

Kurdish Human Rights Project

ÖZGÜR GÜNDEM v. TURKEY: Violations of Freedom of Expression

A KURDISH HUMAN RIGHTS PROJECT CASE REPORT

DECEMBER 2000

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**ÖZGÜR GÜNDEM v. TURKEY:
Violations of Freedom of Expression**

December 2000

Institut kurde de Paris

TABLE OF CONTENTS

FOREWORD	i
INTRODUCTION	1
Summary of <i>Özgür Gündem v. Turkey</i>	3
The Facts	
The facts as presented by the applicants	3
The facts as presented by the Government	4
Proceedings before the domestic authorities	6
The findings of fact by the European Commission of Human Rights	7
The findings of fact by the European Court of Human Rights	9
The Legal Proceedings	
Chronology of events, including legal proceedings	10
How the case was brought before the European Commission and Court of Human Rights	11
The investigation under the old procedure	11
Preliminary objections to the Court's jurisdiction	12
The Applicants' Complaints under the European Convention on Human Rights	
Article 10: Right to freedom of expression	13
Article 14: Prohibition of discrimination	15
Article 1 of Protocol No. 1: Right to peaceful enjoyment of possessions	15
Just satisfaction: Compensation under Article 41	16
AFTERWORD	18
APPENDICES	
Appendix A Decision of the European Commission of Human Rights (Article 31 Report), including the Admissibility Decision	
Appendix B Judgment of the European Court of Human Rights	
Appendix C The European Court of Human Rights: System and Procedure	

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FOREWORD

On 16 March 2000 the European Court of Human Rights delivered its judgment in the case of *Özgür Gündem v. Turkey*, a ground-breaking case in which it found Turkey to have violated freedom of expression. The case related to a sustained and deliberate campaign against *Özgür Gündem*, a daily Turkish language newspaper reflecting Turkish Kurdish opinion, and many people associated with it. The brutal campaign included killings, violent attacks, raids on the office and criminal prosecutions of the newspaper and its employees, and eventually resulted in the closure of the newspaper April 1994.

For KHRP, the judgment represents the culmination of many years of work on press freedom in Turkey in general, and for *Özgür Gündem* in particular. We have brought a number of applications related to the persecution of *Özgür Gündem* to the European Court of Human Rights, including the one that is the subject of this Case Report. We have also sent delegations to observe the trials that resulted from the criminal prosecutions of those involved in *Özgür Gündem*, published several reports on violations of press freedom and *Özgür Gündem* and carried out other public awareness activities aimed at drawing attention to the issue of freedom of expression in Turkey.¹

Özgür Gündem v. Turkey was brought to the European Court of Human Rights as part of the ongoing Litigation Programme of the Kurdish Human Rights Project. KHRP works for the protection of human rights of all persons living within the Kurdish areas and since 1992 has assisted in numerous cases before the European Commission and Court of Human Rights, many of which have created new precedents for the Court.²

¹ See for instance, *Freedom of the Press in Turkey: the case of Özgür Gündem*, by KHRP, Article 19, International Centre on Censorship and Medico International, 1993 and *Censorship and the Rule of Law: Violations of press and attacks on Özgür Gündem*, by KHRP in conjunction with Article 19, International Centre on Censorship, Medico International, and the Bar Human Rights Committee of England and Wales, 1994, *Yasa v. Turkey and Tekin v. Turkey: Torture, Extra-Judicial Killing and Freedom of Expression in Turkey, A Case Report*, April 1999.

² Other KHRP cases which have been decided by the Court to date are: *Akdivar v. Turkey*, (1997) 23 E.H.R.R. 143, see KHRP Case Report: *Akdivar v. Turkey: The Story of Kurdish Villagers Seeking Justice in Europe* (London 1996); *Aksoy v. Turkey* (1996) 23 E.H.R.R. 553; *Aydin v. Turkey*, Judgment of 25 September 1997, see KHRP Case Report: *Aksoy v. Turkey; Aydin v. Turkey: A Case Report on the Practice of Torture in Turkey* (London 1997); *Mentes and Others v. Turkey*, Judgment of 28 November 1997, see KHRP Case Report: *Mentes and Others v. Turkey: A KHRP Case Report on Village Destruction in Turkey* (London 1998); *Gündem v. Turkey*, Judgment of 25 May 1998, *Selcuk and Asker v. Turkey*, Judgment of 24 April 1998, see KHRP Case Report: *Gündem v. Turkey; Selcuk and Asker v. Turkey: A Case Report* (London 1998); *Kurt v. Turkey*, Judgment of 25 May 1998; *Kaya v. Turkey*, Judgment of 19 February 1998, see KHRP Case Report: *Kurt v. Turkey; Kaya v. Turkey: A Case Report* (London 1999); *Yasa v. Turkey*, Judgment of 2 September 1998; *Tekin v. Turkey*, Judgment of 9 June 1998, see KHRP Case Report: *Yasa v. Turkey and Tekin v. Turkey: Torture, Extra-Judicial Killing and Freedom of Expression in Turkey - A Case Report* (London 1999); *Ergi v. Turkey*, Judgment of 28 July 1998, *Aytekin v. Turkey*, Judgment of 23 September 1998, see KHRP Case Report: *Ergi v. Turkey; Aytekin v. Turkey: Human Rights and Armed Conflict in Turkey* (London 1999), *Cakici v. Turkey* (23657/94) and *Tanrikulu v. Turkey* (23763/94) both decided on 8 July 1999, see KHRP Case Report: *Tanrikulu v. Turkey, Cakici v. Turkey: Violations of the Right to Life* (London May 2000); *Kaya v. Turkey* and *Kilic v. Turkey*, both decided on 28 March 2000; *Ertak v. Turkey*, Judgment of 9 May 2000; *Timurtas v. Turkey*, Judgment of 13 June 2000; *Salman v. Turkey* and *Ilhan v. Turkey*, both decided on 26 June 2000; *Aksoy v. Turkey* and *Akkoc v. Turkey*, both decided on 10 October 2000; *Tas v. Turkey*, Judgment of 14 November 2000; *Bilgin v. Turkey*, Judgment of 16 November 2000.

The co-operation of many individuals and organisations is essential for the effective conduct of litigation before the Strasbourg organs, and KHRP works closely with human rights organisations both in Turkey³ and elsewhere.⁴ We have assisted more than 400 individuals with their complaints before the European human rights system, thereby obtaining some form of justice for the individuals concerned and building up pressure on Turkey to reform. A case like *Özgür Gündem*, which involves a large number of individuals and a wide range of incidents, and in which the Court condemned a whole pattern of behaviour, has a wider significance and sends a strong signal that Turkey's behaviour towards its Kurdish population is unacceptable. In addition to assisting applicants to bring their cases, KHRP follows up the enforcement of judgments and monitors their effect in bringing about change in Government policy and practice in Turkey.

Closely linked to the Litigation Programme are KHRP's training projects which are aimed at transferring information, experience and skills to lawyers and human rights organisations in the Kurdish regions. Making available legal texts and materials in languages used in the Kurdish regions is an important part of these projects. We are delighted that, for the first time, this case report will be published in Turkish as well as in English. Our plan is that this will be the first of many translations of KHRP case reports into Turkish and other languages.

In addition to litigation and training, KHRP also works to raise awareness of the human rights violations directed against Kurds in all the Kurdish regions, primarily Turkey, Syria, Iraq, Iran, and parts of the former Soviet Union. We do this through fact-finding and trial observation missions, research and publications, and other public awareness and communications strategies.

This Case Report includes the Report of the Commission and the Judgment of the Court in the case of *Özgür Gündem*. It also contains an introduction outlining the facts, the legal proceedings and the applicant's complaints under the Convention. This is intended to provide a convenient summary and brief analysis of the main issues arising in the case.

Finally, we would like to thank Nusrat Chagtai who drafted this report while interning at KHRP during this year, together with Bill Bowring and Osman Ergin who represented the applicants with us.

Kerim Yildiz
Executive Director
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³ For example, the Human Rights Association of Turkey (IHD) and the Bar Associations in Turkey.

⁴ For example, the Law Society of England and Wales, the Bar Human Rights Committee of England and Wales, and the Human Rights Committee of the Norwegian Bar Association.

INTRODUCTION

Focused as it was on the right to freedom of expression as set out in Article 10 of the European Convention of Human Rights, the case of **Özgür Gündem v. Turkey** serves to highlight the problem of media repression in Turkey and demonstrates the extreme measures which the Turkish Government is prepared to take in order to ensure that the freedom of the Kurdish population to impart and receive information is severely restricted.

The Kurds of Turkey, now numbering more than 15 million, have long been denied basic political, cultural and linguistic rights and their status as a national minority in Turkey has not been recognised. On the contrary, Turkey's constitution and law are based on the idea that all identities must be subsumed under a single Turkish identity. Official policy denies the separate identity of the Kurds and expressions of Kurdish identity are severely restricted. Anyone who calls for democratic and constitutional rights for Kurds or even raises the Kurdish issue in public is liable to be labelled as separatist and prosecuted under the draconian Anti-Terror Law and other legislation. The media is a particular target for such persecution, and the campaign against *Özgür Gündem* must be viewed in this context.

This persecution and other official acts against the Kurds clearly violate international human rights standards. The fact that Turkey is a party to the European Convention on Human Rights has given victims of these violations an avenue for redress in a situation where they are unable to obtain an effective remedy domestically. To date, the European Court of Human Rights has handed down more than 50 judgments against Turkey, the majority of which have involved violations against Kurdish people or those sympathetic towards them, including political parties and the media. The catalogue of European Court of Human Rights judgments against Turkey in relation to its treatment of Kurds covers disappearance, state responsibility for killings, village destruction, torture and ill treatment, inadequate investigations and violations of freedom of expression and association.

The *Özgür Gündem* case highlights the great lengths to which the Turkish Government has gone in order to ensure that the current situation in Southeast Turkey is not brought to light. Not only were legal proceedings instigated which resulted in prosecutions, seizures of documents and publications, and finally the closing down of *Özgür Gündem*, but a large number of individuals associated with *Özgür Gündem* were subjected to acts of brutal violence including attacks, threats of violence, arson attacks and the unlawful killing of many journalists.

Özgür Gündem, a major newspaper published in Istanbul, sought to reflect the opinions of the Kurdish people in Turkey. The first issue of *Özgür Gündem*, "Free Agenda" in Turkish, was published on 31 May 1992. It was Kurdish owned and written in the Turkish language. It had a predominantly left-wing orientation and was pro-Kurdish in its cultural and political outlook. From the outset the authorities' attitude towards the newspaper was hostile, and the legal proceedings and violence against those connected with it began immediately and were unremitting. For instance, during a period of 68 days from 26 April 1993, 41 issues of the newspaper were ordered to be seized. For the preceding four and a half months, it was forced to cease production altogether. Seven people connected with the newspaper were unlawfully killed and dozens were detained and tortured. Production and distribution were prevented by arson attacks, threats and intimidation, raids and confiscation, directed against many including newsagents and distributors. This sustained campaign is described in the Report of the Commission, which is appended to this Case Report.

The co-operation of many individuals and organisations is essential for the effective conduct of litigation before the Strasbourg organs, and KHRP works closely with human rights organisations both in Turkey³ and elsewhere.⁴ We have assisted more than 400 individuals with their complaints before the European human rights system, thereby obtaining some form of justice for the individuals concerned and building up pressure on Turkey to reform. A case like *Özgür Gündem*, which involves a large number of individuals and a wide range of incidents, and in which the Court condemned a whole pattern of behaviour, has a wider significance and sends a strong signal that Turkey's behaviour towards its Kurdish population is unacceptable. In addition to assisting applicants to bring their cases, KHRP follows up the enforcement of judgments and monitors their effect in bringing about change in Government policy and practice in Turkey.

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The Turkish Government's campaign against the newspaper is not just an issue of freedom of expression. The cases of some of the individuals targeted during the campaign against *Özgür Gündem* have also been the subject of separate proceedings before the European Court of Human Rights. These include the cases of Kemal Kiliç, Ferhat Tepe, Haşim Yaşa and Salih Tekin. In *Kiliç v. Turkey*, the Court found Turkey responsible for unlawful killing. In the case of *Tekin v. Turkey*, the Court held that the applicant had suffered inhuman and degrading treatment while in police custody in violation of Article 3. He had been employed by *Özgür Gündem* as a journalist.

The series of legal actions instigated by the authorities against the newspaper were based mainly on provisions of the Constitution, the Anti Terror Law and the Press Law.¹ These provisions allow suspension and closure of publications on certain grounds including threat to the internal or external security of the State, and spreading separatist propaganda. The State Security Court, in upholding a number of confiscation decisions, ruled that *Özgür Gündem* had attempted to portray Turkish citizens as Kurds, which was an "act of separatism". The Court also found that the use of the words "Kurd" and "Kurdistan" in the newspaper was a breach of the provisions of the Constitution that define Turkey as a unitary state.

Although there have been a large number of judgments against Turkey, at least fourteen of which involved the freedom of expression, the case of *Özgür Gündem* was unique in that it was the only freedom of expression case where the Commission and Court examined a series of events as a whole and concluded that the effect of these events had hindered the right to freedom of expression. In previous cases regarding Article 10 of the Convention, the Strasbourg institutions had dealt with individual publications, speeches or interviews. Furthermore, while the Court had previously found that Contracting States must comply with positive obligations inherent in the rights conferred by the Convention, in *Özgür Gündem* it was the first time that the Court has explicitly found a positive obligation to exist under Article 10. In doing so, the Court recognised that freedom of expression is so important to establishing a functioning democracy, that positive measures of protection may be required in particular circumstances. The judgment also underlined the important principle that the positive obligation may apply not just in relation to State interference with rights, but also where the interference is caused by private individuals or entities. The failure of the authorities to conduct adequate investigations and provide protection to *Özgür Gündem* and those associated with it, meant that the Government had not complied with this positive obligation.

This judgment will also have important wider implications wherever there is a serious threat to freedom of expression, for example in the form of a sustained campaign of harassment. This need not be restricted to newspapers, but could apply to all forms of expression, including actions by public demonstrators, trade unions or political associations, and could also apply outside the field of political expression to include, for example, artistic or cultural expression.

¹ Anti Terror Law No. 3713 of 12 April 1991 and Press Law No. 5680 of 24 July 1950. Relevant sections of these laws as well as of the Turkish Constitution and the Criminal Code are reproduced in the Report of the Commission, Appendix A, to this Case Report, at paragraphs 104-112.

SUMMARY OF ÖZGÜR GÜNDEM V. TURKEY

The case of *Özgür Gündem* concerned the right to freedom of expression under Article 10 of the European Convention of Human Rights. The applicants alleged that the Turkish Government had been responsible for a series of violent attacks, including extra-judicial killings and threats on individuals associated with the newspaper. *Özgür Gündem* had also faced a series of legal proceedings and prosecutions which, it was argued, aimed to hinder publication of the newspaper.

On 16 March 2000, the European Court of Human Rights delivered its judgment in the case and held unanimously that the Government was under a positive obligation under Article 10 to take measures of protection. It found that the authorities had failed to comply with this positive obligation. It further found that the Government had been responsible for serious interference with the applicants' freedom of expression. Such interference, though "prescribed by the law", was found to be disproportionate and unjustified.

THE FACTS

The facts as presented by the applicants

Özgür Gündem ("Free Agenda") was a daily Turkish language newspaper which had been published in Istanbul since 30 May 1992, with a national circulation of some 30,000 and a further international circulation of 10,000. It aimed to report news of interest to Turkish Kurds and to reflect Turkish Kurdish opinion.

The applicants were three Turkish nationals, namely, Ms. Gurbetelli Ersoz ("the first applicant"), Mr. Fahri Ferda Cetin ("the second applicant"), and Mr. Yasar Kaya ("the third applicant"). The fourth applicant was Ulkem Basın ve Yayıncılık Sanayi Ticaret Limited, a company based in Istanbul ("the applicant company"). The first and second applicants were editor-in-chief and assistant editor of the newspaper respectively. The third applicant and the applicant company were owners of the newspaper.

During the period September 1991 to August 1993, there were seven unlawful killings of journalists employed by *Özgür Gündem*. In addition, distribution of the newspaper was obstructed or prevented by arson attacks and threats. Police officers had, on a number of occasions, threatened and beaten those selling the newspaper. Some newsagents had died in circumstances which indicated the complicity or acquiescence of the Turkish authorities. During the period November 1992 to October 1993, it was recorded that there were eight cases of arson attacks, ten cases of physical attacks, four murders and thirteen cases of threats, all relating to distributors or sellers of *Özgür Gündem*.

The newspaper was also subject to a number of legal proceedings which resulted in numerous confiscation orders. From 31 May 1992 to April 1993, confiscation orders were issued against 39 out of the 228 issues of *Özgür Gündem*. Between 15 January 1993 and 26 April 1993, the newspaper was forced to cease publication and from 26 April 1993, for a period of 68 days, 41 issues of *Özgür Gündem* were ordered to be seized. In early 1993, a delegation from the newspaper visited the Interior Minister, İsmet Sengun, and the Government spokesman, Akin Gonen, and fully explained the persecution being suffered by the newspaper. However, following the meeting, three more persons associated with the newspaper were killed. Requests for protection were also made on a number of other occasions.

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

On 12 July 1993, the Istanbul Court of First Instance banned *Özgür Gündem* on the ground that "the Chief Editor of the newspaper Davut Karadag did not communicate his new address to the Istanbul Governate". On 15 July 1993, Mr. Karadag was arrested when attending the State Security Court to give evidence for thirty articles published which were said to have "disseminated separatist propaganda". On 15 September 1993, Mr Yasar Kaya was arrested and subsequently charged for making an allegedly illegal speech in Iraq. By December 1993, there were 170 ongoing prosecutions of *Özgür Gündem* and its employees, all based upon similar grounds.

The current case concerned an article by Mr. Ahmet Alkan, published on 24 September 1992, entitled "From the dialogue of arms to political propaganda". *Özgür Gündem* was charged with "making separatist propaganda" and "praising the PKK", contrary to Articles 7 and 8 of the Anti-Terror Law. On 15 July 1993 the State Prosecutor brought further charges against the newspaper under Supplementary Article 2 of the Press Law, so that if it was found guilty of offences classified as being against national security or general morality as defined in Supplementary Article 1, the Court could close it for three days to one month, and indefinitely thereafter.

Twelve employees of *Özgür Gündem* were remanded in custody and one, Ms. Aysel Malkac, a reporter in Istanbul, was abducted by plain-clothes police on 7 August 1993 just after she left the *Özgür Gündem* building. It is feared by Amnesty International and others that she may have been killed.

The facts as presented by the Government

The Government claimed that the criminal incidents against the workers of *Özgür Gündem* were the result of multi-terrorist acts. It denied that any Government agent or officer was involved in these incidents.

With regard to the allegations concerning the various deaths, arson attacks and threats, the Government stated either that:

1. the incidents were being investigated; or
2. there was insufficient evidence to take any further steps; or
3. trials were pending against suspects who were members of the Hizbullah organisation; or
4. no complaint had ever been made.

With regard to the allegations that requests for protection of *Özgür Gündem* staff were refused, the Government claimed that it received no such requests. It stated that the police headquarters in Diyarbakir received a faxed message on 2 December 1992 from Merdan Yanardag, editor of *Özgür Gündem*, and a representative of Yasar Kaya, requesting security measures to be taken while *Özgür Gündem* was being distributed. As a result, the employees of two companies dealing with distribution were escorted by security officers to the distribution stores. The Government claimed that security measures were also taken

by the police while delivering newspapers to the newsagents. It stated that no other requests were received from persons working for the newspaper.

The Government further claimed that following the explosion at the *Özgür Ülke* (*Özgür Gündem's* successor) office on 2 December 1994 and on request of Osman Ergin, lawyer for the owner of the newspaper, security measures were taken. No further incidents occurred before the newspaper decided to close down.

In relation to the legal proceedings against the newspaper and its staff, the Government submitted that at the time of the application, 69 cases relied on by the applicants regarding legal proceedings against *Özgür Gündem* and its journalists were pending. By 20 October 1995, 39 measures had been approved by the Court of Cassation, one decision was reversed and 29 were pending. The Public Prosecutor's requests for closure of the newspaper, according to Supplementary Article 2 of the Press Code No. 5680, were not considered or decided in 38 cases; they were rejected by the courts in nine cases; and a temporary closure decision was given in 20 cases. Of these 20 closure decisions, three were for one month, 15 decisions were for 15 days and two decisions were for ten days.

In its decision of 14 March 1994, the State Security Court No. 2 of Istanbul stated that the mere use of the words "Kurds" or "Kurdistan" in a newspaper article does not violate a penal rule. The Court concluded that "although in the two news articles the words 'Kurds' and 'Kurdistan' were used frequently, the theme and the context of the articles as a whole clearly showed that they were written with the aim of informing the public" and that therefore, "the elements of separatist propaganda were not present". The Court decided that the journalists Kaya and Karadag should be acquitted of charges of separatist propaganda.

In the State Security Court No. 2 decision of 1 September 1994, regarding an article published in *Özgür Gündem* on 25 July 1993, the Court discussed the application of Article 10 of the European Convention on Human Rights. It stated that although the Convention is accepted as an instrument of national law, conditions in the Southeast of Turkey oblige the court to consider the clear and present danger created by the publication in question as inciting hatred among members of society and thus violating Article 8 of the Anti-Terrorism Act.

In a letter from the Public Prosecutor of the Istanbul State Security Court dated 11 November 1994, it was stated that none of the judgments pronounced against *Özgür Gündem* had been executed.

The Government also alleged that *Özgür Gündem* acted as the propaganda tool of the PKK. They referred to a statement of the first applicant dated 21 December 1993, taken by the police, which stated that he had been convicted of having been involved in PKK activities and sentenced to ten years imprisonment. It further stated that most of the employees of the newspaper had been involved in the activities of the PKK and had served terms of imprisonment as a result. The Government also referred to a statement of the second applicant, which stated that documents signed by ARGK (the military wing of the PKK) and materials about the soldiers killed were received through their reporters in the Southeast who had contacts with the PKK.

The Government relied on the argument that the eastern part of Turkey was under a State of Emergency and that the PKK had been carrying out terrorist acts in order to secure a Kurdish State. These acts amounted to crimes against the integrity and indivisibility of the Turkish State.

The Government alleged that the third applicant, Mr. Kaya, was the spokesman of a political party which had been closed by the Constitutional Court. It claimed that the ideology behind the newspaper was the creation of a Kurdish State on Turkish territory and that limitations to the freedom of expression could be accepted where such expression encouraged separatism. The Government referred to the Turkish Press Code, and in particular the provisions that allow for free press but also the limitations which will be applied where any news or articles threaten the indivisible integrity of the State.

The Government also alleged that the applicants had not exhausted domestic remedies, as some actions were still pending in the Turkish Courts and further, that they were not victims of the alleged violations of the Convention.

Proceedings before the domestic authorities

The applicants and others acting for *Özgür Gündem* made complaints and requested protection pursuant to the Turkish Constitution. Various letters were written to provincial governors and ministers, but no replies were received.

On 23 December 1992, petitions were presented by *Özgür Gündem*'s Sanliurfa Representatives. They requested measures be taken to ensure the safety of distributors after receiving threats. On 30 December 1992, Ziya Cosckum, Deputy Governor, replied that the application dated 23 December 1992 had been examined. However, as no threat or attack had occurred on newspaper distribution vehicles, the application was not deemed to be appropriate and therefore no protection was assigned to any vehicles in the city and towns of the province. On 18 February 1993, Kemal Kilic was killed.

On 1 March 1993, a petition was presented by Baaayram Balci, Sanliurfa provincial correspondent of *Özgür Gündem*, to the Provincial Office of Sanliurfa. Mr. Balci reported that following the killing of Kemal Kilic, he had been followed by a white Renault. He reported the registration number to the Security Directorate, and asked them whether this was a police car. He received a reply that the car's registration number was false and belonged to a tractor. On 28 February 1993 at 12:30 p.m. and 3:20 p.m., Mr. Balci was threatened by telephone by a person who said, "You will die soon." He requested all measures to ensure his safety. His petition was registered but he received no reply.

On 8 July 1993, a petition was presented on behalf of Bayram Balci to the Sanliurfa Governate. The Governate was informed that Mr. Balci had received death threats, including a telephone call on 7 July 1993 saying that he would be killed. Mr. Balci was in constant receipt of telephone threats at his home and at work and he was from time to time followed and watched. However, the Governate refused to take any steps to secure his safety.

The applicants submitted that many persons had subsequently received threats to their lives but had not applied to the State for protection due to the lack of response to the petitions and letters referred to.

The applicants had made 20 applications to various levels of administration of the Turkish State, which were either refused or ignored.

The findings of fact by the European Commission of Human Rights

Following consultation with the parties, the Commission decided not to hear oral evidence from the witnesses because the allegations were of such a width and character that they would not be easily clarified by oral testimony. It therefore decided to examine the applicants' allegations on the basis of the documentary evidence and the parties' submissions in response to questions posed by the Commission.

Regarding documentary evidence, the Commission considered domestic court judgments and a list of prosecutions submitted by the Government, as well as a list of proceedings and decisions provided by the applicants. The applicants also submitted a number of articles from *Özgür Gündem* which had been the subject of prosecutions.

The applicants also provided the Commission with a copy the Susurluk Report. This was a report prepared at the request of the Prime Minister by Mr. Kutlu Savas, Vice President of the Board of Inspectors within the Prime Minister's Office. The report described a number of events which had occurred mainly in Southeast Turkey, including killings and other acts of intimidation directed against those connected with *Özgür Gündem*. It confirmed that unlawful dealings had taken place between political figures, government institutions and clandestine groups, and concluded that there was a connection between the fight to eradicate terrorism in the region and the underground relations that had been formed as a result, particularly in the drug trafficking sphere. The report also put forward a number of recommendations including that the report be forwarded to the appropriate authorities for proceedings to be undertaken.

The Commission did not examine the application of the first applicant, due to her death in the autumn of 1997. It received no information to the effect that her heirs or close relatives wished to pursue her complaints.

Regarding the other three applicants, the Commission recalled that the second and third applicants were taken into detention and criminal charges were brought against them in an indictment dated 5 April 1994, in which it was alleged, inter alia, that they had assisted the PKK by producing propaganda. It also noted that the third applicant was the defendant, as publisher, in over 70 prosecutions brought in the Istanbul State Security Court. The Commission further found that numerous editions of the newspaper were confiscated and that it was subject to a number of closure orders.

It was considered unnecessary to examine all the killings, assaults, attacks and threats separately. Instead, the Commission interpreted the application as concerning a consistent pattern of actions taken over a relatively long period of time which aimed at preventing *Özgür Gündem* from being published. The Commission was satisfied that there was a disturbing pattern of attacks on persons connected with *Özgür Gündem* and that the newspaper's journalists were a particular target for unlawful attacks. It considered that the production and distribution of the newspaper was restricted by this pattern of events.

The Commission noted that the difficulties facing *Özgür Gündem* were drawn to the attention of the authorities, in particular, by the third applicant in letters to the Prime Minister and other ministers and to the Governor of the Emergency Region. Other persons had complained to the Governors of Batman, Sanliurfa, Elazig, Nusaybin and Istanbul. The Commission also found that meetings took place between spokesmen for the newspaper and the Minister of the Interior which included requests for protection. It however found no indication that any investigation was undertaken by the authorities in respect of allegations that the newspaper was being subject to a campaign of violence and harassment.

The Commission also referred to the Susurluk Report and noted that it made critical comment on the way in which the rule of law was undermined in Southeast Turkey, by allowing village protectors, confessors, groups associated with JITEM (Gendarme Intelligence Combating Terrorism) to operate with impunity and in some cases permitting security officers to pursue their own objectives according to their own methods. The Report stated that this situation was known to the authorities. The Commission, however, found it difficult to indicate what protective measures should have been taken by the authorities. Nevertheless, it considered that it should have been apparent to the authorities that *Özgür Gündem* staff were working in such dangerous situations that their freedom of expression was seriously threatened. This imposed an obligation on the authorities to take reasonable measures of protection in order to prevent interference with the freedom of expression.

Furthermore, the Commission considered that the situation in which *Özgür Gündem* found itself highlighted the fact that without effective investigation into the attacks, it was difficult to take adequate preventative measures. The Commission remarked that there had been a tendency to discount or ignore allegations and blame them on the PKK or other terrorist groups. It therefore found that by failing to take measures of protection and make adequate investigations in relation to the pattern of attacks on *Özgür Gündem* and persons connected with it, the authorities had not complied with their positive obligation to ensure the applicants' right to freedom of expression under Article 10 of the Convention.

With regard to the search and arrests, the Commission noted that the publication of *Özgür Gündem* was disrupted for two days when the police performed an operation on the newspaper's premises on 10 December 1993 and confiscated administrative documents, archives, and library facilities. All the employees were taken into custody. The Government did not contest the accuracy of these allegations. As a result of the arrests, the second and third applicants were respectively charged with being a member of the PKK and with supporting the organisation. The Commission found that since these measures were directed against *Özgür Gündem* and its staff, they must be regarded as interference with their freedom of expression. Since the interference had affected the freedom of expression in such a fundamental way, the Commission did not consider it proportionate as no convincing justification was provided.

In respect of prosecutions, the parties provided the Commission with a large number of Court decisions relating to editions of *Özgür Gündem*. The Commission noted that the applicants alleged, uncontradicted by the Government, that there had been prosecutions in respect of 486 out of 580 editions of the newspaper and that the third applicant had been fined up to 35 billion Turkish Lira and journalists and editors had received sentences which reached a total of 147 years' imprisonment as well as 21 billion Turkish Lira in fines. Numerous prosecutions resulted in closure orders of ten days to a month. The Commission noted that these measures were part of the efforts of the authorities to combat illegal terrorist activities and to maintain national security and public safety, which are a legitimate aim under Article 10, para. 2 of the Convention. In deciding whether such measures were necessary, the Commission examined only five examples of prosecutions under the various categories of offences, namely, prosecutions for:

1. insulting the State and the military authorities (Article 159 of the Turkish Criminal Code).
2. provoking racial and regional hostility (Article 312 paras, 2 and 3 of the Turkish Criminal Code);
3. reporting statements of the PKK (Article 6 of the Anti-Terror Law);
4. identifying officials appointed to fight terrorism (Article 6 of the Anti-Terror Law);

5. statements constituting separatist propaganda (Article 8 of the Anti-Terrorist Law).

In considering the above prosecutions, the Commission examined 21 domestic court decisions in respect of 32 articles and news reports. It found that the criminal convictions and the imposition of sentences could be justified only in respect of three publications.

The Commission noted that *Özgür Gündem* and numerous employees of the newspaper were subjected to serious violence and threats. It found that the State must have been aware of the dangerous and precarious circumstances in which *Özgür Gündem* and its personnel carried out their work. It further considered that it was the duty of the authorities, in order to protect life, property and the freedom of expression, to provide adequate protection and to effectively investigate incidents which continuously occurred.

The Commission also found that the authorities themselves acted against *Özgür Gündem* in a manner which made it extremely difficult for the newspaper to continue publication and which contributed to the newspaper being closed down. This action included seizure of documents and large-scale arrest of persons employed by *Özgür Gündem*. The character of these actions made them an exceptionally serious interference with the freedom of expression, for which no sufficient justification was provided. The confiscation of numerous issues of *Özgür Gündem* and the penalties imposed on the owner and the editor also amounted to serious interferences with the freedom of expression.

The findings of fact by the European Court of Human Rights

The Court tended to accept the approach of the Commission. Concerning the allegations of attacks on the newspaper and persons associated with it, the Court was satisfied that such attacks took place, that the newspaper communicated its fears to the authorities, and that the authorities took no measures to investigate. The Court also relied on the Commission's findings concerning the police operation at the newspaper's premises in Istanbul on 10 December 1993. Concerning the legal measures taken in respect of issues of the newspaper, the Court accepted the approach adopted by the Commission in selecting certain domestic decisions for examination, and noted that the Government had not provided any reasons for holding that the approach taken by the Commission was biased or unrepresentative.

As regards the probative value of the Susurluk Report, the Court found that although it could not be relied upon as proof that State officials were implicated in any particular incident, it could be relied on as providing factual substantiation of the fears expressed by the applicants, from 1992 onwards, that the newspaper and persons associated with it were at risk of unlawful violence. It did not appear to the Court that the authorities had responded with any adequate investigations or protective measures.

THE LEGAL PROCEEDINGS

Chronology of events, including legal proceedings

July 1992 to September 1993	Killings, attacks, threats and arson attacks on <i>Özgür Gündem</i> journalists, distributors and sellers.
24 December 1992	Written request for protective measures made to the Sanliurfa Governor which was refused.
12 July 1993	Istanbul Court of First Instance banned <i>Özgür Gündem</i> .
15 July 1993	State Prosecutor brought further charges against <i>Özgür Gündem</i> under Supplementary Article 2 of the Press Law, so that if <i>Özgür Gündem</i> is found guilty of offences classified as being against national security or general morality, the Court can close it for between three days to one month.
15 September 1993	Mr. Kaya, Editor-in-Chief, was arrested and charged for making an allegedly illegal speech in Iraq.
21 September 1993	<i>Özgür Gündem</i> appeared before the State Security Tribunal when all substantive matters were adjourned until 11 November 1993 and then again until 9 December 1993.
8 December 1993	Applicants, assisted by the Kurdish Human Rights Project, applied to the European Commission alleging a violation of Article 10.
10 December 1993	Police conducted a search of <i>Özgür Gündem</i> offices in Istanbul. 107 people, including the first and second applicants taken into custody.
5 April 1994	Charges were brought against the applicants alleging that they were members of the PKK and had assisted and made propaganda in its favour.
20 October 1995	Commission declares application admissible.
12 December 1996	The Istanbul State Security Court No. 5 found that the first applicant and Mr. Ali Riza Halis aided and abetted the PKK.
29 October 1998	Commission adopts Article 31 Report.
8 March 1999	Commission refers case to European Court of Human Rights.
3 February 2000	Hearing before the European Court of Human Rights.
16 March 2000	Court delivers judgment and holds Turkey to have breached Article 10 of the Convention.

How the case was brought before the European Commission and Court of Human Rights

On 1 November 1998, Protocol 11 to the European Convention on Human Rights came into operation. The Protocol established a full-time single court to replace the former European Commission of Human Rights and the former European Court of Human Rights. Under the new procedure, all applications are to be submitted to the European Court. Each case is registered and assigned to a Judge Rapporteur who may refer the application to a three-judge committee. The committee, by unanimous decision, can declare the application inadmissible. An oral hearing may be held to decide admissibility, although this is rare. If the application is not referred to a Committee, a Chamber of seven judges will examine it in order to determine admissibility and merits of the case.

The examination of the case may, if necessary involve an investigation. States are obliged to furnish “all necessary facilities” for the investigations (Article 38). In the establishment of the facts, witnesses may be examined and investigations may be conducted, although this is also rare. It should be noted that the role of the Committee of Ministers is reduced to supervising the execution of judgments.

The *Özgür Gündem* case was dealt with under the old system. The procedure involved in lodging a complaint with the former Commission has already been explained in KHRP’s previous publications including *Ergi v Turkey* and *Aytekin v Turkey – A Case Report* (London, August 1999). Further information about this procedure can be obtained from the relevant editions of human rights textbooks such as *The Law of the European Convention of Human Rights* by D.J. Harris, M. O’Boyle and C. Warbrick (Butterworths, London, Dublin and Edinburgh), *Theory and Practice of the European Convention of Human Rights* by P. van Dijk and G.J.H. van Hoof (Kluwer Law and Taxation Publishers, The Netherlands), *A Practitioner’s Guide to the European Convention of Human Rights* by Karen Reid (Sweet & Maxwell, London), *European Human Rights: Taking a Case under the Convention* by Luke Clements, Nuala Mole and Alan Simmons (Sweet & Maxwell, London).

The investigation under the old procedure

Under the old Pre-protocol 11 procedure, if the Commission considered it necessary, it was able to “undertake ... an investigation for the effective conduct of which the State concerned shall furnish all necessary facilities” pursuant to the former article 28(1)(a). In the case of individual complaints, where the facts were in dispute and the allegations were amenable to clarification from oral testimony, the Commission’s action under article 28(1)(a) took the form of investigations whereby the applicant’s and the Government’s witnesses gave oral evidence before a select number of Commission Delegates (usually three). Investigation hearings were held *in camera* with the parties in attendance. For convenience, the hearings were usually conducted in the country whose conduct was in issue.

In *Özgür Gündem*, the Commission decided, after consultation with the parties, not to hear oral evidence. It considered that the allegations made were of a width and character that would not be easily amenable to clarification from oral testimonies. Instead, the Commission decided to examine the allegations on the basis of the written materials in the file and the submissions made by the parties in answer to questions posed by the Commission.

Preliminary objections to the Court's jurisdiction

Former Article 26 of the Convention provides as follows:

The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

The Government submitted that the applicants had failed to exhaust domestic remedies as required under former Article 26. They argued that the applicants, in respect of most of the acts of which they complain, had not availed themselves of domestic remedies, or at least, had not exhausted these remedies. They further contended that court decisions dealing with Press Code violations were open to challenge on constitutionality grounds.

The applicants stated that they were faced with a continuing flood of prosecutions which they considered constituted continuing violations. Regarding the constitutionality objections, the applicants argued that the Government had not specified whether there had been any cases in which such objections had proved successful.

The Commission noted that in regard to many of the acts, domestic remedies had not been exhausted. Instead, it interpreted the application as being concerned not with individual acts or events but with the pattern of actions over a long period of time which aimed at preventing *Özgür Gündem* from being published. The Commission could not find any evidence that any remedy in Turkey would have been effective in changing the general situation of which the applicants complained.

Regarding an appeal to the Constitutional Court, the Commission did not consider that this amounted to an effective remedy as it is the exclusive competence of the court examining the case to decide whether an objection of unconstitutionality appears sufficiently serious to merit referral to the Constitutional Court. The Commission therefore concluded that the application could not be rejected for non-exhaustion of domestic remedies.

Referral to the Court

The Commission referred the case to the Court on 8th March 1999.

THE APPLICANTS' COMPLAINTS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The applicants in *Özgür Gündem* complained that Turkey had violated Articles 10 and 14 of the Convention and Article 1 of Protocol No. 1 to the Convention. The Court held that there had been a violation of Article 10 as set out below.

Table 1

Articles allegedly violated	Commission's opinion	Court's opinion
Article 10 (freedom of expression)	Violation (unanimous)	Violation (unanimous)
Article 14 (prohibition of discrimination)	No violation (15 votes:2)	No violation (unanimous)
Article 1 of Protocol 1	Not necessary to decide whether there has been a violation (unanimous)	Not considered.

Article 10: Right to freedom of expression

Article 10 of the Convention provides as follows:

- 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.*
- 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 applicants asserted that the Government of Turkey had sought to hinder the production of *Özgür Gündem* through the pattern of killings and attacks on persons associated with the newspaper. Moreover, the Government's failure to take protective measures and conduct adequate investigations in relation to these attacks did not comply with the positive obligation to secure the applicants' right to freedom of expression. They submitted that this right had further been infringed by the legal proceedings and subsequent prosecutions relating to *Özgür Gündem* and the search and arrest operation conducted at the premises.

The Government claimed that *Özgür Gündem* was an instrument of the terrorist organisation PKK and aimed to destroy the territorial integrity of the Turkish State. They submitted that the incidents against those associated with *Özgür Gündem* were a consequence of multi-terrorist acts which the Government

combat with the purpose of safeguarding the right to life. They claimed that no Government agent or officer was involved in these incidents and that the attacks were by unknown perpetrators. It was further claimed that the Istanbul and Ankara police headquarters received no requests for protection. The police headquarters in Diyarbakir however had responded to a request for security measures in October 1992, as well as in December 1994. In relation to the legal proceedings and prosecutions, the Government argued that the correct test was to examine the actual danger caused by the publication. It contended that it was for the domestic authorities who are in contact with the vital forces of their countries to determine whether safety or security is threatened.

The Commission noted that *Özgür Gündem* and individuals associated with it had been subjected to a series of acts of violence and threats. It considered that the State must have been aware of the dangerous circumstances in which the newspaper was functioning and it was the duty of the authorities to provide protection in order to protect life and property and ensure freedom of expression. It concluded that the Government had failed in this regard.

The Commission further noted that the authorities had themselves acted against *Özgür Gündem* in a manner which made it difficult for the newspaper to continue publication. The Commission found no justification for the interferences with the applicants' freedom of expression, taken as a whole.

The Court proceeded to examine whether there had been a violation of Article 10 under three headings. First, the Court examined whether the attacks on the newspaper and persons associated with it amounted to a violation of Article 10. The Court held that although the essential object of many provisions of the Convention was to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. The Court had already found such obligations in relation to Articles 8, 11, 2 and 3, and said that given the key importance of freedom of expression for a functioning democracy, effective exercise of this freedom may require positive measures of protection on the part of the State. In this case the authorities had been aware of the acts taking place and had not taken sufficient steps in response. The Court concluded that Turkey had failed to comply with its positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

Second, regarding the search operation at *Özgür Gündem* premises on 10 December 1993, the Court found that these could be said to have been conducted according to a procedure "prescribed by law" for the purpose of preventing crime and disorder, within the meaning of Article 10.2. However, the Court held that the measures used were disproportionate and were not shown to be necessary, in a democratic society, for the implementation of any legitimate aim.

Third, regarding the legal measures taken in respect of issues of the newspaper, the Court held, as it had done in previous cases, that the measures taken under the Anti-Terror Law could be regarded as "prescribed by law" and as actions that pursued the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder. The Court went on to examine whether the measures were "necessary in a democratic society". Relying on its previous jurisprudence, the Court again reiterated the importance of freedom of expression in a democratic society and the essential role played by the press, and concluded that the numerous prosecutions and convictions were disproportionate and could not be justified as "necessary in a democratic society" in the pursuit of any legitimate aim. The Court stated that even if the newspaper was a PKK propaganda tool, this did not provide a justification for failing to take steps effectively to investigate and provide protection against unlawful acts of violence. The Court therefore concluded that the Government failed to comply with their positive obligation to protect *Özgür*

Gündem in the exercise of its freedom of expression. The Court therefore judged that there had been a breach of Article 10.

Article 14: Prohibition of discrimination

Article 14 states the following:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds 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 applicants submitted that since no other newspaper had experienced the level of repression or attacks on its staff suffered by *Özgür Gündem*, there was an administrative practice of discrimination on grounds of race in relation to Article 10. They complained that in so far as the third and fourth applicants suffered the confiscation of their property, there was an administrative practice of discrimination on the grounds of race in respect of Article 1 of Protocol No. 1.

The Government denied that there had been any concerted campaign against the newspaper, or any failure to protect it. It maintained that any legal steps taken against the newspaper were in conformity with domestic law and pursued legitimate aims in a proportionate manner.

The majority of the Commission considered it unsubstantiated that the actions taken against the newspaper, or any failure to protect it, were based on the racial origin or background of the newspaper and those associated with it, as opposed to the official or popular perception of the newspaper as supporting an illegal terrorist organisation.

The Court found no reason to believe that the restrictions on freedom of expression which resulted were attributable to a difference of treatment based on the applicants' national origin or to an association with a national minority. The Court therefore concluded that there had been no breach of Article 14.

Article 1 of Protocol No. 1: Right to peaceful enjoyment of possessions

Article 1 of Protocol No. 1 provides as follows:

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

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

Concerning the third and fourth applicants

The third and fourth applicants submitted that they suffered the confiscation of their property.

The Government did not directly address this allegation.

The Commission noted that the seizures and confiscations of issues of *Özgür Gündem* were incidental effects of the prosecutions and convictions which it had found to be breaches of Article 10. It therefore found it unnecessary to consider this complaint separately.

The Court did not consider Article 1 of Protocol No. 1.

Just satisfaction: Compensation under Article 41

Article 41 of the Convention states the following:

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

The applicant company claimed that it suffered pecuniary loss through the prosecution and seizure of its daily production. It claimed TRL 110,000 million, representing one year's production of the newspaper. It also claimed TRL 1,000 million for lawyers' fees, costs of medical treatment and other expenses incurred in respect of attacks on and arrest and trial of correspondents, distributors and other workers. It further claimed expenses in respect of the 17 editors who were remanded in custody, including lawyers' fees totalling TRL 20,000 million. Moreover, as a number of the newspaper's offices were raided, TRL 10,000 was claimed for documents and archives which were seized and not returned. The total pecuniary damage claim was therefore TRL 141,000 million. However, the applicant company was unable to provide documentary evidence in respect of the pecuniary loss as all the documents and registers were destroyed by a bomb in December 1994.

The second applicant claimed GBP 30,000 pounds sterling for acute distress, anxiety and mental suffering. He alleged that during his detention for 13 days, he was tortured and that on his release, forced to flee Turkey, leaving his wife and children behind. **The third applicant** also claimed GBP 30 pounds sterling and submitted that he too was forced to leave. He claimed he underwent acute distress, anxiety and mental suffering.

The Government submitted that no compensation should be paid as there had been no violation of the Convention. However, they stated that even assuming there had been a violation, the amounts claimed by the applicants were excessive, inflated and unacceptable.

The Court observed that the applicant company was unable to produce documentary evidence in support of its pecuniary claim. Furthermore, it was not satisfied that there was a direct link between the finding of a failure to protect or investigate and the claimed pecuniary losses in respect of medical and other expenses. It also noted that the company's claims related to the legal measures taken against the newspaper as a whole, irrespective of whether the measure has been found to be justified or not. It further noted that additional claims are made for the seizure of archives and documents in a number of offices, although the applicants' substantive complaints concerned the headquarters in Istanbul. The Court, however, accepted that some pecuniary loss must have been sustained as a result of the breaches identified and that the cumulative effects of the breaches resulted in the newspaper ceasing publication. The Court therefore awarded TRL 9,000 million on an equitable basis.

The Court recalled that it made no findings under the Convention regarding the second applicant's detention or the periods of imprisonment imposed on the third applicant. However, it accepted that they must have suffered considerable anxiety and stress in respect of the breaches established. It therefore awarded them GBP 5,000 pounds sterling each.

AFTERWORD

The lessons of *Özgür Gündem v. Turkey* have yet to be learned by the Turkish State as evidenced by continued press repression in Turkey through the first half of 2000. Reporters sans Frontières (RSF) recent report of press violations in Turkey outlines the continuing violations of the right to free expression by the Turkish State. In particular, the RSF report highlights Turkey's on-going acts of media repression with its continued banning of newspapers in Southeast Turkey, attacks on television owners, seizures of pro-Kurdish publications and arrests and imprisonment of journalists. In the first six months of this year, twelve periodicals, the majority of which are pro-Kurdish, were banned in Southeast Turkey. As one example of the extent of Turkey's media repression, the pro-Kurdish weekly, *Roja Teze*, has seen 21 of its issues seized since it began publishing in early 1999. These seizures included recent confiscations for such diverse reasons as the inclusion of a map of Kurdistan in one issue and the use of the Kurdish phrase "Birê min" ("my brother") in another edition. Meanwhile, the paper's owner and editor-in-chief have been heavily fined and the editor-in-chief was imprisoned - all on the basis of distributing "separatist statements".

APPENDIX A

Institut kurde de Paris

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 23144/93

Gurbetelli Ersöz and others

against

Turkey

REPORT OF THE COMMISSION

(adopted on 29 October 1998)

TABLE OF CONTENTS

	Page
I. INTRODUCTION (paras. 1-27)	1
A. The application (paras. 2-4)	1
B. The proceedings (paras. 5-23)	1
C. The present Report (paras. 24-27)	3
II. ESTABLISHMENT OF THE FACTS (paras. 28-112)	4
A. The particular circumstances of the case (paras. 28-77)	4
B. The evidence before the Commission (paras. 78-103)	17
C. Relevant domestic law and practice (paras. 104-112)	22
III. OPINION OF THE COMMISSION (paras. 113-254)	28
A. Complaints declared admissible (para. 113)	28
B. Points at issue (para. 114)	28
C. Approach to the evidence (paras. 115-117)	28
D. Concerning the first applicant (para. 118)	29

Decision (para. 119)	29
E. As regards Article 10 of the Convention (paras. 120-242)	29
CONCLUSION (para. 243)	58
F. As regards Article 1 of Protocol No. 1 (paras. 244-247)	59
CONCLUSION (para. 248)	60
G. As regards Article 14 of the Convention (paras. 249-252)	59
CONCLUSION (para. 253)	60
H. Recapitulation (paras. 253-257)	60
APPENDIX: DECISION OF THE COMMISSION AS TO THE ADMISSIBILITY OF THE APPLICATION	61

I. INTRODUCTION

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

A. The application

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

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

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

B. The proceedings

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

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

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

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

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

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

11 On 20 October 1995, the Commission declared the application admissible. The Commission requested that the parties provide further information by 19 November 1993, relating to the texts of articles in Özgür Gündem, copies of orders and legislation. The Government were requested to identify the measures taken to protect persons working for Özgür Gündem or involved in its distribution.

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

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

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

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

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

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

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

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

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

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

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

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

C. The present Report

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

MM S. TRECHSEL, President
J.-C. GEUS
E. BUSUTTIL
G. JÖRUNDSSON
A.S. GÖZÜBÜYÜK
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs G.H. THUNE
MM F. MARTINEZ
L. LOUCAIDES
B. MARXER
I. CABRAL BARRETO
B. CONFORTI
D. ŠVÁBY
C. BÎRSAN
P. LORENZEN

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

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

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

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

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

a. Facts as presented by the applicant

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. Facts as presented by the Government

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

Concerning the alleged attacks and incidents

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

a. allegations concerning the deaths

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

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

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

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

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

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

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

b. concerning the arson attacks, threats etc.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Concerning the legal proceedings against the newspaper and its staff

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

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

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

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

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

The relationship between the PKK and Özgür Gündem

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

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

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

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

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

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

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

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

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

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

B. The evidence before the Commission

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

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

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

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

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

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

Özgür Gündem articles subject to prosecution

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

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

The Susurluk report

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

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

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

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

(page 8)

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

(page 9)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Relevant domestic law and practice

Constitutional Law

<Translation>

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

...

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

...

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

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

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

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

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

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

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

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

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

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

Anti-Terror Legislation

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

<Original>

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

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

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

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

<Translation>

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

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

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

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

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

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

<Original>

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

<Translation>

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

106. Article 8 paragraph 2 of Anti-Terror Law

<Original>

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

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

<Translation>

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

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

Press Law No. 5680 of 24 July 1950

108. Article 3

<Original>

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

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

<Translation>

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

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

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

Miscellaneous offences

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

<Original>

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

<Translation>

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

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

<Original>

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

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

<Translation>

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

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

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

III. OPINION OF THE COMMISSION

A. Complaints declared admissible

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

- that there has been a deliberate and unjustified interference with their freedom of expression due to measures and incidents relating to the Özgür Gündem newspaper and persons connected with the newspaper;

- that the measures implemented in relation to Özgür Gündem violated the third and fourth applicants' peaceful enjoyment of their possessions;

- that the applicants have been subject to discrimination in the enjoyment of their freedom of expression and peaceful enjoyment of their possessions.

B. Points at issue

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

- whether there has been a violation of Article 10 of the Convention in respect of the applicants;

- whether there has been a violation of Article 1 of Protocol No. 1 to the Convention in respect of the third and fourth applicants;

- whether there has been a violation of Article 14 of the Convention in conjunction with the above provisions in respect of the applicants.

C. Approach to the evidence

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

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

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

D. Concerning the first applicant

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

DECISION

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

E. As regards Article 10 of the Convention

120. Article 10 provides:

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

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

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

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

(i) Freedom of expression, as enshrined in paragraph 1 of Article 10 constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress. It is applicable not only to "information" or "ideas" that are favourably received or are regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society".

(ii) The adjective "necessary", within the meaning of Article 10 para. 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court.

(iii) In exercising its supervisory jurisdiction, the organs of the Convention must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context in which he made them. In particular, they must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient".

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

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

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

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

(a) The submissions of the parties

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

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

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

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

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

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

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

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

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

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

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

(b) The applicants' victim status

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

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

(c) Scope of the Commission's examination

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

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

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

(d) Attacks on individuals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Search and arrests

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

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

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

(f) Seizures, confiscations and prosecutions

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

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

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

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

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

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

Assize Court decision 1994/77, 1 April 1994

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

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

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

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

Assize Court decision 1994/56, 23 March 1994

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) General assessment

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

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

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

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

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

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

CONCLUSION

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

F. As regards Article 1 of Protocol No. 1

244. Article 1 of Protocol No. 1 provides:

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

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

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

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

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

CONCLUSION

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

G. As regards Article 14 of the Convention

249. Article 14 of the Convention provides as follows:

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

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

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

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

CONCLUSION

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

H. Recapitulation

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

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

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

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

M. DE SALVIA
Secretary
to the Commission

S. TRECHSEL
President
of the Commission

APPENDIX B

Institut kurde de Paris

CONSEIL
DE L'EUROPE



COUNCIL
OF EUROPE

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

FOURTH SECTION

CASE OF ÖZGÜR GÜNDEM v. TURKEY

(Application no. 23144/93)

JUDGMENT

STRASBOURG

16 March 2000

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 Özgür Gündem v. Turkey,

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

Mr M. PELLONPÄÄ, *President*,

Mr G. RESS,

Mr A. PASTOR RIDRUEJO,

Mr L. CAFLISCH,

Mr J. MAKARCZYK,

Mr V. BUTKEVYCH, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr V. BERGER, *Section Registrar*,

Having deliberated in private on 10 November 1999 and on 3 February 2000,

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 European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the European Commission of Human Rights ("the Commission") on 8 March 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention. The case originated in an application (no. 23144/93) against the Republic of Turkey lodged with the Commission under former Article 25 by three Turkish nationals, Gurbetelli Ersöz, Fahri Ferda Çetin and Yaşar Kaya and by Ülkem Basın ve Yayıncılık Sanayi Ticaret Limited, a company having its seat in Istanbul, on 9 December 1993. The first two applicants were, respectively, the editor-in-chief and the assistant editor-in-chief of the newspaper *Özgür Gündem* and the third and fourth applicants were the owners of the *Özgür Gündem*. The Commission later decided not to pursue the examination of the application insofar as it concerned the first applicant, since she had died in 1997. The applicants are represented by Mr William Bowring, a lawyer practising in the United Kingdom. The Government of Turkey ("the Government") are represented by their Co-Agent, Mr Münci Özmen.

The application concerned the applicants' allegations that there had been a concerted and deliberate assault on their freedom of expression through a campaign of targeting journalists and others involved in the newspaper *Özgür Gündem*. The applicants relied on Articles 10 and 14 of the Convention and on Article 1 of Protocol No. 1.

2. On 31 March 1999, the Panel of the Grand Chamber decided, pursuant to Article 5 § 4 of Protocol No. 11 to the Convention and Rules 100 § 1 and 24 § 6 of the Rules of Court, that the application would be examined by one of the Sections. It was, thereupon, assigned to the Forth Section.

3. The Chamber constituted within the Section included *ex officio* Mr R. Türmen, the judge elected in respect of Turkey (Article 27 § 2 of the Convention and Rule 26 § 1 (a) of the Rules of Court), and Mr M. Pellonpää, President of the Section (Rules 12 and 26 § 1 (a)). The other members designated by the latter to complete the Chamber were Mr G. Ress, Mr A. Pastor Ridruejo, Mr L. Caflisch, Mr J. Makarczyk and Mrs N. Vajić.

4. On 1 June 1999 Mr R. Türmen withdrew from sitting in the Chamber (Rule 28). The Government accordingly appointed Mr F. Gölcüklü to sit as *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

5. On 13 July 1999 the Chamber decided to hold a hearing.

6. Pursuant to Rule 59 § 3 the President of the Chamber invited the parties to submit memorials on the issues in the application. The Registrar received the applicants' and Government's memorials on 5 and 20 October 1999 respectively.

7. In accordance with the Chamber's decision, a hearing took place in public in the Human Rights Building, Strasbourg, on 10 November 1999.

There appeared before the Court:

(a) *for the Government*

Mr M. ÖZMEN,	<i>Co-Agent,</i>
Mr F. POLAT,	
Mr F. ÇALIŞKAN,	
Ms M. GÜLSEN,	
Mr E. GENEL,	
Mr F. GÜNEY,	
Mr C. AYDIN,	<i>Advisers;</i>

(b) *for the applicant*

Mr W. BOWRING,	<i>Counsel,</i>
Mr K. YILDIZ,	<i>Adviser.</i>

The Court heard addresses by Mr Bowring and Mr Özmen.

8. On 3 February 2000 Mrs Vajić, who was unable to take part in further consideration of the case, was replaced by Mr Butkevych (Rules 24 § 5 (b) and 28).

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. *Özgür Gündem* was a daily newspaper the main office of which was situated in İstanbul. It was a Turkish language publication with an estimated national circulation of up to 45,000 copies and a further unspecified international circulation. It incorporated its predecessor, the weekly publication *Yeni Ülke*, which was produced between 1990 and 1992. *Özgür Gündem* was published from 30 May 1992 until April 1994. It was succeeded by another newspaper, *Özgür Ülke*.

10. The case concerns the allegations of the applicants that *Özgür Gündem* was the subject of serious attacks and harassment which forced its eventual closure and for which the Turkish authorities are directly or indirectly responsible.

A. Incidents of violence and threats concerning *Özgür Gündem* and persons associated with it

11. The applicants made detailed submissions to the Commission, listing the attacks made on journalists, distributors and others associated with the newspaper (see the Commission report, §§ 32-34). The Government, in their submissions to the Commission, denied that some of these attacks occurred (see the Commission report §§ 43-62). In their submissions to the Court, neither party has made any comment on the Commission's findings in this respect (see §§ 141-142).

12. The following incidents are uncontested.

Seven persons connected with *Özgür Gündem* were killed in circumstances originally regarded as "unknown perpetrator" killings: (1) Yahya Orhan, a journalist shot dead on 31 July 1992; (2) Hüseyin Deniz, a member of staff of *Özgür Gündem*, shot dead on 8 August 1992; (3) Musa Anter, a regular columnist for *Özgür Gündem*, shot dead on 20 September 1992; (4) Hafız Akdemir, a member of the staff of *Özgür Gündem*, shot dead on 8 June 1992; (5) Kemal Kılıç, the Şanlıurfa representative of *Özgür Gündem*, shot dead on 18 February 1992 (an application no. 22492/93 introduced by Cemal Kılıç concerning alleged State responsibility for this killing is pending before the Court, see the Commission's Report of 23.10.98); (6) Cengiz Altun, a reporter of *Yeni Ülke*, shot dead on 24 February 1992; (7) Ferhat Tepe, the Bitlis correspondent of *Özgür Gündem*, found dead on 4 August 1993 after his abduction on 28 July 1993.

The following attacks occurred:

(1) on 16 November 1992 an arson attack on the newsstand of Kadir Saka in Diyarbakır; (2) an armed attack on Esref Yaşa, also a newsagent, on 15 January 1993, in Diyarbakır; (3) an armed attack on the newsagent Haşim Yaşa on 15 June 1993 in Diyarbakır (this incident and that concerning the attack on Eşref Yaşa were the subject of an application under the Convention, see the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2411); on 26 September 1993, Mehmet Balamir, a newsboy, was attacked with a knife in Diyarbakır as he was selling the newspaper; (4) in 1993, in Ergani, boys selling the newspaper were attacked by a person with a knife; (5) an arson attack on a newsagent in Mazıdağı; (6) in Bingöl, on 17 November 1992, the car of a newsagent was destroyed by fire; (7) in Yüksekova, in October 1993, a bomb explosion damaged a newsagency; (8) a bomb exploded at the İstanbul office of the newspaper's successor *Özgür Ülke* on 2 December 1994, killing one employee and injuring eighteen others.

13. The applicants listed a large number of other incidents (arson attacks, attacks and threats on newsagents, distributors and newsboys) which the Government stated either did not occur or concerning which they stated that they had received no information or complaint (see Commission report, §§ 32-34 and 43-62). They also referred to the disappearance of the journalist Aysel Malkaç on 7 August 1993 and to the detention and ill-treatment of many journalists, one of whom, Salih Tekin, was found, upon his application to Strasbourg, to have been subject to inhuman and degrading treatment while in custody (see Commission report, § 37; the Tekin v. Turkey judgment of 9 June 1998, *Reports* 1998-IV, pp. 1517-1518, §§ 53-54).

14. The applicants, and others acting on behalf of the newspaper and its employees, addressed numerous petitions to the authorities concerning the threats and attacks which they claimed had occurred. These are listed in the Commission report (§ 35) and include letters from the applicant Yaşar Kaya to the Governor of the State of Emergency Region, the Minister of the Interior, the Prime Minister and Deputy Prime Minister, informing them of the attacks and requesting investigations to be opened and measures of protection to be taken. No reply was made to the vast majority of these letters.

15. Written complaints were made by persons from the newspaper about specific attacks, incidents and threats concerning which the Government stated that they had received no information or complaint, including the attacks on child distributors in Diyarbakır during 1993, the death of

newsagent Zülküf Akkaya in Diyarbakır on 27 September 1993 and attacks on distributors by persons with meat axes, also in Diyarbakır, in September 1993 (see Commission report, § 35(s)). A written request for protective measures was made on 24 December 1992 to the Şanlıurfa Governor on behalf of the persons involved in the newspaper in Şanlıurfa, which was refused shortly before the journalist Kemal Kılıç was shot dead on 18 February 1993 (see Commission report, § 35(l)).

16. Following a request for security measures received by the Diyarbakır police on 2 December 1993, police escorted employees of the two companies dealing with the distribution of newspapers from the borders of Şanlıurfa province to the distribution stores. Measures were also taken with respect to deliveries of the newspaper from the stores to newsagents. The Government submitted to the Commission that no other requests for protection were received. Following the explosion at the *Özgür Ülke* office on 2 December 1994 and a request from the owner, security measures, including patrolling, were taken by the authorities.

B. The search and arrest operation at the *Özgür Gündem* premises in Istanbul

17. On 10 December 1993, the police conducted a search at the *Özgür Gündem* office in Istanbul. During the operation, they took into custody those present in the building (107 persons, including the applicants Gurbetelli Ersöz and Fahri Ferda Çetin) and seized all the documents and archives.

18. Two search and seizure documents dated 10 December 1993 record that the police found two guns, ammunition, 2 sleeping bags and 25 gas masks. In a further search and seizure document dated 10 December 1993, it is stated that the following items had been found: photographs (described as kept in envelopes with a label "PKK Terrorist Organisation"), a tax receipt stamped with the name ERNK (a wing of the PKK organisation) for TRL 400,000,000, found in the desk of the applicant Yaşar Kaya, and numerous printed and handwritten documents, including an article on Abdullah Öcalan. A document dated 24 December 1993 signed by a public prosecutor at the Istanbul State Security Court listed the following material as having been seized: in a sealed envelope the military ID of Muzaffer Ulutaş killed in Şırnak in March 1993, in a sealed box 1,350 injections kits, 1 typewriter, 1 video cassette and audio cassette, and 40 books found at the house of the applicant Fahri Ferda Çetin. As a result of these measures, the publication of the newspaper was disrupted for two days.

19. In an indictment dated 5 April 1994, charges were brought against the editor Gurbetelli Ersöz, Fahri Ferda Çetin, Yaşar Kaya, the manager Ali Rıza Halis and six others, alleging that they were members of the PKK and had rendered the PKK assistance and made propaganda in its favour. The Government have stated that Gurbetelli Ersöz and Ali Rıza Halis were convicted of aiding and abetting the PKK, by judgment of the Istanbul State Security Court no. 5 on 12 December 1996. Gurbetelli Ersöz had previously been convicted of involvement with the PKK in or about the end of December 1990 and had been released from prison in 1992.

C. Prosecutions concerning issues of *Özgür Gündem*

20. Numerous prosecutions were brought against the newspaper (including the relevant editor, the applicant Yaşar Kaya as the owner and publisher and the authors of the impugned articles), alleging that offences had been committed by the publication of various articles. The prosecutions resulted in many convictions, carrying sentences imposing fines and prison terms and orders of confiscation of issues of the newspaper and orders of closure of the newspaper for periods of three days to a month.

The prosecutions were brought under provisions rendering it an offence, *inter alia*, to publish material insulting or vilifying the Turkish nation, the Republic or other specific State officers or authorities, material provoking feelings of hatred and enmity on grounds of race, region or class, materials constituting separatist propaganda, disclosing the names of officials involved in fighting terrorism or publishing the declarations of terrorist organisations (see Relevant domestic law below).

21. On 3 July 1993, *Özgür Gündem* published a press release announcing that the newspaper was charged with offences which cumulatively were punishable by fines totalling TRL 8,617,441,000 and prison terms ranging between 155 years 9 months to 493 years and 4 months.

22. During one period of 68 days in 1993, 41 issues of the newspaper were ordered to be seized. In twenty cases, closure orders were issued, three for a period of one month, 15 for a period of 15 days and two for 10 days.

23. The applicants have further stated, uncontested by the Government, that there have been prosecutions in respect of 486 out of 580 editions of the newspaper and that, pursuant to convictions by the domestic courts, the

applicant Yaşar Kaya has been fined up to TRL 35 billion, while journalists and editors together have had imposed sentences totalling 147 years' imprisonment and fines reaching the sum of TRL 21 billion.

D. Material before the Commission

1. Domestic court proceedings

24. Both parties provided the Commission with copies of judgments and decisions by the courts relating to the proceedings brought in respect of the newspaper. These involve 112 prosecutions brought during 1992-1994. Details of the articles in issue and the judgments given in 21 cases are summarised in the Commission's report (see §§ 161-237).

2. The Susurluk report

25. The applicants provided the Commission with a copy of the so-called *Susurluk* report¹, produced at the request of the Prime Minister by Mr Kutlu Savaş, Vice-President of the Board of Inspectors within the Prime Minister's Office. After receiving the report in January 1998, the Prime Minister made it available to the public, though eleven pages and certain annexes were withheld.

26. The introduction states that the report was not based on a judicial investigation and did not constitute a formal investigative report. It was intended for information purposes and purported to do no more than describe certain events which had occurred mainly in south-east Turkey and which tended to confirm the existence of unlawful dealings between political figures, government institutions and clandestine groups.

27. The report analyses a series of events, such as murders carried out under orders, the killings of well-known figures or supporters of the Kurds and deliberate acts by a group of "informants" supposedly serving the State, and concludes that there is a connection between the fight to eradicate terrorism in the region and the underground relations that had been formed as a result, particularly in the drug-trafficking sphere. The passages from the report that concern certain matters affecting radical periodicals distributed in the region are reproduced below.

1. *Susurluk* was the scene of a road accident in November 1996 involving a car in which a member of parliament, a former deputy director of the Istanbul security services, a notorious far-right extremist, a drug trafficker wanted by Interpol and his girlfriend had been travelling. The latter three were killed. The fact that they had all been travelling in the same car had so shocked public opinion that it had been necessary to start more than sixteen judicial investigations at different levels and a parliamentary inquiry.

“... In his confession to the Diyarbakır Crime Squad, ... Mr G. ... had stated that Ahmet Demir¹ (page 35) would say from time to time that he had planned and procured the murder of Behçet Cantürk² and other partisans from the mafia and the PKK who had been killed in the same way... The murder of ... Musa Anter³ had also been planned and carried out by A. Demir (page 37).

Summary information on the antecedents of Behçet Cantürk, who was of Armenian origin, are set out below (page 72).

As of 1992 he was one of the financiers of the newspaper *Özgür Gündem*. ... Although it was obvious who Cantürk was and what he did, the State was unable to cope with him. Because legal remedies were inadequate *Özgür Gündem* was blown up with plastic explosives and when Cantürk started to set up a new undertaking, when he was expected to submit to the State, the Turkish Security Organisation decided that he should be killed and that decision was carried out (page 73).

All the relevant State bodies were aware of these activities and operations. ... When the characteristics of the individuals killed in the operations in question are examined, the difference between those Kurdish supporters who were killed in the region in which a state of emergency had been declared and those who were not lay in the financial strength the latter presented in economic terms. ... The sole disagreement we have with what was done relates to the form of the procedure and its results. It has been established that there was regret at the murder of Musa Anter, even among those who approved of all the incidents. It is said that Musa Anter was not involved in any armed action, that he was more concerned with the philosophy of the matter and that the effect created by his murder exceeded his own real influence and that the decision to murder him was a mistake. (Information about these people is to be found in Appendix 9⁴). Other journalists have also been murdered (page 74)⁵.”

1. One of the pseudonyms of a former member of the PKK turned informant who was known by the name “Green Code” and had supplied information to several State authorities since 1973.

2. An infamous drug trafficker strongly suspected of supporting the PKK (see paragraph 25 above) and one of the principal sources of finance for *Özgür Gündem*.

3. Mr Anter, a pro-Kurdish political figure, was one of the founding members of the People’s Labour Party (“the HEP”), director of the Kurdish Institute in Istanbul, a writer and leader writer for, *inter alia*, the weekly review *Yeni Ülke* and the daily newspaper *Özgür Gündem*. He was killed at Diyarbakır on 30 September 1992. Responsibility for the murder was claimed by an unknown clandestine group named “Boz-OK”.

4. The appendix is missing from the report.

5. *Ibid*, for the page following this last sentence.

28. The report concludes with numerous recommendations, including the improvement of co-ordination and communication between different branches of the security, police and intelligence departments, the identification and dismissal of security force personnel implicated in illegal activities, limiting of the use of confessors, a reduction of the number of village protectors, the cessation of the use of the Special Operations Bureau outside the south-east region and its incorporation into the police outside that area, the opening of investigations into various incidents and steps to suppress gang and drugs smuggling activities, and the recommendation that the results of the Grand National Assembly Susurluk enquiry be forwarded to the appropriate authorities for the relevant proceedings to be undertaken.

II. RELEVANT DOMESTIC LAW

1. The Criminal Code (Law no. 765)

29. The relevant provisions of the Criminal Code read as follows:

Article 36 § 1

“In the event of conviction, the court shall order the seizure and confiscation of any object which has been used for the commission or preparation of the crime or offence...”

Article 79

“A person who infringes various provisions of this Code by a single act, shall be punished under the provision which prescribes the heaviest punishment.”

Article 159 § 1

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

Article 311 § 2

“Where incitement to commit an offence is done by means of mass communication, of whatever type – whether by tape recordings, gramophone records, newspapers, press publications or other published material – by the circulation or distribution of printed papers or by the placing of placards or posters in public places, the terms of imprisonment to which convicted persons are liable shall be doubled...”

Article 312

“A person who expressly praises or condones an act punishable by law as an offence or incites the population to break the law shall, on conviction, be liable to between six months’ and two years’ imprisonment and a heavy fine of from six thousand to thirty thousand Turkish liras.

A person who incites the people to hatred or hostility on the basis of a distinction between social classes, races, religions, denominations or regions, shall, on conviction, be liable to between one and three years’ imprisonment and a fine of from nine thousand to thirty-six thousand liras. If this incitement endangers public safety, the sentence shall be increased by one third to one half.

The penalties to be imposed on those who have committed the offences defined in the previous paragraph shall be doubled when they have done so by the means listed in Article 311 § 2.”

30. The conviction of a person pursuant to Article 312 § 2 entails further consequences, particularly with regard to the exercise of certain activities governed by special legislation. For example, persons convicted of an offence under that Article may not found associations (Law no. 2908, section 4(2)(b)) or trade unions, nor may they be members of the executive committee of a trade union (Law no. 2929, section 5). They are also forbidden to found or join political parties (Law no. 2820, section 11(5)) and may not stand for election to parliament (Law no. 2839, section 11(f3)).

2. The Press Act (Law no. 5680 of 15 July 1950)

31. The relevant provision of the Press Act 1950 reads as follows:

Section 3

“For the purposes of the present Law, the term ‘periodicals’ shall mean newspapers, press agency dispatches and any other printed matter published at regular intervals.

‘Publication’ shall mean the exposure, display, distribution, emission, sale or offer for sale of printed matter on premises to which the public have access where anyone may see it.

An offence shall not be deemed to have been committed through the medium of the press unless publication has taken place, except where the material in itself is unlawful.”

3. The Prevention of Terrorism Act (Law no. 3713 of 12 April 1991)

32. This law, promulgated with a view to preventing acts of terrorism, refers to a number of offences defined in the Criminal Code which it

describes as “acts of terrorism” or “acts perpetrated for the purposes of terrorism” (sections 3 and 4) and to which it applies. The relevant provisions of the Prevention of Terrorism Act 1991 read as follows:

Section 6

“It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to announce, orally or in the form of a publication, that terrorist organisations will commit an offence against a specific person, whether or not that person’s ... identity is divulged, provided that it is done in such a manner that he or she may be identified, or to reveal the identity of civil servants who have participated in anti-terrorist operations or to designate any person as a target.

It shall be an offence, punishable by a fine of from five million to ten million Turkish liras, to print or publish declarations or leaflets emanating from terrorist organisations.

...
Where the offences contemplated in the above paragraphs are committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, or from the sales of the previous issue if the periodical appears monthly or less frequently, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*¹. However, the fine may not be less than fifty million Turkish liras. The editor of the periodical shall be ordered to pay a sum equal to half the fine imposed on the publisher.”

Section 8

(before amendment by Law no. 4126 of 27 October 1995)

“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.

Where the crime of propaganda contemplated in the above paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly, *or from the average sales for the previous month of the daily newspaper with the largest circulation if the offence involves printed matter other than periodicals or if the periodical has just been launched*². However the fine

1-2. The phrase in italics was deleted by a judgment of the Constitutional Court on 31 March 1992 and ceased to be in force on 27 July 1993.

may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment."

Section 8

(as amended by Law no. 4126 of 27 October 1995)

"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. Any person who engages in such an activity shall be sentenced to not less than one and not more than three years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras. The penalty imposed on a reoffender may not be commuted to a fine.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of periodicals within the meaning of section 3 of the Press Act (Law no. 5680), the publisher shall also be liable to a fine equal to ninety per cent of the income from the average sales for the previous month if the periodical appears more frequently than monthly. However, the fine may not be less than one hundred million Turkish liras. The editor of the periodical concerned shall be ordered to pay a sum equal to half the fine imposed on the publisher and sentenced to not less than six months' and not more than two years' imprisonment.

Where the crime of propaganda contemplated in the first paragraph is committed through the medium of printed matter or by means of mass communication other than periodicals within the meaning of the second paragraph, those responsible and the owners of the means of mass communication shall be sentenced to not less than six months' and not more than two years' imprisonment and a fine of from one hundred million to three hundred million Turkish liras..."

4. Law no. 4126 of 27 October 1995 amending sections 8 and 13 of Law no. 3713

33. The following amendments were made to the Prevention of Terrorism Act 1991 after the enactment of Law 4126 of 27 October 1995:

Temporary provision relating to section 2

"In the month following the entry into force of the present Law, the court which has given judgment shall re-examine the case of a person convicted pursuant to section 8 of the Prevention of Terrorism Act (Law no. 3713) and, in accordance with the amendment ... to section 8 of Law no. 3713, shall reconsider the term of imprisonment imposed on that person and decide whether he should be allowed the benefit of sections 4¹ and 6² of Law no. 647 of 13 July 1965."

-
1. This provision concerns substitute penalties and measures which may be ordered in connection with offences attracting a prison sentence.
 2. This provision concerns reprieves.

AS TO THE LAW

I. STANDING OF GURBETELLI ERSÖZ

34. The Court recalls that this case was introduced by four applicants, the first of which was Gurbetelli Ersöz, formerly the editor of *Özgür Gündem*. In its report of 29 October 1998, the Commission decided not to pursue its examination of the case insofar as it concerned Gurbetelli Ersöz as she had died in autumn of 1997 and no information had been received that any heir or close relative wished to pursue her complaints.

35. The parties have made no submissions on this aspect of the case.

36. The Court considers, pursuant to Article 37 § 1(c) of the Convention, that it is no longer justified to continue the examination of the application insofar as it concerns Gurbetelli Ersöz. Accordingly, this part of the case shall be struck off the list.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

37. The applicants complain that the newspaper *Özgür Gündem* was forced to cease publication due to the campaign of attacks on journalists and others associated with the newspaper and due to the legal steps taken against the newspaper and its staff, invoking Article 10 of the Convention 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. Concerning the allegations of attacks on the newspaper and persons associated with it

38. The applicants claimed that the Government of Turkey have, directly or indirectly, sought to hinder, prevent and render impossible the production of *Özgür Gündem* by the encouragement of or acquiescence in unlawful killings and forced disappearances, by harassment and intimidation of journalists and distributors, and by failure to provide any or any adequate protection for journalists and distributors when their lives were clearly in danger and despite requests for such protection.

The applicants relied on the findings in the Commission's report that there was a disturbing pattern of attacks on persons concerned with *Özgür Gündem* and that the authorities, through their failure to take measures of protection and to conduct adequate investigations in relation to the apparent pattern of attacks on *Özgür Gündem* and persons connected with it, did not comply with their positive obligation to secure to the applicants their right to freedom of expression guaranteed under Article 10 of the Convention.

39. The Government emphasised that *Özgür Gündem* was the instrument of the terrorist organisation PKK and espoused the aim of that organisation to destroy the territorial integrity of Turkey by violent means. They disputed that any reliance could be placed on previous judgments of the Court or on the *Susurluk* report in deducing that there was any official complicity in any alleged attacks. In particular, the *Susurluk* report was not a judicial document and had no probative value.

The Government submitted that the Commission based its findings on general presumptions unsupported by any evidence and that the applicants had not substantiated their claims of a failure to protect the lives and physical integrity of persons attached to *Özgür Gündem*. Nor had they substantiated that the persons attacked were related to the newspaper. They disputed that any positive obligation extends to the protection and promotion of the propaganda instrument of a terrorist organisation but asserted that, in any event, necessary measures were taken in response to individual complaints, investigations being carried out by public prosecutors as required.

40. The Court observes that the Government have disputed the Commission's findings concerning the pattern of attacks in general terms without specifying which are, or in what way they are, inaccurate. It notes that the Government deny specifically that any weight can be given to the *Susurluk* report and its description of acquiescence and connivance by State

authorities in unlawful activities, some of which targeted *Özgür Gündem* and journalists, of whom Musa Anter is specifically named.

In its judgment in the Yaşa case (the Yaşa v. Turkey judgment of 2 September 1998, *Reports* 1998-VI, p. 2411, §§ 95-96), in which it was alleged that the security forces had connived in an attack on Esref Yaşa and his uncle who were both involved in the sale and distribution of *Özgür Gündem* in Diyarbakır, the Court found that the *Susurluk* report did not provide a basis for enabling the perpetrators of the attack on Esref Yaşa and his uncle to be identified. It did find that the report gave rise to serious concerns and that it was not disputed in the Yaşa case that there had been a number of serious attacks on journalists, newspaper kiosks and distributors of *Özgür Gündem*. Furthermore, while the *Susurluk* report indeed may not be relied on for establishing to the required standard of proof that State officials were implicated in any particular incident, the Court considers that the report, which was drawn up at the request of the Prime Minister and which he decided should be made public, must be regarded as a serious attempt to provide information on and analyse problems associated with the fight against terrorism from a general perspective and to recommend preventive and investigative measures. On that basis, the report can be relied on as providing factual substantiation of the fears expressed by the applicants from 1992 onwards that the newspaper and persons associated with it were at risk of unlawful violence.

41. Having regard to the parties' submissions and the findings of the Commission in its report, the Court is satisfied that from 1992 to 1994 there were numerous incidents of violence, including killings, assaults and arson attacks, involving the newspaper and journalists, distributors and other persons associated with it. The concerns of the newspaper, and its fears that it was victim of a concerted campaign tolerated, if not approved, by State officials, were brought to the attention of the authorities (see paragraphs 14-15 above). It does not appear, however, that any measures were taken to investigate this allegation. Nor did the authorities respond by any protective measures, save in two instances (see paragraph 16 above).

42. The Court has long held that, although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned. It has found that such obligations may arise under Article 8 (see, amongst others, the *Gaskin v. the United Kingdom* judgment of 7 July 1989, Series A no. 160, §§ 42-49) and Article 11 (the *Plattform "Ärzte für das Leben" v. Austria* judgment of 21 June 1988, Series A no. 139, § 32). Obligations to take steps to undertake effective investigations have also been found to accrue in the context of Article 2 (e.g. the *McCann and Others v. the United*

Kingdom judgment of 27 September 1995, Series A no. 324, § 161) and Article 3 (the *Assenov and Others v. Bulgaria* judgment of 28 October 1998, *Reports 1998-VIII*, p. 3265, at § 102), while a positive obligation to take steps to protect life may also exist under Article 2 (the *Osman v. the United Kingdom* judgment of 28 October 1998, *Reports 1998-VIII*, pp. 3159-3161, §§ 115-117).

43. The Court recalls the key importance of freedom of expression as one of the preconditions for a functioning democracy. Genuine, effective exercise of this freedom does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals (*mutatis mutandis*, the *X and Y v. the Netherlands* judgment of 26 March 1985, Series A no. 91, § 23). In determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is called for throughout the Convention. The scope of this obligation will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources. Nor must such an obligation be interpreted in such a way as to impose an impossible or disproportionate burden on the authorities (see, amongst other authorities, the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, § 37, the *Osman v. the United Kingdom* judgment, cited above, § 116).

44. In the present case, the authorities were aware that *Özgür Gündem*, and persons associated with it, had been subject to a series of violent acts and that the applicants feared that they were being targeted deliberately in efforts to prevent publication and distribution of the newspaper. No response however was given to almost all petitions and requests for protection submitted by the newspaper or its staff. The Government have only been able to identify one protective measure concerning the distribution of the newspaper which was taken while the newspaper was still in existence. The steps taken after the bomb attack at the İstanbul office in December 1994 concerned the newspaper's successor. The Court finds, having regard to the seriousness of the attacks and their widespread nature, that the Government cannot rely on the investigations lodged by individual public prosecutors into specific incidents. It is not persuaded by the Government's contention that these investigations provided adequate or effective responses to the applicants' allegations that the attacks were part of a concerted campaign which was supported, or tolerated, by the authorities.

45. The Court has noted the Government's submissions concerning its strongly-held conviction that *Özgür Gündem* and its staff supported the PKK and acted as its propaganda tool. This does not, even if true, provide a

justification for failing to take steps effectively to investigate and, where necessary, provide protection against unlawful acts involving violence.

46. The Court concludes that the Government have failed, in the circumstances, to comply with their positive obligation to protect *Özgür Gündem* in the exercise of its freedom of expression.

B. Concerning the police operation at the *Özgür Gündem* premises in Istanbul on 10 December 1993

47. The applicants relied on the findings in the Commission's report that the search and arrest operation conducted on the premises of *Özgür Gündem* in Istanbul, during which all the employees were detained and the archives, library and administrative documents seized, disclosed an interference with the newspaper's freedom of expression for which there was no convincing justification. In their submissions to the Commission, they stated that there were innocent explanations for the allegedly incriminating material found on the premises (see the Commission's report, § 36(i)).

48. The Government pointed to the materials seized during the search, including injection kits, gas masks, an ERNK receipt and the identity card of a dead soldier, which, they submitted, were incontrovertible proof of the links between the newspaper and the PKK. They referred to the conviction on 12 December 1996 of the editor Gurbetelli Ersöz and manager Ali Rıza Halis for aiding the PKK. They also asserted that, of the 107 persons apprehended at the Istanbul office, 40 persons could claim no attachment to the newspaper, which gave additional grounds for suspicions of complicity with the terrorist organisation.

49. The Court finds that the operation, which resulted in newspaper production being disrupted for two days, constituted a serious interference with the applicants' freedom of expression. It accepts that the operation was conducted according to a procedure "prescribed by law" for the purpose of preventing crime and disorder within the meaning of the second paragraph of Article 10. It does not, however, find that a measure of such dimension was proportionate to this aim. No justification has been provided for the seizure of the newspaper's archives, documentation and library. Nor has the Court received an explanation for the blanket apprehension of every person found on the newspaper's premises, including the cook, cleaner and heating engineer. The presence of 40 persons who were not employed by the newspaper is not, in itself, evidence of any sinister purpose or of the commission of any offence.

50. As stated in the Commission's report, the necessity for any restriction in the exercise of freedom of expression must be convincingly established (see, amongst other authorities, the *Otto-Preminger-Institut v. Austria* judgment of 20 September 1994, Series A no. 295-A, § 50.) The Court concludes that the search operation, as conducted by the authorities, has not been shown to be necessary, in a democratic society, for the implementation of any legitimate aim.

C. Concerning the legal measures taken in respect of issues of the newspaper

1. The applicants

51. The applicants claimed that the Government also sought to hinder, prevent and render impossible the production and distribution of *Özgür Gündem* by means of unjustified legal proceedings. They adopt the findings in the Commission's report that many of the prosecutions brought against the newspaper in respect of the contents of articles and news reports were unjustified and disproportionate in their effects. They submit that the Commission analysed thoroughly a representative sample of prosecutions in the light of the principles established by the Court and found that most of the impugned articles contained no incitement to violence or comments likely to exacerbate the situation which could justify the measures imposed.

2. The Government

52. The Government submitted that the Commission was selective in the manner in which it examined domestic court decisions concerning *Özgür Gündem* publications. It was furthermore simplistic, in their view, to consider that only words directly and expressly inciting to violence might justifiably be prohibited, an approach which the Commission had taken in examining the articles. Implied, covert and veiled messages could equally have a negative impact. The Government argued that the correct test was to examine the actual danger caused by the publication. They also contended that the intention of the newspaper, namely, that of acting as a tool of propaganda for the PKK and of supporting its aim of endangering territorial integrity of Turkey, was crucial in this assessment. It is for the domestic authorities who are in contact with the vital forces of their countries to determine whether safety or security is threatened and the Contracting State must enjoy a wide margin of appreciation in any supervision carried out by Strasbourg.

3. *The Commission*

53. In its report, the Commission examined 21 court decisions concerning prosecutions in respect of 32 articles and news reports. These prosecutions related to various offences: insulting the State and the military authorities under Article 159 of the Criminal Code, provoking racial and regional hostility under Article 312 of the Criminal Code, reporting statements of the PKK under section 6 of the Prevention of Terrorism Act 1991, identifying officials appointed to fight terrorism under section 6 of the 1991 Act, and publishing separatist propaganda under section 8 of the 1991 Act. The prosecutions resulted in convictions involving prison terms, fines and closure of the newspaper. The Commission found that the criminal convictions and the imposition of sentences could be justified only in respect of three publications. Its summaries of the articles and court judgments are contained in its report (§§ 160-237).

4. *The Court's assessment*

54. The Court, firstly, sees no reason for criticising the approach adopted by the Commission which consisted in selecting domestic decisions for examination. The Commission reviewed the material and information provided by the parties, including the convictions and acquittals involved. Given the number of prosecutions and decisions, a detailed analysis of all cases would have been impracticable. The Commission identified decisions reflecting the different criminal offences at stake in the domestic cases. The articles examined varied in subject-matter and form and included news reports on different subjects, interviews, a book review and a cartoon. The Government have not provided any reason for holding that this selection was biased, unrepresentative or otherwise gave a distorted picture; nor did they identify any court decisions or articles which should have been examined instead.

55. The Court therefore accepts the approach taken by the Commission and will examine whether, in the cases which the latter included in its report, the measures imposed disclose any violation of Article 10 of the Convention.

56. It finds, first, that *prima facie* these measures constituted an interference with the freedom of expression within the meaning of the first paragraph of Article 10 and fall to be justified in terms of the second paragraph. While the applicants submit, in their memorial, that the 1991 Prevention of Terrorism Act provisions (see paragraphs 32-33 above) are so vague and potentially all-inclusive as to violate the letter and spirit of

Article 10, they have not provided any precise argument on why the measures in question should not be considered as “prescribed by law”.

The Court recalls that it has already considered this point in previous judgments (see e.g. the *Sürek v. Turkey* (no. 1), judgment of 8 July 1999, to be published in the official reports of the Court, §§ 45-46, and twelve other freedom of expression cases concerning Turkey) and found that measures imposed pursuant to the 1991 Act could be regarded as “prescribed by law”. The applicants have provided no basis on which to alter this conclusion. As in those other judgments, the Court therefore finds that the measures taken can be said to have pursued the legitimate aims of protecting national security and territorial integrity and of preventing crime and disorder (see e.g. *Sürek v. Turkey* (no. 1), cited above, § 52).

57. The Court shall now examine whether these measures were “necessary in a democratic society” for achieving such aim or aims in the light of the principles established in its case-law (see, amongst recent authorities, the *Zana v. Turkey* judgment of 25 November 1997, *Reports* 1997-VII, p. 2533, § 51, the *Sürek v. Turkey* (no. 1) judgment, cited above, § 58). These may be summarised as follows:

(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 extends not only to “information” or “ideas” that are favourably received or regarded as inoffensive or indifferent, but also to those that offend, shock or disturb. Such are the demands of the 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 that margin 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 a final ruling on whether a given “restriction” is reconcilable with the freedom of expression 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 that interference 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.

58. As these cases also concern measures against newspaper publications, they must equally be seen in the light of the essential role played by the press for ensuring the proper functioning of democracy (see, among many other authorities, the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, p. 26, § 41; and the above-mentioned *Fressoz and Roire v. France* judgment of 21 January 1999, to be published in the official reports of the Court, § 45). While the press must not overstep the bounds set, *inter alia*, for the protection of the vital interests of the State, such as the protection of national security or territorial integrity against the threat of violence or the prevention of disorder or crime, it is nevertheless incumbent on the press to convey information and ideas on political issues, even divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders (see the above-mentioned *Lingens* judgment, p. 26, §§ 41-42).

(a) Prosecutions concerning the offence of insulting the State and the military authorities (Article 159 of the Criminal Code)

59. The Commission examined in this context three articles concerning the alleged destruction of houses in Lice by the security forces which led to the imposition of a prison sentence of ten months and a closure order of 15 days, and a cartoon depicting the Turkish Republic as a figure labelled "*kahpe*¹", which entailed the imposition of a fine, a 10-month prison term and a closure order of 15 days (see the Commission's report, §§ 161-166).

60. The Court recalls that the dominant position enjoyed by the State authorities makes it necessary for them to display restraint in resorting to criminal proceedings. The authorities of a democratic State must tolerate criticism, even if it may be regarded as provocative or insulting. The Court notes, in respect of the articles concerning the destruction in Lice, that allegations of security force involvement were circulating widely and indeed are the subject of proceedings in Strasbourg (see e.g. no. 23656/94, *Ayder and others v. Turkey*, Commission's report 21.10.1999, pending before the Court). The Commission also found that the terms of the article were factual in content and emotional, but not offensive, in tone. In respect of the cartoon, it notes that the domestic court rejected the claim that it was

1. This word conveys a range of meanings, including prostitute, tricky, deceitful.

intended as a joke but found that it disclosed “the concentrated nature of the intention to insult”. The Court does not find any convincing reason, however, for penalising any of these publications as described above. It agrees with the Commission’s findings that the measures taken were not “necessary in a democratic society” for the pursuit of any legitimate aim.

(b) Prosecutions concerning the offence of provoking racial and regional hostility (Article 312 of the Criminal Code)

61. The case examined under this heading concerned an article describing alleged attacks by security forces on villages in the south-eastern region and attacks made by terrorists, including the killing of an *imam* (see the Commission’s report, §§ 167-169). The domestic court, which imposed a fine and a prison sentence of 16 months’ imprisonment on the author and issued a closure order of one month, referred to the manner in which the article was written, the reason why it was written and the social context, without offering any explanation. The Court notes that it did not rely on any alleged inaccuracy in the article. The Commission found that the article was factual and of public interest and that it contained no element of incitement to violence or overt support for the use of violence by the PKK. The Court does not find relevant and sufficient reasons for imposing criminal convictions and penalties in respect of this article and agrees with the Commission that the interference was not justified under Article 10 paragraph 2 of the Convention.

(c) Prosecutions for reporting statements of the PKK (section 6 of the 1991 Act)

62. The Commission reviewed seven court decisions concerning convictions which were imposed in respect of eight articles, and which involved fines and the confiscation of newspaper issues. The articles included reports of declarations of PKK organisations (e.g. ARGK), statements, a speech and an interview with Abdullah Öcalan, the PKK leader, a statement by the European representative of the PKK, an interview with Osman Öcalan, a PKK commander, a statement by the Dev-Sol European office, and an interview with Cemil Bayık, a PKK commander (see the Commission’s report, §§ 174-195).

63. The Court recalls that the fact that interviews or statements were given by a member of a proscribed organisation cannot in itself justify an interference with the newspaper’s freedom of expression. Nor can the fact that the interviews or statements contain views strongly disparaging of Government policy. Regard must be had instead to the words used and the

context in which they were published, with a view to determining whether the texts taken as a whole can be considered as inciting to violence (see e.g. the Sürek and Özdemir judgment of 8 July 1999, § 61).

64. The Court agrees with the Commission that four of the eight articles cannot be regarded as inciting to violence, in view of their content, tone and context. In particular, it finds that the statement of the Dev-Sol office in Europe, which recounts alleged police maltreatment of persons at a Turkish funeral in Germany, did not contain any material relevant to public order concerns in Turkey.

65. Three articles were found by the Commission to contain passages which advocated intensifying the armed struggle, glorified war and espoused the intention to fight to the last drop of blood. The Court agrees that, in the context of the conflict in the south-east, these could reasonably be regarded as encouraging the use of violence (see e.g. the Sürek v. Turkey (no. 1) judgment, §§ 61-62). Given also the relatively light penalties imposed, the Court finds that the measures complained of were reasonably proportionate to the legitimate aims of preventing crime and disorder and could be justified as necessary in a democratic society within the meaning of the second paragraph of Article 10.

(d) Prosecutions for identifying officials participating in the fight against terrorism (section 6 of the 1991 Act)

66. Five court decisions on six articles are concerned under this heading. Penalties imposed included fines, the confiscation of issues and, in one instance, a closure order of fifteen days (see the Commission's report, §§ 199-215).

67. The Court observes that the convictions and sentences had been imposed because the articles had identified by name certain officials in connection with alleged misconduct, namely, the death of the son of a DEP candidate during detention, the allegation of official acquiescence in the killing of Musa Anter, the forcible evacuation of villages, the intimidation of villagers, the bombing of Şırnak and the revenge killing of two persons after a PKK raid on a gendarme headquarters. However, it is significant that in two of the articles the officials named were not in fact alleged to be responsible for the misconduct but merely implicated in the surrounding events. In particular, concerning the death during detention, the Şırnak security director was cited as having previously re-assured the family that the man would be released safely and the Şırnak chief public prosecutor was reported as being unavailable for comment. While three village guards were

named in the article concerning the revenge killing, it was alleged that the gendarmes had killed the two people.

68. It is true that the other three articles alleged serious misconduct by the officials named and were capable of exposing them to public contempt. However, as for the other articles, the truth of their content was apparently not a factor taken into account, and, if true, the matters described were of public interest. Nor was it taken into account that the names of the officials and their role in fighting terrorism were already in the public domain. Thus the State of Emergency Governor, who was named in one article, was a public figure in the region, while the gendarmerie commanders and village guards named in the other articles would have been well-known in their districts. The interest in protecting their identity was substantially diminished, therefore, and the potential damage which the restriction aimed at preventing was minimal. To the extent therefore that the authorities had relevant reasons to impose criminal sanctions, these could not be regarded as sufficient to justify the restrictions placed on the newspaper's freedom of expression (see e.g. the *Sürek v. Turkey* (no. 2) judgment of 8 July 1999, §§ 37-42). These measures accordingly could not be justified in terms of Article 10 § 2 of the Convention.

(e) Prosecutions for statements constituting separatist propaganda (section 8 of the 1991 Act)

69. Under this heading, the Commission identified six court decisions concerning twelve articles. The penalties imposed upon conviction included terms of imprisonment of 20 months and two years, fines, confiscation of issues and, in one instance, a closure order of one month (see the Commission's report, §§ 218-317).

70. The Court observes that the articles in question included reports on economic or social matters (e.g. a dam project, public health), commentaries on historical developments in the south-eastern region, a declaration condemning torture and massacres in Turkey and calling for a democratic solution, and accounts of alleged destruction of villages in the south-east. The Court notes that the use of the term "Kurdistan" in a context which implies that it should be, or is, separate from the territory of Turkey, and the claims by persons to exercise authority on behalf of that entity, may be highly provocative to the authorities. However, the public enjoys the right to be informed of different perspectives on the situation in south-east Turkey, irrespective of how unpalatable those perspectives appear to the authorities. The Court is not persuaded that, even against the background of serious disturbances in the region, expressions which appear to support the idea of a

separate Kurdish entity must be regarded as inevitably exacerbating the situation. While several of the articles were highly critical of the authorities and attributed unlawful conduct to the security forces, sometimes in colourful and pejorative terms, the Court nonetheless finds that they cannot be reasonably regarded as advocating or inciting the use of violence. Having regard to the severity of the penalties imposed, it concludes that the restrictions imposed on the newspaper's freedom of expression disclosed in these cases were disproportionate to the aim pursued and cannot be justified as "necessary in a democratic society".

D. Conclusion

71. The Court concludes that the respondent State has failed to take adequate protective and investigative measures to protect *Özgür Gündem*'s exercise of its freedom of expression and that it has imposed measures on the newspaper, through the search and arrest operation of 10 December 1993 and through numerous prosecutions and convictions in respect of issues of the newspaper, which were disproportionate and unjustified in the pursuit of any legitimate aim. As a result of these cumulative factors, the newspaper ceased publication. There has accordingly been a breach of Article 10 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

72. The applicants claimed that the measures imposed on *Özgür Gündem* disclosed discrimination, invoking Article 14 of the Convention which provides:

"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."

73. The applicants asked the Court to reconsider the opinion, expressed in the Commission's report, that their complaints of discrimination were unsubstantiated. They submitted that the finding of a violation of Article 10 supports the conclusion that they suffered discrimination on the grounds of their national origin and association with a national minority. They argue that any expression of Kurdish identity was treated by the authorities as advocacy of separatism and PKK propaganda. In the absence of any justification for the restrictive measures imposed with regard to most of the

articles examined by the Commission, these measures could only be explained by prohibited discrimination.

74. The Government submitted that the applicants' claims of discrimination were unsubstantiated.

75. The Court recalls that it has found a violation of Article 10 of the Convention. However, in reaching the conclusion that the measures imposed in respect of 29 articles and news reports were not necessary in a democratic society, it was satisfied that they pursued the legitimate aims of protecting national security and territorial integrity or that of the prevention of crime or disorder. There is no reason to believe that the restrictions on freedom of expression which resulted can be attributed to a difference of treatment based on the applicants' national origin or to association with a national minority. Accordingly, the Court concludes that there has been no breach of Article 14 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

76. The applicants claimed compensation for pecuniary and non-pecuniary damage as well as the reimbursement of costs and expenses incurred in the domestic and Convention proceedings. Article 41 of the Convention provides:

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

A. Pecuniary damage

77. The applicant company, *Ülkem Basın v Yayıncılık Sanayi Ticaret Ltd.*, claimed that it suffered pecuniary loss through the prosecution and seizure of its daily production. Prior to the actions of the Government, the newspaper was selling about 45,000 copies per day. Circulation fell as a result of the violations to around 30,000 and then ceased altogether. The newspaper was sold for 10,000 Turkish liras (TRL). They therefore held that it would be reasonable to claim the equivalent of one year's production of the newspaper, namely TRL 110,000 million.

The applicant company also claimed that it was required to pay lawyers' fees, the costs of medical treatment and other expenses such as travel and communications incurred in respect of attacks on and arrest and trial of correspondents, distributors and other workers. It was estimated that these expenditures amounted to TRL 1,000 million. The applicant company also paid all the expenses in respect of the 17 editors who were remanded in

custody, including lawyers' fees totalling TRL 20,000 million. Furthermore, on 10 December 1993, the newspaper's offices in İstanbul, Diyarbakır, Batman, Elazığ, Van, İzmir, Agri, Antalya and Tatvan were raided and searched and archives and documents seized. None of these documents were returned. The value of the documents and archives was about TRL 10,000 million. The claims totalled TRL 141,000 million.

The applicant company stated that it was unable to supply documentary evidence in respect of the pecuniary loss as all the documents and registers of the newspaper, which had been retained by its successor *Özgür Ülke*, were destroyed in the bombing of the building in December 1994.

78. The Government stated that no compensation was payable as there had been no violation of the Convention. However, even assuming a violation, the amounts claimed by the applicants were excessive, inflated and unacceptable.

79. The Court observes that the applicant company is unable to produce any documentary support of its claims for pecuniary loss. Nor has it attempted to specify as far as possible the basis of claims for legal fees, medical and other expenses. The Court is not satisfied that there is a direct causal link between the finding of a failure to protect or investigate and the claimed pecuniary losses in respect of medical and other expenses. It also notes that the company's claims relate to the legal measures taken against the newspaper as a whole, irrespective of whether the measure has been found to be justified or not. Further, additional claims are made for the seizure of archives and documents in a number of offices, although the applicant's substantive complaints concerned its headquarters in İstanbul.

80. Nonetheless, the Court accepts that some pecuniary loss must have flowed from the breaches identified, both in relation to the search and seizure of archives and documents at the İstanbul office and to the unjustified restrictions disclosed by the prosecutions and convictions identified in this judgment. It has also found that the cumulative effects of the breaches resulted in the newspaper ceasing publication. Making an assessment on an equitable basis, the court awards the applicant company TRL 9,000 million.

B. Non-pecuniary damage

81. The applicant Fahri Ferda Çetin claims 30,000 pounds sterling (GBP) for acute distress, anxiety and mental suffering. He alleges that during his detention for 13 days, during which he was tortured, and that on release he was forced to flee Turkey, leaving his wife and children behind.

82. The applicant, Yaşar Kaya, also claims GBP 30,000. He states that Istanbul State Security Court no. 5 imposed terms of imprisonment on him for the articles published by him in the newspaper. He too was forced to flee abroad, leaving his wife and children in Turkey, and so also underwent acute distress, anxiety and mental suffering.

83. The Government states that the amounts claimed are inflated and, if granted, would amount to unjust enrichment.

84. The Court recalls that it has made no findings under the Convention regarding Fahri Ferda Çetin's detention or the periods of imprisonment imposed on Yaşar Kaya. It does not doubt, however, that these applicants suffered considerable anxiety and stress in respect of the breaches established by the Court. Having regard to other awards made in cases against Turkey (see e.g. the Ceylan v. Turkey judgment of 8 July 1999, to be published in the Court's official reports, § 50, and the Arslan v. Turkey judgment of 8 July 1999, § 61) and ruling on an equitable basis, it awards the applicants GBP 5,000 each.

C. Costs and expenses

85. The applicants claim legal fees and expenses for Mr Osman Ergin, who acted for the newspaper in domestic proceedings, but have not furnished any details. Similarly, they have not provided details of claims for fees and expenses of the Turkish lawyers assisting the applicants. They claimed GBP 5,390 (less FRF 5,595 legal aid from the Council of Europe) for fees, expenses and costs incurred by their United Kingdom lawyers and GBP 7,500 fees, GBP 1,710 administrative costs, GBP 12,125 translation costs and GBP 1,650 travel expenses incurred by the Kurdish Human Rights Project (KHRP) in assisting in the application. In respect of the hearing before the Court, the applicants claimed GBP 1,450 fees and GBP 46 administrative costs (less FRF 3,600 legal aid) for their United Kingdom lawyers and also in respect of the costs and fees of the KHRP for the hearing, GBP 2,490 for fees, costs and expenses.

86. The Government submit that these claims are excessive, and that accessory expenses, such as those claimed by the KHRP, should not be accepted as this would inflate the award into unjust enrichment.

87. The Court is not satisfied that all the amounts claimed in respect of the KHRP may be regarded as necessarily incurred, save in regard to the translation costs. Taking into account awards made in other cases, and making an equitable assessment, the Court awards GBP 16,000, less the amount of FRF 9,195 paid by way of legal aid from the Council of Europe.

D. Default interest

88. The Court deems it appropriate to adopt the statutory rate of interest applicable in the United Kingdom at the date of adoption of the present judgment, which according to the information available to it, is 7.5 % per annum.

FOR THESE REASONS THE COURT

1. *Decides* unanimously to strike the case out of the list insofar as it concerns Gurbetelli Ersöz;
2. *Holds* unanimously that there has been a violation of Article 10 of the Convention;
3. *Holds* unanimously that there has been no violation of Article 14 of the Convention;
4. *Holds* by six votes to one
 - (a) that the respondent State pay, within three months;
 - (i) to the applicant company 9,000,000,000 (nine thousand million) Turkish liras;
 - (ii) to Fahri Ferda Çetin and Yaşar Kaya for non-pecuniary damage 5,000 (five thousand) pounds sterling each to be converted into Turkish liras at the exchange rate applicable at the date of delivery of this judgment;
 - (iii) to the applicants for costs and expenses 16,000 (sixteen thousand) pounds sterling less 9,195 (nine thousand, one hundred and ninety five) French francs to be converted into pounds sterling at the exchange rate applicable at the date of delivery of this judgment;
 - (b) that simple interest at an annual rate of 7.5 % shall be payable from the expiry of the above-mentioned three months until settlement;

5. *Dismisses* unanimously the remainder of the applicants' claims for just satisfaction.

Done in English and in French, the English text being authentic, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 16 March 2000.

Vincent BERGER
Registrar

Matti PELLONPÄÄ
President

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

M.P.

V.B.

PARTLY DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

To my great regret, I am unable to share the conclusion reached by the majority regarding the application of Article 41 in this case. Allow me to explain.

1. The applicant alleged that he had sustained substantial pecuniary damage as a result of being subjected to prosecution, the seizure of his possessions and other measures. In support of his claims, he has alleged only hypothetical, illusory and imaginary facts, without providing any evidence. In short, he was speculating and, furthermore, certain matters relied on bore no relation whatsoever with the truth. I shall refer to only one of the allegations, so that it can be seen in the light of a finding of the European Commission of Human Rights based on its own investigation in a previous case. Thus, according to the applicant, prior to the actions of the Government, the newspaper *Özgür Gündem* was selling 45,000 copies per day. That figure fell to 30,000 and the newspaper disappeared permanently as a result of those actions (see the judgment, § 76). That account is shown to be untrue by the European Commission of Human Rights. The Commission stated in its report of 23 October 1998 in the case of *Kılıç v. Turkey* (application no. 22492/93, § 176): "*Özgür Gündem* was a daily newspaper ... with a national circulation of some thousand copies... In or about April 1994, *Özgür Gündem* ceased publication and was succeeded by another newspaper, *Özgür Ülke*..." The difference between the alleged figure and the Commission's figure is striking. In addition, *Özgür Gündem* disappeared only in theory, since it was replaced by *Özgür Ülke*. That clearly shows the fanciful and speculative nature of the claim for pecuniary damage in the instant case.

2. Under its settled case-law, the European Court of Human Rights will award compensation for pecuniary damage only if the claims have been duly established and there is an immediate and direct causal link between the facts and the alleged damage. That rule is illustrated in the following examples taken from judgments in cases against Turkey also concerning Article 10 of the Convention.

"81. With regard to pecuniary damage, the Delegate of the Commission suggested that the Court should consider the question of the application of Article 50 in the light of the hypothetical character of the amount claimed. He left the question of non-pecuniary damage to the Court's discretion. Lastly, with regard to the sum claimed for costs and expenses, he mentioned the problem raised by the lack of supporting documents.

82. On the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of proceedings compatible with Article 6 § 1 would have been. It further notes that there is insufficient proof of a causal connection between the breach of Article 10 it has found and the loss of professional and commercial income alleged by the applicant. Moreover, the applicant's claims in respect of pecuniary damage are not supported by any evidence whatsoever. The Court can therefore not allow them."

(Incal v. Turkey judgment of 9 June 1998)

"47. The applicant sought 262,000 French francs (FRF) for pecuniary damage and FRF 500,000 for non-pecuniary damage.

48. The Government invited the Court to dismiss that claim.

49. As Mr Çiraklar did not specify the nature of the pecuniary damage of which he complained, the Court cannot but dismiss the relevant claim. As to the alleged non-pecuniary damage, it is sufficiently compensated by the finding of a violation of Article 6 § 1."

(Çiraklar v. Turkey judgment of 28 October 1998)

"66. The Delegate of the Commission submitted that the applicants' presentation – which was very general and hypothetical – was insufficient to allow their claims under Article 50 to be upheld.

67. The Court notes that the applicants have not furnished any evidence in support of their claims for substantial sums in respect of pecuniary damage and costs and expenses. Consequently, it cannot uphold those claims (see, *mutatis mutandis*, the Pressos Compania Naviera S.A. and Others v. Belgium (Article 50) judgment of 3 July 1997, Reports 1997-IV, p. 1299 § 24). It notes, however, that the applicants received FRF 57,187 in legal aid paid by the Council of Europe."

(Socialist Party and Others v. Turkey judgment of 8 July 1999)

"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."

(Arslan v. Turkey judgment of 8 July 1999)

"66. The Government contended that Mr Karataş had not proved his loss of earnings.

67. The Delegate of the Commission expressed no view on this point.

68. The Court finds that there is insufficient proof of a causal link between the violation and the applicant's alleged loss of earnings. In particular, it has no reliable information on Mr Karataş's salary. Consequently, it cannot make an award under this head (see Rule 60 § 2 of the Rules of Court)."

(Karataş v. Turkey judgment of 8 July 1999)

"53. The Delegate of the Commission considered that there was no reason for the Court to reach a different conclusion from that reached in the cases of the United Communist Party and the Socialist Party cited above.

54. The Court notes that the applicant party has not furnished any evidence in support of its claim. Consequently, it is unable to accept it (Rule 60 § 2 of the Rules of Court; see, *mutatis mutandis*, the Socialist Party and Others v. Turkey judgment of 25 May 1998, Reports 1998-III, p. 1261, § 67)."

(Freedom and Democracy Party (ÖZDEP) v. Turkey judgment of 8 December 1999)

APPENDIX C

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THE EUROPEAN COURT OF HUMAN RIGHTS:

SYSTEM AND PROCEDURE

As from 1 November 1998, Protocol 11 to the European Convention on Human Rights abolished the former two-tier system of the European Commission and Court, and created a single full-time permanent Court. This note briefly summarises the main points of the new system in Strasbourg and sets out how a case will progress through the system.

The new system under Protocol 11

- There are no changes to the substantive human rights protected by the Convention (Articles 1-18).
- The amended Convention created a new Court functioning on a permanent basis (Article 19). One judge is elected by the Parliamentary Assembly for each state party, holds office for six years and may be re-elected (Article 23).
- The Court may establish Committees of three judges which will be able unanimously to declare cases inadmissible (Article 28). Chambers of seven judges will determine the remainder of the cases (Articles 27 & 29). The national judge will be an *ex officio* member of the chamber. There is no right of appeal from an admissibility decision.
- The pre-existing admissibility criteria have been retained (Article 35). The most important of these are the requirement to exhaust all available, effective domestic remedies and the requirement to lodge a case at the European Court within six months of the final decision of the domestic courts (or within six months of the incident complained of, if there are no effective domestic remedies).
- The President of the Court may permit any Convention state or "any person concerned" (including human rights organisations) to submit written comments or take part in hearings as a 'third party' (i.e. even if the organisation is not acting for the applicant).
- New rules of the Court were adopted on 4 November 1998. The rules specify the procedure and internal workings of the Court.

How a case is handled by the European Court of Human Rights

Lodging the application with the Court

- An application can initially lodged simply by letter. There is no Court fee.

Registration and examination of the case

- The Court will open a provisional file. A Court Registry lawyer will respond with an application form and a form of authority (which should be signed by the applicant and which authorises the lawyer to act on his/her behalf).

- The application form and form of authority should be completed and returned to the Court within six weeks. Copies of all relevant documents should be lodged at the Court with the application form.
- The application is registered on receipt of the completed application form. Following registration, all documents lodged with the Court are accessible to the public (unless the Court decides otherwise).
- Once registered, an application is assigned to a Judge Rapporteur (whose identity is not disclosed to the applicant) to consider admissibility.
- The Court (in Committees of three or Chambers of seven) may declare an application inadmissible or the application may be sent to the respondent Government for a reply.

Communication of a case

- If a case is sent to the Government, the Government will be asked to reply to specific questions (copies of which are sent to the applicant) within a stipulated time.

Legal Aid

- When a case is sent to the Government, the applicant is then invited to apply for legal aid. The assessment of the applicant's financial situation is carried out by the appropriate domestic body (in Turkey, this is usually the muhtar or the local municipal authorities). The Court will send an application for legal aid to the Government to comment on.

Government's Observations

- A copy of the Government's written Observations will be sent to the applicant. The applicant may submit further written Observations in reply (within a stipulated time).

Interim Measures

- In very urgent cases, where there is an imminent threat to life or of serious injury, the Court may ask the Government to take particular action or to stop from taking certain action. For example, 'interim measures' may be applied where an applicant is threatened with expulsion to a country where there is a danger of torture or death. In that situation, the Court may ask the Government not to deport the applicant whilst the case is pending at the European Court.

Decision on admissibility

- An application may be declared inadmissible by a Committee of three judges (if unanimous). The remainder of the cases are dealt with by a Chamber of seven judges.

- The Court may hold an oral hearing to decide admissibility, although this is now rare and usually only if the case raises difficult or new issues. An application may be declared admissible/inadmissible in part.

Friendly settlement

- The friendly settlement procedure provides the Government and the applicant with an opportunity to resolve the dispute. The Court will write to the parties asking for any proposals as to settlement. The case is struck off the Court's list of cases if settlement is agreed.

Consideration of the merits

- The parties are invited to lodge final written submissions (commonly referred to as the 'Memorial'). Details of any costs or compensation which are being claimed should either be included with the Memorial or should be submitted to the Court within two months of the admissibility decision (or other stipulated time).
- The Court now decides most cases without holding a hearing. However, if there is a hearing, it takes place in public (unless there are particular reasons for the hearing to be held in private). The hearings usually take no more than two hours in total. Applicants' representatives are usually given 30 minutes to make their initial oral arguments, followed by the same period for the government's representatives. If the Court asks questions of the parties there may be a 15-20 minute adjournment, then each party may have 15-20 minutes to answer questions and reply to the other side.

Judgment

- Most judgments are issued by chambers of seven judges, but the most significant cases will be heard by a Grand Chamber of 17 judges. The Court's judgment is published several months after any hearing or after the parties' final written submissions. The Court may reach a decision unanimously or by a majority. In either case, full reasons are provided in the judgment. Individual judges may also add their dissenting judgment to the majority judgment. Within three months of a chamber judgment, any party may ask for the case to be referred to the Grand Chamber of 17 judges for a final judgment. The request is considered by a panel of five judges from the Grand Chamber. Once final, judgments are legally binding on the Government (Article 46(1)).
- The Court's primary remedy is a declaration that there has been a violation of one or more Convention rights.
- The judgment may include an award for 'just satisfaction' under Article 41 (previously Article 50). This may include compensation for both pecuniary and non-pecuniary loss, legal costs and expenses. Awards for just satisfaction may be reserved in order for the Court to receive further submissions.

- The Court will not quash decisions of the domestic authorities or courts, strike down domestic legislation or otherwise require a Government to take particular measures.
- There is no provision in the Convention for costs to be awarded against an applicant.

Supervision of enforcement of Court judgments

- Judgments are sent to the Committee of Ministers which will review at regular intervals whether the Government has complied with it (Article 46(2)).

How long will the case take?

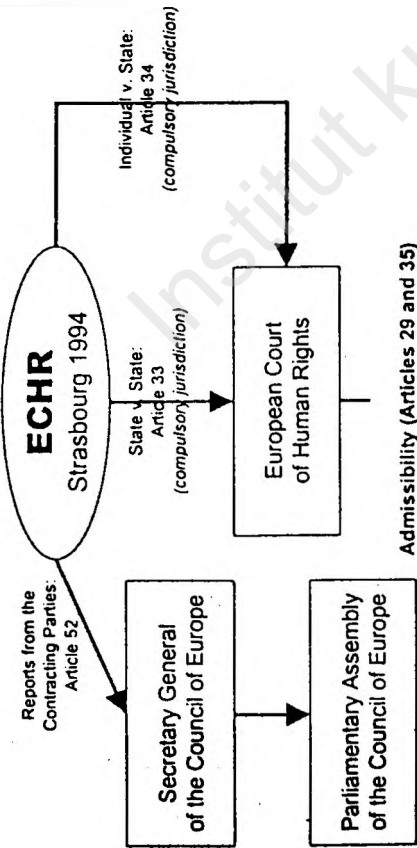
European Court cases are still taking several years to progress through the system. A case will be registered shortly after the application is lodged, but it may take more than a year for the Court even to decide whether to refer the case to the Government to reply.

Usually, it takes at least two to three years for admissibility decisions to be taken (unless there are clear reasons why the case should be declared inadmissible at the outset).

Where a case is declared admissible it is likely to take at least four to five years (from the initial introduction of the case) before the Court will produce a final judgment.

European Convention on Human Rights (ECHR) Summary overview

New control mechanism

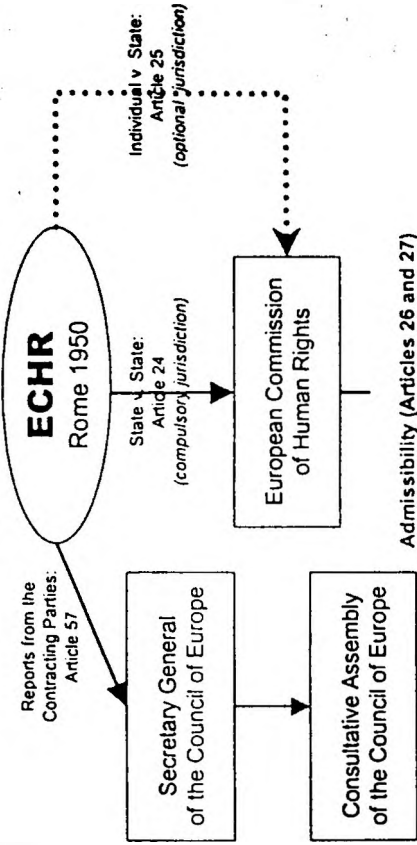


Establishment of facts. Attempt to reach friendly settlement on the basis of respect for human rights: Articles 38 and 39

Judgment of the European Court of Human Rights

Committee of Ministers supervises the execution of the Court's judgment: Article 46 (2)

Former control mechanism



Establishment of facts. Attempt to reach friendly settlement on the basis of respect for human rights: Article 28

Commission report: legal opinion as to breach

Optional jurisdiction: Article 46: State concerned or Commission

European Court of Human Rights: judgment

Committee of Ministers supervises the execution of the Court's judgment: Article 54

Committee of Ministers of the Council of Europe decision: Article 32

If necessary, the Committee of Ministers supervises the execution of its own decision: Article 32 (3)

→ Compulsory jurisdiction

.....→ Optional jurisdiction

* Applicant with respect to State which ratified Protocol No 9

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Relevant Articles of the European Convention on Human Rights

(Note the changes made following the coming into force of Protocol 11).

Convention

Article 2: Right to life.

Article 3: Prohibition of torture or inhuman or degrading treatment or punishment.

Article 4: Prohibition of slavery and forced labour.

Article 5: Right to liberty and security.

Article 6: Right to a fair trial.

Article 7: No punishment without law.

Article 8: Right to respect for private and family life.

Article 9: Freedom of thought, conscience and religion.

Article 10: Freedom of expression.

Article 11: Freedom of assembly and association.

Article 12: Right to marry.

Article 13: Right to an effective remedy.

Article 14: Prohibition of discrimination.

Article 15: Derogation in time of emergency.

Article 16: Restrictions on political activity of aliens.

Article 17: Prohibition of abuse of rights.

Article 18: Restrictions under Convention shall only be applied for prescribed purpose.

Article 34: Application by person, non-governmental organisations or groups of individuals. (formerly Article 25).

Article 38: Examination of the case and friendly settlement proceedings (formerly Article 28).

Article 41: Just satisfaction to injured party in event of breach of Convention. (formerly Article 50).

Protocol No. 1

Article 1: Protection of property.

Article 2: Right to education.

Article 3: Right to free elections.

Protocol No. 2

Article 1: Prohibition of imprisonment for debt.

Article 2: Freedom of movement.

Article 3: Prohibition of expulsion of nationals.

Article 4: Prohibition of collective expulsion of aliens.

Protocol No. 6

Article 1: Abolition of the death penalty.

Protocol No. 7

Article 1: Procedural safeguards relating to expulsion of aliens.

Article 2: Right to appeal in criminal matters.

Article 3: Compensation for wrongful conviction.

Article 4: Right not to be tried or punished twice.

Article 5: Equality between spouses.

To date, Turkey has only ratified the Convention and Protocol No. 1.

The Kurdish Human Rights Project

The Kurdish Human Rights Project (KHRP) is an independent, non-political, non-governmental human rights organisation founded and based in London, England. KHRP is a registered charity and is committed to the promotion and protection of the human rights of all persons living within the Kurdish regions, irrespective of race, religion, sex, political persuasion or other belief or opinion. Its supporters include both Kurdish and non-Kurdish people.

AIMS

- To promote awareness of the situation of the Kurds in Iran, Iraq, Syria, Turkey and the countries of the former Soviet Union
- To bring an end to the violation of the rights of the Kurds in these countries
- To promote the protection of human rights of Kurdish people everywhere

METHODS

- Monitoring legislation including emergency legislation and its application
- Conducting investigations and producing reports on the human rights situation of Kurds in Iran, Iraq, Syria, Turkey, and in the countries of the former Soviet Union by, amongst other methods, sending trial observers and engaging in fact-finding missions
- Using such reports to promote awareness of the plight of the Kurds on the part of committees established under human rights treaties to monitor compliance of states
- Using such reports to promote awareness of the plight of the Kurds on the part of the European Parliament, the Parliamentary Assembly of the Council of Europe, the national parliamentary bodies and inter-governmental organisations including the United Nations
- Liaison with other independent human rights organisations working in the same field and co-operating with lawyers, journalists and others concerned with human rights
- Assisting individuals with their applications before the European Court of Human Rights
- Offering assistance to indigenous human rights groups and lawyers in the form of advice and training seminars on international human rights mechanisms

Özgür Gündem v. Turkey — One of a series of cases brought by Kurds with the assistance of the Kurdish Human Rights Project