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

CASE OF ARSLAN v. TURKEY

(Application no. 23462/94)

JUDGMENT

STRASBOURG

8 July 1999

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

In the case of Arslan v. Turkey,

The European Court of Human Rights, sitting, in accordance with Article 27 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), as amended by Protocol No. 11[1], and the relevant provisions of the Rules of Court[2], as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,
Mrs E. PALM,
Mr A. PASTOR RIDRUEJO,
Mr G. BONELLO,
Mr J. MAKARCZYK,
Mr P. KŪRIS,
Mr J.-P. COSTA,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A. BAKA,
Mr R. MARUSTE,
Mr K. TRAJA,
Mr F. GÖLCÜKLÜ, ad hoc *judge*,

and also of Mr P.J. MAHONEY and Mrs M. DE BOER-BUQUICCHIO, *Deputy Registrars*,

Having deliberated in private on 1 March and 16 June 1999,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court, as established under former Article 19 of the Convention[3] by the European Commission of Human Rights ("the Commission") on 17 March 1998, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. It

Notes by the Registry

1-2. Protocol No. 11 and the Rules of Court came into force on 1 November 1998.

3. Since the entry into force of Protocol No. 11, which amended Article 19, the Court has functioned on a permanent basis.

originated in an application (no. 23462/94) against the Republic of Turkey lodged with the Commission under former Article 25 by a Turkish national, Mr Günay Arslan, on 7 January 1994.

The Commission's request referred to former Articles 44 and 48 (a) of the Convention and to Rule 32 § 2 of the former Rules of Court A[1]. The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 10 of the Convention, taken both alone and in conjunction with Article 14.

2. In response to the enquiry made in accordance with former Rule 33 § 3 (d), the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (former Rule 30). Subsequently Mr R. Bernhardt, the President of the Court at the time, gave the lawyer leave to use the Turkish language in the written proceedings (former Rule 27 § 3). At a later stage Mr Wildhaber, President of the new Court, authorised the applicant's lawyer to use the Turkish language in the oral proceedings (Rule 36 § 5).

3. As President of the Chamber originally constituted (former Article 43 of the Convention and former Rule 21) in order to deal in particular with procedural matters that might arise before the entry into force of Protocol No. 11, Mr Bernhardt, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicant's counsel and the Delegate of the Commission on the organisation of the written procedure (former Rules 37 § 1 and 38). Pursuant to the order made in consequence, the Registrar received the memorials of the applicant and the Government on 10 and 17 July 1998 respectively. On 8 September the Government sent documents intended to be appended to their memorial and on 13 November the applicant filed his claim for just satisfaction (Article 41 of the Convention and Rule 60 of the new Rules of Court)

4. After the entry into force of Protocol No. 11 on 1 November 1998 and in accordance with Article 5 § 5 thereof, the case was referred to the Grand Chamber of the Court. On 22 October 1998 Mr Wildhaber had decided that, in the interests of the proper administration of justice, a single Grand Chamber should be constituted to hear the instant case and twelve other cases against Turkey, namely: Karataş v. Turkey (application no. 23168/94); Polat v. Turkey (no. 23500/94); Ceylan v. Turkey (no. 23556/94); Okçuoğlu v. Turkey (no. 24146/94); Gerger v. Turkey (no. 24919/94); Erdoğdu and İnce v. Turkey (nos. 25067/94 and 25068/94); Başkaya and Okçuoğlu v. Turkey (nos. 23536/94 and 24408/94); Sürek and Özdemir v. Turkey

1. Rules of Court A applied to all cases referred to the Court before the entry into force of Protocol No. 9 (1 October 1994) and from then until 31 October 1998 only to cases concerning States not bound by that Protocol.

(nos. 23927/94 and 24277/94); Sürek v. Turkey no. 1 (no. 26682/95), Sürek v. Turkey no. 2 (no. 24122/94); Sürek v. Turkey no. 3 (no. 24735/94) and Sürek v. Turkey no. 4 (no. 24762/94).

5. The Grand Chamber constituted for that purpose included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 24 § 4 of the Rules of Court), Mr Wildhaber, the President of the Court, Mrs E. Palm Vice-President of the Court, and Mr J.-P. Costa and Mr M. Fischbach, Vice-Presidents of Sections (Article 27 § 3 of the Convention and Rule 24 §§ 3 and 5 (a)). The other members appointed to complete the Grand Chamber were Mr A. Pastor Ridruejo, Mr G. Bonello, Mr J. Makarczyk, Mr P. Kūris, Mrs F. Tulkens, Mrs V. Strážnická, Mr V. Butkevych, Mr J. Casadevall, Mrs H.S. Greve, Mr A. Baka, Mr R. Maruste, and Mrs S. Botoucharova (Rule 24 § 3 and Rule 100 § 4).

On 19 November 1998 Mr Wildhaber exempted Mr Türmen from sitting after his withdrawal from the case having regard to the decision of the Grand Chamber in the case of Ogŭr v. Turkey taken in accordance with Rule 28 § 4. On 16 December 1998 the Government notified the registry that Mr F. Gölcüklü had been appointed *ad hoc* judge (Rule 29 § 1).

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

6. At the invitation of the Court (Rule 99 § 1) the Commission delegated one of its members, Mr H. Danelius, to participate in the proceedings before the Grand Chamber.

7. In accordance with the President's decision, a hearing took place in public in the Human Rights building, Strasbourg, on 1 March 1999, the case being heard simultaneously with the cases of Sürek v. Turkey and Ceylan v. Turkey.

There appeared before the Court:

(a) *for the Government*
Mr D. TEZCAN,
Mr ÖZMEN, *Co-Agents,*
Mr B. ÇALIŞKAN,
Miss G. AKYÜZ,
Miss A. GÜNYAKTI,
Mr F. POLAT,
Miss A. EMÜLER,
Mrs I. BATMAZ KEREMOĞLU,
Mr B. YILDIZ,
Mr Y. ÖZBEK, *Advisers*;

(b) *for the Commission*
Mr H. DANELIUS, *Delegate ;*

(c) *for the applicant*
Mr H. KAPLAN, of the Istanbul Bar, *Counsel*.

The Court heard addresses by Mr Danelius, Mr Kaplan, Mr Tezcan and Mr Özmen.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant is the author of a book entitled "History in Mourning, 33 bullets" (*Yas Tutan Tarih, 33 Kurşun*), which won the Yunus Nadi Prize.

The book was published in December 1989, with a second edition appearing in July 1991. It is accompanied by a preface attributed to Musa Anter, a well-known pro-Kurdish politician and leader writer whose main theme was the Kurdish question in Turkey and who was murdered in 1992.

A. The proceedings concerning the first edition

9. On 29 December 1989, in the course of a criminal investigation he was conducting in respect of Mr Arslan, the public prosecutor at the Istanbul National Security Court ("the National Security Court") requested a single judge of that court to order the seizure of the above-mentioned book as an interim measure.

By an order made on that date the judge allowed this application.

10. On 22 January 1990 the public prosecutor charged the applicant with disseminating separatist propaganda. Noting that in his book Mr Arslan had contended that there were various nations within the Republic of Turkey, described the Turkish nation as barbarous, maintained that the Kurds were the victims of constant oppression, if not genocide, and glorified the acts of insurgents in south-east Turkey, he called for the application of Article 146 §§ 3 and 6 of the Criminal Code (see paragraph 22 below) and confiscation of the book. The indictment included the following extracts from the book:

> "... the position of the Turks in the Middle East is very interesting... Having arrived as a wave of nomads, they invaded the territories of nations which were a thousand times more civilised than them and, not having a superior culture of their own, attempted to control these peoples - the Arabs, the Persians and the Kurds, for example - by tyranny, violence and inhuman acts. Is it now to be expected that such an organisation, this barbarous mechanism founded on violence, this State order, will implement democratic decisions? That would be a vain hope... Even today, it is this

> mentality which prevails in Turkey. For example, if one were to say that Kurdistan belongs to the Kurds, Armenia to the Armenians, 'Lazistan'[1] to the 'Laz' and the territory of Rūm to the 'Rūmis', what would be left for the Turks? ... In the Balkans and the Middle East there is not a single people whom [the Turks] have not persecuted. That is why today the Turks realise that the Bulgarians, the Greeks ... and, internally, the Kurds regard them as enemies. As a result, it has become axiomatic among [the Turks] that, as the saying has it, 'A Turk's only friend is another Turk'. ... Several groups, such as the Bulgarians, the Greeks and the Arabs, have won their freedom from this barbarous administration. Only the Kurds remain. Both Turks and Kurds are at a loss to know what to do about this situation. A Turk from *Turkistan* denies the Turk who lives in Kurdistan. A Kurd may neither give his father's forename to his son nor choose his name... [*preface, pages 7-10*]
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> ... that being said, the revolt of the Kurdish peasants at Silopi had led to reactions on a larger scale; the Kurds exploded in fury against the massacre of their fellow Kurds. The Kurdish people, who once took command of the peoples of the Middle-East in their struggle against Assyrian despotism, were announcing, through their resistance, the joyful news of the day when they would tear down the fortress of violence of Turkish chauvinism... [*chapter entitled* "The infinity of Silopi", pages 58-59]"

11. Before the National Security Court the applicant denied the charges. He argued in particular that he could not be held responsible for the content of the preface written by Mr Anter. That argument was not accepted by the judges because Mr Anter, who had been heard by them as a witness, had explained that he had never intended to write a preface for the book but had merely handed over to the applicant, at his request, a periodical containing an article he had written several years before.

The applicant also submitted that in writing the book his intention had never been to work towards separatist ends but to set out his thoughts about incidents that had taken place in Van, his native province, and had claimed the lives of 33 peasants, including members of his family.

12. On 29 March 1991 the National Security Court sentenced the applicant to six years and three months' imprisonment and ordered the book's confiscation.

In its judgment it noted in particular that in order to criticise State policy he had related without objectivity in his book certain events which had occurred in eastern and south-eastern Anatolia, and that he had maintained that the Kurds were oppressed and crushed by the violence of the gendarmerie, which sometimes even shot them down, and that the fundamental rights of the Kurdish people had been trampled on. It held in particular:

> "In the book certain parts of the national territory are referred to as the Kurdish region or provinces and it is explained that these must belong to the Kurds, that they form their country, called Kurdistan; moreover, it is stated that the Turks, coming from Turkistan, have driven the Kurds out of Kurdistan and that this region has entered into a general war and is in a state of resistance."

[1] Part of the Black Sea coast region whose population contains an ethnic group commonly called "Laz".

The National Security Court emphasised the extreme importance for society of being informed of the events in question and of the facts which had led to them, which should be related without comment, but stated that the content of the book, although presented as research findings, went well beyond such an aim.

Accepting the prosecution submissions, the National Security Court held that the theme which could be discerned throughout the book, and particularly in its preface, amounted to separatist propaganda based on racial considerations and intended to weaken patriotic sentiment, and that this justified Mr Arslan's conviction.

13. On 12 April 1991 the Prevention of Terrorism Act (Law no. 3713) came into force. It repealed, *inter alia*, Article 142 of the Criminal Code, on which the applicant's conviction had been based. As a result, by a further judgment of 3 May 1991, the National Security Court declared Mr Arslan's conviction null and void and ordered the return of the confiscated copies of the book.

B. The proceedings concerning the second edition

14. Mr Arslan's book was republished on 21 July 1991.

On 30 July the public prosecutor asked the National Security Court to order its seizure on the ground that its republication contravened section 8 of Law no. 3713, which prohibited all propaganda against "the indivisible untiy of the State" (see paragraph 23 below).

15. By a decision of 31 July a single judge of the court rejected this application on the ground that the constituent elements of the offence had not been made out.

The public prosecutor repeated his application on the same day, arguing in particular that the acts which constituted the offence contemplated in former Article 142 § 3 of the Criminal Code did not differ in any way from those made punishable by section 8(1) of Law no. 3713. He submitted that it was illogical not to find that the book constituted propaganda against the indivisible unity of the State when its seizure had been ordered on 29 December 1989 on the ground that it conveyed separatist propaganda (see paragraph 9 above). On 5 August 1991 the single judge rejected the application.

16. On 23 August, at the request of the public prosecutor, the Ministry of Justice ordered the principal public prosecutor at the Court of Cassation to lodge an appeal in the interests of clarifying the law against the decision of 5 August 1991 (see paragraph 15 above).

The Court of Cassation dismissed that appeal in a judgment of 13 September 1991, on the ground that it was for the judge dealing with the case to assess the expediency of an interim measure and that the question whether the content of a publication was contrary to the law could be determined only by a judgment on the merits.

17. In an indictment of 12 December 1991 the public prosecutor accused Mr Arslan and his publisher of disseminating propaganda against "the indivisible unity of the State" within the meaning of section 8(1 and 2) of Law no. 3713 (see paragraph 23 below).

He reproduced the extracts included in his submissions of 22 January 1990 (see paragraph 10 above) and referred to other passages in the book, including the following:

> "... The Kurdish people, who until recently were utterly disorganised, in disarray and torn in different directions, have called "Halt!", refusing this destiny imposed on them, and have now begun to take giant strides towards the accomplishment of their own destiny. Those who for centuries have kept these people in chains and exploited their labour panicked when they saw the seeds of resistance [the Kurds] had cherished in their hearts in the face of such injustice and indignity beginning to sprout. As one of the main features of the special war, and in order to serve rulers who responded with massacres to the resistance of the great majority of the Kurdish people against the policies of deportation, threats, arrest, torture and oppression, the special forces have found no better way of expressing their feeling of defeat at the hands of the PKK militants than to massacre peasants. The slaughter of the peasants at Silopi announced the advent of a new epoch in the developments taking place in those regions where Kurds form a majority of the population. The special war being conducted in that region between the security forces and PKK guerillas was coming to an end. A new era of total war was beginning… The State, which for months had been mobilising troops in large numbers and sending them to the Botan region – particularly the Cudi mountains – had not been able to prevent [the PKK's] armed raids and, once the State had realised that its latest operations [against the PKK] – whose scale was so much exaggerated by the press – had led to nothing, it decided to follow the historic example of the repression of the rebellion of Ağrı and implement the final solution – genocide. From then on, every effort would be made to reach that solution. They began with Silopi; the squadrons of death tried by every means they had to make progress with their manhunt. Like the counter-insurgency agents, the gangs and the village guards let loose in the Kurdish regions, those clan leaders who were in the pay of the government also received the order to drink Kurdish blood…"

18. Before the National Security Court the applicant once more contested the charges brought against him, arguing in particular that the book was based on real events and on his observations as a journalist. He had done nothing more than relate certain events in the context of his professional activity.

19. On 28 January 1993 the National Security Court found the applicant guilty of disseminating propaganda against "the indivisible unity of the State" and sentenced him, pursuant to section 8(1) of Law no. 3713, to one year and eight months' imprisonment and a fine of 41,666,666 Turkish liras.

In its judgment the National Security Court made it clear at the outset that the fact that the applicant's previous conviction had been declared null and void on 3 May 1991 (see paragraph 13 above) did not stand in the way of fresh charges being brought against him on the basis of a different provision of criminal law. As to the merits of the case, the court referred to certain passages of the book and – following in large part the same line of reasoning as in the judgment of 29 March 1991 (see paragraph 12 above) – held that the applicant had intended to incite citizens of Kurdish origin to rebel against the State.

20. On 9 March 1993 the applicant appealed against this judgment to the National Security Court. In order to prove that Mr Anter was in fact the author of the preface, he asked for a witness to be heard. He maintained that the first part of the book related in a dramatised form a historic event and that the second part was only a collection of recent articles. In addition, his conviction for criticising the oppression of the Kurdish population constituted a serious threat to his freedom of expression.

On 17 March 1993 the National Security Court declared the appeal inadmissible on the ground that it was out of time. The applicant then appealed to the Court of Cassation. Repeating the arguments set out above, he contended that to convict someone for expressing his thoughts was unacceptable in a modern society and that a country could not be said to have any "unity" or "integrity" if even the preface of a book was thought capable of endangering them.

21. The Court of Cassation gave judgment against Mr Arslan in a judgment of 16 September 1993, holding that the assessment of the evidence conducted by the Istanbul National Security Court justified the rejection of the applicant's grounds of appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The criminal law

1. Former Article 142 of the Criminal Code

22. Paragraphs 3 and 6 of former Article 142 of the Criminal Code, repealed by Law no. 3713 (see paragraph 23 below), provided:

> "3. A person who, prompted by racial considerations, by any means whatsoever spreads propaganda aimed at abolishing in whole or in part public-law rights guaranteed by the Constitution or undermining or destroying patriotic sentiment shall, on conviction, be liable to a term of imprisonment of from five to ten years.
>
> ...

6. Where the offences contemplated in the above paragraphs are committed through publication, the penalty to be imposed shall be increased by half."

2. The Prevention of Terrorism Act (Law no. 3713)i

23. Law no. 3713 was promulgated on 12 April 1991. Section 8, (subsequently repealed by Law no. 4126 of 27 October 1995) was worded as follows:

Former section 8(1)

"Written and spoken propaganda, meetings, assemblies and demonstrations aimed at undermining the territorial integrity of the Republic of Turkey or the indivisible unity of the nation are prohibited, irrespective of the methods used and the intention. Any person who engages in such an activity shall be sentenced to not less than two and not more than five years' imprisonment and a fine of from fifty million to one hundred million Turkish liras."

B. Criminal case-law submitted by the Government

24. The Government supplied copies of several decisions given by the prosecutor attached to the Ankara National Security Court withdrawing charges against persons suspected of inciting people to hatred or hostility, especially on religious grounds (Article 312 of the Criminal Code) or of disseminating separatist propaganda against the indivisible unity of the State (section 8 of Law no. 3713 – see paragraph 23 above). In the majority of cases where offences had been committed by means of publications the reasons given for the prosecutor's decision included such considerations as the fact that the proceedings were time-barred, that some of the constituent elements of the offence could not be made out or that there was insufficient evidence. Other grounds included the fact that the publications in issue had not been distributed, that there had been no unlawful intent, that no offence had been committed or that those responsible could not be identified.

Furthermore, the Government submitted a number of decisions of the National Security Courts as examples of cases in which defendants accused of the above-mentioned offences had been found not guilty. These were the following judgments: **1991**/23, 75, 132, 177 and 100; **1992**/33, 62, 73, 89 and 143; **1993**/29, 30, 38, 39, 82, 94 and 114; **1994**/3, 6, 12, 14, 68, 108, 131, 141, 155, 171 and 172; **1995**/1, 25, 29, 37, 48, 64, 67, 84, 88, 92, 96, 101, 120, 124, 134 and 135; **1996**/2, 8, 18, 21, 34, 38, 42, 43, 49, 54, 73, 86, 91, 103, 119 and 353; **1997**/11, 19, 32, 33, 82, 89, 113, 118, 130, 140, 148, 152, 153, 154, 187, 191, 200 and 606; **1998**/6, 8, 50, 51, 56, 85 and 162.

As regards more particularly proceedings against authors of works dealing with the Kurdish problem, the National Security Courts in these cases reached their decisions on the ground that there had been no dissemination of "propaganda", one of the constituent elements of the offence, or on account of the scientific, historical and/or objective nature of the words used.

PROCEEDINGS BEFORE THE COMMISSION

25. Mr Arslan applied to the Commission on 7 January 1994. He complained that he had been tried twice for the same offence, in breach of his right to a fair trial as guaranteed by Article 6 § 1. Relying on Articles 6, 9 and 10 of the Convention, he further complained that his conviction had infringed his right to freedom of thought and freedom of expression, and that the Istanbul National Security Court had convicted him on the basis of only one chapter of his book and the preface, which he had not written. Lastly, he alleged that he was the victim of discrimination on the ground of political opinion, contrary to Article 14 taken in conjunction with Article 10.

26. On 14 October 1996 the Commission declared the application (no. 23462/94) admissible, with the exception of the complaint of a violation of the *ne bis in idem* principle, on the ground that that principle was enshrined in Article 4 of Protocol No. 7, which had not been ratified by Turkey. In its report of 11 December 1997 (Article 31), it examined the complaint of an infringement of the right to freedom of thought and freedom of expression from the standpoint of Article 10 alone, and expressed the opinion by thirty votes to two that there had been a violation of that provision. It also expressed the opinion that no separate issue arose under Article 14 taken in conjunction with Article 10 (thirty votes to two). The full text of the Commission's opinion and of the dissenting opinion contained in the report is reproduced as an annex to this judgment[1].

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

FINAL SUBMISSIONS TO THE COURT

27. In his memorial the applicant alleged that he was the victim of a two-fold violation of Article 6 § 1, firstly in that he had been convicted twice on account of the same act, and secondly in that the Istanbul National Security Court which had tried him was not "an independent and impartial tribunal". He also complained of a violation of Articles 9 and 10 and of Article 14 read in conjunction with Article 10, and requested the Court to award him certain sums under Article 41 of the Convention.

28. The Government asked the Court to hold:

> "1. that the present application should in the first place be declared inadmissible, under Article [35] of the Convention, for failure to exhaust domestic remedies, since the argument that application of the Prevention of Terrorism Act in the present case constituted an infringement of the applicant's freedom of expression was not raised before the Turkish courts;
>
> 2. that the applicant's conviction for incitement to violence and the commission of crimes against Turkey was necessary in a democratic society and proportionate to the legitimate aim sought to be achieved, and accordingly that it did not breach Article 10 of the Convention;
>
> 3. that it is not appropriate to apply Article [41] since there has been no violation of freedom of expression."

In support of their arguments they submitted extracts from daily newspapers published during 1991 containing reports on various events that had occurred in south-east Turkey and information about the social and political impact of those incidents inside Turkey.

AS TO THE LAW

I. SCOPE OF THE CASE

29. The scope of the case before the Court is determined by the Commission's decision on admissibility (see, for example, the Çıraklar v. Turkey judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-.., p. .., § 28, and the Janowski v. Poland judgment of 21 January 1999, *Reports* 1999-.., p. .., § 19). It follows that the Court cannot in the present case deal with the complaints relating to Article 6 § 1 (see paragraph 27 above) since the first of these was declared inadmissible by the Commission and the second was not submitted to the Commission. The

Court's examination will accordingly be confined to the complaints under Articles 9 and 10 taken separately and Article 14 taken in conjunction with Article 10.

II. ALLEGED VIOLATION OF ARTICLES 9 AND 10 OF THE CONVENTION

30. In his application Mr Arslan submitted that his conviction pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) had breached Articles 9 and 10 of the Convention. At the hearing before the Court, however, he did not object to the proposal made by the Government and the Commission that this complaint should be considered from the standpoint of Article 10 alone (see, among other authorities, the Incal v. Turkey judgment of 9 June 1998, *Reports* 1998-.., p. .., § 60), which provides:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without 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."

A. The Government's preliminary objection

31. The Government submitted, as they had done before the Commission, that the applicant had omitted to raise before the Turkish courts the complaint of a violation of his right to freedom of expression, and had therefore not exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention.

32. Mr Arslan asserted that his application satisfied the requirements of the Convention regarding admissibility.

33. The Court reiterates that the purpose of Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. This provision must be applied "with some degree of flexibility and without excessive formalism"; it is sufficient that the applicant should have raised before the national authorities, "at least in substance and in compliance with the formal requirements and time-limits

laid down in domestic law", the complaints he intends to make subsequently in Strasbourg (see, among other authorities, the Fressoz and Roire v. France judgment of 21 January 1999, *Reports* 1999-.., p. .., § 37).

In the present case the Court notes that Mr Arslan argued before the Court of Cassation, among other submissions, that his conviction seriously threatened his freedom of expression (see paragraph 20 above). It deduces from that fact, like the Commission, that he submitted to the Turkish supreme court, at least in substance, the complaint that he now raises under Article 10. The objection must accordingly be dismissed.

B. The merits of the complaint

34. Those appearing before the Court agreed that the applicant's conviction following publication of the second edition of his book entitled "History in mourning, 33 bullets" amounted to an interference with the exercise of his right to freedom of expression. Such interference breaches Article 10 unless it satisfies the requirements of the second paragraph of Article 10. The Court must therefore determine whether it was "prescribed by law", was directed towards one or more of the legitimate aims set out in that paragraph and was "necessary in a democratic society" to achieve the aims concerned.

1. "Prescribed by law"

35. Neither the applicant nor the Government expressed an opinion on the question whether section 8 of Law no. 3713 could be regarded as a "law" within the meaning of the Convention.

36. At the hearing before the Court, the Delegate of the Commission submitted that the wording of this provision was rather vague and that it might be questioned whether it satisfied the requirements of clarity and foreseeability inherent in the term "law". Noting, however, that the Commission had taken the view that section 8 provided a sufficient legal basis for the applicant's conviction, he concluded that the interference was "prescribed by law".

37. The Court takes note of the Delegate's concern about the vague wording of section 8 of Law no. 3713. However, like the Commission, it finds that since the applicant's conviction was based on section 8 of the Prevention of Terrorism Act (Law no. 3713) the resulting interference with his right to freedom of expression may be regarded as "prescribed by law", especially as the applicant did not contest that point (see paragraph 35 above).

2. Legitimate aim

38. The applicant did not express an opinion on this point.

39. The Government submitted that the aim of the interference in issue had been not only to maintain "national security" and prevent "[public] disorder", as the Commission had found, but also to preserve "territorial integrity" and national unity.

40. The Court considers that, having regard to the sensitivity of the security situation in south-east Turkey (see the Zana v. Turkey judgment of 25 November 1997, *Reports* 1997-VII, p. 2539, § 10) and to the need for the authorities to be alert to acts capable of fuelling additional violence, the measures taken against the applicant can be said to have been in furtherance of certain of the aims mentioned by the Government, namely the protection of national security and territorial integrity and the prevention of disorder and crime. This is certainly true where, as with the situation in south-east Turkey at the time of the circumstances of this case, the separatist movement had recourse to methods which rely on the use of violence.

3. "Necessary in a democratic society"

(a) Arguments of those appearing before the Court

(i) The applicant

41. The applicant submitted that his book related events that had occurred before the beginning of the conflict which was tearing south-east Turkey apart and before the creation of the PKK. He emphasised that no link could be established between publication of his book and that conflict or the organisation mentioned. His writings did not constitute propaganda in favour of a rising against the Republic, of "violent separatism" or of secessionism and did not contain any opinion tinged by hate or likely to arouse the people against the government. In any event, writing a book could not be equated with an act of terrorism.

(ii) The Government

42. The Government asserted that, as the Istanbul National Security Court had found, the applicant, in his book, had described the Turkish State as an aggressor, incited readers of Kurdish origin to take up arms and publicly defended a terrorist organisation whose objective was to destroy Turkey's territorial integrity. In support of that argument, they cited a number of extracts from the preface – which, they asserted, had not been written by Musa Anter but by the applicant – and the body of the book. They emphasised in particular that the Turkish State was described therein as terrorist and compared to Nazi Germany, and that the protest organised at

Silopi by the PKK had been presented as an uprising by the entire Kurdish population.

Article 10 left Contracting States a particularly broad margin of appreciation in cases where their territorial integrity was threatened by terrorism. What is more, when confronted with the situation in Turkey – where the PKK systematically carried out massacres of women, children, schoolteachers and conscripts – the Turkish authorities had a duty to prohibit all separatist propaganda, which could only incite violence and hostility between society's various component groups and thus endanger human rights and democracy.

Lastly, since the book had been published at a time when, taking advantage of the disorder created on the border with Iraq by the Gulf War, the PKK had been escalating its operations in south-eastern Turkey, the Government emphasised the "duties and responsibilities" which exercise of the rights protected by Article 10 carried with it and submitted in conclusion that the applicant's conviction had by no means been disproportionate to the aims pursued.

(iii) The Commission

43. The Commission likewise adverted to the "duties and responsibilities" mentioned in the second paragraph of Article 10, which made it important for people expressing an opinion in public on sensitive political issues to ensure that they did not condone "unlawful political violence". Freedom of expression nevertheless included the right to engage in open discussion of difficult problems like those with which Turkey was confronted with a view to analysing, for example, the underlying causes of the situation or to expressing opinions on possible solutions.

The Commission noted that in his book the applicant had alleged that the State was oppressing the population of Kurdish origin and trying to destroy its identity through genocide, evacuation and organised massacres and that as a result it was compelling the Kurds to fight back. Nevertheless, it could not see in the passages criticised any incitement to violence and expressed the opinion that the book essentially amounted to a description of the historical background to the current situation in south-east Turkey. The applicant's conviction therefore constituted a form of censorship, which was incompatible with the requirements of Article 10.

(b) The Court's assessment

44. The Court reiterates the fundamental principles underlying its judgments relating to Article 10, as set out in, for example, its Zana v. Turkey judgment (previously cited, p. 2547-48, § 51), and its Fressoz and Roire v. France judgment (previously cited, p. .., § 45).

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

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

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

45. The book is in the form of a literary historical narrative. It essentially relates events which took place in south-east Turkey, at Silopi in the Mardin region, during which a number of people died. In the passages referred to by the public prosecutor and the Istanbul National Security Court the Turks are described as invaders and persecutors who formed Turkey by conquering the lands of other peoples. Among these, only the Kurdish people, it is claimed, have not succeeded in freeing themselves from the Turkish yoke. As for the events at Silopi, the author presents these as a massacre of peasants by the authorities, who had been prompted by a feeling of defeat

caused by the failure of their action against the PKK. In that connection, he contends that the State intended to begin at Silopi to implement the "final solution" – genocide. He also asserts that the "resistance" of the Kurdish people at Silopi announced the "joyful news of the day when they would tear down the fortress of violence of Turkish chauvinism" (see paragraphs 10 and 17 above).

It is obvious that this was not a "neutral" description of historical facts and that through his book the applicant intended to criticise the action of the Turkish authorities in the south-east of the country and to encourage the population concerned to oppose it. Furthermore, the undeniable virulence of the style confers a certain amount of vehemence to this criticism.

46. The Court recalls, however, that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest (see the Wingrove v. the United Kingdom judgment of 25 November 1996, *Reports* 1996-V, p. 1957, § 58). Furthermore, the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries. Nevertheless, it certainly remains open to the competent State authorities to adopt, in their capacity as guarantors of public order, measures, even of a criminal-law nature, intended to react appropriately and without excess to such remarks (see the Incal v. Turkey judgment of 9 June 1998, *Reports*-IV, p. 1567, § 54). Finally, where such remarks incite to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression.

47. The Court will take into account the background to the cases submitted to it, particularly problems linked to the prevention of terrorism (see the above-mentioned Incal judgment, p. 1568, § 58). On that point, it takes note of the Turkish authorities' concern about the dissemination of views which they consider might exacerbate the serious disturbances that have been going on in Turkey for some fifteen years (see paragraph 40 above). In that connection, it should be noted that the second edition of the book was published shortly after the Gulf War, at a time when, fleeing repression in Iraq, a large number of people of Kurdish origin were thronging at the Turkish border.

48. The Court observes, however, that the applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on "national security", public "order" and "territorial integrity" to a substantial degree. The Court notes in addition that although certain particularly acerbic passages in the book paint an extremely negative picture of the population of Turkish origin and give the narrative a hostile tone, they do not constitute an incitement to violence, armed resistance or an uprising; in the Court's view this is a factor which it is essential to take into consideration.

49. Furthermore, the Court is struck by the severity of the penalty imposed on the applicant – particularly the fact that he was sentenced to one year and eight months' imprisonment – and the persistence of the prosecution's efforts to secure his conviction. It observes that he had already been convicted by the National Security Court on the basis of the former Article 142 of the Criminal Code (judgment of 29 March 1991; see paragraph 12 above) when the book was first published. As that provision had been repealed, this conviction was declared null and void by a judgment of the same court on 3 May 1991 (see paragraph 13 above). Almost as soon as the book was republished (on 21 July 1991) fresh proceedings were brought against the applicant, this time on the basis of section 8 of Law no. 3713 (see paragraphs 14-21 above).

The Court notes in that connection that the nature and severity of the penalties imposed are also factors to be taken into account when assessing whether the interference was proportionate.

50. In conclusion, Mr Arslan's conviction was disproportionate to the aims pursued and accordingly not "necessary in a democratic society". There has therefore been a violation of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLE 10

51. The applicant submitted that he had been prosecuted on account of his writings merely because they were the work of a person of Kurdish origin and concerned the Kurdish question. He argued that on that account he was a victim of discrimination contrary to Article 14 of the Convention read in conjunction with Article 10. Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in the 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."

52. The Government submitted that Mr Arslan's conviction was based solely on the separatist content and violent tone of the writings concerned.

53. The Commission expressed the opinion that no separate issue arose under Article 14 read in conjunction with Article 10.

54. Having regard to its conclusion that there has been a violation of Article 10 taken separately (see paragraph 50 above), the Court does not consider it necessary to examine the complaint under Article 14.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

55. The applicant claimed just satisfaction under Article 41 of the Convention, which provides:

> "If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

56. The applicant claimed 400,000 French francs (FRF) as compensation for pecuniary damage resulting from loss of earnings due to his imprisonment. In that connection, he asserted that he worked as a journalist for a number of press agencies and a German television station, and that he had received from the latter remuneration of 32,000 German marks (DEM) in 1991, DEM 37,000 in 1992 and DEM 24,000 for the first six months of 1993.

57. The Government replied that there was no causal connection between the alleged violation of the Convention and the pecuniary damage complained of. In any event, Mr Arslan had not furnished evidence of the income he had referred to.

58. The Court finds that there is not sufficient evidence of a causal connection between the violation of Article 10 it has found and the loss of earnings alleged by the applicant. Moreover, no documentary evidence has been submitted in support of the applicant's claims in respect of pecuniary damage. The Court cannot therefore allow them.

B. Non-pecuniary damage

59. Mr Arslan sought payment of FRF 100,000 for non-pecuniary damage.

60. The Government asked the Court to hold that a finding that there had been a violation would constitute sufficient just satisfaction.

61. The Court considers that the applicant must have suffered distress on account of the facts of the case. Ruling on an equitable basis, it awards him compensation in the sum of FRF 30,000 under that head.

C. Costs and expenses

62. The applicant claimed FRF 105,000 for his costs and expenses, comprised of FRF 40,000 for translations, faxes, stationery and work carried out during the proceedings in the Turkish courts and FRF 65,000 for his lawyer's fees (130 hours of work at FRF 500 per hour). He supplied various documents in support of his claims and specified that he had taken inflation into account when calculating the amounts he sought.

63. The Government found these sums excessive. They submitted in particular that the documentary evidence supplied by the applicant did not accurately reflect his claims and that the fees requested exceeded the rates normally applied in Turkey in similar cases.

64. The Court notes that the applicant's lawyer has been associated with the preparation of other cases before the Court concerning complaints under Articles 6 and 10 of the Convention based on similar facts. Deciding on an equitable basis and according to the criteria laid down in its case-law (see, among many other authorities, Eur. Court HR, Nikolova v. Bulgaria judgment of 25 March 1999, *Reports* 1999-.., p. .., § 79), the Court awards the applicant a total sum of FRF 15,000.

D. Default interest

65. The Court deems it appropriate to adopt the statutory rate of interest applicable in France at the date of adoption of the present judgment, namely 3.47% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds* that no separate issue arises under Articles 10 and 14 of the Convention read in conjunction with each other;

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

5. *Dismisses* the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg on 8 July 1999.

Luzius WILDHABER
President

Paul MAHONEY
Deputy Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) joint concurring opinion of Mrs Palm, Mrs Tulkens, Mr Fischbach, Mr Casadevall and Mrs Greve ;
(b) concurring opinion of Mr Bonello.

L. W.
P.J. M.

JOINT CONCURRING OPINION OF JUDGES PALM, TULKENS, FISCHBACH, CASADEVALL AND GREVE

We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach as set out in the dissenting opinion of Judge Palm in the case of Sürek v. Turkey (no. 1).

In our opinion the majority assessment of the Article 10 issue in this line of cases against the respondent State attaches too much weight to the form of words used in the publication and insufficient attention to the general context in which the words were used and their likely impact. Undoubtedly the language in question may be intemperate or even violent. But in a democracy, as our Court has emphasised, even "fighting" words may be protected by Article 10.

An approach which is more in keeping with the wide protection afforded to political speech in the Court's case-law is to focus less on the inflammatory nature of the words employed and more on the different elements of the contextual setting in which the speech was uttered. Was the language intended to inflame or incite to violence? Was there a real and genuine risk that it might actually do so? The answer to these questions in turn requires a measured assessment of the many different layers that compose the general context in the circumstances of each case. Other questions must be asked. Did the author of the offending text occupy a position of influence in society of a sort likely to amplify the impact of his words? Was the publication given a degree of prominence either in an important newspaper or through another medium which was likely to enhance the influence of the impugned speech? Were the words far away from the centre of violence or on its doorstep?

It is only by a careful examination of the context in which the offending words appear that one can draw a meaningful distinction between language which is shocking and offensive – which is protected by Article 10 – and that which forfeits its right to tolerance in a democratic society.

CONCURRING OPINION OF JUDGE BONELLO

I voted with the majority to find a violation of Article 10, but I do not endorse the primary test applied by the Court to determine whether the interference by the domestic authorities with the applicant's freedom of expression was justifiable in a democratic society.

Throughout these, and previous Turkish freedom-of-expression cases in which incitement to violence was an issue, the common test employed by the Court seems to have been this: if the writings published by the applicant supported or instigated the use of violence, then his conviction by the national courts was justifiable in a democratic society. I discard this yardstick as insufficient.

I believe that punishment by the national authorities of those encouraging violence would be justifiable in a democratic society only if the incitement were such as to create 'a clear and present danger'. When the invitation to the use of force is intellectualised, abstract, and removed in time and space from the foci of actual or impending violence, then the fundamental right to freedom of expression should generally prevail.

I borrow what one of the mightiest constitutional jurists of all time had to say about words which tend to destabilise law and order: "We should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country"[1].

The guarantee of freedom of expression does not permit a state to forbid or proscribe advocacy of the use of force except when such advocacy is directed to inciting or producing imminent lawlessness and is likely to incite or produce such action[2]. It is a question of proximity and degree[3].

[1] Justice Oliver Wendell Holmes in *Abrahams v. United States,* 250 U.S. 616 (1919) at 630.
[2] *Brandenburg v. Ohio*, 395 U.S. 444 (1969) at 447.
[3] *Schenck v. United States* 294 U.S. 47 (1919) at 52.

In order to support a finding of clear and present danger which justifies restricting freedom of expression, it must be shown either that immediate serious violence was expected or was advocated, or that the past conduct of the applicant furnished reason to believe that his advocacy of violence would produce immediate and grievous action[1].

It is not manifest to me that any of the words with which the applicant was charged, however pregnant with mortality they may appear to some, had the potential of imminently threatening dire effects on the national order. Nor is it manifest to me that instant suppression of those expressions was indispensable for the salvation of Turkey. They created no peril, let alone a clear and present one. Short of that, the Court would be subsidising the subversion of freedom of expression were it to condone the conviction of the applicant by the criminal courts.

In summary "no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose, through discussion, the falsehood and the fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence".[2]

[1] *Whitney v. California* 274 U.S. 357 (1927) at 376.
[2] Justice Louis D. Brandeis, in *Whitney v. California*, 274 U.S. 357 (1927) at 377.