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

CASE OF BAŞKAYA AND OKÇUOĞLU v. TURKEY

(Applications nos. 23536/94 and 24408/94)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Başkaya and Okçuoğlu v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 11 March and 16 June 1999,

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

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3], by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It originated in two applications (nos. 23536/94 and 24408/94) against the Republic of Turkey lodged with the Commission under former Article 25 by

---

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.

two Turkish nationals, Mr Fikret Başkaya and Mr Mehemet Selim Okçuoğlu, on 22 February and 9 June 1994 respectively.

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 Articles 6 § 1 and 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 applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (former Rule 30). The lawyers were given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (former Rule 27 § 3).

3. As President of the Chamber which had originally been constituted (former Article 43 of the Convention and former Rule 21) in order to deal, in particular, with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted Mrs D. Akçay, Co-Agent of the Turkish Government ("the Government"), the applicants' lawyers, Mr A. Erdoğan and Ms E.E. Keskin, and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 14 October 1998. On various dates between 6 December 1998 and 5 March 1999, the applicants and the Government submitted additional observations on the former's claim for just satisfaction.

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. The President of the Court, Mr L. Wildhaber, decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24246/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); 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

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.

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, 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).

On 19 November 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 16 December 1998 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 S. Botoucharova, who was unable to take part in the further consideration of the case (Rule 24 § 5 (b)).

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

7. On 7 January 1999, having consulted the Co-Agent of the Government, the Delegate of the Commission and the representatives of the applicants, the Grand Chamber decided to dispense with a hearing in the case, being of the opinion that the discharging of its functions under Article 38 § 1 (a) of the Convention did not require one to be held (Rule 59 § 2).

8. On 22 January 1999 the first applicant submitted certain documents following a request by the Judge Rapporteur (Rule 49 § 2 (a)).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicants

9. The applicants, Mr Fikret Başkaya and Mr Mehemet Selim Okçuoğlu, are Turkish citizens. The first applicant was born in 1940 and lives in Ankara. He is a professor of economics and a journalist. The second applicant was born in 1964 and lives in Istanbul. He is the owner of a publishing house, Doz Basin Yayin Ltd Sti.

B. The impugned publication

10. In April 1991 Doz Basin Yayin Ltd Sti published a book written by the first applicant and entitled *Batılılaşma, Çağdaşlaşma, Kalkınma – Paradigmanın İflası/Resmi İdeolojinin Eleştirisine Giriş* ("Westernisation, Modernisation, Development – Collapse of a Paradigm/An Introduction to the Critique of the Official Ideology").

The book was an academic essay of 219 pages, containing 370 references, which involved a description of the socio-economic evolution of Turkey since the 1920s and the analysis and criticism of the "official ideology" of the State. According to the titles listed in the table of contents, the author dealt with the following topics: Intelligentsia and Official Ideology; The Characteristics of the National Struggle; The Question of the National Character of the National Struggle; The Comintern and whether the National Struggle was Anti-Imperialist; Mustafa Kemal and the Individual's Role in History; The Characteristics of the Kemalist Regime: an Original Form of Bonapartism; Productive Forces and Economic Policies; Bonapartist Regime and Accumulation of Capital; A Classless, Privilegeless, Populist Dictatorship; The Evolution of Socio-Economic Formation in the Neo-Colonialist Era; The Eighties: Strengthening of the Satellitisation Process; The Collapse of the Paradigm and the Science of Economics: Means to Legitimise Existing Tendencies.

11. The impugned chapter of the book included the following passages:

> "The Kurdish problem plays a significant role in the analysis of the evolution of *Milli Mücadele* [Turkish National Independence War (1919-1922)] and Turkish social formation. The Kurdish problem and the process of the colonisation of Kurdistan are indeed very important and, as such, should be the subject-matter of another book. Moreover, the problem is not only related to Turkey. The formation of the domestic politics of four States in the region (Turkey, Iran, Iraq, Syria) (type of political regimes) as well as the 'unique' nature of relationships between these four neighbouring States make it a complicated issue.
>
> We have two reasons why we wish to discuss the problem, even if in limited form, within the plan and scope of this book. These are to indicate the 'irrationality' of official ideology and the real nature of *Milli Mücadele*. In other words, [we wish] to discuss whether what is presented as '*Kurtuluş Savaşı*' [Independence War] is in reality an 'Independence Movement' or not. Without any doubt, the imprisonment of Kurdistan (if the small area within the borders of the Soviet Union is omitted) within the borders of four different States gives the imperialists too easily 'control' over these four States. Although the Kurdish problem is of great importance with regard to the protection of the imperialist status quo in the region, we shall not here go into an analysis of this aspect of the problem. [page 51]
>
> ...
>
> On the other hand, the racist policy of denial which has been followed with regard to the Kurds since the foundation of the Republic [1923] has also been an important factor in the development of the fascist movement in Turkey. As a contradiction, even

> though 'the assumption of non-existence' of the Kurdish Nation constitutes an important element of the official ideology, this is at the same time the weakest point of the ideology in question. It is not possible 'to eliminate with the mind' a nation which exists and the objective reality continues to exist regardless of the nonsense and unfounded suspicions of the people. Of course, this does not mean that the nonsense, unfounded suspicions have no effect! There is never a lack of those who profit from it, acquire bureaucratic, academic careers, receive high salaries, go up the step ladder of the political arena ... [page 52]
>
> ...
>
> It was believed that colonialism would come to an end with the abolishment of direct political-military-police control in the colonies. Today, however, the [natural] resources of the Third World are carried to imperialist countries in volumes which are much higher than those of the colonial period. Therefore, the relationship between the Turkish State and Kurdistan is not of an imperialist devouring category. One can speak of a situation which also directly embodies a political, military, cultural, ideological oppression. Thus, a direct colony status is in force. [page 59]"

12. It appears that the publication of the book came to the notice of the prosecution authorities on 3 May 1991.

C. The first round of proceedings against the applicants

13. On 2 August 1991 the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*), having regard to the contents of the book in question, issued an indictment against the applicants. The first applicant, as the author of the book, was charged under section 8(1) of the Prevention of Terrorism Act 1991 ("the 1991 Act") with disseminating propaganda against the indivisibility of the State. The second applicant, as the owner of the publishing company, was charged under section 8(2) of the 1991 Act. In the bill of indictment, the public prosecutor quoted extracts from the chapter of the book reproduced at paragraph 11 above.

14. In the proceedings before the National Security Court, the applicants denied the charges and sought their acquittal.

The first applicant submitted that his book had been an academic work that could not be viewed as propaganda. Being a professor he had had the duty to conduct research and publish his conclusions and could not be forced to accept the "official version of reality". His book might be judged by academics, but not by the courts. It could not be permissible to try and convict someone for the expression of his or her opinion.

The second applicant submitted, *inter alia*, that it was not possible to make an assessment of the book as a whole solely on the basis of extracts from a single chapter. He alleged that section 8 of the 1991 Act was inconsistent with the Turkish Constitution and Turkey's international

obligations. There was a "Kurdish problem" in Turkey and commenting or expressing ideas on this problem could not constitute an offence.

15. In a final statement dated 18 March 1992, the public prosecutor requested the conviction of the first applicant under section 8(1) of the 1991 Act and that of the second applicant under section 8(2), as well as the confiscation of all copies of the book. The public prosecutor considered that the offence had been committed on 3 May 1991.

16. On 14 October 1992 the court acquitted the applicants. It held that the book as a whole was an academic work containing no elements of propaganda.

17. The public prosecutor appealed. He submitted that the book alleged that a certain part of Turkish territory had belonged to "Kurdistan" which the Turks had annexed and colonised. Concluding that the book did indeed disseminate propaganda against the indivisibility of the State, he requested that the verdict be set aside.

18. On 4 February 1993 the Court of Cassation quashed the decision of the trial court and referred the case back for retrial. It gave the following reasons:

> "In the writings on pages 51 to 59 of the book … it is stated that a part of the territory within the borders of the Turkish Republic is a part of Kurdistan which belongs to the Kurdish nation, and that this territory has been annexed by the Turks and is subject to colony status. The Istanbul National Security Court, without considering that [the above] statement, as such, exceeds the limits of criticism and constitutes dissemination of propaganda against the indivisible integrity of the State of the Turkish Republic with its territory and nation, found [both] accused 'not guilty'.
>
> The judgment … is contrary to the law and thus, the public prosecutor's grounds of appeal are upheld. Accordingly, it is unanimously decided that the judgment be reversed …"

D. The second round of proceedings against the applicants

19. In a judgment dated 5 August 1993, the Istanbul National Security Court found the applicants guilty of the offences with which they had been charged. It sentenced the first applicant to two years' imprisonment and a fine of 50,000,000 Turkish liras (TRL) and the second applicant to six months' imprisonment and a fine of TRL 50,000,000. Considering the applicants' good conduct during the trial, the court reduced the first applicant's sentence to one year and eight months' imprisonment and a fine of TRL 41,666,666 and the second applicant's sentence to five months' imprisonment and a fine of TRL 41,666,666. On the other hand, the court dismissed the public prosecutor's request for an order of confiscation of the book.

In its reasoning supporting the convictions, the court stated:

"After the examination of the book which is the subject of the offence, it is understood that the [following] statements

on page 51 that '*The Kurdish problem plays a significant role in the analysis of the evolution of* Milli Mücadele *[Turkish National Independence War (1919-1922)] and Turkish social formation. The Kurdish problem and the process of the colonisation of Kurdistan are indeed very important and, as such, should be the subject-matter of another book. Moreover, the problem is not only related to Turkey. The formation of the domestic politics of four States in the region (Turkey, Iran, Iraq, Syria) ...*', '*to discuss whether what is presented as "Kurtuluş Savaşı" [Independence War] is in reality an "Independence Movement" or not. Without any doubt, the imprisonment of Kurdistan (if the small area within the borders of the Soviet Union is omitted) within the borders of four different States gives the imperialists too easily "control" over these four States ...*',

on page 52 that '*the racist policy of denial which has been followed with regard to the Kurds since the foundation of the Republic [1923] has also been an important factor in the development of the fascist movement in Turkey... It is not possible "to eliminate with the mind" a nation which exists ...*'

and on page 59 that '*the relationship between the Turkish State and Kurdistan is not of an imperialist devouring category. One can speak of a situation which also directly embodies a political, military, cultural, ideological oppression. Thus, a direct colony status is in force.*'

identify a certain part of the Turkish Republic as Kurdistan, declare that the Turkish Republic rules this region with colony status and thus aim to disseminate propaganda against the indivisible integrity of the State of the Turkish Republic with its territory and nation. Therefore, the following sentence shall be drafted under the provisions of Law no. 3713 which is applicable to the proven acts of the accused."

20. The applicants appealed to the Court of Cassation, which held a hearing in the case. The applicants, while reiterating the defence made before the National Security Court, emphasised that the latter had failed to consider the book as a whole and had erroneously based its decision on an assessment of one chapter. The first applicant maintained that section 8 of the 1991 Act was inconsistent with the Turkish Constitution and the Convention, and he could not therefore be tried and convicted under that provision. He also referred to his previous arguments concerning the lack of clarity of the relevant provisions of the 1991 Act. The second applicant asserted that his sentence to imprisonment had been unlawful in that section 8(2) only authorised the imposition of a fine.

21. In its decision of 16 December 1993, delivered on 22 December 1993, the Court of Cassation upheld the National Security Court's findings and dismissed the appeals.

E. Subsequent developments

22. As of 18 March 1994 the first applicant was dismissed, under section 98(2) of the Civil Servants Act (Law no. 367), from his post as lecturer at the University of Ankara. The relevant decision referred to his conviction under the 1991 Act and to his being sentenced to twenty months' imprisonment.

23. On 3 October 1997 the National Security Court granted a request by the prosecution for an order of seizure in respect of the sixth edition of the impugned book.

24. The applicants served their sentences in prison and paid the fines. After the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act, the Istanbul National Security Court re-examined the second applicant's case. On 19 April 1996 the court held that these amendments could not be applied to his case as he had already served his sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

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

Article 2 § 2

"Where the legislative provisions in force at the time when a crime is committed are different from those of a later law, the provisions most favourable to the offender shall be applied."

Article 36 § 1

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

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

26. The relevant provisions of the Press Act 1950 read as follows:

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."

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)[1]

27. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

"[(1)] Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras.

[(2)] Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly*, or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*[2]. However the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"[(1)] Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

---

1. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it describes as "acts of terrorism" or "acts perpetrated for the purposes of terrorism" (sections 3 and 4) and to which it applies.
2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

[(2)] Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

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

…"

The Government have submitted case-law concerning the application of section 8, details of which may be found in *Karataş v. Turkey* [GC], no. 23168/94, § 22, ECHR 1999-IV.

Section 13

(before amendment by Law no. 4126 of 27 October 1995)

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

Section 13

(as amended by Law no. 4126 of 27 October 1995)

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

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

B. The National Security Courts

28. A summary of the relevant domestic law governing the organisation and procedure of the National Security Courts is contained in *Karataş* cited above, §§ 24-29.

PROCEEDINGS BEFORE THE COMMISSION

29. Mr Başkaya and Mr Okçuoğlu applied to the Commission on 22 February and 9 June 1994 respectively. Both applicants alleged violations of Articles 9 (right to freedom of thought and conscience) and 10 (right to freedom of expression) of the Convention on account of their conviction for the publication of the impugned book. The applicants further complained of violations of Article 7 (prohibition of retrospective punishment) and of Article 6 § 1 (right to a hearing before an independent and impartial tribunal). The first applicant maintained that there had been a breach of this provision also on account of a lack of fairness of the proceedings and that there had been a violation of Article 6 § 2 (right to be presumed innocent until proved guilty). The second applicant in addition alleged that his conviction entailed a breach of Article 14 (prohibition of discrimination) taken in conjunction with Article 10.

30. The Commission declared the applications (nos. 23536/94 and 24408/94) admissible on 2 September and 14 October 1996 respectively. In its report of 13 January 1998 (former Article 31 of the Convention), it expressed the opinion that there had been violations of Article 10 on account of the applicants' convictions (unanimously) and of Article 6 § 1 in that their case had not been heard by an independent and impartial tribunal (thirty-one votes to one). It further concluded that there had been no violation of Article 7 with respect to the first applicant (thirty-one votes to one) but that there had been a violation of that provision with respect to the second applicant (unanimously). It found that it was not necessary to examine the other complaints made by the first applicant under Article 6 (unanimously) and that no separate issue arose with regard to the second applicant's complaint under Article 14 taken in conjunction with Article 10 (unanimously).

Extracts from the Commission's opinion are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

31. In their memorials, the applicants requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1, 7, 9 and 10 of the Convention. The first applicant also invited the Court to find violations of Articles 3 and 14. Both applicants requested the Court to award them just satisfaction under Article 41.

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 reports is obtainable from the Registry.

The Government for their part invited the Court to reject the applicants' complaints.

THE LAW

I. SCOPE OF THE CASE

32. In his memorial to the Court, the first applicant, Mr Başkaya, alleged violations of Articles 3 (prohibition of degrading punishment) and 14 (prohibition of discrimination) of the Convention on account of the fact that, in his view, he was released from prison seven months later than should normally have been the case.

33. However, these new complaints are not covered by the Commission's decision on admissibility. The Court has therefore no jurisdiction to entertain them (see, for instance, the Olsson v. Sweden (no. 2) judgment of 27 November 1992, Series A no. 250, pp. 30-31, § 75).

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

34. Mr Başkaya and Mr Okçuoğlu complained that their convictions and sentences under respectively subsections 1 and 2 of section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act") violated Article 7 of the Convention, which reads:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
>
> 2. This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The applicants maintained that, since the book in question was solely an academic study, the measures imposed upon them had been unlawful. In view of the lack of clarity of the wording of section 8 of the 1991 Act and the vagueness of the notion of "dissemination of propaganda against the indivisibility of the State", it had not been foreseeable at the material time that the publication in issue constituted an offence. The applicants also referred to the fact that, in the first round of proceedings, the National Security Court had acquitted them on the ground that the book was an academic work containing no elements of propaganda.

35. The Government disputed these allegations. The Commission was of the view that there had been no violation of Article 7 with respect to the first applicant but that there had been one with regard to the second applicant.

36. The Court recalls that, according to its case-law, Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence and the sanctions provided for it must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.

When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see the Cantoni v. France judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1627, § 29, and the S.W. and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively).

37. As regards the first applicant, the Commission considered that the wording of section 8(1) was sufficiently specific to enable him, if necessary after appropriate legal advice, to regulate his conduct in the matter and that the requirement of foreseeability had thus been met.

38. As to the second applicant, the Commission had doubts as to whether his conviction was in compliance with the principle "*nullum crimen sine lege*". Although section 8(2), in its version in force at the material time, contained a reference to publications other than periodicals, it appeared to be the general hypothesis of this provision that the "offence of propaganda" would be committed by publishing periodicals within the meaning of section 3 of the Press Act.

Moreover, the Commission found that section 8(2) provided no basis for the imposition of a prison sentence on the second applicant and that, accordingly, the principle "*nulla poena sine lege*" had been contravened in his case.

39. 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 against the indivisibility of the State.

However clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances.

Contrary to what is suggested by the applicants, section 8 did not confer an over-broad discretion on National Security Courts in interpreting the scope of the offence. While a definition of the offence was contained in the first subsection of section 8, the second subsection setting out the penalties gave pointers as to what kind of publications were covered by the offence and who might incur liability. Unlike the Commission, the Court considers that there can hardly be any doubt that books fell within the category of publications contemplated in this provision, which at the material time specifically mentioned "printed matter other than periodicals".

It is further to be noted that the National Security Court's interpretations and applications of section 8 could form the subject of an appeal to the Court of Cassation. In actual fact, it was the interpretation made by the latter in the first set of proceedings, after the applicants had been acquitted by the National Security Court, which was relied on and led to their conviction in the second set.

40. In the Court's view, the interpretation of the relevant law made by the National Security Court in convicting the applicants in the second round of proceedings and upheld by the Court of Cassation did not go beyond what could be reasonably foreseen in the circumstances. The Court does not find a breach of the principle "*nullum crimen sine lege*" embodied in Article 7 of the Convention on account of the applicants' conviction under section 8 of the 1991 Act.

41. As regards sentencing, the Court notes that the first applicant, who was sentenced under section 8(1), received the lowest sentence provided for in that provision, which fact does not seem to give rise to any issue under Article 7 of the Convention.

42. On the other hand, the second applicant complained that he had been sentenced to a term of imprisonment under a provision in section 8(2) which expressly applied to the sentencing of editors, while publishers could only be punished by a fine. In this connection, the Government stressed that the application of section 8(2) to publishers would normally entail a more favourable sentence than under section 8(1). Although this may be so, it rather appears that section 8(2) was a *lex specialis* on the sentencing of editors and publishers and that the sentence imposed on the applicant publisher in the present case was based on an extensive construction, by analogy, of the rule in the same subsection on the sentencing of editors.

In these circumstances, the Court considers that the imposition of a prison sentence on the second applicant was incompatible with the principle "*nulla poena sine lege*" embodied in Article 7.

43. In sum, as regards the first applicant the Court concludes that there has been no violation of Article 7 of the Convention with respect to his conviction and sentence.

As regards the second applicant, the Court finds that there has been no violation of Article 7 on account of his conviction.

The Court concludes however that there has been a violation of this Article on account of his sentence to a term of imprisonment.

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

44. The applicants alleged that in convicting and sentencing them the authorities had unjustifiably interfered with their right to freedom of thought and their right to freedom of expression under respectively Articles 9 and 10 of the Convention.

The Court, like the Commission, considers that the facts of the applicants' complaint fall to be considered under Article 10, 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."

45. The Government maintained that the interference with the applicants' right to freedom of expression was justified under the second paragraph of Article 10. The Commission, on the other hand, accepted the applicants' allegations.

A. Existence of an interference

46. The Court finds it clear, and this has not been disputed, that there has been an interference with the applicants' right to freedom of expression on account of their conviction and sentence under section 8 of the 1991 Act.

B. Justification of the interference

47. The above-mentioned interference contravened Article 10 unless it was "prescribed by law", pursued 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 aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

48. None of those taking part in the proceedings before the Court submitted any argument in relation to the requirement of "prescribed by law" under Article 10 § 2 which substantially differed from those invoked in connection with Article 7 (see paragraphs 34-35, 37-38 above).

49. The Court for its part observes that the requirements under the two provisions are largely the same and, for the reasons stated above, it reaches the conclusion that the first applicant's conviction and sentence were "prescribed by law".

50. As regards the second applicant, there is one difference between Article 7 and Article 10 § 2 which is relevant to his case. Under Article 7, it is a condition for punishment that the proscribed conduct constituted an offence "at the time when it was committed". In contrast, under Article 10 § 2, it is also the time of the imposition of the measures constituting the interference which is material to the consideration of the issue of lawfulness.

51. In the case at hand, the alleged offence was committed by the book's publication on 3 May 1991. Above, the Court has concluded that the second applicant's conviction, like that of the first applicant, did not infringe Article 7 since the law as applicable at the time of commission of the offence was sufficiently clear to meet the requirement of lawfulness under this Article.

However, as of 27 July 1993, the relevant provision concerning publishers in section 8(2), on which the second applicant was convicted, had been repealed by the Constitutional Court. Thus, the provision which applied at the time of the commission of the offence was no longer in force when the second applicant was convicted in the National Security Court on 5 August 1993 and when this conviction was later upheld by the Court of Cassation.

It follows that the competent courts failed to comply with the rule in Article 2 § 2 of the Criminal Code, according to which "the provisions most favourable to the offender shall be applied" (see paragraph 25 above).

Against this background, the Court finds that, in breach of Article 10 of the Convention, neither the second applicant's conviction nor his sentence were prescribed by law.

52. Having regard to the above conclusion, it would in principle not be necessary to review compliance in the case of the second applicant with the other requirements of paragraph 2 of Article 10 (see, for instance, the Kruslin and Huvig v. France judgments of 24 April 1990, Series A nos. 176-A and 176-B, respectively at p. 25, § 37, and p. 57, § 36). However, since the alleged lack of compliance with those requirements appears to be an essential element to the complaint of both applicants, the Court will examine these further aspects of the case without distinguishing between the applicants.

2. Legitimate aim

53. The applicants argued that the interference complained of had been aimed at suppressing opinions and thoughts which were deemed at variance with the "official ideology" of the State.

54. The Government reiterated that the measures taken against the applicants were based on section 8 of the 1991 Act. This provision was aimed at protecting interests such as territorial integrity, national unity, national security and the prevention of disorder and crime. The applicants were convicted in pursuance of these legitimate aims since they had disseminated separatist propaganda vindicating the acts of the PKK (Workers' Party of Kurdistan), a terrorist organisation, which threatened these interests.

55. The Commission concluded that the applicants' convictions were part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which were legitimate aims under Article 10 § 2.

56. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicants can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments before the Court

(i) The applicants and the Commission

57. The Commission, whose views the applicants shared, stressed that the freedom of expression must be considered to include the right to openly discuss difficult problems such as those facing Turkey in connection with the prevailing unrest in part of its territory in order, for instance, to analyse the background causes of the situation or to express opinions on the solutions to those problems. The incriminating book contained an academic analysis of, and the author's personal opinions about, the Kurdish question, presented in relatively moderate terms without the author associating himself with the use of violence in the context of the Kurdish separatist struggle. The applicants' convictions amounted to a kind of censure which

was likely to discourage them or others from expressing or publishing ideas of a similar kind in future.

58. The applicants argued in addition that judicial proceedings were not an appropriate forum for the discussion of scientific studies published in a book, a matter which was better left to intellectuals, academics or readers generally. The applicants complained that they had been punished for the publication of a study which did not reflect the "official ideology" of the State but the author's own opinions and attempts to establish the truth on the subject dealt with in his book.

Both applicants maintained that the measures taken against them amounted to an unjustified interference with their Article 10 rights.

(ii) The Government

59. The Government maintained that, by convicting the applicants of separatist propaganda following the book's publication, the Turkish courts had struck a fair balance between the applicants' right to freedom of expression and the right of the public to be protected against the actions of armed groups, which have as their expressed or veiled aim the overthrow of the democratic regime. Chapter 4 of the book, which described Turkey as a colonialist power oppressing Kurdistan, would suggest that it sought to justify PKK terrorism aimed at the creation of a new State on Turkish territory. In other words, by providing moral support for the PKK terror campaign, the book incited to violence. In this connection the Government highlighted several extracts from the book.

60. In the Government's view, the sanctions imposed on the applicants under section 8 of the 1991 Act corresponded to a pressing social need in safeguarding the various legitimate interests pursued. The measures taken against them properly fell within the authorities' margin of appreciation in this area. The interference was accordingly justified under Article 10 § 2 of the Convention.

(b) The Court's assessment

61. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out, for example, in the Zana judgment (cited above, pp. 2547-48, § 51) and in *Fressoz and Roire v. France* ([GC], no. 29183/95, § 45, ECHR 1999-I).

(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". As set forth in Article 10, this freedom is subject to exceptions,

which must, however, be construed strictly, and the need for any restrictions must be established convincingly.

(ii) The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient". In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts.

62. The Court further recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, pp. 1957-58, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1567-68, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

63. The Court will have particular regard to the words used in the impugned passages of the book and to the context in which they were published. In this latter respect it recalls that it takes into account the

background to cases submitted to it, particularly the problems linked to the prevention of terrorism (see the Incal judgment cited above, pp. 1568-69, § 58).

64. It observes in the first place that the relevant passages described part of the Turkish territory as belonging to "Kurdistan" and as having been annexed as a colony by the Turkish State. The latter was portrayed as an oppressor of "Kurdistan" in "political, military, cultural [and] ideological" terms. The "racist policy of denial" *vis-à-vis* the Kurds had been instrumental in the development of the "fascist movement".

While the impugned passages contained strongly worded statements that could be seen as an expression of support for Kurdish separatism, the author also affirmed the view that the Kurdish problem was complex. It related to the domestic policies not only of Turkey but also to those of Iran, Iraq and Syria, as well as to the unique nature of the relationships between these four neighbouring States. The statements in issue featured in an academic study on the socio-economic evolution of Turkey in a historical perspective and of the prevailing political ideology in that country. The Court considers that the views expressed in the book could not be said to incite to violence; nor could they be construed as liable to incite to violence.

65. The Court is naturally aware of the concern of the authorities about words or deeds which have the potential to exacerbate the security situation in the region, where since approximately 1985 serious disturbances have raged between the security forces and the members of the PKK involving a very heavy loss of life and the imposition of emergency rule in much of the region (see the Zana judgment cited above, p. 2539, § 10). However, it would appear to the Court that the domestic authorities in the instant case failed to have sufficient regard to the freedom of academic expression (see, *mutatis mutandis,* the Hertel v. Switzerland judgment of 25 August 1998, *Reports* 1998-VI, pp 2331-32, § 50) and to the public's right to be informed of a different perspective on the situation in south-east Turkey, irrespective of how unpalatable that perspective may be for them. In the Court's view the reasons adduced for convicting and sentencing the applicants, although relevant, cannot be considered sufficient to justify the interference with their right to freedom of expression.

66. Furthermore, the Court is struck by the severity of the penalty imposed on the applicants – particularly the fact that Mr Başkaya and Mr Okçuoğlu were sentenced to imprisonment of one year and eight months and five months respectively and were both ordered to pay substantial fines (see paragraph 19 above). Furthermore, copies of the book were seized by the authorities and Mr Başkaya was dismissed from his post as a university lecturer (see paragraphs 22-23 above).

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

67. Having regard to the above considerations, the Court concludes that the conviction and sentencing of the applicants were disproportionate to the aims pursued and therefore not "necessary in a democratic society". There has accordingly been a violation of Article 10 of the Convention with respect to both applicants.

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

A. The Government's preliminary objection (non-exhaustion of domestic remedies)

68. In their memorial to the Court the Government maintained that the applicants, not having raised before the domestic courts their complaint that their case had not been heard by an independent and impartial tribunal, had failed to exhaust domestic remedies as required by Article 35 of the Convention.

69. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, for instance, the Aytekin v. Turkey judgment of 23 September 1998, *Reports* 1998-VII, p. 2825, § 77).

70. The Court notes that, before the Commission, the Government did not express any objection of non-exhaustion in the case of Mr Başkaya, but they did at the admissibility stage in the case of Mr Okçuoğlu (by observations of 21 February 1996). The Commission declared Mr Başkaya's and Mr Okçuoğlu's applications admissible respectively on 2 September and 14 October 1996 without, however, mentioning the Government's non-exhaustion plea in either of its admissibility decisions. On the latter date the Commission decided to join the two applications.

While it is clear that the Government are not estopped from raising their objection in the case of the second applicant, the Court has doubts as to whether this is so also in the case of the first applicant. However, it need not determine this question, since, in any event, it would appear that a challenge to the independence and impartiality of the National Security Court would have been doomed to failure on account of that court's constitutional status in the respondent State (see paragraph 28 above). According to the Court's case-law, there is no obligation to have recourse to remedies which are inadequate or ineffective (see the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports* 1996-IV, p. 1210, § 67).

Accordingly, the Government's preliminary objection must be dismissed.

B. Merits of the applicants' complaint

71. The applicants complained that they had been denied a fair hearing in breach of the Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the National Security Court which tried and convicted them. The relevant parts of Article 6 § 1 provide:

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

72. The Government contested this allegation whereas the Commission accepted it.

73. In the applicants' submission the military judges appointed to the National Security Courts such as the Istanbul National Security Court were dependent on the executive, being appointed by the joint decree of the Minister of Defence and the Prime Minister, subject to the approval of the President of the Republic. The applicants further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers. The applicants were civilians and the participation of a military judge in their case could be viewed as an interference by the army in a civilian domain.

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

74. The Government submitted that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoyed in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicants' argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Criminal Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 28 above). Secondly, the assessment reports related only to conduct of a military judge's non-judicial duties. Military judges had access to their assessment reports and were able to challenge their content before the Supreme Military Administrative Court (ibid.). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

75. The Government further averred that the fairness of the applicants' trial had not been prejudiced by reason of the presence of a military judge on the bench. They claimed that neither the military judge's hierarchical authorities nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of case. Furthermore,

a majority of the members of the National Security Court, including the military judge, had voted for the applicants' acquittal in the first round of proceedings. The applicants had been convicted in the National Security Court only in the second round, after the Court of Cassation, the independence and impartiality of which were not in dispute, had quashed the acquittal and referred the case back for fresh examination (see paragraphs 17-20 above).

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

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

78. The Court recalls than in its Incal judgment cited above and in its Çıraklar v. Turkey judgment of 28 October 1998 (*Reports* 1998-VII) the Court had to address arguments similar to those raised by the Government in their pleadings in the instant case. In those judgments the Court noted that the status of military judges sitting as members of National Security Courts did provide some guarantees of independence and impartiality (see the Incal judgment cited above, p. 1571, § 65). On the other hand, the Court found that certain aspects of these judges' status made their independence and impartiality questionable (ibid., p. 1572, § 68): for example, the fact that they are servicemen who still belong to the army, which in turn takes its orders from the executive; or that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 28 above).

79. As in its Incal judgment the Court considers that its task is not to determine *in abstracto* the necessity for the establishment of National Security Courts in the light of the justifications advanced by the Government. Its task is to ascertain whether the manner in which the Istanbul National Security Court functioned infringed Mr Başkaya's and Mr Okçuoğlu's right to a fair trial, in particular whether, viewed objectively, they had a legitimate reason to fear that the court which tried them lacked independence and impartiality (see the Incal judgment cited above, p. 1572, § 70, and the Çıraklar judgment cited above, pp. 3072-73, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çıraklar, both of whom, like the present applicants, were civilians. It is understandable that the applicants – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see *Karataş* cited above, § 27). On that account they could, irrespective of the fact that they were acquitted in the first round of proceedings, legitimately fear that in the second round the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicants' fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the Incal judgment cited above, p. 1573, § 72 *in fine*).

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

V. ALLEGED VIOLATION OF ARTICLE 6 §§ 1 AND 2 AND ARTICLE 14 OF THE CONVENTION

81. Before the Commission, the first applicant complained that there had been a breach of his right to a fair hearing under Article 6 § 1 in that the domestic courts had failed to consider his book as a whole. Moreover, referring to the same matters as with regard to his complaint under Article 7, he also alleged that there had been a violation of his right under Article 6 § 2 to be presumed innocent of a criminal offence until proved guilty. The Commission found it unnecessary to examine these allegations, in view of its conclusions on the other Convention issues raised.

The Court further notes that at the Commission stage the second applicant, referring basically to the same facts as in his complaint under Article 10, alleged a violation of Article 14 taken in conjunction with the former Article. The Commission concluded that no separate issue arose under these provisions taken together.

However, the applicants did not mention the above complaints before the Court, which does not consider it necessary to examine them of its own motion.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

82. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses

incurred in the domestic and the Convention proceedings. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

83. The first applicant claimed 500,000 French francs (FRF) in compensation for loss of earnings and of retirement bonus resulting from the fact that, because of the termination of his appointment, he was forced to retire at the age of 54, thirteen years before the normal age of retirement.

He also claimed FRF 420,000 in compensation for loss of income from the sales of his book, corresponding to 15% of the estimated return from the sale of 70,000 copies. At the time when the book was banned and a confiscation order was imposed, 30,000 copies had been printed, whereas 70,000 more copies would otherwise have been made.

84. The second applicant, referring to the first applicant's calculations, claimed compensation for loss of 20% in profits from the sale of the book. In the light of the calculations made by the first applicant, the second applicant's loss could be estimated as amounting to approximately FRF 440,000.

85. Both applicants in addition sought compensation in an amount corresponding to the 41,666,666 Turkish liras they had each paid in fines. According to the first applicant this corresponded to FRF 7,400.

86. The Government contested the above claims. They disputed that the first applicant had sustained any economic loss as a result of his early retirement. He had been receiving a substantial pension since 1998. In any event, nothing would have prevented him from seeking alternative employment, which is customary for early retirees in Turkey.

As regards the claims related to the alleged loss of income from sales of the book, the suggestion that it would have sold 100,000 copies was entirely unfounded. Even the best-selling books in Turkey do not reach as high a level of circulation.

87. The Delegate of the Commission did not make any comments in this connection.

88. The Court is satisfied that there was a sufficient causal link between the alleged pecuniary damage and the violations found of the first and second applicants' rights under Article 10 and the second applicant's rights under Article 7. The fines imposed on the applicants and paid by them should be reimbursed in their entirety. On the other hand, the Court does not consider that the evidence submitted lends itself to a precise quantification of the first applicant's loss of earnings resulting from his dismissal by the

University or his and the second applicant's loss of prospective income from future sales of the impugned book. Making an overall assessment on an equitable basis, the Court awards the first applicant FRF 67,400 and the second applicant FRF 17,400 in respect of pecuniary damage.

B. Non-pecuniary damage

89. The first applicant, Mr Başkaya, requested FRF 1,000,000 in compensation for the suffering caused by his conviction and by his having served fifteen of his twenty months' sentence to imprisonment. While he had legitimate expectations of further advancement in his academic career, these measures had resulted in the termination of his employment at the University. The measures had not only severely affected his life as an academic and intellectual but had also deprived him of the possibility of taking an active part in politics and standing for election.

90. The second applicant, without specifying an amount, claimed compensation for the damage which he had suffered as a result of the criminal proceedings, his conviction and imprisonment.

91. For the Government the finding of a violation would constitute adequate just satisfaction for the purposes of Article 41 of the Convention, the allegations of suffering being unsubstantiated and the amount claimed, in the case of the first applicant, being more than excessive.

92. The Delegate of the Commission did not offer any comments.

93. The Court considers that both applicants must have suffered a certain amount of distress which cannot be compensated solely by the Court's findings of violations. The Court, having regard to the nature of the violations found in the present case and deciding on an equitable basis, awards the first applicant FRF 40,000 and the second applicant FRF 45,000 under the head of non-pecuniary damage.

C. Costs and expenses

94. The first applicant sought the reimbursement of FRF 250,000, apparently in respect of costs in the domestic proceedings, and FRF 100,000, seemingly in respect of costs before the Convention institutions.

95. The second applicant asked the Court to take into account his agreement with his lawyer to pay her 25,000 US dollars.

96. The Government stated that the amount claimed was exaggerated in comparison with fees earned by Turkish lawyers in the domestic courts and had not been properly justified.

97. The Delegate of the Commission did not comment.

98. The Court will consider the above claims in the light of the criteria laid down in its case-law, namely whether the costs and expenses were

actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum. As to the latter, it does not regard itself bound by domestic scales and practices, although it may derive some assistance from them (see, among many other authorities, the Tolstoy Miloslavsky v. the United Kingdom judgment of 13 July 1995, Series A no. 316-B, p. 83, § 77, and *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II). To a large degree, the Court shares the Government's views that the claims made are unsubstantiated and excessive. This is especially so as regards those of the second applicant, who did not submit a memorial to the Court on the merits of his case. Deciding on an equitable basis, the Court awards the first and second applicants respectively FRF 22,000 and FRF 15,000 under the head of costs and expenses.

D. Default interest

99. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, which is 3.47 % per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that it does not have jurisdiction to examine the first applicant's complaints under Articles 3 and 14 of the Convention;

2. *Holds* unanimously that there has been no violation of Article 7 of the Convention with respect to the first applicant;

3. *Holds* unanimously that there has been a violation of Article 7 of the Convention with respect to the second applicant;

4. *Holds* unanimously that there has been a violation of Article 10 of the Convention with respect to both applicants;

5. *Dismisses* unanimously the Government's preliminary objection concerning the exhaustion of domestic remedies in relation to the applicants' complaint under Article 6 § 1 of the Convention;

6. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention as regards the complaint relating to the independence and impartiality of the Istanbul National Security Court;

7. *Holds* unanimously that it is not necessary to examine the applicants' further complaints under respectively Article 6 §§ 1 and 2 of the Convention and Article 14 taken in conjunction with Article 10;

8. *Holds* unanimously
(a) that the respondent State is to pay the first and second applicants, within three months, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:
(i) respectively 67,400 (sixty-seven thousand four hundred) and 17,400 (seventeen thousand four hundred) French francs for pecuniary damage;
(ii) respectively 40,000 (forty thousand) and 45,000 (forty-five thousand) French francs for non-pecuniary damage;
(iii) respectively 22,000 (twenty-two thousand) and 15,000 (fifteen thousand) French francs for costs and expenses;
(b) that simple interest at an annual rate of 3.47% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

9. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

A declaration by Mr Wildhaber and, in accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve;
(b) concurring opinion of Mr Bonello;
(c) partly dissenting opinion of Mr Gölcüklü.

L.W.
P.J.M.

DECLARATION BY JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV), I now consider myself bound to adopt the view of the majority of the Court.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach set out in the partly dissenting opinion of Judge Palm in *Sürek v. Turkey (no.1)* ([GC], no. 26682/95, ECHR 1999-IV).

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

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

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

CONCURRING OPINION OF JUDGE BONELLO

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

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

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

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

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

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

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

1. Justice Oliver Wendell Holmes in *Abrahams v. United States* 250 U.S. 616 (1919) at 630.
2. *Brandenburg v. Ohio* 395 U.S. 444 (1969) at 447.
3. *Schenck v. United States* 294 U.S. 47 (1919) at 52.
4. *Whitney v. California* 274 U.S. 357 (1927) at 376.

the subversion of freedom of expression were it to condone the convictions of the applicants by the criminal courts.

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

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

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Translation*)

To my great regret, I do not agree with the view of the majority of the Court that there has been a violation of Article 6 § 1 in that the National Security Courts are not "independent and impartial tribunals" within the meaning of that provision owing to the presence of a military judge on the bench. In that connection, I refer to the partly dissenting opinion which I expressed jointly with those eminent judges, Mr Thór Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV) and to my individual dissenting opinion in the case of Çıraklar v. Turkey (judgment of 28 October 1998, *Reports* 1998-VII). I remain firmly convinced that the presence of a military judge in a court composed of three judges, two of whom are civilian judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

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