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

CASE OF ÖZTÜRK v. TURKEY

(application no. 22479/93)

JUDGMENT

STRASBOURG

28 September 1999

In the case of Öztürk 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*,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr L. CAFLISCH,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mrs S. BOTOUCHAROVA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrar*,

Having deliberated in private on 22 April and 20 September 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 24 September 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in an application (no. 22479/93) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Ünsal Öztürk, on 24 May 1993.

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.

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

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of former Rules of Court A[1], the applicant stated that he wished to take part in the proceedings and designated Mr H. Öndül of the Ankara Bar as the lawyer who would represent him (former Rule 30).

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, the President of the Court at the time, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's lawyer and Mr H. Danelius, the Delegate of the Commission, on the organisation of the written procedure. An order was made in consequence on 15 October 1998 fixing a time-limit for the submission of memorials.

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with the provisions of Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 11 December 1998 the President of the Court, Mr L. Wildhaber, decided that, in the interests of the proper administration of justice, the instant case should be referred to the Grand Chamber that had been constituted to hear thirteen other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); 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); Sürek v. Turkey (no. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94) and Sürek v. Turkey (no. 4) (no. 24762/94).

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

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

Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A.B. Baka, Mr R. Maruste and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

6. On 15 December 1998 the Registrar received the memorial of the applicant, to whom the President had given leave to use the Turkish language in the written procedure (Rule 34 § 3).

7. On 21 December 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case in the light of the decision of the Grand Chamber taken in accordance with Rule 28 § 4 in the case of Oğur v. Turkey. On 11 January 1999 the Government notified the Registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

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

8. On 8 February 1999, within the time-limit as extended by the President, the Registry received the Government's memorial, written in Turkish, and on 22 February it received a corrected version of the documents appended to the memorial. The applicant and the Government filed replies on 15 and 16 March respectively. On the last-mentioned date the Government also supplied information in response to the Judge Rapporteur's questions about the facts of the case and Turkish law. On 30 March they sent the Registry documents intended to be appended to their memorial in reply. On 20 April the Registry received the English version of the Government's memorial.

9. On 22 April 1999 the Grand Chamber decided to dispense with a hearing, having regard to the case file and the fact that the applicant and the Government had stated that they were prepared to forgo such a hearing (Rule 59 § 2).

10. On 20 September 1999 Mr L. Caflisch, substitute, replaced Mr Makarczyk, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. Mr Öztürk, the applicant, was born in 1957. He is one of the owners of the Yurt Kitap-Yayın publishing house and lives in Ankara.

In October 1988 he published a book by N. Behram entitled *A testimony to life – Diary of a death under torture* (*Hayatın Tanıklığında – İşkencede Ölümün Güncesi*). The book gave an account of the life of İbrahim Kaypakkaya, who in 1973 had been one of the founder members of the

Communist Party of Turkey – Marxist-Leninist (*Türkiye Komünist Partisi – Marksist-Leninist* – "the TKP-ML"), an illegal Maoist organisation.

The 111-page book, illustrated by photographs, has 24 chapters, each of which is prefaced by a poem. These poems were written by four Turkish poets, namely the author himself, A. Arif, M. Derviş and A. Kadir, by the Chilean writer P. Neruda and by İbrahim Kaypakkaya.

As the first edition had sold out as soon as it was placed on sale, the book was republished in November 1988.

12. On 21 December 1988 the public prosecutor at the Ankara National Security Court ("the National Security Court") instituted criminal proceedings against Mr Behram, the author of the book, and the applicant, its publisher. However, he dealt with the case against Mr Behram separately, having noted that he had not been in Turkey at the material time.

A. The proceedings brought against Mr Öztürk

13. On 23 December 1988, at the request of the public prosecutor, a single judge of the National Security Court made an interim order for the seizure of the copies of the second edition. According to the file, 3,195 copies were seized as a result, including 3,133 at the applicant's publishing house.

On 5 January 1989 the applicant asked the judge to reconsider the above order; this appeal was dismissed.

14. On 14 February 1989 the public prosecutor charged the applicant with disseminating communist propaganda in breach of former Article 142 §§ 4 and 6 of the Criminal Code (see paragraph 29 below) and of inciting the people to hatred and hostility on the basis of a distinction between social classes, an offence under Article 312 §§ 2 and 3 of the same Code (see paragraph 30 below).

Referring to İ. Kaypakkaya's antecedents, the public prosecutor emphasised that at the head of the TKP-ML, a terrorist organisation, he had carried out armed raids with a view to overthrowing the constitutional order of the State in order to set up a communist regime.

In support of his submissions the public prosecutor first drew attention to the description of İ. Kaypakkaya's father given on the second page of the book: "He was a worker who could not accept that life should flow by in that way, and that sweat, energy and labour should be exploited like that. He was dissatisfied with this state of affairs and wanted that forlorn world to change". The public prosecutor argued that by equating the status quo with a spoliatory regime this sentence undoubtedly praised communism.

The public prosecutor went on to cite the following poems.

> "... Ambushes guide me towards my people,
> vital force of the guerilla war;
> resistance is a terrible and noble passion,

but that is not all;
like a mistress, it is in addition
hesitant,
docile,
delicate,
deft;
we who are masters of patriotism,
hope
is hidden within us, the immortal standard is red
and streams out in the wind ...”

((p. 15) A. Arif, published in January 1974 in the weekly publication *Yeni A*)

According to the public prosecutor, this poem was to be interpreted in the light of the actions of İ. Kaypakkaya. Seen from that point of view, it insinuated that terrorist acts enabled their perpetrators to draw closer to the people and recruit active terrorists from among them and that it was necessary to struggle patiently to establish a communist regime. In his submission, that amounted to illegal communist propaganda.

“To our dead comrades

You, who gave your lives for our people;
You, who gave everything in this fight;
You, who gave the colour red
To the battle standard
Which flies proudly in our hearts;
You, who died for our immortal people;
You, the sublime sons of our people,
Rest now with pride and patience,
Your comrades are carrying on the fight ...”

((p. 27) İ. Kaypakkaya)

The public prosecutor observed that this text honoured the memory of the dead terrorists who had sought to undermine the State’s constitutional regime by force of arms and was intended, particularly in its last phrase, to stir up hatred and hostility.

“... The only light
That awoke us
Was the light of the world!
I went into their houses
Where they sat round the table
After returning from their work;
They laughed or wept
And each resembled the others;
They turned their faces towards the light,
Seeking their way ...”

((p. 30) P. Neruda)

The public prosecutor argued that this poem constituted communist propaganda because it held up communism as the only source of light for proletarians.

> "... They carried out the death sentence;
> They spattered with blood
> The blue mist of the mountains and
> The newly woken morning breeze;
> Then they came [and put down their] weapons.
> Carefully feeling our chests,
> They examined us,
> Searching everywhere ..."
>
> ((p. 35) A. Arif, "Your absence made me wear out chains", 1968)

The public prosecutor contended that these phrases were contemptuous of the security forces who had to stand against the terrorists and thus incited the people to show hatred and hostility towards them.

Lastly, he noted that the expression "May their virtue be our guide and their memory a light on our way", which appeared on the very last page of the book, referred to İ. Kaypakkaya and the other terrorists.

Consequently, the public prosecutor argued that the enthusiastic eulogy of the personality and acts of the rebel İ. Kaypakkaya in the book in issue justified both Mr Öztürk's conviction as the publisher responsible within the meaning of section 16(4) of the Press Act (Law no. 5680 – see paragraph 32 below) and confiscation of the copies of the book pursuant to Article 36 § 1 of the Criminal Code (see paragraph 28 below).

15. Before the National Security Court the applicant contested the charges, submitting that he had published the book because he considered that there was nothing in it which could justify repressive measures. In addition, his lawyers argued in particular that the passages in issue, reproduced in the indictment, could not by any means be taken for separatist propaganda and that even supposing that they could be regarded as a criticism of the State as constituted at that time, it was the right of every citizen to make such a criticism.

16. On 30 March 1989 the National Security Court found the applicant guilty as charged.

In its judgment, after stating that it was satisfied "that there [was] no need to ask experts to examine the book, given that its content [could] be understood by anyone on the first reading ...", the National Security Court accepted that the passages cited in the indictment did indeed praise the aim and the armed raids of the TKP-ML and its leader and accordingly that the public prosecutor was fully justified in interpreting them as open incitement of the people to hatred and hostility. However, observing that it had considered the content of the book as a whole – in accordance with the case-law of the Court of Cassation – the National Security Court dismissed the

defence arguments relating precisely to the alleged lack of relevance of an assessment based on this or that isolated extract from the book.

Considering that it was not necessary to reproduce in the operative provisions of the judgment the passages judged to be in breach of the law, the National Security Court held:

> "All things considered, the book is intended to glorify and venerate both communism and the terrorist İ. Kaypakkaya ... who was a supporter of communism, and to defend his actions ... Moreover, [the book] expressly incites the people to hatred and hostility on the basis of a distinction between regions, social classes and races."

The National Security Court sentenced Mr Öztürk to fines of 328,500 and 285,000 Turkish liras (TRL) under Article 142 § 4 and Article 312 § 2 of the Criminal Code respectively (see paragraphs 29 and 30 below) and ordered the book's confiscation (see paragraph 28 below).

17. By a judgment of 26 September 1989 the Court of Cassation declared an appeal by the applicant on points of law inadmissible as regards his conviction under Article 312 of the Criminal Code, on the ground that no appeal lay against it in view of the amount of the fine ordered for the offence concerned. However, it set aside the verdict under Article 142 § 4 on the ground that it was unlawful to establish the accused's guilt merely by referring to the indictment without stating, with reasons, how and in what parts the book was an apologia of communism. It remitted the case on this point to the National Security Court.

18. On 9 January 1990 the applicant paid the fine of TRL 285,000.

19. In the judgment it delivered on 28 December 1990 the National Security Court, basing its decision on an expert report on the content of the book, confirmed the sentence it had imposed under Article 142 of the Criminal Code; it also upheld its order for the confiscation of the book.

However, on 1 March 1991 this judgment was likewise quashed by the Court of Cassation, on the ground that the report on which it was based had not been written by experts who had taken the oath. The case was then once again remitted to the National Security Court.

20. Before the National Security Court the public prosecutor called for Mr Öztürk's acquittal on the charge of disseminating communist propaganda. He submitted that Article 142 of the Criminal Code, on which the conviction in question had been based, had been repealed by the Prevention of Terrorism Act (Law no. 3713), which had come into force on 12 April 1991.

By a judgment of 11 June 1991 the National Security Court accepted the public prosecutor's submissions. However, observing that the judgment delivered on 30 March 1989 had become final with regard to the conviction under Article 312 of the Criminal Code (see paragraph 17 above), it noted that the confiscation order remained operative.

It appears from the file that 2,845 confiscated copies of the book were destroyed on 21 April 1992.

B. The proceedings brought against the author

21. On 1 March 1989, that is before the date of Mr Öztürk's initial conviction (see paragraph 16 above), the public prosecutor charged the book's author, Mr N. Behram, then living in Germany. The indictment filed for that purpose was essentially a copy of the one which had set in motion the proceedings against the applicant (see paragraph 14 above).

22. By a judgment of 22 May 1991, given in the defendant's absence, the National Security Court, composed of three judges of whom one had also tried the case of Mr Öztürk, observed firstly that the court was not required to rule on application of Article 142, which had been repealed in the meantime (see paragraph 29 below), then acquitted Mr Behram on the basis of an expert report, in which three professors of criminal law maintained that there was nothing in the book which might be held to constitute the offence defined in Article 312 of the Criminal Code.

In its judgment the National Security Court, emphasising the book's documentary nature, confined itself to an endorsement of the conclusions of the above-mentioned expert report.

23. This judgment became final, no appeal on points of law having been lodged.

C. The further proceedings brought by the applicant

24. On 19 September 1991 the applicant, having been informed of Mr Behram's acquittal, applied to the Minister of Justice asking him to refer the case to the Court of Cassation (*Yazılı emir ile bozma* – see paragraph 33 below) by means of an appeal against his conviction under Article 312 of the Criminal Code and against the confiscation order (see paragraph 16 above). In support of his application the applicant pleaded the contradiction between the judgment given against him and the judgment given in respect of the author, whereas both of them had been tried on account of the same book.

25. Consequently, on 16 January 1992, by order of the Minister of Justice, Principal State Counsel at the Court of Cassation ("Principal State Counsel") appealed against the judgment delivered on 28 December 1990 in the applicant's case (see paragraph 19 above), pleading the lack of an explicit decision on what was to be done about the confiscation order.

After the Court of Cassation's dismissal of the appeal on 27 January 1992 the applicant applied for a second time to the Minister of Justice, submitting that Principal State Counsel had appealed on the wrong grounds.

The Minister of Justice allowed this application and instructed Principal State Counsel to argue that the judgment of 30 March 1989 (see paragraph 16 above) was bad in so far as the author himself had subsequently been acquitted of charges identical to those which had led to Mr Öztürk's conviction for incitement of the people to hatred and hostility (see paragraph 22 above).

26. In its judgment of 8 January 1993 the Court of Cassation dismissed the ground of appeal submitted by Principal State Counsel, ruling as follows:

> "The defendant was charged with the offences contemplated in Article 142 §§ 4 and 6 and Article 312 §§ 2 and 3 of the Criminal Code. The constituent elements of those offences were different. The acquittal of another accused tried for the same offence cannot be taken as justified and unshakeable evidence that the defendant should also have been acquitted. [In addition] the two accused were tried separately and the judgment acquitting Mustafa Nihat [Behram] became final without any appeal on points of law being lodged. Lastly, there is no evidence that the assessment of the content of the book *A testimony to life – Diary of a death under torture* made in the judgment at first instance is bad and must be invalidated ..."

27. At the present time Mr Behram's book is on open sale. It is published by another publishing house, Altınçağ Yayıncılık, under the different title *Biography of a communist* (*Bir komünistin biyografisi)*.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

28. Article 36 § 1 of the Criminal Code provides:

> "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 ..."

29. The relevant paragraphs of former Article 142 of the Criminal Code, repealed by the Prevention of Terrorism Act (Law no. 3713), provided:

> "Harmful propaganda
>
> 1. A person who by any means whatsoever spreads propaganda with a view to establishing the domination of one social class over the others, annihilating a social class, overturning the fundamental social or economic order established in Turkey or the political or legal order of the State shall, on conviction, be liable to a term of imprisonment of from five to ten years.

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

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

4. A person who publicly condones the offences contemplated in the above paragraphs shall, on conviction, be liable to a term of imprisonment of from two to five years.

...

6. Where the offences contemplated in the above paragraphs are committed through publication, the penalty to be imposed shall be increased by half."

30. Article 311 § 2 and Article 312 of the Criminal Code provide:

Article 311 § 2

"Public incitement to commit an offence

…

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

Article 312

"Non-public incitement to commit an offence

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

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

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

31. With regard more particularly to application of the above-mentioned Article 312 of the Criminal Code to the publishers of printed matter giving rise to criminal charges, the Government have submitted examples of judgments given by the Court of Cassation and supplied further information which may be summarised as follows.

In connection with offences committed through the medium of printed matter, the "principal" responsibility for the offence defined in Article 312 is incurred by the author of the writing concerned. The publisher's responsibility is "secondary" and is incurred under section 16(4) of Law no. 5680 (see paragraph 32 below). A publisher facing criminal proceedings is charged with "publishing the writing which constitutes the offence" contemplated in Article 312. However, there are provisions, such as section 8 of the Prevention of Terrorism Act (Law no. 3713), which form a *lex specialis* making publishers criminally responsible.

The main effect of the distinction drawn between the responsibility borne by authors and that borne by publishers is that, unlike the position regarding the former, prison sentences imposed on the latter are commuted to a fine, save in those cases where the above-mentioned Law no. 3713 applies.

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

32. Section 3 and section 16(4) of Law no. 5680 provide:

Section 3

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

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

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

Section 16(4)

"...

4. With regard to offences committed through the medium of publications other than periodicals, criminal responsibility shall be incurred by the author, translator or illustrator of the publication which constitutes the offence, and by the publisher. However, custodial sentences imposed on publishers shall be commuted to a fine, irrespective of the term [of imprisonment] ..."

3. The Code of Criminal Procedure

33. Article 343 § 1 of the Code of Criminal Procedure, concerning references to the Court of Cassation by written order of the Minister of Justice (*Yazılı emir ile bozma* – "reference by written order") provides:

> "Where the Minister of Justice has been informed that a judge or court has delivered a judgment that has become final without coming under the scrutiny of the Court of Cassation, he may issue a formal order to Principal State Counsel requiring him to ask the Court of Cassation to set aside the judgment concerned ..."

34. With regard to the practice followed under Turkish law for a reference by written order, the Government have submitted the following information.

This form of appeal lies only against judgments given at last instance which are not appealable to the Court of Cassation (see paragraph 17 above) or against which no party has lodged an appeal on points of law. Only Principal State Counsel at the Court of Cassation is empowered to refer a case, and then only on receipt of a formal order to that effect from the Minister of Justice, who may act either of his own motion or at the request of the convicted person. The powers conferred on the Court of Cassation when it deals with such an appeal are "extraordinary"; they may not be exercised save under the conditions laid down by law nor may the decision prejudice the convicted person. If the appeal succeeds, the Court of Cassation will normally, in the judgment delivered as a result, set aside the conviction or reduce the sentence; in the latter case, it will also determine what length of sentence must be served.

B. Criminal case-law submitted by the Government

35. The Government have supplied, by way of example, a number of judgments given by the Court of Cassation concerning the way courts of trial have assessed writings and/or speech that have given rise to prosecutions, particularly for offences defined in former Article 142 and Article 312 of the Criminal Code (see paragraphs 29 and 30 above) and the offence contemplated in section 8 of the Prevention of Terrorism Act (Law no. 3713). These were judgments nos. 1991/18, 1994/240 and 1995/98, given by the plenary Court of Cassation, and judgments nos. 1974/2, 1978/4806, 1985/1682, 1989/2439, 1993/664, 1993/1066, 1993/1388, 1994/6080, 1996/4387 and 1996/8450, given by its Criminal Divisions.

One principle which emerges from this case-law is that the first-instance judgment must be based on an assessment of the whole of the writing and/or speech in issue. As regards assessment of the material constituting the offence defined in Article 312 of the Criminal Code, the Court of Cassation has made it clear, particularly in the above-mentioned judgment no. 1974/2, that the offence of "incitement" consists in an act "capable of endangering

public safety and public order" irrespective of whether the incitement has actually produced that result. In addition, in judgment no. 1994/6080, in setting aside a conviction under Article 312, the Court of Cassation would appear to have confined itself to noting the "remote" nature of the danger posed by the "incitement" in issue. Moreover, as regards the imposition of heavier sentences on account of aggravating circumstances, the Court of Cassation has held that such circumstances must be considered in relation to the existence of a grave and imminent danger threatening the general security of the country or the public. Lastly, in one of these cases, the Court of Cassation stressed the extreme importance – for the protection of the right to a fair trial – of the rule that the accused must always have the opportunity to speak last, before the judges rule.

PROCEEDINGS BEFORE THE COMMISSION

36. Mr Öztürk applied to the Commission on 24 May 1993. Relying on Article 9 of the Convention, he maintained that his conviction as publisher of the book even though the author himself had been acquitted amounted to an infringement of his right to freedom of thought. He also complained that confiscation of the copies of the book he had published had infringed his right to the peaceful enjoyment of his possessions, guaranteed by Article 1 of Protocol No. 1.

37. On 7 April 1997 the Commission declared the application (no. 22479/93) admissible, but expressed the opinion that the complaint concerning infringement of the right to freedom of thought should be considered under Article 10 of the Convention. In its report of 30 June 1998 (former Article 31 of the Convention), it expressed the unanimous opinion that there had been a violation of Article 10. It also expressed the opinion that it was not necessary to examine the complaint of a violation of Article 1 of Protocol No. 1 (thirty votes to one). The full text of the Commission's opinion is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

38. In his memorials the applicant, while agreeing with the Commission that there had been a violation of Article 10 of the Convention, requested the Court to hold that Article 312 § 2 of the Criminal Code, regard being

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

had to the material and legal content of the offence defined therein, was in breach as such of that provision of the Convention. In addition, he maintained his complaint of a violation of Article 1 of Protocol No. 1, pleading the pecuniary loss he had allegedly sustained on account of the events in issue in the present case, particularly confiscation of the book. Lastly, he asked the Court to award him a sum in respect of pecuniary damage under Article 41 of the Convention.

39. The Government, for their part, asked the Court to hold that a reference to the Court of Cassation by written order was not a remedy that was required to be exhausted for the purposes of Article 35 (former Article 26) of the Convention or one which was capable of causing a further period of six months within the meaning of that provision to begin to run.

With regard to the merits, they asked the Court to dismiss the application, taking into account

> "[the fact] that at the time when the judgment was rendered there was a pressing social need justifying the confiscation of the book and the conviction of [Mr Öztürk], ... that within the past ten years [criminal] laws and their application have totally changed, ... that the fine imposed on [the applicant] was a very minor one [and] that later editions of the book published by another publisher are freely sold in Turkey".

THE LAW

I. SCOPE OF THE CASE

40. In his application to the Commission Mr Öztürk complained that his conviction had breached Article 9 of the Convention (see paragraph 36 above). In his memorials to the Court, however, he did not submit argument in support of that complaint, making no more than a passing reference to Article 9. He can therefore not be considered to have maintained it before the Court, which can see no reason to examine it of its own motion (see, *mutatis mutandis*, the Yaşa v. Turkey judgment of 2 September 1998, *Reports of Judgments and Decisions* 1998-VI, p. 2428, § 60).

The Court's examination will accordingly be confined to the complaints under Article 10 of the Convention and Article 1 of Protocol No. 1.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

41. Mr Öztürk submitted that his conviction of an offence under Article 312 of the Criminal Code had breached 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."

A. The Government's preliminary objection

42. Before the Court the Government maintained that in the present case the final decision for the purposes of Article 35 (former Article 26) of the Convention was the National Security Court's judgment of 30 March 1989 (see paragraphs 16 and 17 above). They therefore considered that as the application to the Commission had been lodged on 24 May 1993 the Commission should have declared it inadmissible on the ground that it was out of time (see paragraph 36 above).

They submitted that the Commission had wrongly calculated the six-month period from 8 January 1993 when the Court of Cassation gave judgment on the second reference by written order lodged by Principal State Counsel (see paragraph 26 above); it would have been sufficient for the Commission to note that because of the extraordinary nature of the remedy concerned its use could not cause a new six-month period to begin to run.

In conclusion, the Government asked the Court to hold that in the present case there had been "an erroneous application" of (former) Article 26 of the Convention.

43. The applicant made no observations on this point.

44. The Court considers that the above arguments amount to an objection on the ground of failure to comply with the six-month rule and notes that in their preliminary observations on admissibility the Government likewise objected that the application was out of time. With regard to the starting-point of the six-month period, however, they referred before the Commission to the date on which the first reference by written order was dismissed (see paragraph 25 above), not that on which the second was dismissed (see paragraph 42 above).

Be that as it may, the Court considers that this preliminary objection is unfounded, for the following reasons.

45. The Court notes that the reference by written order (*Yazılı emir ile bozma*) provided for in Turkish law is an extraordinary remedy available against judgments given at last instance against which no appeal lies to the

Court of Cassation. According to Article 343 of the Code of Criminal Procedure (see paragraphs 33 and 34 above), only Principal State Counsel at the Court of Cassation is empowered to refer a case, but he may do so only on the formal instructions of the Minister of Justice. The remedy in question is therefore not directly accessible to people whose cases have been tried. Consequently, regard being had to the generally recognised rules of international law, it is not necessary for this remedy to have been used for the requirements of Article 35 of the Convention to be held to have been satisfied.

It follows that a reference by written order should not in principle be taken into consideration for the purposes of the six-month rule. However, it is a different matter where, as in the present case, this remedy has actually been exercised.

In that case it becomes similar to an ordinary appeal on points of law, in that it gives the Court of Cassation the opportunity to set aside the impugned judgment, if necessary, and remit the case to the lower court, and therefore to remedy the situation criticised by the person whose case has been tried.

And in order to determine whether the conditions laid down in Article 35 of the Convention have been satisfied the Convention organs have always taken appeals on points of law into consideration. The Court observes in addition that in the present case the argument submitted by Principal State Counsel in support of the second reference by written order was in fact considered by the Court of Cassation (see paragraph 26 above), which, moreover, gave judgment as a court of last instance. The fact that the appeal was declared ill-founded on the ground that the case had not revealed any manifest breach of the law takes nothing away from that finding.

46. In conclusion, the Court considers, like the Commission, that by requesting the Minister of Justice to refer his case to the Court of Cassation the applicant set in motion a procedure which, in the present case, proved to be effective, and that the six-month period did indeed begin to run on 8 January 1993, the date of the Court of Cassation's judgment on the second reference.

As Mr Öztürk therefore lodged his application in good time, the Government's objection must be dismissed.

B. Merits of the complaint

1. Existence of an interference

47. The Government submitted that Mr Öztürk's conviction in the capacity of publisher could not be regarded as an infringement of his freedom of expression. N. Behram was the author and real beneficiary of the right to freedom of expression, and no restriction of Mr Behram's right to

impart or express opinions could be alleged since he had been acquitted (see paragraph 22 above) and his work had been on open sale in Turkey since 1991 (see paragraph 27 above).

48. The applicant did not make any observation on this point.

49. The Court would first point out that Article 10 guarantees freedom of expression to "everyone". No distinction is made in it according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (see, *mutatis mutandis*, the Casado Coca v. Spain judgment of 24 February 1994, Series A no. 285-A, pp. 16-17, § 35). It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the means necessarily interferes with the right to receive and impart information (see, *mutatis mutandis*, the Autronic AG v. Switzerland judgment of 22 May 1990, Series A no. 178, p. 23, § 47). Admittedly, publishers do not necessarily associate themselves with the opinions expressed in the works they publish. However, by providing authors with a medium they participate in the exercise of the freedom of expression, just as they are vicariously subject to the "duties and responsibilities" which authors take on when they disseminate their opinions to the public (see, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 63, ECHR 1999-IV; see also paragraph 31 above).

In short, the Court considers that Mr Öztürk's conviction for helping to publish and distribute Mr Behram's book unquestionably constituted interference with the exercise of his freedom of expression under the first paragraph of Article 10 (see, *mutatis mutandis*, the Engel and Others v. the Netherlands judgment of 8 June 1976, Series A no. 22, p. 40, §§ 94-95, and the Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133, p. 19, §§ 27-28).

2. Justification for the interference

50. Such interference breaches Article 10 unless it satisfies the requirements of the second paragraph of that Article. 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. The Court will examine each of these criteria in turn.

(a) "Prescribed by law"

51. The applicant submitted that while it was legitimate to punish "incitement of the people to crime", Article 312 § 2 of the Criminal Code could not be held to be compatible with the requirements of Article 10 of the Convention since it did not define sufficiently clearly the constituent elements of the offence it made punishable.

52. The Government rejected this argument, asserting in particular that the Turkish courts applied the legislation in issue in accordance with the principles laid down and developed in the case-law of the Court of Cassation, to the effect that courts are required to ascertain whether this or that instance of speech or writing is capable of creating an imminent danger to public order, while taking into account the particular circumstances of each case (see paragraph 35 above). Read in the light of the case-law on the question, the wording of the impugned provision was precise enough for people to be able to foresee whether or not a given act would constitute the offence contemplated in it.

53. The Commission considered that Article 312 § 2 of the Criminal Code provided a sufficient basis for the applicant's conviction.

54. The Court refers to its established case-law to the effect that one of the requirements flowing from the expression "prescribed by law" is the foreseeability of the measure concerned. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice (see *Rekvényi v. Hungary* [GC], no. 25390/94, § 34, ECHR 1999-III).

55. The Court recognises that in the area under consideration it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may be called for to enable the national courts to assess whether a publication should be considered separatist propaganda capable of inciting others to hatred and hostility. However clearly drafted a legal provision may be, there will inevitably be a need for interpretation by the courts, whose judicial function is precisely to elucidate obscure points and dispel any doubts which may remain regarding the interpretation of legislation (see, *mutatis mutandis*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 39, ECHR 1999-IV, and *Rekvényi* cited above, loc. cit.).

In the present case the Court observes that, contrary to the applicant's assertions, Article 312 § 2 does not give the National Security Courts excessive discretion to interpret the constituent elements of the offence it defines. The text in issue (see paragraph 30 above) makes it an offence to incite people to hatred and hostility when this is done on the basis of a distinction drawn in terms of a number of criteria which are exhaustively listed therein, and it provides for increased sentences in the event of conduct which endangers public safety. The third paragraph of Article 312 refers

moreover to Article 311 § 2, which contains indications of the types of publications and forms of dissemination through which the offence may be committed. In addition, the case-law on the question cited by the Government lays down certain principles governing the classification and punishment of incitement to commit an offence (see paragraphs 35 and 52 above).

56. The Court notes that in respect of the same book two different benches of the National Security Court gave divergent interpretations and classifications and reached two contradictory decisions (see paragraphs 16 and 22 above). It considers, however, that that is not sufficient to justify *in abstracto* the conclusion that Article 312 § 2 of the Criminal Code lacked the required clarity and precision, or that the interpretation made by the National Security Court when it convicted Mr Öztürk went beyond what might reasonably have been expected, although it is, in the Court's opinion, one specific aspect to be taken into consideration for the purpose of assessing the necessity in a democratic society of the interference in issue, regard being had to the arguments the Government submitted on that question (see paragraphs 61 and 67 below).

57. In short, the Court, like the Commission, accepts that the interference with the applicant's right to freedom of expression, being the result of his conviction under Article 312 § 2 of the Criminal Code, may be considered to have been prescribed by law (see, *mutatis mutandis*, the following judgments: *Ceylan v. Turkey* [GC], no. 23556/94, § 25, ECHR 1999-IV; Incal v. Turkey of 9 June 1998, *Reports* 1998-IV, pp. 1564-65, § 41; and Zana v. Turkey of 25 November 1997, *Reports* 1997-VII, p. 2546, § 47).

(b) Legitimate aim

58. The Court notes that no argument was submitted to it on this question by the parties to the dispute. The Commission considered that the applicant had been convicted in the interest of "national security".

59. Having regard to the sensitive nature of the fight against terrorism, the need for the authorities to exercise vigilance when dealing with actions likely to exacerbate violence, and the reasons set out in the judgment given by the National Security Court on 30 March 1989 (see paragraph 16 above), the Court considers that it can accept that the applicant's conviction pursued two aims compatible with Article 10 § 2, namely the prevention of disorder or crime.

(c) "Necessary in a democratic society"

(i) Arguments submitted to the Court

60. Mr Öztürk submitted that when he published a first and then a second edition of the book he was convinced that there was nothing illegal

in it. There was no justification for the penalties imposed on him on account of the opinions expressed in the book either under the Convention or under domestic law. In that connection he observed that, two years after he himself had been convicted under Article 312 of the Criminal Code, Mr N. Behram, the book's author, had been acquitted of the same charges; since then the book had been on open sale in Turkey and no one to date had been prompted to commit a crime by reading it.

In the applicant's submission this paradoxical situation illustrated the way in which the Turkish authorities had made improper use of Article 312 § 2 in order to punish politicians, human rights activists and intellectuals.

61. The Government replied in the first place that the applicant could not rely on the fact that the author of the book had been acquitted to support his assertion that he was a victim of a violation of Article 10 of the Convention. Although the National Security Court, after convicting the applicant on 30 March 1989, had acquitted the author of the book on 22 May 1991, that had only been the result of the way application of Article 312 § 2 of the Criminal Code had been influenced by "changes in the world as regards the threat of communism" and "developments in the case-law" that had taken place in the meantime. But a change in case-law or a development in the application of a particular law had no retrospective effect which could benefit the applicant.

The Government submitted that where a violation of the Convention had been committed initially but subsequently made good, as in the present case, there should be no further ruling on the question. Moreover, it would be inequitable to conclude that Turkey was at fault without taking into account the changes mentioned above. In support of this argument they observed that even if the Court found a violation of the Convention in the present case, the judgment given as a result would not have any bearing on Mr Öztürk's present situation, since in practice application of Article 312 § 2 of the Criminal Code had already been made less strict.

Mr Öztürk's conviction and the confiscation of the remaining copies of the edition in issue had been justified in the circumstances which obtained in 1989. Similarly, Mr Behram's acquittal had also been a just decision and one appropriate to the situation in 1991. In convicting the applicant the National Security Court had considered the book as a whole, without singling out this or that passage. It had noted, for example, that the book was a biography of the "terrorist" İ. Kaypakkaya, leader of the TKP-ML, a "terrorist organisation" whose aim was to overthrow the constitutional order in Turkey; by praising the activities of İ. Kaypakkaya it had overstepped the limits of permissible criticism and condoned the violence which the TKP-ML had formerly resorted to in an attempt to install a communist regime.

62. The Government further asserted that both at the time when the indictment was drawn up and at the time when the judgment in issue was delivered the TKP-ML had posed a real threat, and that in view of the situation when it was published the book had given rise to a "present risk" and an "imminent danger" for the Turkish State and Turkish society (see paragraph 61 above). Although the communist ideology of the TKP-ML had ceased to be a threat to Turkey in the 1990s, that was not true of the "separatism" which was part of the organisation's platform.

For the above reasons, the Government considered it legitimate for dissemination of terrorist and separatist propaganda and incitement of the people to crime to have been made criminal offences. They submitted that this formed part of the restrictions on freedom of expression authorised by the second paragraph of Article 10 of the Convention, and that assessment of the acts which constituted those offences, which were capable of undermining a country's social order and security, came within the particularly broad margin of appreciation left to States in this field. The Court should therefore confine itself to a review of lawfulness and refrain from determining the facts of the situation in Turkey and even more from substituting its own assessment for that of the domestic courts on the question whether this or that publication was capable of causing a threat. In that connection, the Government criticised the Commission for, among other things, omitting to take due note of the criteria laid down in the previously cited Zana judgment.

The Government further submitted that the fine of 285,000 Turkish liras imposed on the applicant had to be described as very moderate and proportionate for the purposes of Article 10 § 2.

In conclusion, the Government argued that the applicant's conviction and the fine imposed on him could reasonably be held to have met a pressing social need and accordingly to have been necessary in a democratic society.

63. The Commission considered that the book was in many respects similar to a political pamphlet, in which İ. Kaypakkaya was presented as a hero and an example for others. While accepting that it was not impossible that the book had been intended as a source of inspiration for those who were carrying on the fight against the Turkish security forces in south-east Turkey, the Commission observed that the Government had not cited any passage indicating that the book advocated the pursuit of violence or that it justified terrorist acts.

After pointing out the particular importance of political debate, an essential element of a democratic society, the Commission concluded that in the present case, even taking the national authorities' margin of appreciation into account, the sanction imposed on the applicant was not justified under Article 10 of the Convention.

(ii) The Court's assessment

64. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out most recently in thirteen other cases against Turkey (see paragraph 4 above and, among other authorities, *Karataş v. Turkey* [GC], no. 23168/94, § 48, ECHR 1999-IV).

(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" or "penalty" 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 work and the context in which it was published. In particular, it must determine whether the measure 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.

65. The Court observes that the book in issue takes the form of a biography of İ. Kaypakkaya, a founder member of an extreme left-wing movement who died in controversial circumstances after being arrested. On account of its epic style the book can be seen as an apologia of İ. Kaypakkaya, his thoughts and his deeds. Relating for the most part facts connected with Kaypakkaya's political activities, it describes the conditions inside Diyarbakır Prison when he was imprisoned there and attempts in particular to persuade its readers that agents of the State were responsible for his death.

In the Court's view it is obvious that the book does not give a neutral account of the events of İ. Kaypakkaya's life but a politicised version.

Through his book the author intended, at least implicitly, to criticise both the Turkish authorities' actions in the repression of extreme left-wing movements and the conduct of those alleged to be responsible for İ. Kaypakkaya's death. Albeit indirectly, the book thus gave moral support to the ideology which he had espoused.

The National Security Court held that by venerating communism and the "terrorist" İ. Kaypakkaya the book "expressly incite[d] the people to hatred and hostility" (see paragraph 16 above). Since the National Security Court did not consider it necessary to mention, in its judgment of 30 March 1989, the passages deemed to give the book this character, the Court can only suppose that it endorsed the public prosecutor's submissions, as set out in the indictment of 14 February 1989. The Court notes, however, that those submissions consisted, for the most part, of a commentary on the poems – mainly taken from literary works – which prefaced the chapters of the book and which the public prosecutor seems to have taken as glosses whereby the hidden meaning of each chapter could be revealed. As for the passage concerning İ. Kaypakkaya's father and the exhortation placed on the book's last page, the Court can see nothing in them capable of giving the political criticism made in the book a particularly virulent tone (see paragraph 14 above).

66. Be that as it may, the Court reiterates 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. 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. Finally, where such remarks incite to violence against an individual, a public official or a sector of the population, the national authorities enjoy a wider margin of appreciation when examining the need for an interference with the exercise of freedom of expression (see, among many other authorities, *Ceylan* cited above, § 34).

67. In that connection, it is important to note the conclusion reached by the bench of the National Security Court which tried the author of the book, N. Behram. In its judgment of 22 May 1991 it ruled, on the basis of the opinion of a committee of experts composed of three professors of criminal law, that nothing in the book disclosed any incitement to crime capable of

justifying Mr Behram's conviction under Article 312 of the Criminal Code (see paragraph 22 above).

Contrary to the Government's submissions, the Court takes the view that this striking contradiction between two interpretations of one and the same book separated in time by about two years and made by two different benches of the same court is one element to be taken into consideration, regard being had to what was at stake for the applicant in the proceedings against him (see paragraphs 24-26 and 60 above).

68. The Court considers that the words used in the relevant edition of the book, whose content, moreover, does not differ in any way from that of the other editions, cannot be regarded as incitement to the use of violence or to hostility and hatred between citizens (see paragraphs 64 and 66 above).

Admittedly, the Court cannot exclude the possibility that such a book might conceal objectives and intentions different from the ones it proclaims (see, *mutatis mutandis*, the Incal judgment cited above, p. 1567, § 51). However, as there is no evidence of any concrete action which might belie it, the Court sees no reason to doubt the sincerity of the aim pursued by Mr Öztürk in the second edition of the book, especially as the first had sold out without occasioning criminal proceedings (see paragraph 11 above).

69. In that connection, the Court reiterates that it is prepared to take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58).

The Court accepts that it was for the domestic courts to determine whether the applicant had published the book with a reprehensible object. Moreover, the fact that domestic law does not require proof that the offence of which the applicant was accused has had any concrete effect (see paragraph 35 above) does not in itself weaken the need to justify the interference under Article 10 § 2.

In the present case, the Court is not convinced that in the long term the November 1988 edition could have had a harmful effect on the prevention of disorder and crime in Turkey. In fact, the book has been on open sale since 1991 and has not apparently aggravated the "separatist" threat which, according to the Government, existed both before and after Mr Öztürk's conviction (see paragraph 61 above). Nor have the Government explained how the second edition of the book could have caused more concern to the judicial authorities than the first, published in October 1988 (see paragraph 11 above).

The Court therefore discerns nothing which might justify the finding that Mr Öztürk had any responsibility whatsoever for the problems caused by terrorism in Turkey and considers that use of the criminal law against the applicant cannot be regarded as justified in the circumstances of the present case, which, contrary to the Government's submissions, are not comparable

to those of the Zana case (judgment cited above, p. 2549, §§ 58-60 – see paragraph 62 above).

70. As regards the Government's argument that the fine imposed on the applicant was moderate in amount (see paragraphs 16 and 62 above), the Court accepts that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference in relation to the aim pursued (see, among other authorities, *Ceylan* cited above, § 37).

However, having regard to the conclusions it has reached above (see paragraphs 68 and 69) and to the fact that the preventive aspect of the interference under consideration – namely the seizure of some copies of the book – in itself raises issues under Article 10 (see, among other authorities, the Incal judgment cited above, p. 1568, § 56), the Court considers, in the circumstances of the present case, that it cannot attach decisive weight to that argument.

71. The Court accordingly takes the view that it has not been established in the present case that at the time when the edition in issue was published there was a "pressing social need" capable of justifying a finding that the interference in question was "proportionate to the legitimate aim pursued".

72. Nor, on that point, can the Court accept the Government's argument, based on "developments in the case-law" since the applicant's conviction, that where a violation of the Convention initially committed has subsequently been made good the Court should not rule on the matter (see paragraph 61 above).

73. The Court's sole task is to assess the particular circumstances of a given case and it reiterates that a decision or measure favourable to an applicant is not sufficient in principle to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, among other authorities, the Amuur v. France judgment of 25 June 1996, *Reports* 1996-III, p. 846, § 36). In the present case, however, the applicant did not even benefit from any such decision or measure.

In that connection, the Court will confine itself to noting the position adopted by the judicial authorities on the question of Mr N. Behram's acquittal, that is to say well after Mr Öztürk's conviction.

In its judgment of 8 January 1993 concerning the second reference by written order lodged by Principal State Counsel, the Court of Cassation held (see paragraphs 25 and 26 above):

> "... the judgment acquitting Mustafa Nihat [Behram] became final without any appeal on points of law being lodged. Lastly, there is no evidence that the assessment of the content of the book *A testimony to life – Diary of a death under torture* made in the judgment at first instance is bad and must be invalidated."

Moreover, the appendices to the Government's memorial in reply (see paragraph 8 above) include a memorandum of 14 December 1995 sent to

the Ministry of Justice by Principal State Counsel at the Court of Cassation, in which the latter expressed the following opinion:

> "in fact, with the judgment ... of 8 January 1993 in which the Court of Cassation dismissed the appeal on points of law of ... Ünsal Öztürk, the contradiction between the two judgments of [the National Security Court] was resolved and it was thus confirmed that the judgment consistent with the law was indeed the judgment given on 30 March 1989 against Ünsal Öztürk ..."

Even supposing that "developments in the case-law" prompted Mr Behram's acquittal, it can only be noted that these did not prove to be sufficiently pertinent to enable the Court of Cassation to remedy the situation the applicant now complains of before the Court (see paragraphs 24-26 above; see also paragraph 17).

74. The Court accordingly concludes that there has been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 1 OF PROTOCOL No. 1

75. The applicant further submitted that the confiscation order made in the present case by the National Security Court had infringed Article 1 of Protocol No. 1, which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

76. The Court notes that the measure complained of by the applicant was an incidental effect of his conviction (see paragraph 28 above), which it has held to have been in breach of Article 10. It is consequently unnecessary to consider this complaint separately (see, *mutatis mutandis*, the Socialist Party and Others v. Turkey judgment of 25 May 1998, *Reports* 1998-III, p. 1259, § 57).

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. The applicant claimed compensation for the pecuniary damage he had allegedly sustained and reimbursement of the costs and expenses he had incurred for the proceedings in Turkey and before the Commission and the Court. He relied on Article 41 of the Convention, 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 decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

78. The applicant claimed 15,719 American dollars (USD), plus interest, for the loss resulting from the confiscation of 3,195 copies of the edition in issue, which cost 1,500,000 Turkish liras (TRL) each, equivalent to USD 4.92, including publishing costs and profit.

He further claimed compensation for loss of profit, which he assessed at approximately USD 442,800, taking into account the sales of further editions which he had been unable to publish. In that connection, he estimated that the book could have run to at least two editions a year, each of 5,000 copies, which made a potential total of 90,000 copies, each of which could have been sold at USD 4.92.

In addition, he claimed reimbursement of the fine of TRL 285,000 (USD 121) he had paid.

79. The Government contested these claims. They argued in particular that there could be no right to compensation for the confiscation of an illegal publication ordered and carried out in accordance with the law.

They submitted that the claims relating to loss of profit were hypothetical and without foundation. In any event, the reason why Mr Öztürk was no longer the publisher of the book, which had been on sale since 1991, was that he had been unable to come up with a more attractive offer than rival publishing houses.

80. The Court notes that the fine imposed on the applicant and the confiscation of the copies of the edition in question were direct consequences of the violation of Article 10 of the Convention which it has found. It must therefore first order reimbursement in full of the fine he paid. As regards the confiscated copies, it appears from the case file that the first edition of the book was out of print; of the 3,195 copies of the second edition seized in the instant case 3,133 were seized on the premises of the Yurt Kitap-Yayın publishing house and 2,845 copies were destroyed. The Court further notes that, according to an opinion expressed on 12 May 1997 by the Union of Turkish Publishers (*Türkiye Yayıncılar Birliği*), the retail price of a book comparable with the one published by the applicant was on that date approximately TRL 500,000 (USD 3.58).

The Court cannot allow the applicant's claims concerning the loss of future sales of the book, having regard to their speculative nature and the impossibility of quantifying precisely, on the basis of the case file, the loss of profit suffered in that way.

In conclusion, the Court, making an equitable ruling on the basis of all the information in its possession, awards the applicant USD 10,000 for pecuniary damage.

B. Costs and expenses

81. The applicant's representative asked the Court to take into account a contract between the applicant and himself signed on 10 May 1993. Under the terms of that agreement Mr Öztürk owed his lawyer TRL 100,000,000 (USD 10,227 at the time), but as it was impossible for him to pay that sum owing to the financial difficulties caused by the fact that he had been imprisoned several times on account of other works published between 1994 and 1997 it had been agreed that the lawyer would receive 10% of any sum awarded by the Court by way of just satisfaction.

82. The Government found this sum excessive in comparison with the fees normally charged by advocates in 1993. They further contended that while the applicant's counsel agreed to work without a fee until 1999, although he could have enforced recovery of the debt, that was something which could not engage the Government's responsibility.

83. The Court observes that in respect of costs and expenses the applicant claimed only reimbursement of the fee of his representative, Mr Öndül. Applying the criteria laid down in its case-law, it must therefore ascertain whether the sum claimed was actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and was reasonable as to quantum (see, among many other authorities, *Başkaya and Okçuoğlu* cited above, § 98). The Court notes that Mr Öndül defended the applicant throughout the domestic proceedings and represented him both before the Commission and during the written proceedings before the Court. Making its ruling, here again, on an equitable basis, the Court considers it reasonable to award the applicant 20,000 French francs for his costs and expenses.

C. Default interest

84. The Court deems it appropriate to make provision for the payment of default interest at the annual rate of 5% for the sum awarded in American dollars and 3.47% for the sum awarded in French francs.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that it is not necessary to consider the complaint under Article 1 of Protocol No. 1;

4. *Holds*
(a) that 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) 10,000 (ten thousand) American dollars for pecuniary damage;
(ii) 20,000 (twenty thousand) French francs for costs and expenses;
(b) that simple interest shall be payable on these sums, from the expiry of the above-mentioned three months until settlement, at the following rates:
(i) 5% per annum for the sum awarded in American dollars;
(ii) 3.47% per annum for the sum awarded in French francs;

5. *Dismisses* 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 28 September 1999.

Maud DE BOER-BUQUICCHIO
Deputy Registrar

Luzius WILDHABER
President