



COUNCIL OF EUROPE    CONSEIL DE L'EUROPE

Strasbourg, 10/10/08

CODEXTER (2008) 30

**COMMITTEE OF EXPERTS ON TERRORISM**  
**(CODEXTER)**

**15th meeting**  
**Strasbourg, 24-26 November 2008**

**FREEDOM OF EXPRESSION AND *APOLOGIE DU TERRORISME***

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### SUMMARY

Prepared by the Registry of the European Court of Human Rights, this document does not bind the Court.

The report highlights the most noteworthy developments in the case-law of the European Court of Human Rights in connection with the cases concerning "*apologie du terrorisme*". It sets out general principles and goes on to describe the judicial technique used by the Court.

The cases the Court has heard in the sphere of "*apologie du terrorisme*" have mainly concerned Turkey. With the *Leroy v. France* judgment of 2 October 2008 (which is not final), the Court had occasion, for the first time, to rule on the issue in a case against France. This judgment undoubtedly represents a noteworthy change in its case-law.

## INTRODUCTION

1. This report is intended to update the information in the earlier reports prepared by the Committee of Experts on Terrorism (CODEXTER) on "*apologie du terrorisme*".<sup>1</sup> There is therefore no need to go back over all the case-law references cited in those reports.<sup>2</sup> It does, however, seem worth reiterating certain principles relating to the case-law on Article 10 of the Convention and the judicial techniques used by the European Court of Human Rights (hereinafter referred to as the Court) in connection with freedom of expression.

2. As soon as it had the opportunity to do so, the Court, in its 1976 *Handyside v. the United Kingdom* judgment, affirmed the fundamental role played by the freedom of expression in a democratic society:

"Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man. Subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'."<sup>3</sup>

3. This passage has been quoted on numerous occasions in cases concerning the freedom of expression. It must be seen as the cornerstone of the entire body of case-law concerning Article 10 of the Convention. Moreover, in the context of a study of "*apologie du terrorisme*", this conception of freedom is all the more valuable.

4. The Court's approach does not, however, cast doubt on the fact that freedom of expression is not an absolute right. It may be subject to restrictions, as is quite clear, moreover, from the wording of Article 10 § 2 :

"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."

5. Article 10 § 2 specifies the boundaries of freedom of expression. It also provides the basis for the review that the Court carries out in order to ensure that restrictions on the freedom of expression are in keeping with the Convention. In order to be deemed compatible with Article 10, interference with the freedom of expression must 1) be prescribed by law, 2) pursue one of the legitimate aims specified and 3) be considered "necessary in a democratic society" in order to achieve that aim.

6. In order to ensure that the exercise of this fundamental right is not unduly restricted, the Court has stressed that exceptions to Article 10 § 2 must be construed and interpreted restrictively.<sup>4</sup>

<sup>1</sup> See doc. CODEXTER (2004) 19, the bulk of which was reproduced in the Council of Europe publication "*Apologie du terrorisme*" and "*Incitement to terrorism*" (2004), pp. 45 ff and doc. CODEXTER (2008) 28 of 27 March 2008.

<sup>2</sup> All the judgments and decisions are available in the Court's HUDOC database: [www.echr.coe.int](http://www.echr.coe.int).

<sup>3</sup> *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A, No. 24.

<sup>4</sup> See, in particular, a recent judgment: *Lindon, Otchakovsky-Laurens and July v. France* [GC], Nos. 21279/02 and 36448/02, § 45, ECHR 2007-...

7. Given the very large number of cases concerning the freedom of expression, it seemed essential to define the scope of our study clearly. The Court has not defined the concept of "*apologie du terrorisme*". Moreover, it would be pointless looking for precise definitions in the case-law: the Court does not operate in that way. The Court bases its review on domestic law. The Court ascertains, in the light of domestic law, whether or not convictions on grounds of, for instance, an offence of "*apologie du terrorisme*" are compatible with the Convention. It is not for the Court to propose a precise definition of a concept which might not be suited to another legal system. The *Leroy v. France* judgment,<sup>5</sup> which is undoubtedly the most noteworthy case-law development in the area in question, is exemplary in this respect.

8. In order to define the scope of the definition of "*apologie du terrorisme*", we shall therefore refer to the relevant articles of the Convention on the Prevention of Terrorism,<sup>6</sup> beginning with Article 5, which concerns public provocation to commit a terrorist offence, taken in conjunction with Article 12. These two articles were, moreover, referred to in the above-mentioned *Leroy v. France* judgment (see §§ 19 ff).

9. In order to have a clear grasp of the protection afforded by the Court pursuant to Article 10 of the Convention (II), it is important to understand what type of speech does not benefit from the protection provided by Article 10 of the Convention (I).

## I. EXCLUSION FROM THE SCOPE OF FREEDOM OF EXPRESSION

10. Exclusions from the scope of Article 10 of the Convention stem from other articles of the Convention. They may also be dictated by the fact that Article 10 does not apply as such.

### A. Restrictions provided for in the Convention

11. Article 10 of the Convention is not one of the inderogable articles. Pursuant to Article 15 of the Convention,<sup>7</sup> a High Contracting Party could, therefore, in time of emergency, suspend the safeguards afforded by Article 10. In the context of the fight against terrorism, this is not a purely theoretical hypothesis. To date, however, derogations by States under Article 15 have not affected the application of Article 10.

12. Article 16 of the Convention,<sup>8</sup> which concerns the political activity of aliens, expressly provides for the possibility of restricting aliens' freedom of expression. This article, which is very rarely invoked, has not, however, been used in the context of the fight against terrorism.

13. When the values intrinsic to the Convention are undermined by speech in respect of which the safeguards provided for in Article 10 are invoked, Article 17 of the Convention,<sup>9</sup> which concerns

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<sup>5</sup> *Leroy v. France*, No. 36109/03, 2 October 2008. The judgment is not final.

<sup>6</sup> Council of Europe Convention on the Prevention of Terrorism, CETS No. 196.

<sup>7</sup> Article 15 provides: "1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under [the] Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed."

<sup>8</sup> Article 16 provides: "Nothing in Articles 10, 11 and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens."

abuse of rights, may apply. Indeed, the Court has had no hesitation in applying it in connection with remarks that are clearly racist or deny the existence of the Holocaust.<sup>10</sup> The Court nevertheless came out clearly against the application of Article 17 in a case concerning "*apologie du terrorisme*". In the above-mentioned *Leroy v. France* judgment, the respondent Government argued that seeking to defend acts of terrorism ("*apologie des actes de terrorisme*") fell within the scope of Article 17 (§ 23 of the judgment, *currently available in French only*). The impugned form of expression in this case was a cartoon representing the attack of 11 September 2001, with a caption parodying an advertising slogan: "*We all dreamt about it ... Hamas did it*". In response to the French Government's submissions, the Court takes the following view:

"27. The Court is of the opinion that the impugned form of expression does not fall within the scope of publications that, pursuant to Article 17 of the Convention, are deprived of the protection afforded by Article 10. On the one hand, being published in the admittedly controversial humorous form of a satirical cartoon, the underlying message the applicant was seeking to put across - the destruction of American imperialism - does not seek to deny fundamental rights and is not on a par with remarks directed against the values underpinning the Convention, such as racist, anti-Semitic (*Garaudy*, cited above, *Ivanov v. Russia* (dec.) No. 35222/04, 20 February 2007) or Islamophobic (*Norwood*, cited above) remarks. On the other hand, notwithstanding the fact that the impugned cartoon was deemed by the domestic courts to constitute "*apologie du terrorisme*", the Court considers that the cartoon and accompanying caption do not seek to justify terrorism sufficiently unambiguously for them to be deprived of the protection afforded by Article 10 to the freedom of the press. Lastly, the offence caused to the memory of the victims of the attacks of 11 September 2001 by the impugned publication must be considered in the light of the right protected by Article 10 of the Convention, which is not an absolute right. The Court has already considered the content of similar remarks in the light of this provision (*Kern v. Germany* (dec.), No. 26870/04, 29 May 2007). The freedom of expression claimed by the applicant must therefore be covered by this provision, and his complaint is not incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 of the Convention." (*Unofficial translation.*)

14. Consequently, Article 17 could be applied to some forms of expression that unambiguously seek to justify terrorism, but the level of seriousness that must be reached for Article 17 to be applicable<sup>11</sup> was not attained in the above-mentioned *Leroy* case.

## **B. Non-applicability of Article 10**

15. In its case-law, the Court has constantly broadened the scope of Article 10, preferring to review alleged interference with the freedom of expression by means of the yardstick of the restrictions provided for in Article 10 § 2 of the Convention.

16. In some decisions, the Court stresses that it is prepared to exclude a certain kind of speech from the scope of Article 10. The 2001 *Kaptan v. Switzerland* decision typifies this approach. In the case in question, the applicant complained that the Swiss customs authorities had confiscated and destroyed material belonging to the Kurdish Workers' Party (PKK) that had been addressed to him. The Court stated that the material in question "*advocated and glorified violence and aimed at winning over as many persons as possible for the armed struggle against the Turkish authorities*". The Court took the view in this case that the confiscation of the material constituted interference but stated that the kind of speech in question was not covered by Article 10 of the Convention.

<sup>9</sup> Article 17 provides: "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth [in the Convention] or at their limitation to a greater extent than is provided for in the Convention."

<sup>10</sup> See, for instance, *Norwood v. the United Kingdom*, (dec.), No. 23131/03, ECHR 2004-XI. For further references, see also OETHEIMER (2007), pp. 66 ff.

<sup>11</sup> See, in particular, a case relating to a book concerning the effects of immigration in France, in which the Court refused to apply Article 17: *Soulas and others v. France*, No. 15948/03, § 48, of 10 July 2008.

After referring to the domestic decisions, the Court considered, moreover, that the restriction was justified in the light of Article 10 § 2.

17. The other type of exclusion from the scope of Article 10 follows from the decision in the 2003 *Murat Kiliç v. Turkey* case.<sup>12</sup> In this case, the applicant was arrested and sentenced for belonging to an illegal organisation and distributing illegal leaflets. The applicant argued before the Court that his arrest for distributing leaflets constituted a violation of Article 10. The Court, on the other hand, considered that there was no interference with the applicant's freedom of expression in this case: the distribution of the leaflets merely served as evidence on the basis of which to convict the applicant of belonging to an illegal organisation.<sup>13</sup>

18. A recent development in the case-law suggests, however, that the Court has abandoned this very restrictive approach. In the *Yılmaz and Kılıç v. Turkey* case (judgment of July 2008) the respondent government argued that the applicants could not claim to be victims of a violation of Article 10 as they had been found guilty of providing assistance to an armed gang. The Court joined this objection, lodged on grounds of inadmissibility, to the merits of the case, concluding:

"... in establishing whether or not there was interference with the applicants' freedom of expression, there is no need to dwell on the domestic courts' definition of the offence. Noting that the sole evidence on which the conviction was based consists of forms of expression, the Court concludes that there was interference in the applicants' right to freedom of expression."<sup>14</sup> (*Unofficial translation: judgment currently available in French only.*)

19. If this precedent were to be confirmed in other cases, it would represent an interesting development, since the Court would take care to review alleged interference without taking account of the way in which the offence is defined by the domestic courts, provided a factor relating to the applicant's freedom of expression arises. In doing so, it would apply the safeguards afforded by Article 10.

## II. PROTECTION AFFORDED BY ARTICLE 10 OF THE CONVENTION

20. The guiding principles of the case-law as described in CODEXTER documents in the past have not really changed. Since the 1997 *Zana v. Turkey* judgment,<sup>15</sup> the Court's approach has been confirmed by several judgments that the Grand Chamber of the new Court handed down on 8 July 1999. In these judgments, the Court carries out a literal analysis of the impugned form of expression, along with an analysis of the context.<sup>16</sup> It can be said that, since then, the Court has consistently ruled on the basis of the central concept of incitement to violence, linked in some cases to the concept of "*apologie du terrorisme*" (A). It is only very recently, with the above-mentioned *Leroy v. France* judgment, that the Court has focused on the concept of "*apologie du terrorisme*" as provided for in French law (B). This is undoubtedly the most striking change in the case-law in this field.

<sup>12</sup> *Murat Kiliç v. Turkey* (dec.), No. 40498/98, 8 July 2003.

<sup>13</sup> This case-law has been quoted in a number of cases. See, in particular: *Yavuz Aksaç v. Turkey* (dec.), No. 41956/98, 15 January 2004, *Nuredin Sirin v. Turkey* (dec.), 27 April 2004, *Rıza Dinç v. Turkey*, No. 42437/98, § 34, 28 October 2004, *Devrim Turan v. Turkey* (dec.), 27 January 2005, *Aynur Siz v. Turkey* (dec.), No. 895/02, 26 May 2005, *Yusuf Salduz v. Turkey* (dec.), No. 36391/02, 28 March 2006, *Mehmet Resit Arslan v. Turkey* (dec.), No. 31320/02, 1 June 2006, *Erhan Uçma and Yurttaş Uçma v. Turkey* (dec.), No. 15071/03, 3 October 2006.

<sup>14</sup> *Yılmaz and Kılıç v. Turkey*, No. 68514/01, § 58, 17 July 2008.

<sup>15</sup> *Zana v. Turkey*, 25 November 1997, Reports of Judgments and Decisions 1997-VII.

<sup>16</sup> LORENZEN (2006), p. 3.

## A. Incitement to violence

21. An example is the approach taken by the Grand Chamber in the *Erdođdu and İnce v. Turkey* judgment.<sup>17</sup> Having been sentenced for separatist propaganda, the applicants had been prosecuted under the Prevention of Terrorism Act (No. 3713) of 12 April 1991. The Court drew attention to the fundamental principles that it applies in cases concerning freedom of expression:

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

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

(iii) In exercising its supervisory jurisdiction, the Court must look at the interference in the light of the case as a whole, including the content of the impugned statements and the context in which they were made. In particular, it must determine whether the interference in issue was 'proportionate to the legitimate aims pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts."<sup>18</sup>

22. A whole series of factors relating to the **context of the case** affected the Court's decision. For instance, the "*problems linked to the prevention of terrorism*" are, naturally, highlighted (§ 51). The Court went on to point out **who made the remarks** (in this case they were made by a sociologist in an interview) and the content of the speaker's message:

"Without expressly advocating the PKK's role in the Kurdish struggle for independence, the interviewee analysed, mainly from a sociological perspective, this situation in the face of the reactions of the Turkish State."<sup>19</sup>

23. In connection with the cases concerning the situation in south-east Turkey, the Court then took account of the existence of **incitement to violence**. Sometimes the Court also noted the existence of **incitement to hatred**. For instance, in ten of the thirteen Grand Chamber cases decided on 8 July 1999, incitement to violence is considered the sole criterion. In the other three,<sup>20</sup> the Court also mentions incitement to hatred. In short, the two concepts are often used together in

<sup>17</sup> *Erdođdu and İnce v. Turkey* [GC], Nos. 25067/94 and 25068/94, ECHR 1999-IV.

<sup>18</sup> *Erdođdu and İnce v. Turkey* [GC], Nos. 25067/94 and 25068/94, § 47, ECHR 1999-IV. Our underlining.

<sup>19</sup> *Erdođdu and İnce v. Turkey*, cited above, § 51.

<sup>20</sup> *Karataş v. Turkey* [GC], No. 23168/94, ECHR 1999-IV *Sürek v. Turkey (No. 1)* [GC], No. 26682/95, ECHR 1999-IV *Sürek and Özdemir v. Turkey* [GC], Nos. 23927/94 and 24277/94, 8 July 1999.

the case-law. In the above-mentioned *Erdođdu and İnce v. Turkey* [GC] judgment, § 52, the Court did not consider the impugned form of expression to constitute incitement to violence:

"... the views expressed in the interview cannot be read as an incitement to violence; nor could they be construed as liable to incite to violence. In the Court's view the reasons given by the Istanbul National Security Court for convicting and sentencing the applicants, although relevant, cannot be considered sufficient to justify the interference with their right to freedom of expression".

24. The European's Court's review also takes account of whether the penalty is proportionate to the legitimate aim pursued. In the above-mentioned *Erdođdu and İnce v. Turkey* [GC] judgment, the Court considers the penalties inflicted on the applicants as "heavy", even though execution of the sentence was suspended. The Court concludes accordingly that the penalties were disproportionate and that, in the final analysis, Article 10 of the Convention was violated, since:

"... where such views cannot be categorised as [hate speech and incitement to violence], Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media."<sup>21</sup>

25. This case exemplifies the cases concerning Turkey. Since 1999, the Court has ruled on dozens of cases on the basis of the case-law established that year. These cases are generally dealt with in simplified judgments ascertaining a violation when the Court does not find that there was speech inciting to violence. Sometimes, where Article 10 has not been violated, the case is dealt with by means of a judgment (see, for instance, *Falakaođlu and Saygılı v. Turkey*, Nos. 22147/02 and 24972/03, 23 January 2007) or in decisions of inadmissibility (see, in particular, *Meya FM Reha Radyo ve İletişim Hizmetleri A.S. v. Turkey* (dec.), No. 32842/02, 14 November 2006, *Kaya v. Turkey* (dec.), No. 62250/02, 22 March 2007, and *Demirel v. Turkey* (dec.), No. 11584/03, 24 May 2007). What is interesting to note in the context of a report on "*apologie du terrorisme*" is that the Court does not, to our knowledge, use this expression in the cases against Turkey. It was not until the above-mentioned *Leroy v. France* judgment that the Court had to deal with a sentence for complicity in "*apologie du terrorisme*".

## **B. Leroy v. France judgment**

26. The applicant was sentenced following publication of a cartoon representing the attack on the Twin Towers on 11 September 2001. The cartoon, which was published two days after the New York attacks in a Basque weekly newspaper, elicited numerous reactions from readers, to which the applicant replied in the next issue with an explanation of his cartoon and his intentions. He was sentenced to a fine of €1,500 for complicity in "*apologie du terrorisme*". Appendix I sets out the relevant passages of the Court's arguments.

27. Referring to the work undertaken by the Council of Europe, the Court points out that "... *what is difficult is mainly to be able to punish 'apologie du terrorisme' without undermining fundamental freedoms, such as freedom of expression.*" (§ 37). (*Unofficial translation: judgment currently available in French only.*)

28. In this case, the Court examines the arguments put forward by the Pau Appeal Court, which are reiterated as follows by the Court (§ 42) :

"(...), *the Appeal Court held that, 'by directly referring to the massive attacks in Manhattan, attributing them to a well-known terrorist organisation, and idealising this deadly plan by using the verb 'dream', thereby unambiguously presenting a lethal act in a favourable light, the cartoonist [justified] recourse to terrorism, subscribing through the use of the first person plural, 'we', to this*

<sup>21</sup> *Erdođdu and İnce v. Turkey* [GC], cited above, § 54.

*means of destruction, which [was] presented as a dream come true, and, in short, indirectly encouraging the potential reader to take a favourable view of the success of a criminal offence". (Unofficial translation: judgment currently available in French only.)*

According to the Court, the criterion used by the domestic court is perfectly compatible with Article 10 of the Convention: "*the cartoon does not criticise American imperialism [as the applicant suggested], but supports and glorifies its destruction by violent means*" (§ 43).

29. The Court admittedly acknowledges that the case in question concerned a satirical cartoon, but considers that even an artist must assume certain "duties and responsibilities" when taking advantage of freedom of expression. According to the Court, two factors relating to the context were particularly relevant in this case. Firstly, Mr Leroy handed his cartoon to the weekly publication's editorial staff two days after the attacks. "*The Court considers that the timing should have prompted the applicant to act more responsibly when portraying - or even supporting - a tragic event, whether from an artistic or a journalistic angle.*" (§ 45). The impugned publication then circulated in a politically sensitive region - the Basque Country. Readers' reactions show that the cartoon could have stirred up violence and could therefore plausibly have affected public order (§ 45). (Unofficial translation: judgment currently available in French only.)

30. The Court also stresses that the applicant was fined quite a small sum, and one that was certainly proportionate to the legitimate aim pursued by the interference. All these factors prompted the Court to conclude that Article 10 of the Convention had not been violated.<sup>22</sup>

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<sup>22</sup> For an initial comment on this judgment, see Voorhoof (2008).

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**APPENDIX: LEROY V. FRANCE JUDGMENT OF 2 OCTOBER 2008 (NOT FINAL) (EXTRACTS)  
(UNOFFICIAL TRANSLATION: JUDGMENT CURRENTLY AVAILABLE IN FRENCH ONLY.)**

Condemnation for complicity in "*apologie du terrorisme*" following publication of a cartoon representing the attacks on the Twin Towers on 11 September 2001 with the following caption:

"*We all dreamt about it ... Hamas did it*".

"36. The Court considers that impugned sentence can be analysed as 'interference' with the applicant's exercise of his freedom of expression. Such interference breaches Article 10 unless it is 'prescribed by law', pursues one or more of the legitimate aims referred to in paragraph 2 and is 'necessary' in a democratic society to attain such aim or aims (*Fressoz and Roire v. France* [GC], No. 29183/95, § 41, ECHR 1999-I). It is not contested that it was prescribed by law - section 24 of the Act of 29 July 1881 - and pursued legitimate aims - given the sensitive nature of efforts to combat terrorism and the need for the authorities to be vigilant in respect of acts liable to exacerbate violence - namely the maintenance of public safety and the prevention of disorder and crime, within the meaning of Article 10 § 2.

37. It remains to be determined whether such interference was 'necessary in a democratic society' in order to achieve such an aim. The Court would refer to the basic principles stemming from its case-law concerning Article 10 (see, *inter alia*, *Ceylan v. Turkey* ([GC], No. 23556/94, § 32, ECHR 1999-IV). It would point out that these principles apply to measures taken by national authorities as part of the fight against terrorism. It must, with due regard to the circumstances of each case and a 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 (*Zana v. Turkey*, judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, § 55). In particular, as is apparent from the Council of Europe's work on the subject (see paragraphs 20 and 21 above), what is difficult is mainly to be able to punish '*apologie du terrorisme*' without undermining fundamental freedoms, such as freedom of expression.

38. The Court will pay special attention to the words used in the caption to the cartoon and the context in which they were published, with due regard for circumstances connected with the difficulty of combating terrorism (*Karatas v. Turkey*, No. 23168/94, § 51, *Reports of Judgments and Decisions* 1999 IV), not least with regard to the situation prevailing in the Basque country, which it has already had occasion to consider in the *Ekin Association v. France* case (No. 39288/98, 17 July 2001), and taken into account in this case in order to determine the amount of the fine inflicted on the applicant (see paragraph 12 above).

39. It will also take account of the language inherent to satirical cartoons, which may be a form of artistic expression. This language is by definition provocative (*Vereinigung Bildender Künstler v. Austria*, No. 68354/01, § 33, 25 January 2007).

40. As the applicant was sentenced for glorifying, through complicity, an act of terrorism in a weekly newspaper whose managing editor was convicted of '*apologie du terrorisme*', it is necessary to examine the interference in question in the light of the essential role of the press in ensuring the proper functioning of a political democracy (see, *inter alia*, the *Lingens v. Austria* judgment of 8 July 1986, Series A No. 103, p. 26, § 41, and the above-mentioned *Fressoz and Roire* judgment, § 45). While the press must not overstep the boundaries set, *inter alia*, in order to protect such vital interests of the State as national security and territorial integrity against the threat of violence or terrorism or to prevent disorder or crime, it is nevertheless incumbent on the press to impart information and ideas on political issues, including divisive ones. Not only has the press the task of imparting such information and ideas; the public has a right to receive them. (*Sürek and Özdemir v. Turkey*, Nos. 23927/94 and 24277/94, § 58, 8 July 1999; *Yalcin Küçük v. Turkey*, No. 28493/95, § 38, 5 December

2002; *Halis Doğan v. Turkey*, No. 75946/01, § 33, 7 February 2006). Because the press has this role, journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (*Gaweda v. Poland*, No. 26229/95, § 34, ECHR 2002-II).

41. The Court first notes that the tragic acts of 11 September 2001 that prompted the impugned form of expression caused chaos worldwide, and that the questions raised on that occasion, including the applicant's interpretation of them, are a matter for debate in the public interest.

42. The Court notes that the cartoon showing the destruction of the towers, with the caption '*We all dreamt about it ... Hamas did it*', parodying a leading brand advertising slogan, was considered by the domestic courts to constitute complicity in '*apologie du terrorisme*'. According to the authorities, even if it had no effect, the impugned publication proclaimed the effectiveness of terrorist acts by idealising the attacks that took place on 11 September. Thus, the Appeal Court held that 'by directly referring to the massive attacks in Manhattan, attributing them to a well-known terrorist organisation, and idealising this deadly plan by using the verb 'dream', thereby unambiguously presenting a lethal act in a favourable light, the cartoonist [justified] recourse to terrorism, subscribing through the use of the first person plural, 'we', to this means of destruction, which [was] presented as a dream come true, and, in short, indirectly encouraging the potential reader to take a favourable view of the success of a criminal offence'. The applicant complains that the Appeal Court denied his true intention - which fell within the sphere of militant political expression - that of exhibiting his anti-Americanism by means of a satirical picture and of illustrating the decline in American imperialism. He contends that the factors constituting '*apologie du terrorisme*' and justifying restrictions on freedom of expression were not present in this case.

43. The Court does not agree with the applicant's analysis. It considers that, on the contrary, the criterion used by the Pau Appeal Court to assess whether the applicant's message constituted '*apologie du terrorisme*' is compatible with Article 10 of the Convention. Admittedly, the image of the four towers collapsing in a cloud of dust may, in itself, demonstrate the cartoonist's intention but, when seen together with the accompanying caption, the image does not criticise American imperialism, but supports and glorifies its destruction by violent means. Here the Court is taking as its basis the caption to the cartoon, and notes that the applicant expresses his support for and moral solidarity with those he presumes to have perpetrated the attack on 11 September 2001. By virtue of the words used, the applicant casts a favourable judgment on the violence perpetrated against thousands of civilians and undermines the dignity of the victims. The Court endorses the Appeal Court's view that 'the applicant's intentions were irrelevant to the prosecution'; moreover, they were not expressed until afterwards and were not, given the context, such as to dispel the favourable assessment of the effects of a criminal offence. It notes in this connection that provocation does not necessarily have to have an effect in order to constitute an offence (see paragraph 14 above; see also paragraph 19, and in particular Article 8 of the Convention on the Prevention of Terrorism).

44. Admittedly, this provocation took the form of satire, which the Court has already described as 'a form of artistic expression and social commentary [which], by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate (*Vereinigung Bildender Künstler*, cited above, § 33), adding that any interference with an artist's right to such expression must be examined with particular care (*ibid.*). The fact remains, however, that an artist whose work is a form of political or militant expression is not exempt from any possibility of restrictions within the meaning of Article 10, paragraph 2: anyone who avails himself or herself of freedom of expression has, in the words of that paragraph, 'duties and responsibilities'.

45. In this connection, while the domestic courts did not take account of the applicant's intention, they did, in the light of Article 10, consider whether the context of the case and the

public interest justified possible recourse to a degree of provocation or exaggeration. It has to be said, here, that the cartoon had a particular impact in the circumstances, of which the applicant could not be unaware. On the date of the attacks, in other words on 11 September 2001, he submitted his cartoon, and it was published on 13 September, at a time when the whole world was in a state of shock over the news, without any precautions being taken in terms of language. The Court considers that the timing should have prompted the applicant to act more responsibly when portraying - or even supporting - a tragic event, whether from an artistic or a journalistic angle. Moreover, the impact of such a message in a politically sensitive region should not be overlooked. Even though this impact was restricted by the fact that the cartoon was published in the weekly publication in question, the Court observes that it elicited reactions (see paragraph 10 above) which could have stirred up violence and which demonstrated that it could plausibly have affected public order in the region.

46. The Court therefore concludes that the 'penalty' inflicted on the applicant is based on 'relevant and sufficient' grounds.

47. The Court also notes that the applicant was fined a moderate sum. The nature and heaviness of the penalties inflicted are also factors to be taken into consideration for the purposes of gauging whether the interference was proportionate.

In the circumstances, and with regard in particular to the context in which the impugned cartoon was published, the Court considers that the measure taken against the applicant was not disproportionate to the legitimate aim pursued.

48. In conclusion, the domestic court could reasonably consider that the interference with the applicant's exercise of his right to freedom of expression was necessary in a democratic society within the meaning of Article 10 of the Convention. There was therefore no violation of this provision."