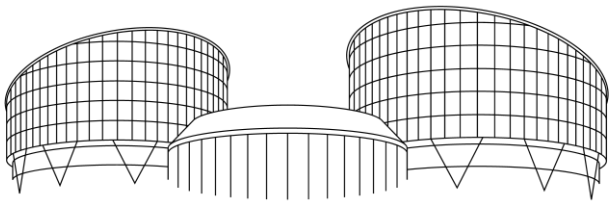

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF DİSK AND KESK v. TURKEY

(Application no. 38676/08)

JUDGMENT

STRASBOURG

27 November 2012

FINAL

29/04/2013

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Disk and Kesk v. Turkey,

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

Ineta Ziemele, *President,*
Danutė Jočienė,
Dragoljub Popović,
Isabelle Berro-Lefèvre,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 23 October 2012,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 38676/08) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by the DİSK (*Devrimci İşçi Sendikaları Konfederasyonu – Confederation of Revolutionary Workers' Trade Unions*) and the KESK (*Kamu Emekçileri Sendikaları Konfederasyonu – Confederation of Public Employees' Trade Unions*) on 13 August 2008.

2. The applicants were represented by Mr N. Okcan, Mr M. İriz, Ms A. Becerik, Ms O. Ataman, Mr Ö. Eryılmaz, and Ms. O. Aydın, lawyers practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 18 June 2009 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. On 29 April 2008 the applicants jointly notified the Beyoğlu district governor that they would be gathering before the Taksim Atatürk memorial on 1 May 2008 at 1 p.m. to celebrate Labour Day and commemorate their friends who had lost their lives during the demonstrations of 1 May 1977.

5. On 30 April 2008 the Beyoğlu district governor authorised a gathering at the requested location for representatives of trade unions only. The

district governor specifically indicated that a demonstration on a larger scale at the said location was not authorised.

6. Subsequently, certain government authorities, including the Minister of the Interior and the Government's spokesman, as well as the Istanbul Governor's office, issued press statements, declaring that they were in possession of intelligence reports which precluded them from authorising any demonstration in Taksim Square, for security reasons. The authorities held that any demonstration held in Taksim on 1 May 2008 would be unlawful and unconstitutional on account of possible provocations and disruption of traffic and public order. They further stated that they were going to take extensive security measures on 1 May 2008, including shutting down certain schools in the nearby districts, stopping the operation of ferries and subways, blocking the roads leading to Taksim Square and deploying extra police for that day. As alternative locations, the Istanbul Governor's office indicated four other squares for the demonstration, namely two on the European side and two on the Anatolian side of Istanbul.

7. On 30 April 2008 the first applicant lodged a complaint against the Governor of Istanbul with the Istanbul public prosecutor, accusing him of denying the trade unions their right to assembly in a discriminatory manner. The first applicant complained that there was no justification for denying them access to Taksim Square on Labour Day, when the same location was available for other large-scale demonstrations and celebrations (investigation no. 2008/20905).

8. At approximately 6 a.m. on 1 May 2008, members of the DİSK and KESK began gathering in front of the DİSK headquarters located in the district of Şişli for Labour Day celebrations. At around 6.30 a.m. the police asked the group to disperse, warning them that they were acting in violation of the Assemblies and Marches Act (Law no. 2911). The members of the group refused, arguing that they were merely waiting in front of the DİSK headquarters, which was a pedestrian area, and that they were not violating the said law in any way. The police, however, proceeded to disperse the group, by spraying them with pressurised water, paint and tear gas, both inside and outside the DİSK building.

9. Similar police interventions occurred over the next couple of hours with increasing intensity. Some of the demonstrators were injured as a result of the use of force by the police. While the injured demonstrators were trying to reach the nearby Şişli Etfal Hospital for medical care, they were chased by the police and were subjected to gas attacks even within the hospital premises. Some members of the DİSK were arrested.

10. At approximately 10.30 a.m. the group of demonstrators broke up of its own accord to forestall any further violence.

11. On 2 May 2008 the Chief of Şişli Etfal Hospital gave a statement to the police, stating that on 1 May 2008 around 20-30 demonstrators had entered the hospital and opened a banner. Subsequently, police officers had also entered the hospital premises in their pursuit and used a gas bomb in

the hospital's garden to neutralise the demonstrators. He further explained that one of the police officers had mistakenly sat on a gas bomb and exploded it in the police car parked at the entrance of the Emergency Service; as a result staff working in the Emergency Service as well as some of the patients had been affected. He concluded by stating that the gas bomb was not deliberately thrown in the hospital building.

12. On an unspecified date after 1 May 2008, the director of the DİSK, along with other persons, lodged a complaint with the Istanbul public prosecutor against various authorities, including the office of the Prime Minister, the Minister of the Interior, the Minister of Justice, the Istanbul Governor's office, the Head of the Istanbul Security Directorate and the police officers involved in the incidents of 1 May 2008, accusing them of breach of the right to freedom of assembly and a disproportionate use of force (investigation no. 2008/59361). On an unspecified date, the public prosecutor issued a decision of lack of jurisdiction in connection with the complaint lodged against the Istanbul Governor and the Head of Istanbul Security Directorate. The case file was accordingly transferred to the Public Prosecutor's Office at the Court of Cassation. Pursuant to the terms of Law no. 4483, the public prosecutor at the Court of Cassation sought authorisation from the Minister of the Interior to prosecute the Istanbul Governor and the Head of Istanbul Security Directorate. On an unspecified date, the Minister refused to do so. Consequently, on 8 April 2009 the public prosecutor decided not to proceed with the case. This decision was notified to the applicants' lawyer on 16 April 2009. The applicant's appeal lodged against this decision was further dismissed by the Supreme Administrative Court as the court held that pursuant to domestic legislation, no appeal was possible against the decision of 8 April 2009.

13. Regarding the complaint lodged against the Prime Minister, the Minister of the Interior, and the Minister of Justice, on 1 February 2009 the Istanbul public prosecutor delivered a decision of non-prosecution, holding that pursuant to the Constitution, the Prime Minister, the Minister of the Interior, and the Minister of Justice could not be held liable for their actions in the course of their duties. This decision was served on the applicants' lawyer on 24 February 2009. The applicants' appeal was rejected on 22 May 2009 by the Sincan Assize Court, which held that no objection could be lodged against the decision of the public prosecutor dated 1 February 2009.

14. On 5 May 2008 the representative of the first applicant handed to the Şişli public prosecutor an undetonated gas bomb belonging to the police force, found inside the DİSK headquarters following the events of 1 May 2008.

15. On 19 June 2008, upon a complaint lodged by the Istanbul Governor's office, the Beyoğlu public prosecutor questioned the director of the DİSK in relation to the events that took place on 1 May 2008 (investigation no. 2008/9241). It appears from the documents in the case file

that no prosecution was initiated against the applicants in relation to the events of 1 May 2008.

II. RELEVANT DOMESTIC LAW

A. The Constitution

16. Article 34 of the Constitution provides:

> "Everyone has the right to hold unarmed and peaceful meetings and demonstration marches without prior permission.
>
> ...
>
> The formalities, conditions, and procedures governing the exercise of the right to hold meetings and demonstration marches shall be prescribed by law."

B. The Demonstrations Act (Law no. 2911)

17. Section 22 of Law No. 2911 prohibits demonstrations and processions on public streets, in parks, places of worship and buildings in which public services are based. Demonstrations organised in public squares have to comply with security instructions and not disrupt individuals' movements or public transport. Finally, Section 24 provides that demonstrations and processions which do not comply with the provisions of this law will be dispersed by force on the order of the governor's office and after the demonstrators are warned.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION

18. The applicants alleged that the police intervention in the Labour Day Celebrations of May 2008 constituted a violation of their right to private life, freedom of expression and freedom of assembly. In this respect, they invoked Articles 8, 10 and 11 of the Convention.

19. The Court considers that the applicants' complaints should be examined from the standpoint of Article 11 alone, which reads in so far as relevant:

> "1. Everyone has the right to freedom of peaceful assembly...
>
> 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the

protection of health or morals or for the protection of the rights and freedoms of others...”

A. Admissibility

20. The Court notes that the Government have not raised any preliminary objections in respect of Article 11 of the Convention. It notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Whether there was an interference with the applicants' exercise of their freedom of peaceful assembly

21. The Government contested the applicants' allegations and maintained that there had been no interference with the applicants' rights under Article 11 of the Convention.

22. The Court notes that as a result of the police intervention, the applicants were not able to exercise their right to peaceful assembly (see paragraph 10 above), and was thus negatively affected. There has therefore been an interference with their rights under Article 11 of the Convention.

2. Whether the interference was justified

23. The Government stated that the meeting in issue had been organised unlawfully. They pointed out that the second paragraph of Article 11 of the Convention imposes limits on the right of peaceful assembly in order to prevent disorder. In their view, the organisation of the Labour Day celebrations in Taksim would have caused major disruption to public life. While the Istanbul Governor's office had pointed out that a meeting in Taksim Square would not be allowed, as an alternative, four other squares had been indicated, namely two on the European side and two on the Anatolian side of Istanbul. The Government maintained that the gathering of the representatives of the trade unions was permitted by the Beyoğlu district governor, and as a result a small group of representatives could have celebrated Labour Day at the Taksim Square to commemorate their friends who had lost their lives during the demonstrations of 1 May 1977. The Government further stated that they had received intelligence reports that a terrorist organisation would interfere in the Labour Day celebrations to provoke commotion. They also maintained that there were terrorists in the DISK's headquarters and stones were thrown from the windows towards the police force. Referring to the testimony of the Chief of Şişli Etfal Hospital,

the Government stated that it was the demonstrators who had attacked the hospital and the police had intervened to secure the area.

24. The Court reiterates that an interference will constitute a breach of Article 11 of the Convention unless it is "prescribed by law", pursues one or more legitimate aim under paragraph 2 of that provision and is "necessary in a democratic society" for the achievement of those aims.

25. In this connection, it is noted that the interference in the present case had a legal basis, namely Sections 22 and 24 of the Meetings and Demonstration Marches Act, and was thus "prescribed by law" within the meaning of Article 11 § 2 of the Convention. As regards a legitimate aim, the Government submitted that the interference pursued, among others, the legitimate aim of preventing public disorder, and the Court finds no reason to differ.

26. Turning to the question of whether the interference was "necessary in a democratic society", the Court refers in the first place to the fundamental principles underlying its judgments relating to Article 11 (see *Djavit An v. Turkey*, no. 20652/92, §§ 56-57, ECHR 2003-III; *Piermont v. France*, 27 April 1995, §§ 76-77, Series A no. 314; and *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 32, Series A no. 139). It is clear from this case-law that the authorities have a duty to take appropriate measures with regard to lawful demonstrations in order to ensure their peaceful conduct and the safety of all citizens (see *Oya Ataman v. Turkey*, no. 74552/01, § 35, ECHR 2006-XIII).

27. The Court also notes that States must not only safeguard freedom of peaceful assembly, but must also refrain from applying unreasonable indirect restrictions upon that right. Finally, it considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities in the exercise of the rights protected, there may also be positive obligations to secure their effective enjoyment (see *Djavit An*, cited above, § 57, and *Oya Ataman*, cited above, § 36).

28. The Court recalls that these principles are also applicable with regard to demonstrations and processions organised in public areas. It notes, however, that it is not contrary to the spirit of Article 11 if, for reasons of public order and national security, *a priori*, a High Contracting Party requires that the holding of meetings be subject to authorisation and regulates the activities of associations (see *Djavit An*, cited above, §§ 66-67).

29. The Court recalls that the Contracting States can impose limitations on holding a demonstration in a given place for public security reasons. Nevertheless, although a demonstration in a public place may cause some disruption to ordinary life, including disruption of traffic, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of its substance (see *Galstyan v. Armenia*,

no. 26986/03, §§ 116-117, 15 November 2007, and *Bukta and Others v. Hungary*, no. 25691/04, § 37, ECHR 2007-III).

30. The Court firstly notes that no official investigation was conducted into the incident at the domestic level. In this connection, it observes that the criminal complaints lodged by the applicants were to no avail, since no authorisation was granted by the Minister of the Interior for the prosecution of the Istanbul Governor or the Head of the Istanbul Security Directorate (see paragraph 12). In the absence of a domestic investigation, the Court is called upon to decide on the basis of the material submitted by the Parties.

31. In the present case, it is clear from the documents in the case file that as soon as the authorities were informed about the intention of the applicants to celebrate Labour Day in the Taksim Square, they took extensive measures to deter the demonstration and made declarations that the police would use force against the demonstrators if they insisted on holding the demonstrations in the Taksim Square. To this end, on 1 May 2008, upon the order of the Istanbul Governor, operations of ferries and subways were stopped, the roads leading to Taksim Square were blocked and extra police were deployed to the area to block entrance to Taksim. The Court also observes that four alternative venues were proposed by the Istanbul Governor to hold the Labour Day celebrations. In this connection, it notes that the Taksim Square, where the applicants had intended to hold their demonstration, is in the heart of the city, and a large-scale demonstration could indeed cause disruption to public life. Nevertheless, the Court also takes note that in 1977, during Labour Day Celebrations in the Taksim Square 37 people had died when a clash had broken out. As a result, the Taksim Square became a symbol of that tragic event, and it is for this reason that the applicants insisted in organising the Labour Day celebrations in Taksim in commemoration. In this connection, the Court is also informed that since 2010, Labour Day has become a national holiday in Turkey and celebrations in Taksim Square are now permitted.

32. Having said that, the Court considers that in the present case it is not called on to pronounce on the choice of the venue of the demonstrations, or to determine whether or not there was a security risk if a demonstration were to be held in the Taksim square, as alleged by the Government, since in any case the police intervention took place in the early hours of 1 May 2008, even before the demonstration commenced. The Court should therefore determine whether the intervention of the security forces was proportionate to the aim pursued.

33. The Court observes that on the day of the incident, members of the DISK, certain members of Parliament and journalists started gathering in front of the DISK's headquarters building in Şişli. The police intervention commenced at 6.30 a.m., before the demonstrators started their march. Although in their observations the Government submitted that members of an illegal organisation threw stones at the police, the Court notes that there is no evidence to support this allegation. In this connection, the Court notes

that no proceedings were initiated against the applicants or other members of the applicant confederations in connection with this incident. According to the information in the file, there is also nothing to suggest that the group waiting in front of the DISK headquarters presented a danger to public order or engaged in violent acts. There is also no information in the file that the police had encountered any violent or active physical resistance which would explain the use of such an extreme use of force. Indeed, the security forces tried dispersing the people in front of the DISK Headquarters by using gas bombs, paint sprays and pressurised water. Several people were chased by police officers and beaten.

34. The Court further notes with concern that the police officers threw a gas bomb in the Şişli Etfal Hospital premises while chasing the demonstrators. The Government maintained that some of the demonstrators had attacked the hospital and that they had tried securing the area by using a gas bomb. In this respect, they submitted the testimony of the Chief of Hospital (see paragraph 11). According to this statement, some demonstrators tried hiding in the hospital, opening a banner, and the police threw a gas bomb in the hospital's garden in their pursuit. The Court recalls that it has recognised that the use of gas bombs against individuals can produce several serious health problems and expressed concern over the use of such gases in law enforcement (see *Ali Güneş v. Turkey*, no. 9829/07, §§ 34-37, 10 April 2012). It therefore considers that the use of a gas bomb in hospital premises cannot be considered as necessary or proportionate in the circumstances of the present case.

35. The Court observes that as a result of the forceful intervention of the police officers, the demonstrators broke up of their own accord at 10.30 a.m. to forestall any further violence, and consequently they were not able to participate in the Labour Day celebrations.

36. In the Court's view, where demonstrators do not engage in acts of violence, it is important for the public authorities to show a certain degree of tolerance towards peaceful gatherings if the freedom of assembly guaranteed by Article 11 of the Convention is not to be deprived of all substance (see *Nurettin Aldemir and Others v. Turkey*, nos. 32124/02, 32126/02, 32129/02, 32132/02, 32133/02, 32137/02 and 32138/02, § 46, 18 December 2007).

37. In view of the above, the Court considers that in the instant case the forceful intervention of the police officers was disproportionate and was not necessary for the prevention of disorder.

38. There has therefore been a breach of Article 11 of the Convention in the instant case.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

39. The applicants complained under Article 13 of the Convention that they did not have an effective remedy in relation to their complaint

concerning the breach of their right to peaceful assembly. They also argued under Article 14 of the Convention, in conjunction with Article 11, that they had suffered discrimination in the enjoyment of their freedom of assembly as they had been refused permission to organise a demonstration in Taksim Square for public order reasons, while other mass demonstrations could be celebrated at the same location.

40. The Court notes that these complaints are linked to the ones examined above and must likewise be declared admissible.

41. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 11 above, the Court considers that it has examined the main legal question raised in the present applications. It concludes, therefore, that there is no need to give a separate ruling on the remaining part of the application (see *Güler and Öngel v. Turkey*, nos. 29612/05 and 30668/05, § 36, 4 October 2011).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

A. Damage

42. The applicants claimed a total of 400,000 euros (EUR) in respect of non-pecuniary damage. Furthermore, without submitting any supporting documents, they claimed EUR 20,000 in respect of pecuniary damage for the damage caused at the Disk Headquarters during the incident.

43. The Government contested the claims.

44. The Court notes that the pecuniary claims of the applicants are not supported by any document; it therefore rejects this claim. With regard to non-pecuniary damage, it considers that the applicants are sufficiently compensated by the finding of a violation of Article 11 of the Convention (see *Oya Ataman*, cited above, § 48, and *Saya and Others v. Turkey*, no. 4327/02, § 54, 7 October 2008).

B. Costs and expenses

45. The applicant confederations did not make a specific claim for costs and expenses. They have solely referred to a legal fee agreement, according to which they would pay their lawyers 10% of the just satisfaction awarded by the Court.

46. The Government contested the claim.

47. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award a total sum of EUR 1,000 to both applicants, covering costs under all heads.

C. Default interest

48. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* the application admissible unanimously;

2. *Holds* unanimously that there has been a violation of Article 11 of the Convention;

3. *Holds* unanimously that there is no need to examine separately the applicants' complaints under Articles 13 and 14 of the Convention;

4. *Holds* by 5 votes to 2 that the finding of a violation of Article 11 in itself constitutes sufficient just satisfaction for the non-pecuniary damage sustained by the applicants;

5. *Holds* unanimously
   (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, a total of EUR 1,000 (one thousand euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* unanimously the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 27 November 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Ineta Ziemele
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Sajó.

(b) joint dissenting opinion of Judge Ziemele and Judge Karakaş.

I.Z.
S.H.N.

CONCURRING OPINION OF JUDGE SAJÓ

I agree with my brethren that the right to demonstrate of the applicant trade unions has been violated in the present case. In order to avoid any misunderstanding I find it useful to add a few points of clarification.

Whilst the victim status of non-governmental organisations has been recognised in our jurisprudence (see, for example. *Rassemblement Jurassien Unité Jurassienne v. Switzerland*, no. 8191/78, Commission decision of 10 October 1979, Decisions and Reports (DR) 17, p. 108, and *Christians against Racism and Fascism v. the United Kingdom*, Commission decision of 16 July 1980, DR 21, p. 153), this has primarily been in the context of a refusal to allow a demonstration. In the present case, however, the finding of a violation with regard to the two applicant trade unions does not concern a ban on having a demonstration. The applicants, through the representatives of the respective trade unions, were expressly granted the right to pay homage in Taksim Square to those killed there in 1977 (see paragraph 5). In the light of the nature of the violation (see below) it is clear that, by restricting the right to demonstrate of those present in front of the DİSK HQ, the applicant trade unions' right of assembly was breached, albeit in a different regard, and there can therefore be no doubt as to their victim status.

Following the notification by the applicants, as the organisers, of a planned demonstration, the district Governor prohibited a large-scale gathering on Taksim Square on May 1st, though four other squares of Istanbul were identified by the authorities as places where commemorative assemblies could have been held on the same day. Among the reasons given for limiting the presence on Taksim Square the authorities mentioned security concerns. In particular, the Government claimed that "it was established by the security forces that various terrorist organisations were prepared for provocative actions and they would attack ... the security forces". The ban served, in principle, the interests of national security or public safety, or the prevention of disorder or crime. This is a legitimate ground for limiting the right of assembly, at least as long as these grounds can be convincingly demonstrated to exist. Neither a hypothetical risk of public disorder, nor the presence of a hostile audience are legitimate grounds for prohibiting a peaceful assembly (see *Makhmudov v. Russia*, no. 35082/04, 26 July 2007). Moreover, the choice of venue, though subject to otherwise acceptable limitations, is part of the right to demonstrate.

The Court, in the present case, considers that it is not called on to rule on the choice of the venue of the demonstrations, or to determine whether or not there was a security risk if a demonstration were to be held in Taksim Square. However, in the absence of any refutation of the authorities' claim of a security risk, it can be accepted that such a risk must have existed.

Once such a risk exists, one cannot in principle deny that preventive measures intended to hamper access to the secured area may be reasonable and, therefore, necessary, and the national authorities are better placed to evaluate the appropriateness of the measures. For the application of such preventive measures see *Scozzari and Giunta v. Italy* ([GC], nos. 39221/98 and 41963/98, ECHR 2000-VIII), *Christians against Racism and Fascism* (cited above), *Rai, Allmond and "Negotiate Now" v. the United Kingdom* (no. 25522/94, Commission decision of 6 April 1995), and *Schwabe and M.G. v. Germany* (nos. 8080/08 and 8577/08, ECHR 2011). In such cases the issue for the Court is the proportionality of the preventive (restrictive) measures.

In the present case people started to gather around 6 a.m. in front of the DİSK HQ in the Şişli district of Istanbul, allegedly on the pavement. This gathering was not a notified gathering, and it was therefore illegal under Turkish law. The illegality of a gathering does not, *per se*, preclude the finding of a violation under Article 11 of the Convention. The authorities have to show a certain level of tolerance, irrespective of the legality of a gathering. The Government argued that there had been several warnings, and the level of force used was only gradually increased, once it was clear that the people present were not willing to disperse. Moreover, the Government argued that the demonstrators had begun to march towards Taksim Square. Further, the representatives of the trade unions were able to make a press statement, and they decided to disperse. The applicants did not respond to the Government's observations in the form required by Rule 34 § 2 of the Rules of Court. The Court did not find those observations to be refuted. As the security risk at Taksim Square cannot be ruled out, it was also reasonable to take preventive measures that would prevent demonstrators from going there.

Are these preventive measures not likely to prejudice the right of assembly? The applicable standard is the following: "Even if there is a real risk of a public demonstration resulting in disorder as a result of developments outside the control of those organising it, such a demonstration does not as such fall outside the scope of Article 11 § 1, but any restriction placed on such an assembly must be in conformity with the terms of paragraph 2 of that provision (see *Christians against Racism and Fascism* ..., and, *mutatis mutandis*, *Ezelin*, ... § 41)." (see *Schwabe and M.G.*, cited above, § 103).

In view of the facts as evaluated in paragraphs 33-34 of the judgment, the intervention to disperse people was disproportionate and very frightening. It is true that the authorities made a number of public squares available for demonstrations on May 1st, but the Government could not prove that efforts were made at the Şişli gathering to invite people to demonstrate at the designated squares, and to help them access those sites when public transportation was restricted as a precautionary measure. The level of force

used in the dispersion was such that it could have had a chilling effect on the applicants and other participants in the assemblies. It could also have discouraged other persons from participating in lawful May 1st assemblies on the grounds of the resulting uncertainty as to the lawfulness of other demonstrations, in view of the hostile attitude of the authorities that was demonstrated in front of the DİSK HQ (see *mutatis mutandis*, *Bączkowski and Others v. Poland*, no. 1543/06, § 67, 3 May 2007).

It remains to be seen how the impact of the disproportionate use of force, in so far as it had a chilling effect on demonstrators at Şişli, and others who intended to follow the call of DİSK and KESK, makes these trade unions victims of the above violation.

First, the two trade unions are victims directly, as organisers of a demonstration to commemorate the Taksim massacre. Secondly, and additionally, they have standing also on behalf of the demonstrators (both members of DİSK and KESK and others who intended to participate in response to the call of these trade unions). The participants or would-be participants, together with the organisers, are a *de facto* "common subject" of the planned demonstration; this unity follows from the nature of the "subject" of the right to demonstrate in the specific situation of a non-spontaneous demonstration, where organisers and the crowd act inseparably. A demonstration is not, at least in the typical case, an occasional coming together of randomly participating individuals. Thirdly, the freedom of assembly of the applicant organisations has been breached directly and indirectly in view of their trade union status. Trade unions have a right to represent members without a specific mandate in matters related to the functions of the given union. A trade union must be considered to be entitled to act in its own name as well as on behalf of its members and represent their rights. In the present case, to celebrate Labour Day and commemorate friends of the trade union and its members who had lost their lives during the demonstrations of 1 May 1977 clearly entered into the general mandate of the two trade unions concerned.

JOINT DISSENTING OPINION OF JUDGES ZIEMELE AND KARAKAŞ

While we follow the Chamber's reasoning on all of the substantive points, we cannot agree with the Court's decision with regard to the issue of an award in respect of non-pecuniary damage in this case. We note that in paragraph 44 of the judgment and point 4 of the operative provisions the Court has decided not to allocate any compensation for non-pecuniary damage, holding that the finding of a violation is sufficient compensation.

We should like to refer back to the extensive discussions that have already taken place in the Court concerning the problem raised by this approach, by which the Court from time to time accepts that a judgment declaring a violation is in itself a form of compensation. We do not believe that this approach is compatible with the general principles of international law as regards State responsibility which have been followed in the Court's case-law. We refer to Judge Spielmann's dissenting opinion in the case of *Guiso-Gallisay v. Italy* (no. 58858/00, 8 December 2005) with all the relevant information notes and sources cited therein, summing up those discussions and the applicable legal principles. In other words, where a court establishes that there has been a breach of an international obligation by a State, it must assess how best that breach should be repaired. This is a different question from that of establishing whether there has been a violation. Normally, any violation would give rise to some award of damages. It is only in highly exceptional circumstances that the Court may decide not to award moral damages if, in its opinion, various relevant factual circumstances preclude such an award. In any event, the Court must address fully the question of reparation for damage or, failing that, appropriate compensation, including assessment of non-pecuniary damage.