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

CASE OF SÜREK v. TURKEY (No. 1)

(Application no. 26682/95)

JUDGMENT

STRASBOURG

8 July 1999

In the case of Sürek v. Turkey (no. 1),

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 1 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 an application (no. 26682/95) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 20 February 1995.

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 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 applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). The lawyer was given leave by the President of the Court at the time, Mr R. Bernhardt, to use the Turkish language in the written procedure (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 the Agent of the Turkish Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the written procedure. Pursuant to the order made in consequence, the Registrar received the applicant's and the Government's memorials on 10 and 17 July 1998 respectively. On 8 September 1998 the Government filed with the Registry additional information in support of their memorial and on 22 November 1998 the applicant filed details of his claims for just satisfaction. On 26 February 1999 the Government filed observations on the applicant's claims 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); 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. 2) (no. 24122/94); Sürek v. Turkey (no. 3) (no. 24735/94); and Sürek v. Turkey (no. 4) (no. 24762/94).

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.

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, 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 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 H. Danelius, to take part in the proceedings before the Grand Chamber.

7. In accordance with the decision of the President, who had also given the applicant's lawyer leave to address the Court in Turkish (Rule 34 § 3), a hearing took place in public in the Human Rights Building, Strasbourg, on 1 March 1999, the case being heard simultaneously with those of Arslan v. Turkey and Ceylan v. Turkey.

There appeared before the Court:

(a) *for the Government*
Mr D. TEZCAN,
Mr M. ÖZMEN, *Co-Agents*,
Mr B. ÇALIŞKAN,
Ms G. AKYÜZ,
Ms A. GÜNYAKTI,
Mr F. POLAT,
Ms A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*
Mr H. KAPLAN, of the Istanbul Bar, *Counsel*;

(c) *for the Commission*
Mr H. DANELIUS, *Delegate*.

The Court heard addresses by Mr Danelius, Mr Kaplan and Mr Tezcan.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. The applicant

8. The applicant is a Turkish citizen who was born in 1957 and lives in Istanbul.

9. At the material time, the applicant was the major shareholder in Deniz Basın Yayın Sanayi ve Ticaret Organizasyon, a Turkish limited liability company which owns a weekly review entitled *Haberde Yorumda Gerçek* ("The Truth of News and Comments"), published in Istanbul.

B. The impugned letters

10. In issue no. 23 dated 30 August 1992, two readers' letters, entitled "*Silahlar Özgürlüğü Engelleyemez*" ("Weapons cannot win against freedom") and "*Suç Bizim*" ("It is our fault"), were published.

11. The letters read as follows (translation):

(a) "Weapons cannot win against freedom

In the face of the escalating war of national liberation in Kurdistan, the fascist Turkish army continues to carry out bombings. The 'Şırnak massacre' which Gerçek journalists revealed at the cost of great self-sacrifice has been another concrete example this week.

The brutalities in Kurdistan are in fact the worst that have been experienced there in the past few years. The massacre carried out in Halepçe in southern Kurdistan by the reactionary BAAS administration is now taking place in northern Kurdistan. Şırnak is concrete proof of it. By causing provocation in Kurdistan, the Turkish Republic was heading for a massacre. Many people were killed. In a three-day attack with tanks, shells and bombs, Şırnak was razed to the ground.

And the bourgeois press, *en masse*, wrote about the slaughter. And as the bourgeois press has said, there are indeed scores of 'unanswered' questions to be asked. As to Şırnak, the attack on Şırnak is the most effective form of the campaign that is being waged throughout Turkey to eradicate the Kurds. Fascism will follow it up with many more Şırnaks.

But the struggle of our people for national freedom in Kurdistan has reached a point where it can no longer be thwarted by bloodshed, tanks and shells. Every attack launched by the Turkish Republic to wipe out the Kurds intensifies the struggle for freedom. The bourgeoisie and its toadying press, which draw attention every day to the brutalities in Bosnia-Herzegovina, fail to see the brutalities committed in Kurdistan. Of course, one can hardly expect reactionary fascists who call for a halt in the brutalities in Bosnia-Herzegovina to call for a halt in the brutalities in Kurdistan.

The Kurdish people, who are being torn from their homes and their fatherland, have nothing to lose. But they have much to gain."

(b) "It is our fault

The TC[1] murder gang is continuing its murders ... on the grounds of 'protecting the Republic of Turkey'. But as people wake up to what is happening and become more aware, as they gradually learn to stand up for their rights and the idea that 'if they won't give, then we'll take by force' gradually germinates in people's minds and grows stronger day by day – as long as this continues, the murders will obviously also continue ... Beginning of course with those who planted the seed in people's minds – according to the generals, imperialism's hired killers, and according to the double-chinned, pot-bellied, stiff-necked Turguts, Süleymans and Bülents ... Hence the events of 12 March, hence the events of 12 September ... Hence the gallows, hence the prisons, hence the people sentenced to 300 or 400 years. Hence the people murdered in the torture rooms 'in order to protect the Republic of Turkey'. Hence the Mazlum Doğans exterminated in Diyarbakır Prison ... Hence the Revolutionaries recently officially assassinated ... The TC murder gang is continuing – and will continue – to commit its murders. Because the awakening of the people is like a flood of enthusiasm ... Hence Zonguldak, hence the municipal workers, hence the public service employees ... Hence Kurdistan. Can the 'murder gangs' stop that flood? There may be some who see the title of this letter and wonder what on earth it has to do with the text.

The 'hired killers' of imperialism, i.e. the authors of the 12 September *coup d'état*, and their successors of yesterday and today, those who are still looking for 'democracy', who in the past participated in one way or another in the struggle for democracy and freedom, who now covertly or openly criticise their past actions, who confuse the masses and present the parliamentary system and the rule of law as the means of salvation, give the green light to the killings of the TC murder gang.

1. The Republic of Turkey (*Türkiye Cumhuriyeti*).

I am addressing the 'faithful servants' of imperialism and its hardened spokesman (-men), the one(s) who said some time ago 'You won't get me to say that the nationalists commit crimes'[1], who say(s) today 'Those are not what we call journalists', who say(s) 'Who's against demonstrations? Who's against claiming one's rights? Of course they can hold a march ... They're my workers, my peasants, my public employees', but then has (have) the public employees who march to Ankara beaten up in the very heart of the city and say(s) afterwards 'The police did the right thing', and who postpone(s) strikes for months on end. I am addressing the blabbers, the deserters and the charlatans who are stirring up the reactionary consciousness of the masses, who try to judge these people by their attitude towards Kurdistan and try to work out how 'democratic' they are. The guilt of the murder gang is proven. It is through flesh-and-blood experience that people are beginning to see it and realise it. But what about the guilt of the charlatans, the ones who are thwarting the struggle for democracy and freedom ... Yes, what about their guilt ... They have their share in the killings by the murder gang ... May their 'union' be a happy one!"

C. The charges against the applicant

12. In an indictment dated 21 September 1992, the public prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicant in his capacity as the owner of the review, as well as the review's editor, with disseminating propaganda against the indivisibility of the State and provoking enmity and hatred among the people. The charges were brought under Article 312 of the Criminal Code and section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act" – see paragraphs 22 and 24 below).

D. The applicant's conviction

13. In the proceedings before the Istanbul National Security Court, the applicant denied the charges. He asserted that the expression of an opinion could not constitute an offence. He further stated that the letters in issue had been written by the readers of the review and for that reason could not engage his responsibility.

14. In a judgment dated 12 April 1993, the court found the applicant guilty of an offence under the first paragraph of section 8 of the 1991 Act. It found no grounds for convicting him under Article 312 of the Criminal Code. The court initially sentenced the applicant to a fine of 200,000,000 Turkish liras (TRL). However, having regard to the applicant's good conduct during the trial, it reduced the fine to TRL 166,666,666. The editor of the review was for his part sentenced to five months' imprisonment and to a fine of TRL 83,333,333.

1. The phrases in inverted commas in this paragraph are quotations from the public speeches of Mr Demirel, former Prime Minister of Turkey.

15. In its judgment, the court held that the incriminated letters contravened section 8 of the 1991 Act. The court concluded that the letters referred to eight districts in the south-east of Turkey as an independent State, "Kurdistan", described the PKK (Workers' party of Kurdistan) as a national liberation movement involved in a "national independence war" against the Turkish State and amounted to propaganda aimed at the destruction of the territorial integrity of the Turkish State. In addition the court found that the letters contained discriminatory statements on grounds of race.

E. The applicant's appeal against conviction and subsequent proceedings

16. The applicant appealed against his conviction to the Court of Cassation, contending that his trial and conviction contravened Articles 6 and 10 of the Convention. He asserted that section 8 of the 1991 Act was contrary to the Constitution and denied that the letters in question disseminated separatist propaganda. He also maintained that he had not been able to be present at the hearing at which the decision on his conviction had been given. He pleaded that the decision given in his absence and without his final statement having been taken was contrary to law.

17. On 26 November 1993 the Court of Cassation ruled that the amount of the fine imposed by the National Security Court was excessive and set aside the applicant's conviction and sentence on that account. The court remitted the case to the Istanbul National Security Court.

18. In its judgment of 12 April 1994, the Istanbul National Security Court sentenced the applicant to a fine of TRL 100,000,000 but subsequently reduced the fine to TRL 83,333,333. As to the grounds for conviction, the court, *inter alia*, reiterated the reasoning used in its judgment of 12 April 1993.

19. The applicant appealed. He relied on the defence grounds which he had invoked at his first trial. He also maintained that the National Security Court had convicted him without having duly heard his defence.

20. On 30 September 1994 the Court of Cassation dismissed his appeal, upholding the National Security Court's reasoning and its assessment of the evidence.

F. The impact of the legislative amendments to the 1991 Act

21. Following the amendments made by Law no. 4126 of 27 October 1995 to the 1991 Act (see paragraph 25 below), the Istanbul National Security Court *ex officio* re-examined the applicant's case. On 8 March

1996 the court confirmed the sentence which it had initially imposed on him.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

1. The Criminal Code

22. 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 19

"The term 'heavy fine' shall mean payment to the Treasury of from twenty thousand to one hundred million Turkish liras, as the judge shall decide ..."

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 …"

Article 142
(repealed by Law no. 3713 of 12 April 1991 on the Prevention of Terrorism)

"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.

…"

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[1]

"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."

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

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

1. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to Parliament (Law no. 2839, section 11(f3)). In addition, if the sentence imposed exceeds six months' imprisonment, the convicted person is debarred from entering the civil service, except where the offence has been committed unintentionally (Law no. 657, section 48(5)).

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."

Additional section 4(1)

"Where distribution of the printed matter whose distribution constitutes the offence is prevented … by a court injunction or, in an emergency, by order of the Principal Public Prosecutor … the penalty imposed shall be reduced to one-third of that laid down by law for the offence concerned."

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

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

Section 6

"It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person's ... identity is divulged provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

…

Where the offences contemplated in the above paragraphs are 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 sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed*

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.

matter other than periodicals or if the periodical has just been launched[1]. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher."

Section 8
(before amendment by Law no. 4126 of 27 October 1995)

"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.

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)

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

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of 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.

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

1-2. 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.

months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras …

…"

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[1]."

Section 17

"Persons convicted of the offences contemplated in the present Law who ... have been punished with a custodial sentence shall be granted automatic parole when they have served three-quarters of their sentence, provided they have been of good conduct.

…

The first and second paragraphs of section 19[2] … of the Execution of Sentence Act (Law no. 647) shall not apply to the convicted persons mentioned above."

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

25. The following amendments were made to the Prevention of Terrorism Act 1991 following the enactment of Law no. 4126 of 27 October 1995:

Transitional provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment

1. See the relevant provision of Law no. 4126, reproduced below.
2. See paragraph 27 below.

imposed on that person and decide whether he should be allowed the benefit of sections 4[1] and 6[2] of Law no. 647 of 13 July 1965."

5. *Law no. 4304 of 14 August 1997 on the deferment of judgment and of executions of sentences in respect of offences committed by editors before 12 July 1997*

26. The following provisions are relevant to sentences in respect of offences under the Press Act:

Section 1

"The execution of sentences passed on those who were convicted under the Press Act (Law no. 5680) or other laws as editors for offences committed before 12 July 1997 shall be deferred.

The provision in the first paragraph shall also apply to editors who are already serving their sentences.

The institution of criminal proceedings or delivery of final judgments shall be deferred where proceedings against the editor have not yet been brought, or where a preliminary investigation has been commenced but criminal proceedings have not been instituted, or where the final judicial investigation has been commenced but judgment has not yet been delivered, or where the judgment has still not become final."

Section 2

"If an editor who has benefited under the provisions of the first paragraph of section 1 is convicted as an editor for committing an intentional offence within three years of the date of deferment, he must serve the entirety of the suspended sentence.

…

Where there has been a deferment, criminal proceedings shall be instituted or judgment delivered if an editor is convicted as such for committing an intentional offence within three years of the date of deferment.

Any conviction as an editor for an offence committed before 12 July 1997 shall be deemed a nullity if the aforesaid period of three years expires without any further conviction for an intentional offence. Similarly, if no criminal proceedings have been instituted, it shall no longer be possible to bring any, and, if any have been instituted, they shall be discontinued."

1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
2. This provision concerns reprieves.

6. The Execution of Sentences Act (Law no. 647 of 13 July 1965)

27. The Execution of Sentences Act 1965 provides, *inter alia*:

Section 5

"The term 'fine' shall mean payment to the Treasury of a sum fixed within the statutory limits.

…

If, after service of the order to pay, the convicted person does not pay the fine within the time-limit, he shall be committed to prison for a term of one day for every ten thousand Turkish liras owed, by a decision of the public prosecutor.

…

The sentence of imprisonment thus substituted for the fine may not exceed three years …"

Section 19(1)

"… persons who ... have been ordered to serve a custodial sentence shall be granted automatic parole when they have served half of their sentence, provided they have been of good conduct ..."

7. The Code of Criminal Procedure (Law no. 1412)

28. The Code of Criminal Procedure contains the following provisions:

Article 307

"An appeal on points of law may not concern any issue other than the lawfulness of the impugned judgment.

Non-application or erroneous application of a legal rule shall constitute unlawfulness[1]."

Article 308

"Unlawfulness is deemed to be manifest in the following cases:

1- where the court is not established in accordance with the law;

2- where one of the judges who have taken the decision was barred by statute from participating;

1. On the question whether the judgment is unlawful, the Court of Cassation is not bound by the arguments submitted to it. Moreover, the term "legal rule" refers to any written source of law, to custom and to principles deduced from the spirit of the law.

…”

B. Criminal case-law submitted by the Government

29. The Government supplied copies of several decisions given by the prosecutor attached to the Ankara National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code), or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 24 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor’s decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

30. Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: 1991/23–75–132–177–100; 1992/33–62–73–89–143; 1993/29–30–38–39–82–94–114; 1994/3–6–12–14–68–108–131–141–155–171–172; 1995/1–25–29–37–48–64–67–84–88–92–96–101–120–124–134–135; 1996/2–8–18–21–34–38–42–43–49–54–73–86–91–103–119–353; 1997/11–19–32–33–82–89–113–118–130–140–148–152–153–154–187–191–200–606; 1998/6–8–50–51–56–85–162.

31. As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of “propaganda”, one of the constituent elements of the offence, or on account of the objective nature of the words used.

C. The National Security Courts[1]

1. The Constitution

32. The constitutional provisions governing judicial organisation of the National Security Courts are worded as follows:

Article 138 §§ 1 and 2

"In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, ... or ... person may give orders or instructions to courts or judges in the exercise of their judicial powers, or send them circulars or make recommendations or suggestions to them."

Article 139 § 1

"Judges … shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution …"

Article 143 §§ 1-5

"National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State's internal or external security.

National Security Courts shall be composed of a president, two other regular members, two substitute members, a prosecutor and a sufficient number of assistant prosecutors.

1. The National Security Courts were created by Law no. 1773 of 11 July 1973, in accordance with Article 136 of the 1961 Constitution. That law was annulled by the Constitutional Court on 15 June 1976. The courts in question were later reintroduced into the Turkish judicial system by the 1982 Constitution. The relevant part of the statement of reasons contains the following passage:

"There may be acts affecting the existence and stability of a State such that when they are committed, special jurisdiction is required in order to give judgment expeditiously and appropriately. For such cases it is necessary to set up National Security Courts. According to a principle inherent in our Constitution, it is forbidden to create a special court to give judgment on a specific act after it has been committed. For that reason the National Security Courts have been provided for in our Constitution to try cases involving the above-mentioned offences. Given that the special provisions laying down their powers have been enacted in advance and that the courts have been created before the commission of any offence …, they may not be described as courts set up to deal with this or that offence after the commission of such an offence."

The president, one of the regular members, one of the substitutes and the prosecutor shall be appointed from among judges and public prosecutors of the first rank, according to procedures laid down in special legislation; one regular member and one substitute shall be appointed from among military judges of the first rank and the assistant prosecutors from among public prosecutors and military judges.

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

Appeals against decisions of National Security Courts shall lie to the Court of Cassation.

...”

Article 145 § 4

“Military legal proceedings

The personal rights and obligations of military judges … shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve in the performance of their non-judicial duties shall also be regulated by law ...”

2. Law no. 2845 on the creation and rules of procedure of the National Security Courts

33. Based on Article 143 of the Constitution, the relevant provisions of Law no. 2845 on the National Security Courts, provide as follows:

Section 1

“In the capitals of the provinces of … National Security Courts shall be established to try offences against the Republic, whose constituent qualities are enunciated in the Constitution, against the territorial integrity of the State or the indivisible unity of the nation or against the free democratic system of government, and offences which directly affect the State’s internal or external security.”

Section 3

“The National Security Courts shall be composed of a president, two other regular members and two substitute members.”

Section 5

“The president of a National Security Court, one of the [two] regular members and one of the [two] substitutes ... shall be civilian … judges, the other members, whether regular or substitute, military judges of the first rank …”

Section 6(2), (3) and (6)

"The appointment of military judges to sit as regular members and substitutes shall be carried out according to the procedure laid down for that purpose in the Military Legal Service Act.

Except as provided in the present Law or other legislation, the president and the regular or substitute members of the National Security Courts … may not be appointed to another post or place, without their consent, within four years …

…

If, after an investigation concerning the president or a regular or substitute member of a National Security Court conducted according to the legislation concerning them, competent committees or authorities decide to change the duty station of the person concerned, the duty station of that judge or the duties themselves … may be changed in accordance with the procedure laid down in that legislation."

Section 9(1)

"National Security Courts shall have jurisdiction to try persons charged with

(a) the offences contemplated in Article 312 § 2 … of the Turkish Criminal Code,

…

(d) offences having a connection with the events which made it necessary to declare a state of emergency, in regions where a state of emergency has been declared in accordance with Article 120 of the Constitution,

(e) offences committed against the Republic, whose constituent qualities are enunciated in the Constitution, against the indivisible unity of the State – meaning both the national territory and its people – or against the free democratic system of government, and offences which directly affect the State's internal or external security.

…"

Section 27(1)

"The Court of Cassation shall hear appeals against the judgments of the National Security Courts."

Section 34(1) and (2)

"The rules governing the rights and obligations of … military judges appointed to the National Security Courts and their supervision …, the institution of disciplinary proceedings against them, the imposition of disciplinary penalties on them and the investigation and prosecution of any offences they may commit in the performance of their duties ... shall be as laid down in the relevant provisions of the laws governing their profession …

The observations of the Court of Cassation on military judges, the assessment reports on them drawn up by Ministry of Justice assessors … and the files on any investigations conducted in respect of them … shall be transmitted to the Ministry of Justice."

Section 38

"A National Security Court may be transformed into a Martial-Law Court, under the conditions set forth below, where a state of emergency has been declared in all or part of the territory in respect of which the National Security Court concerned has jurisdiction, provided that within that territory there is more than one National Security Court …"

3. The Military Legal Service Act (Law no. 357)

34. The relevant provisions of the Military Legal Service Act are worded as follows:

Additional section 7

"The aptitude of military judges … appointed as regular or substitute members of the National Security Courts that is required for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports drawn up according to the procedure laid down below, subject to the provisions of the present Law and the Turkish Armed Forces Personnel Act (Law no. 926).

(a) The first superior competent to carry out assessment and draw up assessment reports for military judges, whether regular or substitute members … shall be the Minister of State in the Ministry of Defence, followed by the Minister of Defence.

…"

Additional section 8

"Members … of the National Security Courts belonging to the Military Legal Service … shall be appointed by a committee composed of the personnel director and the legal adviser of the General Staff, the personnel director and the legal adviser attached to the staff of the arm in which the person concerned is serving and the Director of Military Judicial Affairs at the Ministry of Defence …"

Section 16(1) and (3)

"Military judges … shall be appointed by a decree issued jointly by the Minister of Defence and the Prime Minister and submitted to the President of the Republic for approval, in accordance with the provisions on the appointment and transfer of members of the armed forces …

…

The procedure for appointment as a military judge shall take into account the opinion of the Court of Cassation, the reports by Ministry of Justice assessors and the assessment reports drawn up by the superiors …"

Section 18(1)

"The rules governing the salary scales, salary increases and various personal rights of military judges … shall be as laid down in the provisions relating to officers."

Section 29

"The Minister of Defence may apply to military judges, after considering their defence submissions, the following disciplinary sanctions:

A. A warning, which consists in giving the person concerned notice in writing that he must exercise more care in the performance of his duties.

…

B. A reprimand, which consists in giving the person concerned notice in writing that a particular act or a particular attitude has been found to be blameworthy.

…

The said sanctions shall be final, mentioned in the assessment record of the person concerned and entered in his personal file …"

Section 38

"When military judges … sit in court they shall wear the special dress of their civilian counterparts …"

4. The Military Criminal Code

35. Article 112 of the Military Criminal Code of 22 May 1930 provides:

"It shall be an offence, punishable by up to five years' imprisonment, to abuse one's authority as a civil servant in order to influence the military courts."

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

36. Under section 22 of Law 1602 the First Division of the Supreme Military Administrative Court has jurisdiction to hear applications for judicial review and claims for damages based on disputes relating to the personal status of officers, particularly those concerning their professional advancement.

PROCEEDINGS BEFORE THE COMMISSION

37. Mr Kamil Tekin Sürek applied to the Commission on 20 February 1995. He argued that his conviction and sentence constituted an unjustified interference with his right to freedom of expression as guaranteed by Article 10 of the Convention and that his case had not been heard by an independent and impartial tribunal, in breach of Article 6 § 1. He also maintained that the criminal proceedings against him had not been concluded within a reasonable time, which gave rise to a separate violation of Article 6 § 1.

38. The Commission declared the application (no. 26682/95) admissible on 14 October 1996, with the exception of the Article 6 § 1 complaint relating to the length of the criminal proceedings. In its report of 11 December 1997 (former Article 31 of the Convention), it expressed the opinion that there had been no violation of Article 10 (nineteen votes to thirteen) but that there had been a violation of Article 6 § 1 (thirty-one votes to one). Extracts from the Commission's opinion and one of the three separate opinions contained in the report are reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

39. The applicant requested the Court to find the respondent State in breach of its obligations under Articles 6 § 1 and 10 of the Convention and to award him just satisfaction under Article 41.

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

THE LAW

I. SCOPE OF THE CASE

40. The Court notes that the applicant in his memorial complained of the unreasonableness of the length of the criminal proceedings in his case and contended that this gave rise to a breach of Article 6 § 1 of the Convention. However that particular complaint was declared inadmissible by the

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.

Commission (see paragraph 38 above) and for that reason it cannot be considered to be within the scope of the case before the Court (see, among other authorities, *Janowski v. Poland* [GC], no. 25716/94, § 19, ECHR 1999-I). The Court will therefore confine its examination to the applicant's main complaint under Article 6 § 1 relating to the independence and impartiality of the Istanbul National Security Court as well as to his complaint under Article 10.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

41. The applicant alleged that the authorities had unjustifiably interfered with his right to freedom of expression guaranteed under 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."

42. The Government maintained that the interference with the applicant's right to freedom of expression was justified under the provisions of the second paragraph of Article 10. The Commission agreed with the Government on this point.

A. Existence of an interference

43. The Court notes that it is clear, and this has not been disputed, that there has been an interference with the applicant's right to freedom of expression on account of his conviction and sentence under section 8 of the Prevention of Terrorism Act 1991 ("the 1991 Act").

B. Justification of the interference

44. The interference contravened Article 10 unless it was "prescribed by law", had one or more of the legitimate aims referred to in paragraph 2 of Article 10 and was "necessary in a democratic society" for achieving such aim or aims. The Court will examine each of these criteria in turn.

1. "Prescribed by law"

45. The applicant did not specifically address the compatibility of section 8 of the 1991 Act with this requirement. He confined himself to stating that this provision was used by the authorities to silence the opposition press and to punish the dissemination of views and opinions including those which do not incite to violence or espouse the cause of illegal organisations or advocate the division of the State.

46. The Government replied that the interference with the applicant's right to freedom of expression was based on section 8 of the 1991 Act which was aimed at the suppression of acts of separatist propaganda such as the one which resulted in the applicant's conviction.

47. The Delegate of the Commission observed at the hearing before the Court that the wording of section 8 of the 1991 Act was rather vague and that it might be questioned whether it satisfied the conditions of clarity and foreseeability inherent in the prescribed-by-law requirement. He noted however that the Commission had accepted that section 8 formed a sufficient legal basis for the applicant's conviction and concluded that the interference was "prescribed by law".

48. The Court notes the concern of the Delegate about the vagueness of section 8 of the 1991 Act. However, like the Commission, the Court accepts that since the applicant's conviction was based on section 8 of the 1991 Act the resultant interference with his right to freedom of expression could be regarded as "prescribed by law", all the more so given that the applicant has not specifically disputed this.

2. Legitimate aim

49. The applicant repeated his earlier contention that section 8 of the 1991 Act was designed to muzzle the opposition press. The measures which had been taken against him could not be justified on any of the grounds relied on by the Government since the letters published in his review could not be seen as a threat to national security and territorial integrity or as an encouragement to violence.

50. The Government disputed this argument. They submitted that the applicant had been convicted of disseminating separatist propaganda by publishing letters which threatened territorial integrity and the unity of the nation, public order and national security. These were legitimate aims under Article 10 § 2 of the Convention.

51. The Commission for its part considered that the applicant's conviction was part of the authorities' efforts to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 § 2.

52. 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 of Judgments and Decisions* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

53. The applicant affirmed that his prosecution, conviction and sentence were an unjustified interference with his right to freedom of expression. He stressed that although he was the owner of the review with no editorial responsibility for its content, he had nonetheless been punished as a terrorist under section 8 of the 1991 Act.

54. The applicant further pleaded that neither he nor his review had any links with terrorist organisations and that the letters which had been published in that review did not incite to violence or support terrorism or amount to separatist propaganda of a criminal nature.

(ii) The Government

55. The Government challenged the merits of the applicant's arguments. They maintained that the letters in question had depicted the respondent State as a criminal organisation and indirectly portrayed the acts of the PKK as acts of national liberation. In their submission, separatist propaganda inevitably incites to violence and provokes hostility among the various groups in Turkish society thus endangering human rights and democracy. As the owner of the review the applicant had participated in the dissemination of separatist propaganda by publishing letters which expressed hatred and praised terrorist crime and threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of crime and disorder.

56. In the Government's view the measures taken against the applicant were within the authorities' margin of appreciation in relation to the type of activity which endangers the vital interests of the State and the taking of these measures in the instant case found its justification under paragraph 2 of Article 10.

(iii) The Commission

57. Having regard to the security situation in south-east Turkey and to the fact that the language used in the impugned letters could be interpreted as an encouragement to further violence, the Commission considered that the authorities of the respondent State had been entitled to take the view that the publication of the letters was harmful to national security and public safety. The Commission reasoned that the applicant, as the owner of the review, had assumed duties and responsibilities with respect to the publication of the letters. His conviction and sentence could be considered in the circumstances a proportionate response to a pressing social need to maintain national security and public safety, a response which fell within the authorities' margin of appreciation. For these reasons, the Commission concluded that there had been no violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

58. 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.

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

60. The Court notes that the applicant's review published two letters which had been submitted by readers. These letters vehemently condemned the military actions of the authorities in south-east Turkey and accused them of brutal suppression of the Kurdish people in their struggle for independence and freedom (see paragraph 11 above). The letter entitled "Weapons cannot win against freedom" makes reference to two massacres which the writer claims were intentionally committed by the authorities as part of a strategic campaign to eradicate the Kurds. It concludes by reaffirming the Kurds' determination to win their freedom. The second letter, "It is our fault", alleges that the institutions of the Republic of Turkey connived in imprisonment, torture and killing of dissidents in the name of the protection of democracy and the Republic.

The Istanbul National Security Court found that the charge against the applicant under section 8 of the 1991 Act was proved (see paragraph 14 above). The court held that the impugned letters contained words which were aimed at the destruction of the territorial integrity of the Turkish State by describing areas of south-east Turkey as an independent State, "Kurdistan", and the PKK as a national liberation movement (see paragraph 15 above).

61. In assessing the necessity of the interference in the light of the principles set out above (see paragraphs 58 and 59), the Court recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports*

1996-V, 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.

62. The Court will have particular regard to the words used in the letters and to the context in which they were published. In this latter respect 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).

It notes in the first place that there is a clear intention to stigmatise the other side to the conflict by the use of labels such as "the fascist Turkish army", "the TC murder gang" and "the hired killers of imperialism" alongside references to "massacres", "brutalities" and "slaughter". In the view of the Court the impugned letters amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence. Furthermore, it is to be noted that the letters were published in the context of the security situation in south-east Turkey, 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). In such a context the content of the letters must be seen as capable of inciting to further violence in the region by instilling a deep-seated and irrational hatred against those depicted as responsible for the alleged atrocities. Indeed, the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor.

It must also be observed that the letter entitled "It is our fault" identified persons by name, stirred up hatred for them and exposed them to the possible risk of physical violence (see paragraph 11 above). It is in this perspective that the Court finds that the reasons given by the authorities for the applicant's conviction with their emphasis on the destruction of the

territorial integrity of the State (see paragraph 15 above) are both relevant and sufficient to ground an interference with the applicant's right to freedom of expression. The Court reiterates that the mere fact that "information" or "ideas" offend, shock or disturb does not suffice to justify that interference (see paragraph 58 above). What is in issue in the instant case, however, is hate speech and the glorification of violence.

63. While it is true that the applicant did not personally associate himself with the views contained in the letters, he nevertheless provided their writers with an outlet for stirring up violence and hatred. The Court does not accept his argument that he should be exonerated from any criminal liability for the content of the letters on account of the fact that he only has a commercial and not an editorial relationship with the review. He was an owner and as such had the power to shape the editorial direction of the review. For that reason, he was vicariously subject to the "duties and responsibilities" which the review's editorial and journalistic staff undertake in the collection and dissemination of information to the public and which assume an even greater importance in situations of conflict and tension.

64. In view of the above considerations the Court concludes that the penalty imposed on the applicant as the owner of the review could reasonably be regarded as answering a "pressing social need" and that the reasons adduced by the authorities for the applicant's conviction are "relevant and sufficient".

It is also to be noted that the applicant first received a relatively modest fine of TRL 166,666,666, which was later halved to TRL 83,333,333 (see paragraphs 14 and 18 above). The Court observes in this connection that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.

65. For these reasons and having regard to the margin of appreciation which national authorities have in such a case, the Court considers that the interference in issue was proportionate to the legitimate aims pursued. There has consequently been no breach of Article 10 of the Convention in the circumstances of this case.

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

66. The applicant complained that he had been denied a fair hearing in breach of 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 him. 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 ..."

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

68. In the applicant's 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. He pointed to the fact that their professional assessment and promotion as well as their security of tenure were within the control of the executive branch and in turn the army. The ties which bound them to the executive and to the army made it impossible for military judges to discharge their functions on the bench in an independent and impartial manner. The applicant further stressed that the independence and impartiality of military judges and hence of the courts on which they sat were compromised since these judges were unable to take a position which might be contradictory to the views of their commanding officers.

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

70. The Government replied 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 applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under Article 112 of the Military Criminal Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 35 above). Secondly, the assessment reports referred to by the applicant 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 (see paragraph 36 above). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

71. The Government further averred that the fairness of the applicant's 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 superiors nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. Moreover, the applicant's original conviction had been quashed on appeal by the Court of Cassation after a full rehearing of the case. When the case was referred back to it the Istanbul National Security Court followed the higher court's ruling and its subsequent judgment was later upheld on appeal by the Court

of Cassation, a court whose independence and impartiality have not been impugned by the applicant (see paragraphs 17-20 above).

72. 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.

73. 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 to the reasons supporting that opinion.

74. The Court recalls that 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, and paragraph 32 above). 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; the fact that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraphs 33-36 above).

75. 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 Sürek's right to a fair trial, in particular whether, viewed objectively, he had a legitimate reason to fear that the court which tried him lacked independence and impartiality (see the 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 applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disseminating propaganda aimed at undermining the territorial integrity of the State and

national unity – should have been apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service (see paragraph 34 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the Incal judgment cited above, p. 1573, § 72 *in fine*).

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

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

77. The applicant claimed compensation for pecuniary and non-pecuniary damage as well as reimbursement of costs and expenses incurred in the domestic and 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

78. The applicant claimed the sum of 150,000 French francs (FRF) by way of compensation for (a) the fine imposed on him and paid (see paragraph 18 above) and (b) expenditure incurred in pursuing the case in the domestic courts. The amount claimed included interest accrued, took account of the high rate of inflation in the respondent State and was calculated on the basis of the current exchange rate.

79. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the fact that the applicant was only fined 83,333,333 Turkish liras and he was allowed to pay the fine in monthly instalments. The Government also pointed out that the applicant had not provided any details to substantiate the amount claimed for his alleged out-of-pocket expenses.

80. The Delegate of the Commission did not comment at the hearing on the amount claimed.

81. The Court would observe that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been, irrespective of its own finding that the respondent State is not in breach of

Article 10 on account of the applicant's conviction and sentence. It considers that in the circumstances the applicant's claim should be disallowed.

B. Non-pecuniary damage

82. The applicant claimed that as a lawyer his career had been blighted on account of the fact that he had a conviction recorded against him for an offence of terrorism. He requested the Court to award him the sum of FRF 100,000 by way of compensation for non-pecuniary damage.

83. The Government argued that if the Court were minded to find a violation in this case that finding would constitute in itself sufficient just satisfaction under this head.

84. The Delegate of the Commission did not comment at the hearing on this limb of the applicant's claim either.

85. The Court recalls that it has found that there has been no violation of Article 10 on the facts of this case. It considers that a finding of a violation of Article 6 § 1 constitutes in itself sufficient just satisfaction for the applicant's alleged non-pecuniary damage.

C. Costs and expenses

86. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the domestic proceedings as well as in bringing his case before the Convention institutions. He assessed these at FRF 90,000. As to the proceedings before the Commission and Court the applicant stated that his lawyer's fees were based on the Turkish Bar Association's minimum rate scales. The applicant added that the total amount claimed took account of the high level of inflation in Turkey and was based on current exchange rates.

87. 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. The case was simple and had not required much effort on the part of the applicant's lawyer who had dealt with it throughout the proceedings in his own language. They cautioned against the making of an award which would only constitute a source of unjust enrichment having regard to the socio-economic situation in the respondent State.

88. The Delegate of the Commission did not comment at the hearing on the sum claimed.

89. The Court notes that it has found a breach only in respect of Article 6 § 1 of the Convention. It further notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention which are

based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, *Nikolova v. Bulgaria* [GC], no. 31195/96, § 79, ECHR 1999-II), the Court awards the applicant the sum of FRF 10,000.

D. Default interest

90. 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* by eleven votes to six that there has been no violation of Article 10 of the Convention;

2. *Holds* by sixteen votes to one that there has been a violation of Article 6 § 1 of the Convention;

3. *Holds* by sixteen votes to one that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself sufficient just satisfaction for the non-pecuniary damage alleged by the applicant;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant in respect of costs and expenses, within three months, the sum of 10,000 (ten thousand) French francs, to be converted into Turkish liras at the rate applicable on the date of settlement;
   (b) that simple interest at an annual rate of 3.47% shall be payable on the above sum from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

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

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) partly dissenting opinion of Mrs Palm;

(b) partly dissenting opinion of Mr Bonello;

(c) joint partly dissenting opinion of Mrs Tulkens, Mr Casadevall and Mrs Greve;

(d) partly dissenting opinion of Mr Fischbach;

(e) 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.

PARTLY DISSENTING OPINION OF JUDGE PALM

I agree with Court's conclusion that there has been a violation of Article 6 § 1 in this case. My dissent relates to the Court's general approach to examining whether there has been a violation of Article 10.

In my opinion the majority has attached too much weight to the admittedly harsh and vitriolic language used in the impugned letters and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the words in question shock and disturb the reader with their general accusatory tone and their underlying violence. But in a democracy, as our Court has emphasised, even such "fighting" words may be protected by Article 10. The question in the present case concerns the approach employed by the Court to decide the point at which such "violent" and offensive speech ceases to be protected by the Convention.

My answer to this question is to focus less on the vehemence and outrageous tone 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.

This was in fact the approach of the former Court when it found that there had been no violation of Article 10 in the Zana case although I dissented in that case on other grounds. In Zana the applicant had indicated his support for the PKK during an interview. The Court examined the context in which the statement was made, noting (1) that the interview coincided with murderous attacks carried out by the PKK on civilians in south-east Turkey, where extreme tension reigned at the material time; (2) that the applicant was the mayor of Diyarbakır – the most important city in south-east Turkey; (3) that the interview had been given in a major national daily newspaper and had to be judged as likely to exacerbate the already explosive situation in that region (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2549, §§ 59 and 60).

Applying this approach to the facts of the present case I attach weight to the following elements. In the first place, the applicant was not punished for the offence of incitement to hatred pursuant to Article 312 of the Criminal Code but for an offence of disseminating separatist propaganda under section 8(1) of the Prevention of Terorrism Act 1991 (see paragraphs 13-20 of the judgment). In fact the courts found "no grounds for convicting him under Article 312" (see paragraph 14 of the judgment). The majority's reliance on the letters as capable of inciting to violence or as hate speech

which glorifies violence thus goes significantly further than the approach of the national courts. Secondly, the applicant was only the major shareholder in the review and not the author of the impugned letters nor even the editor of the review responsible for selecting the material in question. He was thus lower down in the chain of responsibility for the publication of readers' letters. Nor was he (or the authors) a prominent figure in Turkish life capable, as in the Zana case, of exercising an influence on public opinion. Thirdly, the review was published in Istanbul far away from the zone of conflict in south-east Turkey. Finally, letter-writing by readers does not occupy a central or headline position in a review and is by its very nature of limited influence. Moreover some allowance must be made for the fact that members of the public expressing their views in letters for publication are likely to use a more direct and vehement style than professional journalists.

The combination of these factors leads me to the conclusion that there was no real or genuine risk of the speech at issue inciting to hatred or to violence and that the applicant was sanctioned because of the political message of the letters rather than their inflammatory tone. I am thus of the view that there was a violation of Article 10 in this case.

PARTLY DISSENTING OPINION OF JUDGE BONELLO

I voted to find a violation of Article 10, as I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's 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 applicant supported or instigated the use of violence, then his 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 applicant was 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

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.

alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant 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].

Moreover, I did not support the majority in its ruling that the finding of a violation of Article 6 § 1 of the Convention constitutes in itself just satisfaction for the non-pecuniary damage alleged by the applicant. I believe that such non-redress is inadequate in any court of justice and is negated by the clear wording of the Convention, as explained in detail in my partly dissenting opinion annexed to *Aquilina v. Malta* ([GC], no. 25642/94, ECHR 1999-III).

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

JOINT PARTLY DISSENTING OPINION OF JUDGES TULKENS, CASADEVALL AND GREVE

(*Translation*)

Like the majority, we voted in favour of finding a violation of Article 6 § 1 of the Convention. However, unlike the majority, we consider that there was also a breach of Article 10 in the present case. Our opinion is based in particular on the following considerations.

1. While, on the one hand, the Court reiterates that freedom of the press must make it possible to "... *impart information and ideas on political issues, including divisive ones*" (see paragraph 59 of the judgment), it finds on the other hand that the impugned letters "... *amount to an appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices which have manifested themselves in deadly violence*" (see paragraph 62). In addition to the fact that the letters concerned must be read in context, it is, in our view, difficult to assess accurately and objectively the meaning of the terms employed and how they should be construed. We consider that freedom of expression as protected by the Convention may be curtailed only when there is direct provocation to commit serious criminal offences (*crimes*).

2. Furthermore, the Court's analysis in the instant case seems to us to be inconsistent with its conclusions in the Arslan, Ceylan and several other cases, three of which also involved the applicant, Mr Sürek. All of those cases concerned the right to information and freedom of expression. The Court hardly distinguishes between these cases in its assessment of the political statements and sometimes virulent and acerbic criticism of the Turkish authorities' actions; in none of them did it find any justification for making an exception to Article 10 of the Convention. More particularly, we fail to see why in the present case, but not in the others "... *the message which is communicated to the reader is that recourse to violence is a necessary and justified measure of self-defence in the face of the aggressor*", as the majority assert in paragraph 62 of the judgment.

3. The case of Sürek (no. 1) differs markedly from Zana, as in the latter case the applicant's statements were unambiguous, they coincided "... *with murderous attacks carried out by the PKK on civilians in south-east Turkey, where there was extreme tension at the material time*" and Mr Zana was a political figure and former mayor of Diyarbakır, so that it followed that the published comments could be regarded as "... *likely to exacerbate an already explosive situation in that region*" (see the Zana v. Turkey judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, p. 2549, §§ 59-60). In the present case Mr Sürek was not even the author of the comments in the impugned letters, which had been written by readers of the review.

4. The criteria used by the majority in its assessment (see paragraphs 59 and 61 of the judgment) and the fact that, as the Court has regularly stated, paragraph 2 of Article 10 must be strictly construed so as to leave little scope for limitations on freedom of expression, meant that the Court should, in our view, have found that there was an unjustified interference with the applicant's right to freedom of expression and, consequently, a violation of Article 10.

PARTLY DISSENTING OPINION OF JUDGE FISCHBACH

(*Translation*)

Having voted with the majority in favour of finding a violation of Article 6 § 1, I regret that I am unable to agree with the reasoning that led it to conclude that there has been no violation of Article 10.

Obviously, I agree with the Court's case-law affording the national authorities a wider margin of appreciation when considering whether there is a need for interference in the exercise of freedom of expression in cases concerning comments inciting people to use violence against an individual, a State representative or a sector of the population.

I cannot, however, detect in the remarks made in the two letters written by readers an incitement to use violence. In view of the situation that has prevailed in south-east Turkey since 1985, it seems to me that only conduct of that nature may be regarded as overstepping the limits of freedom of expression as protected by the Convention. The applicant, who has done no more than to describe, admittedly in violent and shocking terms, what is happening in the region, has not said any more in his comments than what the Court has in other cases regarded as tolerable and thus not falling within the exceptions to Article 10 (see *Ceylan v. Turkey* [GC], no. 23556/94, ECHR 1999-IV, and *Arslan v. Turkey* [GC], no. 23462/94, 8 July 1999).

That is why I find that there has been a violation of Article 10 in the present case.

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 75 of the judgment, that it is "understandable that the applicant ... 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.