

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 23144/93

Gurbetelli Ersöz and others

against

Turkey

REPORT OF THE COMMISSION

(adopted on 29 October 1998)

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I. INTRODUCTION

1 The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2 The first applicant, Gurbetelli Ersöz, born in 1965, was a Turkish citizen who lived in İstanbul and who died in the autumn of 1997. The second applicant, Fahri Ferda Çetin, born in 1960, and the third applicant, Yaşar Kaya, born in 1938, are Turkish citizens and live in İstanbul. The fourth applicant, a company Ülkem Basın ve Yayıncılık Sanayi Ticaret Limited, has its seat in İstanbul. The third and fourth applicants owned the newspaper Özgür Gündem. The first applicant was the editor and the second applicant the assistant editor in chief of that newspaper. The applicants are represented before the Commission by Mr. K. Boyle and Ms. F. Hampson, both teachers at the University of Essex, England.

3 The application is directed against Turkey. The respondent Government were represented by their Agent, Mr. B. Çağlar.

4 The applicants allege that there has been a concerted and deliberate assault on their freedom of expression, through a campaign targeting journalists and others involved in Özgür Gündem and its successor, and involving murder, disappearances, abduction, threats and use of violence and also threatened and actual prosecutions, seizure and confiscation of editions of the newspaper and the imposition of heavy fines. Issues are raised under Articles 10 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention.

B. The proceedings

5 The application was introduced on 9 December 1993 and registered on 21 December 1993.

6 On 6 July 1994, the Commission decided, pursuant to Rule 48 para. 2 (b) of its Rules of Procedure, to give notice of the application to the respondent Government and to invite the parties to submit written observations on its admissibility and merits.

7 The Government's observations were submitted on 5 December 1994, after the expiry set for this purpose on 12 November 1994.

8 The applicants provided further information on 20 and 21 April 1994, 2 and 22 August 1994, 11 October 1994, 23 and 25 November 1994 and 7 December 1994. They submitted observations in reply on 9 March 1995, after one extension in the time-limit.

9 On 11 April 1995, the Commission decided to invite the parties to make oral submissions on the application at a hearing fixed for 20 October 1995.

10 At the hearing held on 20 October 1995, the Government were represented by Mr. B. Çağlar, Agent, Mr. Ş. Alpaslan, Mr. M. Özmen, Ms. D. Akçay, Mr. T. Özkörol, Mr. A. Kurudal, Mr. A. Kaya and Ms. S. Eminağaoğlu as advisers. The applicants were represented by Mr. W. Bowring, counsel, Mr. O. Ergin, advocate, and Mr. M Yıldız, legal adviser.

11 On 20 October 1995, the Commission declared the application admissible. The Commission requested that the parties provide further information by 19 November 1995, relating to the texts of articles in Özgür Gündem, copies of orders and legislation. The Government were requested to identify the measures taken to protect persons working for Özgür Gündem or involved in its distribution.

12 By letter dated 15 November 1995, the Government provided information and submissions relating to an edition of Özgür Politika. By letters dated 21 November, 6 December and 12 December 1995, the Government provided information, inter alia, relating to certain legislative amendments and court decisions.

13 The text of the Commission's decision on admissibility was sent to the parties on 13 December 1995 and they were invited to submit such further information or observations on the merits as they wished.

14 On 15 December 1995, the applicants provided selected editions of newspapers and prosecutions.

15 Following three extensions in the time-limit for the submission of observations on the merits, the Government provided observations on 10 April 1996.

16 On 30 November 1996, the Commission examined the state of proceedings in the case.

17 On 16 March 1998, the Secretariat requested the applicants to provide copies of articles which had been subject to prosecution.

18 By letter dated 17 April 1998, the applicants requested further time for supplying the material.

19 By letter dated 23 April 1998, following the decision of the Commission, the Secretariat requested the Government to produce in the context of another case (Kılıç v. Turkey, No. 22492/93 which concerned the killing of a journalist of Özgür Gündem) the pages and annexes of the so-called Susurluk report which had not been made public.

20 On 28 May 1998, the applicants submitted the requested materials, and further information and submissions.

21 By letter dated 5 June 1998, the Government declined to provide copies of the missing pages and annexes of the Susurluk report.

22 On 29 October 1998, the Commission decided that there was no basis on which to apply Article 29 of the Convention.

23 After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, also placed itself at the disposal of the parties with a view to securing a friendly settlement. In the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

24 The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM S. TRECHSEL, President

J.-C. GEUS

E. BUSUTTIL

G. JÖRUNDSSON

A.S. GÖZÜBÜYÜK

A. WEITZEL

J.-C. SOYER

H. DANELIUS

Mrs G.H. THUNE

MM F. MARTINEZ

L. LOUCAIDES

B. MARXER

I. CABRAL BARRETO

B. CONFORTI

D. ŠVÁBY

C. BÎRSAN

P. LORENZEN

25 The text of this Report was adopted on 29 October 1998 by the Commission and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

26 The purpose of the Report, pursuant to Article 31 of the Convention, is:

(i) to establish the facts, and

(ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

27 The Commission's decision on the admissibility of the application is attached hereto as an Appendix.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

a. Facts as presented by the applicant

28 The applicants claim that the following events relating to this case have occurred:

29 Özgür Gündem was a daily newspaper which had been published in İstanbul since 30 May 1992, with a national circulation of some thousand copies and a further international circulation. It was a Turkish language publication, seeking to reflect Turkish Kurdish opinion. Özgür Gündem incorporated its predecessor, the weekly Yeni Ülke, which was published from 1990 to 1992. In view of the various actions set out below, Özgür Gündem was obliged to cease publication in April 1994, some time after the present application had been lodged with the Commission. Özgür Gündem was succeeded by another newspaper, Özgür Ülke, which was however also the subject of serious attacks and other harassment.

30 The applicants claim that the Government of Turkey have, directly or indirectly, sought to hinder, prevent and render impossible the production and distribution of Özgür Gündem. This has been done by the following measures:

- by encouragement of or acquiescence to unlawful killings and forced disappearances;
- by harassment and intimidation of journalists and distributors;
- by failure and refusal to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger, and despite requests to do so;
- by means of unjustified legal proceedings;
- by enacting and implementing the Anti-Terrorism Act whose provisions are so vague and potentially all-inclusive as to violate the letter and spirit of Article 10 of the Convention.

31 From 15 January 1993 until 26 April 1993, Özgür Gündem was forced to cease publication. Since 26 April 1993, during a period of 68 days, 41 issues of Özgür Gündem were ordered to be seized. In early 1993, a delegation from Özgür Gündem visited the Interior Minister, İsmet Şengün, and the Government spokesman, Akın Gönen, and the situation facing the newspaper was fully explained. Nevertheless, since that meeting,

three more persons, including two distributors, connected with Özgür Gündem have been killed.

32 Seven persons connected with Özgür Gündem have been killed by persons unknown. They are the following: (a) Yahya Orhan, a reporter for Özgür Gündem, who was shot dead on 31 July 1992; (b) Hüseyin Deniz, a member of the staff of Özgür Gündem, who was shot dead on 8 August 1992 at about 7.45 a.m.; (c) Musa Anter, a regular columnist for Özgür Gündem, who was shot dead on 20 September 1992; (d) Hafız Akdemir, a member of the Özgür Gündem staff, who was shot dead on 8 June 1992; (e) Cengiz Altun, a reporter of Yeni Ülke, who was shot dead on 24 February 1992; (f) Kemal Kılıç, the Şanlıurfa representative of Özgür Gündem, who was killed on 18 February 1993 ; (g) Ferhat Tepe, the Bitlis correspondent of Özgür Gündem, who was found dead on 4 August 1993 in Sivrice, in the Elazığ province, after being abducted on 28 July 1993 in Bitlis.

33 Moreover, the distribution of Özgür Gündem has been prevented by arson attacks, murder and threats, on some occasions in circumstances which indicate the complicity or acquiescence of the Turkish authorities.

34 In this respect, reference is made to the following events :

(a) In Diyarbakır: (i) on 15 November 1992, an arson attack by unknown persons on a news stand (subject of Application No. 22495/93, Yaşa v. Turkey); (ii) on 16 November 1992, an arson attack by unknown persons on a newsstand; (iii) on 19 November 1992, stationer's premises burnt down by unknown persons after threats concerning the sale of Özgür Gündem; (iv) on 20 November 1992, 22 newsagents refused to sell Özgür Gündem because of the risks involved; (v) on 23 November 1992, an attack by three armed men on Özgür Gündem's office chief and a reporter; (vi) on 29 November 1992, a newsagent attacked with clubs by two unknown persons; (vii) on 16 December 1992, Kemal Ekinci, a newsagent shot dead by unknown persons; (viii) in November 1992, warning by a policeman not to sell Özgür Gündem and Yeni Ülke; (ix) in early 1993, a newsboy, Enver Yakut, prevented by police officers from selling Özgür Gündem ; (x) on 15 June 1993, the owner of a newsstand shot dead after being threatened by persons unknown and told not to sell Özgür Gündem; (xi) about 26 September 1993, a newsboy attacked with a knife by persons unknown as he was distributing Özgür Gündem; (xii) on 27 September 1993, Zülküf Akkaya killed; (xiii) in September 1993, Abdülkadir Altan who distributed Özgür Gündem seriously injured when he was attacked with meat cleavers by two unknown persons close to a police station, but without any intervention by the police.

(b) In Bismil: in December 1992, İbrahim Savaş, the main newsagent, threatened by persons unknown if he did not stop selling Özgür Gündem, the result being that he stopped selling the newspaper.

(c) In Silvan: on 18 November 1992, the chief newsagent, Gani Amaç, threatened by persons unknown, the result being that he stopped selling Özgür Gündem.

(d) In Batman: (i) on 13 November 1992, the chief newsagent Muharrem İdman received death threats by persons unknown and stopped selling Özgür Gündem; (ii) on 21 November 1992, a taxi driver, Halil Adanır, burnt alive in his vehicle while distributing Özgür Gündem; (iii) on 2 January 1993, six persons selling Özgür Gündem stopped and beaten up, with their papers confiscated, by persons unknown, but in full sight of the police who did not act.

(e) In Ergani: (i) in early 1993, the main distributor threatened by persons unknown and stopped selling Özgür Gündem; (ii) in early 1993, confiscation by the police of all copies of Özgür Gündem which were being taken to Ergani by minibus; (iii) thereafter, despite assurances by the District Governor and the Police Chief, boys selling Özgür Gündem attacked with a meat cleaver.

(f) In Adıyaman: main newsagent threatened, and harassed by the police.

(g) In Mardin: main newsagents in Mardin, Kızıltepe and Mazıdağı threatened; arson attack in Mazıdağı.

(h) In Elazığ: (i) main newsagent, Ali Doğan, threatened; arson attack on stationers; (ii) newsagent who applied to Public Prosecutor for protection against attack was asked to sign a paper confirming that he sold Özgür Gündem because that was supposed to reflect his views.

(i) In Bingöl: (i) on 17 November 1992, a vehicle belonging to newsagent destroyed by fire; (ii) a journalist employed by Özgür Gündem arrested and threatened; (iii) on 24 November 1992, arson attack against a tea shop where Özgür Gündem was sold.

(j) In Yüksekova: in early October 1993, newsagency selling Özgür Gündem bombed by Special Teams at about 3 a.m.

35 The applicants refer to numerous petitions which drew the attention of the authorities to the attacks being made on the newspaper and the persons involved with it:

(a) 6 August 1992: letter from Arzu Şahin, lawyer, to the Provincial Governorship, İstanbul, requesting permission for the acquisition of firearms for the Özgür Gündem paymaster and watchman;

(b) 21 October 1992: letter from the applicant Yaşar Kaya to İsmet Sezgin, Minister of the Interior, referring to the death of Musa Anter and to the lack of reply to the petition in that respect;

(c) 5 November 1992: letter from the applicant Yaşar Kaya to Governor Ünal Erkan of the State of Emergency region, informing him that the newsagent in Kulp had given up his job; that since 4 November 1992 Özgür Gündem was not being distributed or sold in Batman, where the newsagents stated that they risked death or being closed down; that

the newsagent in Nusaybin was threatened similarly; and requesting that the Government investigate, and take measures to protect the lives and property of newsagents; no reply was received;

(d) 5 November 1992: letter from the applicant Yaşar Kaya to İsmet Sezgin, Minister of the Interior, informing him of attacks on Özgür Gündem and requesting that the attacks be investigated and that the newspaper be informed of the results of the inquiry; no reply was received;

(e) 6 November 1992: letter from the applicant Yaşar Kaya to Prime Minister Süleyman Demirel, informing him of attacks on Özgür Gündem with the result that newsagents in the State of Emergency region were not selling the newspaper, stating that this disclosed a violation of the right of publication and freedom of expression and requesting his interest in the matter; no reply was received;

(f) 12 November 1992: letter from the applicant Yaşar Kaya to Deputy Prime Minister Erdal İnönü, as in (e) above; no reply was received;

(g) 12 November 1992: letter from the applicant Yaşar Kaya to Gökberk Ergenekon, State Minister Responsible for the Press, as in (e) above; no reply was received;

(h) 12 November 1992: letter from the applicant Yaşar Kaya to Hüsamettin Cindoruk, President of the Turkish Grand National Assembly, as in (e) above; no reply was received;

(i) 12 November 1992: letter from the applicant Yaşar Kaya to Fikri Sağlar, Minister of Culture, as in (e) above; no reply was received;

(j) 19 November 1992: letter from Arzu Şahin to the Provincial Governor of İstanbul, reporting that Özgür Gündem had received many telephone threats that day that there would be attack following the funeral which was to take place and requesting urgent measures to be taken; no reply was received;

(k) 4 December 1992: letter from Osman Ergin, lawyer for Özgür Gündem, to the Governorate of Batman, informing them that an employee in the Batman office had been followed morning and evening by suspicious plain-clothed persons and feared for his safety, requesting measures to be taken to guarantee his safety and that a security officer be assigned to accompany him; no reply was received;

(l) 24 December 1992: letter from Osman Ergin, as lawyer for the Özgür Gündem, to the Şanlıurfa governor, informing him that after threats received by Fatih Billurcu of Birleşik Basın Dağıtım Şirketi distributors, Özgür Gündem was now being distributed by office personnel and requesting measures to be taken to protect the safety of Bayram Balcı, Kemal Kılıç, Nazım Babaoğlu and driver Hasan Yektaş. The petition was numbered 686. On 30 December 1992, Ziya Coşkun, Deputy Governor, replied to Kemal Kılıç that no protection was assigned to vehicles since no threat or attack had occurred and the

application was deemed inappropriate. On 1 January 1993, the distributors and salespeople in Şanlıurfa signed a declaration that they would not sell Özgür Gündem as they had been threatened. A statement of 11 January 1993 by Kemal Kılıç concerning attacks on distributors of the newspaper was forwarded by the Deputy Governor to the State prosecution. Kemal Kılıç was killed by unknown persons on 18 February 1992 ;

(m) 1 March 1993: petition by Bayram Balcı, Özgür Gündem Şanlıurfa representative, to the Şanlıurfa Governor, reporting that following Kemal Kılıç's death he had been followed by a white Renault registration 63 EC 443; that the security directorate had stated that the number was false; that on 28 February 1993 he had been threatened on the telephone that he would die soon and requesting all measures to secure his safety; his petition was registered as No. 112 but he received no reply;

(n) 27 April 1993: letter from Osman Ergin, lawyer, to the Nusaybin District Governor, reporting that on 26 April when Özgür Gündem recommenced publication three news sellers at the bus terminal were threatened by persons unknown with the aim of preventing sale of the newspaper; that requests to the security directorate for protection had gone unanswered and requesting proper guarantees of safety; the letter received no reply;

(o) 27 April 1993: letter from Osman Ergin, lawyer, to Madame Yolcu, Ministry of the Interior (as in (n) above);

(p) 28 May 1993: letter from Arzu Şahin, lawyer, to Elazığ provincial offices, reporting that in the early morning hours that day plain-clothed persons threatened the lives and property of sellers of Özgür Gündem if they continued to distribute Özgür Gündem and requesting necessary measures to be carried out to ensure the newspaper's distribution and sale; no reply was received;

(q) 8 July 1993: petition on behalf of Bayram Balcı to the Şanlıurfa Governor by Arzu Şahin, referring to two earlier petitions, informing that Balcı had received death threats, including a call at about midnight on 7 July 1993 telling him that he would be killed and was being followed and watched from time to time; that four named newsagents working with the Birleşik Basın Company had received phone calls warning them not to sell Özgür Gündem and that if they complied they and their families would not be harmed and their shops not burned down, and requesting the necessary security precautions; no reply was received;

(r) undated letter from Arzu Şahin to the Batman Governor, informing him that the distributors Birleşik Basın Dağıtım had received threats; that on 1 September 1993 the vehicle distributing newspapers was stopped by armed persons and Özgür Gündem bundles taken from the vehicle and the driver threatened with a gun, and requesting, inter alia, measures to be taken to ensure the safety of newsvendors; no reply was received;

(s) letters dated 10 October 1993 from the applicant Gurbetelli Ersöz to the Ministry of the Interior and the Diyarbakır security directorate referring, inter alia, to attacks on child

distributors in Diyarbakır and woundings by meat axes of three distributors, to the deaths of newsagents Zülküf Akkaya in Diyarbakır and Adil Aslan in Nusaybin and the death and wounding of two young boys, Yılmaz Yaşa and Yalçın Yaşa respectively;

(t) letter dated 10 October 1993: petition on behalf of Bayram Balcı to the Şanlıurfa Governor by Arzu Şahin, referring to two earlier petitions, informing that Balcı had received death threats by telephone on 8 October 1993 and requesting, for the fifth time, that measures be taken to protect his life.

36. Özgür Gündem has also been the subject of legal proceedings which allegedly can only have had the ulterior purpose of closing or hindering the newspaper and from which there is no effective appeal. Reference is made to the following events:

(a) From 31 May 1992 to April 1993, confiscation orders were issued against 39 out of 228 issues of the newspaper, either under unspecified provisions, or under Articles 6, 7 and 8 of the Anti-Terrorism Act and Article 36 of the Turkish Criminal Code.

(b) Between April and July 1993, a further 41 issues of the newspaper were confiscated. The İstanbul State Security Court ruled, inter alia, that Özgür Gündem had attempted to portray Turkish citizens as Kurds and that this was an "act of separatism". The Court also found that the use of the words "Kurd" and "Kurdistan" was a breach of the Constitution in which Turkey is defined as a unitary State.

(c) Cases were filed in the İstanbul State Security Court as follows:

(i) on 7 June 1992, against the applicant Yaşar Kaya, under Article 7 of the Anti-Terrorism Act; (ii) on 14 August 1992, against Yaşar Kaya and two others under Article 7 of the Anti-Terrorism Act and Article 36 of the Criminal Code; (iii) on 24 August 1992 and 25 August 1992, against Yaşar Kaya and another person under Article 8 of the Anti-Terrorism Act and Article 36 of the Criminal Code; (iv) on 15 September 1992, against Yaşar Kaya and two others under Articles 2 and 8 of the Anti-Terrorism Act; (v) on 18 September 1992, against Yaşar Kaya and two others under Articles 3 and 8 of the Anti-Terrorism Act; (vi) on 24 September 1992, against Yaşar Kaya and one other person under Article 7 of the Anti-Terrorism Act; (vii) on 27 September 1992, against Yaşar Kaya and one other person under Article 8 of the Anti-Terrorism Act and Article 36 of the Criminal Code.

(d) A press release by the Editorial Board of Özgür Gündem on 3 July 1993 announced that the newspaper was charged with offences punishable by fines totalling TL 8,617,441,000 (\$736,500), and prison terms ranging in total from 155 years and 9 months to 493 years and 4 months.

(e) On 12 July 1993, the İstanbul Court of First Instance decided to ban Özgür Gündem on the ground that "the Chief Editor of the newspaper Davut Karadağ did not communicate his new address to the İstanbul Governor". On 15 July 1993, Mr. Karadağ was arrested when attending the State Security Court to give evidence in respect of thirty

articles published in Özgür Gündem on 12, 13, 14 and 15 July 1993, which were said to have "disseminated separatist propaganda". On 15 September 1993, Yaşar Kaya was arrested and subsequently charged for making an allegedly illegal speech in Iraq. When the application was lodged with the Commission, Yaşar Kaya was still in custody.

(f) The applicants further refer to 170 ongoing prosecutions of Özgür Gündem and its employees.

(g) A case, which has been observed by certain human rights non-governmental organisations, concerns an article by Mr. Ahmet Alkan, published on 24 September 1992 and entitled "From the dialogue of arms to political propaganda". In respect of this article, Özgür Gündem was charged with "making separatist propaganda" and "praising the PKK", contrary to Articles 7 and 8 of the Anti-Terrorism Act. On 15 July 1993, the State Prosecutor brought further charges under Supplementary Article 2 of the Press Law.

(h) Furthermore, in respect of 48 out of 114 issues of Yeni Ülke there were confiscations or prosecutions. In 1990, 13 issues were confiscated under Article 148 of the Criminal Code and 6 issues under Article 8 of the Anti-Terrorism Act. In 1991, 20 issues were confiscated under the Anti-Terrorism Act and in 1992 9 issues under that Act. In respect of 21 prosecutions (out of 70, the remaining being pending) Yeni Ülke was acquitted; in no case was it convicted. The effect of so many prosecutions was eventually to drive Yeni Ülke out of business.

(i) Finally, the police confiscated all the administrative documents, archives and library facilities of the Özgür Gündem İstanbul office on 10 December 1993, in an operation during which they also took into custody all the members of staff and employees in the building (over 100). While the police claimed to find incriminating objects, including gas masks, materials for blood transfusions, documents including ERNK receipts and lists of soldiers killed, the applicants submit that the presence of gas masks is not suspicious in a building containing highly inflammable materials, that the medical materials belonged to the doctor who worked there and that the documents were stored as items of news collection. As a result of these measures, publication was disrupted for two days.

37. The applicants further point to the numerous cases of detention and abduction of persons employed by Özgür Gündem, which have affected the activities of the newspaper. They refer to the following cases:

(a) Remanded in custody: (i) Yaşar Kaya, remanded in custody on 15 September 1993 and still there when the application was introduced; (ii) Nezahat Özem, remanded from 17 July to 14 September 1993; (iii) Mehmet Yazıcı, remanded from 20 July to 16 September 1993; (iv) Salih Tekin, remanded on 19 August 1993; (v) Haydar Geçilmez and Mehmet Senol, Diyarbakır correspondents of the newspaper, arrested on 11 and 13 March 1993 respectively; (vi) Serdar Uzun and Beşir Ant, Cizre correspondents of the newspaper, arrested on 12 and 14 March 1993 respectively; (vii) Ahmet H. Akkaya, a news editor for Özgür Gündem, arrested on 25 May 1993; (viii) Tacettin Demir, a reporter in Diyarbakır, detained on 13 July 1993; (ix) Davut Karadağ, an editor, taken into

custody on 15 July 1993 when attending the State Security Court to give evidence; (x) Nezahat Özmen, a reporter, seven months pregnant, taken into custody on 16 July 1993; (xi) Mehmet Şah Yıldız, detained on 12 September 1993; (xii) Cevdet Birkay, detained on 12 September 1993; (xiii) all the employees of the İstanbul office of the newspaper, including its lawyers, taken into custody on 10 December 1993.

(b) Abduction: Aysel Malkaç, a reporter in İstanbul, abducted by plain-clothes police on 7 August 1993 just after she had left the Özgür Gündem building, her whereabouts being unknown when the application was introduced.

38. After Özgür Gündem had ceased publication in or about April 1994 and been succeeded by Özgür Ülke, the latter newspaper was subject to the following actions:

(a) On 3 December 1994, its four-storey printing press and headquarters in İstanbul and its Ankara office were bombed; one person was killed and 18 injured.

(b) In the first week of January 1995, the National Security Council decided that the paper should be prevented from printing, but by legal means.

(c) From 6 January 1995, police started to wait outside the printing press to seize the paper as soon as it was printed.

(d) On 2 February 1995, the İstanbul First Justice Court ordered confiscation of all copies pursuant to the Press Law.

39. The applicants further refer to a number of statements by non-governmental organisations which have criticised the actions of the Turkish State in relation to the press, and Özgür Gündem in particular, e.g. "A desolation called peace", report by the Parliamentary Human Rights Group, "Censorship and the rule of law in Turkey: violations of press freedom and attacks on Özgür Gündem", report by Article 19, "What happened to the press in 1993", report by Özgür Gündem, extracts from 1993 Info-Türk (E.208-7, E.209-6, E.212-8/9) and "Free Expression in Turkey 1993: Killings, convictions, confiscations", Helsinki Watch Vol. 5 Issue 17, and "L'intimidation - rapport sur les meurtres de journalistes et les pressions à l'encontre de la presse turque" by Reporters Sans Frontières (January 1993).

40. The applicants finally rely on the official investigation made into undercover and unlawful activities in which Government and State officials were implicated following the so-called "Susurluk report" (see paras. 84-103). On page 8 of that report, the bombing of the newspaper Özgür Gündem in İstanbul is referred to as part of a pattern of uncontrolled, unlawful activities in which State agents connived or participated. On page 74 of the report, it is stated that the killing of Musa Anter was recognised as having been a mistake by those who approved it and that other journalists were murdered. (The following page 75 and the appendix were not made public.)

b. Facts as presented by the Government

41. The Government state the following as regards the events alleged by the applicants.

Concerning the alleged attacks and incidents

42. The criminal incidents against the workers of the Özgür Gündem newspaper are the consequence of multi-terrorist acts which the Government combat with the purpose of safeguarding the right to life. No Government agent or officer was involved in these incidents, which did not involve any security operation or armed clash. These incidents were the result of attacks by unknown perpetrators.

a. allegations concerning the deaths

43. As regards the killing of Yahya Orhan, the Government state that he was a kiosk shopkeeper not a journalist. An investigation (1992/2609) is being carried out by the public prosecutor at the State Security Court in Diyarbakır. There is insufficient evidence as yet to take any further steps.

44. As regards the killing of Hüseyin Deniz on 8 August 1992, the suspected perpetrator, from the Hizbullah organisation, was arrested and his trial began on 1 April 1996.

45. As regards the killing of Musa Anter on 20 September 1992, he was shot by an unknown person, whose description is in the investigation file pending with the public prosecutor at the Diyarbakır State Security Court (file no. 1992/2598). Despite all efforts, the unidentified perpetrator has not yet been found. The Government dispute that Musa Anter was a regular columnist for Özgür Gündem.

46. As regards the death of Hafız Akdemir on 9 June 1992, the investigation file is pending with the Diyarbakır State Security Court public prosecutors (No. 1993/1003). The file gives cause to suspect that the perpetrator was from the Hizbullah organisation.

47. As regards the death of Cengiz Altun on 24 February 1992, this is being investigated under file no. 1993/576. A suspect has been detained, on whom was found the pistol which was used to shoot Cengiz Altun.

48. As regards the death of Kemal Kılıç on 18 February 1993, the suspected perpetrator, a member of the Hizbullah organisation, is being tried with 16 other defendants in proceedings before the State Security Court in Diyarbakır (file no. 1994/116).

49. As regards the death of Ferhat Tepe after being abducted on 28 July 1993, the investigation is pending before the Bitlis public prosecutor.

b. concerning the arson attacks, threats etc.

50. As regards the alleged arson attack on Eşref Yaşa's kiosk on 15 November 1992, the report of the Ministry of the Interior of 16 February 1996 states that it is established that this did not occur.

51. As regards the alleged arson attack on Kadir Saka's news stand on 16 November 1992, the report of the Ministry of the Interior (para. 50 above) discloses that Kadir Saka was attacked by Hizbullah terrorists on 20 September 1992 and subsequently the perpetrators were arrested and brought before the State Security Court for trial.

52. As regards the alleged arson attack on the news stand of Süleyman Sunal on 19 November 1992, the report (para. 50 above) states that this did not occur.

53. As regards the alleged attack on the newsagent Coşkun Baloğlu on 29 November 1992, the report (para. 50 above) states that this did not occur.

54. As regards the alleged attack on the newsagent Haşim Yaşa on 15 June 1993, the report (para. 50 above) states that this did not occur.

55. As regards the alleged attack on Mehmet Balamir on 26 September 1993, the investigation into the incident is continuing.

56. The Government state that no information or complaint was received by the authorities concerning:

- the allegation that on 20 November 1992 22 newsagents decided not to sell the newspaper;
- the alleged incident on 23 November 1992;
- the allegation that a newsagent Kemal Ekinci was shot on 16 December 1992;
- the allegation that Enver Yakut was prevented from selling the newspaper;
- the allegation that Zülküf Akkaya was killed on 27 September 1993;
- the allegation that Abdülkadir Altan was attacked in September 1993;
- the allegation that in Bismil, İbrahim Savaş was threatened;
- the allegations that in Batman, the chief newsagent Muharrem İdman was threatened on 13 November 1992, that six persons were beaten up on 2 January 1993; nor was any complaint made about the death of the taxi driver Halil Adanır;
- the allegations that in Elazığ the main newsagent Ali Doğan received threats and that an arson attack took place on stationers.

57. As regards the allegation that the chief newsagent in Silvan, Gani Amaç, stopped selling the newspaper due to threats, enquiries disclosed that the chief newsagent was in fact Mehmet Özkan and he has never been threatened.

58. As regards the allegation that in Ergani the main distributor was threatened in early 1993, the statement of the main newsagent Yaşar Öztürk and the decision of non-jurisdiction relate that he was threatened and faced arson attempts on 9 December and 24 December because he did not sell the newspaper. In relation to the assertion that boys selling the newspaper were attacked, the Government points to the fact that the perpetrator of a knife attack was arrested and is being tried in the Ergani criminal court (file no. 1993/38).

59. As regards the allegation that in Adıyaman, Mardin, Kızıltepe, and Mazıdağı, the main newsagents were threatened and harassed, enquiries established that the newsagents have not been so threatened or harassed.

60. There is a pending investigation (file no. 1995/3835) into the arson attack in Mazıdağı.

61. As regards the allegation that in Bingöl the vehicle owned by the main newsagent Abdülrezak Aydemir was destroyed by fire, the report of the Ministry of the Interior (para. 50 above) stated that the vehicle was owned by the main newsagent called Mehmet Akdemir and that the suspected perpetrators, members of the Hizbullah, were arrested and have been indicted in the Diyarbakır State Security Court. In relation to the allegation that a teashop belonging to Zeki Bulut was burned, an investigation into the incident is being carried out but the evidence indicates that it had nothing to do with the sale of Özgür Gündem, since the newspaper was not sold there.

62. As regards the alleged bombing in Yüksekova in October 1993 of Ferhat Altan's newsagency, there is a pending investigation (file no. 1993/413) which shows that an explosive device was thrown into the passage where there were a number of shops and that a number of premises were damaged, including the newsagency.

Concerning the allegations that requests for protection of Özgür Gündem staff were refused

63. The Government submit that the İstanbul and Ankara police headquarters received no requests for protection.

64. In Diyarbakır, the police headquarters on 2 December 1992 received a faxed message from Merdan Yanardağ, editor of Özgür Gündem and a representative of Yaşar Kaya, requesting security measures to be taken while Özgür Gündem was being distributed. Following consultations between the police and the person in charge of the distribution of the newspaper in Diyarbakır, the employees of two companies (Birleşik Basın Dağıtım A.Ş. and Gameda A.Ş.) dealing with distribution were escorted by the

security officers from the border of Şanlıurfa province to the distribution stores. Security measures were also taken by the police while delivering newspapers to the newsagents. No other requests asking for personal protection were received from persons working for the newspaper.

65. Following the explosion at the Özgür Ülke office on 2 December 1994 and on written request of Osman Ergin, lawyer for the owner of the newspaper, necessary security measures, including patrolling, were carried out and no further incidents occurred before the newspaper decided to close down.

Concerning the legal proceedings against the newspaper and its staff

66. At the time of the application on 9 December 1993, 69 cases relied on by the applicants regarding the legal proceedings against the Özgür Gündem newspaper and its journalists were pending. As of 20 October 1995, the date of the hearing before the Commission, 39 measures had been approved by the Court of Cassation, one decision had been reversed by that court and 29 cases were still pending before it. The public prosecutor's closure requests, according to Supplementary Article 2 of the Press Code No. 5680, were not considered or decided in 38 cases; they were rejected by the courts in 9 cases; and a temporary closure decision was given in 20 cases. Of these 20 closure decisions, 3 decisions were for a month, 15 decisions were for 15 days and 2 decisions were for 10 days.

67. The State Security Court No. 2 of İstanbul in its decision of 14 March 1994 (files Nos. 93/237 and 178) stated that the mere use of the words "Kurds" or "Kurdistan" in a newspaper article does not violate a penal rule. The court concluded that "although in the two news articles the words 'Kurds' and 'Kurdistan' are used frequently, the theme and the context of the articles as a whole clearly show that they were written with the aim of informing the public" and that, therefore, "the elements of separatist propaganda are not present". The court then decided that the journalists Kaya and Karadağ should be acquitted of charges of separatist propaganda.

68. In its decision on 1 September 1994 regarding an article published in the newspaper Özgür Gündem of 25 July 1993, the İstanbul State Security Court No. 2 discussed the application of Article 10 of the Convention in detail and cited the fact that, although the Convention is accepted as an instrument of national law, conditions in the south-east of Turkey oblige the court to consider the clear and present danger created by the publication in the case as inciting hatred among members of society and thus violating Article 8 of the Anti-Terrorism Act. The court clearly stated that, in the application of Article 10 of the Convention, the restrictions stated in paragraph 2 of the Article should be kept in mind.

69. In his letter dated 11 November 1994 sent to the Ministry of Justice, the Public Prosecutor of the İstanbul State Security Court stated that none of the judgments

pronounced against the Özgür Gündem newspaper (in 69 cases referred to by the applicants) had been executed.

The relationship between the PKK and Özgür Gündem

70. The Government submit that newspaper Özgür Gündem acted as the propaganda tool of the PKK, under its directives. They submit that this is proved by the statements of persons working for the newspaper who have admitted to assisting the PKK and by the statements of journalists who admitted that the newspaper was run and published material under the direction of the PKK. They also refer to the fact that various persons connected with Özgür Gündem have been convicted of offences arising out of their activities or support for the PKK.

71. The Government refer, inter alia, to statements attributed to the applicants Gurbetelli Ersöz and Fahri Ferda Çetin, following their arrest in an operation by the police which involved a search of Özgür Gündem premises, in which was found 25 gas masks, 2 sleeping bags, a rucksack, two identity cards with bloodstains and bullet holes belonging to gendarme private Muzaffer Ulutaş killed by PKK terrorists in Şırnak on 9 March 1993; a reference letter and notepad, many coagulant injections, various medicines and a receipt used by the ERNK made out to Seyid Ali Gündüz attesting to the payment of TL 400 million.

72. In a statement of 21 December 1993 taken by the police, Gurbetelli Ersöz was recorded as saying:

"... I had been convicted of having been involved in the activities of the PKK and sentenced to 10 years' imprisonment and was released in 1992 conditionally... For security reasons, there were in the office weapons without permits... I do not know why and by whom those gas masks, sleeping bags, rucksacks, injections to stop bleeding, 400 million lira, the tax receipts of ERNK and the identities of the soldiers killed were brought to the office... Most of the employees of our newspaper have been tried and served terms of imprisonment for having been involved in the activities of the PKK and as they cannot find jobs elsewhere, they are employed here."

73. In a statement of 23 December 1990 taken by police officers before or about the time of her trial, she explained how after being a student she spent time in PKK camps in Syria and elsewhere, with the codename Zozan.

74. In a statement undated, which appears to have been taken by police officers after his arrest in December 1993, Fahri Ferda Çetin was recorded as stating that the documents signed by ARGK and ERNK and materials about the soldiers killed were received through their reporters in the south-east who had contacts with the PKK. He had no knowledge that 140 000 DM were deposited in the bank accounts of, inter alia, Gurbetelli Ersöz. He gave an explanation for the amount of TL 70 000 received in connection with publications.

75. The Government have not provided any further information as to the outcome or progress of the criminal proceedings brought against Gurbetelli Ersöz, Fahri Ferda Çetin or others arrested during the operation at the Özgür Gündem premises.

76. According to a statement of 5 July 1993 taken by the public prosecutor of the Ankara State Security Court, Abdülcabbar Gezici, editor in chief of the Zagros publishing company, former member of HEP and one of the founders of DEP (both political parties having been declared unconstitutional) stated, inter alia:

"... In fact, establishments like HEP and Yeni Ülke all act in pursuance of the orders and advocate the aims of the PKK. Their personnel, financial support and (conceptions) are entirely derived from the PKK.... After a while, Yeni Ülke newspaper started again with the label Özgür Gündem, which is run by people who have been trained in the PKK camps... some of them are.... Gurbetelli Ersöz, Fahri Çetin... they act as spokesmen of the PKK... At that time, Yaşar Kaya was owner of Özgür Gündem as well as administrator of HEP and President of DEP..."

77. A protocol dated 5 July 1993 records that Abdülcabbar Gezici was placed under protection as a witness in respect of connections between the PKK, political parties (DEP, HEP, ÖZDEP and HADEP), newspapers (eg. Yeni Ülke, Özgür Gündem, Özgür Ülke) and certain publishing houses.

B. The evidence before the Commission

Documents relating to prosecutions against Özgür Gündem and persons associated with it

78. The Government have provided judgments concerning 75 prosecutions aimed against Özgür Gündem for the contents of various editions. Of these, 73 resulted in convictions, 2 in complete acquittal, and in 8 cases there were acquittals on some charges. The applicant Yaşar Kaya was convicted in cases nos. 1-70. No other applicant was cited as defendant in these cases.

79. The Government have also provided a list of the prosecutions before İstanbul State Security Courts Nos. 1, 2 and 3, which includes almost all of the 75 cases referred to above but additionally includes three cases where there were acquittals or decisions of lack of jurisdiction and a fourth case pending appeal.

80. The applicants have provided lists of proceedings and decisions, which overlap to a considerable extent with that provided by the Government. Their lists however contain a further number of prosecutions - five before State Security Court No. 2 all of which involved Yaşar Kaya, resulting in four convictions and one acquittal; one before State Security Court No. 3 resulting in a conviction for Yaşar Kaya; and an additional 22 prosecutions before the İstanbul Aggravated Felonies Court No. 2 involving none of the applicants and resulting in convictions. They have also provided copies of :

- nine judgments given in prosecutions against Yaşar Kaya with other defendants before the İstanbul State Security Courts in 1994 and 1995;
- five decisions taken by the İstanbul State Security Courts (1, 3, 4, 8 and 11 May 1993) for seizure of particular editions of Özgür Gündem;
- the indictment of 5 April 1994 charging the first three applicants Gurbetelli Ersöz, Fahri Ferda Çetin and Yaşar Kaya, with ten others (journalists, editors and workers at Özgür Gündem) with being members of the PKK and of rendering it assistance and making propaganda;

81. The texts of the judgments as relevant to the Commission's examination of the application are summarised in the Opinion part of the Report (see paras. 160-237).

Özgür Gündem articles subject to prosecution

82. The applicants have provided 29 articles amongst which those which in 1992-1994 were subject to prosecution. The texts of these articles as relevant to the Commission's examination of the application are summarised in the Opinion part of the Report (see paras. 160-237).

83. The applicants provided a further set of articles from 50 editions of Özgür Gündem, which the Commission has not found necessary to incorporate in the text of its report.

The Susurluk report

84. This report was drawn up by Mr. Kutlu Savaş, vice president of the Committee for Co-ordination and Control, attached to the Prime Minister's Office, at the request of the Prime Minister. The report was issued in January 1998. The Prime Minister made the bulk of the report public, though certain pages and the annexes were omitted.

85. The report relates to concerns arising out of the so-called Susurluk incident, when in November 1996, there was a crash between a lorry and a Mercedes car at the town of Susurluk, and it was discovered that in the Mercedes car there were Sedat Bucak, member of Parliament and Kurdish clan chief from Urfa, Siverek district; Hüseyin Kocadağ, a senior police officer who was director of the İstanbul police college, founder of the special forces operating in the south east who had once been the senior police officer in Siverek; and Abdullah Çatlı, an former extreme right wing militant accused of killing seven students, at one time arrested by the French authorities for drug smuggling, extradited to and imprisoned in Switzerland from where he escaped and who was allegedly both a secret service agent and a member of an organised crime group.

86. In the preface of the report, it is stated that is not an investigation report and that the authors had no technical or legal authority in that respect. It is stated that the report was prepared for the purposes of providing the Prime Minister's Office with information and suggestions and that its veracity, accuracy and defects are to be evaluated by the Prime Minister's Office.

87. The first section of the report, which describes general matters and general aspects of the situation, included the following extracts:

(page 8)

"The bombing of the newspaper *Özgür Gündem* in İstanbul, the murder of Behçet Cantürk, the murder of the writer Musa Anter in Diyarbakır, the action concerning Tarık Ümit in İstanbul the trillions of credits in the banks are in reality various aspects of the incident which occurred in Ankara."

(page 9)

"While the continuation of the fighting in the region and the attacks of the PKK resulted in a reaction spreading out to the region in the West as well, it is possible to understand and excuse, some of the attitudes of martyrs, the reactions, the anger and attitudes of the State forces who fought the PKK and lived in the State of Emergency region. It is in fact inevitable..."

88. On pages 10-23, there is a description of the development and various concerns arising out of the personnel and operations of the General Directorate of Security, including the Special Operations Bureau.

89. On pages 24-43, there is a description of the development and involvement of the National Intelligence Organisation (MİT). References are made at length to a person known as Mahmut Yıldırım, sometimes known as Ahmet Demir or under the codename "Yeşil":

- (page 26) "Whilst the character of Yeşil, and the fact that he, along with the group of confessors he gathered around himself, is the perpetrator of offences such as extortion, seizure by force, assault on homes, rape, robbery, murder, torture, kidnap of the public authorities with such an individual.

It is possible to understand that a respected organisation such as MİT may use a lowly individual... it is not an acceptable practice that MİT should have used Yeşil several times...

Yeşil, who carried out activities in Antalya under the name of Metin Güneş, in Ankara under the name of Metin Atmaca, Ahmet Demir, is an individual whose activities and presence were known to both by the police and by MİT... As a result of the State's silence the field is left open to the gangs."

- (page 27) Yeşil was also associated with JİTEM, an organisation within the gendarmes, which used large numbers of protectors and confessors;

- (pages 34-40) records are cited from MİT which state that from 1989 Yeşil took part in operations with the security forces in Nazimiye and Ovacık districts under the command of the Tunceli gendarme regimental command; that as a result of this work he was withdrawn to Diyarbakır where he carried out rural activities under the command of the gendarme public order commanding officer in Diyarbakır; that on 27 May 1993 he murdered five PKK suspects apprehended in Muş; that as Ahmet Demir he planned the kidnapping of Bayram Kanat who was found dead on 6 April 1994; that he murdered

Major Cem Ersever in November 1994; that he raped and tortured Zeynep Baba and Şükran Mizgin, the latter found dead near Muş; that with Alaattin Kanat, Mesut Mehmetoğlu and others he planned and murdered Mehmet Sincar (Batman member of Parliament); that he personally planned and executed the murders of Vedat Aydın and Musa Anter. His relationship with MİT is stated as ending on 30 November 1993.

90. From page 44 to 58, there is a description of the activities of a powerful "mafioso" style leader, Ömer Lütfi Topal, his business connections, his connections with various officials and authorities and his killing, allegedly conducted with the acquiescence or connivance of State authorities, in which Abdullah Çatlı was implicated.

91. From page 59 to 66, there is a description of gang leader Mehmet Ali Yaprak and his kidnap incident, in which Abdullah Çatlı was implicated.

92. Information is set out concerning Behçet Cantürk (pages 71-73). He is described as one of the financiers of Özgür Gündem from 1992 and as having been involved in drugs smuggling and terrorist action, handing over drugs money to the PKK. It is stated that:

"Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate, 'the Özgür Gündem was blown up with plastic explosives and when Cantürk started to set up a new establishment ...the Turkish Security Organisation decided that he should be killed and the decision was carried out.'

By doing so one individual was dropped from the 'list of businessmen financing the PKK' as the Prime Minister of the time referred to it..." (page 73)

93. Comment is made that the situation arose where a chaotic system permitted, inter alia, a person like Yeşil to operate and Abdullah Çatlı working under the orders of the State to carry out smuggling and to spread fear around him and to take advantage of this to allow others a share in the protection money. The acquiescence in these activities permitted a group of individuals, civil and public officials, turning from the service of the nation to their own personal advantage.

"All the relevant State bodies were aware of these activities and operations... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter represented in economic terms. We can say that the above indicated matters are also valid in similar matters such as the murder of Savaş Buldan, who was exposed as a smuggler and pro-PKK activist. The same matters are also valid for Medet Serhat Yöş, Metin Can... The sole disagreement we have with what was done relates to the form of procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real

influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9.) Other journalists have also been murdered." (page 74).

94. On page 75 (pages 74 and 76-79 have not been published) a statement by an unspecified person is quoted:

"... an illegal formation was carried out under the umbrella of JITEM. We had the authority to execute almost anybody whom we suspected of having a relationship with the PKK. We used the method of apprehending these individuals, establishing their offences, and instead of handing them over to justice, murdered them in a way which ensured the perpetrator would remain unknown. This was required from us and we were receiving instructions in that fashion."

95. Pages 80-81 appear to continue a description of Abdullah Çatlı's activities and his connections with State officials and various authorities.

96. On pages 82-87, there is a description of the organisation and significance of the Bucak tribe headed by Sedat Bucak, who is described as arming his tribe with the close collaboration of the security forces. There were 1000 village protectors in Siverek and Silvan receiving a salary from the State, as well as voluntary village protectors who carried weapons with the State's permission. Following their success in scoring blows against the PKK, they were accorded privileges, including official tolerance to smuggling and their shows of strength (firing their guns into the air). The local security forces also tended to leave the planning and execution of operations to the tribe. There were indications that the tribe was getting out of control, incidents occurring, for example, of individuals being interrogated without the knowledge of security officials, of a PKK supporter Hasan Taşkaya being killed. The tribe's rivalry with the PKK was not based on ideology but on rivalry for power and control. They marketed their struggle with the PKK to the State and used it to disguise their own illegal behaviour.

97. On pages 88-95, there is a description of the gangs, in particular the Kocaeli, Söylemezler and Yüksekova gangs. Police and security forces officers are named as being implicated in various incidents; MİT is named as intervening to extend the residence permits of persons involved in drugs trafficking who were threatened with deportation; MİT also stalled the proposed deportation of an arms dealer involved in illegal activities.

98. On pages 96-99, there is a description of various disquieting developments in public banks, including the grants of loans to certain groups, holdings and companies of amounts greater than they were capable of repaying. Some banks acted as if they were the banks of certain companies. They concentrated investments on a few companies increasing their risks. While the banks made losses, companies receiving credit were placed in advantageous positions.

99. In its final evaluation on pages 100-109, the report seeks to describe the connections between illegal elements and the security forces. It describes how JITEM

grew and expanded with the south-east situation which was its reason for existence. The confessors and local elements employed by it however became loose and free. The intelligence staff were also left outside the military hierarchy and even higher ranking officers such as Major Cem Ersever acted independently. Officers returning from the south-east maintained contacts and used what they had learned. The harshness of the tools applied and the cruelty of the methods used by the PKK caused those who fought against them to use similar methods.

100. On pages 110-118, the report makes numerous recommendations, including the limiting of the use of confessors, the reduction in the number of village protectors, the cessation of the use of Special Operations Bureau outside the south-east and its incorporation into the police structure outside that area and that steps be taken to investigate various incidents and to suppress gang and drugs smuggling activities.

101. On 23 April 1998, the Commission requested the Government to provide the pages and annexes of the Susurluk report which had not been made public. By letter dated 5 June 1998, the Government declined to provide copies of the missing pages and annexes of the Susurluk report, stating that the report, which concerned an internal investigation, was still confidential and the inquiry by the competent authorities into the allegations was in progress. The Government stated that giving the Commission a copy of the report at this stage might impede the investigations from progressing properly.

102. The applicants have provided extracts from Turkish newspapers (Milliyet, Hürriyet and Gündem newspapers) which have published lists of the journalists who were named in the missing page 75 of the Susurluk report. These state that the journalists listed were Cengiz Altun, Hafız Akdemir, Yahya Orhan, İzzet Keser, Mecit Akgün, Çetin Abubay and Burhan Karadeniz. The Government have not denied the accuracy of these reports.

103. The applicants have submitted an article from Ülkede Gündem of 29 January 1998, which reports on the Susurluk report as vindicating the newspapers such as Özgür Gündem, Özgür Ülke, Yeni Politika and Demokrasi, which had reported the killings by contraguerrillas, confessors, village guards and special forces. The article alleges that, according to the report, journalists, reporters and distributors of newspapers reporting on these matters were systematically killed. Minister of State Eyüp Aşık is also quoted as confessing publicly that journalists in the Kurdish provinces had been killed by State officials. The article concludes 29 named writers, reporters and distributors, including Kemal Kılıç, were killed or kidnapped by the State. The Government have denied that the Minister made any such statement.

C. Relevant domestic law and practice

Constitutional Law

<Translation>

Article 28 : "The press is free, and shall not be censored. The establishment of a printing house shall not be subject to prior permission and to the deposit of a financial guarantee.

...

The State shall take the necessary measures to ensure the freedom of the press and freedom of information.

...

Anyone who writes or prints any news or articles which threaten the internal or external security of the State or the indivisible integrity of the State with its territory and nation, which tend to incite offences, riots or insurrection, or which refer to classified State secrets and anyone who prints or transmits such news or articles to others for the above purposes, shall be held responsible under the law relevant to these offences.

Distribution may be suspended as a preventive measure by a decision of a judge, or in the event delay is deemed prejudicial by the competent authority designated by law. The authority suspending distribution shall notify the competent judge of its decision within twenty-four hours at the latest. The order suspending distribution shall become null and void unless upheld by the competent judge within forty-eight hours at the latest.

No ban shall be placed on the reporting of events, except by a decision of a judge issued to ensure the proper functioning of the judiciary, within the limits specified by law.

Periodicals and non-periodical publications may be seized by a decision of a judge in cases of ongoing investigation or prosecution of offences prescribed by law and in situations where delay could endanger the indivisible integrity of the State with its territory and nation, national security, public order or public morals, and for the prevention of offences by order of the competent authority designated by law. The authority issuing the seizure order shall notify the competent judge of its decision within twenty-four hours at the latest. The seizure order shall become null and void unless upheld by the competent court within forty-eight hours at the latest.

The general common provisions shall apply when seizure and confiscation of periodicals and non-periodicals for reasons of criminal investigation and prosecution take place.

Periodicals published in Turkey may be temporarily suspended by court sentence if found guilty of publishing material which contravenes the indivisible integrity of the State with its territory and nation, the fundamental principles of the Republic, national security and public morals. Any publication which clearly bears the characteristics of being the continuation of the suspended periodical is prohibited and shall be seized by a decision of a judge."

Article 29 : "Publication of periodicals or non-periodicals shall not be subject to prior authorization or to the deposit of a financial guarantee.

To publish a periodical it shall suffice to submit the information and documents prescribed by law to the competent authority designated by law. If the information and documents submitted are found to be in contravention of the law, the competent authority shall apply to the competent court for suspension of publication.

The publication of periodicals, the conditions of publication, the financial resources and rules relevant to the profession of journalism shall be regulated by law. The law shall not impose any political, economic, financial and technical conditions obstructing or making difficult the free dissemination of news, thoughts or beliefs.

Periodicals shall have equal access to the means and facilities of the State, other public corporate bodies and their agencies."

Anti-Terror Legislation

104. Article 6 of the Anti-Terror Law No. 3713 of 12 April 1991

<Original>

"İsim ve kimlik belirterek veya belirtmeyerek kime yönelik olduğunun anlaşılmasını sağlayacak surette kişilere karşı terör örgütleri tarafından suç işleneceğini veya terörle mücadelede görev almış kamu görevlilerinin hüviyetlerini açıklayanlar veya yayınlayanlar veya bu yolla kişileri hedef gösterenler beşmilyon liradan onmilyon liraya kadar ağır para cezası ile cezalandırılır.

Terör örgütlerinin bildiri veya açıklamalarını basanlara veya yayınlayanlara beşmilyon liradan onmilyon liraya kadar ağır para cezası verilir.

Bu Kanunun 14üncü maddesine aykırı olarak muhbirlerin hüviyetlerini açıklayanlar veya yayınlayanlar beşmilyon liradan onmilyon liraya kadar ağır para cezası ile cezalandırılır.

Yukarıdaki fıkralarda belirtilen fiillerin 5680 sayılı Basın Kanunu'nun 3 üncü maddesindeki mevcuteler vasıtasıyla işlenmesi halinde, ayrıca sahiplerine de; mevkute bir aydan az süreli ise bir önceki ay ortalama fiili satış miktarının, aylık veya bir aydan fazla süreli ise bir önceki fiili satış miktarının,[mevkute niteliğinde bulunmayan basılı eserler ile yeni yayına giren mevcuteler hakkında ise, en yüksek tirajlı günlük mevkutenin bir önceki ay ortalama satış tutarının] yüzde doksanı kadar ağır para cezası verilir. Ancak, bu ceza ellimilyon liradan az olamaz. Bu mevcutelerin sorumlu müdürlerine, sahiplerine verilecek cezanın yarısı uygulanır."

<Translation>

"Those who announce that a crime will be committed by terrorist organisations against certain persons either expressly or without mentioning their names, or who disseminate or disclose to the public the identity of officials appointed to fight terrorism, or who

render such officials targets, shall be subject to a fine of between 5 and 10 million Turkish lira.

Those who print or publish the leaflets of terrorist organisations shall be subject to a fine of between 5 and 10 million Turkish lira.

Those who, contrary to Article 14 of this Law, disclose or publish the identity of informants shall be subject to a fine of between 5 and 10 million Turkish lira.

If one of the crimes defined above is committed by means of periodicals, as defined in Article 3 of Press Law No. 5680, the owners of such periodicals shall be punished by a fine to be determined in accordance with the following provisions: for periodicals published at less than monthly intervals, the fine shall be ninety per cent of the average real sales revenue of the previous month; for periodicals published monthly or at more than monthly intervals, the fine shall be ninety per cent of the average real sales revenue of the previous issue [; for printed works that are not periodicals or for periodicals which have recently started business, the fine shall be ninety per cent of the monthly sales revenue of the highest circulating daily periodical]. In any case, the fine may not be less than 50 million Turkish lira. Responsible editors of these periodicals shall be sentenced to half of the sentences to be imposed upon the publishers."

105. Article 8 paragraph 1 of Anti-Terror Law (before the amendments of 27 October 1995)

<Original>

"Hangi yöntem, maksat ve düşünceyle olursa olsun Türkiye Cumhuriyeti Devletinin ülkesi ve milletiyle bölünmez bütünlüğünü bozmayı hedef alan yazılı ve sözlü propaganda ile toplantı, gösteri ve yürüyüş yapılamaz. Yapanlar hakkında 2 yıldan 5 yıla kadar ağır hapis ve ellimilyon liradan yüzmilyon liraya kadar ağır para cezası hükmolunur."

<Translation>

"No one shall, by any means or with any intention or idea, make written or oral propaganda or hold assemblies, demonstrations or manifestations against the indivisible integrity of the State of the Turkish Republic, its territories and the nation. Those carrying out any such activity shall be sentenced to imprisonment between two and five years and a fine between 50 and 100 million Turkish lira."

106. Article 8 paragraph 2 of Anti-Terror Law

<Original>

"Yukarıdaki fıkrada belirtilen propaganda suçunun 5680 sayılı Basın Kanununun 3 üncü maddesinde belirtilen mevkateler vasıtası ile işlenmesi halinde, ayrıca sahiplerine de

mevkute bir aydan az süreli ise, bir önceki ay ortalama satış miktarının: [mevkute niteliğinde bulunmayan basılı eserler ile yeni yayına giren mevkuteler hakkında ise, en yüksek tirajlı günlük mevkutenin bir önceki ay ortalama satış tutarının]; yüzde doksanı kadar ağır para cezası verilir. Ancak, bu para cezaları yüzmilyon liradan az olamaz. Bu mevkutelerin sorumlu müdürlerine, sahiplerine verilecek para cezasının yarısı uygulanır ve altı aydan iki yıla kadar hapis cezası hükmolunur."

<Translation>

"If the offence of propaganda, referred to in paragraph 1 above, is committed by means of periodicals, as defined in Article 3 of Press Law No. 5680, the owners of such periodicals shall be punished by a fine to be determined in accordance with the following provisions: for periodicals published at less than monthly intervals, the fine shall be ninety per cent of the average real sales revenue of the previous month; [for printed works that are not periodicals or for periodicals which have recently started business, the fine shall be the average monthly sales revenue of the highest circulating daily periodical]. In any case, the fine may not be less than 100 million Turkish lira. Responsible editors of these periodicals shall be sentenced to imprisonment of between six months and two years and to half of the fine determined in accordance with the provisions concerning the owners."

107. In its judgment No. 1991-18/20, dated 31 March 1992, the Constitutional Court found the above clauses in square brackets in the text of Articles 6 and 8 of the Anti-Terror Law to be contrary to the Constitution and annulled it. The decision was published in the Official Gazette on 27 January 1993. The annulled clauses ceased to have effect on 27 July 1993.

Press Law No. 5680 of 24 July 1950

108. Article 3

<Original>

"Gazetelere, haber ajansları neşriyatına ve belli aralıklarla yayınlanan diğer bütün basılmış eserlere bu kanunda 'mevkute' denir.

Basılmış eserlerin herkesin görebileceği veya girebileceği yerlerde gösterilmesi veya asılması veya dağıtılması veya dinletilmesi veya satılması veya satışa arzı 'neşir' sayılır. ..."

<Translation>

"Newspapers, publications of news agencies and all other published matter, published at specific intervals, are referred to as 'periodicals' in this Law.

The display, distribution, broadcast, sale and supply of published matter in locations accessible to the public shall be regarded as 'publication'. ... "

109. Under Article 7 of the Press Law, in cases where a periodical is owned by a company, the major shareholder in that company is considered to be the owner of the periodical.

Miscellaneous offences

110. Article 159 para. 1 of the Turkish Criminal Code:

<Original>

Türklüğü, Cumhuriyeti, Büyük Millet Meclisini, Hükümetin manevî şahsiyetini, Bakanlıkları, Devletin askerî veya emniyet muhafaza kuvvetlerini veya Adliyenin manevî şahsiyetini alenen tahkir ve tezyif edenler bir seneden altı seneye kadar ağır hapis cezası ile cezalandırılırlar...

<Translation>

"Whoever overtly insults or vilifies the Turkish nation, the Republic, the Grand National Assembly, or the moral personality of the Government, the Ministries or the military or security forces of the State or the moral personality of judicial authorities shall be punished by imprisonment for one to six years."

111. Article 312 paras. 2 and 3 of the Turkish Criminal Code:

<Original>

"Halkı, sınıf, ırk, din, mezhep veya bölge farklılığı gözeterek kin ve düşmanlığa açıkça tahrik eden kimse bir yıldan üç yıla kadar hapis ve üçbin liradan onikibin liraya kadar ağır para cezası ile cezalandırılır. Bu tahrik umumun emniyeti için tehlikeli olabilecek bir şekilde yapıldığı takdirde faile verilecek ceza üçte birden yarıya kadar arttırılır.

Yukarıdaki fıkralarda yazılı suçları 311inci maddenin ikinci fıkrasında sayılan vasıtalarla işleyenlere verilecek cezalar bir misli arttırılır."

<Translation>

"It shall be an offence punishable by not less than one and not more than three years' imprisonment, and by a fine of not less than three thousand and not more than twelve thousand lira, to provoke feelings of hatred and enmity among the people by discriminating on the grounds of social class, race, religion, sect or region. If such provocation imperils public safety, the punishment shall be increased by one third to one half of the sentence.

The punishment for the acts defined in the preceding paragraph shall be doubled where they have been committed by the means enumerated in paragraph 2 of Article 311."

112. The means enumerated in Article 311 para. 2 of the Criminal Code are: mass media, audio tapes, records, films, newspapers, magazines, handwritten texts distributed in the form of leaflets, placards and posters.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

113. The Commission has declared admissible the applicants' complaints concerning their allegations:

- that there has been a deliberate and unjustified interference with their freedom of expression due to measures and incidents relating to the Özgür Gündem newspaper and persons connected with the newspaper;
- that the measures implemented in relation to Özgür Gündem violated the third and fourth applicants' peaceful enjoyment of their possessions;
- that the applicants have been subject to discrimination in the enjoyment of their freedom of expression and peaceful enjoyment of their possessions.

B. Points at issue

114. The points at issue in the present case are as follows:

- whether there has been a violation of Article 10 of the Convention in respect of the applicants;
- whether there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the third and fourth applicants;
- whether there has been a violation of Article 14 of the Convention in conjunction with the above provisions in respect of the applicants.

C. Approach to the evidence

115. The Commission notes that there are important disputes of fact between the parties. In particular, there is fundamental disagreement as to the existence of the alleged campaign, carried out directly or with the connivance of State officials, directed at driving the Özgür Gündem newspaper out of existence, and as to the occurrence or nature of various of the incidents (alleged killings, assaults, arson attacks, threats etc.).

116. The Commission, after consultation with the parties, did not hear oral evidence from witnesses in this case. It is of the opinion that the allegations are of a width and character that would not be easily amenable to clarification from oral testimony from the persons who could be identified as connected with the facts of this case.

117. The Commission consequently decided to examine the applicants' allegations as to the violations disclosed by these events on the basis of the written materials in the file and the submissions of the parties made in answer to the questions posed by the Commission.

D. Concerning the first applicant

118. The Commission notes that the applicant's representatives have informed it that the first applicant, Gurbetelli Ersöz, died in the autumn of 1997. No information has been received to the effect that her heirs or close relatives wish to pursue her complaints. In these circumstances, the Commission finds no basis for pursuing its examination of the application, insofar as it was submitted by Gurbetelli Ersöz.

DECISION

119. The Commission decides, unanimously, not to pursue the examination of the application, insofar as it was brought by Gurbetelli Ersöz.

E. As regards Article 10 of the Convention

120. Article 10 provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

121. Where measures constitute restrictions on the freedom of expression guaranteed under Article 10 para. 1 of the Convention, the Commission recalls that the question arises whether such restrictions were prescribed by law, pursued legitimate aims under Article 10 para. 2 and were "necessary in a democratic society" in order to realise those aims.

122. As regards the criterion "necessary in a democratic society", the Commission recalls the following principles adopted by the Court (see, e.g., Eur. Court HR, *Zana v. Turkey* judgment of 25 November 1997, Reports 1997, para. 51):

(i) Freedom of expression, as enshrined in paragraph 1 of Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to "information" or "ideas" that are favourably received or are 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 broad-mindedness without which there is no "democratic society".

(ii) The adjective "necessary", within the meaning of Article 10 para. 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.

(iii) In exercising its supervisory jurisdiction, the organs of the Convention must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, they 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".

123. The Commission further notes that, while freedom of political debate is at the very core of the concept of a democratic society (Eur. Court HR, *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, para. 42), that freedom is not absolute. A Contracting State is entitled to subject it to certain "restrictions" or "penalties", but the Convention organs are empowered to give the final ruling on whether they are reconcilable with freedom of expression as protected by Article 10 (Eur. Court HR, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, p. 30, para. 59(c)). In doing so, the Convention organs must satisfy themselves that the national authorities did apply 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 (Eur. Court HR, *Jersild v. Denmark* judgment of 23 September 1994, Series A no. 298, p. 24, para. 31).

124. Even where interferences with freedom of expression are based on considerations of national security and public safety and are part of a State's fight against terrorism, the interferences can be regarded as necessary only if they are proportionate to the aims pursued. Consequently, the Commission must, with due regard to the circumstances of each case and the State's margin of appreciation, ascertain whether a fair balance has been struck between the individual's fundamental right to freedom of expression and a democratic society's legitimate right to protect itself against the activities of terrorist organisations (cf. above-mentioned *Zana* judgment, para. 55).

125. The Commission observes in this connection that Article 10 para. 2 also refers to "duties and responsibilities" which the exercise of the freedom of expression carries with it. Thus, it is important for persons addressing the public on sensitive political issues to take care that they do not support unlawful political violence. On the other hand, freedom of expression must be considered to include the right openly to discuss difficult problems

such as those facing Turkey in connection with the prevailing unrest in part of its territory in order, for instance, to analyze the background causes of the situation or to express opinions on the solutions to those problems (see e.g. *Erdođdu and İnce v. Turkey*, Nos. 25067/94 and 25068/94, Comm. Rep. 11.12.97, pending before the Court).

(a) The submissions of the parties

126. The applicants submit that from 30 May 1992 when *Özgür Gündem* commenced publication until its closure which took effect on 14 April 1994 the newspaper was subjected to an unremitting campaign of grave violations of human rights, designed to bring about its closure. Similar attacks followed on its successor, *Özgür Ülke*. They submit that, as editors and owners, they can claim to be victims of the measures against the newspaper, many of which affected them directly as individuals when they were themselves prosecuted in the courts. This campaign has included killings, disappearances, injuries and ill-treatment of journalists, as well as killings, attacks and threats against persons involved in the sale and distribution of the newspaper. The applicants submit that this was a continuing pattern instigated, condoned and encouraged by State authorities, which have failed to provide protection or take effective steps to investigate the incidents. They rely on the *Susurluk* report (paras. 84-103) to support their claims that State authorities encouraged or carried out unlawful activities directed against the newspaper and persons associated with it.

127. The applicants submit that in this campaign there was direct involvement by the State in the form of a vast and abusive number of prosecutions brought against the newspaper, which on 22 August 1994 involved the seizure of 486 out of 580 issues of the paper, 328 prosecutions before the courts, and resulted in the imposition of 9 billion lira in fines on the third applicant, *Yaşar Kaya*.

128. The applicants point out that mere opposition to terrorism is not a legitimate or necessary aim under the Convention. There is *prima facie* evidence that the Turkish legislation under which the newspaper, its editors and journalists have been prosecuted, by its vagueness and inconclusiveness, and the way it is systematically used, violates Article 10. Freedom of the press is a prerequisite for, and the product of, democratic society and penalties against the press are unacceptable except in the narrowest of circumstances, since it otherwise would deter journalists from contributing to the public discussion of issues affecting the life of the community. The question of the Kurds is a matter of the greatest public interest and concern in the south-east of Turkey and Turkey as a whole and affects the life of the community. They refer to the principle that democratic governments must be subject to close scrutiny not only by the legislature and the judiciary but by the press and public opinion. Prior restraints are also inherently dangerous and require the most careful scrutiny.

129. The applicants refer to the report of the European Committee on Crime Problems (Council of Europe) "Extortions under terrorist threats" (Strasbourg 1986 Common

Market Law Bulletin (1986) p. 836) which recommended that government interference with broadcasting freedom in the terrorist context should be limited to two exceptional circumstances: where the media threaten to hamper apprehension of terrorists by, for example, broadcasting the plans of the police or where broadcasts incite or tend to vindicate terrorist actions. The applicants submit that Özgür Gündem has done neither. It has consistently sought to present factual information about the activities of the Turkish Government in the Kurdish areas of Turkey and to comment forcefully on those activities.

130. The Government deny that there is any proof to support allegations of State persecution of certain newspapers and those involved in their publication and distribution or any failure to provide adequate protection or investigations pursuant to Turkish law. They submit that these allegations are spurious, unsubstantiated and conflate the complaints made in a number of other individual applications. Incidents are relied on which fall outside the six month time-limit and in respect of which no remedies have been exhausted. In any event, many acts referred to derive from the terrorist activities of groups such as the Hizbullah which are outside Government control. Nor can it be said that the three individual applicants have been affected in any way by these incidents and they cannot claim to be representing the individuals concerned. They deny that the Susurluk report, which concerns internal investigations and is not of any judicial or legal standing, can be relied on as supporting the applicants' claims.

131. The Government submit that any restrictions under Article 10 may be considered as prescribed by law, pursue the legitimate aims of protecting democracy, territorial integrity, constitutional order and the right to life of others. As regards necessity, there is a compelling need to take urgent measures against the propaganda of terrorism to prevent its escalation. This also applies to reducing the social friction which is agitated by the PKK through the press.

132. The Government refer to the state of emergency existing due to the intense activities of the terrorist organisation PKK. They submit that Özgür Gündem was the spokesman of a political party banned by the Constitutional Court. In the Government's view, the ideological objective behind the newspaper was the establishment of a Kurdish State on Turkish territory. They point out that people living under the social tension caused by terrorism as well as under unfavourable economic conditions aggravated again by terrorists, can be exploited. Özgür Gündem functioned on behalf of the PKK, sending messages to raise the excitement of agitated groups and incite hatred and violence. Measures may be legitimately taken to limit freedom of expression which threatens national security or territorial integrity. The Press Code has regard to the limitations imposed by Article 10 as do the Turkish courts. The Government submit that none of the Özgür Gündem articles impugned in the court proceedings could be considered as expressing peaceful political opinions or as conveying information to the public but rather included the advocacy of terrorism, incitement to violence and inducement to separatism. The Government emphasise the element of danger and affirm that it is for the Turkish courts to evaluate the existence and severity of the danger. They also consider as

significant the element of intention or "animus injurandi" which distinguishes the case from other situations considered by the Commission and the Court (e.g. Eur. Court HR, Castells v. Spain judgment of 23 April 1992, Series A no. 236; Jersild v. Denmark, Comm. Rep. 8.7.93, para. 44, Series A No. 298). Further, unlike the Castells case, there was no other means available to the Government to stop the terrorist propaganda or inducement to separatism published in *Özgür Gündem*.

133. The Government submit that Article 10 should not apply in this situation, invoking Article 17 of the Convention with regard to the circumstances indicating that incitement of terrorism is likely to yield violence destroying the rights and freedoms provided in the Convention.

134. The Government also point out that of the applicants only Yaşar Kaya is in fact a defendant in the lists of prosecutions provided by their representatives. As regards the admitted fact that Yaşar Kaya was convicted in 70 cases, they dispute that he can claim to be a victim since no sentence has been executed. They also point out that he fled from Turkey and argue that he has no real interest in making claims of violation of his right of freedom of expression, in particular given the nature of his own separatist activities. The applicants Gurbetelli Ersöz and Fahri Ferda Çetin were not involved in any of the listed cases nor were they running the newspaper during the period in which these judicial decisions were made. As regards the applicant company, they submit that it can only claim to be affected by the decisions ordering temporary closure. Further, the closure concerns only property rights, an artificial corporate personality pursuing commercial purposes not being able to claim a right under Article 10.

(b) The applicants' victim status

135. The Commission recalls that the second applicant, Fahri Ferda Çetin, was the assistant editor in chief of *Özgür Gündem* and that the third and fourth applicants, Yaşar Kaya and the company *Ülkem Basın ve Yayıncılık Sanayi Ticaret Limited*, owned the newspaper. It also recalls that the second and third applicants were taken into detention and criminal charges brought against them in an indictment dated 5 April 1994, in which it was alleged, inter alia, that they had assisted the PKK by making propaganda. It recalls that the third applicant was the defendant, as the publisher, in over 70 prosecutions brought in the State Security Court in İstanbul in which he was convicted and sentenced to numerous fines. Whether or not the court judgments were executed or rendered final, the Commission finds that third applicant may claim to be directly affected by the prosecutions and convictions concerned. The evidence before the Commission also indicates that numerous editions of the newspaper were confiscated and that the newspaper was subject to numerous closure orders. While the fourth applicant is a company, the Commission notes that a corporate entity which owns a newspaper and therefore has a publishing role may invoke Article 10 of the Convention (see e.g. No. 9615/81 Dec. 5.3.83, DR 32 p. 231).

136. The Commission is satisfied that these three applicants may claim to be victims in respect of allegations that the newspaper *Özgür Gündem* has been subject to a campaign by the State to bring about its closure.

(c) Scope of the Commission's examination

137. The Commission does not find itself called upon in the context of this application to examine whether or not each of the numerous alleged killings, assaults, arson attacks and threats carried out in respect of journalists, newspaper sellers and distributors involved in the production and distribution of Özgür Gündem took place as alleged and involved infringement of rights under the Convention. Nor is it necessary to reach a separate conclusion in regard to each measure of seizure or confiscation of issues of the newspaper or each other action complained of in the present case. As pointed out in the decision on the admissibility of the application, the Commission interprets the application as not being primarily concerned with individual acts or events but with a consistent pattern of actions taken over a relatively long period of time and aimed at preventing the Özgür Gündem newspaper from being published.

138. The scope of the Commission's examination is therefore focused on the applicants' complaints that their freedom of expression has been violated through a pattern of actions applied by the respondent Government to Özgür Gündem or through their failure to protect the applicants' exercise of that freedom.

139. The Commission will analyze the various aspects of the action allegedly taken against Özgür Gündem in violation of the freedom of expression of the applicants, i.e. the attacks on individuals, the search of the newspaper office and the arrest of staff members as well as the seizure and confiscation of various issues of the newspaper in order to finally make a general assessment of whether these various occurrences disclose a violation of the right to freedom of expression.

(d) Attacks on individuals

140. The applicants have referred to a very large number of incidents involving persons working in some capacity for Özgür Gündem. These incidents include killings, arson attacks, threats and various kinds of violence. The Government have denied that some of these events occurred and have declared more generally that the State was not responsible for any attacks that may have been carried out.

141. As to the Government's denial that some of the attacks actually occurred as alleged (see paras. 43-62), the Commission observes that the report of the Ministry of the Interior of 16 February 1996, on which the Government rely in this context, states that the attack on Haşim Yaşa did not occur, whereas the killing of that individual was to the Commission's knowledge subject to a police investigation under preliminary investigation file no. 1993/2248. Also while the Government dispute that Yahya Orhan was a journalist (see para. 43) rather than a kiosk owner, this is not supported by the investigation documents provided and the basis of their assertion is not apparent.

142. While it is not necessary, or even possible, for the Commission to analyze each of the events referred to by the applicants in support of their allegations regarding a systematic Government campaign against Özgür Gündem, the Commission is satisfied,

on examination of the materials submitted, that there was a disturbing pattern of attacks on persons connected with Özgür Gündem. That Özgür Gündem, and its journalists, were a particular target for unlawful attacks finds additional support in the Susurluk report (paras. 84-100) which refers to the bombing of the newspaper's successor Özgür Ülke and to the killing of journalists in the context of the unlawful activities carried out with the acquiescence, connivance or involvement of State officials implicated in clandestine or undercover activities. Reference should also be made to the judgment in the case of *Yaşa v. Turkey*, in which the Court made the following observation:

"The Court notes that the Susurluk report - which was prepared at the Prime Minister's request - relates to a series of disturbing events that occurred in the south-east region of Turkey ... The fate of certain newspaper-publishing companies, in particular the company which published the Özgür Gündem, is particularly alarming in that regard. According to the author of the report, the cause of that general situation, which has considerably troubled public opinion, has been the Kurdish problem and the means used to combat the PKK in that part of the country." (Eur. Court HR, *Yaşa v. Turkey* judgment of 2 September 1998, para. 95, to be published in Reports 1998)

143. Nevertheless, while it does not seem unlikely that at least some of the attacks concerned were carried out by persons for whom the State was responsible, the Commission does not find the Susurluk report and the other available material to be sufficient to link the Government to specific incidents of killings or other violent attacks on individual persons working for Özgür Gündem.

144. While Article 10 is concerned primarily with protecting individuals or relevant organisations from arbitrary interference by public authorities, the Commission considers that it does not merely compel the State to abstain from such interference. In addition to this primarily negative undertaking, there may, in conjunction with Article 1 of the Convention which requires that "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms" in the Convention, be positive obligations on a State as regards the effective exercise of the rights guaranteed under this provision (e.g., *mutatis mutandis*, the Court's case-law on Article 8, *inter alia*, Eur. Court H.R., *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 17, para. 32). In the context of positive obligations, regard must be had to the balance which has to be struck between the competing interests of the individual and of the community as a whole. In striking this balance, the aims mentioned in the second paragraph may be relevant and the State enjoys a certain margin of appreciation (*mutatis mutandis*, Eur. Court H.R., *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, p. 15, para. 37).

145. The Commission has accordingly considered whether in the circumstances of this case the State has failed in carrying out any positive obligation to take steps to protect the Özgür Gündem newspaper's freedom of expression.

146. The Commission recalls first of all the seriousness of the attacks on Özgür Gündem and persons involved with it, including killings, assaults, threats and arson attacks affecting persons or property connected with Özgür Gündem. It considers it established that the production and distribution of Özgür Gündem was hampered and restricted by this pattern of attacks. The difficulties facing the newspaper were drawn to the attention of the authorities, in particular, by the third applicant Yaşar Kaya in letters to the Prime Minister and other ministers and to the Governor of the Emergency Region, and by other persons to the Governors of Batman, Şanlıurfa, Elazığ, Nusaybin and İstanbul (para. 35). A meeting also took place in early 1993 between spokesmen for the newspaper and the Minister of the Interior, in which the difficulties were raised. These contacts included requests for protection and effective investigations.

147. In these circumstances, the Commission finds that the Government were under a positive obligation to take steps to safeguard the exercise of the freedom of expression of the newspaper. As regards the extent of the positive obligation, no absolute duty of protection from violence can be required under Article 10. The Commission recalls that many of the incidents took place in an area of Turkey subject to serious disturbances of public order and which, because of the grave difficulties, has been subjected to emergency rule (ten of the eleven provinces in the south-east of Turkey). As has been noted in previous cases (e.g. *Yaşa v. Turkey*, No. 22495/93 Comm. Rep. 8.4.97, paras. 99-100), there were large numbers of security forces in the area pursuing the aim of maintaining public order, many of whom have lost their lives in the conflict. Nonetheless, having regard to the seriousness of the attacks on the newspaper, the Commission considers that the obligation cannot be regarded as having been fulfilled by the mere existence of laws prohibiting criminal acts or the existence of an infrastructure of law enforcement bodies.

148. The Government were requested by the Commission to specify what steps were taken in response to the particular situation in which there was an apparent pattern of attacks targeting the newspaper and persons connected with it. The Commission notes that the Government deny that requests for personal protection were received. They refer to only two concrete instances of measures being taken, firstly, steps being taken in Şanlıurfa to escort vans and, secondly, following the bombing at Özgür Ülke, special security measures being taken by way of patrolling. They state that, in respect of any reported unlawful acts, investigations were commenced and pursued in the normal manner by the appropriate public prosecutor.

149. The Commission finds no indication that any investigation was undertaken by the authorities in respect of allegations that the newspaper was being subject to a campaign of violence and harassment. It is not satisfied that local investigations undertaken by individual public prosecutors in response to individual incidents can be regarded as an adequate or effective response. This is particularly the case where it is being alleged that there is involvement, acquiescence or connivance in the attacks by local State officials. That there was some basis for the allegations of unlawful, covert activities is borne out by the Susurluk report which appears to be the first detailed investigation into the allegations of misfeasance in office of State officials in the south-east of Turkey. The

Commission observes that the report is expressly qualified as not being a judicial or legal investigation report. While it is certainly not presented as making express findings of fact and responsibility, it makes strong and critical comment on the way in which the rule of law appears to have been undermined in the south-east of Turkey, allowing village protectors, confessors, groups associated with JITEM to operate with impunity and, in some cases, permitting security officers to pursue their own objectives according to their own methods. The report states without reservation that this situation was known to the relevant authorities. The report's source as having been drawn up under the instructions of the Prime Minister's office and the fact that the Prime Minister chose to release most of the report to the public indicates that it should be given not inconsiderable weight. It provides significant substantiation, inter alia, for the suspicions voiced in respect of the killings of Musa Anter, Metin Can and the journalists Cengiz Altun, Hafız Akdemir, Yahya Orhan and Çetin Abubay, amongst others.

150. In the absence however of information as to the precise nature or extent of the threats to the newspaper or its staff, the Commission finds it difficult to indicate what protective measures should have been taken by the authorities. However, the dangerous situation in which the newspaper and its staff carried out their activities must have made it clear to the authorities that the freedom of expression of the newspaper, its owners and journalists was seriously threatened and imposed on them an obligation to take reasonable measures of protection in order to prevent, as far as possible, that that freedom was interfered with by violence and threats.

151. The situation in which Özgür Gündem found itself also highlights the fact that without effective investigation into the attacks it was difficult, or even impossible, to take adequate or appropriate preventive measures. It is to be remarked that, while allegations about State-sanctioned counter-terrorist groups, the misuse of confessors and the implication of State officials in unknown perpetrator killings were current from an early stage, the responsible State authorities ignored or discounted them, consistently laying the blame on the PKK or other terrorist groups, a tendency which the Commission identified also where, in other cases, public prosecutors have been confronted with allegations that a person has disappeared or has been shot by the security forces or that property has been destroyed by security forces.

152. The Commission finds therefore on the facts of this case that the authorities, through their failure to take measures of protection and to make adequate investigations in relation to the apparent pattern of attacks on Özgür Gündem and persons connected with it, did not comply with their positive obligation to secure to the applicants their right to freedom of expression guaranteed under Article 10. It would emphasise that the Government's views as to the role of the newspaper or particular members of its staff in supporting the PKK and the cause of separatism do not disclose any factor which would alter the scope of obligations under the Convention which Turkey has undertaken to comply with as a democratic country respecting the rule of law.

(e) Search and arrests

153. The Commission notes the applicants' declaration according to which the police carried out an operation on the premises of Özgür Gündem in İstanbul on 10 December 1993 and on that occasion confiscated all administrative documents, archives and library facilities and also took all of the employees - over 100 persons - into custody. This resulted in publication being disrupted for two days. The Government have not contested the accuracy of these allegations. From an indictment dated 5 April 1994 it appears that some of the arrested persons were charged with membership of the PKK and assisting and making propaganda for it. The second applicant was charged under Article 168 para. 2 of the Turkish Criminal Code and Article 5 of Law No. 3713 with being a member of the illegal separatist terrorist organisation, the PKK. The third applicant was charged under Article 169 of the Turkish Criminal Code and Article 5 of Law No. 3713 in respect of supporting the organisation. Statements were made and signed by the first and second applicants on or about 23 December 1993, which indicate that they were questioned, inter alia, with regard to the alleged presence on the premises of particular items (unlicensed weapons, injections to stop bleeding, tax receipts of ERNK and the provenance of large sums of money).

154. Since these measures were directed against Özgür Gündem and its staff, they must be regarded as interferences with their freedom of expression. As regards the question whether the interference satisfied the conditions laid down in para. 2 of Article 10, the Commission accepts that there were probably suspicions that some persons working for Özgür Gündem also had connections with the PKK. Nevertheless, the Commission has doubts as to the lawfulness of arrests which appear to have involved indiscriminately a very large number of employees of the newspaper. It also seems doubtful whether a large-scale action of that kind could be considered in its entirety to serve a legitimate purpose under para. 2 of Article 10.

155. In any case, the central point would seem to relate to the necessity of the interference. In this respect, the Commission notes that the confiscation of the administrative documents and the archives of a newspaper together with the arrest of all its employees, or at least a very large number of them, must have a devastating effect on the possibilities for the newspaper to continue publication in an orderly manner. Since it thus affects its freedom of expression in a fundamental way, it cannot be considered proportionate unless there is a very convincing justification for it. No such justification has been provided in the present case, and the necessity of an action of this size has thus by no means been established.

(f) Seizures, confiscations and prosecutions

156. It is uncontested that editions of the newspaper Özgür Gündem were seized and confiscated pursuant to court orders, that journalists and editors, including the third applicant, were prosecuted and fined for articles published in the newspaper, and that the newspaper was subject to a series of short term closure orders of ten days to one month imposed by the courts (para. 66). Nor is it disputed that the second and third applicants, along with others working at Özgür Gündem, were charged with offences related to allegations that they assisted the PKK through propaganda in the newspaper.

157. The parties have provided copies of over a large number of decisions relating to prosecutions in respect of the contents of editions of *Özgür Gündem*. The Commission notes that the applicants have alleged, uncontradicted by the Government, that there have been prosecutions in respect of 486 out of 580 editions of the newspaper and that, pursuant to convictions, the third applicant has been fined up to 35 billion Turkish lira and journalists and editors have received sentences which reach a total of 147 years' imprisonment as well as over 21 billion Turkish lira in fines. Numerous of the prosecutions resulted in closure orders of ten days to a month (see para. 66). Seizures and confiscations of copies of editions were also common features of the legal proceedings. The Commission finds that the pressure of these legal measures on *Özgür Gündem* was intense and it accepts the applicants' submission that it rendered it impossible to continue with publication, resulting accordingly in the newspaper's final closure. This discloses a far-reaching restriction in the exercise of the applicants' freedom of expression under Article 10. The measures could only be justified if they were in conformity with para. 2 of that Article, having regard to the principles stated above (paras. 121-125).

158. As regards the aims of the measures, the Commission notes that generally they formed part of the efforts of the authorities to combat illegal terrorist activities and to maintain national security and public safety, which are legitimate aims under Article 10 para. 2 of the Convention. They were taken pursuant to, inter alia, Articles 6 and 8 of the Anti-Terror Law and the provisions of the Press Law. The Commission also finds that they were "prescribed by law". It refers to previous cases in which it found that the wording of Articles 6 and 8 were sufficiently specific to enable applicants, if necessary after taking legal advice, to regulate their conduct and that the requirement of foreseeability was thus met (for example, *Erdoğdu and İnce v. Turkey*, op. cit., para. 49, and *Sürek and Özdemir v. Turkey*, Nos. 23927/94 and 24277/94, Comm. Rep. 13.1.98, pending before the Court).

159. As regards the necessity of the measures, the Commission, having regard to its general view on the scope of its examination in the present case (para. 134 above), has not felt it useful or appropriate to examine in detail the conformity with this requirement of all the examples provided by the parties, which exercise would moreover entail an excessively lengthy report. It has instead selected examples of prosecutions under the various categories of the offences which have been charged, namely, the offence of insulting the State or the military (Article 159 para. 1 of the Turkish Criminal Code), the offence of provoking racial and regional hostility (Article 312 paras. 2 and 3 of the Turkish Criminal Code), the offence of disseminating declarations of the PKK organisation or its leaders (Article 6 of the Anti-Terror Law), the offence of naming officials involved in fighting terrorism (Article 6 of the Anti-Terror Law) and the offence of making propaganda imperilling the territorial integrity of the State (Article 8 of the Anti-Terror Law).

(i) Prosecutions for insulting the State and the military authorities (Article 159 of the Turkish Criminal Code)

160. The Commission notes that the offences of insulting or scorning the State or the army appear aimed at protection of honour in the sense of the aim of protecting the rights and reputation of others, which notion is difficult to apply to the impersonal concept of the State. However, as in *Castells v. Spain* (Eur. Court HR, *Castells v. Spain* judgment, op. cit., para. 36), the Commission finds that the security of the State could conceivably be threatened by attempts to discredit democratic institutions and thus such measures could also be for the aim of preventing disorder. However, it would emphasise that State authorities in a democratic state must be able to tolerate a considerable degree of negative and critical comment, even where this may appear to some to be provocative and shocking.

Assize Court decision 1994/77, 1 April 1994

161. Articles published on 5, 6 and 7 November 1993, concerning events in Lice, were found by the Assize Court to scorn and insult the State, since the Turkish State was held responsible for massacring Kurdish people. The editor was sentenced to ten months' imprisonment and an order for fifteen day closure of the newspaper was made. The issues of the newspaper concerned were ordered to be confiscated.

162. The Commission has been provided with three of the four articles which the Assize Court found to offend Article 159. It notes that in the article of 5 November 1993 entitled "Help! My God, Where are you?", there is an alleged description of how on 22 October 1992 attacks commenced on the town with bombs, heavy machine gun fire. References are made to a planned massacre and it is affirmed that there were no guerillas in the town to justify any firing. It is claimed that at least 50 people died, with some names being listed, that hundreds were wounded, that 400 houses were completely or partly destroyed by the security forces. The article of 6 November 1993, entitled "Lice? It is a quarter of Diyarbakır now", describes houses and shops as having been burned in the town and reports the purported statements of two women who claim that it was the soldiers. The exodus of people to Diyarbakır, their despair, suffering and occasional anger is described as well. Comments are made that Kurds are historically accustomed to these migrations and to being the victims of force. The article dated 7 November 1993, entitled "We wait for help but not from the Government", describes the difficulties of people from Lice allegedly destitute and facing hunger and sickness and purports to recount the stories of particular individuals who refer to the security forces as having opened fire on the town and burned down their houses, and in one case, of having been threatened with summary execution.

163. The Assize Court held in respect of these articles that it was ignored that the incidents had been triggered by a raid of the PKK on public buildings and that they alleged that the security forces had committed barbarous acts and that the State was a ferocious ultra-fascist regime carrying out a special war on the Kurds. Since the State and its military forces had been insulted and humiliated and the article lacked any restraint and lacked the quality of giving news, the offence was found to have been committed.

164. The Commission notes that there is no indication that the defendants were afforded an opportunity to substantiate their allegations or provide evidence as to alleged wrongdoing on the part of the security forces. The editor's defence was that the articles were intended to convey news but this was discounted by the court as unpersuasive and without foundation without further explanation. The Commission notes that the events in Lice were subject to wide coverage at the time, since they involved an episode of armed attack on the town causing much damage. It recalls that there is a pending case before the Commission (Ayder v. Turkey, No. 23656/94 dec. 15.5.95) in which it is similarly alleged by applicants from Lice that Government forces were involved in causing damage to the town. The incident in Lice was clearly an event of significant public interest in respect of which there were conflicting versions of the course of events. The domestic court also appears to have had regard to the phrasing of the articles. However, the Commission finds that the tone and contents of the articles do not trespass into gratuitously offensive remarks but report alleged factual events, albeit in dramatic and emotive terms. The Commission is not persuaded that the mere accusation of unlawful acts by members of the security forces, shocking though the alleged acts might be, was sufficient to render necessary the measures in question. Consequently, the conviction and the resulting sentences of ten months' imprisonment and fifteen days' closure must be regarded as disproportionate.

Assize Court decision 1994/56, 23 March 1994

165. A cartoon in the edition of 15 October 1993, where the Turkish State was caricatured, was found on 23 March 1994 to insult the State. The editor and cartoonist were convicted under Article 159, the editor being fined 1.5 million Turkish lira and the cartoonist being sentenced to ten months' imprisonment. The issues held in the depository were ordered to be seized and the newspaper to be closed down for a period of fifteen days.

166. The Commission observes that the cartoon portrayed a figure labelled with the word "kahpe" which the Assize Court found to portray the Turkish Republic. The word "kahpe" can convey a range of meanings including prostitute, tricky, deceitful. The court did not accept the defendants' submissions that the word was meant to be a joke and was used without intending insult but had regard to what it considered "the concentrated nature of the intention to insult". The Commission however considers that democratic Governments have to accept satirical and critical treatment in the press. While such a cartoon may be regarded as being in bad taste and offensive, this cannot justify a criminal conviction and penalties involving a fine, ten months imprisonment, and closure for fifteen days, which are disproportionate to any aim of protecting the reputation and rights of others or of preventing disorder.

(ii) Prosecutions for provoking racial and regional hostility (Article 312 paras. 2 and 3 of the Turkish Criminal Code)

State Security Court No. 2, İstanbul (1994/129), 7 June 1994

167. In the *Özgür Gündem* edition of 16 June 1993, the article "The guerillas turned on the guards and the State on the villages" resulted in the conviction of the author for inciting the population to hatred and enmity and disclosing discrimination based on race and region pursuant to Article 312 para. 2 of the Criminal Code. The author was sentenced to a fine of 426,666 Turkish lira and one year and four months' imprisonment. On the basis of convictions on this and other counts against the editor and publisher in the same judgment, *Özgür Gündem* was banned for publishing for a month. The copies of the edition were confiscated.

168. The Commission notes that according to the article it was reported that the security forces carried out raids on villages, burned down *Dêredevs* and partially burned two other villages. It recounted other details, including the taking into custody at Hazro of 150 villagers from Barkuş, of whom 105 had been released within five hours. Details were given of attacks by ARGK on villages, in which village guards were killed or taken prisoner and schools burned down. References were made to clashes with the security forces and the killing of a village imam because he had collaborated with the State. The build up of military forces and imposition of tight security measures was said to have caused tremendous tension in the region. The domestic court found an offence committed, having regard to the manner in which the article was written, the reason why it was written and the social setting in which it was written, without however explaining its conclusions in these regards.

169. The Commission finds that the article recounts events in a factual manner without making comment, approving or disapproving, on either the alleged atrocities of the security forces or of ARGK. It finds no element of provocation or incitement to violence in the presentation or content of the article, though it would observe that the reports of burnings of villages, if believed in reference to the actions of the security forces, might understandably undermine public confidence in the authorities. However, the allegations, if true, concern matters of public importance and there is no indication that their accuracy or otherwise was of any relevance to the decision to convict. The Commission recalls that since 1993 villagers have been making applications under the Convention with regard to allegations that houses have been burned by security forces (e.g. Eur. Court HR, *Akdivar v. Turkey* judgment of 16 September 1996, Reports 1996-IV p.**, *Mentes and others v. Turkey* judgment of 28 November 1997, Reports 1997-VIII, *Selçuk and Asker v. Turkey* judgment of 24 April 1998, Reports 1998-II, which resulted in finding of violations of, inter alia, Article 8 of the Convention). The Commission is not satisfied that it was necessary in a democratic society to penalise the publication of the article concerned by way of criminal conviction and the imposition of a prison sentence and fines.

(iii) Prosecutions for reporting statements of the PKK (Article 6 of the Anti-Terror Law)

170. The Commission considers that the fact of publishing an interview with a leading representative of the PKK, which is an illegal organisation in Turkey, or statements made by such representatives on behalf of the PKK, is in itself insufficient to justify the interferences with the newspaper's or the journalist's freedom of expression by way of criminal convictions and penalties. What is decisive are the contents of the interview and,

in particular, whether or not it constituted an encouragement of further violent acts (see, *mutatis mutandis*, e.g. *Sürek v. Turkey*, No. 24762/94, Comm. Rep. 13.1.98, pending before the Court, paras. 64-65).

171. The Commission notes that in their decisions (see, for example, the cases related below) the domestic courts appear to be distinguishing between information published by way of the reporting of events, i.e. "news", and the conveying through the medium of newspaper interviews, declarations and statements by the PKK, which explain their goals and ideals and their version of events. The Commission accepts that the use of the press in this way by a terrorist organisation may be provocative to the State authorities who are seeking to combat terrorism. Where the statements reproduced seek to portray the PKK in an idealistic light or make unflattering references to the authorities, the Commission understands that the Government may fear that this will mislead persons as to what they perceive to be the true nature of the PKK organisation and, by increasing support for the organisation, render their task in combating the PKK more difficult. While it may be argued that any statements which seek to inspire a favourable opinion of an unlawful or terrorist organisation may indirectly incite or encourage violence, such tenuous or indirect results cannot in themselves justify restrictions in the exercise of the right of freedom of expression.

172. The Commission recalls that in *Zana v. Turkey* (*op. cit.*) the Court found that the expressions of support by the applicant for the PKK could justifiably lead to his conviction and sentence to a term of imprisonment. However the Court emphasised that his statements should be regarded in their context and in that case, the support to the PKK apparently given by a former mayor of Diyarbakır could be regarded as likely to exacerbate an already explosive situation, having regard to the fact that the interview coincided with murderous attacks by the PKK and the existence of extreme tension (paras. 56-60).

173. Further, the Commission finds that statements made by leaders of the PKK may be regarded as having information value and being of interest to the public. It recalls that news reporting based on interviews, whether edited or not, constitutes one of the most important means whereby the press is able to play its vital role of "public watchdog" and that the punishment of journalists for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so (e.g. *Eur. Court HR, Jersild v. Denmark* judgment, *loc. cit.*, para. 35). Therefore, where the statements or interviews published cannot reasonably be regarded as acting as incitement to violence or illegal acts, the Commission is not satisfied that their source or the risk of influence on the population is sufficient to justify the imposition of criminal punishments of fines, imprisonment or closure of the newspaper which published them.

State Security Court No. 1 İstanbul (1994/118), 30 May 1994

174. Articles published on 7, 8 and 9 October 1992 - "We interviewed the leader of the PKK about the incidents in Northern Iraq", "Turkish army entered Northern Iraq", "A policy of violence is not the solution" and "We are not separatists" - were found to infringe Article 6 of the Anti-Terror Law on the basis that they included an interview with the head of the PKK and declarations of ARGK. The third applicant, as publisher, was convicted and fined 90,892,800 Turkish lira and the editor fined 45,446,400 Turkish lira.

175. The Commission notes that the State Security Court, in convicting, held that the articles were announcements made on behalf of the outlawed PKK organisation, since they derived from Abdullah Öcalan (the General Secretary of the PKK) and ARGK. While they referred to the arguments of the publisher and editor that the articles had news value, this appears to have been considered as irrelevant to determining whether the offence had been committed. The State Security Court also made no answer to the defendants' arguments that the articles were intended to inform the public about events in Northern Iraq, which were relevant to current popular concerns, that exaggeration was avoided and that similar reportage of events was published and broadcast in the daily media and television.

176. The Commission has been provided with three of the articles. In the article "Turkish army entered Northern Iraq", the Commission notes that there is a report which recounted an alleged intervention by the Turkish army in Northern Iraq and the attacks made on the PKK by other Kurdish groups, the KDP (Kurdish democratic party) and the KDU (Kurdish democratic union), and gave the comments of various Government and non-Government sources. In particular, it reported a declaration by ARGK given the day before in Cizre and Silopi that an embargo was imposed by the PKK on Southern Kurdistan against KDP and KDU members who are called collaborators. The declaration was described as calling for all business relations with, and truck journeys to, Iraq to be stopped. The Commission considers that the overall tone of the article was factual, without any comment for or against any particular group. In reporting the ARGK declaration, the article did not contain any support or encouragement for their call for an embargo. The Commission accordingly finds that the article cannot reasonably be regarded as inciting violence or any other unlawful activity.

177. In the second article, "A policy of violence is not the solution", the interview, inter alia, reported the comments of Abdullah Öcalan on recent events in Şırnak during the Nevroz celebrations and on clashes between the PKK and the security forces in Şemdinli, Garzan and Bitlis, listing the alleged casualties in the security forces and the PKK and referring to the punishment of collaborators, particularly, village guards. Öcalan was quoted as saying that the policy of the Government in escalating the use of force would only increase the violence and had already been shown to increase the amount of support for and membership of the PKK. He stated that violence will bring greater violence and the PKK would resist. The Commission does not find that the content or tone of the words is such as to constitute incitement to others to commit further violent action. While the way in which he recounts the alleged success of the PKK in their "operations" may be viewed as intending to cast the organisation in a favourable light and the listing of casualties of State forces compared to their own may be viewed as

unpleasant and offensive, the Commission does not find these elements sufficient to justify a criminal conviction of the publisher and editor for reproducing his words.

178. In the third article, "We are not separatists", the Commission observes that Abdullah Öcalan replied to questions about the risk of a coup d'état occurring in Turkey, giving his views on the current leadership and organisation of the Government in Turkey and on the effect on the PKK and its policies of any coup d'état. While he referred to the "struggle" and the occurrence of massacres, the Commission notes that this was in an abstract fashion in the context of his political analysis of developments in Turkey. The Commission finds no incitement to violence in the words reported. The Commission notes that the domestic court made no reference to such an aspect in finding that the offence was committed. While Öcalan criticised the Government and made claims which purported to portray the PKK in a favourable light, referring to the PKK's aims of brotherhood and unity and alleging that it was not a violent or terrorist movement, the Commission does not consider that this justifies imposing a criminal conviction and fines (see above para. 174). Given the contents of the interview and the fact that Öcalan is known to be the General Secretary of the PKK, there is no indication that the reporting of this interview would lend any particular credibility to the organisation or exacerbate any existing situation.

179. Consequently, the Commission finds that the criminal conviction and fines imposed in respect of these articles cannot be justified under the second paragraph of Article 10.

State Security Court No. 3 İstanbul (1993/183), 10 December 1993

180. An article published on 27 November 1992 under the title of "Incident at the annual celebrations of the PKK", which reported the declaration of the European PKK representative calling for the people to make the fifteenth year since the founding of the PKK victory year, was found to constitute the publication of a declaration by the PKK contrary to Article 6 of the Anti-Terror Law and the publisher and editor were fined 96,452,100 and 48,226,050 Turkish lira respectively. An order was made for seizure of the edition.

181. The Commission observes that the article recounted the events and incidents, including demonstrations, fights, clashes between various groups and the security forces, occurring in various towns in the south-east of Turkey and in İstanbul on the anniversary of the founding of the PKK fourteen years before. The article gives details in a factual manner, without comment, describing various of the demonstrations as illegal. The part of the article which seems to have attracted the condemnation of the State Security Court is the report of a declaration made by the European PKK representative who stated, inter alia, that the Kurdish people would have free elections and be able to express their own independent will, that the PKK had widened and deepened the struggle to a new level of intensity, that the awakening of the people would begin the victory march into their fifteenth year, the year which symbolised victory. This is summarised at the beginning of the article as a call to the people to make the fifteenth year victory year.

182. The Commission considers that, while the article arguably contains matters of public interest, it could be understood as inciting to, or encouraging, further armed struggle. In these circumstances, the authorities could reasonably be considered to have been justified in suppressing the edition in which it appeared and in sanctioning the publisher and the editor.

State Security Court No. 3 İstanbul (1993/136), 13 October 1993

183. An article published on 12 November 1992 under the title of "PKK settle in Talabani's headquarters <northern Iraq>" was found to constitute the publication of a declaration by the PKK and thereby infringed Article 6 of the Anti-Terror Law. The State Security Court found that the article which published the statements of Osman Öcalan, PKK commander in chief, in an interview about the fighting in Northern Iraq, did not give information about the activities of terrorists in an impartial manner but with a phrasing that rendered it the publication of the declaration of a terrorist organisation. The third applicant, Yaşar Kaya, as publisher, was fined 96,452,100 Turkish lira and the editor 48,226,050 Turkish lira. The issue of the newspaper concerned was seized.

184. The Commission notes that the article included an interview with Osman Öcalan, recounting his version of recent fighting between the PKK and other Kurdish groups, in or near northern Iraq, and of the outcome of the fighting. He alleged that the Turkish Government was involved in inciting the other groups to attack the PKK and that the PKK's real enemy was the Turkish Government whose aim was to eliminate them. He also alleged that Turkish special teams and planes were involved in the fighting and that the other Kurdish peshmergas were not committed to the fighting. The Commission considers that the article concerns matters which were arguably of public interest. While it reported the PKK leader's complimentary opinion on the tactical skill and psychological commitment of the PKK fighters, the Commission does not find that the article contains any elements, in content or in tone, which would incite others to violence. The Commission notes that the State Security Court expressly found that the article did not disclose incitement to commit a crime. Nor does the Commission perceive any direct or overt support given to the PKK by the writer recounting the interview, who refrained from comment and only included descriptive elements about the location of the interview and placed the interview in the context of reports in some newspapers which had alleged that Osman Öcalan had surrendered or been killed in the fighting.

185. The Commission concludes that conviction of the publisher and editor and the imposition of fines of 96,452,100 and 48,226,050 Turkish lira was disproportionate.

State Security Court No. 3 İstanbul (1993/180), 10 December 1993

186. In the edition of 1 December 1992, an article entitled "The German police are distorting the facts" was found by the State Security Court to constitute the publication of declarations by the PKK infringing Article 6 of the Anti-Terror Law. The publisher,

Yaşar Kaya, and the editor were convicted and fined 77,722,200 and 38,861,100 Turkish lira respectively. The copies of that edition held by the authorities were confiscated.

187. The Commission notes that the article refers to incidents of violence in Germany in which people of Turkish origin were killed and injured, inter alia, in arson attacks. It recounts the allegations that the police assaulted persons in a funeral procession which sought to pay last respects to the bodies before they were flown back to Turkey. Reference is made to a statement issued by the Dev-Sol European office in which the organisation (presumably the PKK) stated that the police, who had claimed that the Dev-Sol and the PKK were going to attack the funeral procession, in fact attacked the funeral procession themselves.

188. The Commission observes that the article reports on events of serious, public concern in Germany where violent attacks were made on persons of Turkish origin. Its tone is overall factual and moderate. The Commission does not consider that its recounting of claims by the PKK as to alleged wrongdoing of the German police at a funeral procession in Hamburg was of such a nature as to constitute incitement to violence. The imposition of criminal conviction and penalties was disproportionate in the circumstances.

State Security Court No. 3 İstanbul (1994/120), 6 May 1994

189. An article published on 23 May 1993 under the title of "Trial of life and death" which in the form of a book review contained passages from a speech by Abdullah Öcalan at the 4th Congress of the PKK was found to constitute the publication of a declaration by the PKK contrary to Article 6 of the Anti-Terror Law. The owner, Yaşar Kaya, and the editor were fined 143,694,000 and 71,982,000 Turkish lira respectively.

190. The Commission observes that the speech as quoted was highly flattering of the aims and purposes of the PKK, with analogies to Socrates and references to the light of liberation dawning. The war being waged was described as being a thing of beauty. Having regard to the source of the quote the sentiments being recorded are hardly surprising and the speech was of a general and rhetorical nature. Nevertheless, in view of the glorification of war, it could well be understood as an encouragement of further violent action against the Turkish State. For this reason, the Commission considers that the authorities could reasonably be considered to have been justified in intervening against the owner and the editor of Özgür Gündem in regard to this article.

State Security Court No. 3 İstanbul (1994/121), 6 May 1994

191. Articles published on 11 June 1993, under the title "ARGK commander Cemil Bayık said that they will fight until no more ammunition is left" and "The way to unity is clear" were found to have been published with the special intention of announcing the declarations of a terrorist organisation. The publisher, Yaşar Kaya, and the editor were fined 121,267,000 and 60,628,500 Turkish lira respectively and an order made for seizure of the copies of the newspaper.

192. The Commission has been provided with the first article. It observes that the article outlined the personal history of an ARGK commander Cemil Bayık and reports an interview with him following a press conference given by him on behalf of General Secretary Öcalan in Lebanon. This included his comments on the future strategy of the PKK as regards education, judiciary and health in areas under its control and on the types of people whom the PKK recruited, plus his own views on his role in the PKK and his own health problems. It included his assertion that though war was not what they wanted, they were ready for a war which would escalate: "we will resist those who claim that they will eradicate the PKK - we will fight to the last man, to the last drop of blood and to the last bullet."

193. The Commission notes that, although the words relating to fighting were prefaced by a rejection of war and related to a personal intention to resist those seeking to eradicate the PKK, it could also be understood as an encouragement to others also to engage in armed struggle on behalf of the PKK. For this reason, the imposition of fines and the seizure of this edition of the newspaper could reasonably be considered to have been proportionate measures.

State Security Court No. 1 İstanbul (1993/102), 12 May 1994

194. In the edition of 28 July 1993, the article "We interviewed POW soldiers" was found by the State Security Court to constitute the offence of publishing a statement of the PKK. The publisher, Yaşar Kaya, was fined 115,524,000 Turkish lira.

195. The Commission notes that the article mainly recounted an apparent interview with two Turkish soldiers taken prisoner by the PKK. However, the ARGK commander was described as the commander of the south-west province of Torhildan and he was cited as saying that soldiers were treated as prisoners of war and that the Turkish people should not send their children against the Kurdish children. The Commission does not find that its contents, however they purport to portray the PKK in a successful and humanitarian light, can reasonably be considered as inciting others to violence. The measure imposed cannot therefore be regarded as proportionate.

(iv) Prosecutions for identifying officials appointed to fight terrorism under Article 6 of the Anti-Terror Law

196. As regards the aims of the restrictions disclosed by these prosecutions, the Commission notes that the primary purpose of the prohibition against disclosing the identity of officials entrusted with the task of combating terrorism is to protect those persons against reprisals or other violent acts. The principal aim is therefore the protection of the rights of others within the meaning of Article 10 para. 2 of the Convention (see e.g. No. 24122/94 Sürek v. Turkey, Comm. Rep. 13.1.98, pending before the Court, para. 47).

197. In relation to the necessity for these restrictions, the Commission recalls that having regard to the general tension and to the level of terrorism and violence occurring in south-east Turkey, 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 (see e.g. *Sürek v. Turkey*, loc. cit.). However, in balancing the various interests, the Commission must also have regard to the role of newspapers in informing the public of matters of public concern and to the fact that effective and meaningful reporting would be undermined by an inability to refer to any State officials involved in newsworthy events in the south-east region. A prohibition which operates to restrict any criticism or accusation of wrongdoing against a State official on the basis that this would render him a target of terrorist violence would require particular scrutiny. The tone, contents, factual nature and accuracy of reports involving State officials may therefore be of relevance as to whether it is proportionate in the circumstances to restrict the naming of particular individuals connected in the fight against terrorism. It must also be taken into account that in the south-east of Turkey certain persons or officials would inevitably be known to the PKK, as well as to the local inhabitants, and that confirmation in the press that they work for the authorities or are involved in controversial events would not appear to increase any existing risk which they face.

198. The Commission notes, finally, that the Government's submissions reflect their belief that Özgür Gündem was acting on behalf of the PKK, and that its personnel were closely associated with the PKK, in particular, that they acted as a conduit of propaganda from the PKK. To this extent, the principal justification in support of the prosecutions, namely, that the publishing by Özgür Gündem of information identifying officials involved in fighting terrorism would render them targets of terrorist violence, would appear somewhat contradictory.

State Security Court No. 5 İstanbul (1994/171), 22 December 1994

199. The article entitled "Son of DEP candidate was murdered in detention" in the edition of 20 February 1994 was found by the State Security Court to infringe Article 6 since it named the Siirt Governor, the Siirt director of security and the Chief Public Prosecutor. The editor held responsible was fined 39,521,850 Turkish lira.

200. The Commission notes however that the newspaper article recounted an event which is not alleged to be untrue, namely, that Ömer Alevcan died while detained in custody. The article described how he had been taken into custody and that thirteen days later the body was handed over to his family, the police stating that he had hung himself. The Provincial Governor was named in the context of having assured a DEP candidate on the day of the arrest that there was nothing to be concerned about since Alevcan would be questioned and released within a few days. The Siirt Security Director was named in the context of admitting that Alevcan was in their custody and then as stating, after the death occurred, that "Due to the judicial enquiry and since this is the state of emergency region, I cannot make a statement." An unnamed public prosecutor was referred to in the context of having stated on application by Alevcan's father that he had granted the police

the authority to hold Alevcan for ten days and the Chief Public Prosecutor was stated as being unavailable for comment after the death.

201. There is no suggestion that the officials concerned did not make the statements alleged. The Commission is not satisfied that the statements as reported are of such a nature as to render them a target, in particular the reference to the journalist being unable to contact the Chief Public Prosecutor. The statements do not even indirectly implicate the officials in such a way as to be reasonably regarded as likely to provoke retaliation. While the title of the article refers pejoratively to the death being caused by murder, there is nothing in the text of the article purporting to identify any person as having carried out or authorised the murder. The Commission finds no convincing reason for penalising the publication of the article, which concerns a matter of public interest - the death of a person in custody - and which is on the whole informative, factual and neutral in tone. The measure accordingly is disproportionate to the aim of protecting the rights of others.

State Security Court No. 2 İstanbul (1994/129), 7 June 94

202. A prosecution in respect of an article "Was it Kanat who killed Anter?" in the edition of 16 June 1993 resulted in the conviction of Yaşar Kaya as the publisher and of the editor on the basis that it named the Governor of the State of Emergency Region as a target. The third applicant as publisher and the editor were fined 121,257,000 and 60,628,500 Turkish lira respectively. The copies of the edition were confiscated.

203. The Commission notes that the article recounted the story of an alleged "confessor" (a former terrorist who had confessed to the authorities) who wished to remain anonymous and who alleged, inter alia, how the well-known Kurdish personality Musa Anter was killed by confessors with the connivance of the authorities. The confessor alleged that the Governor knew about the assassination from beginning to end and that those involved in the killing referred to the Governor as "Chief".

204. The Commission finds that the article made no direct allegations itself but reported what the anonymous confessor purportedly said. While these statements expressly incriminated the State of Emergency Governor as having knowledge of a planned assassination and implied that it took place with his permission, the Commission would note that the Governor was a known and important figure in the south-east of Turkey and that allegations of counter-terrorist activities, involving confessors, were current. The allegations with regard to official involvement or acquiescence in the killing of Musa Anter have also to some extent been borne out by the Susurluk report commissioned and made public by the Turkish Prime Minister (see paras. 84-93). In these circumstances, the Commission is not satisfied that this article could reasonably be said to render the Governor more of a target than he inevitably already was due to his position and the existing tensions. The information as to his prior knowledge of an assassination attempt, if true, was of obvious public importance and there is no suggestion in the Security Court's judgment that its accuracy or falsity was of any relevance in the decision to convict. Consequently, the Commission finds that the measure could not be regarded in the circumstances as proportionate.

State Security Court No. 1 İstanbul (1993/121), 30 May 1994

205. In the edition of 27 July 1993, the article "They first killed the dogs..." was subject to a prosecution which resulted in the conviction of the publisher, who was fined 115,524,000 Turkish lira, and the seizure of the newspaper on the ground that the military officer conducting an operation on a village, allegedly threatening the muhtar to make him evacuate the village, had been identified and discredited so as to render him and the forces under him a target. The 5,400 copies held by the authorities were confiscated.

206. The Commission notes that the article recounted alleged raids by the security forces on named villages and described the threats allegedly made to a particular muhtar requiring the evacuation of his village when summoned to the local gendarme station. The subject, that of alleged involvement of the State security forces in the destruction and evacuation of villages in the south-east of Turkey is of public interest and has been found in a number of individual applications to be substantiated (see above para. 169). Nor did the domestic court base itself on any element showing that the allegations made were in fact false. The Commission would also observe that it would be difficult to report the incident involving the muhtar in any meaningful manner without making it possible to identify the gendarme commanding officer who would have been well-known in the area under his command, as would the identity of the local gendarme unit. The Commission is accordingly not satisfied that the article is of such a nature as to justify the measures imposed.

207. While the Commission recalls that in a previous case the Commission majority considered that the conviction and fining of a writer who identified a gendarme and police officer could be considered proportionate (see *Sürek op. cit.*, para. 50), the Commission notes that the officials in that case were accused respectively of ordering fire to be opened on a crowd and of making statements such as "drinking all your blood would not quench my thirst", which may be considered as particularly inflammatory and more likely to provoke retaliation than the alleged pressure exerted on a muhtar in the present example. Consequently, having regard to the contents of the article in issue in this case, it finds that restriction cannot be regarded as necessary in a democratic society for the purposes of protecting the rights of others within the meaning of Article 10 para. 2 of the Convention.

State Security Court No. 5 İstanbul (1995/39), 28 February 1995

208. In the edition of 23 January 1994, an article, entitled "40 meat axes or 40 mules", was the subject of a prosecution which resulted in a conviction and a fine of 41,865,750 Turkish lira for the editor on the basis that it identified an NCO commander in Kozluk district, Batman, exceeding the quality of news and indicating a target.

209. The Commission notes that the article reported an alleged meeting of the muhtars of the district called by the NCO at which they were required to state whether they were

pro-State or pro-PKK. The article listed the muhtars by name and purported to report their reaction of being placed in an impossible position, since they claimed that they would have either to become village guards and fight the PKK or risk having their villages destroyed as being PKK supporters. The NCO declined to make any comment to the writer of the article.

210. The Commission observes that the allegations were of a factual and detailed nature and that there is no indication that the domestic authorities or courts disputed the veracity of the article. The Commission finds that the article was of public interest and contained no overt incitement or provocation. The Commission is not satisfied that the report of a meeting of this kind is of such a nature as to reasonably be regarded as rendering the NCO in question a target of violence.

211. Accordingly, the Commission finds the imposition of a conviction and a fine of 41,865,750 Turkish lira disproportionate and unjustified.

State Security Court No. 2 İstanbul (1994/187), 21 July 1994

212. In the edition dated 21 June 1993, the articles "The Mustafa Muğlali Complex", naming a General Mete Sayar, and "Soldiers shoot two people in cold blood", identifying village protectors as targets, resulted in the conviction of the third applicant as publisher and the editor and in respective fines of 121,257,000 and 60,628,500 Turkish lira being imposed. The State Security Court also convicted the publisher and the editor on a count of publishing the declarations of a PKK organisation in a third article. It imposed a fifteen day closure since the offence concerned national security. The number of copies of the edition which were confiscated was 6.192.

213. The Commission notes that the first article recounted an incident in 1943 when a General Muğlali was said to have executed 33 Kurds by firing squad and was later tried by a military court in 1949. The incident was used to illustrate the alleged attitude in the security forces that there was no fear that they would be prosecuted like that general and that persecution of Kurds continued to be approved of by the highest authorities. It then referred to the bombing of Şırnak, during which it was alleged that more than 15 persons were murdered. It is stated that the general, identified by name, in charge of the massacre was rewarded with a medal and complimented by the Government, sending a message thereby to the Kurds of approval of the massacre.

214. The Commission recalls that having regard to the general tension and to the level of terrorism and violence occurring in south-east Turkey, 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. However, the incriminated news report, which arguably contained information and comment of public interest with regard to the alleged unaccountability of the security forces, could not have reported on the award of a medal to the general at Şırnak without his identity having been apparent. Further, the Commission has no doubt that the incident in Şırnak was well-known in the region, as was the identity of the commanding officer in the area. The Commission finds no

indication that the information that he was awarded a medal and complimented by the Government could reasonably be regarded as responsible for making him a target of terrorist violence. In these circumstances, the conviction and penalties imposed were disproportionate and could not be regarded as necessary for the purpose of protecting the official concerned.

215. The Commission notes that in the second article report was made of an alleged incident in which gendarmes and village guards collected together the people of a town, after a PKK raid on the gendarmes headquarters. The village protectors were allegedly under the command of three named headguards who brought the townspeople to the Battalion yard. Subsequently, an unnamed officer singled out two people and shot them. The article, whose truthfulness was not disputed by the domestic court, is of public interest. While it named the three head village guards, the Commission notes that they were not accused of any unlawful violence themselves, the alleged perpetrator of the execution being identified as a gendarme. Having regard to the notoriety of the village guard system in the south-east of Turkey and the fact that the head village guards would be known in a particular area, the Commission is not persuaded that the mentioning of their names as being involved in a subsidiary character in a gendarme operation in itself could be regarded as responsible for rendering them a target or as necessitating the restrictions imposed in this case.

(v) Prosecution for statements constituting separatist propaganda (Article 8 of the Anti-Terror Law)

216. The Commission recalls that the text of Article 8 prohibits written propaganda aimed at undermining the indivisible territorial and national unity of the State, irrespective of the methods used, or the intention or ideas behind them. Many of the decisions provided relate to prosecutions and convictions under this provision.

217. The Commission notes that references to Kurdistan or to the Kurds or the Kurdish problem or describing the conflict in the south-east of Turkey as part of a national struggle or defensive war do not suffice to justify restrictions on freedom of speech (Nos. 24762/94 *Sürek v. Turkey*, Comm. Rep. 13.1.98, para. 64, Nos. 23927/94 and 24277/94 *Sürek and Özdemir v. Turkey*, Comm. Rep. 13.1.98, paras. 67-68, No. 24246/94, *Okçuoğlu v. Turkey*, Comm. Rep. 11.12.97, para. 52, and Nos. 23536/94 and 24408/94 *Başkaya and Okçuoğlu*, Comm. Rep. 13.1.98, paras. 71-73, all pending before the Court). While the domestic courts have in some cases acknowledged that the mere use of the words "Kurd" or "Kurdistan" does not constitute prohibited propaganda, it is apparent from the decisions provided that the domestic courts have regard to whether the statements in question describe or refer to Kurds or Kurdistan as being separate from the State or seeking to be so separate. In other words, considerable weight is given to the context of the words. The Commission observes that while some of the court judgments assess certain articles as exalting violence or as inciting persons to violence, these factors are not taken into consideration in the majority of the examples provided.

State Security Court No. 1 İstanbul (1994/78), 18 April 1994

218. In the edition of 13 May 1993, the article "Roads and a football ground from emergency aid package" was found by the State Security Court to infringe Article 8. The court found that the word "Kurdistan" had been added to denote that it was a separate country with the purpose of inculcating the objective of separatism in people's minds. The court noted that the word "Kurdistan" had been added by the newspaper to the article altering its original form as sent out by the central news agency. A second article, "South East Anatolia Dam Constructions Project is the project of becoming a political power in the Middle East", was also found to infringe the provision since it referred to the provinces within the GAP project as the Kurdish region. Since both articles constituted propaganda aiming to upset the indivisible unity of the state, the publisher, Yaşar Kaya, was sentenced to a fine of 143,694,000 Turkish lira and the editor to two years' heavy imprisonment and a fine of 250,000,000 Turkish lira.

219. As regards the first article, the Commission observes that it recounted details of an aid package drawn up after the Under-Secretary of State responsible for the State planning office visited "Kurdistan". There is no reference which could reasonably be regarded as inciting persons to violence in the aim of separating off part of the Turkish State. The fact that the newspaper added the word "Kurdistan" to the text, in circumstances where it was not necessary for the clear understanding of the item, does not alter this position. The Commission has not been provided with a copy of the second article. However, it notes that the article is described as examining and criticising the GAP project, a dam-building construction, and that the court in condemning it refers only to its inclusion of descriptions of the region as constituting Kurdistan. The Commission accordingly is not satisfied that the convictions and sentences imposed in respect of these articles, in particular the two year prison sentence, can be regarded as proportionate.

State Security Court No. 1 İstanbul (1993/102), 12 May 1994

220. In the edition of 28 July 1993, four articles, entitled "German guerillas", "Workers' movement rises again", "Not terror but Kurdish problem" and "Free press, informant citizen", were found by the State Security Court to constitute the offence of separatist propaganda, since they referred to Northern Kurdistan as if it was a distinct territory and contained descriptions of the PKK as leading the fight for liberation and representing the Kurdish people. The publisher, Yaşar Kaya, was fined 115,524,000 Turkish lira. The number of confiscated copies of the edition was 7.699.

221. The Commission has been provided with three of these articles. It recalls that the first article - "German guerillas" - described four Germans who were allegedly with the PKK, recounting their backgrounds and explaining why they were there, inter alia, including the view that the PKK not only struggles for Kurdistan but against the world imperialist system. One of them was alleged to have said that without the PKK the Kurds would not become free. The Commission does not find that the reported claims of the guerillas in support of the PKK can reasonably be regarded as inciting others to violence.

222. In the second article - "Workers' movement rising again" - the writer referred to apparent demonstrations by workers and civil servants about their standard of living as disclosing a renewal of previous unsuccessful workers' movements and contended that the workers in order to be successful, had to establish a friendship with the Kurdish national movement and install an efficient leadership. He stated that there were massacres and a war in Kurdistan. The Commission finds nothing however in the article which can be reasonably construed as advocating the use of violence in the pursuance of the workers' aims.

223. In the third article - "Not terror but Kurdish problem" - the author sought to explain why the PKK had to be properly analyzed in the context of the Kurdish problem, pointing to an alleged wide basis of support in Turkey and abroad. Strong criticism was made of politicians and the Turkish authorities, who were purported to be committing human rights violations and wanting a policy of bloodshed. It was stated that, if a solution was wanted instead of fighting, the problem could be wrapped up in a week, but instead it was likely that bloodshed would continue for several years. The Commission notes that the article claimed that the PKK enjoyed support from the Kurdish people, including thousands of young people joining, and that Kurdish people in Northern Kurdistan openly said "The PKK is the People, the People are the PKK." The Commission finds the article moderate in tone and seeking to explain the complexity of the situation pertaining in the south-east of Turkey and the degree of support enjoyed there by the PKK. It is not persuaded that these claims are of such a nature or expressed in such a manner as to constitute an incitement to violence, justifying the imposition of a criminal conviction and the penalty of a fine.

State Security Court No. 1 İstanbul (1994/121), 30 May 1994

224. In the edition of 27 July 1993, the articles "The Treaty of Lausanne has been declared invalid", "From Lausanne to the present" and "Solid friendships were attained" were found by the State Security Court to have been published with a view to impairing the unity of the State as referring to PKK terrorist acts being committed by citizens of Kurdish origin. The publisher was convicted and fined 115,524,000 Turkish lira, and the issues ordered to be seized.

225. The Commission has been provided with the first two articles. It observes that they referred to the treaty signed in Lausanne between Allied powers and Turkey in 1924, which was alleged to have divided Kurdistan into four areas and deprived the Kurdish people of their nationhood. It was stated that a conference meeting in Lausanne had, inter alia, declared the treaty invalid and reached various decisions, including calling on the United Nations, the Council of Europe and the European Union to put pressure on Turkey for a political solution of the Kurdish question and for the international community to recognise a federal Kurdish State declared in southern Kurdistan. There was a description of alleged oppression since 1924 imposed on Kurdish people by the authorities and the Kurdish people's desire for freedom and a national identity.

226. The Commission finds the articles moderate in tone and considers that their analyses of historical developments and references to the aspirations and problems of the Kurdish people cannot reasonably be regarded as inciting violence. Overall, the articles refer to peaceful and political solutions. The references to the conflict in the south-east of Turkey are not of such a character as to constitute overt provocation to others to take up violent means. The Commission notes that the court objected primarily to the designation of part of Turkey as Kurdistan, to individuals being described as Kurdish citizens and to the presentation of the PKK as the Kurdish national liberation movement. The conviction and the imposition of a fine were however disproportionate in the circumstances.

State Security Court No. 2 İstanbul (1993/272), 24 December 1993

227. In the edition of 22 September 1992, the article "Condolences to the Kurdish people" was found by the State Security Court to constitute propaganda of separatism since it conveyed messages which denoted that the Kurds were a separate nation oppressed by the Turks. At the same time, another article, entitled "The Göle atrocities are a manifestation of impotence", was found to constitute separatist propaganda. The publisher, Yaşar Kaya, was fined 100 million Turkish lira and the editor was sentenced to two years' imprisonment and a fine of 50 million Turkish lira. The court made an order of closure of the newspaper for one month. Copies of the edition were confiscated.

228. The Commission has been provided with the first article. It concerned the important Kurdish intellectual figure, Musa Anter, describing his qualities and contributions in the wake of his killing by an unknown perpetrator. The article referred to him as a typical symbol of the Kurdish nation and a living witness of the struggle. It described the attack on him as deriving from "organised gangs which nestled deep inside the dark caves of the State", referring to the "murderous gangs of the State". It accused the authorities of seeking to annihilate a nation and block the Kurdish people in their struggle to become a nation. It gave the opinion that those responsible would be drowned in the sea of blood in the war which they had brought about. It concluded that if the warmongers did not cease the Kurdish nation would bring those responsible to account and disperse this gang.

229. The Commission recalls that the State Security Court appears to base itself on its assessment that the article was essentially about the presence of a Kurdish nation as distinct from the Turkish nation. The Commission however is not persuaded that the descriptions of the murder of Musa Anter as constituting an attack on the Kurdish nation are of such a nature as to incite violence. Its references to the current situation of violence with predictions that this will continue may be expressed in colourful language but do not as such advocate the continuance of violence. While the article concluded with a warning as to consequences if incidents such as Anter's murder did not cease, this was phrased in general, unspecific terms. The Commission does not find that it was justifiable to impose a criminal conviction, including penalties of a term of imprisonment, fines and closure.

State Security Court No. 2 İstanbul (1994/86), 8 April 1994

230. In the edition of 8 January 1993, the article "Announcement from deputies of the Kurdistan National Assembly" was found by the court to contain expressions denoting that a part of the territory of Turkey was a foreign country and describing the mobilisation of the security forces as a mass annihilation operation, which constituted separatist propaganda. The publisher, Yaşar Kaya, was convicted and fined 100 million Turkish lira.

231. The Commission notes that the impugned article consisted of a quoted declaration by 15 deputies from the Kurdish National Assembly, who announced that they were going on hunger strike. They called for support from the people of Kurdistan in favour of the unity and freedom of their people and the independence of their country, setting out their demands which included the condemnation of torture and massacres by the Turkish State and of murders of democrats, journalists and others by contra-guerillas, international pressure to be applied on the Turkish State for a democratic solution to the demand for the freedom of the people of Kurdistan, and for European and national parliaments to send missions to investigate developments in their country.

232. The Commission does not consider that the article can reasonably be regarded as inciting or provoking violence, referring in terms to democratic solutions. The words deriving from persons purporting to represent citizens of Turkey in a nationalistic "assembly" are no doubt highly provocative to the Turkish authorities but do not justify the imposition of criminal measures, including a fine.

State Security Court No. 5 İstanbul (1995/39), 28 February 1995

233. In the edition of 23 January 1994, the articles entitled "War has negative effects on health", "Calm or freedom", "No credit with 0% interest to Kurdistan" and "The consciousness of judgment and the right to judge" were subject to prosecution and resulted in conviction of the editor, who was sentenced to one year eight months' heavy imprisonment and fined 375,199,083 Turkish lira. Only the first two articles have been provided to the Commission.

234. In the first article, the Commission observes that there was a report of an alleged increase in incidents of infectious disease in the south-east of Turkey which was attributed to a lack of inoculations and other preventive health care, which itself was the result of midwives and nurses being reluctant to take up posts in the area. The announcement of the Fever Prevention Bureau of the Ministry of Health giving priority to preventive health in high risk areas was cited. The Commission finds that the article is factual, informative, deals with a subject of significant public interest and is objective and balanced in tone, referring to Government sources. There is no indication of any element of provocation to illegal or violent acts. Indeed the only specific ground mentioned by the court in convicting was that the article suggested that one of the parts of Turkey was Kurdistan.

235. The second article refers to alleged incidents in which children were injured in Cizre and other places in the south-east of Turkey by fire from the security forces. The

writer described the soldiers as being specialised in massacres and village burnings and questions what the solutions should be, calling for answers to the questions he poses. He anticipated that 1994 would be a year of further violence by the State and stated that all patriots, progressive-democratic circles and the Kurdish forces should be prepared and planning for war. The Commission notes that the tenor of the article was assertive and highly critical. While it referred to factual incidents, and issues of public concern such as village destruction, the Commission considers that the writer's statement that Kurdish forces should plan for war may reasonably have been regarded as advocating the use of violence in response to alleged grievances. Insofar as the action of the authorities was based on that article, the interference with the freedom of expression could therefore be considered to have been proportionate.

236. The Commission has not been provided with the third article but notes that the State Security Court condemned it on the basis that it contained a sentence stating that "the provinces of Kurdistan did not benefit from the credit" which was found to refer to part of the lands of the Turkish Republic as being Kurdistan. There is no indication that there was any basis for finding any inflammatory tone or contents. The fourth article, which also has not been provided, was found by the State Security Court to refer to Kurdistan, and as equating acts of terrorism to a fight for freedom. In the absence of the article, the Commission is unable to assess whether or not the writer stepped beyond the bounds of acceptable comment on the terrorist acts concerned.

237. Having regard however to the Commission's findings in respect of the articles which have been at its disposal, it considers that the imposition of criminal convictions was only justified in regard to one of these articles. It is not apparent from the court's judgment to what extent the sentence of imprisonment and fines was apportioned, if at all, between the findings of guilt on the four articles. The inclusion of these articles as a basis for imposing heavy penalties must nonetheless be regarded as disproportionate.

(g) General assessment

238. It is the Commission's task in the present case to assess whether there has been, as a result of numerous individual acts combined with the lack of adequate protection against violence and threats, a general pattern of behaviour by the State which can be said to have constituted a violation of the applicants' freedom of expression.

239. The Commission has noted above that Özgür Gündem as well as numerous individuals working for Özgür Gündem were subjected over a relatively long period to serious violence and threats. While the Susurluk report and the general situation in south-east Turkey do not make it unlikely that a number of these acts were carried out by persons for whom the State was responsible, the Commission has been unable, on the basis of the material before it, to draw any such conclusions in regard to specific incidents. It finds however that in any case the State must have been well aware of the dangerous and precarious circumstances in which Özgür Gündem and its personnel carried out their work and that it was the duty of the authorities, in order to protect not only life and property but also the freedom of expression, to provide adequate protection

and to investigate effectively the serious incidents which continuously occurred. The Commission has found above that the authorities failed in this regard.

240. The Commission has further noted that the authorities themselves acted against Özgür Gündem in a manner which made it extremely difficult for the newspaper to continue publication and which undoubtedly contributed to the newspaper being finally closed down. This action included seizure of documents and archives and a large-scale arrest of persons employed by Özgür Gündem. While there may have been justification for some of these measures, the massive character of the action makes it an exceptionally serious interference with the freedom of expression, for which no sufficient justification has been provided.

241. Moreover, the confiscation of numerous issues of Özgür Gündem and the penalties imposed on the owner and the editor also constituted serious interferences with the freedom of expression. The Commission has found, however, that these interferences could be considered to have been justified in some instances, whereas on many other occasions the interferences were disproportionate and thus unjustified.

242. Making a global assessment, the Commission considers that there is no any justification for the interferences with the applicants' freedom of expression taken as a whole, combined with the lack of protection and investigations for which the authorities were responsible. The second, third and fourth applicants' right under Article 10 of the Convention has thus been violated, and the violation must be regarded as a particularly serious one, since it resulted in a newspaper having finally to cease publication, a result which may indeed have been intended by the authorities, or which at least must have been foreseeable in view of the numerous and serious problems continuously facing Özgür Gündem, its owners, editor and staff.

CONCLUSION

243. The Commission concludes, unanimously, that there has been a violation of Article 10 of the Convention.

F. As regards Article 1 of Protocol No. 1

244. Article 1 of Protocol No. 1 provides:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

245. The third and fourth applicants submit that they have suffered the confiscation of their property.

246. The Government have not directly addressed this allegation. They have, under Article 10 of the Convention, submitted that legal measures against the newspaper were in accordance with domestic law and pursued the legitimate aims of protecting national security and preventing crime and disorder in a manner proportionate to the important interests at stake.

247. The Commission notes that the seizures and confiscations of issues of Özgür Gündem were incidental effects of the prosecutions and convictions which it has found to disclose a breach of Article 10 of the Convention. It consequently finds it unnecessary to consider this complaint separately.

CONCLUSION

248. The Commission concludes, unanimously, that it is not necessary to decide whether there has been a violation of Article 1 of Protocol No. 1 to the Convention.

G. As regards Article 14 of the Convention

249. Article 14 of the Convention provides as follows:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

250. The applicants maintain that since no other newspaper has experienced the level of repression or attacks on its staff suffered by Özgür Gündem, there was an administrative practice of discrimination on grounds of race in relation to Article 10. Insofar as the third and fourth applicants have suffered the confiscation of their property, there was an administrative practice of discrimination on the grounds of race in respect of Article 1 of Protocol No. 1.

251. The Government refute the applicants' allegations. They deny that there has been any concerted campaign against the newspaper, or any failure to protect it. Any legal steps taken against the newspaper were in conformity with domestic law and pursued legitimate aims in a proportionate manner.

252. The Commission has examined the applicants' allegations in the light of the evidence submitted to it, but considers it unsubstantiated that the actions taken against the newspaper, or any failure to protect it, were based on the racial origin or background of the newspaper and those associated with it, as opposed to the official or popular perception of the newspaper as supporting an illegal terrorist organisation.

CONCLUSION

253. The Commission concludes, by 15 votes to 2, that there has been no violation of Article 14 of the Convention.

H. Recapitulation

254. The Commission decides, unanimously, not to pursue the examination of the application, insofar as it was brought by Gurbetelli Ersöz (para. 119 above).

255. The Commission concludes, unanimously, that there has been a violation of Article 10 of the Convention (para. 243 above).

256. The Commission concludes, unanimously, that it is not necessary to decide whether there has been a violation of Article 1 of Protocol No. 1 to the Convention (para. 248 above).

257. The Commission concludes, by 15 votes to 2, that there has been no violation of Article 14 of the Convention (para. 253 above).

M. DE SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission