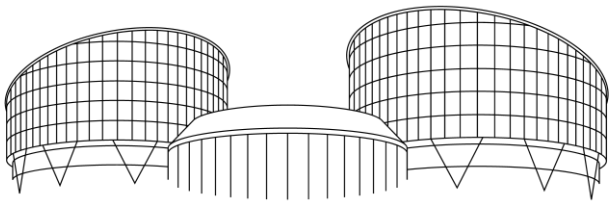

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GÜL AND OTHERS v. TURKEY

(Application no. 4870/02)

JUDGMENT

STRASBOURG

8 June 2010

FINAL

08/09/2010

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

In the case of Gül and Others v. Turkey**,**

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

Françoise Tulkens, *President,*
Ireneu Cabral Barreto,
Danutė Jočienė,
Dragoljub Popović,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges,*
and Sally Dollé, *Section Registrar,*

Having deliberated in private on 4 May 2010,

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

PROCEDURE

1. The case originated in an application (no. 4870/02) 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 four Turkish nationals, Mr Ercan Gül, Mr Deniz Kahraman, Ms Zehra Delikurt and Mr Erkan Arslanbenzer ("the applicants"), on 5 November 2001.

2. The applicants were represented by Ms F. Kalaycı, a lawyer practising in Ankara. The Turkish Government ("the Government") were represented by their Agent.

3. On 11 December 2007 the Court declared the application partly inadmissible and decided to communicate to the Government the complaints concerning the lack of legal assistance to the applicants during their police custody and the interference with their right to freedom of expression and assembly. It also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

4. The applicants were born in 1966, 1977, 1979 and 1965 respectively.

5. On 30 November 1999 the applicants were arrested by police officers from the Anti-Terrorist Branch of the Ankara Police Headquarters. On the same day the applicants' representatives applied to the principal public prosecutor's office at the Ankara State Security Court seeking information about the applicants' arrest and the duration of their custody, as well as authorisation to provide them with legal assistance during their questioning by the police. The principal public prosecutor informed them that, under

section 16 of Law no. 2845 and sections 30 and 31 of Law no. 3842, the applicants were not entitled to receive legal assistance during their police custody.

6. On 3 December 1999 the applicants were brought before a public prosecutor at the Ankara State Security Court and questioned about their alleged affiliation with the Turkish Communist Party/Marxist-Leninist - Turkish Workers and Peasants' Liberation Army - Marxist-Leninist Youth Union of Turkey ("the TKP/ML-TIKKO-TMLGB"), an armed, illegal organisation. Before the public prosecutor, Mr Ercan Gül stated that he was not a member of the organisation in question. He maintained that the periodicals found in his apartment were legal publications and that the poster allegedly found there did not belong to him. He had therefore refused to sign the arrest and search report. The applicant further stated that he was one of the founders and directors of the Tüm Maliye-Sen (*Tüm Maliye Çalışanları Sendikası* – the Financial Sector Trade Union) and that, consequently, as a member of this trade union, he had participated in several demonstrations, such as the one on May Day and demonstrations to commemorate the 1993 Sivas Massacre. Mr Ercan Gül lastly contended that he had never shouted slogans in support of the TKP/ML-TIKKO-TMLGB.

7. Mr Erkan Aslanbenzer stated before the public prosecutor that he was not a member of the organisation in question. He maintained that the periodicals found in his apartment were legal publications and not propaganda tools for the TKP/ML-TIKKO-TMLGB. He further contended that he was a member of the Confederation of Public Employees' Trade Unions ("KESK") and that he had participated in several demonstrations. When the applicant was shown a photograph, allegedly of him at a demonstration behind a banner bearing the name *Partizan*, a periodical, he maintained that the person in the photograph could not have been him. Lastly, he stated that he did not remember whether on 2 July 1998 he had participated in the demonstration to commemorate the 1993 Sivas Massacre.

8. Mr Deniz Kahraman maintained that he had no affiliation with the TKP/ML. He said that he had taken part in the May Day Workers demonstration in 1997 and in the demonstration of 2 July 1998. When the applicant was shown a photograph allegedly of him at a demonstration behind a *Partizan* banner, he maintained that the person in the photograph was not him.

9. Finally, Ms Zehra Delikurt stated that she was not a member of the TKP/ML-TIKKO-TMLGB. She denied the allegation that she had written slogans in favour of the TKP/ML-TIKKO on the walls of schools in Ankara. When she was shown a photograph in which she was allegedly carrying a picture of the general secretary of the TKP/ML-TIKKO, Ms Zehra Delikurt contended that she had participated in the demonstration of 2 July 1998 and that she did not know the person in the picture.

10. On the same day the applicants were brought before a single judge at the Ankara State Security Court, where they repeated their statements made

to the public prosecutor. The judge ordered Ms Delikurt's detention and the other applicants' release.

11. On 21 December 1999 the public prosecutor at the Ankara State Security Court filed a bill of indictment against ten persons, including the applicants. The public prosecutor charged Ms Zehra Delikurt with membership of an illegal organisation and the other applicants with aiding and abetting members of an illegal organisation, under Articles 168 and 169 of the former Criminal Code respectively. The public prosecutor alleged that Ms Zehra Delikurt had shouted slogans in support of the TKP/ML-TIKKO during the May Day demonstrations in 1997 and 1999 as well as the demonstration of 2 July 1998, where she had been behind the *Partizan* banner and carried a poster of the general secretary of the TKP/ML-TIKKO. It was alleged that during the said demonstrations Ms Delikurt had shouted:

"*Biz işçinin, köylünün yiğit sesiyiz, namluya sürülmüş halk mermisiyiz* (We are the brave voice of the workers and peasants; we are the public's bullet lodged in the barrel of a gun)"; "*Marks, Lenin, Mao, Önderimiz IBO, Savaşıyor Tikko* (Marx, Lenin, Mao, our leader is Ibo; TIKKO is fighting)".

It was also alleged that she had written TKP/ML-TIKKO slogans on school walls in Ankara, such as "TKP-ML TIKKO", "*IBO yaşıyor, TIKKO savaşıyor* (IBO is alive, TIKKO is fighting)"; "*Yaşasın partimiz TKP-ML TIKKO* (Long live our party TKP-ML, TIKKO)"; "*Gerillalar ölmez, yaşasın halk savaşı* (Guerrillas don't die; long live the people's war)"; "*Parti ve devrim şehitleri ölümsüzdür* (the martyrs of the party and revolution are immortal)"; "*TKP-ML TIKKO işçi köylü elele demokratik devrime* (TKP-ML, TIKKO, workers and peasants hand in hand, towards democratic revolution)". The applicant was also alleged to have participated in seminars held in cultural centres and in the headquarters of a left-wing political party and a trade union. Furthermore, the applicant was suspected of having sold the periodical *Özgür Gelecek*.

12. As regards Mr Ercan Gül, the public prosecutor noted that he had participated in the May Day demonstration of 1997, where slogans in support of the TKP/ML-TIKKO had been shouted, such as "*Liderimiz Ibrahim Kaypakkaya* (Our leader is Ibrahim Kaypakkaya)"; "*Yaşasın Halkın Adaleti* (Long live the people's justice)"; "*Yaşasın parimiz TKP-ML* (Long live our party TKP-ML)"; "*İktidar namlunun ucundadır* (Political power grows out of the barrel of the gun)"; "*Marks Lenin Mao önderimiz Ibo, Savaşıyor TIKKO* (Marx, Lenin, Mao, Our leader is IBO; TIKKO is fighting)"; "*Biz işçinin, köylünün yiğit sesiyiz, namluya sürülmüş halk mermisiyiz* (We are the brave voice of the workers and peasants; we are the public's bullet lodged in the barrel of a gun)"; "*Liderimiz İbrahim Kaypakkaya, işçi, köylü, gençlik halk savaşında birleştik* (Our leader is İbrahim Kaypakkaya; workers, peasants and youth, we are all united in the people's war)". The public prosecutor alleged that Mr Ercan Gül had also shouted illegal slogans in the demonstration of 1999. Furthermore, it was noted that some periodicals, a picture of a member of the TKP/ML-TIKKO and a book had been found in his apartment.

13. The public prosecutor alleged that Mr Erkan Arslanbenzer had participated in the May Day demonstrations of 1996 and 1997, the *Newroz* celebrations in 1998 and the demonstrations of 1997 and 1998 to commemorate the Sivas Massacre, where he had shouted slogans in favour of the TKP/ML-TIKKO, such as "*Yaşasın partimiz TKP/ML* (Long live our party TKP-ML)"; "*Faşizme isyan, halka önder partisan* (Revolt against fascism; the leader is Partizan)"; "*İktidar namlunun ucundadır* (Political power grows out of the barrel of the gun)"; "*Umudun adı TKP-ML* (TKP-ML is our hope)"; "*Biz işçinin, köylünün yiğit sesiyiz, namluya sürülmüş halk mermisiyiz* (We are the brave voice of the workers and peasants; we are the public's bullet lodged in the barrel of a gun)"; "*Kızılordu, TIKKO TMLGB* (Red Army, TIKKO, TMLGB)"; "*Faşist devlet, yıkacağız elbet* (Fascist State will surely be demolished)"; "*Bizde hesapları namlular sorar* (It is the barrel of the gun that will call to account)". He further noted that periodicals and books in support of that organisation had been found in the applicant's apartment.

14. Finally, the public prosecutor stated that Mr Deniz Kahraman had taken part in the May Day demonstrations of 1997 and 1998 and the demonstration of 2 July 1998, where he had shouted TKP/ML-TIKKO slogans including "*Faşisme isyan, halka önder Partizan* (Revolt against fascism; the leader is Partizan)"; "*Yaşasın parimiz TKP-ML* (Long live our party TKP-ML)"; "*Biz işçinin, köylünün yiğit sesiyiz, namluya sürülmüş halk mermisiyiz* (We are the brave voice of the workers and peasants; we are the public's bullet lodged in the barrel of a gun)"; "*işçi, köylü, gençlik halk savaşında birleştik* (workers, peasants and youth, we are all united in the people's war)"; "*Bizde hesapları namlular sorar* (It is the barrel of the gun that will call to account)". The public prosecutor also noted that certain periodicals had been found in the applicant's apartment.

15. On 26 January 2000 the Ankara State Security Court held the first hearing on the merits of the case and heard the accused. The applicants reiterated their statements made before the public prosecutor and the single judge on 3 December 1999 and retracted their statements taken by the police. On the same day, the first-instance court ordered Ms Zehra Delikurt's release from prison.

16. The Ankara State Security Court held eight hearings and on 9 August 2000 gave its judgment. The court convicted the applicants under Article 169 of the former Criminal Code, which read as follows at the material time:

> "Any person who, knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever shall be sentenced to not less than three and not more than five years' imprisonment..."

17. The first-instance court sentenced the applicants to three years and nine months' imprisonment. It found it established that the applicants had participated in the demonstrations behind TKP/ML-TIKKO banners and shouted slogans in support of that illegal organisation. The court based its

judgment on the transcriptions of video recordings of demonstrations made by the Anti-Terrorist Branch of the Ankara Police Headquarters, photographs taken by the security forces and the applicants' "evasive" statements made to the police, the public prosecutor and the single judge at the Ankara State Security Court, as well as the arrest and search reports, according to which periodicals used as propaganda tools for the TKP/ML-TIKKO had been found in the applicants' apartments. The court also noted that some of the periodicals were illegal as the distribution of certain issues had been suspended by court decisions.

18. On 16 April 2001 the Court of Cassation upheld the judgment of 9 August 2000.

19. Following the enactment of Law no. 4963, which came into force on 7 August 2003, the phrase "or facilitates its operations in any manner whatsoever" was removed from the text of Article 169 of the former Criminal Code.

20. Subsequently, the case against the applicants was reopened at the request of both the applicants' representative and the public prosecutor at the Ankara State Security Court.

21. On an unspecified date Ms Zehra Delikurt filed a request with the Ankara State Security Court to benefit from the Reintegration of Offenders into Society Act (Law no. 4959), which came into force on 6 August 2003.

22. In the meantime, on 29 April 2004 Ms Zehra Delikurt started serving her prison sentence.

23. By Law no. 5190 of 16 June 2004, published in the Official Gazette on 30 June 2004, State Security Courts were abolished. The case against the applicants was transferred to the Ankara Assize Court.

24. On 21 July 2004 the Ankara Assize Court delivered its judgment. It allowed Ms Zehra Delikurt's request and decided not to convict her, in conformity with section 4 of Law no. 4959. As a result, she was released from prison. As regards the other applicants, the Assize Court held that, following the amendment to Article 169 of the former Criminal Code, the acts committed by them could not be considered to constitute the offence defined in that provision. The court nevertheless found Mr Ercan Gül, Mr Erkan Arslanbenzer and Mr Deniz Kahraman guilty of disseminating propaganda related to an illegal armed organisation through incitement to use violent methods, an offence proscribed by section 7 § 2 of the Prevention of Terrorism Act. It sentenced them to ten months' imprisonment.

25. Mr Ercan Gül and Mr Erkan Arslanbenzer appealed.

26. On 26 February 2006 the principal public prosecutor at the Court of Cassation sent the case file back to the Ankara Assize Court for the reconsideration of its judgment of 21 July 2004 since, in the meantime, a new Criminal Code had entered into force (Law no. 5237).

27. On 15 December 2006 the Ankara Assize Court once again convicted Mr Ercan Gül and Mr Erkan Arslanbenzer under section 7 § 2 of the Prevention of Terrorism Act of disseminating the propaganda of an

illegal armed organisation through incitement to use violent methods, and sentenced them to ten months' imprisonment.

28. Mr Ercan Gül and Mr Erkan Arslanbenzer appealed. According to the latest information in the case file, the proceedings are still pending before the Court of Cassation.

II. RELEVANT DOMESTIC LAW

29. The relevant provision of the former Criminal Code reads as follows:

Article 169

> "Any person who, knowing that such an armed gang or organisation is illegal, assists it, harbours its members, provides it with food, weapons and ammunition or clothes or facilitates its operations in any manner whatsoever, shall be sentenced to not less than three and not more than five years' imprisonment..."

30. Under Section 7 § 2 of the Prevention of Terrorism Act (Law no. 3713 of 12 April 1991), any person who disseminates propaganda in favour of a terrorist organisation shall be liable to a term of imprisonment of one to five years.

31. Finally, Law no. 4959 on the Reintegration of Offenders into Society Act applies to members of terrorist organisations who surrender to the authorities without armed resistance, either directly, on their own initiative, or through intermediaries, those who can be considered to have left a terrorist organisation, and those who have been arrested. The law also applies to those who, despite being aware of the aims pursued by the terrorist organisation, provided shelter, food, weapons, ammunition or any other kind of assistance. An important feature of the rehabilitation law is that it provides the possibility of reducing the sentences of those who wish to take advantage of the law by providing relevant information and documents on the structure and activities of the terrorist organisation.

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 10 and 11 OF THE CONVENTION

32. The applicants complained that their conviction and sentence constituted a breach of Articles 10 and 11 of the Convention since the first-instance court had convicted them for reading certain periodicals, participating in demonstrations and shouting slogans. Two of the applicants Mr Ercan Gul and Mr Erkan Arslanbenzer, further submitted in this

connection under Article 11 that the Ankara Assize Court had failed to take into consideration the fact that they had participated in several demonstrations within the context of their trade union duties.

33. The Government maintained that the applicants were not tried and convicted for having expressed their opinions or for having participated in a meeting, but for having aided and abetted an illegal organisation, pursuant to Article 169 of the Criminal Code.

34. The Court considers that the applicants' complaints should be examined solely under Article 10 of the Convention (see, *Karademirci and Others v. Turkey*, nos. 37096/97 and 37101/97, § 26, ECHR 2005-I). It notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds. It must therefore be declared admissible.

35. Turning to the particular circumstances of the case, the Court notes that criminal proceedings were initiated against the applicants based on the fact that they had shouted slogans in support of an armed, illegal organisation. Although all four of the applicants were convicted as charged and each was sentenced to three years and six months' imprisonment, following recent amendments in the criminal law system the proceedings were reopened and are still pending in respect of two of the applicants, Mr Ercan Gül and Mr Erkan Arslanbenzer. As a result, although there is no final conviction in respect of two of the applicants, having regard to the fact that all of the applicants were found guilty under Article 169 of the former Criminal Code and that the criminal proceedings which were initially commenced in 1999 have not yet been terminated, there has been an interference with the applicants' right to freedom of expression. The Court further notes that the interference was prescribed by law, namely Article 169 of the former Criminal Code and Section 7 § 2 of the Prevention of Terrorism Act on disseminating the propaganda of an illegal, armed organisation through incitement to use violent methods. As to the legitimacy of the aims pursued, the Court observes that the authorities sought to protect national security and public order. It therefore remains to be determined whether the interference complained of was "necessary in a democratic society".

36. The Court has frequently held that "necessary" implies the existence of a "pressing social need" and that the Contracting States have a certain margin of appreciation in assessing whether such a need exists, but that this goes hand in hand with a European supervision (see *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII).

37. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in question was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I). Furthermore, the nature and severity of the penalties imposed are

also factors to be taken into account when assessing the proportionality of the interference (see, *Yarar v. Turkey*, no. 57258/00, § 41, 19 December 2006).

38. The Court considers that the above-mentioned principles also apply to measures taken by domestic authorities to maintain national security and public safety as part of the fight against terrorism. In this connection, it 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 (see *Zana*, cited above, § 55).

39. At this point, the Court recalls that it has examined complaints relating to similar issues to those in the present case and found a violation of Article 10 of the Convention (see, *Yılmaz and Kılıç v. Turkey*, no. 68514/01, §§ 48-69, 17 July 2008; *Bahçeci and Turan v. Turkey*, no. 33340/03, §§ 24-34, 16 June 2009; *Kızılyaprak v. Turkey*, no. 27528/95, § 43, 2 October 2003; *Feridun Yazar v. Turkey*, no. 42713/98, §§ 23-29, 23 September 2004).

40. In the instant case, there is no dispute between the parties that the applicants shouted the slogans in question during lawful demonstrations that were held on May Day 1997 and 1998, and on 2 July 1998 in commemoration of the Sivas massacre. There is also no indication in the case file that these demonstrations were not peaceful or that the demonstrators engaged in acts of violence.

41. The Court observes that, taken literally, some of the slogans shouted (such as "Political power grows out of the barrel of the gun", "It is the barrel of the gun that will call into account") had a violent tone (see paragraphs 11-14 above). Nevertheless, having regard to the fact that these are well-known, stereotyped leftist slogans and that they were shouted during lawful demonstrations – which limited their potential impact on "national security" and "public order" – they cannot be interpreted as a call for violence or an uprising. The Court stresses, however, that whilst this assessment should not be taken as an approval of the tone of these slogans, it must be recalled that Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed (see, *Karataş v. Turkey* [GC], no. 23168/94, § 49, ECHR 1999-IV). The Court also reiterates that, according to its well-established case-law, paragraph 2 of Article 10, is applicable not only to "information" or "ideas" which are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society" (see, *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 57, 8 July 1999).

42. The Court observes that, by shouting these slogans, the applicants did not advocate violence, injury or harm to any person. Furthermore, neither in the domestic court decisions nor in the observations of the

Government is there any indication that there was a clear and imminent danger which required an interference such as the lengthy criminal prosecution faced by the applicants.

43. The Court further notes that the present application is distinguishable on its facts and context from the case of *Taşdemir v. Turkey* ((dec.), 38841/07, 23 February 2010). In the latter case, the slogan shouted by the applicant had clearly amounted to an apology for terrorism and, furthermore, at the end of the proceedings, he was sentenced to twenty-five days' imprisonment. In that connection, the Court reiterates that the nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of an interference with freedom of expression (see *Yarar v. Turkey*, no. 57258/00, § 41, 19 December 2006). In the instant case the Court notes that although, following recent amendments in domestic legislation, the criminal proceedings against the applicants were re-opened, initially all of the applicants had been sentenced to three years and nine months' imprisonment. However, the Court finds that this sentence and the lengthy criminal proceedings were disproportionate (see, *mutatis mutandis, Koç and Tambaş v. Turkey*, no. 50934/99, § 39, 21 March 2006).

44. In view of the above findings, the Court is of the view that the applicants' conduct cannot be considered to have had an impact on "national security" or "public order" by way of encouraging the use of violence or inciting others to armed resistance or rebellion, which are essential elements to be taken into account (see, *a contrario, Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 62, ECHR 1999-IV).

45. Having regard to the above considerations, the Court concludes that, in the circumstances of the present case, the interference in question was not "necessary in a democratic society". Accordingly, there has been a violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

46. The applicants alleged under Article 6 of the Convention that they were deprived of legal assistance during their police custody.

47. The Government argued that, in respect of Mr Deniz Kahraman, this complaint should be rejected for non-exhaustion of domestic remedies as he had failed to file an appeal against the decision of the Ankara Assize Court dated 21 July 2004. The Government further maintained that Ms Zehra Delikurt could not be considered as a victim since she had benefited from Law no. 4959.

48. The Court observes that it is not required to decide on the preliminary objections of the Government for the reasons set out below. It also notes that these complaints are linked to that examined above and must therefore, likewise, be declared admissible.

49. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 10 of the Convention

above (paragraphs 40-45), the Court considers that it has examined the main legal question raised in the present application. It concludes that, in the special circumstances of the present case, there is no need to make a separate ruling on the applicants' remaining complaints under this provision (see, *Böke and Kandemir v. Turkey*, nos. 71912/01, 26968/02 and 36397/03, § 73, 10 March 2009; *Yalçın Küçük v. Turkey (no. 3)*, no. 71353/01, § 40, 22 April 2008).

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. The applicants claimed the following sums in respect of pecuniary and non-pecuniary compensation:

- Mr Ercan Gül: 37,000 euros (EUR) for pecuniary damage and EUR 20,000 for non-pecuniary damage;
- Mr Deniz Kahraman: EUR 10,000 for pecuniary damage and EUR 20,000 for non-pecuniary damage;
- Ms Zehra Delikurt: EUR 10,000 for non-pecuniary damage;
- Mr Erkan Arslanbenzer: EUR 20,000 for pecuniary damage and EUR 20,000 for non-pecuniary damage.

They further requested a total of EUR 3,600 in respect of costs and expenses, without submitting any pertinent documentation in support of this claim.

51. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, ruling on an equitable basis, it awards the applicants EUR 3,000 each in respect of non-pecuniary damage.

52. As regards costs and expenses, 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, the applicants have not established that they actually incurred the costs claimed. Accordingly, the Court makes no award under this head.

53. The Court considers it appropriate that the default interest 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* by a majority the application in respect of Mr Deniz Kahraman admissible;

2. *Declares* unanimously the remainder of the application admissible;

3. *Holds* by 5 votes to 2 that there has been a violation of Article 10 of the Convention;

4. *Holds* unanimously that there is no need to examine separately the complaint under Article 6 of the Convention;

5. *Holds* by 5 votes to 2
(a) that the respondent State is to pay each of the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into Turkish liras 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 8 June 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges A. Sajó and N. Tsotsoria is annexed to this judgment.

F.T.
S.D.

DISSENTING OPINION OF JUDGES SAJÓ AND TSOTSORIA

We agree with the majority that in cases where violence, injury or harm to any person is advocated, the danger of such consequences has to be clear and imminent (see paragraph 42 of the judgment). However, the issue in this case cannot be limited to the simple advocacy of violence. The applicants were found guilty of disseminating propaganda for an illegal, armed organisation, by way of incitement to use violent methods. Specifically, during a lawful demonstration commemorating the Sivas Massacre, they shouted slogans in favour of an armed, illegal organisation, adding that "It is the barrel of the gun that will call to account!", "Political power grows out of the barrel of the gun" and "We are the public's bullet lodged in the barrel of a gun"). Such sentences, printed in a pamphlet would not amount, *per se*, to a clear and imminent danger, as they are unspecific. However, supporting an illegal, armed organization at a mass demonstration *with* slogans which have "a violent tone" (see paragraph 41 of the judgment) is a different matter and may amount to support for the violence used by such organisations. In terms of clear and imminent danger, the risk of that danger materialising is significantly increased, given the ongoing terrorist activity. In this context it is irrelevant, in our view, that the demonstration commemorating the massacres was lawful: unlawful acts may be committed at a lawfully convened demonstration too. Vice versa, support of an illegal, armed organisation at an illegal meeting may be protected (see *Yılmaz and Kılıç v. Turkey*, no. 68514/01, 17 July 2008).

The majority are of the view that the case can be distinguished from *Tasdemir v. Turkey* ((dec.), no. 38841/07, 23 February 2010). According to the present judgment the slogan shouted in *Tasdemir* "had clearly amounted to an apology for terrorism" (see paragraph 43 of the judgment) and, *a contrario*, it does not in the present case. The majority does not explain the difference and we cannot see it. In both cases the slogan uttered at a demonstration was in support of a terrorist group and the language is clearly similar ("to the front line in retaliation" compared to "the barrel of the gun ... will call to account."). Of course, the impact of such statements is contextual and the domestic courts are in a better situation to evaluate them in the given circumstances. In both cases the original conviction was serious (the domestic courts took into consideration other factors of culpability too). In the present case, however, the original conviction was reduced to ten months' imprisonment and the appeal is still pending. With the exception of Ms Zehra Delikurt, none of the applicants was imprisoned. Ms Zehra Delikurt chose to benefit from the Reintegration of Offenders into Society

Act, after serving nearly three months in prison (see paragraphs 21-24 above).

The second reason given for distinguishing this case is that in *Tasdemir* the applicant was sentenced to twenty five days' imprisonment, commuted to a fine of TRY 500. In the present case, however, according to the majority, the applicants were sentenced to three years and nine months' imprisonment.

We accept that the length of the criminal procedure in itself might be disproportionate to the goal of the limitations authorised by Article 10. However, the proportionality of the sanctions applied is to be considered in the light of the actual impact which the expression has on the protected interest. In the present case the slogans supported the continued use of violence by an armed, illegal organisation. The applicants identified themselves with the violent means used by that organisation. Such identification may amount to the glorification of violent destruction and an expression of moral support (*Leroy v. France*, no. 36109/03, § 43, 2 October 2008). Without taking a position on the specific application of the above consideration in other cases, we do not believe that moral support for terrorism *per se* deprives an expression of the protection of Article 10. It is possible, for example, that someone agrees with certain terrorists about an alleged injustice, which the terrorists claim to be the reason of their fight. Such agreement on matters of injustice is indirect support only, and does not amount, *per se*, to the support of terrorist methods. However, in the present case the moral support is expressly and without ambiguity related to the violent means of the illegal movement in a situation where the people present may not have had the benefit of an ulterior exchange of ideas. Moreover the impact of such support given to the illegal, armed group has to be seen in the context of the tensions of the late nineties in Turkey when the likelihood of violent reactions was considerable (for the relevance of local circumstances see *Falakaoglou and Sayagli v. Turkey*, nos. 22147/02 and 24972/03, 23 January 2007; *Leroy*, cited above, § 45.)

In view of the nature of the speech, the legitimate interests of the prevention of terrorist crime and the protection of public security, we are of the opinion that the limitation of the right resulting from the lengthy criminal procedure was not manifestly disproportionate in the circumstances of the present case. For the above reasons we respectfully dissent.

Finally, as to the applicant Mr Deniz Kahraman, we find his application inadmissible. According to the Government he never appealed against the Ankara Assize Court judgment. The applicant's lawyer conceded this fact, whilst acknowledging that his client, fearing imprisonment, had left Turkey and the lawyer no longer had contact with him. However, his lawyer continued to have his power of attorney but failed to pursue domestic

remedies on his client's behalf. The majority is silent on the matter except that, in regard to the alleged violation of Article 6, it is stated that the Court is not required to decide on the preliminary objections of the Government because the main legal question in the case had been examined under Article 10 of the Convention (paragraphs 45-46 of the judgment). However, we note that the Government's preliminary objection had also been made in the context of Article 10 and, in our opinion, it necessitated a favourable response.