EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 23168/94

Hüseyin Karatas

against

Turkey

REPORT OF THE COMMISSION

(adopted on 11 December 1997)

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I. INTRODUCTION

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

A. The application

2. The applicant is a Turkish national of Kurdish origin. He was born in 1963 and lives in istanbul. He was represented before the Commission by Mr. Gülizar Tuncer, a lawyer practising in istanbul.

3. The application is directed against Turkey. The respondent Government were represented by Mr. Bakir Çaglar, Professor at istanbul University.

4. The case concerns the applicant's conviction by the State Security Court for having an anthology of his poems entitled "Dersim - Bir isyanin Türküsü" (Dersim - Folk Song of a Rebellion) published.

5. The applicant complains under Articles 9 and 10 of the Convention that his conviction on account of the publication of his poems constituted an unjustified interference with his freedom of thought and freedom of expression. He also complains under Article 6 para. 1 of the Convention that his case was not dealt with by an independent and impartial tribunal. He asserts in this regard that one of the three members of the State Security Court is a military judge answerable to his military superiors whose presence prejudices the independence of the Court.

B. The proceedings

6. The application was introduced on 27 August 1993 and registered on 4 January 1994.

7. On 20 February 1995, the Commission decided, pursuant to Rule 48 para. 2(b) of its Rules of Procedure, to give notice of the application to the Turkish Government and to invite the parties to submit written observations on the admissibility and merits of the applicant's complaints based (under Article 10 of the Convention) on the alleged violation of his freedom of expression and (under Article 6 para. 1 of the Convention) on the alleged violation of the principle of a fair trial.

8. The Government's written observations were submitted on 29 July 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 31 October 1995.

9. On 4 December 1995 the Government submitted information concerning the amendments made to the Anti-Terror Law (Law No. 3713) and developments in the cases of persons convicted and sentenced under Article 8 of the said Law. The applicant submitted comments in reply on 30 May 1996.

10. On 14 October 1996 the Commission declared the application admissible.

11. The text of the Commission's decision on admissibility was sent to the parties on 23 October 1996 and they were invited to submit such further information or observations on the merits as they wished.

12. On 25 October 1996 the Government submitted observations on the documents annexed to the Commission's decision on admissibility. The Government considered unjustified the publication by the Commission of "confidential documents which are part of the investigation file" and which "constitute an offence according to the judgment of the State Security Court". The Government requested the Commission to desist from publishing the appendix to decisions in this application. On 30 November 1996 the Commission decided to admit this request.

13. The applicant did not submit any observations.

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

C. The present Report

15. 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:

Mr S. TRECHSEL, President
Mrs G.H. THUNE
Mrs J. LIDDY
MM E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
F. MARTINEZ
C.L. ROZAKIS
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
M.A. NOWICKI
I. CABRAL BARRETO
B. CONFORTI
N. BRATZA
I. BÉKÉS
J. MUCHA
D. SVÁBY
G. RESS
A. PERENIC
C. BÎRSAN
P. LORENZEN
K. HERNDL
E. BIELIUNAS
E.A. ALKEMA
M. VILA AMIGÓ
Mrs M. HION
MM R. NICOLINI
A. ARABADJIEV

16. The text of this Report was adopted by the Commission on 11 December 1997 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

17. 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 respondent Government of their obligations under the Convention.

18. The Commission's decision on the admissibility of the application is appended to this Report.

19. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

20. In November 1991 the applicant had an anthology of his poems entitled "Dersim - Bir isyanin Türküsü" (Dersim - Folk Song of a Rebellion) published in istanbul.

21. In an indictment dated 8 January 1992 the Public Prosecutor at the istanbul State Security Court (istanbul Devlet Güvenlik Mahkemesi) charged the applicant with disseminating propaganda in his poetry against the indivisibility of the State. In his indictment the Public Prosecutor quoted certain extracts from the applicant's poems. The charges were brought under Article 8 paragraph 1 of the Anti-Terror Law.

22. In the proceedings before the istanbul State Security Court, the applicant denied the charges. He stated that the extracts from his anthology, relied on by the Public Prosecutor in his indictment, were merely quotations that the applicant had taken from other sources.

23. In a judgment dated 22 February 1993 the State Security Court found the applicant guilty of an offence under Article 8 of the Anti-Terror Law. It originally sentenced the applicant to two years' imprisonment and a fine of 50,000,000 Turkish lira. Then, taking into consideration the good conduct of the applicant during the trial, it reduced his sentence to one year and eight months' imprisonment and a fine of 41,666,666 Turkish lira.

24. The poems for the publication of which the applicant was convicted glorified in a poetic form Kurdish resistance against the Turkish oppressors and the martyrdom of those Kurds who had been killed during the fight. They also expressed the conviction that Kurdistan would survive and that the struggle of the Kurds would be successful. In its judgment the State Security Court relied on certain extracts from these poems. It held, inter alia, that the following passages amounted to propaganda against the indivisibility of the State:
... "let us go! children of those who do not yield, we have heard, there is a rebellion in the mountains, would one stay behind upon hearing this?" ... "let the guns speak freely" ... "the whelps of the Ottoman whore" ... "I invite you to die, in these mountains, freedom is blessed with death" ... "Kurds and Kurdistan will live" ... "the Kurdish youth will take revenge".

25. The applicant appealed.

26. On 1 July 1993 the Court of Cassation, after a hearing, dismissed the appeal. It upheld the cogency of the State Security Court's assessment of evidence and its reasoning in rejecting the applicant's defence.

27. After the amendments made by Law No. 4126 of 27 October 1995 to

the Anti-Terror Law, the istanbul State Security Court re-examined the applicant's case and sentenced him to one year and one month's imprisonment and a fine of 133,333,333 Turkish lira under Article 8 paragraph 1 of the Anti-Terror Law as amended.

B. Relevant domestic law

a) Anti-Terror Legislation

28. Article 8 of Anti-Terror Law No. 3713 of 12 April 1991 (before the amendments of 27 October 1995)

<Original>

"Hangi yöntem, maksat ve düsünceyle olursa olsun Türkiye Cumhuriyeti Devletinin ülkesi ve milletiyle bölünmez bütünlügünü bozmayi hedef alan yazili ve sözlü propaganda ile toplanti, gösteri ve yürüyüs yapilamaz. Yapanlar hakkinda 2 yildan 5 yila kadar agir hapis ve ellimilyon liradan yüzmilyon liraya kadar agir para cezasi hükmolunur."

<Translation>

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the indivisible territorial and national unity of the State of the Turkish Republic are prohibited, irrespective of the methods used or the intention or ideas behind them. Anyone who carries on such an activity shall be sentenced to imprisonment between two and five years and a fine of between fifty and one hundred million Turkish liras."

29. Article 8 paragraph 1 of Anti-Terror Law, as amended by Law No. 4126 of 27 October 1995

<Original>

"Türkiye Cumhuriyeti Devleti'nin ülkesi ve milletiyle bölünmez bütünlügünü bozmayi hedef alan yazili ve sözlü propaganda ile toplanti, gösteri ve yürüyüs yapilamaz. Yapanlar hakkinda 1 yildan 3 yila kadar hapis ve yüzmilyon liradan üçyüzmilyon liraya kadar agir para cezasi hükmolunur. Bu suçun mükerreren islenmesi halinde verilecek cezalar paraya çevrilemez."

<Translation>

"No one shall make written or oral propaganda or hold assemblies, demonstrations or manifestations against the indivisible integrity of the State of the Turkish Republic, its territory and nation. Those carrying out such an activity shall be sentenced to imprisonment between one and three years and a fine of between one hundred and three hundred million Turkish liras. In case of re-occurrence of this offence, sentences shall not be commuted to fines."

b) The composition of the State Security Court

30. Article 143 of the Turkish Constitution

<Original>

"Devletin ülkesi ve milletiyle bölünmez bütünlügü, hür demokratik düzen ve nitelikleri Anayasada belirtilen Cumhuriyet aleyhine islenen ve dogrudan dogruya Devletin iç ve dis güvenligini ilgilendiren suçlara bakmakla görevli Devlet Güvenlik Mahkemeleri kurulur.

Devlet Güvenlik Mahkemesinde bir Baskan, iki asil ve iki yedek

üye ile savci ve yeteri kadar savci yardimcisi bulunur.

Baskan, bir asil ve bir yedek üye ile savci, birinci sinifa ayrilmis hakim ve Cumhuriyet savcilari arasindan; bir asil ve bir yedek üye, birinci sinif askeri hakimler arasindan; savci yardimcilari ise Cumhuriyet savcilari ve askeri hakimler arasindan özel kanunlarda gösterilen usule göre atanirlar.

Devlet Güvenlik Mahkemesi Baskani üye ve yedek üyeleri ile savci ve savci yardimcilari dört yil için atanirlar, süresi bitenler yeniden atanabilirler.

Devlet Güvenlik Mahkemeleri kararlarinin temyiz mercii Yargitaydir. ..."

<Translation>

"State Security Courts are to be established to deal with offences against the indivisible integrity of the State and its territory and nation, offences against the Republic which are contrary to the democratic order enunciated in the Constitution, and offences which undermine the internal or external security of the State.

The State Security Court shall be composed of a president, two titular members and two substitute members, a public prosecutor and a sufficient number of substitutes.

The president, the public prosecutor, a titular member and a substitute member shall be appointed, according to the procedures laid down by special laws, from the Republic's first class rank of judges and prosecutors, a titular member and a substitute member from the first class rank of judges, and the substitutes from the Republic's public prosecutors and military judges.

The president, titular members and substitute members, the public prosecutor and the substitutes of the State Security Courts are appointed for four years; they can be reappointed after the expiry of their mandate.

There is an appeal against the decisions of the State Security Courts to the Court of Cassation. ..."

31. Article 145 of the Turkish Constitution

<Original>

"... Askeri yargi organlarinin kurulusu, isleyisi, askeri hakimlerin özlük isleri, askeri savcilik görevlerini yapan askeri hakimlerin mahkemesinde görevli bulunduklari komutanlik ile iliskileri, mahkemelerin bagimsizligi, hakimlik teminati, askerlik hizmetinin gereklerine göre kanunla düzenlenir. Kanun, ayrica askeri hakimlerin yargi hizmeti disindaki askeri hizmetler yönünden askeri hizmetlerin gereklerine göre teskilatinda görevli bulunduklari komutanlik ile olan iliskilerini gösterir."

<Translation>

"... The composition and functioning of military judicial organs, matters relating to the status of military judges and relations between military judges acting as military prosecutors and the commanders under whom they serve shall be regulated by law in accordance with the principles of the independence of the courts and the security of tenure of the judiciary and requirements of military duty. Relations between military judges and the commanders under whom they serve with regard to military duties other than judicial functions shall also be regulated by law."

32. Article 16 of the Law on Military Judges

<Original>

"Askeri hakimlerin atanmalari (...) Milli Savunma Bakani ve Basbakanin müsterek kararnamesi ile Cumhurbaskaninin onayina sunulur. ..."

<Translation>

"The appointment of military judges by the decree of the Minister of Defence and the Prime Minister is subject to the approval of the President of the Republic. ..."

33. Article 29 of the Law on Military Judges

<Original>

"Askeri hakim subaylar hakkinda Milli Savunma Bakani tarafindan, savunmalari aldirilarak, asagida açiklanan disiplin cezalari verilebilir .

A. Uyarma ...

B. Kinama..."

<Translation>

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

A. Written warning ...

B. Rebuke ..."

34. Article 7 annexed to the Law on Military Judges

<Original>

"Devlet Güvenlik Mahkemesi üyeligi, yedek üyeligi ve Cumhuriyet savci yardimciligi görevlerine atanan askeri hakim subaylarin rütbe terfii, rütbe kidemliligi, kademe ilerlemesi yapmalarini saglayacak yeterlilikleri, bu Kanunun ve Türk Silahli Kuvvetleri Personel Kanununun hükümleri sakli kalmak sarti ile, asagida belirtilen sekilde düzenlenecek sicillerle saptanir.

a) Birinci sinifa ayrilmis üye ve yedek üye askeri hakimlere subay sicil belgesi düzenlemeye ve sicil vermeye yetkili birinci sicil amiri Milli Savunma Bakanligi Müstesari, ikinci sicil amiri Milli Savunma Bakanidir.

b) Cumhuriyet savci yardimciligi kadrolarina atanan askeri subaylar hakkinda;

1. Mesleki sicil belgesi, Yargitayda incelem yapan dairece ve adalet müfettislerince, bu Kanundaki esaslar gözönünde tutularak verilecek sicil notlarina göre düzenlenir ve bu sicil belgesi süresi içinde Milli Savunma Bakanligina gönderilir.

2. Subay sicil belgesi, sirasiyla; Milli Savunma Bakanligi ilgili müstesar yardimcisi, Müstesari ve Milli Savunma Bakani tarafindan düzenlenir.

Cumhuriyet savci yardimcisi askeri hakim subaylar hakkinda Devlet Güvenlik Mahkemesi Cumhuriyet savcisi tarafindan, subay sicil formu esaslarina göre kanaat notu verilir".

<Translation>

"The eligibility for promotion, seniority in grade and salary increments of officers acting as judges in the capacity of assistant public prosecutors and State Security Court members, is subject both to the said Law and the Law on Military Personnel and assessed in accordance with the following procedure:

a) The first hierarchical superior competent to issue an assessment certificate for military judges who are to be appointed is the Secretary to the Ministry of Defence, the second superior is the Minister of Defence.

b) In respect of judges acting as military prosecutors:

1. The professional assessment certificate is issued, according to the procedure laid down in the said Law, by the competent chamber of the Court of Cassation and the Inspector of Legal Affairs. This certificate has to be sent to the Minister of Defence within the prescribed time-limit.

2. The assessment certificate for officers is established by the Under-Secretary and the Secretary of State to the Minister of Defence, and the Minister of Defence.

The judges acting as military prosecutors are evaluated according to the assessment formula. This evaluation is carried out by the Public Prosecutor attached to the State Security Court."

35. Article 8 annexed to the Law on Military Judges

<Original>

"Devlet Güvenlik Mahkemelerinin askeri yargiya mensup mahkeme üyeleri ile Cumhuriyet savci yardimcilari, Genelkurmay Personel Baskani, Adli Müsaviri ile atanacaklarin mensup oldugu Kuvvet Komutanliginin personel baskani ile adli müsaviri ve Milli Savunma Bakanligi Askeri Adalet isleri Baskanindan olusan Kurul tarafindan seçilir ve usulüne uygun olarak atanirlar."

<Translation>

"The military members of the State Security Court and assistant public prosecutors are appointed by a committee consisting of the personnel director, the legal adviser of the General Military Staff, the personnel director, the legal adviser of the regiment to which the candidate belongs and the director of military judicial affairs attached to the Ministry of Defence."

36. Article 307 of the Code of Criminal Procedure provides that cassation appeals only lie in respect of alleged illegality and non-compliance of the first instance judgment with the relevant procedure.

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

37. The Commission has declared admissible:

- the applicant's complaint that his conviction on account of the publication of his poems constituted an unjustified interference with his freedom of thought and freedom of expression;

- the applicant's complaint that his case was not dealt with by an independent and impartial tribunal, given that one of the three members

of the State Security Court is a military judge answerable to his military superiors whose presence prejudices the independence of the Court.

B. Points at issue

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

- whether the applicant's conviction on account of the publication of his poems infringed his freedom of thought and expression as guaranteed by Articles 9 and 10 (Art. 9, 10) of the Convention;

- whether the fact that the applicant was convicted by the State Security Court constituted a violation of his right to a fair hearing within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

C. As regards Articles 9 and 10 (Art. 9, 10) of the Convention

39. The applicant complains that his freedom of thought and of expression have been infringed, contrary to Articles 9 and 10 (Art. 9, 10) of the Convention, in that he was convicted on account of the publication of his poems.

40. The Commission considers that the applicant's complaint essentially concerns an alleged violation of his freedom of expression. The Commission will therefore examine this complaint under Article 10 (Art. 10) of the Convention, which states:

> "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."

41. The applicant submits that the extracts from his poems relied on by the domestic courts in their decisions were merely quotations from other sources.

42. The applicant also alleges that his conviction was not for any legitimate purpose under the Convention. He states that he was convicted because he had written poems about facts concerning the Kurdish people in Turkey.

43. He alleges that freedom of expression should also protect opinions which carry a risk of damaging, or which actually damage the interests of others, or opinions which are contrary to the official line unless there exists a pressing social need for restraining them. He contends that, in the circumstances of the present case, there was no pressing social need for his conviction.

44. With regard to the amendments made by Law No. 4126 of 27 October 1995 to Article 8 (Art. 8) of the Anti-Terror Law, the applicant states that following the re-examination of the case, the sentence remains enforceable against him. He emphasises that in these circumstances his status has not changed following the amendments to

the said Law.

45. The respondent Government maintain that the interference with the applicant's rights under Article 10 (Art. 10) of the Convention was prescribed by law i.e. by Article 8 (Art. 8) of the Anti-Terror Law. They state that in the impugned poems the applicant made a reference to a certain region of Turkish territory as Kurdistan, and supported the terrorist activities of the P.K.K. by considering their action as an independence struggle of the Kurds. The Government assert that according to Article 8 (Art. 8) of the Anti-Terror Law these forms of expression constitute propaganda against the indivisible integrity of the State. They consider that the domestic courts therefore interpreted the law reasonably.

46. The Government also maintain that the applicant's conviction was part of the campaign to prevent terrorism by illegal organisations and consequently served to protect the territorial integrity and national security.

47. As to the necessity of the measure in a democratic society, the respondent Government state that the threat posed to Turkey by the P.K.K. and its affiliated organisations is internationally recognised, as is the need to react firmly to it. They state that freedom of expression constitutes one of the essential foundations of a democratic society. However, in a situation where politically motivated violence poses a constant threat to the lives and security of the population and where advocates of this violence seek access to the mass media for publicity purposes, it is particularly difficult to strike a fair balance between the requirements of freedom of information and the imperatives of protecting the State and the public against armed conspirators seeking to overthrow the democratic order which guarantees this freedom and other human rights. They assert that the poems in question are based on propaganda against the indivisible integrity of the State. They submit that it is generally accepted in comparative and international law on terrorism that restrictions on Convention rights will be deemed necessary in a democratic society threatened by terrorist violence, as being proportionate to the aim of protecting public order.

48. In this respect the Government claim that the decisions of the domestic courts did not exceed the margin of appreciation conferred on States by the Convention.

49. The Commission is of the opinion that the penalty imposed on the applicant constituted an "interference" in the exercise of his freedom of expression as guaranteed by Article 10 para. 1 (Art. 10-1) of the Convention. This point has not been in dispute between the parties.

50. Therefore, the question is whether this interference was prescribed by law, pursued a legitimate aim under Article 10 para. 2 (Art. 10-2) and was "necessary in a democratic society" in order to realise that legitimate aim.

51. The Commission notes that the applicant's conviction was based on Article 8 (Art. 8) of the Anti-Terror Law and therefore considers that the interference was prescribed by law.

52. As regards the aims of the interference, the Commission notes that the applicant's conviction was 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 (Art. 10-2) of the Convention.

53. The remaining issue is whether the interference was "necessary in a democratic society". In this respect the Commission recalls the following principles adopted by the Court (see, as the latest authority, Eur. Court HR, Zana v. Turkey judgment of 25 November 1997,

Judgments and Decisions 1997 ...., para. 51):

(i) Freedom of expression, as enshrined in paragraph 1 of Article 10 (Art. 10-1) 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 (Art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.

(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".

54. 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 (Art. 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 (Art. 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).

55. Even where, as in the present case, an interference with freedom of expression is based on considerations of national security and public safety and is part of a State's fight against terrorism, the interference can be regarded as necessary only if it is 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).

56. The Commission observes in this connection that Article 10 para. 2 (Art. 10-2) 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 analyse the background causes of the situation or to express opinions on the solutions to those problems.

57. A special feature in the present case is the fact that the applicant expressed himself in the form of poetry. It is well-known that this is a form of expression in which exaggerations, metaphors and other literary means are frequently used to reflect emotions, sentiments and opinions. Poems cannot therefore be assessed according to the same standards as, for instance, other statements describing facts or expressing opinions.

58. In the present case, however, the Commission, even taking into account the prerogatives of a poet, finds that parts of the applicant's poems glorify armed rebellion against the Turkish State and martyrdom in that fight. The poems contain, in particular, the following passages: "... let us go! children of those who do not yield, we have heard, there is a rebellion in the mountains, would one stay behind upon hearing this?" ... "let the guns speak freely" ... "the whelps of the Ottoman whore" ... "I invite you to die, in these mountains, freedom is blessed with death" ... "the Kurdish youth will take revenge". In the Commission's opinion, those expressions, read in the context of the poems as a whole, were capable of creating among readers the impression that the applicant was encouraging, or even calling for, an armed struggle against the Turkish State and was supporting violence for separatist purposes.

59. Consequently, the Commission considers that the Turkish authorities were entitled to consider that the poems were harmful to national security and public safety. In these circumstances, the applicant's conviction and the penalty imposed on him on account of the publication of these poems could reasonably be regarded as answering to a pressing social need.

60. In the light of these considerations, the Commission, having regard to the State's margin of appreciation in this area, is of the opinion that the restriction placed on the applicant's freedom of expression was proportionate to the legitimate aims pursued and that, therefore, it could reasonably be regarded as necessary in a democratic society to achieve those aims.

CONCLUSION

61. The Commission concludes, by 26 votes to 6, that there has been no violation of Article 10 (Art. 10) of the Convention.

D. As regards Article 6 para. 1 (Art. 6-1) of the Convention

62. The applicant complains that his case was not heard by an independent and impartial tribunal. He invokes Article 6 (Art. 6) of the Convention which provides, inter alia, that:

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

63. The applicant claims that the State Security Courts are extraordinary courts dealing with political offences and that they are not sufficiently independent. He contends that one of the three members of the State Security Court is a military judge answerable to his military superiors; the members of the State Security Court are appointed by the High Council of Judges and Prosecutors and the president of this Council is the Minister of Justice and one other member also holds office in the Ministry of Justice.

64. The respondent Government state that State Security Courts, which are special courts set up to deal with offences against the existence and survival of the State, are ordinary courts, given that they were established in accordance with the provisions of Article 143 of the Constitution. As they are independent judicial organs, no public

authority or agent could give instructions to such courts. State Security Courts are composed of three members, one of whom is a military judge. A civil judge acts as president and all the judges have attained the first grade in the career-scale. The presence of a military judge in the court does not prejudice its independence, this judge being a judge by profession and not being a member of the military. The judges of State Security Courts evaluate the evidence and take their decisions in accordance with the law and the dictates of their conscience as required by Article 138 of the Turkish Constitution. The verdicts of such courts are subject to review by the Court of Cassation.

65. The Commission has already examined the question whether the State Security Court meets the requirements of independence and impartiality, as required by Article 6 (Art. 6) of the Convention. It recalls the following considerations in the case of Incal v. Turkey (Comm. Report 25.2.97, paras. 74-77):

> "74. The Commission is of the opinion, given the current legislation on the composition of the State Security Courts, that the appointment and assessment of military judges raise certain questions and may cast doubt on the image of independence which they should project. In this respect, the Commission notes that military judges, being military officers, are accountable to their commanding officers.
>
> 75. Moreover, the fact that a military judge participates in a criminal procedure against a civilian, which in no way involves the internal discipline of the armed forces, indicates the exceptional nature of this procedure and could be viewed as an intervention by the armed forces in a non-military judicial domain, which, in a democratic country, should be beyond any suspicion of dependence or partiality.
>
> 76. In these circumstances, the Commission considers that the applicant, having been tried and convicted by a court which had a military judge amongst its three members, could be legitimately concerned about the objective impartiality of this jurisdiction. The fact that this court also included two non-military judges, whose independence and impartiality are not in question, makes no difference in this respect (see, e.g., Eur. Court HR, Langborger v. Sweden judgment of 22 June 1989, Series A no. 155, p. 16, para. 36; Mitap and Müftüoglu v. Turkey, Comm. Report 8.12.94, p. 20, para. 106).
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> 77. In the light of the above, the Commission considers that the independence and impartiality of the State Security Court which had to determine the criminal charges against the applicant was doubtful and that the applicant's fears were objectively justified. Accordingly, the Commission is of the opinion that the applicant's case was heard by a court which cannot be considered independent and impartial, within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention."

66. The Commission finds that the same considerations apply in the present case.

67. It follows that the applicant was convicted by a court which cannot be considered independent and impartial within the meaning of Article 6 para. 1 (Art. 6-1) of the Convention.

CONCLUSION

68. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention.

E. Recapitulation

69. The Commission concludes, by 26 votes to 6, that there has been no violation of Article 10 (Art. 10) of the Convention (see para. 61 above).

70. The Commission concludes, by 31 votes to 1, that there has been a violation of Article 6 para. 1 (Art. 6-1) of the Convention (see para. 68 above).

M. de SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

(Or. French)

PARTLY DISSENTING OPINION OF MR F. MARTINEZ
JOINED BY MR I BÉKÉS

Avec la majorité de la Commission, j'ai voté pour la violation de l'article 6 par. 1 de la Convention du fait du manque d'impartialité et d'indépendance de la Cour de Sûreté de l'Etat intervenue en l'espèce.

Je pense donc qu'une cour qui ne satisfait pas aux exigences de l'article 6 de la Convention n'a pas de pouvoir légitime pour décider du bien-fondé de l'accusation en matière pénale dirigée contre le requérant.

Le statut de la Cour de Sûreté de l'Etat étant en soi la source d'une violation de la Convention, l'arrêt rendu par cette cour et qui condamne le requérant ne peut être justifié à l'égard de l'article 10 de la Convention.

A mon avis, le fait de conclure à la violation de l'article 6 par. 1 en même temps qu'à la non-violation de l'article 10 constitue une "contradictio in terminis".

Cette contradiction d'ordre logique ébranle un vieux principe général du droit selon lequel un vice à l'origine de la procédure rend vicieuses toutes les conséquences qui découlent de cette procédure.

C'est la raison pour laquelle je pense que, après avoir constaté un vice dans la composition de la cour qui a condamné le requérant, la meilleure solution consiste à dire qu'aucune question séparée ne se pose à l'égard de l'article 10 de la Convention.

(or. English)

JOINT PARTLY DISSENTING OPINION OF MM L. LOUCAIDES, G. RESS, K. HERNDL AND A. ARABADJIEV

We did not vote with the majority in the present case as regards the issue of a violation of Article 10 of the Convention, partly for the reasons which are so well presented in the dissenting opinion of Mr Martinez, partly because we feel that the Commission, as regards the application of Article 10, is making distinctions and drawing lines which might give the impression, at least to the outside reader, of a certain degree of inconsistency.

In a series of cases decided more or less simultaneously with the present one, the Commission viewed the imposition of prison sentences, under Article 8 of the Turkish Anti-Terror Law, on certain writers and publishers as a violation of Article 10 of the Convention, i.e. an unlawful interference with those persons' freedom of expression (Nos. 23462/94, 235000/94, 23556/94, 24246/94, 24919/94, 25067/94 and 25068/94). In those cases the Commission found that the various incriminated utterances of the applicants, referring as they did to the

situation of the Kurdish minority in the South-East of Turkey and their quest for freedom, alleging also various forms of oppression and attempts at genocide, were not to be regarded as incitement to any violent action. The case of Gerger v. Turkey (No. 24919/94) is a particular case in point.

The facts of the current case are not basically different. Here, the applicant has published a book of poetry and was indicted, on the basis of a number of short excerpts from altogether 22 pages of his book, for "dissemination of propaganda against the indivisibility of the State" (Article 8 of the Anti Terror Law). Six of these brief excerpts were retained by the State Security Court for the conviction of the applicant. They are reproduced verbatim in para. 24 of the Commission's report. Five of those excerpts are referred to by the Commission in para. 58 of its report as "capable of creating among readers the impression that the applicant was encouraging, or even calling for, an armed struggle against the Turkish State and was supporting violence for separatist purposes".

As the Court has stated most recently in the Zana judgment (Eur. Court HR, Zana v. Turkey judgment of 25 November 1997), alleged interferences with freedom of expression must be looked at "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 the Zana case the incriminated remarks - expressing support for the "P.K.K. liberation movement" - were made (1) by the former mayor of Diyarbakir (i.e. a politician), (2) in an interview (3) published in a major national daily newspaper. The remarks were consequently regarded by the Court "as likely to exacerbate an already explosive situation in that region". Would the same reasoning hold true for the much more abstract lyrics of a poet published in the form of an anthology ? The majority themselves recognize that poetry "is a form of expression in which exaggerations, metaphors and other literary means are frequently used to reflect emotions, sentiments and opinions. Poems cannot therefore be assessed according to the same standards as, for instance, other statements describing facts or expressing opinions" (see para. 57 of the present report).

One must not lose sight of the fact that the five quotations which the majority in the final analysis regards as "supporting violence" are excerpts from a book of poems (poems, which although they might be regarded as somewhat offensive as far as their choice of words is concerned, were otherwise not incriminated). These excerpts are now placed in the context of an armed uprising. Did the author, whose poems must be seen as largely reflecting his imagination as an artist, ever contemplate, by having the anthology published (or allowing its publication) that he was supporting violence ? In our view neither the context of the case nor the personality aspect (the words having been written not by a politician or someone prominent in matters of State, but by a poet) would favour this conclusion. It is therefore difficult to find that sentencing someone to two years' imprisonment and a fine of 50,000,000 Turkish lira (reducing this sentence to one year and eight months' imprisonment and a fine of 41,666,666 Turkish lira in view of his "good conduct") for the authorship of certain poetic lines is indeed proportionate to the legitimate aim pursued, namely to protect a democratic society against the activities of terrorist organisations (see para. 60 of the present report together with para. 55).

Finally, reference must be made to the analogous case of Sürek v. Turkey (No. 26682/95), where a joint dissenting opinion with which we wholeheartedly concurred, lets out in further detail additional considerations concerning the criteria applicable, and the interpretation to be given, to oral or written statements of individuals for which they are subsequently sentenced in disregard of Article 10 of the Convention.

(or. English)

PARTLY DISSENTING OPINION OF MR E.A. ALKEMA

I have voted against the majority's conclusion that Article 6 para. 1 has been violated in the present case.

The majority is of the opinion that the independence and impartiality of a State Security Court are not warranted.

In my dissenting opinion in the Report of 20 May 1997 in the case of Çiraklar v. Turkey, Application No. 19601/92, I have set out the reasons why the majority's opinion is abstract and in need of further foundation in fact and law in order to be justified.