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

CASE OF ZANA v. TURKEY

(69/1996/688/880)

JUDGMENT

STRASBOURG

25 November 1997

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SUMMARY[1]

Judgment delivered by a Grand Chamber

Turkey – prison sentence imposed by Diyarbakır National Security Court on account of a statement to journalists (Articles 168 and 312 of the Criminal Code) – accused unable to appear at hearing in that court (Article 226 § 4 of the Code of Criminal Procedure in force at material time) – length of criminal proceedings against him

I. ARTICLE 10 OF THE CONVENTION

A. Government's preliminary objections

1. Lack of jurisdiction ratione temporis

Court could only take cognisance of facts subsequent to 22 January 1990, when Turkey's declaration (under Article 46 of the Convention) was deposited – in the instant case principal fact lay in applicant's conviction by Diyarbakır National Security Court on 26 March 1991 – question whether the Government, who had referred case to Court, were estopped from relying on Turkey's declaration had not been raised before Court and did not need to be determined.

Conclusion: objection dismissed (eighteen votes to two).

2. Failure to exhaust domestic remedies

Objection had not been raised at admissibility stage and there was therefore an estoppel.

Conclusion: objection dismissed (unanimously).

B. Merits of complaint

Applicant's conviction and sentence had amounted to an interference with his exercise of his freedom of expression.

The interference had been based on Articles 168 and 312 of the Criminal Code and had therefore been prescribed by law within the meaning of Article 10 § 2.

It had pursued legitimate aims under Article 10 § 2, since the statement in question could, at a time when serious disturbances were raging in south-east Turkey, have had an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety.

1. This summary by the registry does not bind the Court.

As to necessity of interference, Court first recapitulated its case-law.

Applicant's statement contained both a contradiction and an ambiguity – it could not, however, be looked at in isolation and had had a special significance in the circumstances of the case – interview had coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey – the support given to the PKK, described as a "national liberation movement", by former mayor of Diyarbakır in interview published in major national daily newspaper had had to be regarded as likely to exacerbate an already explosive situation in that region – penalty imposed could therefore reasonably have been regarded as answering a pressing social need, and reasons adduced by the national authorities were relevant and sufficient – at all events, applicant had served only one-fifth of his sentence in prison – interference in issue proportionate to legitimate aims pursued.

Conclusion: no violation (twelve votes to eight).

II. ARTICLE 6 OF THE CONVENTION

A. Government's preliminary objections (failure to exhaust domestic remedies)

Objection had not been raised at admissibility stage and there was therefore an estoppel.

Conclusion: objection dismissed (unanimously).

B. Merits of complaint

1. Article 6 §§ 1 and 3 (c) (fair trial)

Recapitulation of case-law.

Fact that applicant had raised procedural objections or wished to address court in Kurdish in no way signified that he had implicitly waived his right to appear before Diyarbakır National Security Court – in view of what had been at stake for the applicant, that court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence – neither the "indirect" hearing by the Aydın Assize Court nor presence of applicant's lawyers at hearing before Diyarbakır National Security Court could compensate for absence of accused.

Conclusion: violation (seventeen votes to three).

2. Article 6 § 1 (length of proceedings)

(a) Period to be taken into consideration

Starting-point: deposit of Turkey's declaration.
End: date of service of Court of Cassation's judgment.
Total: one year and six months, but account had to be taken of fact that by date of deposit of Turkey's declaration the proceedings had already lasted two years and five months.

(b) Reasonableness of length of proceedings

To be assessed in light of circumstances of case, regard being had to criteria laid down in Court's case-law.

Proceedings complained of not particularly complex – applicant's conduct could not, on its own, explain such a length of time – during period in question Diyarbakır National Security Court had not delivered its judgment until nine months after hearing at Aydın Assize Court – earlier period of inactivity on part of judicial authorities, which Court could take into account in assessing whether "reasonable time" requirement had been satisfied – importance to applicant of what had been at stake in the case.

Conclusion: violation (nineteen votes to one).

III. ARTICLE 50 OF THE CONVENTION

A. Damage

Pecuniary damage: no causal link between violations found and alleged damage.

Non-pecuniary damage: compensation awarded.

Conclusion: respondent State to pay applicant specified sum for non-pecuniary damage (eighteen votes to two).

B. Costs and fees

Reimbursed on equitable basis.

Conclusion: respondent State to pay applicant specified sum for costs and fees (nineteen votes to one).

COURT'S CASE-LAW REFERRED TO

7.12.1976, Handyside v. the United Kingdom; 12.2.1985, Colozza v. Italy; 8.7.1986, Lingens v. Austria; 2.3.1987, Monnell and Morris v. the United Kingdom; 22.2.1989, Barfod v. Denmark; 23.9.1994, Jersild v. Denmark; 8.6.1995, Yagcı and Sargın v. Turkey; 8.6.1995, Mansur v. Turkey; 19.2.1996, Botten v. Norway; 25.3.1996, Mitap and Müftüoğlü v. Turkey; 27.6.1997, Philis v. Greece (no. 2)

In the case of Zana 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. RYSSDAL, *President*,
Mr R. BERNHARDT,
Mr THÓR VILHJÁLMSSON,
Mr F. GÖLCÜKLÜ,
Mr F. MATSCHER,
Mr A. SPIELMANN,
Mrs E. PALM,
Mr A.N. LOIZOU,
Sir John FREELAND,
Mr A.B. BAKA,
Mr M.A. LOPES ROCHA,
Mr L. WILDHABER,
Mr G. MIFSUD BONNICI,
Mr D. GOTCHEV,
Mr P. JAMBREK,
Mr K. JUNGWIERT,
Mr P. KŪRIS,
Mr E. LEVITS,
Mr J. CASADEVALL,
Mr P. VAN DIJK,

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

Having deliberated in private on 24 April, 23 June and 24 October 1997,

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 28 May 1996 and by the Turkish

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Notes by the Registrar

1. The case is numbered 69/1996/688/880. 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.

Government ("the Government") on 29 July 1996, within the three-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. 18954/91) against the Republic of Turkey lodged with the Commission under Article 25 by a Turkish national, Mr Mehdi Zana, on 30 September 1991.

The Commission's request referred to Articles 44 and 48 and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46); the Government's application referred to Article 48. The object of the request and of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 §§ 1 and 3 (c) and Articles 9 and 10 of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of Rules of Court A, 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 in both the written and the oral proceedings (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 10 June 1996, 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 Thór Vilhjálmsson, Mr F. Matscher, Mr S.K. Martens, Mme E. Palm, Mr M.A. Lopes Rocha, Mr G. Mifsud Bonnici and Mr P. Jambrek (Article 43 *in fine* of the Convention and Rule 21 § 5). Subsequently Mr K. Jungwiert, substitute judge, replaced Mr Martens, who had resigned (Rule 22 § 1).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of 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, the Registrar received the applicant's and the Government's memorials on 11 and 17 December 1996 respectively. On 23 December 1996 the Registrar also received the applicant's claims under Article 50, and on 10 February 1997 the Government's observations in reply.

On 20 December 1996 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

5. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 19 February 1997. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr A. GÜNDÜZ, *Co-Agent,*
Mrs D. AKÇAY, *Adviser,*
Miss A. EMÜLER, *Expert*;

(b) *for the Commission*
Mr A. WEITZEL, *Delegate*;

(c) *for the applicant*
Mr M.S. TANRIKULU,
Mr R. TANRIKULU,
Mr S. YILMAZ, of the Diyarbakır Bar, *Counsel*,
Mr M. ZANA, *Applicant*.

The Court heard addresses by Mr Weitzel, Mr Zana, Mr M.S. Tanrikulu, Mr Gündüz and Mrs Akçay.

6. On 21 February 1997 the Chamber decided unanimously to relinquish jurisdiction forthwith in favour of a Grand Chamber (Rule 51).

7. 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 members and the three substitutes of the original Chamber, the latter being Mr A.N. Loizou, Mr E. Levits and Mr R. Macdonald (Rule 51 § 2 (a) and (b)). On 25 February 1997, the President, in the presence of the Registrar, drew by lot the names of the eight additional judges needed to complete the Grand Chamber, namely Mr A Spielmann, Sir John Freeland, Mr A.B. Baka, Mr L. Wildhaber, Mr D. Gotchev, Mr P. Kūris, Mr J. Casadevall and Mr P. van Dijk (Rule 51 § 2 (c)). Subsequently Mr Macdonald, who was unable to take part in the further consideration of the case, was not replaced after the hearing (Rule 24 § 1 taken in conjunction with Rule 51 § 3).

8. On 25 February 1997 the President asked those who had appeared before the Court if they wanted a new hearing to be held. On 24 and 25 March and 9 April 1997 respectively the Government, the Delegate of the Commission and the applicant replied in the negative.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

9. Mr Mehdi Zana, a Turkish citizen born in 1940, is a former mayor of Diyarbakır, where he currently lives.

A. The situation in the south-east of Turkey

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

11. At the time of the Court's consideration of the case, ten of the eleven provinces of south-east Turkey had since 1987 been subjected to emergency rule.

B. The applicant's statement to journalists

12. In August 1987, while serving several sentences in Diyarbakır military prison, the applicant made the following remarks in an interview with journalists:

> "I support the PKK national liberation movement; on the other hand, I am not in favour of massacres. Anyone can make mistakes, and the PKK kill women and children by mistake …"
>
> *"... PKK'nın ulusal kurtuluş hareketini destekliyorum. Katliamlardan yana değiliz, yanlış şeyler her yerde olur. Kadın ve çocukları yanlışlıkla öldürüyorlar ..."*

That statement was published in the national daily newspaper *Cumhuriyet* on 30 August 1987.

C. The criminal proceedings

13. On 30 August 1987 the "press offences" department of the Istanbul public prosecutor's office began a preliminary investigation in respect of the applicant among others, on the ground that he had "defended an act punishable by law as a serious crime", an offence under Article 312 of the Criminal Code (see paragraph 31 below).

14. On 28 September 1987 the Istanbul public prosecutor's office ruled that there was no case to answer in respect of the journalists and that it had no jurisdiction *ratione loci* to deal with Mr Zana's case. It sent the file to the Diyarbakır public prosecutor.

15. In an order of 22 October 1987 the Diyarbakır public prosecutor ruled that he had no jurisdiction, on the ground that the offence committed by the applicant was governed by Article 142 §§ 3–6 of the Criminal Code (a provision which makes it an offence to disseminate propaganda that is racist or calculated to weaken national sentiment). He forwarded the file to the public prosecutor at the Diyarbakır National Security Court.

16. On 4 November 1987 the latter likewise ruled that he had no jurisdiction, on the ground that when the applicant had made his statement to the journalists he was in custody in a military prison and therefore had military status in law. He forwarded the file to the Diyarbakır military prosecutor's office.

17. By means of an indictment dated 19 November 1987, the Diyarbakır military prosecutor's office instituted proceedings in the Diyarbakır Military Court against Mr Zana (among others) under Article 312 of the Criminal Code. The applicant was charged with supporting the activities of an armed organisation, the PKK, whose aim was to break up Turkey's national territory.

18. At a hearing before the Diyarbakır Military Court on 15 December 1987 the applicant argued that the court had no jurisdiction to hear his case and refused to put forward a defence on the merits.

19. At a hearing on 1 March 1988 counsel for Mr Zana asked the Military Court to rule that it had no jurisdiction as the offence with which his client was charged was not a military one and a military prison could not be regarded as military premises. The court dismissed that application on the same day.

20. On 28 July 1988 the applicant was transferred from Diyarbakır military prison to Eskişehir civilian prison.

21. The Eskişehir Air Force Court, acting under powers delegated to it by the Diyarbakır Military Court, summoned the applicant to submit his defence. The applicant, who was on hunger strike, did not appear at the hearing on 2 November 1988. He did appear at one held on 7 December 1988 but refused to address the court, as he considered that it had no jurisdiction to try him.

22. In a decision of 18 April 1989 the Diyarbakır Military Court held that it had no jurisdiction in the case and sent the file to the Diyarbakır National Security Court.

23. On 2 August 1989 Mr Zana was transferred to the high-security civilian prison at Aydın.

24. At a hearing held on 20 June 1990 by the Aydın Assize Court, acting under powers delegated by the Diyarbakır National Security Court, the applicant refused to speak Turkish and said in Kurdish that he wished to defend himself in his mother tongue. The Assize Court pointed out to him that, if he persisted in his refusal to defend himself, he would be deemed to have waived his right to do so. Since Mr Zana continued to speak in Kurdish, the court noted in the record of the hearing that he had not put forward a defence.

D. The judgment of the Diyarbakır National Security Court

25. The proceedings then continued before the Diyarbakır National Security Court, where the applicant was represented by his lawyers.

26. In a judgment of 26 March 1991 the Diyarbakır National Security Court sentenced the applicant to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" and "endangering public safety". In accordance with the Act of 12 April 1991, he would have to serve one-fifth of the sentence (two months and twelve days) in custody and four-fifths on parole.

27. The National Security Court held that the PKK qualified as an "armed organisation" under Article 168 of the Criminal Code, that its aim was to bring about the secession of part of Turkey's territory and that it committed acts of violence such as murder, kidnapping and armed robbery. The court also held that Mr Zana's statement to the journalists, the exact terms of which had been established during the judicial investigation, amounted to an offence under Article 312 of the Criminal Code.

28. The applicant appealed on points of law on 3 April 1991. In a judgment of 19 June 1991, served on the applicant's representative on 18 July 1991, the Court of Cassation upheld the National Security Court's judgment.

29. In the meantime, on 16 April 1991, Mr Zana, who had just served the sentences imposed on him earlier, had been released.

30. On 26 February 1992 the Diyarbakır public prosecutor requested the applicant to report to Diyarbakır Prison in order to serve his latest sentence – one-fifth of the prison term, for the remainder of which he would be on parole.

II. RELEVANT DOMESTIC LAW

A. Substantive law

31. The relevant provisions of the Criminal Code at the material time provided:

Article 168

"It shall be an offence punishable by at least fifteen years' imprisonment to form an armed gang or organisation or to assume control or special responsibility within such a gang or organisation with the intention of committing any of the offences referred to in Articles 125 ...

It shall be an offence punishable by five to fifteen years' imprisonment to belong to such an organisation."

Article 312

"It shall be an offence, punishable by six months' to two years' imprisonment and a 'heavy' [ağ*ır*] fine of 6,000 to 30,000 liras publicly to praise or defend an act punishable by law as a serious crime or to urge the people to disobey the law.

It shall be an offence, punishable by one year's to three years' imprisonment and by a heavy fine of 9,000 to 36,000 liras, publicly to incite hatred or hostility between the different classes in society, thereby creating discrimination based on membership of a social class, race, religion, sect or region. Where such incitement endangers public safety, the sentence shall be increased by one-third to one-half.

..."

B. Procedure

32. Article 226 § 4 of the Code of Criminal Procedure at the material time provided:

"A person in custody in a prison situated outside the jurisdiction of the court which is to try him may be examined by other courts."

III. TURKEY'S DECLARATION OF 22 JANUARY 1990 UNDER ARTICLE 46 OF THE CONVENTION

33. On 22 January 1990 the Turkish Minister for Foreign Affairs deposited with the Secretary General of the Council of Europe the following declaration under Article 46 of the Convention:

"On behalf of the Government of the Republic of Turkey and acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, I hereby declare as follows:

The Government of the Republic of Turkey acting in accordance with Article 46 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, hereby recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the European Court of Human Rights in all matters concerning the interpretation and application of the Convention which relate to the exercise of jurisdiction within the meaning of Article 1 of the Convention, performed within the boundaries of the national territory of the Republic of Turkey, and provided further that such matters have previously been examined by the Commission within the power conferred upon it by Turkey.

This Declaration is made on condition of reciprocity, including reciprocity of obligations assumed under the Convention. It is valid for a period of 3 years as from the date of its deposit and extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

That declaration was renewed on 22 January 1993 for a period of three years and again on 22 January 1996, in slightly different terms, for two years.

PROCEEDINGS BEFORE THE COMMISSION

34. Mr Zana applied to the Commission on 30 September 1991. Relying on Article 6 §§ 1 and 3 and Articles 9 and 10 of the Convention, he complained of the length of the criminal proceedings, of an infringement of his right to a fair trial in that he had not been able to appear before the court which convicted him and had not been able to defend himself in his mother tongue (Kurdish), and of an interference with his freedom of thought and expression.

35. On 21 October 1993 the Commission declared the application (no. 18954/91) admissible as to the complaints concerning the length of the criminal proceedings, the applicant's absence from the hearing and the interference with his freedom of thought and expression and declared it inadmissible as to the remainder. In its report of 10 April 1996 (Article 31), it expressed the opinion that

(a) there had not been a violation of Article 10 of the Convention (fourteen votes to fourteen, with the President's casting vote);

(b) there had been a violation of Article 6 §§ 1 and 3 (c) of the Convention because the applicant had not been present at his trial (unanimously);

(c) there had been a violation of Article 6 § 1 of the Convention in that his case had not been heard within a reasonable time (twenty-three votes to five).

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

FINAL SUBMISSIONS TO THE COURT

36. In their memorial the Government requested the Court

> "(a) to declare that it has no jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;
>
> (b) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 6 of the Convention;
>
> in the alternative,
>
> (a) to declare that domestic remedies have not been duly exhausted as regards the complaints under Article 10 of the Convention;
>
> (b) to declare that there has not been a breach as regards the complaints under Article 6 of the Convention; and
>
> in the further alternative,
>
> to declare that there has been no breach of Article 10 of the Convention."

37. At the hearing, counsel for the applicant asked the Court to dismiss all the Government's preliminary objections and to rule that there had been breaches of Article 10 and Article 6 §§ 1 and 3 (c).

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

38. Mr Zana maintained that his conviction by the Diyarbakır National Security Court on account of his statement to journalists had infringed his

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* 1997), but a copy of the Commission's report is obtainable from the registry.

right to freedom of expression. He relied on 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."

39. He also complained of an interference with his right to freedom of thought, guaranteed by Article 9 of the Convention. Like the Commission, the Court considers that this complaint is bound up with the one made under Article 10.

A. The Government's preliminary objections

40. The Government raised two preliminary objections, one based on lack of jurisdiction *ratione temporis* and the other on failure to exhaust domestic remedies.

1. Lack of jurisdiction ratione temporis

41. The Government maintained, as their primary submission, that the Court had no jurisdiction *ratione temporis* to entertain the applicant's complaint under Article 10 of the Convention, given that the principal fact lay in the applicant's declaration to journalists in August 1987 (see paragraph 12 above), that is to say before Turkey recognised the compulsory jurisdiction of the Court. When, on 22 January 1990, Turkey had recognised the Court's compulsory jurisdiction in "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention had been, they said, to remove from the ambit of the Court's review events that had taken place before the date on which the declaration made under Article 46 of the Convention was deposited and also judgments relating to such facts even if they had been delivered after that date.

42. The Court points out that Turkey accepted its jurisdiction only in respect of facts and events subsequent to 22 January 1990, when it deposited its declaration (see paragraph 33 above). In the instant case, however, the Court considers, like the Delegate of the Commission, that the principal fact lay not in Mr Zana's statement to the journalists but in the

Diyarbakır National Security Court's judgment of 26 March 1991, whereby the applicant was sentenced to twelve months' imprisonment for having "defended an act punishable by law as a serious crime" under Turkish legislation (see paragraph 26 above), a judgment that was upheld by the Court of Cassation on 26 June 1991 (see paragraph 28 above). It was that conviction and sentence, subsequent to Turkey's recognition of the Court's compulsory jurisdiction, which constituted the "interference" within the meaning of Article 10 of the Convention and whose justification under that Article the Court must determine. This preliminary objection must accordingly be dismissed.

The question whether the Government should, in the light of their reference of the case to the Court (see paragraph 1 above), be regarded as estopped from relying on the terms of the declaration of 22 January 1990 to exclude this complaint on grounds of incompetence *ratione temporis* was not raised before the Court and the Court does not consider it necessary, in the circumstances, to determine that question.

2. Failure to exhaust domestic remedies

43. In the alternative, the Government pleaded failure to exhaust domestic remedies. Mr Zana, they said, had omitted to raise in substance his complaint under Article 10 of the Convention in the Turkish courts.

44. Like the Delegate of the Commission, the Court notes that this objection was not raised when the admissibility of the application was being considered and that there is therefore an estoppel.

B. Merits of the complaint

45. As the Court has already pointed out (see paragraph 42 above), the applicant's conviction and sentence by the Turkish courts for remarks made to journalists indisputably amounted to an "interference" with his exercise of his freedom of expression. This point was, indeed, not contested.

46. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such an aim or aims.

1. "Prescribed by law"

47. The Court notes that the applicant's conviction and sentence were based on Articles 168 and 312 of the Turkish Criminal Code (see paragraph 31 above) and accordingly considers that the impugned interference was "prescribed by law". This point was likewise undisputed.

2. Legitimacy of the aims pursued

48. The Government maintained that the interference had pursued legitimate aims, namely the maintenance of national security and public safety, the preservation of territorial integrity and the prevention of crime. As the PKK was an illegal terrorist organisation, the application of Article 312 of the Turkish Criminal Code by the national courts in the case had had the aim of punishing any act calculated to afford support to that type of organisation.

49. In the Commission's view, such a statement from a person with some political standing – the applicant is a former mayor of Diyarbakır – could reasonably lead the national authorities to fear a stepping up of terrorist activities in the country. The authorities had therefore been entitled to consider that there was a threat to national security and public safety and that measures were necessary to preserve the country's territorial integrity and prevent crime.

50. The Court notes that in the interview he gave the journalists the applicant indicated that he supported "the PKK national liberation movement" (see paragraph 12 above) and, as the Commission noted, the applicant's statement coincided with the murders of civilians by PKK militants.

That being so, it considers that at a time when serious disturbances were raging in south-east Turkey (see paragraphs 10 and 11 above) such a statement – coming from a political figure well known in the region – could have an impact such as to justify the national authorities' taking a measure designed to maintain national security and public safety. The interference complained of therefore pursued legitimate aims under Article 10 § 2.

3. Necessity of the interference

(a) General principles

51. The Court reiterates the fundamental principles which emerge from its judgments relating to Article 10:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for 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". 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 (see the following judgments: Handyside v. the

United Kingdom, 7 December 1976, Series A no. 24, p. 23, § 49; Lingens v. Austria, 8 July 1986, Series A no. 103, p. 26, § 41; and Jersild v. Denmark, 23 September1994, Series A no. 298, p. 26, § 37).

(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 (see the Lingens judgment cited above, p. 25, § 39).

(iii) In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. 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" (see the Lingens judgment cited above, pp. 25–26, § 40; and the Barfod v. Denmark judgment of 22 February 1989, Series A no. 149, p. 12, § 28). 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 (see the Jersild judgment cited above, p. 26, § 31).

(b) Application of the above principles to the instant case

52. Mr Zana submitted that his conviction and sentence were wholly unjustified. An activist in the Kurdish cause since the 1960s, he had always spoken out against violence. In maintaining that he was supporting the PKK's armed struggle, the Government had, he argued, misinterpreted what he had said. In reality he had told the journalists that he supported the national liberation movement but was opposed to violence, and he had condemned the massacres of women and children. At all events, he was not a member of the PKK and had been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action.

53. The Government, on the other hand, maintained that the applicant's conviction and sentence were perfectly justified under paragraph 2 of Article 10. They emphasised the seriousness of what the applicant had said at a time when the PKK had carried out a number of murderous attacks in south-east Turkey. In their submission, a State faced with a terrorist situation that threatened its territorial integrity had to have a wider margin of appreciation than it would have if the situation in question had consequences only for individuals.

54. The Commission accepted the Government's views for the most part and expressed the opinion that there had been no violation of Article 10.

55. The Court considers that the principles set out in paragraph 51 above also apply to measures taken by national authorities to maintain national security and public safety as part of the fight against terrorism. In this connection, it must, with due regard to the circumstances of each case and a State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations.

56. In the instant case the Court must consequently assess whether Mr Zana's conviction and sentence answered a "pressing social need" and whether they were "proportionate to the legitimate aims pursued". To that end, it considers it important to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time.

57. The Court takes as a basis the applicant's statement as published in the national daily newspaper *Cumhuriyet* on 30 August 1987 (see paragraph 12 above), which the applicant did not contest in substance. The statement comprises two sentences. In the first of these the applicant expresses his support for the "PKK national liberation movement", while going on to say that he is not "in favour of massacres". In the second he says "Anyone can make mistakes, and the PKK kill women and children by mistake."

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

59. The statement cannot, however, be looked at in isolation. It had a special significance in the circumstances of the case, as the applicant must have realised. As the Court noted earlier (see paragraph 50 above), the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

60. In those circumstances the support given to the PKK – described as a "national liberation movement" – by the former mayor of Diyarbakır, the most important city in south-east Turkey, in an interview published in a major national daily newspaper, had to be regarded as likely to exacerbate an already explosive situation in that region.

61. The Court accordingly considers that the penalty imposed on the applicant could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient"; at all events, the applicant served only one-fifth of his sentence in prison (see paragraph 26 above).

62. Having regard to all these factors and to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

63. Mr Zana complained of an infringement of the principle of a fair trial as he had been unable to appear at the hearing before the Diyarbakır National Security Court, and also of the length of the criminal proceedings against him. He relied on Article 6 §§ 1 and 3 of the Convention, which provide:

> "1. In the determination of … any criminal charge against him, everyone is entitled to a fair … hearing within a reasonable time by [a] … tribunal …
>
> …
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> …
>
> (c) to defend himself in person …"

A. The Government's preliminary objection

64. The Government pleaded, as their principal submission, failure to exhaust domestic remedies. The applicant, they said, had omitted to raise in substance his complaints under Article 6 §§ 1 and 3 in the Turkish courts.

65. Like the Delegate of the Commission, the Court notes that this objection was not raised when the application's admissibility was considered and that there is therefore an estoppel.

B. Merits of the complaints

1. Article 6 §§ 1 and 3 (c) of the Convention (fair trial)

66. Mr Zana submitted that his absence from the hearing at the National Security Court had prevented him from defending himself effectively. Had he been present, he would have been able to explain to the judges what his intentions had been when he had made his statement to the journalists.

67. The Government maintained that the applicant had several times appeared before courts acting under delegated powers, as provided in Article 226 § 4 of the Code of Criminal Procedure (see paragraph 32 above). In doing no more than raise objections to jurisdiction and in refusing to speak Turkish at those different hearings, Mr Zana had deliberately waived his right to defend himself on the merits. Furthermore, the presence of his lawyers at the hearing before the Diyarbakır National Security Court had been sufficient to satisfy the requirements of Article 6 § 3 (c).

68. The Court reiterates that the object and purpose of Article 6 of the Convention taken as a whole show that a person charged with a criminal offence is entitled to take part in the hearing. Moreover, sub-paragraphs (c) and (d) of paragraph 3 guarantee to "everyone charged with a criminal offence" the right "to defend himself in person" and "to examine or have examined witnesses", and it is difficult to see how these rights could be exercised without the person concerned being present (see the Colozza v. Italy judgment of 12 February 1985, Series A no. 89, p. 14, § 27; and the Monnell and Morris v. the United Kingdom judgment of 2 March 1987, Series A no. 115, p. 22, § 58).

69. In the instant case the Court notes that Mr Zana was not requested to attend the hearing before the Diyarbakır National Security Court, which sentenced him to a twelve-month prison term (see paragraph 26 above). In accordance with Article 226 § 4 of the Code of Criminal Procedure, the Aydın Assize Court had been asked to take evidence from him in his defence, under powers delegated by the National Security Court (see paragraphs 24 and 32 above).

70. Contrary to the Government's contention, the fact that the applicant raised procedural objections or wished to address the court in Kurdish, as he did at the hearing in the Aydın Assize Court, in no way signifies that he implicitly waived his right to defend himself and to appear before the Diyarbakır National Security Court. Waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the Colozza judgment cited above, p. 14, § 28).

71. In view of what was at stake for Mr Zana, who had been sentenced to twelve months' imprisonment, the National Security Court could not, if the trial was to be fair, give judgment without a direct assessment of the applicant's evidence given in person (see, *mutatis mutandis*, the Botten v. Norway judgment of 19 February 1996, *Reports of Judgments and Decisions* 1996-I, p. 145, § 53). If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intentions had been when he had made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording.

72. Neither the "indirect" hearing by the Aydın Assize Court nor the presence of the applicant's lawyers at the hearing before the Diyarbakır National Security Court can compensate for the absence of the accused.

73. The Court accordingly considers, as the Commission did, that such an interference with the rights of the defence cannot be justified, regard being had to the prominent place held in a democratic society by the right to a fair trial within the meaning of the Convention.

There has consequently been a breach of Article 6 §§ 1 and 3 (c) of the Convention.

2. Article 6 § 1 of the Convention (length of the proceedings)

(a) Period to be taken into consideration

74. The proceedings began on 30 August 1987, when the preliminary investigation in respect of the applicant was begun (see paragraph 13 above), and ended on 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above). They therefore lasted for almost three years and eleven months.

However, the Court can take cognisance of the complaint relating to the length of the criminal proceedings only from 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited (see paragraph 33 above). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (see, as the most recent authority, the Mitap and Müftüoğlü v. Turkey judgment of 25 March 1996, Reports 1996-II, p. 410, § 28). On the critical date the proceedings had already lasted two years and five months.

(b) Reasonableness of the length of the proceedings

75. The reasonableness of the length of proceedings is to be assessed in the light of the circumstances of the case, regard being had to the criteria laid down in the Court's case-law, in particular the complexity of the case and the conduct of the applicant and of the relevant authorities. It is also

necessary to take account of what is at stake for the applicant in the litigation (see the Philis v. Greece (no. 2) judgment of 27 June 1997, Reports 1997-IV, p. 1083, § 35).

76. In Mr Zana's submission, the case had not been complex and the excessive length of the criminal proceedings had been due solely to the conduct of the judicial authorities: his case had been transferred from the civil courts to the National Security Court, then to the Military Court and finally back to the National Security Court, going from Istanbul to Diyarbakır, then to Eskişehir and Aydın and finally back to Diyarbakır.

77. The Government underlined the issues of jurisdiction *ratione loci* and *ratione materiae* which the national courts had had to determine in that the applicant had made his statement in Diyarbakır military prison and it had appeared in a daily newspaper published in Istanbul. Furthermore, the attempts to find a co-defendant on the run and the conduct of Mr Zana and his lawyers had contributed to prolonging the proceedings in question. Lastly, the Court of Cassation's judgment had been delivered two years and two months after the Diyarbakır Military Court's decision that it had no jurisdiction.

78. The Court considers, as the Commission did, that the proceedings complained of were not particularly complex, the facts of the case being straightforward, notwithstanding the issues of jurisdiction that could arise.

79. As to the applicant's conduct, the Court reiterates that Article 6 does not require a person charged with a criminal offence to cooperate actively with the judicial authorities (see, among other authorities, the Yağcı and Sargın v. Turkey judgment of 8 June 1995, Series A no. 319-A, p. 21, § 66). It considers, like the Commission, that the applicant's conduct, even if it may to some extent have slowed down the proceedings, cannot, on its own, explain such a length of time.

80. The Court also notes that between 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited (see paragraph 33 above), and 18 July 1991, when the Court of Cassation's judgment was served (see paragraph 28 above), one year and six months elapsed. In that period the Diyarbakır National Security Court did not deliver its judgment until 26 March 1991 (see paragraph 26 above), that it is to say nine months after the hearing of 20 June 1990 at the Aydın Assize Court (see paragraph 24 above), during which the applicant had refused to speak Turkish.

81. The Commission also noted a period of inactivity attributable to the judicial authorities between the hearing before the Diyarbakır Military Court on 15 December 1987 (see paragraph 18 above), during which the applicant raised an objection to that court's jurisdiction, and the Military Court's decision of 18 April 1989 in which the court declared it had no jurisdiction (see paragraph 22 above).

82. Even if this latter period does not, strictly speaking, come within the Court's jurisdiction *ratione temporis*, it may nonetheless be taken into account in assessing whether the "reasonable time" requirement was satisfied.

83. The Court reiterates in this connection that Article 6 § 1 of the Convention guarantees to everyone against whom criminal proceedings are brought the right to a final decision within a reasonable time on the charge against him. It is for the Contracting States to organise their legal systems in such a way that their courts can meet this requirement (see, among many other authorities, the Mansur v. Turkey judgment of 8 June 1995, Series A no. 319-B, p. 53, § 68).

84. Lastly, what was at stake in the case was important to the applicant as he was already in custody when he made his statement to the journalists and was sentenced to a further term of imprisonment by the Diyarbakır National Security Court (see paragraph 26 above).

85. In the light of all the circumstances of the case, the Court cannot regard the length of the proceedings complained of as reasonable.

There has consequently been a violation of Article 6 § 1 of the Convention in this respect.

III. APPLICATION OF ARTICLE 50 OF THE CONVENTION

86. Article 50 of the Convention provides:

> "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. Damage

87. Mr Zana sought 250,000 French francs (FRF) for pecuniary damage and FRF 1,000,000 for non-pecuniary damage. He pointed to the ill-treatment he had allegedly sustained during his unlawful detention, the after-effects of which he was still suffering; the excessive length of the criminal proceedings had, moreover, prevented him from being given concurrent sentences, as provided in Law no. 3713 on the prevention of terrorism.

88. Referring to their preliminary objections and to their observations on the merits, the Government requested the Court, as their main submission, to dismiss the claim. In the alternative, they maintained that any finding of a breach would constitute sufficient just satisfaction; in the further alternative,

there was no causal link between any violation of the Convention and the alleged damage.

89. The Delegate of the Commission was in favour of awarding the applicant, if a breach of Article 6 was found, compensation in the amount of FRF 40,000, half of it in respect of the applicant's absence from his trial and the other half in respect of the excessive length of the proceedings.

90. As regards pecuniary damage, the Court considers that there is no causal link between the breaches found of Article 6 and the alleged damage. It does, on the other hand, consider that Mr Zana sustained indisputable non-pecuniary damage, for which the findings of breaches in paragraphs 73 and 85 above cannot compensate on their own. Making its assessment on an equitable basis, it awards him the sum of FRF 40,000 under this head, to be converted into Turkish liras at the rate applicable at the date of settlement.

B. Costs and fees

91. The applicant also sought reimbursement of the costs incurred and fees paid for his defence in Turkey and before the Convention institutions, which he estimated at FRF 142,000 in all.

92. In the Government's submission, the amounts claimed were excessive and unjustified.

93. The Delegate of the Commission proposed awarding FRF 30,000 for lawyers' fees and allowing reimbursement of the costs to the extent that they appeared justified.

94. On the basis of its case-law and the information in its possession, the Court decides on an equitable basis to award Mr Zana the sum of FRF 30,000 to be converted into Turkish liras at the rate applicable at the date of settlement, less the sum of FRF 20,980 received from the Council of Europe in legal aid.

C. Default interest

95. The Court deems it appropriate to adopt the statutory rate applicable in France at the date of adoption of the present judgment, which is 3.87% per annum.

FOR THESE REASONS, THE COURT

1. *Dismisses* by eighteen votes to two the objection to jurisdiction *ratione temporis* as regards the complaint under Article 10 of the Convention;
2. *Dismisses* unanimously the objection of failure to exhaust domestic remedies as regards the complaint under Article 10 of the Convention;

3. *Holds* by twelve votes to eight that there has not been a breach of Article 10 of the Convention;
4. *Dismisses* unanimously the objection of failure to exhaust domestic remedies as regards the complaints under Article 6 of the Convention;
5. *Holds* by seventeen votes to three that there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention on account of the applicant's absence from his trial;
6. *Holds* by nineteen votes to one that there has been a breach of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
7. *Holds* by eighteen votes to two that the respondent State is to pay the applicant, within three months, 40,000 (forty thousand) French francs in respect of non-pecuniary damage, to be converted into Turkish liras at the rate applicable at the date of settlement;
8. *Holds* by nineteen votes to one that the respondent State is to pay the applicant, within three months, 30,000 (thirty thousand) French francs, less 20,980 (twenty thousand nine hundred and eighty) French francs, already received in legal aid, for costs and lawyers' fees, to be converted into Turkish liras at the rate applicable at the date of settlement;
9. *Holds* by nineteen votes to one that simple interest at an annual rate of 3.87% shall be payable on those sums from the expiry of the above-mentioned three months until settlement;
10. *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 25 November 1997.

For the President

Signed: Rudolf BERNHARDT
Vice-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 dissenting opinion of Mr Matscher, joined by Mr Gölcüklü;
(b) partly dissenting opinion of Mr Lopes Rocha;
(c) partly dissenting opinion of Mr van Dijk, joined by Mrs Palm, Mr Loizou, Mr Mifsud Bonnici, Mr Jambrek, Mr Kūris and Mr Levits;
(d) dissenting opinion of Mr Thór Vilhjálmsson;
(e) dissenting opinion of Mr Gölcüklü.

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

PARTLY DISSENTING OPINION OF JUDGE MATSCHER, JOINED BY JUDGE GÖLCÜKLÜ

(*Translation*)

In my view, the wording of the relevant part of Turkey's declaration of 22 January 1990 under Article 46 of the Convention which says:

> "This Declaration … extends to matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to the date of deposit of the present Declaration."

is clear and its interpretation should not give rise to controversy. According to all the generally recognised rules of interpretation, the meaning of the text can only be the one given it by the respondent State's Government.

I accept that this reservation *ratione temporis* is somewhat unusual. It might also be asked whether it is to be regarded as valid, in view of its broad, general nature, but it cannot be denied that the text in itself is clear.

In the instant case the fact to which the text refers was the statement made by the applicant in August 1987, a few days before court proceedings were brought against him, on 30 August 1987. That being so, I consider it artificial and, accordingly, unsustainable to state (see paragraph 42 of the judgment) that "the principal fact" lay in the Diyarbakır National Security Court's judgment of 26 March 1991.

It follows that the complaints under Article 6 §§ 1 and 3 (c) (fair trial) and Article 10 fall outside the Court's jurisdiction *ratione temporis*.

PARTLY DISSENTING OPINION OF JUDGE LOPES ROCHA

(*Translation*)

I agree with all the conclusions of the majority of the Court, except for the finding of a breach of Article 6 §§ 1 and 3 (c) of the Convention. Primarily for reasons of consistency.

The Court holds, very properly, that there has been no breach of Article 10 of the Convention. In order to reach that conclusion the Court relied on a whole series of reasons, in particular ones relating to the content of Mr Zana's statement to the journalists from the daily newspaper *Cumhuriyet*, pointing out that this statement had a special significance in the circumstances of the case, as the applicant must have realised, and that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time.

The Court also considers that the penalty imposed on the applicant could reasonably regarded as answering a "pressing social need" and that the reasons adduced by the national authorities are "relevant and sufficient", especially as the applicant served only one-fifth of his sentence in prison.

Lastly, the Court, having regard to all these factors and to the margin of appreciation which national authorities have in such a case, considers that the interference in issue was proportionate to the legitimate aims pursued.

That said, I have difficulty in understanding why the Court has ruled that there has been a breach of Article 6 § 3 (c) of the Convention on the basis of Mr Zana's absence from the hearing of the Diyarbakır National Security Court, at which he could have said what his intentions had been when he had made his statement and in what circumstances the interview had taken place and summoned journalists as witnesses.

Logically, therefore, the Court should have taken the view that the applicant's "intentions" and the "evidence" of the journalists were indispensable for a just decision from the point of view of analysing the issue of a possible violation of Article 10 of the Convention.

The Court has decided, however, that in the circumstances of the case the content alone of the statement is sufficient to justify the interference in the light of paragraph 2 of Article 10.

Furthermore, there is nothing to show that it was impossible for the applicant to explain, at his hearing before the Aydın Assize Court, which is a judicial body, the true intentions underlying his statement to the journalists and to indicate those journalists as witnesses for the defence.

Besides, looking at the *whole* of the proceedings, before the various courts, I am not persuaded that he was deprived of the opportunity of defending himself in person.

The fact that the Security Court asked for him to be "examined" by the Aydın Assize Court, acting under delegated powers in accordance with Article 226 § 4 of the Code of Criminal Procedure, does not seem to me a decisive argument for concluding that there was no right to a fair trial within the meaning of Article 6 of the Convention.

As to a *tribunal* belonging to the Turkish court system, I do not see that the applicant was deprived of the right of everyone charged with a criminal offence to be tried by an independent and impartial tribunal established by law, before which he could defend himself in person, and to indicate defence witnesses and also seek to have them called before the National Security Court.

For these reasons I consider that there are no grounds for finding that there has been a breach of Article 6 §§ 1 and 3 (c) of the Convention.

PARTLY DISSENTING OPINION OF JUDGE VAN DIJK, JOINED BY JUDGES PALM, LOIZOU, MIFSUD BONNICI, JAMBREK, KŪRIS AND LEVITS

I fully endorse the reasoning and conclusions of the majority concerning the jurisdiction of the Court *ratione temporis* and concerning the Government's being estopped from raising the objection of non-exhaustion of domestic remedies. I am equally in agreement with the majority that Article 6 of the Convention has been violated in this case on account both of the applicant's absence from his trial and of the length of the criminal proceedings. However, I do not find it possible to join the majority in concluding that there has not been a breach of Article 10 of the Convention.

In the judgment, the majority summarise the three fundamental principles which the Court has applied so far when determining whether interferences with freedom of expression were necessary in a democratic society (see paragraph 51 of the judgment). In my opinion, however, there are no solid grounds for concluding, as the majority do after applying those principles to the instant case, that here the interference was necessary, and in particular was proportionate to the aim of maintaining national security and public safety.

Even if one accepts – and in view of the circumstances prevailing in south-east Turkey at the relevant time I am prepared to do so – that the maintenance of national security and public safety constituted a legitimate aim for the purpose of taking measures in respect of the statement made by the applicant, his conviction and twelve-month prison sentence for making that statement cannot, in my opinion, be held to be proportionate to those aims, considering the content of the statement. If the Government were of the opinion that the statement constituted a threat to national security and public safety, they could have taken more effective and less intrusive measures to prevent or restrict such harm. The fact that the applicant had to serve only one-fifth of his sentence in prison does not suffice to convert me to a different view, since I would also find a sentence of two months' imprisonment disproportionate in the circumstances of the case.

I base my opinion mainly on the following considerations, which are largely to be found in the judgment also:

(i) Freedom of expression constitutes one of the essential foundations of a democratic society (see paragraph 51 of the judgment). Although relying on the situation in south-east Turkey at the moment when the applicant made his

statement, the Government did not claim that the statement was not made in a democratic society and that it deserved less protection on that account.

(ii) Article 10 also applies to information or ideas that offend, shock or disturb (see paragraph 51 of the judgment). The mere fact that in his statement the applicant indicated support for a political organisation whose aims and means the Government reject and combat cannot, therefore, be a sufficient reason for prosecuting and sentencing him.

(iii) In assessing whether the interference was necessary, the Court must take into consideration the content of the remarks held against the applicant and the context in which he made them (see paragraph 51 of the judgment). In his statement the applicant expresses support for the PKK but at the same time dissociates himself to some extent from the violence used by the PKK. According to the applicant, he was misinterpreted by the Government and had in reality told the journalists that he was opposed to violence. He claimed that, as an activist in the Kurdish cause since the 1960s, he had always spoken out against violence and referred to having been imprisoned for belonging to the "Path of Freedom" organisation, which had always advocated non-violent action (see paragraph 52 of the judgment). This claim by the applicant as to the content of his statement and the personal background against which it had to be interpreted, was not dealt with by the Government or discussed by the majority in the judgment.

(iv) I have to grant the majority that the applicant's statement as recorded in *Cumhuriyet* is partly contradictory and ambiguous (see paragraph 58 of the judgment). However – and this is my main point of disagreement with the majority – the Court should have taken into consideration that the Turkish court which ultimately examined the charges against the applicant and convicted and sentenced him did not offer him any opportunity to explain what he had actually said and had meant to say and against what background the statement had to be interpreted. Indeed, when discussing the alleged violation of Article 6 §§ 1 and 3, the Court makes the following observation: "If the applicant had been present at the hearing, he would have had an opportunity, in particular, to say what his intention had been when he made his statement and in what circumstances the interview had taken place, to summon journalists as witnesses or to seek production of the recording" (see paragraph 71 of the judgment). If the Court deems the fact that this opportunity was withheld from the applicant relevant to its examination under Article 6, why did it not also take that fact into consideration when looking at the content and context of the statement in order to determine the proportionality of the interference?

(v) Finally, the statement having been made by "the former mayor of Diyarbakır, the most important city in south-east Turkey" (see paragraph 60 of the judgment), the Court should, in order to determine the possible effect

the statement might have had in the "already explosive situation in that region" (ibid.), have expressly indicated what weight it attached to the fact that the interview was with a *former* mayor who, moreover, was in prison at the relevant time.

These considerations lead me to the conclusion that the interference with the applicant's freedom of expression was not proportionate and amounted to a breach of Article 10. I therefore do not find it possible to concur with the majority in this part of the judgment.

DISSENTING OPINION OF JUDGE THÓR VILHJÁLMSSON

In August 1987 the newspaper *Cumhuriyet*, which is published in Istanbul, printed the following remarks made by the applicant to journalists who visited him in prison in Diyarbakır in south-east Turkey:

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

The plain meaning of these words is that the applicant has the same opinion as the PKK on the question of the status of the territory where Kurds live in Turkey but he disapproves of the methods used by this organisation. I have to believe that this public statement is in breach of Turkish law. However, I do not see how these words, published in a newspaper in Istanbul, can be taken as a danger to national security or public safety or territorial integrity, let alone that they endorse criminal activities.

Accordingly, I am of the opinion that the restrictions and the penalty imposed did not pursue a legitimate aim and were not necessary in a democratic society.

I have therefore found a violation of Article 10 of the Convention.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

As I have joined Mr Matscher's dissenting opinion concerning the validity of the limitation of the Court's jurisdiction *ratione temporis*, it is unnecessary for me to consider the case under Article 6 §§ 1 and 3 (c), but I would like all the same to emphasise certain relevant facts.

Thus, if the way the case proceeded is looked at, it can be seen that at the hearing before the Diyarbakır Military Court on 15 December 1987 the applicant refused to put forward a defence.

At the hearing on 1 March 1988 the applicant did not defend himself.

At the hearing on 2 November 1988 the applicant did not appear, because he was on hunger strike.

At the hearing on 7 December 1988 he appeared but refused to address the court.

At the hearing at Aydın Assize Court on 20 June 1990 the applicant refused to speak Turkish and insisted on addressing the court in his mother tongue, Kurdish (see paragraphs 18 et seq. of the judgment).

In those circumstances, can it be argued that the applicant was deprived of the opportunity of defending himself in person?