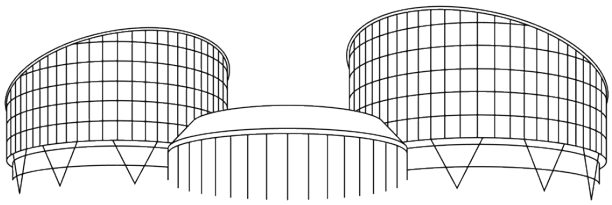

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF FATULLAYEV v. AZERBAIJAN

(Application no. 40984/07)

JUDGMENT

STRASBOURG

22 April 2010

FINAL

04/10/2010

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

In the case of Fatullayev v. Azerbaijan**,**

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

Christos Rozakis, *President,*
Nina Vajić,
Dean Spielmann,
Sverre Erik Jebens,
Giorgio Malinverni,
George Nicolaou, *judges,*
Lətif Hüseynov, ad hoc *judge,*
and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 25 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 40984/07) against the Republic of Azerbaijan lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Azerbaijani national, Mr Eynulla Emin oglu Fatullayev (*Eynulla Emin oğlu Fətullayev* – "the applicant"), on 10 September 2007.

2. The applicant was represented by Mr I. Ashurov, a lawyer practising in Baku. The Azerbaijani Government ("the Government") were represented by their Agent, Mr Ç. Asgarov.

3. The applicant alleged, in particular, that his criminal convictions for statements made in newspaper articles authored by him had constituted a violation of his freedom of expression, that he had not been heard by an independent and impartial tribunal established by law, and that his right to the presumption of innocence had not been respected.

4. On 3 September 2008 the President of the First Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3 of the Convention).

5. Mr K. Hajiyev, the judge elected in respect of Azerbaijan, withdrew from sitting in the Chamber (Rule 28 of the Rules of Court). The Government accordingly appointed Mr L. Hüseynov to sit as an *ad hoc* judge in his place (Article 27 § 2 of the Convention and Rule 29 § 1 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1976 and lives in Baku.

7. The applicant was the founder and chief editor of the newspapers *Gündəlik Azərbaycan*, published in the Azerbaijani language, and *Realny Azerbaijan* ("*Реальный Азербайджан*"), published in the Russian language. The newspapers were widely known for often publishing articles harshly criticising the Government and various public officials.

8. Prior to the events complained of in this application, the applicant had been sued for defamation in a number of sets of civil and criminal proceedings instituted following complaints by various high-ranking government officials, including cabinet ministers and members of parliament. In the most recent set of proceedings, on 26 September 2006 the applicant was convicted of defamation of a cabinet minister and conditionally sentenced to two years' imprisonment. Moreover, according to the applicant, at various times he and his staff had received numerous threatening phone calls demanding him to stop writing critical articles about high-ranking officials or even to completely cease the publication of his newspapers.

9. In 2007 two sets of criminal proceedings were brought against the applicant in connection with, *inter alia*, two articles published by him in *Realny Azerbaijan*.

A. First set of proceedings

1. Statements made by the applicant

10. In 2005 the applicant visited, as a journalist, the area of Nagorno-Karabakh and other territories controlled by the Armenian military forces. This was one of a few exceptionally allowed and organised visits by Azerbaijani nationals to those territories and to Armenia in the years following the Nagorno-Karabakh war, as movement across the front line in Nagorno-Karabakh and across the Armenian-Azerbaijani border remains severely restricted to this day from both sides. During his visit he met, among others, some officials of the self-proclaimed, unrecognised "Nagorno-Karabakh Republic" and some ordinary people. In the aftermath of this visit, in April 2005 the applicant published an article called "The Karabakh Diary" (Russian: *"Карабахский дневник"*) in *Realny Azerbaijan*.

11. In the article, styled as a diary, the applicant described his visits to several towns, including Lachin, Shusha, Agdam and Khojaly, which had

formerly been inhabited primarily by ethnic Azerbaijanis who had been forced to flee their homes during the war. He described both the ruins of war and the new construction sites that he had seen in those towns, as well as his casual conversations with a number of local Armenians he had met during his visit.

12. One of the topics discussed in "The Karabakh Diary" concerned the Khojaly massacre of 26 February 1992. Discussing this topic, the applicant made certain statements which could be construed as differing from the commonly accepted version of the Khojaly events according to which hundreds of Azerbaijani civilians had been killed by the Armenian armed forces, with the reported assistance of the Russian (formerly Soviet) 366th Motorised Rifle Regiment, during their assault on the town of Khojaly in the course of the war in Nagorno-Karabakh. Specifically, the article contained the following passages:

> "Having seen Khojaly, I could not hide my astonishment. This Azerbaijani town, which had been razed to the ground, has been completely reconstructed and converted into a town called Ivanovka, named after an Armenian general who had actively participated in the occupation of Khojaly. The Khojaly tragedy and the deep wounds inflicted on our soul by the Armenian expansionism on this long-suffering Azerbaijani land permeated all my meetings in Askeran [a town in Nagorno-Karabakh close to Khojaly]. How so? Can it be true that nothing human is left in these people? However, for the sake of fairness I will admit that several years ago I met some refugees from Khojaly, temporarily settled in Naftalan, who openly confessed to me that, on the eve of the large-scale offensive of the Russian and Armenian troops on Khojaly, the town had been encircled [by those troops]. And even several days prior to the attack, the Armenians had been continuously warning the population about the planned operation through loudspeakers and suggesting that the civilians abandon the town and escape from the encirclement through a humanitarian corridor along the Kar-Kar River. According to the Khojaly refugees' own words, they had used this corridor and, indeed, the Armenian soldiers positioned behind the corridor had not opened fire on them. Some soldiers from the battalions of the NFA [the National Front of Azerbaijan, a political party], for some reason, had led part of the [refugees] in the direction of the village of Nakhichevanik, which during that period had been under the control of the Armenians' Askeran battalion. The other group of refugees were hit by artillery volleys [while they were reaching] the Agdam Region.
>
> When I was in Askeran, I spoke to the deputy head of the administration of Askeran, Slavik Arushanyan, and compared his recollection of the events with that of the Khojaly inhabitants who came under fire from the Azerbaijani side.
>
> I asked S. Arushanyan to show me the corridor which the Khojaly inhabitants had used [to abandon the town]. Having familiarised myself with the geographical area, I can say, fully convinced, that the conjectures that there had been no Armenian corridor are groundless. The corridor did indeed exist, otherwise the Khojaly inhabitants, fully surrounded [by the enemy troops] and isolated from the outside world, would not have been able to force their way out and escape the encirclement. However, having crossed the area behind the Kar-Kar River, the row of refugees was separated and, for some reason, a group of [them] headed in the direction of Nakhichevanik. It appears that the NFA battalions were striving not for the liberation

> of the Khojaly civilians but for more bloodshed on their way to overthrow A. Mutalibov [the first President of Azerbaijan] ..."

13. More than a year after the publication of the above article, during the period from December 2006 to January 2007, a person registered under the username "Eynulla Fatullayev", identifying himself as the applicant, made a number of postings on the publicly accessible Internet forum of a website called AzeriTriColor. The postings were made in a specific forum thread dedicated to other forum members' questions to the forum member named "Eynulla Fatullayev" about the contents of "The Karabakh Diary". In his various answers to those questions, the person posting under the username "Eynulla Fatullayev" made, *inter alia*, the following statements:

> "I have visited this town [Naftalan] where I have spoken to hundreds (I repeat, hundreds) of refugees who insisted that there had been a corridor and that they had remained alive owing to this corridor ...
>
> You see, it was wartime and there was a front line... Of course, Armenians were killing [the civilians], but part of the Khojaly inhabitants had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators. ...
>
> [They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions ... [The corpses] had been mutilated by our own ..."

2. Civil action against the applicant

14. On 23 February 2007 Ms T. Chaladze, the Head of the Centre for Protection of Refugees and Displaced Persons, brought a civil action against the applicant in the Yasamal District Court. She claimed that the applicant had "for a long period of time insulted the honour and dignity of the victims of the Khojaly Tragedy, persons killed during those tragic events and their relatives, as well as veterans of the Karabakh War, soldiers of the Azerbaijani National Army and the entire Azerbaijani people". She alleged that the applicant had done so by making the above-mentioned statements in his article "The Karabakh Diary" as well as by making similar insulting statements on the forum of the AzeriTriColor website. Ms Chaladze attributed the authorship of the Internet forum postings made from the forum account with the username "Eynulla Fatullayev" to the applicant.

15. In his submissions to the court, the applicant argued that the forum postings at the AzeriTriColor website had not been written by him and denied making these statements. He also argued that, in "The Karabakh Diary", he had merely reported the information given to him by persons whom he had interviewed.

16. The Yasamal District Court, sitting as a single-judge formation composed of Judge I. Ismayilov, heard evidence from a number of refugees from Khojaly, all of whom testified about their escape from the town and noted that they had not been fired upon by Azerbaijani soldiers and that the

applicant's assertions concerning this were false. Furthermore, having examined electronic evidence and witness statements, the court established that the postings on the AzeriTriColor forum had indeed been made by the applicant himself and that they had been posted in response to various questions by readers of *Realny Azerbaijan*. The court found that the applicant and the newspaper had disseminated false and unproven statements tarnishing the honour and dignity of the survivors of the Khojaly events.

17. In view of the above findings, on 6 April 2007 the Yasamal District Court upheld Ms Chaladze's claim and ordered the applicant to publish, in *Realny Azerbaijan* and on related websites, a retraction of his statements and an apology to the refugees from Khojaly and the newspaper's readers. The court also ordered the applicant and *Realny Azerbaijan* to pay 10,000 New Azerbaijani manats (AZN – approximately 8,500 euros) each in respect of non-pecuniary damage. This total award of AZN 20,000 was to be spent on upgrading the living conditions of the refugees from Khojaly temporarily residing in Naftalan.

3. Criminal conviction

18. Thereafter, on an unspecified date, a group of four Khojaly survivors and two former soldiers who had been involved in the Khojaly battle, represented by Ms Chaladze, lodged a criminal complaint against the applicant with the Yasamal District Court, under the private prosecution procedure. They asked that the applicant be convicted of defamation and of falsely accusing Azerbaijani soldiers of having committed an especially grave crime.

19. At a preliminary hearing held on 9 April 2007 the applicant filed an objection against the entire judicial composition of the Yasamal District Court. He claimed that all of the judges of that court had been appointed to their positions in September 2000 for a fixed five-year term and that their term of office had expired in 2005. He therefore argued that the composition of the court meant that it could not be regarded as a "tribunal established by law". This objection was dismissed.

20. The hearing of the criminal case took place on 20 April 2007 and was presided over by Judge I. Ismayilov, sitting as a single judge.

21. In his oral submissions to the court, the applicant pleaded his innocence. In particular, he denied making the statements on the forum of the AzeriTriColor website and maintained that those statements had been made by some unknown impostor who had used his name for this purpose.

22. The court heard a linguistic expert who gave an opinion on the applicant's statements. The expert testified, *inter alia*, that, owing to the specific style in which "The Karabakh Diary" had been written, it was difficult to differentiate whether the specific statements and conclusions made concerning the Khojaly events could be attributable to the applicant

personally or to those persons whom he had allegedly interviewed in Nagorno-Karabakh. He also noted that it was difficult to analyse separately the specific phrases taken out of the context of the article as a whole, and that it appeared from the context that the author had attempted to convey the positions of both sides to the conflict. The court also heard several witnesses who testified about the Khojaly events and stated that there had been no escape corridor for the civilians and that the civilians had been shot at from the enemy's positions. The court further found that the Internet forum of the AzeriTriColor website, in essence, had replaced the Internet forum of the *Realny Azerbaijan* website, which had become defunct in 2006, and that the statements posted on that forum under the username "Eynulla Fatullayev" had indeed been made by the applicant himself. Lastly, the court found that, through his statements made in "The Karabakh Diary" and his Internet forum postings, the applicant had given a heavily distorted account of the historical events in Khojaly and had deliberately disseminated false information which had damaged the reputation of the plaintiffs and had accused the soldiers of the Azerbaijani Army (specifically, the two plaintiffs who had fought in Khojaly) of committing grave crimes which they had not committed. The court convicted the applicant under Articles 147.1 (defamation) and 147.2 (defamation by accusing a person of having committed a grave crime) of the Criminal Code and sentenced him to two years and six months' imprisonment.

23. The applicant was arrested in the courtroom and taken to Detention Facility No. 1 on the same day (20 April 2007).

24. On 6 June 2007 the Court of Appeal upheld the Yasamal District Court's judgment of 20 April 2007.

25. On 21 August 2007 the Supreme Court dismissed a cassation appeal by the applicant and upheld the lower courts' judgments.

B. Second set of proceedings

1. "The Aliyevs Go to War"

26. In the meantime, on 30 March 2007, *Realny Azerbaijan* had published an article entitled "The Aliyevs Go to War" (Russian: *"Алиевы идут на войну"*). The article was written by the applicant but published under the pseudonym "Rovshan Bagirov".

27. This analytical article was devoted to the possible consequences of Azerbaijan's support for a recent "anti-Iranian" resolution of the United Nations (UN) Security Council, which had called for economic sanctions against that country. The article referred to the current Azerbaijani government as "the Aliyev clan" and "the governing Family" and expressed the view that the government had sought United States (US) support for

President Ilham Aliyev's "remaining in power" in Azerbaijan in exchange for Azerbaijan's support for the US "aggression" against Iran.

28. The article continued as follows:

> "It is also known that, immediately after the UN [Security Council] had voted for this resolution, [the authorities] in Tehran began to seriously prepare for the beginning of the 'anti-Iranian operation'. For several years, the military headquarters of the Islamic regime had been developing plans for repulsing the American aggression and counter-attacking the US and their allies in the region. After 24 March 2007 Azerbaijan, having openly supported the anti-Iranian operation, must prepare for a lengthy and dreadful war which will result in large-scale destruction and loss of human life. According to information from sources close to official Paris, the Iranian General Staff has already developed its military plans concerning Azerbaijan in the event that Baku takes part in the aggression against Iran. Thus, the Iranian long-range military air force, thousands of insane kamikaze terrorists from the IRGC [the Islamic Revolution's Guardian Corps] and hundreds of Shahab-2 and Shahab-3 missiles will strike the following main targets on the territory of Azerbaijan ..."

29. The article continued with a long and detailed list of such targets, which included, *inter alia*, active petroleum platforms on the shelf of the Caspian Sea, the Sangachal Oil Terminal and other petroleum plants and terminals, the Baku-Tbilisi-Ceyhan petroleum pipeline and the Baku-Tbilisi-Erzurum gas pipeline, the building of the Presidential Administration, the building of the US Embassy in Azerbaijan, buildings of various ministries, the Baku seaport and airport, and a number of large business centres housing the offices of major foreign companies doing business in Azerbaijan.

30. Further, it was noted in the article that the Azerbaijani Government should have maintained neutrality in its relations with both the US and Iran, and that its support of the US position could lead, in the event of a war between those two States, to such grave consequences as loss of human life among Azeris in both Azerbaijan and Iran. In this connection, the author noted that the US military forces were already operating four airbases on the territory of Azerbaijan and had expressed an interest in operating the Gabala Radar Station, which was then operated by Russia.

31. The article also discussed the issue of possible unrest, in the event of a conflict with Iran, in the southern regions of Azerbaijan populated by the Talysh ethnic minority, who are ethnically and linguistically close to the Persians. Among other things, the article appeared to imply that the current ruling elite, a large number of whom allegedly came from the region of Nakhchivan, was engaging in regional nepotism by appointing people from Nakhchivan to government posts in southern areas of the country, including the Lenkoran region. In particular, the article stated:

> "Thus, the Talysh have long been expressing their discontent with the fact that [the central authorities] always appoint to administrative positions in Lenkoran persons hailing from Nakhchivan who are alien to the mentality and problems of the region. ... The level of unemployment in the region is terribly high, drug abuse is flourishing,

every morning hundreds of unemployed Talysh cluster together at the 'slave' [that is, cheap labour] market in Baku. Is this not a powder keg?

But the authorities, seemingly unaware of the danger of the developing situation, are giving preference to their standard methods – repressive measures and paying off the Talysh elite. It seems as if the authorities are deliberately pushing the Talysh into the embrace of Iranian radicals."

32. The article noted that certain high-ranking Iranian officials and ayatollahs were of Talysh ethnicity, and that there were "several million" Talysh living across the Iranian border who could "support their kin" living in Azerbaijan in the event of a war. Lastly, the article concluded that the Azerbaijani authorities did not realise all the dangerous consequences of the geopolitical game they were playing.

2. Criminal conviction

33. On 16 May 2007 the investigation department of the Ministry of National Security ("the MNS") commenced a criminal investigation in connection with the publication of the article under Article 214.1 of the Criminal Code (terrorism or threat of terrorism).

34. On 22 May 2007 the investigation authorities conducted searches in the applicant's flat and in the office of the *Realny Azerbaijan* and *Gündəlik Azərbaycan* newspapers. They found and seized certain photographs and computer disks from the applicant's flat and twenty computer hard drives from the newspaper's office.

35. On 29 May 2007 the applicant was transferred to the MNS detention facility.

36. On 31 May 2007 the Prosecutor General made a statement to the press, noting that the article published in *Realny Azerbaijan* contained information which constituted a threat of terrorism and that a criminal investigation had been instituted in this connection by the MNS. This statement was reported on Media Forum, an Internet news portal, as follows:

"Today, the Prosecutor General ... provided an explanation concerning the criminal case instituted by the Ministry of National Security in respect of Eynulla Fatullayev, the editor-in-chief of *Gündəlik Azərbaycan* and *Realny Azerbaijan* newspapers, and stated that the Internet site [of the newspapers] had indeed contained information threatening acts of terrorism. According to Azadliq Radio, the Prosecutor General stated: 'The site mentions specific State facilities and addresses which would allegedly be bombed by the Islamic Republic of Iran. This information constitutes a threat of terrorism.' [He] noted that, in connection with this, the MNS had instituted criminal proceedings under Article 214.1 of the Criminal Code. The Prosecutor General stated that the MNS would shortly make a statement concerning the results of the investigation."

37. Another Internet news portal, Day.Az, reported as follows:

> "The Internet site of *Realny Azerbaijan*, founded by Eynulla Fatullayev, indeed contains a threat of terrorism. The Prosecutor General ... made this statement. According to him, the Internet site of *Realny Azerbaijan* mentions specific addresses of certain State facilities and asserts that, according to available information, they will be bombed by the Islamic Republic of Iran. 'This information constitutes a threat of terrorism. Therefore, the Ministry of National Security (the MNS) has instituted criminal proceedings under Article 214.1 of the Criminal Code and is taking investigative measures.' [The Prosecutor General] noted that the MNS would keep the public informed about the progress in the case..."

38. On 3 July 2007, by a decision of an MNS investigator, the applicant was formally charged with the criminal offences of threat of terrorism (Article 214.1 of the Criminal Code) and inciting ethnic hostility (Article 283.2.2 of the Criminal Code).

39. On the same day, 3 July 2007, pursuant to a request by the Prosecutor General's Office, the Sabail District Court remanded the applicant in custody for a period of three months in connection with this criminal case. The applicant appealed. On 11 July 2007 the Court of Appeal upheld the Sabail District Court's decision.

40. On 4 September 2007 the applicant was also charged with tax evasion under Article 213.2 of the Criminal Code on account of his alleged failure to duly declare taxes on his personal earnings as a newspaper editor.

41. During the trial, among other evidence, the prosecution produced evidence showing that in May 2007 the full electronic version of "The Aliyevs Go to War" had been forwarded by e-mail to the offices of a number of foreign and local companies in Baku. A total of eight employees of these companies testified during the trial that, after reading the article, they had felt disturbed, anxious and frightened. The court found that the publication of this article had pursued the aim of creating panic among the population. The court further found that, in the article, the applicant had threatened the Government with destruction of public property and acts endangering human life, with the aim of exerting influence on the Government to refrain from taking political decisions required by national interests.

42. On 30 October 2007 the Assize Court found the applicant guilty on all charges and convicted him of threat of terrorism (eight years' imprisonment), incitement to ethnic hostility (three years' imprisonment) and tax evasion (four months' imprisonment). The partial merger of these sentences resulted in a sentence of eight years and four months' imprisonment. Lastly, the court partially merged this sentence with the sentence of two years and six months' imprisonment imposed on the applicant in the previous criminal case, which resulted in a total sentence of eight years and six months' imprisonment. In imposing this final sentence, the court found that, on account of his previous convictions, the applicant was a repeat offender and assessed this as an aggravating circumstance. The court also ordered that 23 computers and several compact discs, previously

seized as material evidence from the newspapers' offices, be confiscated in favour of the State. Lastly, the court ordered that AZN 242,522 (for unpaid taxes) and AZN 17,800 (for unpaid social security contributions) be withheld from the applicant.

43. On 16 January 2008 the Court of Appeal upheld the Assize Court's judgment of 30 October 2007.

44. On 3 June 2008 the Supreme Court upheld the lower courts' judgments.

45. In his defence speech at the trial and in his appeals to the higher courts, the applicant had complained, *inter alia*, of a breach of his presumption of innocence on account of the Prosecutor General's statement to the press, relying directly on Article 6 § 2 of the Convention. His arguments under the Convention in this respect had been summarily rejected.

46. It appears that, on an unspecified date during the period when the above-mentioned criminal proceedings were taking place, the publication and distribution of *Gündəlik Azərbaycan* and *Realny Azerbaijan* were halted, in circumstances which are not entirely clear from the material available in the case file.

II. RELEVANT DOMESTIC LAW

A. Criminal Code of 2000

47. Article 147 of the Criminal Code, in force at the relevant time, provided as follows:

> "147.1. Defamation, that is, dissemination, in a public statement, publicly exhibited work of art or through the mass media, of knowingly false information discrediting the honour and dignity of a person or damaging his or her reputation,
>
> shall be punishable by a fine in the amount of one hundred to five hundred conditional financial units, or by community service for a term of up to two hundred and forty hours, or by corrective labour for a term of up to one year, or by imprisonment for a term of up to six months.
>
> 147.2. Defamation by accusing [a person] of having committed a serious or especially serious crime
>
> shall be punishable by corrective labour for a term of up to two years, or by restriction of liberty for a term of up to two years, or by imprisonment for a term of up to three years."

48. Article 214.1 of the Criminal Code provided as follows:

> "Terrorism, that is, perpetration of an explosion, arson or other acts creating a danger to human life or significant material damage or other grave consequences, if

such acts are carried out for the purpose of undermining public security, frightening the population or exerting influence on the State authorities or international organisations to take certain decisions, as well as the threat to carry out the above-mentioned acts with the same purposes,

shall be punishable by deprivation of liberty for a term of eight to twelve years together with confiscation of property."

49. Article 283 of the Criminal Code provided as follows:

"283.1. Acts aimed at incitement to ethnic, racial or religious hostility or humiliation of ethnic dignity, as well as acts aimed at restricting citizens' rights or establishing citizens' superiority on the basis of their ethnic or racial origin, if committed openly or by means of the mass media,

shall be punishable by a fine in the amount of one thousand to two thousand conditional financial units, or by restriction of liberty for a term of up to three years, or by imprisonment for a term of two to four years.

283.2. The same acts, if committed:

283.2.1. with the use of violence or the threat of use of violence;

283.2.2. by a person using his official position;

283.2.3. by an organised group;

shall be punishable by imprisonment for a term of three to five years."

B. Code of Criminal Procedure of 2000

50. Under Article 449 of the Code of Criminal Procedure ("the CCrP"), an accused or suspected person can lodge a complaint against procedural steps or decisions of the prosecuting authorities (preliminary investigator, investigator, supervising prosecutor, etc.) with the court supervising the pre-trial investigation. Article 449.3 of the CCrP provides that such a complaint may be lodged, *inter alia*, in the event of a violation of a detainee's rights.

51. Articles 450 and 451 of the CCrP provide for the procedure for examining such complaints and outline the supervising court's competence. In particular, under Article 451.1 of the CCrP, the supervising court may take one of the following two decisions in respect of a complaint under Article 449 of the CCrP: (a) declaring the impugned procedural step or decision lawful; or (b) declaring the impugned procedural step or decision unlawful and quashing it. Article 451.3 of the CCrP provides that in the event of a finding that the impugned step or decision is unlawful, the prosecutor supervising the investigation or a superior prosecutor is to take

immediate measures aimed at stopping the violations of the complainant's rights.

C. Code of Civil Procedure of 2000

52. Chapter 27 of the Code of Civil Procedure ("the CCP"), consisting of Articles 296-300, provides for the procedure for examining civil lawsuits concerning decisions and acts (or omissions) of "the relevant executive authorities, local self-administration authorities, other authorities and organisations and their officials". In particular, in accordance with Article 297.1 of the CCP, decisions and acts (or omissions) covered by this procedure include those which violate a person's rights or freedoms, impede a person's exercise of his or her rights or freedoms, or impose an unlawful obligation or liability upon a person.

D. Appointment and tenure of judges

53. The relevant provisions of the Law on Courts and Judges of 10 June 1997, in force before the amendments adopted on 28 December 2004, and the relevant domestic law concerning the status and composition of the Judicial Legal Council, in force prior to the enactment of the Law on the Judicial Legal Council of 28 December 2004, are summarised in *Asadov and Others v. Azerbaijan* ((dec.), no. 138/03, 12 January 2006).

54. Law No. 817-IIQD on Additions and Amendments to the Law on Courts and Judges, of 28 December 2004 ("Law No. 817-IIQD"), in force from 30 January 2005, introduced a number of amendments concerning, *inter alia*, the process for the selection and appointment of candidates for judicial office, terms of office of judges, the code of judicial ethics, disciplinary procedures in respect of judges and the immunity of judges. Specifically, Articles 93-1 to 93-4 of the Law on Courts and Judges, as amended by Law No. 817-IIQD, provide that candidates for judicial office are selected by the Judge Selection Committee, established by the Judicial Legal Council, according to a procedure involving written and oral examinations and long-term training courses where each candidate's performance is subsequently graded by the Judge Selection Committee. In accordance with Article 96 of the Law on Courts and Judges, as amended by Law No. 817-IIQD, judges are initially appointed for a five-year term and, during this term, must attend a judicial training course at least once. If following the initial five-year term no professional shortcomings are detected in the judge's work, he or she is reappointed to an indefinite term of office (expiring at the age of 65 or, in exceptional cases, 70) pursuant to a recommendation by the Judicial Legal Council. Prior to the latter amendment, judges were appointed for fixed terms of five or ten years, depending on the court in which they served.

55. Clause 1 of the Transitional Provisions of Law No. 817-IIQD provided as follows:

> "The terms of office of judges of the courts of the Republic of Azerbaijan who were appointed before 1 January 2005 shall expire on the date of the appointment of new judges to those courts ..."

56. The Law on the Judicial Legal Council of 28 December 2004 provides that the Judicial Legal Council has 15 members (including representatives of the executive and legislative authorities, judges of various courts, and representatives of the prosecution authorities and the Bar Association) and is a body competent to organise the process of selecting candidates for judicial office and submitting recommendations to the President on judicial appointments, and to perform other tasks including organising training courses for judges, providing logistical support to the courts and taking disciplinary measures against judges.

III. COUNCIL OF EUROPE DOCUMENTS

57. The following are extracts from Resolution 1614 (2008) of the Parliamentary Assembly of the Council of Europe on the functioning of democratic institutions in Azerbaijan:

> "19. As regards freedom of expression, the Azerbaijani authorities should:
>
> 19.1. initiate the legal reform aimed at decriminalising defamation and revise the relevant civil law provisions to ensure respect for the principle of proportionality, as recommended in Resolution 1545 (2007); in the meantime, a political moratorium should be reintroduced so as to put an end to the use of defamation lawsuits as a means of intimidating journalists ..."

58. The following are extracts from the report by the Council of Europe Commissioner for Human Rights, Mr Thomas Hammarberg, on his visit to Azerbaijan, from 3 to 7 September 2007 (CommDH(2008)2, 20 February 2008):

> "**B. A matter of urgency: the decriminalisation of defamation**
>
> 69. At the time of the Commissioner's visit, it was reported that there were seven journalists in prison, out of whom four were for libel or defamation under Articles 147 and 148 of the Criminal Code. Both international monitoring bodies and local NGOs claimed that charging individuals for defamation was used as a means to avoid the dissemination of news that could be detrimental to high-ranking officials or to other influential people. According to the parliamentary assembly of the Council of Europe rapporteurs, the number of charges has grown in the last few years. Out of fear of imprisonment journalists are compelled to resort to self-censorship. In 2005, the President, Mr Ilham Aliyev had called for abandoning the use of criminal provisions in matters of defamation, but this was not respected. Some cases, which the Commissioner was informed about point to abusive or unfair imprisonment of journalists.

70. ... Indeed, many journalists remain incarcerated. Mr Eynulla Fatullayev, who was held at the pre-trial detention centres on the premises of the Ministry for National Security is still incarcerated. This journalist had criticised the authorities' and armed forces' conduct during the siege of Khojaly. His critical analysis of the handling of the crisis cost him a two and half year sentence for libel. Furthermore, in a concerning stacking of incriminations, he was sentenced on 30 October 2007 to an additional eight and a half years, this time on charges of terrorism and incitement to racial hatred. When this journalist met the Commissioner, he said that the fact that he had been jailed was evidence of political pressure on him as a journalist. After the decision on this second sentence, he reiterated this comment. The Commissioner mentioned his imprisonment for libel to the authorities and called for his immediate release. The Commissioner once again urges the authorities to release Mr Eynulla Fatullayev.

71. The authorities' response to questions regarding this issue is that actions against journalists are caused by their lack of professionalism, which leads them to writing in a non-responsible manner and ignoring their legal and ethical duties. There should indeed be proper training and education of journalists, who have a responsibility in the exercise of their profession and should follow a code of ethics in line with European standards. At the same time, officials should allow easy access to information and accept criticism inherent to their position of accountability in society.

72. Nevertheless, the fundamental issue here is whether people, in particular but not only journalists, should be deprived of liberty and other criminal law consequences on account of views expressed. The supplementary issue, as already dealt with, is whether, where it still exists as an offence under criminal law, as it is the case in Azerbaijan, the prosecution of defamation does not in fact lead to instances of abusive prosecution and/or excessive sentences. There is clearly a general trend to move towards a decriminalisation of defamation in Europe today. International standards allow the penalisation of defamation through criminal law but only in cases of hate speech directly intended at inciting violence. To corroborate the requirement of intention, there has to be a direct link between the intention and the likeliness of the violence. ... In most countries, the criminal route is not used: there is a moratorium on such laws. The criminalisation of defamation has a chilling effect on freedom of expression. The legal framework in Azerbaijan provides for a wide range of possibilities for criminalisation, notably for 'damage to honour and reputation'. Work on a draft law on defamation has been going on for more than a year, involving a working group of parliamentarians and media experts, with the support of the OSCE. Emphasis would be shifted from criminal law to civil law.

73. The Commissioner was encouraged by talks he had on this issue with the Minister of Justice. He recommends the launching of an open public debate that would help define a rights-based approach that would remove defamation from the criminal books and offer alternative protection to other rights and interests. Council of Europe experts could provide assistance in that respect. In order to support the holding of that debate, the President could reiterate his 2005 declaration on a moratorium on the use of the criminal provision. The Commissioner recommends, as a first step, the release of all those, who have been criminally prosecuted under the relevant provisions of the criminal code."

IV. INFORMATION NOTE ON THE KHOJALY EVENTS

59. Most of the facts of the reported massacre of Azerbaijani civilians in Khojaly are contested by the Azerbaijani and Armenian sides. As for third-party sources, the following are extracts from reports of international organisations and human-rights NGOs concerning these events.

60. The background paper prepared by the Directorate General of Political Affairs of the Council of Europe, appended to the report by the Parliamentary Assembly's Political Affairs Committee on the conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference (rapporteur Mr D. Atkinson, 29 November 2004, Doc. 10364), states:

> "In February 1992, almost day-to-day four years after the Sumgait events, the ethnic Armenian forces attacked the only airport in [Nagorno-Karabakh], in *Khojali*, to the North of the local capital. At the time, the population of Khojali was 7000. The Azerbaijani view is that the taking of Khojali, which left some 150 defenders of the airport dead, was followed by unprecedented brutalities against the civilian population. In one day, reportedly 613 unarmed people were massacred and close to 1300 were captured – many of them while trying to flee through an alleged humanitarian corridor. The Armenian side contests this view and the number of casualties.
>
> *The Khojali massacre* sparked an exodus of Azerbaijanis and precipitated a political crisis in Baku. Five years later, in 1997, President Aliyev issued a Decree referring to the tragedy as the 'Khojali genocide'."

61. The following are extracts from the Human Rights Watch World Report 1993 on the former Soviet Union:

> "During the winter of 1992, Armenian forces went on the offensive, forcing almost the entire Azerbaijani population of the enclave to flee, and committing unconscionable acts of violence against civilians as they fled. The most notorious of these attacks occurred on February 25 in the village of Khojaly. A large column of residents, accompanied by a few dozen retreating fighters, fled the city as it fell to Armenian forces. As they approached the border with Azerbaijan, they came across an Armenian military post and were cruelly fired upon. At least 161 civilians are known to have been murdered in this incident, although Azerbaijani officials estimate that about 800 perished. Armenian forces killed unarmed civilians and soldiers who were *hors de combat*, and looted and sometimes burned homes."

62. The Memorial Human Rights Centre, based in Moscow, dispatched its observers to Nagorno-Karabakh during the war. The following are extracts from the report by the Memorial Human Rights Centre "On Mass Violations of Human Rights in Connection with the Armed Capture of the Town of Khojaly on the Night of 25 to 26 February 1992" (translated from Russian):

> "As practically all refugees from Khojaly claimed, military personnel from the 366th Regiment took part in the assault on the town. According to the information received from the Armenian side, combat vehicles of the 366th Regiment which took part in the assault on the town shelled Khojaly but did not actually enter the town. As

the Armenian side asserts, the participation of the military personnel [from the 366th Regiment] was not sanctioned by a written order from the Regiment's command. ...

Part of the population started to leave Khojaly soon after the assault began, trying to flee in the direction of Agdam. There were armed people from the town's garrison among some of the fleeing groups. People left in two directions: (1) from the eastern side of the town in the north-east direction along the river, passing Askeran to their left (this specific route, according to Armenian officials, was provided as a 'free corridor'); (2) from the northern side of the town in the north-east direction, passing Askeran to their right (it appears that a smaller number of refugees fled using this route). Thus, the majority of civilians left Khojaly, while around 200-300 people stayed in Khojaly, hiding in their houses and basements. As a result of the shelling of the town, an unascertained number of civilians were killed on the territory of Khojaly during the assault. The Armenian side practically refused to provide information about the number of people who so perished. ...

According to the officials of the NKR [the self-proclaimed 'Nagorno-Karabakh Republic'], a 'free corridor' was provided for fleeing civilians..., which began at the eastern side of the town, passed along the river and continued to the north-east, leading to Agdam and passing Askeran to its left. ... According to the officials of the NKR and those taking part in the assault, the Khojaly population was informed about the existence of this 'corridor' through loudspeakers mounted on armoured personnel carriers. ... NKR officials also noted that, several days prior to the assault, leaflets had been dropped on Khojaly from helicopters, urging the Khojaly population to use the 'free corridor'. However, not a single copy of such a leaflet has been provided to Memorial's observers in support of this assertion. Likewise, no traces of such leaflets have been found by Memorial's observers in Khojaly. When interviewed, Khojaly refugees said that they had not heard about such leaflets. In Agdam and Baku, Memorial's observers have interviewed 60 persons who had fled Khojaly during the assault on the town. Only one person out of those interviewed said that he had known about the existence of the 'free corridor' (he had been told about it by a 'military man' from the Khojaly garrison). ... Several days prior to the assault, the representatives of the Armenian side had, on repeated occasions, informed the Khojaly authorities by radio about the upcoming assault and urged them to immediately evacuate the population from the town. The fact that this information had been received by the Azerbaijani side and transferred to Baku is confirmed by Baku newspapers (*Bakinskiy Rabochiy*). ...

A large column of inhabitants [of Khojaly] rushed out of town along the river (route 1 – [see above]). There were armed people from the town garrison in some of the groups of refugees. These refugees, who walked along the 'free corridor'..., were fired upon, as a result of which many people were killed. Those who remained alive dispersed. Running [refugees] came across Armenian military posts and were fired upon. Some refugees managed to escape to Agdam, some, mainly women and children (the exact number is impossible to determine), froze to death while wandering around in mountains, some ... were captured ... The site of the mass killing of refugees, as well as their corpses, was filmed on videotape when the Azerbaijani units carried out an operation to evacuate the corpses to Agdam by helicopter. ... Among the corpses filmed on the videotape, the majority were those of women and elderly people; there were also children among those killed. At the same time, there were also people in uniform among those killed. ... Within four days, about 200 corpses were evacuated to Agdam. A few score of corpses bore signs of mutilation. ...

Official representatives of the NKR and members of the Armenian armed forces explained the death of civilians in the zone of the 'free corridor' by the fact that there were armed people fleeing together with the refugees, who were firing at Armenian outposts, thus drawing return fire, as well as by an attempted breakthrough by the main Azerbaijani forces. According to members of the Armenian armed forces, the Azerbaijani forces attempted to battle through from Agdam in the direction of the 'free corridor'. At the moment when the Armenian outposts were fighting off this attack, the first groups of Khojaly refugees approached them from the rear. The armed people who were among the refugees began firing at the Armenian outposts. During the battle, one outpost was destroyed ..., but the fighters from another outpost, of whose existence the Azerbaijanis were unaware, opened fire from a close distance at the people coming from Khojaly. According to testimonies of Khojaly refugees (including those published in the press), the armed people inside the refugee column did exchange gunfire with Armenian outposts, but on each occasion the fire was opened first from the Armenian side. ...”

THE LAW

I. ALLEGED VIOLATIONS OF ARTICLE 10 OF THE CONVENTION

63. The applicant complained under Articles 6, 10 and 13 of the Convention that each of his criminal convictions for the statements he had made in the newspaper articles and Internet forums had amounted to an unjustified interference with his right to freedom of expression and that, in this connection, his rights to a fair trial and an effective remedy had also been infringed in the relevant criminal proceedings. Having regard to the circumstances of the case, the Court considers that these complaints fall to be examined solely under Article 10 of the Convention, which reads as follows:

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

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

A. Admissibility

64. The Court notes that these complaints are not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

65. The Court notes that the applicant was convicted and sentenced to prison terms in two unrelated sets of criminal proceedings concerning two separate sets of statements made in different publications. Therefore, the Court will examine separately whether there has been a violation of Article 10 in respect of each of the convictions.

1. First criminal conviction

(a) The parties' submissions

66. The Government submitted that the applicant's conviction in the first set of criminal proceedings had been prescribed by law and had been aimed at protecting the reputation and rights of the plaintiffs.

67. As to the necessity of the interference, the Government submitted that the applicant's conviction had been justified on account of the nature of his statements concerning the Khojaly events, a very sensitive issue for the Azerbaijani people as a whole, and in particular for those who lived and fought in that region. During the events in question, at least 339 inhabitants of Khojaly, including 43 children and 109 women, had been killed, 371 persons had been taken hostage, 200 had disappeared and 421 had been wounded. The applicant's publications asserted that some of those who had perished had been killed by Azerbaijani fighters and that, moreover, the corpses of the victims had been mutilated by the Azerbaijanis. These statements ran counter to the overwhelming evidence indicating that those acts had been committed by Armenian fighters who had been assisted by the soldiers of the former Soviet 366th Motorised Rifle Regiment stationed in Nagorno-Karabakh. As such, the applicant's statements damaged the reputation of those plaintiffs who were former Khojaly inhabitants and also accused those plaintiffs who had fought in the battle of having committed serious crimes against humanity. The Government maintained that, in making those statements, the applicant had not acted in good faith and had breached the ethics of journalism.

68. In the Government's submission, the applicant's conviction served the purpose of protecting the right to respect for private life of the plaintiffs, which was guaranteed by Article 8 of the Convention. Article 17 of the Convention prevented a person from relying on his or her Convention rights

(in the present case, on Article 10) in order to engage in activities aimed at the destruction of any of the rights and freedoms set forth in the Convention. In that connection, the Government referred to the case of *D.I. v. Germany* (no. 26551/95, Commission decision of 26 June 1996), in which the interference with the applicant's freedom of expression had been found to be compatible with the Convention owing to the nature of his remarks, in which he had denied the existence of gas chambers at Auschwitz. In view of the above, the Government concluded that, similarly, the decisions of the domestic courts in the present case had been based on the striking of a balance between a right protected under Article 8 of the Convention and a right protected under Article 10 of the Convention, and that they had correctly found that the reputation of the survivors of the Khojaly events outweighed the applicant's freedom to impart information of a revisionist nature.

69. The applicant maintained that the domestic courts had failed to provide any reasonable justification for the interference with his freedom of expression.

70. The applicant agreed with the Government that the topic of the Khojaly massacre was indeed a very sensitive issue. However, the applicant noted that certain issues concerning the events in question had not been fully investigated. For example, he pointed out that the figures produced by the Government in the present case as to the total number of Khojaly victims were inconsistent with other official government sources, which estimated the number of people killed at 613, including 106 women and 23 children, and the number of people wounded and missing at 487 and 1,257. Some private publications provided different estimates. The applicant also noted that former President Mutalibov, who himself had been accused of failure to defend Khojaly, had implied that some Azerbaijani military units might have been responsible for failing to prevent the high number of civilian casualties. Some Azerbaijani military commanders, including the former Commander of Internal Troops F. Hajiyev, had been either accused or even convicted of failing to organise the proper defence of Khojaly and, thus, to prevent or reduce losses among the civilian population. According to the applicant, the main reason why different sources provided divergent information concerning the exact number of victims and the exact course of events during the fall of Khojaly was that a thorough and conclusive investigation of the events in question from the factual and historical point of view had not yet been completed. Accordingly, the applicant contended that, precisely because the issue was very sensitive and important, a public debate about these events was necessary in order to establish the complete truth and the responsibility of all the culprits of this massacre. Likewise, in connection with these events, there was also a need for a public debate in the context of internal politics in Azerbaijan, as the topic of the Khojaly massacre had been used by former

President Mutalibov, the National Front Party and other political forces in their political struggle for power.

71. The applicant noted that "The Karabakh Diary" was an article written in the style of a reportage, in which he had merely conveyed what he had seen himself and what he had heard from the people whom he had met during his visit, and which contained only very brief conclusions of his own on the basis of what he had seen and heard from others. The applicant argued that, in the article, he had merely conveyed the statements of Slavik Arushanyan, who had told the applicant his version of the events during the interview. The article did not directly accuse any of the plaintiffs or any other specific Azerbaijani national of committing any crime. Likewise, it did not contain any slanderous or humiliating remarks in respect of any specific person and in respect of the people of Khojaly in general.

72. The applicant noted that, in his article, there was no statement asserting that any of the Khojaly victims had been killed or mutilated by Azerbaijani fighters. These specific statements had been made by an unidentified person on the Internet forums of the AzeriTriColor website. The applicant insisted that these statements had not been made by him and that, despite his submissions to this effect before the domestic courts, he had been convicted mainly on the basis of these statements, which had been made by someone else. In any event, the statements did not deny the fact of the "Khojaly tragedy"; they simply made assumptions as to what could possibly have caused it. Even though these assumptions might have been made in the absence of sufficient factual basis, they should have been regarded as recourse to a degree of exaggeration allowed by the freedom of expression.

73. The applicant stressed that, while he had been found to have provided a distorted historical account of the Khojaly events, there was no provision in Azerbaijani law defining any type of liability for having suspicions about the Khojaly massacre or even denying it. Therefore, he could not be held liable on that account. Instead, it had been found that his statements had allegedly defamed the six plaintiffs in his criminal case, even though neither "The Karabakh Diary" nor the Internet forum postings had specifically mentioned any of those persons by name or otherwise.

74. The applicant argued that it was inappropriate and unethical to draw analogies between the present case and *D.I. v. Germany* (cited above). He contended that, since the Khojaly events had not yet received a conclusive legal assessment, it was incorrect to equate them to the Holocaust. There was a difference between a State policy on deliberate murders of prisoners in death camps and the loss of civilians who had fallen victim to military operations during a single battle. In the latter case, it could be argued that the Azerbaijani authorities shared a part of the responsibility for casualties among civilians, as they had not been able to prevent the massacre by the Armenian troops. The applicant stressed that, in "The Karabakh Diary", he

had been far from denying the fact of the massacre and had not attempted to exonerate those responsible. He had simply attempted to convey to the Azerbaijani readers the views of the Armenian population of Nagorno-Karabakh on this subject. The article itself was motivated by good will and constituted an attempt at thawing the relations between the conflicting parties.

75. Lastly, the applicant submitted that his criminal convictions should be viewed in the context of the Government's "aggressive policy" aimed at suppressing the freedom of speech. He noted that the situation in respect of the freedom of expression had seriously deteriorated in recent years and that an increasing number of journalists were being attacked, arrested or convicted. This had been reflected in a number of reports by various international organisations. These persecutions had resulted in self-censorship among a number of critics of the Government. The applicant further claimed that, in his case, by convicting him, the authorities had been primarily driven by the desire to suppress his journalistic activity in general, as his writings constantly criticised the Government's policies and exposed public officials' involvement in corruption and violations of civil and political rights. His ongoing journalistic investigation into the case of E. Huseynov (a journalist assassinated in 2005) had implicated certain high-ranking State officials, and as a result, prior to the events of the present case, he had received threats of arrest and conviction.

(b) The Court's preliminary remarks

76. The discussion in the present judgment of the applicant's statements on the Khojaly events is intended solely for the purposes of the present case, and is made in the context of the Court's review of restrictions on debates of general interest, in so far as relevant for determining whether the national courts of the respondent State overstepped their margin of appreciation in interfering with the applicant's freedom of expression. This judgment is not to be understood as containing any factual or legal assessment of the Khojaly events or any arbitration of historical claims relating to those events.

77. Furthermore, the Court observes that, in connection with his statements in "The Karabakh Diary" and the related statements made in the Internet forum postings, the applicant was held liable in the civil proceedings and was subsequently convicted on the basis of the same statements in the criminal proceedings. The Court notes, however, that the applicant did not specifically complain under Article 10 about the civil action against him. Therefore, the Court will examine solely the compatibility with Article 10 of the applicant's criminal conviction; however, for the purposes of such examination, it will, where necessary, have regard to the entirety of the factual circumstances surrounding the alleged interference with the applicant's rights.

(c) The Court's assessment

78. The Court considers, and it was not disputed by the Government, that the applicant's conviction by the national courts amounted to an "interference" with his right to freedom of expression. Such interference will infringe the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It should therefore be determined whether it was "prescribed by law", whether it pursued one or more of the legitimate aims set out in that paragraph and whether it was "necessary in a democratic society" in order to achieve those aims.

79. The applicant's conviction was indisputably based on Articles 147.1 and 147.2 of the Criminal Code and was designed to protect "the reputation or rights of others", namely the group of soldiers and civilian survivors of the Khojaly events who had lodged the criminal complaint against the applicant. Accordingly, the Court accepts that the interference was "prescribed by law" and had a legitimate aim under Article 10 § 2 of the Convention.

80. Consequently, the Court's remaining task is to determine whether the interference was "necessary in a democratic society".

81. At the outset, the Court notes that it cannot accept the Government's reliance on Article 17 of the Convention or their argument that the present case is somehow similar to *D.I. v. Germany* (cited above). The situation in the present case is not the same as situations where the protection of Article 10 is removed by virtue of Article 17 owing to the negation or revision of clearly established historical facts such as the Holocaust (see, *mutatis mutandis*, *Lehideux and Isorni v. France*, 23 September 1998, § 47, *Reports of Judgments and Decisions* 1998-VII). In the present case, the specific issues discussed in "The Karabakh Diary" were the subject of an ongoing debate (see paragraph 87 below). As the Court will discuss further below, it does not appear that the applicant attempted to deny the fact that the mass killings of the Khojaly civilians had taken place or that he expressed contempt for the victims of these events. Rather, the applicant was supporting one of the conflicting opinions in the debate concerning the existence of an escape corridor for the refugees and, based on that, expressing the view that some Azerbaijani fighters might have also borne a share of the responsibility for the massacre. By doing so, however, he did not seek to exonerate those who were commonly accepted to be the culprits of this massacre, to mitigate their respective responsibility or to otherwise approve of their actions. The Court considers that the statements that gave rise to the applicant's conviction did not amount to any activity infringing the essence of the values underlying the Convention or calculated to destroy or restrict the rights and freedoms guaranteed by it. It follows that, in the present case, the applicant's freedom of expression cannot be removed from the protection of Article 10 by virtue of Article 17 of the Convention.

82. The Court reiterates that, as a matter of general principle, the "necessity" for any restriction on freedom of expression must be convincingly established. Admittedly, it is in the first place for the national authorities to assess whether there is a "pressing social need" for the restriction and, in making their assessment, they enjoy a certain margin of appreciation. In cases, such as the present one, concerning the press, the national margin of appreciation is circumscribed by the interest of the democratic society in ensuring and maintaining a free press. Similarly, that interest will weigh heavily in the balance in determining, as must be done under paragraph 2 of Article 10, whether the restriction was proportionate to the legitimate aim pursued (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 45, ECHR 1999-I).

83. The Court's task in exercising its supervisory function is not to take the place of the competent domestic courts but rather to review under Article 10 the decisions they have taken pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully or in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole, including the content of the comments held against the applicant and the context in which he or she made them (see *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 89, ECHR 2004-XI).

84. In particular, the Court must determine whether the reasons adduced by the national authorities to justify the interference were "relevant and sufficient" and whether the measure taken was "proportionate to the legitimate aims pursued". In doing so, the Court has to satisfy itself that the national authorities, basing themselves on an acceptable assessment of the relevant facts, applied standards which were in conformity with the principles embodied in Article 10 (see, among many other authorities, *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI).

85. In the present case, the statements held against the applicant concerned the Khojaly massacre which took place in the course of the war in Nagorno-Karabakh. More specifically, he was found to have baselessly accused Azerbaijani fighters of killing some of the Khojaly victims and mutilating their corpses and, by doing so, to have damaged the reputation of the specific individuals who had lodged a criminal complaint against him.

86. Owing to the fact that the Nagorno-Karabakh war was a fairly recent historical event which resulted in significant loss of human life and created considerable tension in the region and that, despite the ceasefire, the conflict is still ongoing, the Court is aware of the very sensitive nature of the issues discussed in the applicant's article. The Court is aware that, especially, the memory of the Khojaly victims is cherished in Azerbaijani society and that the loss of hundreds of innocent civilian lives during the Khojaly events is a source of deep national grief and is generally considered within that society

to be one of the most tragic moments in the history of the nation. In such circumstances, it is understandable that the statements made by the applicant may have been considered shocking or disturbing by the public. However, the Court reiterates that, subject to paragraph 2 of Article 10, the freedom of expression 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 pluralism, tolerance and broadmindedness without which there is no "democratic society" (see *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24).

87. Moreover, the Court notes that it is an integral part of freedom of expression to seek historical truth. At the same time, it is not the Court's role to arbitrate the underlying historical issues which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation (see *Chauvy and Others*, cited above, § 69). The Court accordingly considers that it is not its task to settle the differences in opinions about the historical facts relating to the Khojaly events. Therefore, without aiming to draw any definitive conclusions in that respect, the Court will limit itself to making the following observations, for the purposes of its analysis in the present case. It appears that the reports available from independent sources indicate that at the time of the capture of Khojaly on the night of 25 to 26 February 1992 hundreds of civilians of Azerbaijani ethnic origin were reportedly killed, wounded or taken hostage, during their attempt to flee the captured town, by Armenian fighters attacking the town, who were reportedly assisted by the 366th Motorised Rifle Regiment (see paragraphs 60-62 above). However, apart from this aspect, there appears to be a lack of either clarity or unanimity in respect of certain other aspects and details relating to the Khojaly events. For example, there are conflicting views as to whether a safe escape corridor was provided to the civilians fleeing their town (see, for example, the extracts from the Memorial report in paragraph 62 above). Likewise, there exist various opinions about the role and responsibility of the Azerbaijani authorities and military forces in these events, with some reports suggesting they could have done more to protect the civilians or that their actions could have somehow contributed to the gravity of the situation. Questions have arisen whether the proper defence of the town had been organised and, if not, whether this was the result of a domestic political struggle in Azerbaijan. Having regard to the above, the Court considers that various matters related to the Khojaly events still appear to be open to ongoing debate among historians, and as such should be a matter of general interest in modern Azerbaijani society. In this connection, the Court also reiterates that it is essential in a democratic society that a debate on the causes of acts of particular gravity which may amount to war crimes or crimes against

humanity should be able to take place freely (see, *mutatis mutandis*, *Lehideux and Isorni*, cited above, §§ 54-55).

88. Another factor of particular importance for the Court's determination of the present case is the vital role of "public watchdog" which the press performs in a democratic society (see *Goodwin v. the United Kingdom*, 27 March 1996, § 39, *Reports* 1996-II). Although it must not overstep certain bounds, in particular in respect of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on political issues and on other matters of general interest (see, among many other authorities, *De Haes and Gijsels v. Belgium*, 24 February 1997, § 37, *Reports* 1997-I, and *Colombani and Others v. France*, no. 51279/99, § 55, ECHR 2002-V).

89. The Court will first assess the statements made by the applicant in "The Karabakh Diary", and thereafter proceed to assess the Internet forum postings attributed to the applicant. As to "The Karabakh Diary", it is necessary to first have regard to the general context and aim of this newspaper article. Having examined the article, the Court considers that it was written in a generally descriptive style and had the aim of informing Azerbaijani readers of the realities of day-to-day life in the area in question. This, in itself, constituted a matter of general interest, as there was not much information of this type available to average members of the public in the circumstances of the ongoing conflict and the public were entitled to receive information about what was happening in the territories over which their country had lost control in the aftermath of the war. It also appears that the author attempted to convey, in a seemingly unbiased manner, various ideas and views of both sides of the conflict. It was in this context that the statements which were ultimately held against the applicant were made.

90. Having regard to the passages containing the statements held against the applicant (see paragraph 12 above), it is generally not very easy to differentiate the reported speech attributable to other persons from the remarks directly constituting the author's own point of view. Specifically, the applicant stated that the forces attacking Khojaly had left a corridor for the civilians to escape. He further noted that, while they had been using this corridor for this purpose, some of them had been led by Azerbaijani soldiers in another direction where other Armenian units were located. He also stated that the remainder of the escaping refugees were hit by artillery fire from the Azerbaijani side. It appears that these were not the applicant's own views, but that he was reporting what he had heard from other persons (some unnamed Khojaly refugees whom he had allegedly met earlier, and a representative of the Nagorno-Karabakh Armenians). While he reported the statements of these interviewees, it does not necessarily mean that he did so with the aim of proving the truth of what was asserted in those statements; rather, he merely conveyed other persons' opinions. However, it can be argued that, as the topic progressed, the author began mingling his own

opinions with those of his sources, as is evidenced by phrases like "I can say, fully convinced, that...". Here, he accepted that a corridor indeed existed and introduced a novel suggestion that "it appears that the NFA battalions strived not for the liberation of the Khojaly civilians but for more bloodshed on their way to overthrow A. Mutalibov". However, this statement, whether taken alone or in conjunction with the earlier statements, left much room for speculation as to what specifically the "NFA battalions" had done to contribute to "more bloodshed", and did not contain any specific allegations as to any acts they had carried out to this end.

91. It must be noted in this context that it may appear that the narration in the impugned portion of the article was rather erratic, as a result of which many statements appear to be elusive, incomplete or even lacking a logical connection with one another. It is at times difficult to follow the author's train of thought and what specifically he meant to say, especially for a reader who is not very familiar with the various intricacies of the topic under discussion. For example, after the statement that part of the refugees were led by the Azerbaijani soldiers in the direction of Nakhichevanik, the narration immediately jumps to discussing the other group of refugees, so it does not clearly transpire what happened to the first group next. It might have been implied that, having been led in another direction (whether deliberately or not), the refugees had been unable to escape through the designated corridor, but came under enemy fire after they had approached unrelated enemy units which were located near Nakhichevanik, while the other group walked into friendly fire (whether deliberate or not). But none of the above was unambiguously stated, and other interpretations are also possible. As demonstrated by this example, the statements made and conclusions reached in the article were rather scant, vague, unclearly worded and open-ended. The Court notes that "The Karabakh Diary" did not constitute a piece of investigative journalism focusing specifically on the Khojaly events and considers that the applicant's statements about these events were made rather in passing, parallel to the main theme of the article. In this context, based on quite limited information sources, the applicant advanced rather unclearly worded ideas to the effect that certain Azerbaijani units had been partly responsible for the plight of the Khojaly victims.

92. Accordingly, although the article contained remarks that some of the Azerbaijani military units (referred to as "NFA battalions") had, to a certain degree, shared responsibility with the perpetrators of the mass killings, it did not contain any statements directly accusing the Azerbaijani military or specific individuals of committing the massacre and deliberately killing their own civilians, as such. As the role and responsibility of the Azerbaijani authorities in either failing to prevent or contributing to the Khojaly events is the subject of ongoing debate (see paragraph 87 above), the applicant as a journalist had a right under Article 10 to impart ideas concerning this matter. The Court notes, in this connection, that journalistic freedom also

covers possible recourse to a degree of exaggeration, or even provocation (see, among other authorities, Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 59, ECHR 1999-III). Even assuming that, in view of the possible scarcity or questionable nature of the applicant's information sources, his remarks in "The Karabakh Diary" concerning the responsibility of some of the Azerbaijani defenders of Khojaly might have been exaggerated, they nevertheless fell well short of directly and specifically accusing them of committing any war crimes.

93. As to the remarks made in postings on the Internet forum of the AzeriTriColor website which were attributed to the applicant, the Court notes that the applicant denied making them. Nevertheless, having regard to the entirety of the evidence examined by the domestic courts in order to determine the applicant's authorship of these postings, the Court notes that it appears to be quite convincing. In such circumstances, the Court will accept that the applicant's authorship of these statements had been proved beyond reasonable doubt.

94. The following specific statements were made in the forum postings: "... part of the Khojaly inhabitants had been fired upon by our own [troops]... Whether it was done intentionally or not is to be determined by investigators ... [They were killed] not by [some] mysterious [shooters], but by provocateurs from the NFA battalions ... [The corpses] had been mutilated by our own ...". The Court considers that these assertions were very specific in that they accused unidentified "provocateurs" from "NFA battalions" of shooting at their own civilians and mutilating their bodies. The Court notes that the author has not supported these statements with any evidence and has not relied on any specific sources. These statements contained assertions which were different from those made in "The Karabakh Diary", in that they accused some Azerbaijani fighters of killing some of the victims (although perhaps not intentionally), and of deliberately mutilating the corpses of victims. As such, they were not of the same nature as mere hypothesising, as in "The Karabakh Diary", about Azerbaijani soldiers' possible responsibility for failure to prevent large-scale bloodshed, based on the sourced information that an escape corridor had existed and that the refugees had been prevented from using it. In respect of these Internet forum postings, the applicant has not claimed that either the Khojaly refugees or the Armenian officials interviewed by him, who were his primary sources in "The Karabakh Diary", had ever specifically accused the Azerbaijani military of mutilating the corpses of their own civilians. In such circumstances, it could be argued that the statements made in the Internet forum postings could not be taken as an example of the "degree of exaggeration" or "provocation" permissible in the exercise of journalistic freedom.

95. In this regard, the Court reiterates that the exercise of freedom of expression carries with it duties and responsibilities, and the safeguard

afforded by Article 10 to journalists is subject to the condition that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see, among other authorities, *Radio France and Others v. France*, no. 53984/00, § 37, ECHR 2004-II, and *Colombani and Others*, cited above, § 65). In the present case, it is not clear whether the applicant intended to post these statements in his capacity as a journalist providing information to the public, or whether he simply expressed his personal opinions as an ordinary citizen in the course of an Internet debate. Nevertheless, it is clear that, by posting under the username "Eynulla Fatullayev", the applicant, being a popular journalist, did not hide his identity and that he publicly disseminated his statements by posting them on a freely accessible popular Internet forum, a medium which in modern times has no less powerful an effect than the print media. The disseminated statements did not constitute value judgments, but were of a specific factual nature. While the truth of value judgments is not susceptible to proof, the existence of facts can be demonstrated (see *De Haes and Gijsels*, cited above, § 42). Moreover, directly accusing specific individuals of a specific form of misconduct entails an obligation to provide a sufficient factual basis for such an assertion (see, *mutatis mutandis*, *Mahmudov and Agazade v. Azerbaijan*, no. 35877/04, § 45, 18 December 2008).

96. However, the Court considers that, in the circumstances of the present case, it is not required to reach any definitive conclusions as to whether the above statements were supported by a sufficient factual basis or whether they were objectively true or false, for the following reasons. The Court stresses that the applicant was not convicted merely for having disseminated the above statements. Indeed, he was not held liable for the act of, *per se*, disseminating allegedly revisionist statements concerning historical events. Rather, the interference complained of in the present case took the form of a criminal conviction based on a finding that the statements disseminated by the applicant defamed specific individuals. Therefore, having accepted that the statements in the Internet forum postings were attributable to the applicant and that they were false or unverified, it is necessary to determine whether the domestic courts provided sufficient and relevant reasons for finding that those statements damaged the reputation of those specific individuals.

97. The individuals in question were four Khojaly refugees and two former soldiers who participated in the criminal proceedings in the capacity of private prosecutors. They claimed that the statements made by the applicant were slanderous and tarnished their honour and dignity. Moreover, the two former soldiers claimed that, by stating that the Azerbaijani soldiers had killed civilians and mutilated their corpses, the applicant had directly and falsely accused them personally of having committed grave crimes.

98. As to the alleged defamation of the Khojaly refugees, the Court considers that there was nothing in "The Karabakh Diary" or the Internet

forum postings to suggest that the applicant aimed to deny the fact of the mass killing of the civilians or exculpate any suspected actual perpetrators, be they Armenian fighters, personnel of the 366th Regiment or any other individuals or military units. None of the impugned statements could be interpreted as doubting the gravity of the suffering inflicted on the Khojaly victims. While the author blamed the "NFA battalions" of having shot at some of the refugees and mutilated victims' bodies, it cannot be said that this assertion was calculated to humiliate or debase the victims of the Khojaly events or to somehow imply that their fate was less unfortunate. On the contrary, the applicant expressed feelings of grief and deep sorrow for the plight of the victims and the survivors of what he referred to as the "Khojaly tragedy". For these reasons, the Court cannot agree with the domestic courts' finding that the article contained any statements undermining the dignity of the Khojaly victims and survivors in general and, more specifically, the four private prosecutors who were Khojaly refugees.

99. As to the alleged false accusation that the remaining two private prosecutors had committed grave crimes, the Court notes that the applicant did indeed make accusatory statements in respect of unidentified "provocateurs" from "NFA battalions". Even assuming that these assertions lacked a sufficient factual basis, the Court notes, firstly, that it is clear that these statements did not appear to implicate the entire Azerbaijani army or all of the Azerbaijani military units who fought in the region during the war or even all of those who participated in the defence of Khojaly during the battle of 25 to 26 February 1992. The statements appeared to concern only a part of the town's defenders, referred to as "NFA battalions". Secondly, the Court notes that these statements did not accuse any specific individuals by identifying them by name or otherwise. In particular, neither of the two private prosecutors who claimed to have fought in the Khojaly battle was named or otherwise identified either in "The Karabakh Diary" or in the Internet forum postings. No reasoning was advanced by the plaintiffs or by the domestic courts to show that these two individuals could be somehow identified as, or considered otherwise representative of, the "provocateurs" implicated in the applicant's statements. In such circumstances, the Court considers that it has not been convincingly established that the applicant's statements directly accused the two plaintiffs of having personally committed grave crimes.

100. Having regard to the above, the Court considers that, although "The Karabakh Diary" might have contained certain exaggerated or provocative assertions, the author did not cross the limits of journalistic freedom in performing his duty to impart information on matters of general interest. On the other hand, while certain assertions in the Internet forum postings attributed to the applicant might have arguably lacked sufficient factual basis, it was not convincingly shown that they were defamatory in respect of

the specific individuals acting as private prosecutors in the applicant's case. In such circumstances, the Court finds that the reasons given by the domestic courts in support of the applicant's conviction cannot be regarded as relevant and sufficient and that, therefore, his conviction on charges of defamation did not meet a "pressing social need".

101. Moreover, in any event, even assuming that the interference met a "pressing social need", the Court considers that the requirement of proportionality was not satisfied in the present case.

102. The Court reiterates that the nature and severity of the penalties imposed are factors to be taken into account when assessing the proportionality of an interference with the freedom of expression guaranteed by Article 10 (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 37, ECHR 1999-IV; *Skałka v. Poland*, no. 43425/98, §§ 41-42, 27 May 2003; and *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 93, ECHR 2004-XI). The Court must also exercise the utmost caution where the measures taken or sanctions imposed by the national authorities are such as to dissuade the press from taking part in the discussion of matters of legitimate public concern (see *Cumpănă and Mazăre*, cited above, § 111). Although the Contracting States are permitted, or even obliged, by their positive obligations under Article 8 of the Convention to regulate the exercise of freedom of expression so as to ensure adequate protection by law of individuals' reputations (see *Pfeifer v. Austria*, no. 12556/03, § 35, ECHR 2007-XII), they must not do so in a manner that unduly deters the media from fulfilling their role of informing the public on matters of general public interest. Investigative journalists are liable to be inhibited from reporting on matters of general interest if they run the risk, as one of the standard sanctions imposable for unjustified attacks on the reputation of private individuals, of being sentenced to imprisonment. A fear of such a sanction inevitably has a chilling effect on the exercise of journalistic freedom of expression (see *Mahmudov and Agazade*, cited above, § 49).

103. In the instant case, the applicant was sentenced to two years and six months' imprisonment. This sanction was undoubtedly very severe, especially considering that the applicant had already been sued for the exact same statements in the civil proceedings and, as a consequence, had paid a substantial amount in damages. The Court reiterates that, although sentencing is in principle a matter for the national courts, the imposition of a prison sentence for a press offence will be compatible with journalists' freedom of expression as guaranteed by Article 10 of the Convention only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in cases of hate speech or incitement to violence (ibid., § 50; see also *Cumpănă and Mazăre*, cited above, § 115). The Court considers that the circumstances of the instant case disclose no justification for the imposition of a prison sentence on the applicant.

104. In view of the above, the Court finds that the interference with the applicant's exercise of his right to freedom of expression cannot be considered "necessary in a democratic society".

105. There has accordingly been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction.

2. Second criminal conviction

(a) The parties' submissions

106. The Government submitted that the applicant's conviction in the second set of criminal proceedings had also been prescribed by law and justified by "the interests of public safety".

107. The Government agreed with the domestic courts' assessment of the statements made by the applicant in "The Aliyevs Go to War". They noted that this article, which concerned possible attacks on various facilities in Azerbaijan, had appeared at a time of rising tension between Iran and a number of other members of the international community, which had led to widespread reports about possible military operations against Iran, Azerbaijan's geographical neighbour. In that context, the applicant had published a number of unverified and inaccurate statements of fact. He had failed to comply with the duties and responsibilities which went hand in hand with journalistic freedom and had failed to act in good faith and in compliance with the ethics of journalism in order to provide accurate and reliable information. The information published by the applicant had been obtained from various, sometimes unidentified, sources which the applicant had not verified by independent research.

108. For the above reasons, the Government concluded that the domestic courts' decisions had been based on striking a balance between the interests of public safety and the applicant's right protected by Article 10.

109. The applicant observed that the Government's submissions concerning this part of the complaint were "superficial and perfunctory", in the light of the seriousness of the offences of which he had been convicted as a result of merely publishing an analytical article.

110. The applicant submitted that, indeed, at the time when the article had been published there had been tension in the region as a result of the deterioration in US-Iranian relations. The worsening relations between Iran and the US and the probability of a war between these States were not the product of the applicant's imagination; they could be deduced from numerous statements by high-ranking US and Iranian officials and politicians, including the Presidents of those States. In their interviews at the time, Iranian officials had unambiguously stated that, in the event of a US attack on Iran, various facilities in Azerbaijan would be subject to an Iranian counter-attack.

111. “The Aliyevs Go to War” was analytical in nature and derived information from many other articles concerning this matter, published in various media outlets. The applicant noted that the subject matter of the article was clearly a matter of public concern. The fact that Azerbaijan was an active member of the US-led “anti-terror” coalition and had already sent peacekeeping forces to Iraq and Afghanistan reinforced the probability of Azerbaijan's involvement in the US-Iranian war, if it were to take place. The applicant noted that “hundreds of similar articles”, reflecting opinions and conclusions concerning the possibility of an attack on Azerbaijan, had been published both before and after the publication of his article. In support of this, the applicant submitted several articles published by local and foreign print media and on Internet news sites in 2006 and 2007 (including *Zerkalo*, *Nash Vek*, *Russian Newsweek*, *Moscow News* and *Kavkazskiy Uzel*). All of these articles discussed Azerbaijan's geopolitical role in the context of US-Iranian relations and, on the basis of several remarks by Iranian officials, speculated that, in the event of a US-Iranian war, it was likely that Azerbaijan would also be involved and that Iran could even attack certain strategic facilities in Azerbaijani territory, such as petroleum and gas pipelines and airports.

112. Moreover, the applicant noted that his article had merely criticised the political decisions of the Government, including the authorities' personnel policies in the southern region of the country, and had suggested that, by appointing officials from outside the region to governing posts, the central authorities were alienating the region's local population, consisting largely of the Talysh minority. The article touched upon the difficult social and economic situation in this region which, coupled with potential separatist tendencies, were relevant considerations in the context of a possible war with neighbouring Iran. The applicant maintained that the publication of this article had been the result of his obligation to provide the newspaper's readers with comprehensive information about the events taking place in the country and in the region.

113. The applicant noted that he had been convicted under Articles 214.1 and 283 of the Criminal Code, despite the fact that he had committed none of the acts proscribed by those provisions. He had neither been involved in any terrorist activities, nor had he incited ethnic hostility. He had not aimed to create fear among the population or exert pressure on State authorities by committing or threatening to commit terrorist acts. He had merely published an analysis of possible future events, based on the information he had obtained from numerous other sources. The applicant also noted that the charges of tax evasion against him had been fabricated and that this should also be regarded as an interference with his freedom of expression.

114. The applicant reiterated that the actual, underlying reason for his conviction was his journalistic activity in general, as he was a harsh critic of

the Government's policies, corruption and violations of citizens' civil and political rights.

(b) The Court's assessment

115. The applicant's conviction for publication of the second article indisputably amounted to an interference with the exercise of his right to freedom of expression. The Court accepts that this interference was prescribed by law; in particular, by Articles 214.1 and 283.2.2 of the Criminal Code. For the purposes of the following analysis, the Court will also accept the Government's submission that the interference pursued the legitimate aim of maintaining public safety. Accordingly, it remains to be determined whether the interference was "necessary in a democratic society".

116. In this connection, the Court reiterates the general principles on the necessity of restrictions on the freedom of expression and its own task in exercising its supervisory function under Article 10 § 2 of the Convention (see paragraphs 82-84 above), as well as the general principles concerning the role of the press in a democratic society (see paragraph 88 above). Specifically, the Court again stresses that there is little scope under Article 10 § 2 for restrictions on political speech or on debate on questions of public interest. The Court also reiterates that the limits of permissible criticism are wider with regard to the government than in relation to a private citizen or even a politician. In a democratic system the actions or omissions of the government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of public opinion. Moreover, the dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings when replying even to the unjustified attacks and criticisms of its adversaries, particularly where other means are available (see *Incal v. Turkey*, 9 June 1998, § 54, *Reports* 1998-IV). Furthermore, where a publication cannot be categorised as inciting to violence or instigating ethnic hatred, Contracting States cannot restrict, with reference to maintaining public order and safety, the right of the public to be informed of matters of general interest, by bringing the weight of the criminal law to bear on the media (see *Sürek and Özdemir v. Turkey* [GC], nos. 23927/94 and 24277/94, § 63, 8 July 1999, and *Erdoğdu v. Turkey*, no. 25723/94, § 71, ECHR 2000-VI).

117. The Court notes that "The Aliyevs Go to War" was an analytical article focusing on Azerbaijan's specific role in the greater picture of the dynamics of international politics relating to US-Iranian relations, which were relevant at the time of the publication of the article. As such, the publication was part of a political debate on a matter of general and public concern. The Court notes in this connection that it has been its constant approach to require very strong reasons for justifying restrictions on

political speech, since broad restrictions imposed in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned (see *Feldek v. Slovakia*, no. 29032/95, § 83, ECHR 2001-VIII, and *Karman v. Russia*, no. 29372/02, § 36, 14 December 2006).

118. The Court observes, more specifically, that the applicant criticised the foreign and domestic political moves made by the Azerbaijani Government, noting that the country's continued close alliance with the US was likely to lead to Azerbaijan's involvement in a possible US-Iranian war, which at the time of the publication in question appeared to be a hot topic of the day and was seriously discussed by various analysts as a probable scenario in which a confrontation between the US and Iran could develop. The author further proposed a hypothetical scenario of such a war, according to which Iran would respond by bombing a number of facilities on the territory of Azerbaijan, which was allegedly considered by Iran to be one of the allies of the US in the region. The Court notes that, indeed, the applicant was not the only one to comment on the probability of this scenario, as a number of other media sources had also suggested during that period that, in the event of a war, Azerbaijan was also likely to be involved and, referring to specific statements by Iranian officials, speculated about possible specific targets for Iranian attacks, including the Baku-Tbilisi-Ceyhan pipeline and various government facilities.

119. Arguably, the list of such "targets" provided by the applicant was longer and more detailed. However, in the Court's view, even assuming that the applicant's sources concerning the alleged existence of such a "target list" had not been fully verified, the fact that the applicant published this list, in itself, neither increased nor decreased the chances of a hypothetical Iranian attack. Moreover, it has never been claimed by the domestic authorities that, by publishing this list, the applicant revealed any State secrets or undermined any efforts of the national military defence authorities. In the context of the article as a whole, the inclusion of this "target list" could be construed simply as an attempt to convey to the readers a more dramatic picture of the specific consequences of the country's possible involvement in a possible future war.

120. In this connection, the Court cannot accept the Government's argument that the applicant failed to support his "statements of fact" with references to reliable sources. Firstly, as mentioned above, similar statements had been made in numerous other publications. Secondly, the applicant's article contained the applicant's opinions about hypothetical scenarios of possible future events and, as such, those opinions were not susceptible of proof. Any opinions about future events involve, by their nature, a high degree of speculation. Whether the scenarios proposed by the applicant were likely or unlikely to happen was a matter of public debate, and any reasonable reader could be expected to understand the hypothetical

nature of the applicant's remarks about the possible course of events in a future war.

121. The Court observes that the scope of the interference in the present case appeared to extend to the publication in its entirety. In particular, the domestic courts found *inter alia* that, by criticising Azerbaijan's support for the "anti-Iranian" UN resolution and writing about the possibility of Iran bombing certain targets in Azerbaijan, the applicant had committed the offence of threat of terrorism under Article 214.1 of the Criminal Code. The Court notes that it is not for it to rule on the constituent elements of the offences under domestic law of terrorism and threat of terrorism, by reviewing whether the *corpus delicti* of "threat of terrorism" actually arose from the applicant's actions. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see, among many other authorities, *Lehideux and Isorni*, cited above, § 50). The Court's task is merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation. In so doing, it must satisfy itself that the national authorities based their decisions on an acceptable assessment of the relevant facts (see paragraph 84 above; see also *Incal*, cited above, § 48).

122. Having regard to the domestic courts' assessment of the facts, the Court notes that, based on a few (seemingly random) persons' testimonies, they found that the applicant's statements were aimed at "frightening the population" and had created panic among the public. In this regard, the Court reiterates that the freedom of expression 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 (see paragraph 86 above). It was the applicant's task, as a journalist, to impart information and ideas on the relevant political issues and express opinions about possible future consequences of specific decisions taken by the Government. The Court considers that, in doing so, he did not overstep any bounds set by Article 10 § 2 of the Convention.

123. Furthermore, the Court notes that the domestic courts characterised the applicant's statements as threatening the Government with destruction of public property and with acts endangering human life, with the aim of exerting influence on the Government to refrain from taking political decisions required by national interests. However, having regard to the circumstances of the case, the Court cannot but conclude that the domestic courts' finding that the applicant threatened the State with terrorist acts was nothing but arbitrary. The applicant, as a journalist and a private individual, clearly was not in a position to influence any of the hypothetical events discussed in the article and could not exercise any degree of control over any possible decisions by the Iranian authorities to attack any facilities in Azerbaijani territory. Neither did the applicant voice any approval of any

such possible attacks, or argue in favour of them. As noted above, the Court considers that the article had the aim of informing the public of possible consequences (however likely or unlikely they might seem) of the Government's foreign policy and, more specifically, criticising the latter for making certain decisions, such as supporting the "anti-Iranian" UN Security Council Resolution. However, there is nothing in the article to suggest that the applicant's statements were aimed at threatening or "exerting influence" on the Government by any illegal means. In fact, the only means by which the applicant could be said to have "exerted influence" on the State authorities in the present case was by exercising his freedom of expression, in compliance with the bounds set by Article 10, and voicing his disagreement with the authorities' political decisions, as part of a public debate which should take place freely in any democratic society.

124. In view of the above, the Court finds that the domestic courts arbitrarily applied the criminal provisions on terrorism in the present case. Such arbitrary interference with the freedom of expression, which is one of the fundamental freedoms serving as the foundation of a democratic society, should not take place in a state governed by the rule of law.

125. Similarly, the Court is not convinced by the reasons advanced by the domestic courts to justify the applicant's conviction under Article 283.2.2 of the Criminal Code. It notes that, in the context of discussing the Government's policies in connection with relations with the US and Iran, the applicant voiced an opinion that these policies, coupled with the central authorities' alleged mistakes in domestic administration, could result in political unrest among the inhabitants of the country's southern regions. The author mentioned that those regions faced a number of social and economic problems, such as unemployment and rising drug use. He also noted that the local population had expressed discontent with the central authorities' tendency to appoint people from outside the region to official positions within the regional administration.

126. In the Court's view, the above issues raised in the relevant passages of the applicant's article could be considered a matter of legitimate public concern which the applicant was entitled to bring to the public's attention through the press. The mere fact that he discussed the social and economic situation in regions populated by an ethnic minority and voiced an opinion about possible political tension in those regions cannot be regarded as incitement to ethnic hostility. Although the relevant passages may have contained certain categorical and acerbic opinions and a certain degree of exaggeration in criticising the central authorities' alleged treatment of the Talysh minority, the Court considers nevertheless that they contained no hate speech and could not be said to encourage inter-ethnic violence or to disparage any ethnic group in any way.

127. Having regard to the above, the Court finds that the domestic courts failed to provide any relevant reasons for the applicant's conviction on charges of threat of terrorism and incitement to ethnic hostility.

128. The Court also considers that the gravity of the interference in the present case is exacerbated by the particular severity of the penalties imposed on the applicant. Specifically, he was sentenced to eight years' imprisonment on the charge of threat of terrorism and to three years' imprisonment on the charge of incitement to ethnic hostility, which resulted, together with previous sentences, in a merged sentence of eight years and six months' imprisonment. The circumstances of the case disclose no justification for the imposition of a prison sentence on the applicant. The Court considers that both the applicant's conviction and the particularly severe sanction imposed were capable of producing a chilling effect on the exercise of journalistic freedom of expression in Azerbaijan and dissuading the press from openly discussing matters of public concern.

129. In sum, the Court considers that the domestic courts overstepped the margin of appreciation afforded to them for restrictions on debates on matters of public interest. The applicant's conviction did not meet a "pressing social need" and was grossly disproportionate to any legitimate aims invoked. It follows that the interference was not "necessary in a democratic society".

130. In view of this finding, the Court considers it unnecessary to examine whether the applicant's conviction for a tax offence could also be linked to the interference with his freedom of expression.

131. There has accordingly been a violation of Article 10 of the Convention in respect of the applicant's second criminal conviction.

II. ALLEGED VIOLATIONS OF ARTICLE 6 § 1 OF THE CONVENTION

132. Firstly, the applicant complained that, in the first set of criminal proceedings, he had not received a fair hearing by an impartial tribunal, because Judge I. Ismayilov, who had heard the criminal case, was the same judge who had previously examined the civil action against him. Secondly, he complained that he had not been tried by a "tribunal established by law", because the term of office of the Yasamal District Court judges had expired prior to his trial, and that, in both sets of criminal proceedings, the domestic courts were not independent from the executive. Article 6 § 1 of the Convention provides as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law."

A. "Impartial tribunal"

1. The parties' submissions

133. The Government submitted that the fact that the same judge had examined a civil claim against a person and later examined a criminal case against that same person did not, in itself, lead to the conclusion that the judge was not independent and impartial.

134. The applicant submitted that the judge who had already examined specific allegations against him in the context of a civil action could not have an impartial position when examining the same allegations in subsequent criminal proceedings. The applicant maintained that, in the criminal proceedings, Judge Ismayilov had routinely rejected his "lawful requests" and had "by all possible means defended" the position of the private prosecutors.

2. The Court's assessment

135. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

136. The Court further reiterates that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is, ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Fey v. Austria*, 24 February 1993, § 28, Series A no. 255-A). As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). The mere fact that the judge rejected all or most of the applicant's requests does not constitute such proof. Accordingly, the objective test should be applied in the present case.

137. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and, above all, in the accused. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Fey*, cited above, § 30).

138. The Court notes, *inter alia*, that the nature of liability under civil law is different from that under criminal law, that different standards of

proof apply in civil and criminal cases, that a criminal conviction does not preclude a finding of civil liability arising from the same facts and that, conversely, the existence of civil liability does not necessarily entail a finding of guilt under criminal law in respect of the same actions by the defendant. For these reasons, the Court considers that a situation where the same judge examines the questions of both civil liability and criminal liability arising from the same facts does not necessarily affect the judge's impartiality. Nevertheless, the Court notes that whether the accused's fear of a lack of impartiality can be considered to be objectively justified depends on the special features of each particular case (see *Hauschildt*, cited above, § 49).

139. The Court considers that, in the assessment of the special features of the present case, importance should be attached to the fact that the proceedings in question concerned alleged defamation of private individuals. Owing to this specific subject matter of the proceedings, the present case is not necessarily comparable to other situations where both criminal and civil liability may arise from the same facts. The Court further notes that the applicant's fear of a lack of impartiality was based on the fact that Judge Ismayilov dealt with the questions of his civil and criminal liability not simultaneously, but in two separate sets of proceedings, with the civil case preceding the criminal case. The Court notes that both sets of proceedings concerned exactly the same set of allegedly defamatory statements made by the applicant. Ms Chaladze was the plaintiff in the first set of proceedings, while in the second set of proceedings she was a representative of several Khojaly refugees acting as private prosecutors. She made essentially the same submissions in both sets of proceedings. In each set of proceedings, in order to determine whether the applicant was liable under either the civil or criminal law on defamation, the judge had to satisfy himself, *inter alia*, that the statements made by the applicant were "false" (or unproven) and that, as such, they tarnished the dignity of the survivors of the Khojaly events. In doing so, the judge was called upon to assess essentially the same or similar evidentiary material. It appears that, under criminal law on defamation, the judge had to additionally establish the element of criminal intent by determining whether the applicant "knowingly" disseminated defamatory statements (see paragraph 47 above). Nevertheless, the Court considers that, having decided the civil case against the applicant, the judge had already given an assessment to the applicant's statements and reached a conclusion that they constituted false information tarnishing the dignity of Khojaly survivors. In such circumstances, where the applicant was subsequently prosecuted under criminal law on defamation, doubts could be raised as to the appearance of impartiality of the judge who had already pronounced his opinion concerning the same allegedly defamatory statements made by the applicant. Accordingly, the Court considers that, in the light of the special features of this particular

case, the applicant's fear of the judge's lack of impartiality could be considered as objectively justified.

140. There has accordingly been a violation of Article 6 § 1 of the Convention in this respect.

B. "Independent ... tribunal established by law"

1. The parties' submissions

141. The Government noted that Judge Ismayilov had indeed been appointed on 2 September 2000 for a five-year term. Under the Law on Courts and Judges, effective at the material time, his term had been due to expire on 3 September 2005. However, Law No. 817-IIQD of 28 December 2004, which entered into force on 30 January 2005, had introduced amendments to the Law on Courts and Judges which concerned, *inter alia*, new provisions regulating the procedure for selection and appointment of judges and their terms of office. In accordance with the Transitional Provisions of the Law No. 817-IIQD, the terms of office of all judges appointed before 1 January 2005 had been extended until the date on which new judges were appointed to the relevant courts pursuant to the new amendments to the Law on Courts and Judges. New judges had been appointed to the Yasamal District Court on 28 July 2007. Until that date, the old judges of the court, including Judge Ismayilov, had carried out their judicial functions in accordance with Law No. 817-IIQD. Therefore, the applicant's case had been heard by a "tribunal established by law".

142. Lastly, the Government submitted that the applicant's allegations concerning the domestic courts' lack of independence were unsubstantiated.

143. The applicant reiterated his complaints. He also challenged the "quality" of Law No. 817-IIQD. He noted that, coupled with the enactment of the new Law on the Judicial Legal Council, which had given the Judicial Legal Council substantial powers in the process of selecting judges, the Transitional Provisions of Law No. 817-IIQD made the judges "fully dependent on the Judicial Legal Council", because their subsequent reappointment depended on the latter.

2. The Court's assessment

144. The Court reiterates that the object of the term "established by law" in Article 6 of the Convention is to ensure "that the judicial organisation in a democratic society does not depend on the discretion of the executive, but that it is regulated by law emanating from Parliament" (see *Gurov v. Moldova*, no. 36455/02, § 34, 11 July 2006). The phrase "established by law" covers not only the legal basis for the very existence of a "tribunal" but

also the composition of the bench in each case (see *Posokhov v. Russia*, no. 63486/00, § 39, ECHR 2003-IV).

145. The Court notes that, in the present case, Law No. 817-IIQD introduced amendments to the domestic law regulating, *inter alia*, the procedure of appointment and terms of office of judges. During the period of transition to this reformed system and pending the finalisation of new appointment procedures, the terms of office of all judges appointed prior to 1 January 2005 were extended in accordance with the Transitional Provisions of Law No. 817-IIQD, ostensibly with the purpose of ensuring the uninterrupted functioning of the judicial system. Thus, the term of office of Judge Ismayilov had been extended by virtue of a parliamentary enactment before the date when it was due to expire under the law effective prior to the reform and, contrary to what the applicant claimed, did not expire until 28 July 2007, well after the examination of the applicant's case in the Yasamal District Court had been completed. Accordingly, in view of the fact that the extension of Judge Ismayilov's term of office had been necessitated by the transition to new rules on the appointment and terms of office of judges, that he had initially been appointed in accordance with all the requirements of the Law on Courts and Judges (contrast *Posokhov*, cited above, § 43, and *Fedotova v. Russia*, no. 73225/01, §§ 41-42, 13 April 2006), and that the extension of his term of office was regulated by a law emanating from Parliament (contrast *Gurov*, cited above, § 37), the Court considers that the applicant was tried by a "tribunal established by law".

146. In so far as the applicant claimed that the extension of the judges' terms of office for an indefinite "transitional" period compromised their independence *vis-à-vis* the executive authorities (whose representatives formed part of the Judicial Legal Council, vested with the task of selecting candidates for judicial office) during that period, the Court notes that the applicant appeared to be suggesting that certain executive authorities (which the applicant failed to identify precisely) were somehow interested in having him convicted and, therefore, had unduly influenced Judge Ismayilov, whose independence was allegedly compromised following the enactment of Law No. 817-IIQD. However, the Court notes that the first set of criminal proceedings against the applicant was instituted not by the State, but by private persons under the private prosecution procedure. In any event, the Court notes that the material in its possession does not contain sufficient evidence in support of the applicant's allegations of undue pressure being exerted on the domestic courts by the executive authorities. Likewise, there is insufficient evidence of the alleged lack of independence of the domestic courts in the second set of criminal proceedings.

147. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 § 2 OF THE CONVENTION

148. The applicant complained that the statement made by the Prosecutor General to the press on 31 May 2007 (see paragraphs 36 and 37 above) amounted to an infringement of his right to the presumption of innocence secured in Article 6 § 2 of the Convention, which provides as follows:

> "Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law."

A. Admissibility

1. The parties' submissions

149. The Government submitted that the applicant had not exhausted all the available domestic remedies in respect of this complaint. Firstly, they noted that, pursuant to Articles 449-451 of the CCrP, the applicant could have lodged with the supervising court a complaint concerning the "procedural steps or decisions of the prosecuting authority", whereby he could have challenged the Prosecutor General's statements to the press. Secondly, the applicant could have alleged a violation of his presumption of innocence by bringing a separate court action under Article 147 of the Criminal Code or Chapter 27 of the CCP.

150. The applicant submitted that the remedies mentioned by the Government were ineffective.

2. The Court's assessment

151. The Court reiterates that the purpose of the domestic-remedies rule in Article 35 § 1 of the Convention is to afford the Contracting States the opportunity of preventing or putting right the violations alleged before they are submitted to the Court. However, the only remedies to be exhausted are those that relate to the breaches alleged and that, at the same time, are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Vernillo v. France*, 20 February 1991, § 27, Series A no. 198). The rule of exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. This rule is neither absolute nor capable of being applied automatically. For the purposes of reviewing whether it has been observed, it is essential to have regard to the circumstances of the individual case. This means, amongst other things, that

the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned, but also of the general context in which they operate, as well as the personal circumstances of the applicant (see *Akdivar and Others v. Turkey*, 16 September 1996, § 69, *Reports* 1996-IV).

152. As to the Government's argument that the applicant had failed to make use of the procedure specified in Articles 449-451 of the CCrP, the Court notes that the relevant provisions concern the possibility of lodging a complaint against "procedural steps or decisions" of the prosecuting authorities. In the present case, the impugned statements were made by the Prosecutor General not in the context of the criminal proceedings themselves, but by way of a statement to the press. Therefore, the Court is not convinced that this statement to the press constituted a "procedural step" or "procedural decision" taken in the context of the relevant criminal proceedings, and the Government have not demonstrated by any evidence (such as court decisions in similar cases) that it qualified as such within the meaning of Articles 449-451 of the CCrP.

153. Likewise, the Court is not convinced by the Government's argument that the applicant had failed either to institute separate criminal proceedings accusing the Prosecutor General of defamation under Article 147 of the Criminal Code, or to bring a separate civil lawsuit complaining of a violation of his rights and obligations. The Court notes that, in the present case, the applicant specifically complained to the first-instance and higher courts about the Prosecutor General's statements and alleged a violation of his right under Article 6 § 2 of the Convention. His complaints under the Convention were summarily rejected. In this connection, the Court reiterates that an individual is not required to try more than one avenue of redress when there are several available. It is for the applicant to select the legal remedy that is most appropriate in the circumstances of the case (see, among other authorities, *Airey v. Ireland*, 9 October 1979, § 23, Series A no. 32, and *Boicenco v. Moldova*, no. 41088/05, § 80, 11 July 2006). The Government have not contested the effectiveness of the avenue of redress which the applicant tried in the present case, namely raising the issue of the presumption of innocence before the courts called upon to determine the criminal charges against him. Even assuming that the remedies suggested by the Government were capable of providing adequate redress, the Court considers that, having raised the issue of the presumption of innocence in the context of the criminal proceedings in question, the applicant should not be required to embark on another attempt to obtain redress by lodging a separate defamation claim under criminal law or bringing a civil action for damages (see, *mutatis mutandis*, *Hajibeyli v. Azerbaijan*, no. 16528/05, § 43, 10 July 2008).

154. For these reasons, the Court dismisses the Government's objections as to the exhaustion of domestic remedies.

155. Moreover, the Court notes that Article 6 § 2 applies to persons "charged with a criminal offence". At the time of the Prosecutor General's interview to the press of 31 May 2007, the criminal investigation under Article 214.1 of the Criminal Code had already been instituted by the MNS on 16 May 2007, and the applicant had been transferred to the MNS detention facility on 29 May 2007 pending the Sabail District Court's decision to remand him in custody. Although the applicant had not been formally indicted until 3 July 2007, his transfer to the MNS detention facility formed part of the investigation commenced on 16 May 2007 by the investigation department of the MNS and thus made him a person "charged with a criminal offence" within the meaning of Article 6 § 2. The Prosecutor General's remarks, made in parallel with the MNS investigation, were explained by the existence of that investigation and had a direct link with it (compare *Allenet de Ribemont v. France*, 10 February 1995, § 37, Series A no. 308). Therefore, Article 6 § 2 of the Convention applies in this case.

156. The Court further notes that this complaint is not otherwise manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

157. The Government noted that Article 6 § 2 of the Convention could not prevent the authorities from informing the public, with all the necessary discretion and circumspection, about criminal investigations in progress. They submitted that the applicant's presumption of innocence had not been violated in the present case. They noted that the Prosecutor General's comments had not depicted the applicant as a criminal. The Prosecutor General had simply commented on the reasons for instituting a criminal case and informed the public that an investigation was being conducted.

158. The applicant reiterated his complaint.

2. The Court's assessment

159. The Court reiterates that Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings. The presumption of innocence enshrined in paragraph 2 of Article 6 is one of the elements of the fair criminal trial that is required by paragraph 1 (see *Allenet de Ribemont*, cited above, § 35). It not only prohibits the premature

expression by the tribunal itself of the opinion that the person "charged with a criminal offence" is guilty before he has been so proved according to law (see *Minelli v. Switzerland*, 25 March 1983, § 38, Series A no. 62), but also covers statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority (see *Allenet de Ribemont*, cited above, § 41, and *Daktaras v. Lithuania*, no. 42095/98, §§ 41-43, ECHR 2000-X). The Court stresses that Article 6 § 2 cannot prevent the authorities from informing the public about criminal investigations in progress, but it requires that they do so with all the discretion and circumspection necessary if the presumption of innocence is to be respected (see *Allenet de Ribemont*, cited above, § 38).

160. It has been the Court's consistent approach that the presumption of innocence will be violated if a judicial decision or a statement by a public official concerning a person charged with a criminal offence reflects an opinion that he is guilty before he has been proved guilty according to law. It suffices, even in the absence of any formal finding, that there is some reasoning suggesting that the court or the official regards the accused as guilty. A fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear declaration, in the absence of a final conviction, that an individual has committed the crime in question. The Court has consistently emphasised the importance of the choice of words by public officials in their statements before a person has been tried and found guilty of a particular criminal offence (see *Khuzhin and Others v. Russia*, no. 13470/02, § 94, 23 October 2008, with further references). Whether a statement of a public official is in breach of the principle of the presumption of innocence must be determined in the context of the particular circumstances in which the impugned statement was made (see *Butkevičius v. Lithuania*, no. 48297/99, § 49, ECHR 2002-II).

161. The Court notes that in the present case the impugned statement was made by the Prosecutor General in an interview to the press, in a context independent of the criminal proceedings themselves. The Court acknowledges that the fact that the applicant was a well-known journalist required the State officials, including the Prosecutor General, to keep the public informed of the alleged offence and the ensuing criminal proceedings. However, this circumstance cannot justify the lack of caution in the choice of words used by officials in their statements. Moreover, in the present case, the statement at issue was made just a few days following the institution of the criminal investigation. It was particularly important at this initial stage, even before the applicant had been formally charged, not to make any public allegations which could have been interpreted as confirming the guilt of the applicant in the opinion of an important public official.

162. The Prosecutor General's statement was reported, with almost identical word-for-word quotations, in at least two popular news media outlets. It is true that the statement was very succinct and that it appeared to have been aimed at informing the public about the fact of, and the reasons for, the institution of criminal proceedings against the applicant. Nevertheless, the statement unequivocally declared that the applicant's article published in his newspaper "indeed contain[ed] a threat of terrorism". Moreover, following a brief explanation as to the content of the applicant's publication, the Prosecutor General made a further declaration that "this information constitutes a threat of terrorism". Given the high position held by the Prosecutor General, particular caution should have been exercised in the choice of words for describing the pending criminal proceedings. The Court considers that these specific remarks, made without any qualification or reservation, amounted to a declaration that the applicant had committed the criminal offence of threat of terrorism. Thus, these remarks prejudged the assessment of the facts by the competent judicial authority and could not but have encouraged the public to believe the applicant guilty before he had been proved guilty according to law.

163. There has accordingly been a violation of Article 6 § 2 of the Convention.

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

A. Article 3 of the Convention

164. The applicant complained about the conditions of his pre-trial detention. In particular, he alleged that, during his detention in Detention Facility No. 1, he had not been allowed to receive newspapers and magazines. He had been handcuffed and searched when taken out of his cell for questioning or other purposes. As to his conditions of detention after his transfer to the MNS detention facility, he alleged that he had not been allowed personal visits and that he had been held alone in a cell measuring 8 square metres, which had been badly ventilated and in which an electric light had been switched on throughout the day and night. He had been allowed to take a hot shower once a week and had had to wash his underwear himself using the cold water in his cell.

165. Even assuming that there were effective remedies available to the applicant in respect of the conditions of his detention and that he has exhausted those remedies, the Court considers that the applicant's description of his conditions of detention does not disclose an appearance of ill-treatment reaching the minimum level of severity required under Article 3 of the Convention. It follows that this complaint is manifestly

ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

B. Article 5 of the Convention

166. The applicant complained under Article 5 §§ 1 (c), 3 and 4 of the Convention about the Sabail District Court's decision of 3 July 2007 remanding him in custody, delivered in the context of the second set of criminal proceedings. In particular, he complained that there had been no reasonable suspicion that he had committed a crime and that the domestic courts had failed to give sufficient reasons for his detention on remand.

167. The Court notes that, prior to the Sabail District Court's detention order of 3 July 2007, the applicant had already been convicted and sentenced to a prison term on 20 April 2007 in the first set of criminal proceedings. That conviction had been upheld by the Court of Appeal on 6 June 2007 and, at the time of the detention order of 3 July 2007 in the second set of criminal proceedings, a cassation appeal against that conviction was pending the Supreme Court's examination. In this connection, the Court notes that, in determining the period of detention pending trial, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, for example, *Hummatov v. Azerbaijan* (dec.), nos. 9852/03 and 13413/04, 18 May 2006). In the present case, the criminal charge in the first set of criminal proceedings against the applicant was determined on 20 April 2007 and, from that date, he was detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. Even though, for whatever reason, an order for the applicant's "pre-trial detention" was made in the second set of proceedings subsequently to his conviction in the first set of criminal proceedings, no issue arises under Article 5 §§ 1 (c) and 3 of the Convention in respect of the applicant's detention after that date, as there was already another "lawful" basis for his detention during that period. The Court considers that no issue arises in the present case under Article 5 § 4 either.

168. It follows that this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

C. Other complaints

169. The applicant complained under Article 6 § 3 (a) of the Convention that he had not been informed promptly of the nature and cause of the accusation against him in the second set of proceedings. He also complained under Article 7 that, in both sets of criminal proceedings, the acts for which he had been convicted did not constitute a criminal offence. Lastly, he

complained under Article 8 of the Convention that the searches conducted on 22 May 2007 in his flat and the newspapers' office had violated his right to respect for his home.

170. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLES 46 AND 41 OF THE CONVENTION

A. Article 46 of the Convention

171. Article 46 of the Convention provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
>
> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

172. In the context of the execution of judgments in accordance with Article 46 of the Convention, a judgment in which the Court finds a breach of the Convention imposes on the respondent State a legal obligation under that provision to put an end to the breach and to make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach. If, on the other hand, national law does not allow – or allows only partial – reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate. It follows, *inter alia*, that a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in its domestic legal order to put an end to the violation found by the Court and make all feasible reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II; and *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 487, ECHR 2004-VII).

173. The Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used

in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII); and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

174. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In such circumstances, it may propose various options and leave the choice of measure and its implementation to the discretion of the State concerned (see, for example, *Broniowski v. Poland* [GC], no. 31443/96, § 194, ECHR 2004-V). In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure (see, for example, *Assanidze*, cited above, § 202).

175. The Court reiterates its above findings that both instances of interference with the applicant's freedom of expression were not justified under Article 10 § 2 of the Convention. In particular, in both instances, there existed no justification for imposing prison sentences on the applicant. The Court notes that, whereas the applicant was also convicted of a (*prima facie* unrelated) tax offence, by the date of delivery of the present judgment he has already served the part of the total sentence corresponding to that offence (four months' imprisonment), and that currently he is serving, in essence, the heavier part of the sentence corresponding to the press offences in respect of which the relevant violations have been found.

176. In such circumstances, in view of the above findings of violations of Article 10 of the Convention, it is not acceptable that the applicant still remains imprisoned. Accordingly, by its very nature, the situation found to exist in the instant case does not leave any real choice as to the measures required to remedy the violations of the applicant's Convention rights.

177. Therefore, having regard to the particular circumstances of the case and the urgent need to put an end to the violations of Article 10 of the Convention, the Court considers that, as one of the means to discharge its obligation under Article 46 of the Convention, the respondent State shall secure the applicant's immediate release.

B. Article 41 of the Convention

178. Article 41 of the Convention provides:

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

1. Damage

(a) Pecuniary damage

179. The applicant claimed that, as a result of his conviction, he had been forced to close down several mass-media outlets which belonged to him personally: two newspapers, two Internet sites and one journal. He estimated the total value of these businesses at 203,652 euros (EUR), based on the initial capital invested to start them. He also claimed that, as the sole owner of the *Realny Azerbaijan* and *Gündəlik Azərbaycan* newspapers, he had sustained a loss of personal profit, in the estimated total amount of EUR 230,136 per year, for each year the newspapers had not been produced. He further claimed EUR 16,568 for advance rental payments for the newspapers' offices, which he had been unable to use after his conviction.

180. He further claimed pecuniary damage in respect of certain possessions that had been allegedly "confiscated" by the authorities during the searches of his flat and his editorial office, including: (a) several "photo archives" and other "investigative journalistic materials", which he valued at EUR 27,098; (b) computer equipment costing 23,000 US dollars; and (c) certain pieces of furniture from the editorial office, estimated to cost EUR 7,287.

181. Lastly, the applicant claimed EUR 8,146 in respect of the expenses that his parents had allegedly incurred in commuting to the prison to visit him, in providing him with food parcels in order to complement his prison diet, and for telephone communications with him.

182. The Government submitted that the applicant had failed to provide sufficient documentary evidence in support of any of the above claims or to explain the method of calculation of the value of his media outlets and other estimated figures. They also submitted that the applicant had failed to provide any evidence that any of his possessions had been confiscated; instead, he had produced only a search record and a record confirming that one of his employees had submitted two computers to the authorities for investigation purposes.

183. The Court points out that under Rule 60 of the Rules of the Court, any claim for just satisfaction must be itemised and submitted in writing

together with the relevant supporting documents or vouchers, failing which the Court may reject the claim in whole or in part.

184. As to the applicant's claims in respect of the value of the media outlets he had to close down and his loss of earnings, the Court notes that the applicant has not raised a complaint before the Court concerning the termination of activities of his newspapers and other media outlets. In any event, he has not submitted any documents or any other evidence in support of his claims in respect of the amounts invested in those media outlets and in respect of his future earnings from operating them as their owner and editor-in-chief. In particular, no records of past profits have been submitted. Likewise, the applicant has not submitted sufficient evidence in respect of the loss of advance rental payments.

185. As to the claims in respect of the allegedly confiscated property, the Court notes that, apart from the 23 computers seized from the newspapers' offices and confiscated pursuant to the Assize Court's judgment, it is unable to determine from the material in its possession that any of the other alleged property has indeed been permanently confiscated and that all of it had belonged personally to the applicant. As to the claim in respect of the confiscated computer equipment, the Court notes that the applicant has submitted no evidence in support of his estimates as to its value.

186. As to the remaining claims, the Court does not discern any causal link between the violations found and the pecuniary damage alleged.

187. For the above reasons, the Court rejects the applicant's claims in respect of pecuniary damage.

(b) Non-pecuniary damage

188. The applicant claimed EUR 70,000 in respect of non-pecuniary damage.

189. The Government submitted that the finding of a violation would constitute sufficient reparation in respect of any non-pecuniary damage suffered.

190. In the light of the specific circumstances of the present case, the particular gravity of the violations of the applicant's freedom of expression and the fact that he had been sentenced to long-term imprisonment for press offences without any relevant justification, and bearing in mind that by the time of the examination of the present application he had spent more than two years in prison, the Court considers that the applicant must have undoubtedly endured serious moral suffering which cannot be compensated solely by the finding of violations. Moreover, although the Court has found above that the alleged pecuniary damage was unsupported or not fully supported by relevant evidence, it does not find it unreasonable to suppose that the applicant incurred other forms of damage which were directly due to the violations found (compare *Ilaşcu and Others*, cited above, § 489).

The Court considers that, in this case, the above circumstance should also be taken into account when assessing the award for damages.

191. Making its assessment on an equitable basis, as required by Article 41 of the Convention, the Court awards the applicant the sum of EUR 25,000 in respect of non-pecuniary damage, plus any tax that may be chargeable on this amount.

2. Costs and expenses

192. The applicant also claimed EUR 602 for the costs and expenses incurred before the domestic courts and EUR 2,200 for those incurred before the Court. He also claimed EUR 520 for translation expenses. In support of these claims, he submitted statements from a law office whose lawyers had represented him in the domestic proceedings, a copy of the contract for legal services in the Strasbourg proceedings, and copies of receipts issued by a translation company.

193. The Government submitted that the evidence submitted by the applicant was insufficient to conclude that the expenses claimed had been actually incurred.

194. 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 were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,822 covering costs under all heads, plus any tax that may be chargeable to the applicant on this amount.

3. Default interest

195. 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* unanimously the complaints under Article 10, Article 6 § 1 (concerning the alleged lack of impartiality) and Article 6 § 2 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 10 of the Convention in respect of the applicant's first criminal conviction;

3. *Holds* unanimously that there has been a violation of Article 10 of the Convention in respect of the applicant's second criminal conviction;

4. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 6 § 2 of the Convention;

6. *Holds* by six votes to one that the respondent State shall secure the applicant's immediate release;

7. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 2,822 (two thousand eight hundred and twenty-two euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into New Azerbaijani manats 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 amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen Registrar	Christos Rozakis President