CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

CASE OF SÜREK v. TURKEY (No. 2)

(Application no. 24122/94)

JUDGMENT

STRASBOURG

8 July 1999

This judgment is subject to editorial revision before its reproduction in final form in the official reports of selected judgments and decisions of the Court.

In the case of Sürek v. Turkey (no. 2),

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] to the Convention and the relevant provisions of its 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 4 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.24122/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Kamil Tekin Sürek, on 9 March 1994.

Notes by the Registry

[1.-2.] Protocol No. 11 and the Rules of Court entered 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 of the Convention 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 the 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). Mr R. Bernhardt, President of the Court at the time, subsequently authorised the applicant's lawyer to use the Turkish language in the written procedure (former Rule 27 § 3). At a later stage, Mr L. Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

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 23 September and 14 October 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 further details of his claim 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 Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Arslan v. Turkey (no. 23462/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); 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 v. Turkey no. 1 (no. 26682/95); Sürek and Özdemir v. Turkey

[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.

(nos. 23927/94 and 24277/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, 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 having regard to the decision of the Grand Chamber in the case of Oğur v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

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

6. Pursuant to the invitation of the Court (Rule 99), the Commission delegated one of its members, Mr D. Šváby, to take part in the consideration of the case before the Grand Chamber. The Commission subsequently informed the Registry that the Commission would not be represented at the oral hearing. On 16 February 1999 the Delegate filed his written pleadings on the case with the Registry.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 3 March 1999, the case being heard simultaneously with the case of Sürek and Özdemir v. Turkey. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*

Mr D. TEZCAN, *Agent*,
Mrs D. AKCAY, *co-Agent*,
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the applicant*
Mr H. KAPLAN, Istanbul Bar, *Advocate*.

The Court heard addresses by Mr Tezcan and Mr Kaplan.

AS TO 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 news report

10. The issue dated 26 April 1992 contained a news report providing information given at a press conference by a delegation - which included two former Turkish parliamentarians Leyla Zana and Orhan Doğan, Lord Avebury and a member of the Anglican Church - on its visit to Şırnak village, in the wake of tensions in the area.

The news report included an article reporting the Governor of Şırnak as having told the delegation that the Şırnak Chief of Police had given an order to open fire on the people.

It further rendered a dialogue between Leyla Zana, Orhan Doğan and İsmet Yediyıldız, a Gendarme Commander.

The relevant part of the report read:

> "Gendarmerie Regiment Commander İsmet Yediyıldız:
>
> 'Your blood would not quench my thirst…'
>
> While the British delegation and Diyarbakır MP Leyla Zana, Şırnak MP Orhan Doğan and Bismil District Governor Mehmet Kurdoğlu managed to persuade the people of Tepe village, which was blockaded by the security forces, after talking to them for a while and telling them that permission had been obtained for them to get the bodies of their dead, an interesting conversation took place between

Diyarbakır Security Director Ramazan Er and Gendarmerie Regiment Commander İsmet Yediyıldız.

The conversation between the MPs Leyla Zana and Orhan Doğan on the one hand and Colonel İsmet Yediyıldız on the other hand was recounted by Leyla Zana as follows:

Colonel Yediyıldız: What business do you have here? There had been nobody here until you arrived. You have come and stirred things up again.

Leyla Zana: No, Sir. The situation had been extremely tense before we arrived. We have come with the District Governor and are trying to calm down the tension here. Here is the District Governor.

Colonel Yediyıldız: No, that's not true. We saw when we were flying by helicopter that there was nobody here before. People gathered when you arrived.

Orhan Doğan: No, you can ask the District Governor if you like. (Meanwhile, District Governor Mehmet Kurdoğlu was also being told off.)

Colonel Yediyıldız: Do you know who these dead people are?

Orhan Doğan: Yes, they are our children, the children of all of us.

Colonel Yediyıldız: No, these are not our children, they are your children.

Orhan Doğan: But my Colonel ...

Colonel Yediyıldız: Do not call me your colonel. I am not your colonel. Your blood would not quench my thirst. You should also be honest and freely admit that my blood would not quench your thirst. Right now I could kill you like a rat. Your death would give us pleasure. Your blood would not quench my thirst.

Leyla Zana: If the problem can be solved by killing us, then here are our people; let's go among them and you kill us and this problem is solved.

Colonel Yediyıldız: No, I would not kill you now. I would kill you after disgracing you in the eyes of the people."

C. The charges against the applicant

11. On 29 May 1992 the Public Prosecutor at the Istanbul National Security Court (*İstanbul Devlet Güvenlik Mahkemesi*) charged the applicant, being the owner of the review, with revealing the identity of officials mandated to fight terrorism and thus rendering them terrorist targets. The charges were brought under section 6 of the Prevention of Terrorism Act 1991 ("the 1991 Act"; see paragraph 16 below).

12. In the proceedings before the Istanbul National Security Court the applicant denied the charges and advanced the following arguments in his

defence. The news report had been published with the aim of informing the public of the events which had occurred during the 1992 Newroz celebrations. It had been based on a joint press declaration by former deputies Leyla Zana and Orhan Doğan and an English delegation, during their visit to south-east Turkey. By virtue of the fact that section 6 of the 1991 Act contained an absolute prohibition on the disclosure and dissemination of the identity of officials appointed to fight terrorism, it enabled officials to abuse their authority, violate the law and subject citizens to ill-treatment. The right to receive and impart information, including information concerning acts of officials, was fundamental in a democratic society. Section 6 of the 1991 Act contravened not only the Turkish Constitution but also Article 10 of the Convention.

D. The applicant's conviction

13. In a judgment of 2 September 1993 the National Security Court convicted the applicant under section 6 of the 1991 Act and sentenced him to pay a fine of 54,000,000 Turkish lira. It noted that the news report had contained an allegation to the effect that the Governor of Şırnak had stated to the visiting delegation that the Şırnak Chief of Police had given an order to open fire on the people. It had further affirmed that a gendarme commander had stated to Orhan Doğan in Leyla Zana's presence "[y]our death would give us pleasure. Your blood would not quench my thirst". By having disclosed the identity of these officials, the publication had rendered them targets for terrorist attack.

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

14. The applicant appealed, reiterating his defence before the National Security Court. He also argued that the press declaration at issue had already been reported in other newspapers and magazines and that the incriminated news report had added nothing to these.

15. On 10 December 1993 the Court of Cassation dismissed the appeal. It upheld the cogency of the National Security Court's assessment of the evidence and its reasoning for rejecting the applicant's defence.

II. RELEVANT DOMESTIC LAW

A. The criminal law

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

16. 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 matter other than periodicals or if the periodical has just been launched.*[2] 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."

B. The National Security Courts

17. The relevant provisions of domestic law governing the organisation and procedure of the National Security Court are quoted in paragraphs 32-33 of the Sürek no. 1 v. Turkey judgment, which is being delivered on the same date as the present judgment.

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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 purpose of terrorism" (sections 3 and 4) and to which it applies.
2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and went out of force on 27 July 1993.

PROCEEDINGS BEFORE THE COMMISSION

18. Mr Kamil Tekin Sürek applied to the Commission on 9 March 1994. He complained 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 of the Convention. 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.

19. The Commission declared the application (no. 24122/94) admissible on 2 September 1996, with the exception of the applicant's Article 6 § 1 complaint relating to the length of the criminal proceedings in his case. In its report of 13 January 1998 (former Article 31), it expressed the opinion that there had been no violation of Article 10 of the Convention (23 votes to 9) and that there had been a violation of Article 6 § 1 (31votes to 1). The full text of the Commission's opinion and of the two separate opinions contained in the report is reproduced as an annex to this judgment[1].

FINAL SUBMISSIONS TO THE COURT

20. 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.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

21. 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

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

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."

22. 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

23. 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 6 of the Prevention of Terrorism Act 1991 (hereinafter "the 1991 Act").

B. Justification of the interference

24. 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"

25. It was not disputed that the interference had a legal basis in section 6 of the 1991 Act and was thus "prescribed by law" within the meaning of Article 10 § 2 of the Convention. The Court does not see any reason for arriving at a contrary conclusion.

2. Legitimate aim

26. The applicant did not dispute that the interference pursued a legitimate aim under the second paragraph of Article 10 of the Convention.

27. The Government submitted that the measures had been imposed in the interests of national security and territorial integrity.

28. The Commission was of the opinion that the applicant's conviction and sentence for the disclosure of the identities of certain officials pursued the legitimate aim of protection of the rights of others. The Commission left

it open whether other aims, such as the protection of national security and public safety, were relevant.

29. The Court, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, Reports 1997-VII, p. 2547, §§ 19 and 50) and to the need for the authorities to take particular steps to protect public officials involved in the fight against terrorism from being targeted for terrorist attack, considers that the contested measures can be said to have been taken in the interest of national security and territorial integrity and for the protection of the rights of others, which are legitimate aims under Article 10 § 2 of the Convention.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

30. The applicant complained that although he was the owner of the review with no editorial responsibility for its content, he had nonetheless been punished under section 6 of the 1991 Act for the disclosure of the names of the public officials in question. He submitted that the impugned data had formed part of an objective news report aimed at providing the public with information given at a press conference by a delegation of public figures, in the wake of certain tensions at Şırnak in 1992. The publication did not praise the PKK. Nor did the review or the applicant himself have any links with that organisation. Finally, he stressed that the press declaration at issue had already been reported in other newspapers and that the incriminated news report added nothing to these reports.

(ii) The Government

31. The Government maintained that the news report published by the applicant had contained unfounded accusations which, by virtue of the disclosure of the identity of certain officials involved in the fight against terrorism, had put their lives at danger from terrorist attack.

As the owner of the review the applicant had participated in the dissemination of separatist propaganda by publishing a news report which, by attempting in a veiled but nonetheless obvious manner to vindicate a terrorist organisation, threatened fundamental interests of the national community such as territorial integrity, national unity and security and the prevention of crime and disorder. In the Government's submission, separatist propaganda inevitably incites to violence and provokes hostility among the various groups in Turkish society, thus endangering human rights and democracy.

In the Government's view the measures taken against the applicant did 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

32. The Commission observed that, bearing in mind the general tension and the level of terrorism and violence occurring in south-east Turkey, the officials engaged in State action against terrorist groups in that area were frequently exposed to serious risks and therefore a high degree of protection was required. According to the findings of the National Security Court, the disclosure of the identities of the officials concerned had made them possible targets of terrorist attack. In the Commission's opinion, the incriminated news report, which in itself might have contained information of public interest, could well have been published without disclosure of the identities of the two officials concerned. It concluded that there had been no violation of Article 10 in the circumstances of the case.

(b) The Court's assessment

33. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (cited above, pp. 2547-48, § 51) and in its Fressoz and Roire v. France judgment of 21 January 1999 (*Reports* 1999-, p. …, § 45).

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

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

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

34. The Court further recalls that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996 Reports 1996-V, p. 1957, § 58). The dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, Reports 1998-IV, p. 1567, § 54). Finally, where such remarks 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.

35. Since the applicant was convicted of disclosing the identity of certain public officials 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 a political democracy (see among many other authorities, the Lingens v. Austria judgment of 8 July 1986, Series A, no. 103, p. 26, § 41; and the above-mentioned Fressoz and Roire judgment, p…., § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of vital interests of the State such as national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned Lingens judgment, p. 26 §§ 41-42).

36. The Court notes that the applicant's conviction and sentence had been imposed on the ground that his review had published a news report

identifying certain officials with certain statements suggesting misconduct on their part. While it is true that the applicant did not personally associate himself with the information contained in the news report, the Court does not accept his argument that he should be exonerated from any criminal liability for their contents on account of the fact that he only had 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 journalist 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.

37. The applicant's conviction and sentence related, in the first place, to the fact that his publication had reported the Governor of Şırnak to have affirmed that the Şırnak Chief of Police had given order to open fire against the people. Secondly, it had quoted Leyla Zana, a former parliamentarian, as having stated that a named Gendarme Commander had told Orhan Doğan, also a former parliamentarian, that "[y]our death would give us pleasure. Your blood would not quench my thirst" (see paragraph 10 above).

Thus, the wording of the statements clearly implied serious misconduct on the part of the police and gendarme officers in question. Although the statements were not presented in a manner which could be regarded as incitement to violence against the officers concerned or the authorities, they were capable of exposing the officers to strong public contempt. Moreover, the news report was 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 above-mentioned Zana judgment, p. 2539, § 10).

38. In the light of the foregoing, the Court sees no reason to doubt that the applicant's conviction and sentence were supported by reasons which were relevant for the purposes of the necessity test under paragraph 2 of Article 10.

39. As regards the further question whether the reasons relied on could also be considered sufficient, the Court observes that the contested interference related to journalistic reporting of statements made by certain politicians to the press concerning their visit to an area of Turkey where tensions had occurred (see the Jersild v. Denmark judgment of 23 September 1994, Series A no. 298, p. 23, § 31). The impugned news report simply reiterated what a police officer and a gendarme officer were said to have ordered or affirmed on specific occasions. Assuming that the assertions were true, the Court considers that, in view of the seriousness of the misconduct in question, the public had a legitimate interest in knowing not only the nature of the conduct but also the identity of the officers.

However, the defences of truth (see the Castells v. Spain judgment of 23 April 1992, Series A no. 236, p. 24, §§ 47-48) and public interest could not have been pleaded under the relevant Turkish law.

40. Furthermore, it is undisputed that the press declaration on which the news report was based had already been reported in other newspapers and that the incriminated news coverage added nothing to those reports. Nor has it been submitted that other newspapers were prosecuted in respect of publication of information derived from the said declaration (see the Weber v. Switzerland judgment of 22 May 1990, Series A no. 177, p. 23, § 51). At the time of the publication of the news report in the present case, the information in issue, identifying specific police and gendarme officers with serious misconduct, was already in the public domain. Thus, the interest in protecting the identity of the officers concerned had been substantially diminished and the potential damage which the restriction was aimed at preventing had already been done (see the *Observer and Guardian* and the *Sunday Times* (no. 2) judgments of 26 November 1991, respectively Series A no. 216, pp. 34-35, §§ 69-71; and Series A no. 217, pp. 30-31, §§ 54-56).

41. Finally, the Court considers that the conviction and sentence were capable of discouraging the contribution of the press to open discussion on matters of public concern.

42. In the light of the above, the Court does not find that the objective of the Government in protecting the officers in question against terrorist attack was sufficient to justify the restrictions placed on the applicant's right to freedom of expression under Article 10 of the Convention. In the absence of a fair balance between the interests in protecting the freedom of the press and those in protecting the identity of the public officials in question, the interference complained of was disproportionate to the legitimate aims pursued. There has therefore been a breach of Article 10 of the Convention in the present case.

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

A. The Government's preliminary objection

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

44. The Court reiterates that it takes cognisance of preliminary objections in so far as the State in question has already raised them, at least in substance and with sufficient clarity, before the Commission, in principle at the stage of the initial examination of admissibility (see, for instance, the Aytekin v. Turkey judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, p. § 77). However, it does not appear from the observations submitted by the Government to the Commission that they objected, on the ground of non-exhaustion, to the admissibility of the above-mentioned complaint. Accordingly, they are estopped from raising their preliminary objection.

B. The merits of the applicant's complaint

45. The applicant complained that he had been denied a fair hearing in breach of the Article 6 § 1 of the Convention on account of the presence of a military judge on the bench of the National Security Court which tried and convicted him. In so far as is relevant Article 6 § 1 provides:

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

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

47. 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.

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.

48. The Government replied that the rules governing the appointment of military judges to the National Security Courts and the guarantees which they enjoy in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of

independence and impartiality within the meaning of Article 6 § 1. The Government disputed the applicant's argument that military judges were accountable to their superior officers. In the first place, it was an offence under section 112 of the Military Code for a public official to attempt to influence the performance by a military judge of his judicial functions (see paragraph 17 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 Military Supreme Administrative Court (*ibidem*). When acting in a judicial capacity a military judge was assessed in exactly the same manner as a civilian judge.

49. 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 authorities nor the public authorities which had appointed him to the court had any interest in the proceedings or in the outcome of the case. The Istanbul National Security Court's judgment was later upheld on appeal by the Court of Cassation, a court whose independence and impartiality have not been impugned (see paragraphs 13-15 above).

50. 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.

51. 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 Incal v. Turkey case in its Article 31 report adopted on 25 February 1997 and the reasons supporting that opinion.

52. The Court recalls that in its Incal v. Turkey judgment of 9 June 1998 (Reports 1998-IV, p. 1504) and in its Çiraklar v. Turkey judgment of 28 October 1998 (Reports 1998-, p. …) 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 certain guarantees of independence and impartiality (see the above-mentioned Incal judgment, p. 1571, § 65). On the other hand, the Court found that some aspects of these judges' status made their independence and impartiality questionable (*ibidem*, § 68): for example, the fact that they are servicemen

who still belong to the army, which in turn takes its orders from the executive; or that they remain subject to military discipline; and the fact that decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army (see paragraph 17 above).

53. 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 above-mentioned Incal judgment, p. 1572, § 70; and the above-mentioned Çiraklar judgment, p. …, § 38).

As to that question, the Court sees no reason to reach a conclusion different from that in the cases of Mr Incal and Mr Çiraklar, both of whom, like the present applicant, were civilians. It is understandable that the applicant – prosecuted in a National Security Court for disclosing the identity of officials involved in the fight against terrorism - 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 17 above). On that account he could legitimately fear that the Istanbul National Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to that court's lack of independence and impartiality can be regarded as objectively justified. The proceedings in the Court of Cassation were not able to dispel these fears since that court did not have full jurisdiction (see the above-mentioned Incal judgment, p.1573, § 72 *in fine*).

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. 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

56. The applicant claimed the sum of 100, 000 French francs (FRF) by way of compensation for the fine imposed on him and paid (see paragraph 13 above). 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 an exchange rate from 1992.

57. The Government maintained that the sum claimed by the applicant was exorbitant having regard to the fact that the applicant was only fined 54,000,000 Turkish liras and he was allowed to pay the fine in monthly instalments.

58. The Delegate of the Commission did not comment.

59. The Court cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been, but has found that the respondent State is in breach of Article 10 on account of the applicant's conviction and sentence. Having regard to the rates of exchange during the relevant period, it considers that in the circumstances the applicant should be awarded FRF 13,000 in respect of pecuniary damage.

B. Non-pecuniary damage

60. The applicant claimed that as a lawyer his career had been blighted on account of the fact that he has a conviction recorded against him for an offence of terrorism. He requested the Court to award him the sum of FRF 80,000 by way of compensation for moral damage.

61. 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.

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

63. The Court considers that the applicant may be taken to have suffered distress on account of the facts of the case. Making an assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant in compensation the sum of FRF 30,000 under this head.

C. Costs and expenses

64. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the proceeding before the domestic courts and the Convention institutions. He

assessed these at 50,000 FRF. As to the proceedings before the Commission and Court he 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.

65. 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.

66. The Delegate of the Commission did not comment.

67. The Court 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, the above-mentioned Nikolova v. Bulgaria judgment Reports 1999-... p. …, § 79), the Court awards the applicant the sum of FRF 15,000.

D. Default interest

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

FOR THESE REASONS, THE COURT

1. *Holds* by sixteen votes to one that there has been a violation of Article 10 of the Convention;

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

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

4. *Holds* by sixteen votes to one
   (a) that the respondent State is to pay the applicant, within three months, the following sums, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) 13,000 (thirteen thousand) French francs in respect of pecuniary damage;
      (ii) 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;
      (iii) 15,000 (fifteen thousand) French francs in respect of costs and expenses;
   (b) that simple interest at an annual rate of 3.47 % shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

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) concurring opinion of Mr Bonello;
(b) dissenting opinion of Mr Gölcüklü.

Initialled: L. W.
Initialled: P. J. M.

DECLARATION OF JUDGE WILDHABER

Although I voted against the finding of a violation of Article 6 § 1 of the Convention in the case of Incal v. Turkey of 9 June 1998 (*Reports* 1998-IV, p. 1547), I now consider myself bound to adopt the view of the majority of the Court.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the 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].

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

It is not manifest to me that any of the words with which the 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 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]

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

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(*Provisional translation*)

To my great regret, I cannot agree with the majority of the Court that there has been a violation of Article 10 of the Convention. In my opinion, there is no valid reason to find that the interference in this case was not necessary in a democratic society and, in particular, not proportionate to the aim of preserving national security and public order.

Nor do I share the majority's view 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.

The general principles which emerge from the judgment of 25 November 1995 in the case of Zana v. Turkey and which I recall in my dissenting opinion annexed to the Gerger v. Turkey judgment (of 8 July 1999) are relevant to, and hold good in, the instant case. To avoid repetition, I refer the reader to paragraphs 1-9 of that dissenting opinion.

The case of Sürek v. Turkey (no. 2) is indistinguishable, if not in form, at least in content, from the Zana and Gerger cases or from the cases of Sürek (no. 4) and Sürek and Özdemir. Indeed, the European Commission of Human Rights concluded by 23 votes to 9 that there had been no violation of Article 10 of the Convention. The Commission also noted: "the State Security Court's finding that the disclosure of the identities of the officials concerned made them possible targets of terrorist attack. Having regard to the general tension and to the level of terrorism and violence occurring in south-east Turkey, the Commission accepts that officials engaged in State action against terrorist groups in that area are frequently exposed to serious risks and therefore require a high degree of protection. Moreover, the Commission notes that the incriminated news report, which in itself may have contained information of public interest, could well have been published without disclosure of the identities of the two officials concerned." In conclusion, the Commission said "the interference with the applicant's freedom of expression was proportionate and could reasonably be regarded as necessary for the purpose of protecting the rights of the two officials concerned."

As regards the Court's finding of a violation of Article 6 § 1, I refer to the dissenting opinion which I expressed jointly with those eminent judges Mr Thor Vilhjálmsson, Mr Matscher, Mr Foighel, Sir John Freeland, Mr Lopes Rocha, Mr Wildhaber and Mr Gotchev in the case of Incal v. Turkey of 9 June 1998 and to my individual dissenting opinion in the case of Çiraklar v. Turkey of 28 October 1998. I remain convinced that the

presence of a military judge in a court composed of three judges, two of whom are civil judges, in no way affects the independence and impartiality of the National Security Courts, which are courts of the non-military (ordinary) judicial order whose decisions are subject to review by the Court of Cassation.

I wish to stress that: (1) the conclusion of the majority results from an unjustified extension to the theory of outward appearances; (2) it does not suffice to say, as the majority do in paragraph 79 of the judgment, that it is "understandable that the applicants ... should be apprehensive about being tried by a bench which included a regular army officer, who was a member of the Military Legal Service", and then simply to rely on the Incal precedent (Çiraklar 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.