CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FIRST SECTION

CASE OF ŞAHİNER v. TURKEY

(*Application no. 29279/95*)

JUDGMENT

STRASBOURG

25 September 2001

FINAL

25/12/2001

In the case of Şahiner 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. PANŢÎRU,
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 4 September 2001,

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

PROCEDURE

1. The case originated in an application (no. 29279/95) 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 İsmail Şahiner ("the 0applicant"), on 22 August 1995.

2. The applicant, who had been granted legal aid, was represented by Mr A. Kalan, a lawyer practising in Ankara. The Turkish Government ("the 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 statements he had made to the police under duress and that his political opinions had constituted the basis for his conviction.

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. Mr R. Türmen, the judge elected in respect of Turkey, withdrew from sitting in the case (Rule 28). The Government

accordingly appointed Mr F. Gölcüklü to sit as an *ad hoc* judge (Article 27 § 2 of the Convention and Rule 29 § 1).

6. By a decision of 11 January 2000 [*Note by the Registry.* The Court's decision is obtainable from the Registry], the Chamber declared admissible 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 29 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 26 January 1981 the Ankara Martial-Law Court (*sıkıyönetim mahkemesi*) remanded the applicant in custody.

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 acting as an armed look-out for the killers of several individuals, a bomb attack on a coffee house and opening fire on a house.

The prosecution sought the death penalty under Article 146 § 1 of the Turkish Criminal Code.

11. In a judgment of 19 July 1989 the Martial-Law Court, composed of two civilian judges, two military judges and an army officer, found the applicant guilty as charged, sentenced him to life imprisonment (in effect eighteen years assuming good conduct) for offences under Article 146 § 1 of the Criminal Code and permanently debarred him from employment in

the civil service. It took from 19 July 1989 until 1993 for the reasons for the judgment to be set down in writing.

C. Proceedings on appeal

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

13. On 23 July 1991 the Martial-Law Court ordered the applicant's release pending trial.

14. 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.

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

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Criminal law

16. 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

17. 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)

Section 11(1)

"The Ministry of Defence shall convene a sufficient number of martial-law courts in areas where martial law applies ..."

Section 11(4)

"Judicial advisers, military judges and military prosecutors attached to the martial-law courts are appointed, with the 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)

Section 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 Legal Service Act (Law no. 357 of 26 October 1963)

Article 12

"... The aptitude of military judges for promotion or advancement in salary step, rank or seniority shall be determined on the basis of assessment reports.

(a) There are three types of assessment report, namely the assessment report for generals, the assessment report for officers (sub-lieutenant – colonel) and the professional assessment report.

...

(b) The superiors in the hierarchy competent to carry out assessment and draw up assessment reports for officers are the following:

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 ..."

Section 29

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

(a) a warning ... in writing ...

(b) a reprimand ..."

THE LAW

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

18. 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, the relevant part of which provides:

> "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*

19. 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.

20. 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 had 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 the 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.

21. Accordingly, the considerations which led the former Court in *Mitap and Müftüoğlu v. Turkey* (judgment of 25 March 1996, *Reports of Judgments and Decisions* 1996-II, pp. 410-11, §§ 26-28) to determine its jurisdiction *ratione temporis* in respect of the complaints raised in that case by reference to 22 January 1990, the date of the respondent State's acceptance of its jurisdiction, cannot be relied on to confine this Court's jurisdiction to facts or events occurring since that date (see *Cankoçak v. Turkey*, nos. 25182/94 and 26956/95, § 26, 20 February 2001, unreported).

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

22. The Court notes that the proceedings began on 29 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 only the period of almost eight years and eleven months that elapsed after 22 January 1987 the date of deposit of Turkey's declaration recognising the right of individual petition (see paragraph 20 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, *Cankoçak*, cited above, § 25). On the critical date the proceedings had already lasted six years and two months.

(b) Reasonableness of the length of the proceedings

23. 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, *Mitap and Müftüoğlu*, cited above, p. 411, § 32).

24. 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 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 500 hearings, at a rate of three per week. The public prosecutor had to study 2,000 pages of written submissions in order to prepare his indictment. The file comprised approximately 1,000 loose-leaf binders and the summary of the judgment ran to no fewer than 264 pages.

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

25. The applicant submitted in reply that he had been kept in detention on remand for ten years and that the courts were unable to deliver a final judgment in his case. In his view, the complexity of the case and the large number of defendants could not justify the delay in the proceedings which

lasted fifteen years. He asserted in this connection that during the impugned period he had not been able to find a job and that he had suffered pecuniary and non-pecuniary damage.

26. 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 length of the proceedings 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 23 above).

27. In this regard, the Court notes that the Government have not made any criticism of the applicant's behaviour at any stage of the trial. Accordingly, the length of the proceedings can only be explained by the failure of the domestic courts to deal with the case diligently (see *Cankoçak*, cited above, § 32).

28. It observes in this connection that the Martial-Law Court reached a verdict in almost seven 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 seised 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 factor contributing to the delay at issue.

29. 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], no. 25444/94, § 74, 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.

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

2. Independence and impartiality of the martial-law court

(a) The parties' submissions

(i) The applicant

31. 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 martial-law commander.

(ii) The Government

32. 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 that the Court hold that there had been no violation of the applicant's right to a fair hearing by an "independent and impartial tribunal".

(b) The Court's assessment

33. The Court notes at the outset that in its former Article 31 report of 8 December 1994 in *Mitap and Müftüoğlu* (loc. cit., opinion of the Commission, pp. 422-25, §§ 87-110) the Commission had to address arguments similar to those raised by the Government in the instant case. The Commission noted that the statutory rules governing the composition and functioning of 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 martial-law commander 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.

34. 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 *Mitap and Müftüoğlu*, cited above, p. 410, § 27). However, this issue must now be examined by this Court, having regard to the conclusion, in paragraph 21 above, in respect of its jurisdiction *ratione temporis*.

35. 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, *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, p. 281, § 73).

36. 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 sufficient guarantees to exclude any legitimate doubt in this respect (see, among many other authorities, *Bulut v. Austria*, judgment of 22 February 1996, *Reports* 1996-II, p. 356, § 31, and *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.

37. 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 *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32).

38. 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 martial-law courts (see paragraph 17 above). These courts are composed of two civilian judges, 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 martial-law courts.

39. 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 belonged 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 was removable after the expiry of one year after his appointment (see paragraph 17 above).

40. 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 *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, pp. 1571-72, § 67, and *Çıraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, p. 3073, § 39).

41. 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 *Mitap and Müftüoğlu*, cited above, opinion of the Commission, p. 424, § 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 was subordinate in the hierarchy to the martial-law commander and/or the commander of the army corps concerned. He was not in any way independent of these authorities.

42. The Court notes that 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.

43. 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, *Fey v. Austria*, judgment of 24 February 1993, Series A no. 255-A, p. 12, § 27, and *Incal*, cited above, p. 1572, § 70).

44. 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, *Hauschildt 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 *Gautrin and Others v. France*, judgment of 20 May 1998, *Reports* 1998-III, pp. 1030-31, § 58, and *Incal*, cited above, pp. 1572-73, § 71).

45. 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*, *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 *Incal*, cited above, p. 1573, § 72).

46. 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 being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court makes no difference in this respect (see *Langborger*, cited above, p. 16, § 36).

47. 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

48. 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

49. The applicant claimed the sum of 1,083,129 French francs (FRF) by way of compensation for pecuniary and non-pecuniary damage. He referred in this connection to the unjustified length of the criminal proceedings and to his claims, *inter alia*, that he was arbitrarily detained in prison for ten years and could not find a job thereafter for a very considerable period.

50. The Government did not make any comments on the applicant's claim.

51. The Court considers that the finding of a violation in respect of the trial by a tribunal which lacked independence and impartiality constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Incal*, cited above, p. 1575, § 82, and *Çıraklar*, cited above, p. 3074, § 45).

It reiterates that it can award reparation only in respect of its finding that there has been a violation of the Convention as regards the unreasonable length of the criminal proceedings and make its calculation accordingly (see *Cankoçak*, cited above, § 37).

52. The Court considers that the applicant must have suffered a certain amount of distress, having regard to the total length of the proceedings against him. Deciding on an equitable basis, it awards him the sum of FRF 100,000.

B. Costs and expenses

53. The applicant claimed the sum of 2,000,000,000 Turkish liras (TRL), equivalent to FRF 23,500 at the material time, for his lawyer's fees and expenses.

54. The Government did not make any observations under this head of claim either.

55. Deciding on an equitable basis and having regard to the criteria laid down in its case-law (see, among other authorities, *Demicoli v. Malta*, judgment of 27 August 1991, Series A no. 210, p. 20, § 49), the Court considers it reasonable to award the applicant FRF 15,000 by way of reimbursement of his costs and expenses.

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 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, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:
      (i) FRF 100,000 (one hundred thousand French francs) in respect of non-pecuniary damage;
      (ii) FRF 15,000 (fifteen thousand French francs) in respect of costs and expenses, together with any value-added tax that may be chargeable;
   (b) that simple interest at an annual rate of 4.26% shall be payable from the expiry of the above-mentioned three months until settlement;

4. *Dismisses* unanimously the remainder of the applicant's claims for just satisfaction.

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 partly dissenting opinion of Mr Gölcüklü is annexed to this judgment.

E.P.
M.O'B.

PARTLY 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 *Incal v. Turkey* (judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1573, § 72). In my opinion, *Incal* is quite different from this case.

Incal 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 *Incal* 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 contravene 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.