr Incal further argued that neither his trial in the İzmir National Security Court nor the proceedings before the Criminal Division of the Court of Cassation had satisfied the requirements of Article 6 § 1 of the Convention, the relevant part of which provides:

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

He submitted that the National Security Court was not an "independent and impartial tribunal"; as to the Court of Cassation, it had not respected the principle of adversarial procedure or equality of arms and had not held a hearing.

The Government rejected this argument, whereas the Commission accepted it, except for that part which related to the lack of a public hearing.

## A. The proceedings in the National Security Court

### *1. Arguments of the participants*

#### (a) The applicant

62. Mr Incal submitted that the İzmir National Security Court could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1. The military judge who sat in it was dependent on the executive and, more specifically, on the military authorities, because while performing his judicial duties he remained an officer and maintained his links with the armed forces and his hierarchical superiors. The latter retained the power to influence his career by means of the assessment reports they drew up on him.

Mr Incal maintained that the National Security Courts were special courts set up to protect the State's interests rather than to do justice as such; in that respect their function was similar to that of the executive. The presence of a military judge in the court's composition only served to confirm the army's authority and its intimidating influence over both the defendant and public opinion in general. The fact that a military judge was able to pass judgment on a civilian, and a politician at that, in connection with an offence that had nothing to do with military justice, evidenced the armed forces' influence over the handling of Turkey's political problems.

#### (b) The Government

63. The Government submitted that the procedure for the appointment of the military judges sitting as members of the National Security Courts and the safeguards they enjoyed in the performance of their judicial duties perfectly satisfied the criteria laid down by the Court's case-law on the subject.

The arguments concerning these judges' responsibility towards their commanding officers and the rules governing their professional assessment were overstated; their duties as officers were limited to obeying military regulations and observing military courtesies. They were safe from any

pressure from their hierarchical superiors, as such an attempt was punishable under the Military Criminal Code. The assessment system applied only to military judges' non-judicial duties. In addition, they had access to their assessment reports and could even challenge their content in the Supreme Military Administrative Court.

In the present case, neither the colleagues or hierarchical or disciplinary superiors of the military judge in question nor the public authorities who had appointed him had any connection with the parties to Mr Incal's trial or any interest whatsoever in the judgment to be delivered.

**(c) The Commission**

64. In the Commission's submission, the legal rules governing the composition and functioning of the National Security Courts raised a number of questions about their independence, particularly as regards the system for the appointment and assessment of the military judges who sat in them. It took the view that the participation of a military judge in criminal proceedings against a civilian showed the exceptional nature of such proceedings and could be interpreted as an intervention by the armed forces in the field of civil justice. The applicant's concerns about the National Security Court's lack of impartiality could therefore be regarded as objectively justified.

*2. The Court's assessment*

65. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

As to the condition of "impartiality" within the meaning of that provision, there are two tests to be applied: the first consists in trying to determine the personal conviction of a particular judge in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect. It was not contested before the Court that only the second of these tests was relevant in the instant case (see, *mutatis mutandis*, the Gautrin and Others v. France judgment of 20 May 1998, *Reports* 1998-III, pp. 1030–31, § 58).

In the instant case, however, the Court will consider both issues – independence and impartiality – together.

66. Law no. 2845, promulgated on 16 June 1983, pursuant to Article 143 of the Constitution, governs the composition and functioning of the National Security Courts (see paragraph 28 above). Under the provisions of section 5,

these courts are composed of three judges, one of whom is a regular officer and member of the Military Legal Service.

As the independence and impartiality of the two civilian judges is not disputed, the Court must determine what the position was with regard to the military judge.

67. The Court notes that the status of military judges sitting as members of National Security Courts provides certain guarantees of independence and impartiality. For example, military judges undergo the same professional training as their civilian counterparts, which gives them the status of career members of the Military Legal Service. When sitting as members of National Security Courts, military judges enjoy constitutional safeguards identical to those of civilian judges; in addition, with certain exceptions, they may not be removed from office or made to retire early without their consent (see paragraphs 27 and 28 above); as regular members of a National Security Court they sit as individuals; according to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the performance of their duties (see paragraphs 27 and 30 above and, *mutatis mutandis*, the Ettl and Others v. Austria judgment of 23 April 1987, Series A no. 117, p. 18, § 38).

68. On the other hand, other aspects of these judges' status make it questionable. Firstly, they are servicemen who still belong to the army, which in turn takes its orders from the executive. Secondly, they remain subject to military discipline and assessment reports are compiled on them by the army for that purpose (see paragraphs 28 and 29 above). Decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 29 above). Lastly, their term of office as National Security Court judges is only four years and can be renewed.

69. The Court notes that the National Security Courts were set up pursuant to the Constitution to deal with offences affecting Turkey's territorial integrity and national unity, its democratic regime and its State security (see paragraphs 26 and 28 above). Their main distinguishing feature is that, although they are non-military courts, one of their judges is always a member of the Military Legal Service.

70. At the hearing before the Court the Government submitted that the only justification for the presence of military judges in the National Security Courts was their undoubted competence and experience in the battle against organised crime, including that committed by illegal armed groups. For years the armed forces and the military judges – in whom, moreover, the people placed great trust – had acted, partly under martial law, as the guarantors of the democratic and secular Republic of Turkey, while assuming their social, cultural and moral responsibilities. For as long as the

terrorist threat persisted, military judges would have to continue to lend their full support to these special courts, whose task was extremely difficult.

It is not for the Court – which is aware of the problems caused by terrorism (see, *mutatis mutandis*, the judgments cited in paragraph 58 above) – to pass judgment on these assertions. Its task is not to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant's right to a fair trial (see, among many other authorities, *mutatis mutandis*, the Fey v. Austria judgment of 24 February 1993, Series A no. 255-A, p. 12, § 27).

71. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, the Hauschildt v. Denmark judgment of 24 May 1989, Series A no. 154, p. 21, § 48, the Thorgeir Thorgeirson judgment cited above, p. 23, § 51, and the Pullar v. the United Kingdom judgment of 10 June 1996, *Reports* 1996-III, p. 794, § 38). In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see, *mutatis mutandis*, the Hauschildt judgment cited above, p. 21, § 48, and the Gautrin and Others judgment cited above, pp. 1030–31, § 58).

72. Mr Incal was convicted of disseminating separatist propaganda capable of inciting the people to resist the government and commit criminal offences, for participating in the decision to distribute the leaflet in issue, taken on 1 July 1992 by the executive committee of the İzmir section of the HEP (see paragraphs 15 and 16 above). As the acts which gave rise to the case were considered likely to endanger the founding principles of the Republic of Turkey, or to affect its security, they came *ipso jure* under the jurisdiction of the National Security Courts (see paragraph 28 above).

The Court notes, however, that in considering the question of compliance with Article 10 it did not discern anything in the leaflet which might be regarded as incitement of part of the population to violence, hostility or hatred between citizens (see paragraph 50 above). Moreover, the National Security Court refused to apply the Prevention of Terrorism Act (Law no. 3713) (see paragraph 16 above). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces.

It follows that the applicant could legitimately fear that because one of the judges of the İzmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. The Court of Cassation was not able to dispel these concerns, as it did not have full jurisdiction (see paragraph 25 above

and, among other authorities, *mutatis mutandis*, the Helle v. Finland judgment of 19 December 1997, *Reports* 1997-VIII, p. 2926, § 46).

73. In conclusion, the applicant had legitimate cause to doubt the independence and impartiality of the İzmir National Security Court.

There has accordingly been a breach of Article 6 § 1.

### B. The proceedings in the Court of Cassation

74. Having regard to the above conclusion (see paragraph 73 above), the Court considers that it is not necessary to consider the other complaints under Article 6 relating to the proceedings in the Court of Cassation (see, *mutatis mutandis*, the Findlay judgment cited above, pp. 282–83, § 80).

## III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

75. In his application to the Commission Mr Incal also alleged a breach of Article 14 taken in conjunction with Article 6 § 1 in that in refusing his application for his prison sentence to be commuted to a fine the İzmir National Security Court had taken account of his political opinions only. He did not maintain this complaint during the proceedings before the Court, which sees no reason to examine it of its own motion (see, *mutatis mutandis*, the United Communist Party of Turkey and Others judgment cited above, p. 28, § 62).

## IV. APPLICATION OF ARTICLE 50 OF THE CONVENTION

76. Under Article 50 of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Elimination of the consequences of the conviction

77. At the hearing Mr Incal asked to be reinstated in the rights he had lost, pursuant to Article 312 of the Criminal Code, on account of his conviction. He also asked the Court to order the Government to take steps to ensure that this provision would no longer be applied in domestic law.

78. The Court notes that it has no jurisdiction under the Convention to order such measures (see, *mutatis mutandis*, the Akdivar and Others v.

Turkey judgment of 1 April 1998 (*Article 50*), *Reports* 1998-II, pp. 723-24, § 47).

### B. Damage and costs and expenses

79. The applicant claimed 2,000,000 French francs (FRF) for pecuniary damage and FRF 5,000,000 for non-pecuniary damage.

In support of his claims he asserted that at the material time he was in practice as a lawyer and was an associate director of five commercial undertakings. He asserted that he had sustained a considerable loss of income.

Mr Incal further claimed reimbursement of his costs and expenses, which amounted to FRF 20,000 for preparing and communicating the documents produced in Strasbourg and FRF 80,000 for his representation before the Convention institutions, including his lawyers' fees.

80. The Government argued, as their principal submission, that no compensation was called for in the present case. In the alternative, they maintained that the sums claimed were excessive and unjustified.

They emphasised that the applicant had had the advantage of a stay of execution of four months in which to organise his affairs and minimise any losses. If the Court were to find a violation of the Convention, that finding in itself would constitute sufficient just satisfaction, as no causal connection had been established between the facts complained of and the damage alleged.

The Government also considered that the claim in respect of costs and expenses had not been duly documented.

81. With regard to pecuniary damage, the Delegate of the Commission suggested that the Court should consider the question of the application of Article 50 in the light of the hypothetical character of the amount claimed. He left the question of non-pecuniary damage to the Court's discretion. Lastly, with regard to the sum claimed for costs and expenses, he mentioned the problem raised by the lack of supporting documents.

82. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. It further notes that there is insufficient proof of a causal connection between the breach of Article 10 it has found and the loss of professional and commercial income alleged by the applicant. Moreover, the applicant's claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them.

With regard to non-pecuniary damage, the Court considers that the applicant 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 50,

the Court awards him compensation in the sum of FRF 30,000 under this head.

83. With regard to costs and expenses, the Court awards Mr Incal, on an equitable basis and according to the criteria laid down by its case-law (see, among other authorities, the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, p. 20, § 49), the overall sum of FRF 15,000.

### D. Default interest

84. 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 is 3.36% per annum.

## FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a breach of Article 10 of the Convention;

2. *Holds* by twelve votes to eight that there has been a breach of Article 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the İzmir National Security Court;

3. *Holds* by nineteen votes to one that it is not necessary to consider the applicant's other complaints under Article 6 § 1, whether taken separately or in conjunction with Article 14 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay Mr Incal, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;
      (ii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.36% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 9 June 1998.

*Signed*: Rudolf BERNHARDT
President

*Signed*: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 53 § 2 of Rules of Court A, the following separate opinions are annexed to this judgment:

(a) partly concurring opinion of Mr Gölcüklü;

(b) joint partly dissenting opinion of Mr Thór Vilhjálmsson, Mr Gölcüklü, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev.

*Initialled*: R. B.
*Initialled*: H. P.

# PARTLY CONCURRING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

I voted, with the majority, for the finding of a breach of Article 10, not on account of the content of the leaflets in question, but because they were seized before they could be distributed and because the applicant was convicted on account of opinions which were never disseminated.

# JOINT PARTLY DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, GÖLCÜKLÜ, MATSCHER, FOIGHEL, Sir John FREELAND, LOPES ROCHA, WILDHABER AND GOTCHEV

(*Translation*)

Given the security situation in Turkey and the involvement of the armed forces in the process of countering terrorism, the Turkish authorities have considered it necessary to reinforce the National Security Courts, as specialised courts of criminal justice, by the inclusion of a military judge.

We voted against the finding of a violation of Article 6 § 1 in respect of the applicant's complaint that the National Security Court which tried him was not an "independent and impartial" tribunal on account of the fact that one of its members was a military judge, which allegedly caused the applicant to doubt its independence and impartiality.

We do not accept that argument.

In a number of cases the Court has acknowledged that a special court whose members include "experts" may be a "tribunal" within the meaning of Article 6 § 1. The domestic legislation of the Council of Europe member States provides many examples of courts in which professional judges sit alongside specialists in a particular sphere whose knowledge is desirable and even necessary in deciding certain cases, provided that all the members of the court can offer the required guarantees of independence and impartiality.

As to military judges who are members of the National Security Courts, paragraph 67 of the judgment describes the constitutional safeguards they enjoy, and paragraph 68 goes on to say that certain aspects of their status make it questionable. We consider the conclusions the Court drew from these aspects – the fact that military judges remain subject to military discipline and that assessment reports are compiled on them for that purpose, that decisions pertaining to their appointment are taken by the administrative authorities and the army and that their term of office as National Security Court judges is only four years – unconvincing.

In that connection we would observe that it is possible for ordinary judges too to be subject to assessment and to disciplinary rules and for decisions pertaining to their appointment to be taken by the administrative authorities, and that the Court has held even a three-year term of office to be sufficient. In addition, at the end of their term of office as National Security Court judges, where that term is not renewed, the judges in question remain military judges for the whole duration of their careers.

As to the argument that the composition of the court may have caused the applicant to harbour doubts about its impartiality and independence, from the point of view of "appearances", we consider that, in view of the constitutional safeguards enjoyed by military judges, doubts about their independence and impartiality cannot be regarded as objectively justified.

The logical consequence of asserting the contrary would be to cease to consider that even specialised courts can be "tribunals" for the purposes of Article 6 § 1, thus departing from the Court's well-established case-law.