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

CASE OF OKÇUOĞLU v. TURKEY

(Application no. 24246/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Okçuoğlu 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 and *Deputy Registrars*,

Having deliberated in private on 11 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

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.

period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 24246/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Ahmet Zeki Okçuoğlu, on 15 March 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 Articles 6 § 1, 10 and 14 of the Convention.

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 Mr S. Okçuoğlu of the Istanbul Bar as 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).

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 a letter in lieu of a memorial from the applicant on 27 July 1998 and the Government's memorial on 24 August. On 29 September the Government produced documents as appendices to their memorial and on 14 October the applicant lodged a document in support of his claims for just satisfaction (Article 41 of the Convention).

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); Gerger v. Turkey (no. 24919/94); 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);

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.

Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr. Wildhaber, the President of the Court, Mrs E. Palm, Vice-President of the Court, 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. Stráznická, 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, the first substitute judge (Rule 24 § 5 (b)).

6. On 11 March 1999 the Grand Chamber decided not to hold a public hearing in view of the material on the case file and the fact that the applicant and the Government had said that they did not require one (Article 31 § (a) of the Convention and Rules 31, 59 § 2 and 71).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Ahmet Zeki Okçuoğlu is a Turk of Kurdish origin and was born in 1950. He lives in Istanbul and works as a lawyer.

8. In May 1991, a magazine, "Demokrat" (*Democrat*), published in its issue no. 12 an article on a round-table debate it had organised under the chairmanship of Mr M.İ.S. in which the applicant had taken part. The applicant's comments were recorded in the article, entitled "The past and present of the Kurdish problem" (*Kürt Sorununun Dünü ve Bugünü*), as follows:

> *"**M.İ.S.*** – Leaving aside the humanitarian side to the current tragic plight of the Kurds in Iraq, there are important political aspects to the problem, the main one perhaps being the intensification, with the crisis in the Gulf, of relations at international level

between the Kurdish movements. At this stage, one question needs to be asked: what did we hope to gain from the relations established with the United States and the European States and what have we in fact achieved? ... If you would allow me to, I should like to return to the question ... of the orchestrating of developments in the regional situation, mainly by the United States and the West,... Mr Okçuoğlu, could I ask you to frame your answer in the context of the unitary State?

A.Z. Okçuoğlu – Your question is badly put. It involves certain ideological considerations. Before answering, I think I should explain what the Kurdish question is about. It concerns a nation of some 40,000,000 people, one which has existed in the region since history began and one which has, in company with the other nations established here, played a major role historically; but it is also a nation which has, since the beginning of this century and under the influence of the international and regional powers, been deprived of its national rights, seen its territory divided up between the States in the region and been divested of its sovereign rights so as to be subjected instead to the hegemony of other States. If we are to make progress on this question, that must be the starting point. Admittedly, that does not mean to say that a radical solution to the problem will be found from one day to the next.

Coming back to your question ... the idea that the Kurdish problem has been fuelled by outside forces, by imperialist powers, is not new. For about a century some observers have seen the problem in those terms. The underlying reasons may be summarised as follows.

Firstly, there are the concerns of the nations which keep the Kurds under their domination. From the beginning, those powers have attempted to assert that the problem is that the Kurds are not a national entity, have no claims of their own and are manipulated by outside forces. Their aim, then, is to prevent international powers intervening in the problem and to cast doubt on its legitimacy and to distract attention from it. There is also the international socialist movement and the doctrine of imperialism which prevails in such circles. As you know, the Soviet Union was akin to an empire in the classic sense. The Soviet Government has always been against the Kurds as it considered that, if it the Kurds were given certain rights, the nations it controlled by force would inevitably also assert claims, and discussion of such issues at the international level would render its networks less inaccessible. That is why the Soviets have since the days of Lenin consistently sided with the powers who have kept the Kurds under their domination and why the local socialist satellite powers have invariably put forward similar arguments. Given the negative attitude of these socialist powers towards the Kurds, the relationship between the sovereign power of the former and the official ideology of the latter has also played a role. That attitude was reinforced by the Soviet position. Soviet ideology is in itself an ideology of the sovereign nation. In that regard, the ideology of Soviet sovereignty and the Turkish national ideology as applied in the region were at one. However, the said doctrine of imperialism does not end there. After the seventies, the Kurds, under the influence of Soviet and Chinese socialist propaganda, whether consciously or subconconsciously, adopted the same tack. That led the Kurdish movement into a series of dead ends.

The allegation that the Kurdish problem arose as a result of provocations from outside is ill-founded. If one has to speak of imperialist protectionism in the Middle East, it will be noted that it has been of no benefit to the Kurds, whereas, shielded by the imperialist powers concerned, the Turks, the Arabs and the Persians have done quite well. If the British had not intervened in favour of the Ottomans in the Crimean War, the Russian Tsar would have expurgated the Ottoman State from the history books and would have seized the Byzantine heritage. Contrary to what is suggested by some left-wing historians, the imperialists tried to save the 'sick man' rather than to kill him. That applies to the Arabs, too. Up till now, the only people in the Middle East – if you except the Palestinians – who have fought for their national rights are the Kurdish people. The Turks, Arabs and Persians have not fired a single bullet for their national rights. Not a shot was fired when the British invaded the Ottoman State in 1918. The so-called war of independence was merely a consequence of an historical conflict between the Greeks and the Turks. The question of who was right is a controversial one. The resistance against the French, launched at Antep and Urfa, was Kurdish. More precisely, it was Turco-Kurdish resistance that developed under the aegis of the local authorities. It was the spontaneous resistance of the people. Neither the Turkish army nor the political authorities played any part in it. The Kurds have fallen behind in obtaining their national rights not, as is suggested in certain quarters, because they are dependent on external powers, but, on the contrary, because they have failed to forge international relations and because the international powers have refused them admission.

While the Kurdish problem is the problem of the Kurds, its solution is also of concern to the regional and international powers as it directly affects their interests. The question cannot be dealt with using concepts, such as imperialism, anti-imperialism, socialism and anti-socialism, that bear scant resemblance to the true position. You cannot say: 'It's our problem. You, the United States, England, the Soviets, the Turks, don't interfere; you, the Arabs, the Persians, stay out of this'. We must solve the problem with all those whose interests are at stake. With or without their help. There, too, it has to be said that of all the parties involved in the Kurdish problem, it is the Kurds who have taken the least initiative. So, the Kurds must be realistic. As the question concerns their existence and is posed at a time when their efforts have been minimal, it would be foolhardy to attempt to solve the problems by denying that initiatives have been taken or opposing them. In practice, the Kurds must on this point work out how and to what extent they can play a bigger role in finding a solution to the problem. That would be the practical approach.

...

M.İ.S. – I wouldn't want you to take what I said the wrong way. I do not suggest that the Kurdish revolt is dependent on imperialist factors. All I say is that the countries in the region do not have the resources to solve the problems that exist here by themselves. Accordingly, the continued presence of the international powers seems likely. Under those circumstances, how can the Kurds play a greater role?

A.Z. Okçuoğlu – Firstly, when considering the Kurdish problem the international powers are mindful of their own interests. We have to be aware of that and determine where our common interest lies. There are a number of nations like the Kurds in the world. Although the United Nations Charter and the fundamental treaties refer to peoples' right to self-determination, it is not in practice accepted that that right applies to the Kurds, any more than it is accepted that it applies to a series of other nations. Such nations only manage to obtain certain humanitarian and cultural rights that do not extend beyond the boundaries of the countries in which they live. None of them have been able to achieve more than that. The problems of peoples confined to minority status cannot readily be referred to and resolved without taking this factor into account. All the boundaries need changing, but that is very difficult to achieve. For that reason, I believe that the Kurds have committed an error of judgement. By that I do not mean that they must accept their present status right to the bitter end. If they wish to enter the history books, they have to be aware of the international implications their presence entails.

I would add that I attach no credit to the idea that the Kurds have been 'deceived or sold'. Recently, the United States cautioned them to act with restraint; they broke off their relations with Talabani and turned down all his requests for arms. In my view, the Kurds have committed an error of judgement. They have adopted a quite radical approach, one for which the organisations of Iraqi Kurdistan cannot be held responsible. The Kurds, believing Saddam to be finished, attempted to rise up spontaneously in reaction to the oppression to which they have been subjected for years. Barzani and Talabani, in company with the other Kurdish leaders, were forced to accept that process. We are not strong enough to face the likes of America, France, the Soviets or a Saddam exhausted to the point where he is no longer able to stay on his feet. We have to examine the problem in the light of these realities. The urgent need is to ensure the democratic unity of the Kurds. We must abandon the notion of hostility. No side is strong enough to destroy the other and in any event there is no reason to come to that. Our relations should be friendly, not hostile. Similarly, when we forge relations with the western powers, it is necessary and even essential to afford preference to national values.

...

For my part, I am opposed to the definition of primitive nationalism that has often been asserted in recent times. The use of such terminology sometimes reveals a lack of discernment. Nationalism takes two known forms. The first is that of the oppressor nation, the second that of the nation that is oppressed. Beyond that, scientific research into nationalism has not come up with any other definition. It is difficult to know what the notion of 'primitive nationalism' covers: does it dismiss nationalism wholesale or does it suggest another form of nationalism? It is unclear. Besides, this terminology is unscientific, of no value and merely serves to reflect certain absurd political preoccupations.

I do not subscribe to the theory that the Kurds' lack of success is due to primitive nationalism. In fact, it is not the Kurds who are responsible for their lack of success. The reasons for it are to be found in the international status of the Kurds. A number of nations in the world are in the same position as the Kurds. None of them has had, up till now, an opportunity to draw its own frontiers, whether by force of arms or otherwise. How can we expect the Kurds to be given an opportunity that has been

offered to no other nation? Let us take the example of Lithuania. The Lithuanians had organised a referendum on the question of their independence and had subsequently declared themselves independent by an overwhelming majority. Yet when the United States gave their approval, the Soviets invaded with tanks. Lithuania was isolated. We have to speak therefore with the benefit of hindsight. Since the beginning of the century the struggle has continued in Iraqi Kurdistan. The only people engaged in combat in the Middle East are the Kurdish people. Despite that, their position has not improved at all. The Kurds will certainly find a solution to their problem, but one must be aware that the factors coming into play do not depend solely on the Kurds.

I should now like to clarify the notion of nationalism about which so much has been said. As you know, nationalist movements began in the west with the French Revolution and subsequently spread to Asia and Africa. The colonies were freed as a result of nationalism. However, the issue of nationality remains alive. There continue to be peoples who have been deprived of their national rights. If they are to be freed they must show nationalist sentiment. The fact that nationalist movements attract an imprecatory reaction from those whom they cause to suffer is understandable. Conversely, it is impossible to comprehend why people who claim to be on the side of the oppressed, who call themselves revolutionaries or innovators, should react in a similar fashion.

The nationalism of the oppressed nation cannot be considered to be a usurpation of the rights of another nation. On the contrary, I believe that internationalism in the modern sense is inherent in nationalism. I do not approve of lumping together all kinds of nationalism, without being aware of the difference between the nationalism of the oppressor nation and the nationalism of the nation that is oppressed. If you ignore that difference, then you are serving the cause of the oppressor nation.

Why do Turkish socialists, who outlaw Kurdish nationalism, not take a look at themselves? They defend the staunchest nationalism of all time, namely Kemalism, yet they ban Kurdish nationalism. Prohibiting an oppressed nation from being nationalistic is to condemn it to slavery.

My friend S. consistently holds the same line. His politics are always reactionary. The Kurds may react, but building a policy on the back of that reaction will not achieve much. In politics, one doesn't have friends or enemies, one has interests. Furthermore, politics is the art of seeking the feasible. Is the position of people who criticise advocates of autonomy and of Kurdish independence any different from that reached by the Kurdish national movement in Iraq? Not at all. In Turkey, too, some benefit has been gained, but not from policies geared towards independence. Those in favour of independence may on occasion agree voluntarily to limit their demands saying: 'Decree a general amnesty, allow us to get organised'. They even add: 'We don't want a separation'. Such policies cannot be brought to fruition with plays on words. Today, the Kurds must come up with medium-term policies that are adapted to the international context."

9. On 10 June 1991 the Public Prosecutor of the Istanbul National Security Court no. 2 ("National Security Court") accused the applicant of disseminating propaganda against the "indivisibility of the State". Relying on the comments set out above (see paragraph 8 above), he requested the application of section 8(1) of the Prevention of Terrorism Act (Law no. 3713 – see paragraph 17 below) and confiscation of the copies of the relevant issue of the aforementioned magazine (see paragraph 16 below).

10. The applicant denied the charges before the National Security Court, arguing, in particular, that he had never intended to promote separatism.

11. On 11 March 1993 the National Security Court, composed of three judges, including a military judge, found the applicant guilty of the offence charged and sentenced him under section 8(1) of Law no. 3713 to one year, eight months' imprisonment and a fine of 41,666,666 Turkish liras ("TRL"), to be paid in twenty monthly instalments. It also ordered confiscation of the publications concerned.

After verifying that the document in issue was an accurate transcription of what had been said at the round-table debate in which the applicant had taken part, the National Security Court found, *inter alia*, that in his comments, the applicant had asserted that some Turkish nationals had been deprived of their "national rights" as a result of their Kurdish origin and that their territory had been divided up between the States in the region concerned. According to the applicant, the Kurdish population – dominated by these States – was fighting to acquire its national rights.

The National Security Court held that those comments, taken as a whole, amounted to separatist propaganda that was detrimental to the unity of the Turkish nation and the territorial integrity of the Turkish State and justified Mr Okçuoğlu's conviction.

12. In a judgment of 24 September 1993, the Court of Cassation dismissed an appeal by the applicant.

13. On 20 February 1995, at the applicant's request, the National Security Court agreed to deduct from the applicant's sentence the period from 28 October to 18 November 1990 which he had spent in pre-trial detention in connection with earlier criminal proceedings. Consequently, he was granted automatic parole.

The applicant paid the fine that had been imposed on him that same day.

14. 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 imosed under section 8 of Law no. 3713 while increasing the level of fines (see paragraph 17 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 18 below).

15. Consequently, the National Security Court reviewed the applicant's case on the merits. In its judgment of 8 March 1996 it reduced Mr Okçuoğlu's prison sentence to one year, one month and ten days but increased the fine to TRL 111,111,110.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

16. Article 36 § 1 of the Criminal Code reads as follows:

Article 36 § 1

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

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

17. 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 (see paragraph 18 below). 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 and 3

"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.

...

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

..."

Former section 13

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

New section 13

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

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

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

18. 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 Code of Criminal Procedure

19. 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

20. The Government supplied copies of several decisions given by the prosecutor attached to the Istanbul National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 17 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

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, or on account of the objective nature of the words used.

C. The National Security Courts

21. 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

22. 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

23. 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)

24. 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

25. 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

26. 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

27. Mr Okçuoğlu applied to the Commission on 15 March 1994. He submitted that he had been denied a fair trial before the National Security Court as it could not be regarded as an independent and impartial tribunal within the meaning of Article 6 § 1 of the Convention. He also maintained that his conviction for the comments he had made at the round table constituted a violation of Articles 9 and 10, taken individually or together with Article 14.

28. The Commission declared the application (no. 24246/94) admissible on 14 October 1996. In its report of 11 December 1997 (former Article 31), it expressed the opinion by 31 votes to 1 that there had been a violation of Article 6 § 1 and of Article 10, considered jointly with Article 9, and that no separate issue arose under Article 14.

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].

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.

FINAL SUBMISSIONS TO THE COURT

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

> "... the military judge did not act in a biased manner in this case and indeed the applicant made no complaint of that nature before the national courts."

30. In his letter in lieu of a memorial, Mr Okçuoğlu referred to the submissions he had made in his application and observations before the Commission, as set out in the Commission's report of 11 December 1997 (see paragraph 29 above). He also sought just satisfaction under Article 41 of the Convention.

AS TO THE LAW

I. SCOPE OF THE CASE

31. Before the Court the applicant also complained of a breach of Article 7 of the Convention. The Court observes, however, that as Mr Okçuoğlu did not raise that complaint at the admissibility stage of the procedure before the Commission (see paragraph 27 above), it has no jurisdiction to examine it (see, *mutatis mutandis*, the Findlay v. the United Kingdom judgment of 25 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 277, § 63).

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

32. In his application Mr Okçuoğlu 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. At the hearing before the Court, however, he did not object to the proposal made by the Government and the Commission that 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* 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."

33. Those appearing before the Court agreed that the applicant's conviction following publication of his comments 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.

1. "Prescribed by law"

34. Neither the applicant nor the Government expressed a view as to whether section 8 of the Prevention of Terrorism Act (Law no. 3713) could be regarded as a "law" for the purposes of the Convention.

35. The Commission found that the applicant's conviction had been based on section 8 of the Prevention of Terrorism Act and accordingly considered that the interference was prescribed by law.

36. Like the Commission, the Court finds that since the applicant's conviction was based on section 8 of the Prevention of Terrorism Act (Law no. 3713) the resultant interference with his right to freedom of expression could be regarded as "prescribed by law", especially as the applicant has not specifically disputed this.

2. Legitimate aim

37. The applicant did not express a view on this point.

38. The Government submitted that the aim of the interference in issue had been not only to maintain "national security" and prevent "[public] "disorder", as the Commission had found, but also to preserve "territorial integrity" and "national unity".

39. 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

40. The applicant considered that he had kept within the bounds of fair comment with his remarks. In his submission, he had been convicted solely for having expressed his views on the "Kurdish question".

(ii) The Government

41. The Government asserted that, as the Istanbul National Security Court had found, the applicant had been guilty of disseminating separatist propaganda by taking part in the debate in issue. The words used by the applicant during the debate were a call to the the feelings, intellect and will of citizens of Kurdish origin to form their own State, at a time when the PKK were attacking soldiers and civilians alike on all fronts and brutally massacring dozens of people every day. Like the other participants, Mr Okçuoğlu had thus helped the cause of separatist violence.

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 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, since the magazine concerned had been published 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-eastern Turkey, the Government emphasised the "duties and responsibilities" which exercise of the rights protected by Article 10 carried with it and submitted in conclusion that the applicant's conviction had by no means been disproportionate to the aims pursued.

(iii) The Commission

42. The Commission likewise 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 underlying causes of the situation or to expressing opinions on possible solutions.

The Commission noted that in his comments the applicant had sought to explain the Kurdish question from an historical perspective. It considered that he had expressed his views in a relatively moderate way and had not approved the use of violence by Kurdish separatists. The applicant's conviction therefore constituted a form of censorship, which was incompatible with the requirements of Article 10.

(b) The Court's assessment

43. 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.

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

45. In his comments, Mr Okçuoğlu sought to explain through the history of international relations the current situation of the population of Kurdish origin. Although his analysis was not neutral and included consideration of what could be done to remedy the situation described, the language used does not appear to have been extreme or excessive.

46. In any event, 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.

47. The Court takes into account, furthermore, 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 39 above).

48. The Court observes, however, that the applicant's comments, made during a round-table debate, were published in a periodical whose circulation was low, thereby significantly reducing their potential impact on "national security", "public order" or "territorial integrity". The Court further notes that although some of his remarks paint a negative picture of the population of Turkish origin and make his comments hostile in tone, they nevertheless do not amount to incitement to engage in violence, armed resistance, or an uprising. That, in the Court's view is an essential factor to be taken into consideration.

49. Furthermore, the Court is struck by the severity of the penalty imposed on the applicant – particularly the fact that he was sentenced to one year, eight months' imprisonment – and the persistence of the prosecution's efforts to secure his conviction. In that regard, it notes that after completing his prison sentence, the applicant was ordered to pay an additional fine under Law no. 4126, which had just come into into force (see paragraph 18 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.

50. In conclusion, Mr Okçuoğlu'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.

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

51. The applicant complained that the presence of a military judge on the bench of the National Security Court which tried and convicted him meant that he had been denied a fair hearing in breach 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 ... hearing ... by an independent and impartial tribunal established by law..."

52. The Government contested that allegation whereas the Commission accepted it.

53. In the applicant's submission, the military judges appointed to the National Security Courts such as the Istanbul National Security Court are dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges are unable to take a position which might be contradictory to the views of their commanding officers.

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

54. 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 (see

paragraph 25 above). Secondly, the assessment reports referred to by the applicant related only to conduct of a military judge's non-judicial duties. Military judges have access to their assessment reports and are able to challenge their content before the Supreme Military Administrative Court (see paragraph 26 above). When acting in a judicial capacity a military judge is assessed in exactly the same manner as a civilian judge.

55. The Government added that the fact that a military judge had sat in the National Security Court had not impaired the fairness of the applicant's trial. Neither the military judge's hierarchical superiors, nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case.

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

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

57. 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. ...) it 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 and paragraph 22 above). 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 23-24 above). Mr Okçuoğlu mentioned some of these shortcomings in his observations.

58. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Okçuoğlu'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 for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity - should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 23 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of 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*).

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

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

60. The applicant submitted that he had been prosecuted on account of his writings merely because they were the work of a person of Kurdish origin and concerned the Kurdish question. He argued that on that account he was a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in the 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."

61. The Government submitted that the judgment delivered when the applicant was convicted showed that Mr Okçuoğlu had been prosecuted not because he belonged to a particular ethnic group, but because he had disseminated separatist propaganda that jeopardised the fundamental interest of the national collectivity.

62. The Commission expressed the opinion that no separate issue arose under Article 14 read in conjunction with Article 10.

63. Having regard to its conclusion that there has been a violation of Article 10 taken separately (see paragraph 50 above), the Court does not consider it necessary to examine the complaint under Article 14.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

64. 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

65. The applicant sought reparation for the damage he had sustained but left the amount to the discretion of the Court.

66. The Government expressed no opinion.

67. The Court notes that there is no evidence before it of any pecuniary damage. On the other hand, the applicant suffered distress on account of the facts of the cause. Ruling on an equitable basis, it consequently awards him FRF 40,000 for non-pecuniary damage.

B. Costs and expenses

68. The applicant also left the issue of costs and expenses to the discretion of the Court. He did however state that he was contractually bound to pay his lawyer 25,000 US dollars in fees.

69. The Government expressed doubts as to the truth of that statement.

70. 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.

C. Default interest

71. 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* unanimously that there has been a breach of Article 10 of the Convention;
2. *Holds* by 16 votes to 1 that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 10 of the Convention taken together with Article 14;
4. *Holds* unanimously that
   (a) the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 40,000 (forty thousand) French francs for non-pecuniary damage;
      (ii) 20,000 (twenty thousand) French francs for costs and expenses;
   (b) simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;
5. *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) partly 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 in the case of Sürek v. Turkey (no. 1).

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

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

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

CONCURRING OPINION OF JUDGE BONELLO

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

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

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

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

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

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

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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.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

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

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

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

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I do not agree with the view of the majority of the Court 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. In that connection, I refer to 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 to my individual dissenting opinion in the case of Çıraklar v. Turkey of 28 October 1998. I remain firmly convinced that the presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çıraklar being a mere repetition of what was said in the Incal judgment); and (3) the majority's opinion is in the abstract and ought therefore, if it was to be justifiable, to have been better supported both factually and legally.