



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

FIRST SECTION

CASE OF YAKIŞ v. TURKEY

(Application no. 33368/96)

JUDGMENT

STRASBOURG

25 September 2001

FINAL

25/12/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Yakış v. Turkey,

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

Mrs E. PALM, *President*,

Mr L. FERRARI BRAVO,

Mr GAUKUR JÖRUNDSSON,

Mr B. ZUPANČIČ,

Mr T. PANȚÎRU,

Mr R. MARUSTE, *judges*,

Mr F. GÖLCÜKLÜ, *ad hoc judge*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 11 January 2000 and on 4 September 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 33368/96) against the Republic of Turkey lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Alper Tunga Levent Yakış ("the applicant"), on 17 June 1996.

2. The applicant was represented by Mrs Nurten Çağlar, a lawyer practising in Ankara (Turkey). The Turkish Government did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged, in particular, that the criminal proceedings brought against him had not been concluded within a "reasonable time" and that his right to a fair hearing had been breached on account of his conviction by the Ankara Martial Law Court which lacked independence and impartiality. He further submitted that he had been convicted on the basis of the statements he had made to the police under duress.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court. Mr Rıza Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government accordingly appointed Mr Feyyaz Gölcüklü to

sit as an *ad hoc* judge, in his place (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 11 January 2000, the Chamber retained the applicant's complaints concerning his right to a fair hearing within a reasonable time by an independent and impartial tribunal and declared the remainder of his complaints inadmissible.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Arrest and detention of the applicant

8. On 26 November 1980 police officers from the Ankara Security Directorate arrested the applicant on suspicion of membership of an illegal organisation, the Dev-Yol (Revolutionary Way).

9. On 27 January 1981 the Ankara Martial Law Court (*sıkıyönetim mahkemesi*) ordered the applicant's detention on remand.

B. Trial in the Ankara Martial Law Court

10. On 26 February 1982 the Military Public Prosecutor filed a bill of indictment with the Martial Law Court against the applicant and 722 other defendants. The public prosecutor accused the applicant of membership of an illegal armed organisation, namely the Dev-Yol, whose object was to undermine the constitutional order and replace it with a Marxist-Leninist regime. He further charged the applicant with having been involved in a number of crimes, such as killings, bomb attacks and robberies. The prosecution sought the death penalty under Article 146 § 1 of the Turkish Criminal Code.

11. On 28 November 1989 the applicant was conditionally released pending trial.

12. In a judgment of 19 July 1989 the Martial Law Court, composed of two civilian judges, two military judges and an army officer, convicted the applicant as charged. It sentenced him under Article 146 § 1 of the Turkish Criminal Code to life imprisonment, permanently debarred him from employment in public service and placed him under judicial guardianship.

C. Proceedings on appeal

13. The applicant lodged an appeal with the Military Court of Cassation (*askeri yargıtay*).

14. On 22 July 1991 the applicant was conditionally released pending trial.

15. Following promulgation of the Law of 27 December 1993, which abolished the jurisdiction of the martial law courts, the Court of Cassation (*yargıtay*) acquired jurisdiction over the case and the file was transmitted to it.

16. On 27 December 1995 the Court of Cassation upheld the applicant's conviction.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

17. Article 146 § 1 of the Turkish Criminal Code provides:

“Whosoever shall attempt to alter or amend in whole or in part the Constitution of the Turkish Republic or to effect a coup d'état against the Grand National Assembly formed under the Constitution or to prevent it by force from carrying out its functions shall be liable to the death penalty.”

B. The Martial Law Courts

18. The provisions governing judicial organisation are worded as follows:

1. *The Constitution*

Article 138 §§ 1 and 2

“In the performance of their duties, judges shall be independent; they shall give judgment, according to their personal conviction, in accordance with the Constitution, statute and the law.

No organ, authority, officer or other person may give orders or instructions to courts or judges in the exercise of their judicial powers, nor send them circulars or make recommendations or suggestions to them.”

Article 139 § 1

“Judges ... shall not be removed from office or compelled to retire without their consent before the age prescribed by the Constitution ...”

Article 145

“... Martial law courts shall be responsible for dealing with offences under special laws committed by civilians against military personnel and offences committed against military personnel in the course of their duties or on scheduled premises.

The offences and persons falling within the jurisdiction of the martial law courts in time of war or under martial law, the composition of martial law courts and the appointment, where necessary, of judges and prosecutors from the ordinary courts to martial law courts shall be regulated by law.

The personal rights and obligations of military judges ... shall be regulated by law in accordance with the principles of the independence of the courts, the safeguards enjoyed by the judiciary and the requirements of military service. Relations between military judges and the commanders under whom they serve as regards their non-judicial duties shall also be regulated by law.”

2. The Martial Law Act (Law no. 1402 of 13 May 1971)

Article 11 § 1

“The Ministry of defence shall convene a sufficient number of martial law courts in areas where martial law applies...”

Article 11 § 4

“Judicial advisers, military judges and military prosecutors attached to the martial law courts are appointed, with agreement of the Chief of Staff, from among the candidates nominated by a committee composed of the personnel director and the legal adviser to the Office of the Chief of Staff, the personnel director and the legal adviser to the army corps to which the judge in question belongs and finally the head of the Military Legal Service at the Ministry of Defence.”

Article 11 § 6

“The army officers serving on martial law courts are appointed, on the proposal of the Chief of Staff, according to the procedure for appointing military judges...”

3. The Act Governing the Formation and Proceedings of Martial Law Courts (Law no. 353 of 26 October 1963)

Article 4

“The officers serving on the martial law courts and their substitutes shall be appointed, in December, by the commander or the superior of the military establishment within which a martial law court is formed, from among the officers of that establishment. The officers thus appointed are irremovable for one year.”

4. The Military Judges Act (Law no. 357 of 26 October 1963)

Article 12

“The suitability of military judges for promotion, priority within the same grade and progress up the career hierarchy is determined on the basis of assessments.

A) There are three types of assessment certificate, which are the assessment certificate for generals, the assessment certificate for officers (sub-lieutenant - colonel) and the professional assessment certificate.

...

B) The superiors in the hierarchy authorised to issue an assessment certificate for officers and to assess officers:

First superior in the hierarchy: the commander or superior of the military establishment to which the judge in question belongs and in which a martial law court is formed.

Second superior in the hierarchy: the commander or the superior immediately above the first superior in the hierarchy.

Third superior in the hierarchy: the commander or the superior immediately above the second superior in the hierarchy...”

Article 29

“The Minister of Defence may apply the following disciplinary sanctions to military judges, after hearing their defence:

- Written warning...;
- Rebuke...”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

19. The applicant complained that he was denied a fair hearing within a reasonable time by an independent and impartial tribunal, in breach of Article 6 § 1 of the Convention which provides, as relevant:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing within a reasonable time by an independent and impartial tribunal...”

A. The Court's jurisdiction *ratione temporis*

20. The Court observes that a question arises as to its jurisdiction *ratione temporis* in respect of the instant application in view of the entry into force of Protocol No. 11 to the Convention.

21. The Court notes in this connection that on 1 November 1998, by operation of Protocol No. 11, applications such as the present one pending before the Commission (see paragraph 4 above) which have not been declared admissible fell to be examined by the Court in accordance with the provisions of that Protocol. Given that the object of Article 5 § 2 of the Protocol is to provide for the examination of former Commission cases as part of transitional arrangement, the former Court no longer being in existence, the Court's jurisdiction *ratione temporis* is determined by the date of the respondent State's acceptance of the right of individual petition.

22. Accordingly, the considerations which led the former Court in its *Mitap and Müftüoğlu v. Turkey* judgment of 25 March 1996 (*Reports of Judgments and Decisions* 1996-II, pp. 410-411, §§ 26-28) to determine its jurisdiction *ratione temporis* in respect of the complaints raised in that case as of 22 January 1990, the date of the respondent State's acceptance of its jurisdiction, cannot be invoked to confine its jurisdiction to facts or events occurring since that date (see *Cankoçak v. Turkey*, nos. 25182/94 and 26956/95, § 26, ECHR 2001- ...).

The Court notes that this conclusion has not been disputed.

B. Merits of the complaints

1. Length of the proceedings

(a) Period to be taken into consideration

23. The Court notes that the proceedings began on 26 November 1980, the date of the applicant's arrest, and ended on 27 December 1995 when the Court of Cassation upheld the applicant's conviction. They therefore lasted almost fifteen years and one month.

However, the Court can consider the period of almost eight years and eleven months that elapsed after 28 January 1987, the date of deposit of Turkey's declaration recognising the right of individual petition (see paragraph 21 above). It must nevertheless take account of the state of the proceedings at the time when the aforementioned declaration was deposited (see, as the most recent authority, the above-mentioned *Cankoçak* judgment, § 25). On the critical date the proceedings had already lasted approximately six years and two months.

(b) Reasonableness of the length of proceedings

24. The reasonableness of the length of the impugned period is to be assessed in the light of the circumstances of the case and having regard to the criteria laid down in the Court's case-law, in particular the complexity of the case, the applicant's conduct and that of the competent authorities (see, among many other authorities, the above-mentioned Mitap and Müftüoğlu judgment, p. 411, § 32).

25. The Government underlined the complexity of the case and the nature of the charges the applicant faced. They pointed out that the applicant was accused of more than twenty five crimes and was convicted of murder and bombing offences. The courts had to deal with a trial involving 723 defendants, including the applicant. The authorities needed time to establish the scope and activities of the terrorist network of which the applicant was alleged to be a member. The Martial Law Court followed an expedited procedure and made every necessary effort to speed up the trial. It held more than five hundred hearings, at a rate of three per week. The public prosecutor had to study two thousand pages of written submissions in order to prepare his indictment. The file comprised approximately one thousand loose-leaf binders and the summary of the judgment ran to no fewer than two hundred and sixty-four pages.

In sum, the Government contended that these factors explained the length of the proceedings and that no negligence or delay was imputable to the judicial authorities.

26. The applicant submitted in reply that the criminal proceedings against him lasted for more than fifteen years and that during this time the courts were unable to deliver a final judgment on his case. He maintains that his case was referred to the Court of Cassation five years after the Martial Law Court had delivered its judgment and that it took the Court of Cassation one year to give the final judgment. The complexity of the case and the large number of defendants cannot justify the length of the proceedings which lasted fifteen years. The applicant further alleges that during this period he suffered pecuniary and non-pecuniary damage. He asserted in this connection that the State should have recruited sufficient number of judges in order to cope with the case.

27. The Court acknowledges the Government's submission that the case was a complex one owing to the large number of defendants, the seriousness of the charges and the courts' difficulties in handling a large-scale trial. However, as the case cannot be explained in terms of the complexity of the issues involved, the Court will examine it in the light of the conduct of the applicant and the national authorities (see paragraph 24 above).

28. In this regard, it is to be noted that the respondent Government have not made any criticism of the applicant's behaviour at any stage of the trial. The Court reiterates that the length of the proceedings can only be explained

by the failure of the domestic courts to deal with the case diligently (see the Cankoçak judgment cited above, § 32).

29. It observes in this connection that the Martial Law Court reached a verdict in almost eight years and four months. It took the Military Court of Cassation, to which the applicant appealed against his conviction, more than four years to rule on the applicant's appeal. Furthermore, the Court of Cassation gave judgment on 27 December 1995, approximately two years after it had been seized of the case. The Court does not dispute the Government's assertion that the delay in the delivery of a final judgment on the applicant's case was caused to a large extent by the complexity of the case. The Court further observes that the legislative changes resulting from transfer of the jurisdiction over the case from the military courts to civil ones was a contributing factor to the delay at issue.

30. However, the Court recalls in this respect that, as it has repeatedly held, Article 6 § 1 imposes on the Contracting States the duty to organise their judicial system in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time (see, among other authorities, *Pelissier and Sassi v. France* [GC], p. 301, § 74, no. 25444/94, ECHR 1999-II). Therefore, the delay in the criminal proceedings against the applicant must be attributed to the national authorities. For these reasons the Court concludes that the length of the criminal proceedings failed to meet the "reasonable time" requirement.

31. There has accordingly been a breach of Article 6 § 1 of the Convention.

2. Independence and impartiality of the Martial Law Court

(a) Arguments of the participants

(i) The applicant

32. According to the applicant, the Martial Law Court which tried him could not be regarded as an "independent and impartial tribunal" within the meaning of Article 6 § 1 of the Convention in that its five members included two military judges and an army officer. The two military judges on the bench were servicemen who belonged to the army and took orders from the executive. They were subject to military discipline and the army compiled assessment reports on them for that purpose. The army officer who had no legal training was accountable to the commander of the state of martial law.

(ii) The Government

33. The Government submitted that at the relevant time the two military judges and their two civilian counterparts sitting on the Martial Law Court

enjoyed the guarantees of judicial independence and immunity laid down in the Constitution. The sole task of the army officer on the bench was to ensure the proper functioning of the hearing and he had no other judicial power. In the Government's view, the procedure for the appointment and the assessment of the military judges sitting on the Martial Law Courts and the safeguards they enjoyed in the performance of their judicial duties at the time perfectly satisfied the criteria laid down by the Court's case-law on the subject. They therefore requested the Court to hold that there has been no violation of the applicant's right to a fair hearing by an "independent and impartial tribunal".

(b) The Court's assessment

34. The Court notes at the outset that in its *Mitap and Müftüoğlu v. Turkey* decision of 8 December 1994 (see applications nos. 15530/89 and 15531/89, *Reports* 1996-II, pp. 422-425, §§ 87-110), the Commission had to address arguments similar to those raised by the Government in the instant case. In its report, under former Article 31 of the Convention, the Commission noted that the statutory rules governing the composition and functioning of the Martial Law Courts raised a number of questions about their independence, particularly as regards the system for appointing and assessing the military judges who sat on them. It observed that the officer serving on the court was not in any way independent *vis-à-vis* the military authorities since he was subordinate in the hierarchy to the commander of martial law and/or the commander of the army corps concerned. The Commission therefore expressed the opinion that the applicants' fears about the Martial Law Court's independence and impartiality were objectively justified and that there had been a violation of Article 6 § 1.

35. It is to be noted in this connection that the former Court was unable to examine the applicants' complaint relating to the independence and impartiality of the Martial Law Court as it fell outside its jurisdiction *ratione temporis* (see the above-mentioned *Mitap and Müftüoğlu* judgment, p. 410, § 27). However, having regard to the above conclusion in respect of its jurisdiction *ratione temporis* (see paragraph 22 above), this issue must now be examined by the Court.

36. The Court reiterates that in order to establish whether a tribunal can be considered "independent" for the purposes of Article 6 § 1, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question whether it presents an appearance of independence (see, among many other authorities, the *Findlay v. the United Kingdom* judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

37. The Court recalls 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 and behaviour 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, among many other authorities, the *Bulut v. Austria* judgment of 22 February 1996, *Reports* 1996-II, p. 356, § 31, and the *Thomann v. Switzerland* judgment of 10 June 1996, *Reports* 1996-III, p. 815, § 30). It was not contested before the Court that only the second of these tests was relevant in the instant case.

38. In this case it appears difficult to dissociate the question of impartiality from that of independence as the arguments advanced by the applicant to contest both the independence and impartiality of the court are based on the same factual considerations. The Court will accordingly consider both issues together (see the *Langborger v. Sweden* judgment of 22 June 1989 Series A no. 155, p. 16, § 32).

39. The Court notes that Article 145 of the Turkish Constitution and Law no. 1402 of 13 May 1971 govern the legal framework and functioning of the Martial Law Courts (see paragraph 18 above). These courts are composed of two civilian judges and two military judges and an army officer.

The Court observes in this connection that the independence and impartiality of the two civilian judges are not in dispute between the parties. It will therefore confine itself to examining the position of the military judges and the army officer sitting as members of the Martial Law Courts.

40. The Court notes that the two military judges serving on these courts were selected by a committee composed of the personal director and the legal adviser to the office of the Chief of Staff, the personnel director and the legal adviser to the army corps to which the judge in question belongs and finally the head of the Military Legal Service at the Ministry of Defence. The military judges thus chosen were appointed with the approval of the Chief of Staff and by a decree signed by the Minister of Defence, the Prime Minister and the President of the Republic.

The army officer, a senior colonel in the instant case, was appointed on the proposal of the Chief of Staff and in accordance with the rules governing the appointment of military judges. This officer is removable on the expiry of one year after his appointment (see paragraph 18 above).

41. As regards the existence of safeguards to protect the members of the Martial Law Court against outside pressures, the Court notes that military judges undergo the same professional training as their civilian counterparts, which gives them the status of career members of the Military Legal Service. Furthermore, military judges enjoy constitutional safeguards identical to those of civilian judges. They may not be removed from office or made to retire early without their consent; as regular members of a Martial Law Court they sit as individuals. According to the Constitution, they must be independent and no public authority may give them instructions concerning their judicial activities or influence them in the

performance of their duties (see the *İncal v. Turkey* judgment of 9 June 1998, *Reports* 1998-IV, p. 1571, § 67, and the *Çıraklar v. Turkey* judgment of 28 October 1998, *Reports* 1998-VIII, p. 3073, § 39).

42. However, other aspects of their status call into question their independence and impartiality. Firstly, the military judges are servicemen who still belong to the army, which in turn takes orders from the executive. Secondly, as the applicant rightly pointed out, they remain subject to military discipline and assessment reports are compiled on them for that purpose. They therefore need favourable reports both from their administrative superiors and their judicial superiors in order to obtain promotion (see the above mentioned *Mitap and Müftüoğlu v. Turkey* decision of the Commission, cited above, § 104). Lastly, decisions pertaining to their appointment are to a great extent taken by the administrative authorities and the army.

As regards the officer serving on the Martial Law Court, the Court observes that he is subordinate in the hierarchy to the commander of the martial law and/or the commander of the army corps concerned. He is not in any way independent of these authorities.

43. The Court notes that the Martial Law Courts were set up to deal with offences aimed at undermining the constitutional order and its democratic regime. They enjoyed emergency powers and were required to function in a period of martial law, during which the armed forces were given the task of overseeing the “internal security” of the country and the regional military commander used police powers to repress acts of violence in his area.

44. However, it is not the Court’s task to determine *in abstracto* whether it was necessary to set up such courts in a Contracting State or to review the relevant practice, but to ascertain whether the manner in which one of them functioned infringed the applicant’s right to a fair trial (see, among other authorities, the *Fey v. Austria* judgment of 24 February 1993, Series A no. 255-A, p. 12, § 27, and the *İncal* judgment cited above, p. 1572, § 70).

45. In the Court’s opinion, even appearances may be of some importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused (see, among other authorities, the *Hauschild v. Denmark* judgment of 24 May 1989, Series A no. 154, p. 21, § 48). In deciding whether in a given case there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified (see the *Gautrin and Others v. France* judgment of 20 May 1998, *Reports* 1998-III, pp. 1030-31, § 58, and the *İncal* judgment cited above, p. 1573, § 71).

46. The Court considers in this connection that where, as in the present case, a tribunal’s members include persons who are in a subordinate

position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, *mutatis mutandis*, the Sramek v. Austria judgment of 22 October 1984, Series A no. 84, p. 20, § 42). In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces (see the İncal judgment cited above, p. 1573, § 72).

47. In the light of the foregoing, the Court considers that the applicant - tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State - could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect (see the Langborger judgment cited above, p. 16, § 36).

48. In conclusion, the applicant's fears as to the Martial Law Court's lack of independence and impartiality can be regarded as objectively justified.

There has accordingly been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

49. Article 41 of the Convention provides:

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

A. Damage

50. The applicant did not submit any claims under this head either with respect to pecuniary or non-pecuniary damage and expressly waived his right to an award under this head. He requested the Court to hold merely that the domestic courts breached his right to a fair hearing.

51. The Government did not make any observations under this head.

52. In the light of the applicant's submissions, the Court considers that in the circumstances of the case the finding of a violation in itself constitutes sufficient just satisfaction.

B. Costs and expenses

53. The applicant claimed the legal costs and expenses (translation, postal, communications and travel expenditure) which he incurred in the proceedings before the domestic courts and the Convention institutions. He left the assessment of these to the discretion of the Court.

54. The Government did not make any submissions.

55. Deciding on an equitable basis and having regard to the criteria laid down by its case-law (see, among other authorities, the *Demicoli v. Malta* judgment of 27 August 1991, Series A no. 210, p. 20, § 49), the Court awards the applicant the overall sum of FRF 20,000.

C. Default interest

56. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 4,26% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention on account of the length of the criminal proceedings;
2. *Holds* by six votes to one that there has been a violation of Article 6 § 1 of the Convention on account of the applicant's trial by the Martial Law Court which lacked independence and impartiality;
3. *Holds* unanimously
 - (a) that this judgment in itself constitutes sufficient just satisfaction in respect of non-pecuniary damage,
 - (b) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, in respect of costs and expenses FRF 20,000 (twenty thousand French francs), together with any tax that may be chargeable, to be converted into Turkish liras at the rate applicable on the date of the settlement;
 - (c) that simple interest at an annual rate of 4,26% shall be payable from the expiry of the above-mentioned three months until settlement;

Done in English, and notified in writing on 25 September 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

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

E.P.
M.O.B.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

In the instant case, in which the issue before the Court was the independence and impartiality of martial-law courts in Turkey (Article 6 § 1 of the Convention), I voted in favour of finding that there had not been a violation, because the logical consequence of the conclusion reached by the majority would be to banish military courts of every kind from the judicial system. My reasons are as follows.

1. In the present case the majority took as their starting-point the *Incal v. Turkey* judgment (9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1573, § 72). In my opinion, the *Incal* case is quite different from this one.

The *Incal* case was concerned with a civilian (as opposed to a military) court, namely the National Security Court, which was composed of two civilian judges and a military judge. That court tried a civilian for an offence under the ordinary criminal law. In the *Incal* case the majority of the Court reached the conclusion that, in spite of the safeguards enjoyed by military judges in Turkey's judicial system, the National Security Court could not be objectively regarded (according to the doctrine of appearances) as an independent and impartial tribunal within the meaning of Article 6 § 1 because one of its members was a military judge, who might have aroused doubts in the mind of the public as to his impartiality and independence. That standpoint was defensible, as the case concerned a civilian court trying a civilian for an ordinary offence.

2. However, in the instant case, in which the tribunal in issue was a martial-law court composed of two civilian judges, two military judges and an army officer, the situation is quite different. It is common knowledge that martial-law courts are military courts *par excellence*. Their jurisdiction is limited: in cases involving civilians, they are competent to deal with offences of a strictly military nature and with offences that have led to a declaration of martial law in the region in which the military authorities – and, with them, the martial-law courts – assume jurisdiction *ratione loci*.

It goes without saying that all military courts will, in the nature of things, necessarily include at least one military judge. To hold, on the basis of the *Incal* precedent, that a court on which a military judge sits is not independent and impartial within the meaning of Article 6 § 1 would, by logical implication, amount to finding that all military courts contravened Article 6 § 1 and should accordingly be banished from the judicial system. That is the general conclusion which I am unable to accept. Military courts have existed since time immemorial; they currently exist, as far as I know, in all States that possess an army, and they will continue to exist until such time as armed forces and martial law are abolished.