



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

FOURTH SECTION

CASE OF ERGIN v. TURKEY (No. 6)

(Application no. 47533/99)

JUDGMENT

STRASBOURG

4 May 2006

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ergin v. Turkey (no. 6),

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, *president*,

MM. G. BONELLO,

R. TÜRMEK,

M. PELLONPÄÄ,

K. TRAJA,

L. GARLICKI,

Mrs L. MIJOVIĆ, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 4 April 2006,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 47533/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Ahmet Ergin ("the applicant"), on 25 March 1999.

2. The applicant was represented by Mr K.T. Sürek, a lawyer practising in Istanbul. The Turkish Government ("the Government") did not appoint an Agent for the proceedings before the Court.

3. On 1 February 2001 the Second Section decided to communicate the application to the Government.

4. On 1 November 2001 and 1 November 2004 the Court changed the composition of its Sections (Rule 25 § 1 of the Rules of Court). This case was assigned to the newly composed Fourth Section (Rule 52 § 1).

5. On 31 March 2005, under the provisions of Article 29 § 3 of the Convention, the Fourth Section decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**1. THE CIRCUMSTANCES OF THE CASE**

6. The applicant was born in 1973 and lives in Istanbul.

7. On 1 September 1997, as editor of the newspaper *Günlük Emek* (Everyday Work), the applicant published in issue number 297 an article

entitled “Giving the conscripts a send-off, and collective memory” (*Asker uğurlamalar ve toplumsal hafıza*) signed by Barış Avşar.

8. On 4 December 1997 the public prosecutor at the Military Court of the General Staff (“the General Staff Court”), acting under Article 58 of the Military Penal Code and Article 155 of the Criminal Code, charged the applicant with incitement, by publication of the above article, to evade military service (*askerlikten soğutma*).

9. The applicant informed the General Staff Court that the article had been written by Mr Şevki Akbaba, who had signed it with a pseudonym.

10. In a judgment of 20 October 1998 the General Staff Court initially sentenced the applicant to two months’ imprisonment and a fine of 60,000 Turkish liras (TRL). By virtue of section 4 of the Execution of Sentence Act (Law no. 647), which provided for prison sentences imposed on editors to be commuted to fines, the applicant was ultimately ordered to pay a “heavy fine” of TRL 1,160,000.¹

11. In its judgment the General Staff Court referred to the following passage from the offending article:

“This last week in bus stations has been a time for sending the August conscripts on their way... The novice soldiers setting off – “but you’ll soon be back”, people tell them to console them – already seemed during these ritual send-offs to be plunging into war by donning “invisible khaki”. It was a time when war seemed rather attractive; the congratulations and praises made it seem like a warm nest, almost as warm as a mother’s arms, into whose embrace they would have liked to run. What we saw at each of these ceremonies shows that the thing has become a collective hysteria and that this hysteria has also spawned its own indispensable attributes: the traditional drum and clarinet, the famous three-crescented flag, sometimes accompanied by the corn-ear flag of the RP [Welfare Party] or the rose-bearing flag of the BBP [Great Union Party] ... Warm-up ceremonies are organised for those setting off for the war, the exaltation felt on killing a man is the exaltation of winning a match and, what is more, the killer justifies his act by speaking of the love he has for his fatherland and his nation. In short, it can’t be said that what we’re doing is right... Those verses, written by a fallen soldier, are carved on his own tombstone. He will no longer see those who gather to give the conscripts a send-off, no longer hear the drum, the clarinet or the gunfire, not be able to read the verses written on his tombstone, on seeing which he would perhaps have felt repelled by the determinism they convey. Because from now on he is reduced to a title: a martyr... It is because the State does not recognise as such the war which is etched deeply into the collective life and the collective memory that, apart from a small minority, those who return from it after losing an arm, a leg or an eye receive no allowance. These people who are no longer capable of meeting their own needs are being deceived by talk of fictitious jobs. ‘There is a war, but not officially; you are war-wounded, but you count for nothing.’”

In its considerations the General Staff Court pointed out that military service was a constitutional duty and that the applicant, by denigrating

¹ The equivalent of about 4 euros at the time, the amounts of fines not being adjusted to take account of inflation. In Turkish criminal law the term “heavy fine”, which was used until the legislation was amended in November 2004, meant that the convicted person was liable to imprisonment if he or she did not pay the fine.

military service had also denigrated the struggle against the PKK, a terrorist organisation which killed soldiers, police officers, teachers and civil servants. It held that the offending article contained terms contrary to morality and public order.

12. Relying on Articles 6 and 10 of the Convention, the applicant appealed on points of law to the Military Court of Cassation. He argued that the General Staff Court had given its judgment without hearing his defence on the merits of the charge. He submitted that as a civilian he should not have been tried by that court, and alleged that it was not independent or impartial.

13. The applicant was allegedly not provided with a copy of the opinion of the Principal Public Prosecutor at the Military Court of Cassation.

14. In a final judgment of 10 February 1999 the Military Court of Cassation upheld the first-instance judgment. It observed that the applicant's submissions on the merits had been filed by his lawyer, and that the fact that he had been tried by a military court was in accordance with the law.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. The Constitution

15. The relevant provisions in force at the material time provided:

Article 145

“Military justice shall be dispensed by military courts and military disciplinary organs. These courts and tribunals shall be responsible for conducting proceedings concerning offences committed by military personnel which are breaches of military law or are committed against other military personnel, on military premises or in connection with military service and the related duties.

Military courts shall also be responsible for dealing with offences committed by civilians where these are designated by special laws as breaches of military law, or have been committed against military personnel, either during their performance of duties designated by law or on military premises so designated.

The jurisdiction of the military courts as regards persons and offences in time of war or state of emergency, the composition of such courts and the secondment of civilian judges and prosecutors to them where necessary shall be regulated by law

The organisation and functions of military judicial organs, the personal status of military judges and the relations between judges acting as military prosecutors and the commanders under whom they serve shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of the judiciary

and with the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law in accordance with the requirements of military service.”

B. The Criminal Code

16. Article 155 of the Criminal Code provides:

“It shall be an offence, punishable by two months’ to two years’ imprisonment and a fine ... to publish articles inciting the population to break the law or weakening national security, to issue publications intended to incite others to evade military service...”

C. The Military Penal Code

17. Article 58 of the Military Penal Code provides:

“Undermining national resistance:

Any person who commits one of the offences defined in Articles ... and 155 of the Criminal Code ... shall be liable to the sentence laid down in the provision concerned, for undermining national resistance”.

D. The Constitution of Military Courts Act

18. At the material time section 11 of the Constitution of Military Courts Act read as follows:

Section 11

“Trial of civilians by military courts:

... the offences referred to in Articles ... and 58 of the Military Penal Code [come within the jurisdiction of the military courts].”

19. Following the amendment introduced on 30 July 2003 by section 6 of Law no. 4963, section 11 of the Constitution of Military Courts Act now reads as follows:

“... Military courts shall not try civilians charged with committing the crimes and lesser offences referred to in Article 58 of the Military Penal Code in time of peace.”

E. The situation in Europe and the UN system

20. At international level, the position regarding the jurisdiction of military courts to try civilian defendants is as follows.

1. The situation in Europe

21. Among the member States of the Council of Europe Turkey is at present the only country whose Constitution explicitly provides that military courts may try civilians in peacetime.

Although there is some diversity in legislation governing the jurisdiction of military courts to try civilians, in the great majority of legal systems that jurisdiction is either non-existent or limited to certain very precise situations, such as complicity between a member of the military and a civilian in the commission of an offence punishable under the ordinary criminal code or the military penal code.

2. The United Nations' Human Rights Committee

22. In its 1984 General Comment on Article 14 of the International Covenant on Civil and Political Rights¹ the UN's Human Rights Committee issued the following warning to member States:

“The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights.”

23. The country reports subsequently adopted enabled the Committee to clarify its position. It no longer hesitated to criticise States whose legislation still permitted military courts to try civilians. The Committee urged those countries to amend their legislation on the question while congratulating those among them who had implemented such a reform. In the final analysis, the Committee took the view that “military courts should not have the faculty to try cases which do not refer to offences committed by members of the armed forces in the course of their duties”. In its 1999 report on Poland the Committee expressed its views even more incisively, stating that it was “concerned at information about the extent to which military courts have jurisdiction to try civilians; despite recent limitations

¹ All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

on this procedure, the Committee does not accept that this practice is justified by the convenience of the military court dealing with every person who may have taken some part in an offence primarily committed by a member of the armed forces” (Concluding Observations of the Human Rights Committee: Poland, Doc. CCPR/C/79/ Add. 110, 29 July 1999, § 21).

Similar criticisms were made of the Russian Federation and Slovakia, to mention only member States of the Council of Europe, with the Committee taking the line that civilians should not be tried by military courts in any circumstances (see, in particular, Concluding Observations of the Human Rights Committee: Slovakia, Doc. CCPR/C/79/Add. 79, 4 August 1997, § 20).

24. Lastly, mention should be made of the report on the issue of the administration of justice through military tribunals, submitted to the Commission on Human Rights, which is to debate it at its 62nd session in 2006 (Doc. E/CN.4/Sub.2/2005/9 of 16 June 2005).

The first of the Principles set out in the report reads:

“Military tribunals, when they exist, may be established only by the constitution or the law, respecting the principle of the separation of powers. They must be an integral part of the general judicial system.”

However, the rapporteur pointed out

“... the ‘constitutionalization’ of military tribunals that exists in a number of countries should not place them outside the scope of ordinary law or above the law but, on the contrary, should include them in the principles of the rule of law, beginning with those concerning the separation of powers and the hierarchy of norms.”

Principle No. 2 emphasises respect for the standards of international law in the following terms:

“Military tribunals must in all circumstances apply standards and procedures internationally recognized as guarantees of a fair trial, including the rules of international humanitarian law.”

Principle No. 5, which deals with the functional jurisdiction of military courts, states:

“Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts.”

3. The Inter-American system of human rights protection

25. The settled case-law of the Inter-American Court of Human Rights excludes civilians from the jurisdiction of military courts in the following terms:

“In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order” (IACHR, *Durand and Ugarte v. Peru*, 16 August 2000, § 117).

That line of case-law, based on Article 8 of the American Convention on Human Rights, was followed in other cases decided by the Court, and the Inter-American Commission had also previously followed that approach (see International Commission of Jurists, *Military Jurisdiction and International Law*, (2004, pp. 118 et seq.).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

26. The applicant alleged that his criminal conviction had infringed his right to freedom of expression as guaranteed by Article 10 of the Convention, the relevant parts of which provide:

“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. ...”

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...”

A. Admissibility

27. The Court notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

28. The Court notes that it is not disputed between the parties that the applicant’s conviction constituted an interference with his right to freedom of expression, protected by Article 10 § 1. Nor is it disputed that the

interference was prescribed by law and pursued a legitimate aim for the purposes of Article 10 § 2, namely the prevention of disorder (see *Yağmurdereli v. Turkey*, no. 29590/96, § 40, 4 June 2002). The Court agrees with that assessment. In the present case the dispute concerns the question whether the interference was “necessary in a democratic society”.

29. The Government submitted that the applicant’s conviction was necessary in a democratic society because the article was offensive to the wounded and the families of conscripts who had been killed during their military service, and that the criticisms of military service were contrary to morality and the public interest.

30. The Court has previously dealt with cases which raised similar issues to those of the present case, and in which it found violations of Article 10 of the Convention (see, among other judgments, *Ceylan v. Turkey* [GC], no. 23556/94, § 38, ECHR 1999-IV; *Öztürk v. Turkey* [GC], no. 22479/93, § 74, ECHR 1999-VI; *İbrahim Aksoy v. Turkey*, nos. 28635/95, 30171/96 and 34535/97, § 80, 10 October 2000; *Karkin v. Turkey*, no. 43928/98, § 39, 23 September 2003; and *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003).

31. After examining the present case in the light of its case-law, the Court considers that the Government have not submitted any fact or argument capable of leading it to a different conclusion. It has paid particular attention to the terms used in the article and the context in which it was published. In that connection, it has taken into account the circumstances surrounding the case submitted to it, and in particular the difficulties linked to the prevention of terrorism (see *İbrahim Aksoy*, cited above, § 60, and *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1568, § 58).

32. The offending article was a critique of the now-traditional ceremony to mark conscripts’ departure for military service. In literary language the author explained that the enthusiasm surrounding these departures was a denial of the tragic end suffered by some of the conscripts concerned, namely death and mutilation.

33. The Court notes the General Staff Court ruled that the offending article contained terms contrary to morality and public order.

34. The Court has examined the grounds given in the decisions of the domestic courts, which cannot as they stand be regarded as sufficient to justify the interference with the applicant’s right to freedom of expression (see, *mutatis mutandis*, *Sürek v. Turkey (no. 4)* [GC], no. 24762/94, § 58, 8 July 1999). It observes in particular that although the words used in the offending article give it a connotation hostile to military service, they do not exhort the use of violence or incite armed resistance or rebellion, and they do not constitute hate-speech, which, in the Court’s view, is the essential element to be taken into consideration (see, by converse implication, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV, and *Gerger*

v. Turkey [GC], no. 24919/94, § 50, 8 July 1999). Moreover, the context in which the opinions were expressed can be distinguished, as regards their potential impact, from that of the *Arrowsmith v. the United Kingdom* case, in which the applicant, a pacifist activist, had distributed a leaflet inciting servicemen to desert at a military camp occupied by troops who were shortly to be posted to Northern Ireland (see *Arrowsmith v. the United Kingdom*, no. 7050/75, Commission's report of 12 October 1978, Decisions and Reports (DR) 19, p. 5). In the present case the offending article was published in a newspaper on sale to the general public. It did not seek, either in its form or in its content, to precipitate immediate desertion.

35. The Court reiterates that 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 a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. 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.

The Court considers that the applicant's criminal conviction did not correspond to a pressing social need. The interference was accordingly not “necessary in a democratic society”. There has therefore been a violation of Article 10 of the Convention.

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

36. The applicant alleged that the General Staff Court which tried him could not be regarded as an independent and impartial tribunal, given that it was composed of two military judges and an officer, all of whom were bound by the orders and instructions of the Ministry of Defence and the general staff, which appointed them. In that connection he submitted that the mere fact of being required, as a civilian, to stand trial before a court composed exclusively of military personnel constituted in itself a violation of Article 6. The applicant further complained that he had not been provided with a copy of the opinion of the Principal Public Prosecutor attached to the Military Court of Cassation. He argued that this had constituted a violation of Article 6 §§ 1 and 3 (b) of the Convention, the relevant parts of which provide:

“1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal...

...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence;

...”

A. Admissibility

37. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. Independence and impartiality of the General Staff Court

(a) General principles

38. The Court reiterates at the outset that, in order to establish whether a tribunal can be considered “independent” for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, *Zolotas v. Greece*, no. 38240/02, § 24, 2 June 2005). As regards the question of the impartiality of a tribunal, in the specific context of the present case it should be assessed by means of an objective approach, which involves ascertaining whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect (see, among many other authorities, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 356, § 31, and *Thomann v. Switzerland*, judgment of 10 June 1996, *Reports* 1996-III, p. 815, § 30).

39. The Court observes that a distinction should be drawn between civil and administrative proceedings on one hand and criminal proceedings on the other. As the circumstances surrounding the present case were those of a criminal proceedings, the Court will limit its examination to that specific field (for an analysis of the jurisdiction of military courts in a civil or administrative case, see, for example, *Aksoy (Eroğlu) v. Turkey* (dec.), no. 59741/00, 3 November 2005).

40. The Court reiterates that the Convention does not prohibit military courts from ruling on criminal charges against military personnel, provided that the guarantees of independence and impartiality enshrined in Article 6 § 1 are respected (see *Morris v. the United Kingdom*, no. 38784/97, § 59, ECHR 2002-I; *Cooper v. the United Kingdom* [GC], no. 48843/99, § 106,

ECHR 2003-XII; and *Hakan Önen v. Turkey*, (dec.), no. 32860/96, 10 February 2004).

41. However, it is a different matter where the national legislation empowers this type of court to try civilians on criminal charges.

42. The Court observes that it cannot be contended that the Convention absolutely excludes the jurisdiction of military courts to try cases in which civilians are implicated. However, the existence of such a jurisdiction should be subjected to particularly careful scrutiny.

43. Moreover, the Court has attached importance in numerous previous judgments to the fact that a civilian has had to appear before a court composed, if only in part, of members of the armed forces (see, most recently, *Öcalan v. Turkey* [GC], no. 46221/99, § 116, ECHR 2005-..., and *Şahiner v. Turkey*, no. 29279/95, § 45, ECHR 2001-IX). It has held that such a situation seriously undermined the confidence that courts ought to inspire in a democratic society (see, *mutatis mutandis*, *Canevi and Others v. Turkey*, no. 40395/98, § 33, 10 November 2004).

44. That concern, which is all the more valid when a court is composed solely of military judges, leads the Court to affirm that only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6.

45. The Court derives support in its approach from developments over the last decade at international level (see paragraphs 22-25 above), which confirm the existence of a trend towards excluding the criminal jurisdiction of military courts over civilians.

In that connection, mention should be made of the report on the issue of the administration of justice through military tribunals, submitted to the relevant UN sub-commission. Principle No. 5 of the report states: "Military courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature are tried by civilian courts". A similar position had previously been adopted by the Inter-American Court of Human Rights (see, for example, *Cantoral Benavides v. Peru*, judgment of 18 August 2000, series C no. 69, § 75), which had emphasised that military courts had been set up by various laws with the aim of maintaining order and discipline within the armed forces. Their jurisdiction should therefore be reserved for military personnel who had committed crimes or lesser offences in the performance of their duties.

46. The Court notes the particular position occupied by the army in the constitutional order of democratic States, which must be limited to the field of national security, since judicial power is in principle an attribute of civil society. It likewise takes account of the existence of special rules governing the internal organisation and hierarchical structure of the armed forces.

47. The power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation, and if so

only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case. It is not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto*.

48. Where cases are merely allocated *in abstracto* in such a manner the citizens concerned might find themselves in a significantly different position from that of citizens tried by the ordinary courts. Although military courts may comply with Convention standards to the same extent as the ordinary courts, differences in treatment linked to their different natures and reasons for existence (see paragraph 45 above) may give rise to a problem of inequality before the courts, which should be avoided as far as possible, particularly in criminal cases.

49. Lastly, situations in which a military court has jurisdiction to try a civilian for acts against the armed forces may give rise to reasonable doubts about such a court's objective impartiality. A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence.

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

50. In the present case it is difficult to separate the questions of impartiality and independence, given that the arguments put forward by the applicant in challenging both the independence and impartiality of the court are based on the same factual elements. The Court will therefore examine them both together (see, for example, *Şahiner*, cited above, § 37).

51. To that end, the Court first takes formal note of the information supplied by the Government to the effect that Turkish legislation has been amended to bring it into line with the Convention (see paragraphs 18 and 19 above). However, it would point out that its task is limited to assessing the specific circumstances of the case; it does not consider that it can conclude that a case no longer has a valid legal interest for the applicant on the ground that there have been changes in domestic legislation since the material time (see *Sadak and Others v. Turkey*, nos. 29900/96, 29901/96, 29902/96 and 29903/96, § 38, ECHR 2001-VIII).

52. The Court observes that it has already had occasion to look into the question of the General Staff Court's organic independence from the executive, and has held that the appointment of military judges and the safeguards accorded to them in the performance of their duties were compatible with the requirements of Article 6 § 1 of the Convention (see *Hakan Önen*, previously cited).

53. The circumstances of the present case differ however significantly from those of the Hakan Önen case. Mr Önen was an army officer who had

been tried by a military court on the charge of committing a breach of military law. The same court tried both cases and the charges were similar, as both cases, for example, concerned incitement to evade military service. However, in the present case the applicant is a civilian, a newspaper editor, who had no duty of loyalty to the army. The case file shows that, through a succession of cross-references in various provisions of domestic legislation (see paragraphs 15 et seq. above), the publication for which the applicant was prosecuted was classified as a “military offence”, and that that was the only reason why he was tried in the General Staff Court.

54. In the light of the foregoing, and particularly of the situation at international level (see paragraphs 22-25 above), the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant’s doubts about the independence and impartiality of that court can therefore be regarded as objectively justified (see, *mutatis mutandis*, *Incal*, cited above, p. 1573, § 72 *in fine*).

There has accordingly been a violation of Article 6 § 1 of the Convention.

2. Failure to provide the applicant with a copy of the Principal Public Prosecutor’s opinion

55. The Court observes that it has already held in similar cases that a court whose lack of independence and impartiality has been established cannot, in any event, guarantee a fair trial to the persons subject to its jurisdiction

56. Having regard to its finding that the applicant’s right to a hearing by an independent and impartial tribunal has been infringed, the Court considers that there is no cause to examine the other complaint relating to Article 6 of the Convention (see, among other authorities, *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, p. 3074, §§ 44-45).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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. Damage

58. The applicant claimed 5,000 euros (EUR) in respect of non-pecuniary damage.

59. The Government contested this claim, which they regarded as exorbitant.

60. As regards non-pecuniary damage, the Court considers that the applicant may be considered to have felt some degree of disquiet on account of the circumstances of the case. It considers that he should be awarded EUR 2,000 for that damage.

61. The Court considers that where an individual, as in the present case, has been convicted by a court which did not satisfy the conditions of independence and impartiality required by the Convention, an appropriate form of redress would, in principle, be for the applicant to be given a retrial or for the proceedings to be reopened if he or she so requests (see *Öcalan*, cited above, § 210 *in fine*).

B. Costs and expenses

62. The applicant further claimed EUR 3,000 for the costs and expenses he had incurred before the domestic courts and the Court.

63. The Government opposed this claim as unsubstantiated.

64. According to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only if they were actually and necessarily incurred and were reasonable as to quantum. In the present case, taking into account all the information in its possession and the criteria mentioned above, the Court considers it reasonable to award the applicant the sum of EUR 1,500, to cover costs under all heads.

C. Default interest

65. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 10 of the Convention;
3. *Holds* that there has been a violation of Article 6 § 1 of the Convention as regards the independence and impartiality of the General Staff Court;
4. *Holds* that there is no need to examine the other complaint under Article 6 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros) in respect of non-pecuniary damage and EUR 1,500 (one thousand five hundred euros) for costs and expenses, plus any tax that may be chargeable on the above amounts, which sums are to be converted into New Turkish liras at the rate applicable on the day of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 4 May 2006, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Nicolas BRATZA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Mr Türmen is annexed to this judgment.

N.B.
M.O'B.

CONCURRING OPINION OF JUDGE TÜRMESEN

I voted for a violation of Article 6 paragraph 1 of the Convention on account of the lack of independence and impartiality of the General Staff Court.

Nevertheless, I do not fully agree with the reasoning of the judgment. In the case-law of the Court, when a civilian is put on trial in a military court or a court where a military judge sits, the Court tries to ascertain whether the military judge offers sufficient guarantees to exclude any legitimate doubt in respect of his impartiality. In *Incal v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV) the Court gave a negative answer to this question, because a. the military judge who was a member of the State Security Court belonged to the army and took his orders from the executive; b. he was subject to military discipline and assessment reports were compiled on him by the army; c. decisions pertaining to his appointment were taken by the army's administrative authorities; d. the term of office was only four years and could be renewed.

On the other hand, in the *Aksoy (Eroğlu)* (no. 59741/00, 3 November 2005) and *Yavuz* (no. 29870/96, 25 May 2000) decisions, the Court reached the opposite conclusion with respect to military judges at the Military Supreme Administrative Court owing to the fact that a. their assessment reports were not compiled by the military; b. they were appointed by the President of the Republic; c. they could not be removed by a decision of the executive or the military hierarchy; d. they enjoyed a maximum four-year term of office.

In view of this, the opinion expressed in paragraph 49 of the judgment "A judicial system in which a military court is empowered to try a person who is not a member of the armed forces may easily be perceived as reducing to nothing the distance which should exist between the court and the parties to criminal proceedings, even if there are sufficient safeguards to guarantee that court's independence." does not seem to be compatible with the criteria established by the case-law of the Court for the impartiality of military judges.

Moreover, in paragraph 54 of the judgment, it is stated that "... the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings."

It seems that, in examining the impartiality of the court, the judgment makes a distinction according to the nature of the offence. In cases where an offence is directed against the army, the judges belonging to the army are party to the case and therefore they cannot be impartial.

However, in *Canevi and Others v. Turkey* (no. 40395/98, 10 November 2004) the first Section of the Court refused to make a distinction on this basis. In this case Mr Canevi was caught in possession of heroin and put on trial before a state security court with a military judge being one of the three members. Although the offence was not directed against the army, the first Section of the Court unanimously decided that there had been a breach of Article 6 paragraph 1 of the Convention, because “...even though the applicants were appearing before the State Security Court for organised drug trafficking, they could have legitimate reasons to fear that the court might allow itself to be unduly influenced by considerations having nothing to do with the nature of their case” (translation by the Registry).

Finally, I do not agree with the distinction drawn in paragraph 39 of the judgment between civil and administrative proceedings on one hand and criminal proceedings on the other. Such a distinction does not exist in the *Yavuz* or *Aksoy (Eroğlu)* decisions where administrative proceedings were at issue and where the applicants’ cases were tried by military administrative courts. It is an artificial distinction as far as impartiality is concerned and also not in harmony with the case-law as reiterated in paragraph 38 of the judgment, namely, “... the question of the impartiality of a tribunal ... should be assessed by means of an objective approach which involves ascertaining whether it afforded sufficient guarantees to exclude any legitimate doubt in this respect”.

I would have preferred reasoning giving more weight to the existence or lack of sufficient safeguards, rather than unjustified distinctions according to the nature of the proceedings (administrative or criminal) or nature of the offence (directed against the army or not).