AS TO THE ADMISSIBILITY OF

Application No. 23462/94
by Günay ASLAN
against Turkey

The European Commission of Human Rights sitting in private on 14 October 1996, 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
H. DANELIUS
F. MARTINEZ
L. LOUCAIDES
J.-C. GEUS
M.P. PELLONPÄÄ
G.B. REFFI
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

Mr. H.C. KRÜGER, Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 7 January 1994 by Günay Aslan against Turkey and registered on 15 February 1994 under file No. 23462/94;

Having regard to :

- the reports provided for in Rule 47 of the Rules of Procedure of the Commission;

- the Commission's decision of 20 February 1995 to communicate the application ;

- the observations submitted by the respondent Government on 11 August 1995 and the observations in reply submitted by the applicant on 28 September 1995;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is a Turkish citizen, born in 1960 and resident in istanbul. Before the Commission he is represented by Hasip Kaplan, a lawyer practising in istanbul.

A. Particular circumstances of the case

The facts of the present case as submitted by the parties may be summarised as follows:

The applicant is the author of the book entitled "Yas Tutan Tarih 33 kursun" (33 Bullets/History in Mourning). The first edition of the book was published in December 1989 and the preface was signed by Musa Anter who was a prominent figure and writer on matters concerning the people of Kurdish origin in Turkey.

In an indictment dated 22 January 1990 the Public Prosecutor at the istanbul State Security Court charged the applicant with disseminating separatist propaganda through his book. He requested the applicant's conviction under Article 142 (3) of the Turkish Criminal Code.

On 29 March 1991 the istanbul State Security Court sentenced the applicant to six years and three months' imprisonment. On 12 April 1991 Article 142 of the Turkish Criminal Code, under which the applicant had been convicted, was repealed. In a supplementary decision dated 3 May 1991, the Court quashed the applicant's conviction.

On 21 July 1991 the book was reprinted with a preface signed by Musa Anter.

On 12 December 1991 the Public Prosecutor at the istanbul State Security Court charged the applicant with disseminating propaganda against the indivisibility of the State in view of the fact that the book had been reprinted. The charges were made in accordance with Article 8 paragraph 1 of the Anti-Terror Law.

In the proceedings before the istanbul State Security Court, the applicant denied the charges. He stated that the book was based on true facts and on his observations as a journalist. He asserted that he had reported certain events within the scope of journalism.

In a judgment dated 28 January 1993, the Court found the applicant guilty of disseminating propaganda against the indivisibility of the State. It first sentenced the applicant to two years' imprisonment plus a fine of 50,000,000 Turkish lira. Then, considering the good conduct of the applicant during the trial, it reduced his sentence to one year and eight months' imprisonment plus a fine of 41,666,666 Turkish lira. The Court held, inter alia, that the applicant, in his book, had alleged that the State oppressed the people of Kurdish origin, seized their belongings and killed them. It held that the applicant's comments and allegations were more than mere criticism. The Court noted that the applicant incited the people of Kurdish origin to rebel against the State. The Court considered that the applicant was also liable for the preface to the book which had been written by another author. The Court noted that the publication of the further edition of the book was an act which constituted an offence under Article 8 paragraph 1 of the Anti-Terror Law which had come into force after the abrogation of Article 142 of the Turkish Criminal Code.

The applicant appealed. He contended that certain sections of the book consisted of articles taken from previously published periodicals. He pleaded that the preface had not been written by him. He asserted that his conviction for criticising the oppression of the Kurdish

people constituted a serious threat to his freedom of expression.

On 17 March 1993 the istanbul State Security Court rejected the applicant's appeal on the ground that it had been filed out of time. The applicant also appealed against this decision.

On 16 September 1993 the Court of Cassation considered that the applicant had appealed in time against his conviction. However, after examining the grounds for the applicant's conviction, it dismissed the appeal, upholding the cogency of the State Security Court's assessment of the evidence and its reasoning in rejecting the applicant's defence.

B. Relevant domestic law:

Article 8 of the Anti-Terror Law No. 3713 of 12 April 1991

<Translation>

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

COMPLAINTS

The applicant complains of violations of Articles 6, 9, 10 and 14 (in conjunction with 10) of the Convention.

As to Articles 6, 9 and 10 of the Convention, the applicant complains that his conviction and sentence for writing a book constituted an unjustified interference with his freedom of thought and freedom of expression. He also complains that he was convicted on the basis of the Court's assessment of a single chapter and a preface to his book which was not written by him.

As to Article 14 of the Convention, the applicant complains that his conviction for expressing his opinion on the "Kurdish problem", allegedly contrary to State policy, constituted discrimination on the ground of political opinion.

The applicant also makes a "ne bis in idem" claim in so far as he was allegedly twice tried and convicted of the same offence.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 7 January 1994 and registered on 15 February 1994.

On 20 February 1995 the Commission decided to communicate the application to the respondent Government, pursuant to Rule 48 para. 2 (b) of the Rules of Procedure.

The Government's observations were submitted on 11 August 1995, after an extension of the time-limit fixed for that purpose. The applicant replied on 28 September 1995.

THE LAW

1. The applicant first complains that his conviction for writing a book constitutes an unjustified interference with his freedom of thought and freedom of expression. In this context he also complains that he was convicted on the basis of the Court's assessment of a

single chapter and a preface to his book which was not written by him. In this context, he invokes Articles 6, 9 and 10 (Art. 6, 9, 10) of the Convention.

Thus formulated, the applicant's complaint is in fact directed against an alleged infringement of his freedom of expression. The Commission has examined this complaint under Article 10 (Art. 10) of the Convention which provides as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, 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."

The applicant also complains under Article 14 of the Convention in conjunction with Article 10 (Art. 14+10) that his conviction for expressing his opinion on the "Kurdish problem", allegedly contrary to State policy, constituted discrimination on the ground of political opinion. Article 14 (Art. 14) reads 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."

The Government first argue that at no stage in the proceedings did the applicant invoke the relevant provisions of the Convention.

The applicant contests this argument and claims that he has raised the substance of all complaints made before the Commission in the domestic proceedings.

The Commission refers to its established case-law to the effect that a person who has raised in substance before the highest competent national authority the complaint he makes before the Commission has exhausted domestic remedies. Even where the Convention is directly applicable in a State's domestic law (as is the case in Turkey), the person concerned may also rely before the domestic courts on "other arguments to the same effect"(No. 7367/76, Dec. 10.3.77, D.R. 8 pp. 185, No. 11425/85 Dec. 5.3.85, D.R. 53 pp. 76). In this respect the Commission notes in the present case that the applicant asserted before the Court of Cassation that his conviction for criticising the oppression of the Kurdish people constituted a serious threat to his freedom of expression.

Consequently, the Commission finds that the requirement as to the exhaustion of domestic remedies has been satisfied and that the application cannot be rejected on the basis of Articles 26 and 27 para. 3 (Art. 26, 27-3) of the Convention.

As to the substance of the case, the 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 of the Anti-Terror Law. They state that the comments made by the applicant in his book constitute a provocation of enmity and hatred between the Kurdish

and Turkish societies which serves to mobilise people to revolt. They assert that according to Article 8 of the Anti-Terror Law these forms of expression constitute propaganda against the indivisible integrity of the State. The Government consider that the domestic courts therefore interpreted the law reasonably.

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

As to the necessity of the measure in a democratic society, the respondent Government state that terrorism strikes at the heart of democracy, the fundamental rights which that concept enshrines and the judicial and political systems. They state that the 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 protecting 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.

In this respect the Government claim that the decisions of the istanbul State Security Court and the Court of Cassation did not exceed the margin of appreciation conferred on States by the Convention.

The applicant observes that he was convicted of an offence for expressing his views on the Kurdish problem in Turkey. He asserts that he had commented as a journalist on the facts concerning the Kurdish people living in Turkey. He also observes that he was convicted on the basis of the Court's assessment of a preface to his book, although the preface was not written by himself.

The applicant also maintains that his conviction cannot be justified for any of the reasons permitted under the Convention. He considers that the content of the incriminated book was within the limits of permitted criticism.

The applicant, in conjunction with the interference with his freedom of expression, complains that his conviction for writing about the problems of the people of Kurdish origin, and for criticising State policy in this respect, constituted discrimination on the ground of political opinion.

The Commission has conducted a preliminary examination of the parties' arguments. It considers that this part of the application raises complex factual and legal issues which cannot be resolved at this stage of the examination of the application, but require an examination of the merits. Consequently, the above complaints cannot be declared manifestly ill-founded within the meaning of Article 27 para. 2 (Art. 27-2) of the Convention. No other grounds for declaring them inadmissible have been established.

2. The applicant further complains that he was twice tried and convicted of the same offence. He invokes his right to a fair hearing under Article 6 para 1 (Art. 6-1) of the Convention also in this respect.

The Commission recalls that in the Convention system the principle of "ne bis in idem" as relied upon by the applicant is

regulated in Article 4 of Protocol No. 7 (P7-4) which has not been ratified by Turkey. This part of the application is therefore incompatible ratione materiae with the provisions of the Convention within the meaning of Article 27 para. 2 (Art. 27-2) (No. 8945/80, Dec. 13.12.83, D.R. 39 pp. 47).

For these reasons, the Commission, unanimously

DECLARES INADMISSIBLE, the complaint related to "ne bis in idem"

DECLARES THE REMAINDER OF THE APPLICATION ADMISSIBLE without prejudging the merits.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (S. TRECHSEL)

ANNEX

23462/94
ASLAN v. Turkey

T.R.
ISTANBUL
STATE SECURITY COURT
ATTORNEY GENERAL
Number :
Preliminary : 1991/747
Case : 1991/711
Indictment : 1991/627

Case 91/445

19 December 1991
(Signature)

INDICTMENT

STATE SECURITY COURT

Plaintiff : Order of Law
Defendants: 1- MUZAFFER Erdogdu, son of Hasan and Menevse, DOB.1956, registered at Arisu village, Almus district, Tokat. Resident at Salkimsogut sokak 2/4 Cagaloglu, Istanbul.
2- GUNAY ARSLAN, son of Mehmet and Ano, DOB.1960, registered at Saray village Ozalp district, Van. Resident at Cumhuriyet mah. No:56, Ozalp district.

Offence : DISSEMINATING PROPAGANDA AGAINST THE INDIVISIBILITY OF THE STATE.

Date of offence: 21 July 1991
A.A.L.[] : Article 8/1 of Act No:3713 for Gunay ARSLAN
Article 8/2 of Act No:3713 for Muzaffer Erdogdu
[*] Applicable Article of the Law

Preliminary documents were examined.

Gunay ARSLAN, one of the defendants, is the author of a book entitled 'MOURNING HISTORY, 33 BULLETS'. Muzaffer Erdogdu, the other defendant is the owner of PENCERE Publications, the publishing company of the aforementioned book.

The aforementioned book was published in December 1989 and as a result a public trial was started against Gunay ARSLAN for offending Article 142/3 of the TPC. The trial established the offence and Istanbul State Security Court No: (2) decided a punitive action on the 29 March 1991 with the case number 1990/44 and decision number 1991/92. The above-referred decision was announced. Consequently, Article 23/C of the Act number 3713 abolished Article 142 of the TPC, therefore the penalty on defendant Gunay ARSLAN was quashed.

However, the defendants published the same book without any change or indication that the new print was the second edition. The imprint was 1550 copies and was scheduled for completion on the 21 July 1991.

Despite the fact that the book's introduction had Musa ANTER signature, Musa ANTER gave evidence in the court; stating that he did not write the introduction. [The witness stated that] the published article was taken from a magazine which was published in 1948, and edited by Gunay ARSLAN. Therefore the article was considered to have been written by Gunay ARSLAN.

8th page of the introduction;

"The Turks' situation in the Middle East is very interesting. With persecution and violence excluded, they would not be able to sustain their hold. Because they arrived in a wave of migration. They conquered the lands of nations much more civilised than themselves. They tried to establish authority by means of cruelty, violence and inhuman behaviour. For example here are Arabs, Persian, Kurds, Georgians, Laz, Armenians and Byzantians.

How can one expect a democratic approach from a (state structure) mechanism of barbarism based on violence? It is out of the question. Even today, such a mentality is dominant in Turkey. Lets say, Kurdistan belongs to Kurds, Armenia to Armenians, Lazistan to Laz, Trachia to Greeks. What would be left to Turks? That's why I recognised their rights. However, what is always left for Turks is injustice, denial of others' rights and being in a laughable position in the face of history. This is the subject, However, today even Turks cannot understand. This is the subject of their complaints. Because there is no nation they did not persecute in the Middle East."

9th page of the introduction;

"Many elements were liberated from this barbaric administration. Such as Bulgarians, Greeks and Arabs. Some parts gave up their rights in a state of hopelessness, such as Laz. Another section is trying to make their pains public to the world as a result of being eradicated from within, such as Armenians. All that is left tied up to the cannon barrel is the Kurds. Both Kurds and Turks are in a state of confusion. Turks, coming from Turkistan deny those in Kurdistan."...

11th page ;

" (SHOOT TO KILL). These are the words which could explain the policy of Turkey on Kurds. Being a Kurd in Republican Turkey is synonymous as being a Jew in Hitler's Germany, a black in Botha's Africa and a Palestinians in the occupied territories in Israel."...

17th page;

"Criminals were punished. The incident could have been considered dealt with. However what concerns me is not punishment of human beings but the punishment of understandings [ideologies]. Unfortunately this has not happened. This is what I want to see realised. In an era where the world gallops towards peace, democracy and freedom; an attempt to destroy the identity of a nation by means of genocides, exiles, tortures is, I think, a black stain which humanity cannot bear, let alone it being impossible."...

51st page;

"CUDI: NOT A MOUNTAIN AS IF A COUNTRY.....As God knew the Kurds would be persecuted to a great extent by fellow human beings. If Cudi didn't exist, the Kurds would have been wiped out of history by the Mongolian invasion. All persecution and cruelty stopped at the skirts of Cudi. Because of this, Cudi was not only the mother's bosom but also a military training camp for Kurds. This dual character made it sacred. Cudi experienced the pride of resistance and rebellion primarily against the Asian invasion which was followed by boots and bayonets."...

52nd page;

" According to Evdi of Cizre what abolished the life security in the region was the state itself. Evdi tells us briefly: They block the roads and summarily execute, they raid houses and kidnap people, they torture, they ban going to the fields and even buying flour for the household."...

" Just the same since the Mongolians. The only difference is, arrow and sword was replaced by bomb and tank."...

"Cudi resisted, because survival was resistance. Wasn't it the case since Mongolians?"...

57th page;

"However, they could have exiled not only the intellectuals and poor peasants but also all the surviving life forms, animals, trees, birds, ants, roses, narcissus', poppies, how about the mountains? Would they be strong enough to remove the mountains? As the old proverb says: If the decree is Sultan's, the mountains are ours [we disobey the decree].

58 and 59th pages;

"SILOPI DEGENERATION.... The Kurdish nation, which experienced the deepest form of disorganisation, isolation and fragmentation, said enough is enough to their fate which was forced upon them. They started pacing towards self-determination. The nucleus [seeds] of resistance which started growing amidst against all forms of degeneration and injustices started to come. This [resistance] panicked those who have exploited their labour and chained the nation for centuries. The hegemonist who carried out practises of exile, threats, arrests, torture and oppression answered this resistance with genocides. Special team[s], one of the basic elements of specialised tactics of war, expressed their helplessness against the PKK militants by massacring the peasants. The massacre of peasants in Silopi, where the Kurdish population was concentrated, expressed a new era in the developments. The special war between the Security Forces and PKK guerrillas meets an end. It pointed out a new era of general warfare between the people and people's reaction. Despite the fact that the state forcibly evacuated to Botan and primarily Cudi mountain. The armed activities were not prevented. As the press reflected in super-headlines, the last blows [coups-?] contained dissolvency. The state brought a solution with genocide, as it carried out against the Agri rebellions. Yes, from then on every effort was to be spent to exercise genocide. They started

from Silopi. The death squads were heavily engaged with head-hunting. Following the counter-guerillas, gangs and village guards it was sell-out tribal landlords' turn to drink Kurdish blood. However, the Kurdish peasants' rebellion in Silopi made way for greater reactions. The Kurdish intifada was exploding against Kurdish genocides. The Kurdish nation who guided the Middle Eastern nations against the Assyrian despotism was heralding the days when the bastions of the Turkish chauvinism would be brought down".

66th page;

"Under the influence of a belief surviving for many years, there is a question repeatedly asked in the regions where the Kurdish population is concentrated. Can an administrative mechanism which practises raids, ambushes, summary executions without questioning, arms ignorant gangs for head-hunting, evacuates villages and kidnaps people be called a state? Ferzande ONER says not. Where is the immunity of household? Where are the constitutional guarantees? If a Kurd is victimised [killed] all the legal and democratic institutions keep quiet."

It is concluded that by expressing such thoughts and expressions without confirming the truthfulness of certain incidents, dissemination of propaganda was carried out against the indivisibility of the state.

In the name of the public we demand and indict that the defendants are to be tried before your court according to Article 39 of Act no: 5680 and Article 20 of Act no: 2845, and the above identified defendants to be punished according to the relevant Articles and Paragraphs of above quoted Act no: 3713. 12 December 1991.

P.Prosecutor-19015
Cevat OZEL
(Signature)