In the case of Yagci and Sargin v. Turkey (1),

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court A (2), as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr R. Bernhardt,
Mr Thór Vilhjálmsson,
Mr F. Gölcüklü,
Mr L.-E. Pettiti,
Mr R. Macdonald,
Mr J. De Meyer,
Mr I. Foighel,
Mr B. Repik,

and also of Mr H. Petzold, Registrar,

Having deliberated in private on 27 October 1994 and 27 April and 23 May 1995,

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

Notes by the Registrar

1. The case is numbered 6/1994/453/533-534. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The third number indicates the case's position on the list of cases referred to the Court since its creation and the last two numbers indicate its position on the list of the corresponding originating applications to the Commission.

2. Rules A apply to all cases referred to the Court before the entry into force of Protocol No. 9 (P9) and thereafter only to cases concerning States not bound by that Protocol (P9). They correspond to the Rules that came into force on 1 January 1983, as amended several times subsequently.

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 March 1994, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated

in two applications (nos. 16419/90 and 16426/90) against the Republic of Turkey lodged with the Commission under Article 25 (art. 25) by two Turkish nationals, Mr Nabi Yagci and Mr Nihat Sargin, on 6 February 1990.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Turkey recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of Rules of Court A, the applicants stated that they wished to take part in the proceedings and designated the lawyers who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Gölcüklü, the elected judge of Turkish nationality (Article 43 of the Convention) (art. 43) and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 24 March 1994, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr R. Bernhardt, Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr R. Macdonald, Mr J. De Meyer, Mr I. Foighel and Mr B. Repik (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Turkish Government ("the Government"), the applicants' lawyers and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the applicants' and the Government's memorials on 19 and 28 July 1994 respectively. The Delegate of the Commission did not submit any written observations.

5. On 8 November 1994 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had given the applicants and their lawyers leave to use the Turkish language (Rule 27 para. 3), the hearing took place in the Human Rights Building, Strasbourg, on 25 October 1994. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr M. Özmen, Acting Agent,
Mrs D. Akçay, Adviser;

(b) for the Commission

Mrs J. Liddy, Delegate;

(c) for the applicants

Mr E. Sansal,
Mr G. Dinç, avukatlar (lawyers), Counsel.

The Court heard addresses by them.

AS TO THE FACTS

I. Circumstances of the case

7. Mr Yagci, a journalist, and Mr Sargin, a doctor, were the general secretaries of the Turkish Workers' Party and the Turkish Communist Party respectively. At a press conference in Brussels in October 1987 they announced their intention of returning to Turkey to found the Turkish United Communist Party (TBKP) and develop its organisation and political action while staying within the law.

8. On arrival at Ankara on 16 November 1987, they were arrested as they alighted from the plane and taken into police custody. On 4 December the public prosecutor's office applied to the Ankara National Security Court to have them placed in detention pending trial. On 5 December a judge of that court made an order to that effect on the basis of strong evidence of guilt and after hearing the suspects. He charged them with leading an organisation whose aim was to establish the domination of a particular social class and disseminating propaganda to that end and with the intention of abolishing the rights guaranteed in the Constitution; inciting public hostility and hatred; and harming the reputation of the Republic of Turkey, its President and its Government (Articles 140, 141/1, 142/1-6, 142/3-6, 158, 159, 311 and 312 of the Turkish Criminal Code). These offences also amounted to an attack on the Government's authority and could be classified as serious crimes.

9. On 10 December 1987, counsel for the applicants appealed against that decision, which was, however, unanimously upheld by the National Security Court on 16 December.

10. On 11 March 1988 the public prosecutor's office brought

proceedings against Mr Yagci and Mr Sargin and fourteen others.

11. The trial opened on 8 June 1988 and there were 48 hearings. The case file was made up of 40 different files. The defendants were represented by 400 lawyers, instructed before or during the course of the trial.

12. The first two hearings were taken up with a reading of the indictment, which ran to 229 pages. The court then devoted six hearings (from 4 July to 24 August 1988) to questioning the applicants and hearing addresses by them. This process, taken together with the content of the file and the nature of the offences which had given rise to the case were held by the court to justify keeping the defendants in detention.

13. At the hearing on 29 August 1988 one of the counsel for the applicants made the first application for their provisional release. He put forward the following arguments. His clients had been in detention for nine and a half months, including the period spent in police custody; although the nature of the offences with which Mr Yagci and Mr Sargin were charged might give rise to fears that they would abscond if released, that danger was ruled out in their case as they had publicly stated that they would be returning to Turkey to put their party on a lawful footing; and the differences of political opinion between the applicants and the regime in power could not be regarded as an attack on the authority of the Government and the State.

The court refused the application, holding that the reasons set out in the order of 5 December 1987 (see paragraph 8 above) remained valid.

14. On 21 September 1988 another of the applicants' representatives renewed the application, which was rejected by the court on the same day on the basis of the content of the file, the nature of the offences and the reasons set out in the relevant order.

15. On 14 October and 4 November 1988 the National Security Court ordered that Mr Yagci and Mr Sargin should be kept in detention, again on the basis of what was in the file. It also considered the organisational problems posed by the hearings on account of the large number of people wishing to attend them. Their lawyers had left the courtroom in order to have the security measures that applied during the trial lifted.

16. A fresh application for provisional release was lodged on 2 December 1988 by one of the applicants' lawyers. This placed particular emphasis on statements made by senior politicians and judges favouring changes to the legislation in order to permit

the establishment of a communist party. At the end of the hearing the court dismissed the application, having regard to the content of the file.

The court dealt similarly with an identical application made by Mr Sargin on 30 December and with others made by counsel on 27 January, 22 February, 24 March, 21 April and 18 May 1989. The reasons for turning down the applications were always the same: the nature of the offences charged, the content of the file, the length of detention and the fact that the evidence remained unchanged.

17. At the eighteenth hearing, on 21 April 1989, the court ordered that the documents containing the evidence should be read out, as counsel for the applicants had requested.

18. In a further application for release made on 3 July 1989 counsel for the applicants relied on the Convention. They maintained that Articles 141 and 142 of the Criminal Code conflicted with the provisions of the Convention and were shortly to be repealed. The court dismissed the application, relying on the content of the file, the date of detention and the reasons for it.

19. A similar application by Mr Yagci on 2 August 1989 met with no greater success. He criticised the court for the repetitiveness of its orders and urged it to give more precise reasons for them. He also observed that the one-month intervals between hearings was contributing to prolonging his detention. The court ruled that there had been no development warranting his release.

20. On 25 August and 18 September 1989 the National Security Court refused two more such applications, and the reasons given for its decisions remained unchanged.

21. On 18 October 1989 one of the applicants' lawyers raised the concept of "reasonable time" referred to in Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1) of the Convention and asserted that the length of his clients' detention infringed those provisions (art. 5-3, art. 6-1). He challenged, in particular, the repetitiveness of the reasons advanced by the court for refusing their applications for release. The court ordered that detention should continue, again relying on the nature of the offences and the content of the file.

22. The Convention's direct applicability in Turkish law was again emphasised in an application for release made at a hearing on 17 November 1989; but the National Security Court rejected this application and others made on 15 December 1989 and

6 April 1990.

On 8 February 1990 the court had looked into the possibility of joining the case with other trials, and on 9 March it had resumed the reading out of evidence. At both hearings it had considered of its own motion the issue of the applicants' continued detention.

23. Mr Yagci and Mr Sargin were eventually released provisionally on 4 May 1990, subject to the condition that they must not leave the country. In its unanimous decision the National Security Court took into account the legislative changes being prepared that might amend, to the defendants' advantage, the Acts on which their indictment had been based.

24. On 11 September 1990 the court dismissed an application to defer judgment that - on 11 July 1990 - had been made on the ground that it would be advisable to await the outcome of proceedings brought in the Constitutional Court concerning the dissolution of the Turkish Communist Party.

25. On 10 June 1991, following the entry into force of the Antiterrorist Act of 12 April 1991, which repealed Articles 141, 142 and 143 of the Criminal Code, the court decided to interrupt the reading out of the evidence relating to those provisions and to read out the evidence relating to the other charges. This process ended on 10 July during the forty-fifth hearing.

26. On 26 July 1991 the prosecutor made his closing address, and on 9 and 26 August the applicants put forward their defence.

27. On 9 October 1991 the Ankara National Security Court acquitted Mr Yagci and Mr Sargin on the charges brought against them under Articles 140, 141 and 142 of the Criminal Code as these had been repealed, and on charges of incitement to hatred made under Articles 311 and 312. It held that it had no jurisdiction in respect of the attack on the reputation of the Republic of Turkey, its President and its Government and referred the relevant charges to the Ankara Sixth Assize Court.

28. On 27 January 1992 that court held that it had no jurisdiction and referred the case to the Ankara Second Assize Court, which in a judgment of 9 July 1992 acquitted the applicants. No appeal on points of law was lodged against that decision, which became final on 16 July.

II. Relevant domestic law

A. The Constitution

29. Article 19 para. 7 of the Constitution provides:

> "Everyone who is deprived of his liberty for any reason whatsoever shall be entitled to take proceedings by which his case shall be decided speedily by a court and his release ordered if the detention is not lawful."

B. The Criminal Code

30. The following were the provisions of the Criminal Code as they applied at the material time:

Article 140

> "It shall be an offence, punishable by not less than five years' imprisonment, for any citizen to disseminate and publish exaggeratedly untruthful information in a foreign country for a subversive purpose, or to engage in any activity contrary to the national interest in such a way that the activity in question diminishes the regard or respect in which Turkey is held abroad."

Article 141

> "It shall be an offence, punishable by eight to fifteen years' imprisonment, to attempt to establish the domination of one social class over the others; to attempt to bring about the disappearance of any social class; or to attempt to set up associations in any manner and under any name whatsoever with the aim of overthrowing the country's fundamental social or economic order; or to set up, organise, lead or manage such associations or guide their activities.
>
> Anyone organising, leading or managing several or all of the associations of this type shall be liable to the death penalty.
>
> ..."

Article 142

> "It shall be an offence, punishable by five to ten years' imprisonment, to disseminate propaganda, in any manner and under any name whatsoever, with the aim of establishing the domination of one social class over the others, bringing about the disappearance of any social class, overthrowing the country's fundamental social or economic order, or totally destroying the State's political or legal system.

...

It shall be an offence, punishable by one to three years' imprisonment, to disseminate propaganda in any manner whatsoever for racist reasons or with the intention of wholly or partly abolishing the rights secured by the Constitution, or with the aim of weakening national sentiment.

It shall be an offence publicly to defend the acts set out in the preceding two paragraphs, punishable by not more than five years' imprisonment in the case of those set out in the first and second paragraphs and by six months' to two years' imprisonment in the case of those set out in the third paragraph.

Where a person has committed the acts set out in the preceding paragraphs as a member of one or more of the organisations referred to in the sixth paragraph of Article 141 or with the persons referred to therein, his sentence shall be increased by not more than one-third.

Where the acts set out in the preceding paragraphs have been committed through publications, the sentence shall be increased by one-half."

Article 158

"It shall be an offence, punishable by not less than three years' imprisonment, to utter insults against the President of the Republic or to utter insults in his presence.

Where the insulting words are uttered in the absence of the President of the Republic, the offender shall be punished by one to three years' imprisonment. Even where the insult is veiled or allusive, the name of the President of the Republic not being clearly mentioned, it shall be deemed to have been uttered explicitly provided that there are presumptions leaving no doubt that it was directed against the person of the President of the Republic.

Where this offence is committed through the medium of the press, sentence shall be increased by one-third to one-half."

Article 159

"It shall be an offence, punishable by one to six years' imprisonment, publicly to insult or revile the nation, the Republic, the Grand National Assembly, the moral authority of the Government, ministries, the armed forces, the national defence and security forces or the moral authority of the judiciary.

Even where, in the commission of the offence set out in the first paragraph, the name of the insulted person is not openly mentioned, the insult shall be deemed to have been uttered explicitly against that person provided that there are presumptions leaving no doubt that it was directed against one of the persons referred to in the first paragraph.

It shall be an offence, punishable by fifteen days' to six months' imprisonment and a fine of 100 to 500 liras, to disparage in public the laws of the Turkish Republic or the decisions of the Grand National Assembly.

If an insult against the Turkish nation is uttered by a Turk in a foreign country, the applicable sentence shall be increased by one-third to one-half."

Article 311

"It shall be an offence, punishable as hereinafter, publicly to incite another to commit an offence:

three to five years' imprisonment in the case of an offence carrying a sentence greater than fixed-term imprisonment;

up to three years' imprisonment, depending on the nature of the offence, where the penalty provided for is fixed-term imprisonment;

a fine not exceeding 500 liras in all other cases.

Where incitement is by means of newspapers or magazines or other distributed printed material or by means of handwritten documents disseminated in duplicated form or as placards and posters displayed in public places, the terms of imprisonment laid down in the preceding paragraphs shall be doubled. Where the penalty laid down is a fine, the sum payable shall be 25 to 1,000 liras, depending on the nature of the offence.

In the cases provided for in the second and third paragraphs, the penalty may not exceed the maximum

sentence for the offence incited.

Where the public incitement has led to commission of the offence or an attempt to commit it, the inciters shall be punished in the same way as principals."

Article 312

"It shall be an offence, punishable by three months' to one year's imprisonment and by a fine of 50 to 500 liras, publicly to praise or defend an act punishable by law as an offence or to urge the people to disobey the law, or to incite hatred between the different classes in society, in such a way as to endanger public safety.

The penalties for the acts set out in the preceding paragraph shall be doubled where they have been committed by means of a publication."

C. The Code of Criminal Procedure

31. The Code of Criminal Procedure contained the following provisions at the material time:

Article 112

"In the course of the preliminary investigation, for the duration of the accused's detention pending trial and at intervals of no more than thirty days, the magistrate's court shall examine, at the public prosecutor's request, whether or not it is necessary to prolong the accused's detention pending trial.

The accused may also request, within the period prescribed by the foregoing paragraph, that the court examine the question of his detention pending trial.

During the trial of an accused detained pending trial, the court shall at each hearing or, if circumstances so require, between hearings decide of its own motion whether it is necessary to prolong his detention."

Article 219

"The trial shall continue without interruption in the presence of the parties.

..."

Article 222

"Trials may not be interrupted for more than eight days, except in cases of necessity. Where the accused are in detention pending trial, the interruption may not exceed thirty days, even where necessity exists."

Article 299

"... [A]pplications to set aside decisions and orders of this court [the Assize Court] shall be heard by the nearest other Assize Court ..."

PROCEEDINGS BEFORE THE COMMISSION

32. Mr Yagci and Mr Sargin applied to the Commission on 6 February 1990. They complained of the length of their detention pending trial (Article 5 para. 3 of the Convention) (art. 5-3) and of the criminal proceedings brought against them (Article 6 para. 1) (art. 6-1).

33. The Commission declared the applications (nos. 16419/90 and 16426/90) admissible on 10 July 1991. In its report of 30 November 1993 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a breach of those two provisions (art. 5-3, art. 6-1). The full text of the Commission's opinion is reproduced as an annex to this judgment (1).

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1. Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 319-A of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

FINAL SUBMISSIONS BY THE GOVERNMENT TO THE COURT

34. In their memorial the Government asked the Court to

"allow [their] preliminary objections both as regards the Court's jurisdiction and as regards the admissibility of the case before the Commission and the Court itself.

In the alternative ... to hold that Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1) of the Convention ha[d] not been violated".

AS TO THE LAW

I. INTRODUCTORY OBSERVATION

35. The Government submitted that their arguments in the present case should be considered only if Turkey's recognition of the Court's compulsory jurisdiction were deemed valid in its entirety.

In the case of Loizidou v. Turkey the Government contended that Turkey's declaration of 22 January 1990 under Article 46 (art. 46) of the Convention would not be valid if the Court held the limitation ratione loci it contained to be invalid. The Court, in its judgment of 23 March 1995, while holding the limitation in question invalid, ruled that the said declaration contained a valid acceptance of its competence (Series A no. 310, p. 32, para. 98).

II. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

36. As their main submission the Government raised three objections to admissibility, based on lack of jurisdiction ratione temporis, failure to exhaust domestic remedies and loss of victim status.

1. Lack of jurisdiction ratione temporis

37. The Government contended that when, on 22 January 1990, Turkey had recognised the Court's compulsory jurisdiction over "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention had been to remove from the ambit of the Court's review events that had occurred before the date on which the declaration made under Article 46 (art. 46) of the Convention was deposited. Moreover, in the present case the Court's jurisdiction ratione temporis was also excluded in respect of facts subsequent to 22 January 1990 which by their nature were merely "extensions of ones occurring before that date".

38. Mr Yagci and Mr Sargin submitted that the Court, in the same way as the Commission, had jurisdiction to deal with the case from the time it began, namely 16 November 1987, when they were arrested. Any other solution would result in different treatment of the same facts by the two Convention institutions.

39. The Delegate of the Commission argued that even if the Court held that it had jurisdiction from 22 January 1990, it would have to take into consideration the fact that on that date the applicants had been in detention pending trial, in connection with criminal proceedings, for more than two years and two months.

40. Having regard to the wording of the declaration Turkey

made under Article 46 (art. 46) of the Convention, the Court considers that it cannot entertain complaints about events which occurred before 22 January 1990 and that its jurisdiction ratione temporis covers only the period after that date. However, when examining the complaints relating to Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1) of the Convention, it will take account of the state of the proceedings at the time when the above-mentioned declaration was deposited (see, among other authorities and mutatis mutandis, the Neumeister v. Austria judgment of 27 June 1968, Series A no. 8, p. 38, para. 7, and the Baggetta v. Italy judgment of 25 June 1987, Series A no. 119, p. 32, para. 20).

It therefore cannot accept the Government's argument that even facts subsequent to 22 January 1990 are excluded from its jurisdiction where they are merely extensions of an already existing situation. From the critical date onwards all the State's acts and omissions not only must conform to the Convention but are also undoubtedly subject to review by the Convention institutions.

2. Non-exhaustion of domestic remedies

41. The Government also pleaded - as they had done before the Commission - failure to exhaust domestic remedies, arguing that the applicants had in the first place neglected to apply to have set aside the decisions in which the Ankara National Security Court had ordered that they should continue to be kept in detention, a possibility afforded them, in particular, by Article 299 of the Code of Criminal Procedure.

Nor had Mr Yagci and Mr Sargin relied in the national proceedings on Article 19 para. 7 of the Constitution, which gave everyone in detention pending trial the right to be tried within a reasonable time.

Lastly, the applicants had not sought relief under Law no. 466 of 7 May 1964, which guaranteed persons who had been lawfully or unlawfully in detention the possibility of obtaining damages, irrespective of whether they had been acquitted, discharged without being brought to trial, or convicted.

42. As regards the first limb of the objection, the Court notes - like the Commission - that the remedy indicated by the Government must be sufficiently certain, in practice as well as in theory (see, mutatis mutandis, the Navarra v. France judgment of 23 November 1993, Series A no. 273-B, p. 27, para. 24). In 1958, however, the Court of Cassation twice held that Article 299 of the Code of Criminal Procedure, which was designed to enable applications to be made to have detention orders set aside, did

not apply to orders prolonging detention. The Government did not cite any case-law to the contrary.

43. As regards Article 19 of the Constitution, the Court observes that the Government did not dispute - either before the Commission or at the hearing on 25 October 1994 - that that provision was largely modelled on Article 5 (art. 5) of the Convention and that the latter had been relied on by the applicants in the National Security Court three times (see paragraphs 18, 21 and 22 above).

44. As to the last limb of the objection, the Court points out that the applicants complained of the length of their detention pending trial, whereas Law no. 466 refers to an action for damages against the State in respect of detention undergone by persons who have been acquitted. Besides, the right to be tried within a reasonable time or released during the proceedings is not the same as the right to receive compensation for detention. Paragraph 3 of Article 5 (art. 5-3) of the Convention covers the former and paragraph 5 of Article 5 (art. 5-5) the latter. In conclusion, the objection is unfounded on this point also.

3. Loss of victim status

45. Lastly, the Government maintained that once they had been released on 4 May 1990, Mr Yagci and Mr Sargin could no longer claim to be victims of breaches of the Convention. They had received a kind of redress for the allegedly excessive length of their detention and the proceedings; the National Security Court had taken account of the major legislative reform that was under way in Turkey, which might result in the criminal provisions on which the applicants' committal for trial was based being amended to their advantage; and on the above-mentioned date, Mr Yagci's and Mr Sargin's acquittal seemed to be the only possible outcome of the proceedings in question.

46. The Court notes that the objection was not raised before the Commission, and it therefore dismisses it as there is estoppel.

III. ALLEGED VIOLATION OF ARTICLE 5 PARA. 3 (art. 5-3) OF THE CONVENTION

47. Mr Yagci and Mr Sargin complained of the length of their detention pending trial. They considered it contrary to Article 5 para. 3 (art. 5-3) of the Convention, which provides:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article

(art. 5-1-c) shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

48. The Government contested this view, in the alternative, whereas the Commission accepted it.

A. Period to be taken into consideration

49. Having regard to the conclusion in paragraph 40 of this judgment, the Court can only consider the period of three months and twelve days which elapsed between 22 January 1990, when the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited, and 4 May 1990, when the applicants were provisionally released (see paragraph 23 above). However, when determining whether the applicants' continued detention after 22 January 1990 was justified under Article 5 para. 3 (art. 5-3) of the Convention, it must take into account the fact that by that date the applicants, having been placed in detention on 16 November 1987 (see paragraph 8 above), had already been in custody for two years and two months.

B. Reasonableness of the length of detention

50. It falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the Court is called upon to decide whether or not there has been a violation of Article 5 para. 3 (art. 5-3) of the Convention (see, among other authorities, the Letellier v. France judgment of 26 June 1991, Series A no. 207, p. 18, para. 35).

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices; the Court must then establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty (ibid. and see the Wemhoff v. Germany judgment of 27 June 1968, Series A no. 7, pp. 24-25, para. 12, and the Ringeisen v. Austria judgment of 16 July 1971, Series A no. 13, p. 42, para. 104). Where such grounds are "relevant" and "sufficient", the Court

must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings (see the Matznetter v. Austria judgment of 10 November 1969, Series A no. 10, p. 34, para. 12; the B. v. Austria judgment of 28 March 1990, Series A no. 175, p. 16, para. 42; and the Letellier judgment previously cited, p. 18, para. 35).

51. During the period covered by the Court's jurisdiction ratione temporis the Ankara National Security Court considered the question of the applicants' continued detention on three occasions - on 8 February and 9 March 1990 of its own motion and on 6 April on an application by the applicants (see paragraph 22 above).

As grounds for refusing to release Mr Yagci and Mr Sargin it cited the nature of the offences (classified as serious crimes, they gave rise in law to a presumption that there was a risk that the accused would abscond), "the state of the evidence" and the date of arrest, namely 16 November 1987 (see paragraph 8 above).

In the Government's submission, the applicants were kept in detention for as long as that was necessary to prevent them from absconding.

52. The Court points out that the danger of an accused's absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial (see, mutatis mutandis, the Letellier judgment previously cited, p. 19, para. 43).

Mr Yagci and Mr Sargin had returned to Turkey of their own accord and with the specific aim of founding the Turkish United Communist Party (see paragraphs 7 and 13 above) and they could not be unaware that they would be prosecuted for this.

The National Security Court's orders confirming detention nearly always used an identical, not to say stereotyped, form of words, without in any way explaining why there was a danger of absconding.

53. The expression "the state of the evidence" could be understood to mean the existence and persistence of serious indications of guilt. Although in general these may be relevant factors, in the present case they cannot on their own justify the continuation of the detention complained of (see the Kemmache v. France (nos. 1 and 2) judgment of 27 November 1991, Series A

no. 218, p. 24, para. 50).

54. The third reason put forward by the National Security Court, namely the date of the applicants' arrest, does not stand up to scrutiny either, since no total period of detention is justified in itself, without there being relevant grounds under the Convention.

55. In the light of these considerations, the Court holds that the applicants' continued detention during the period in question contravened Article 5 para. 3 (art. 5-3).

That conclusion makes it unnecessary to look at the way in which the judicial authorities conducted the case.

IV. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1) OF THE CONVENTION

56. Mr Yagci and Mr Sargin further complained of the length of the criminal proceedings against them. They relied on Article 6 para. 1 (art. 6-1) of the Convention, which provides:

> "In the determination of ... any criminal charge against him, everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal ..."

57. The Government contested this view, again in the alternative, whereas the Commission accepted it.

A. Period to be taken into consideration

58. The proceedings began on 16 November 1987, when the applicants were arrested and taken into police custody, and ended not - as the Government argued - on 9 October 1991, when the applicants were acquitted of offences under Articles 141-43 (repealed on 12 April 1991 - see paragraphs 23, 25 and 27 above), 311 and 312 of the Criminal Code, but on 16 July 1992, when the Ankara Second Assize Court's judgment of 9 July in which the applicants were acquitted on the remaining charges became final (see paragraph 28 above).

However, having regard to the conclusion in paragraph 40 of this judgment, the Court can only consider the period of two years, five months and twenty-four days that elapsed between 22 January 1990, the date on which the declaration whereby Turkey recognised the Court's compulsory jurisdiction was deposited, and 16 July 1992. Nevertheless, it must take into account the fact that by the critical date the proceedings had already lasted more than two years.

B. Reasonableness of the length of proceedings

59. The reasonableness of the length of proceedings is to be assessed in the light of the particular circumstances of the case, regard being had 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 precedents, the Kemmache (nos. 1 and 2) judgment previously cited, p. 27, para. 60).

1. Complexity of the case

60. The Government maintained that the case had been an extremely complex one as the evidence in the trial ran to forty files concerning sixteen accused, who were defended by a very large number of counsel. The Ankara National Security Court had not only to look at the evidence before it but also to read it out at the hearings, as requested by counsel for Mr Yagci and Mr Sargin so that the defence could make their observations. Ignoring that request would have resulted in the judgment's being quashed under Article 250 of the Code of Criminal Procedure.

61. The applicants contended that they had asked to have the documents in the case file read out because the prosecution had given no indication as to which charges the documents were supposed to prove. Furthermore, in view of the number of documents, Mr Sargin had himself suggested to the court that his counsel should, together with the representative of the public prosecutor's office, make a preliminary selection from them in order to speed up the trial; the court had refused. Nor had the case been especially complex, since it was a question simply of establishing that the party that they had wished to found was illegal at the time. Three months ought to have sufficed to complete the proceedings. The large number of counsel present had to be interpreted as a form of protest against political trials.

62. According to the Delegate of the Commission, even supposing that the case had been a complex one, the National Security Court's task of establishing the facts had been made easier as the applicants had never denied their aims and the file had contained documents concerning their political activities.

63. The Court notes merely that from 22 January 1990 the National Security Court held twenty hearings, sixteen of which were devoted almost entirely to reading out evidence. That process, even allowing for the quantity of documents, cannot be regarded as complex.

2. The applicants' conduct

64. The Government criticised the applicants' lawyers for having contributed to prolonging the proceedings by leaving the hearing room on several occasions in protest against the security measures imposed at the trial and by not complying with the time-limits for making observations on the evidence in the file. Furthermore, the Government regarded the application of 11 July 1990 to defer judgment (see paragraph 24 above) and the filing of numerous documents as having been delaying tactics.

65. The applicants said that they had always co-operated with the relevant courts.

66. The Court reiterates that Article 6 (art. 6) does not require a person charged with a criminal offence to co-operate actively with the judicial authorities (see, as the most recent authority, the Dobbertin v. France judgment of 25 February 1993, Series A no. 256-D, p. 117, para. 43). It notes, like the Commission, that the conduct of Mr Yagci and Mr Sargin and their counsel at the hearings does not seem to have displayed any determination to be obstructive. At all events, the applicants cannot be blamed for having taken full advantage of the resources afforded by national law in their defence. Even if the large number of counsel present at the hearings and their attitude to the security measures slowed down the proceedings to some extent, they are not factors that, taken alone, can explain the length of time in issue.

3. Conduct of the judicial authorities

67. In the Government's submission, the judicial authorities had always tried to bring the trial to a swift conclusion without, however, infringing the rights of the defence.

68. The applicants maintained that by claiming to be staging a "mass trial" of which they were the sole targets, the prosecution had been able to apply the special rules on the length of police custody, judicial investigation and proceedings. Furthermore, by holding an average of one hearing a month, the National Security Court had systematically disregarded Article 222 of the Code of Criminal Procedure, which prohibited any interruption of a trial for longer than eight days except in cases of necessity.

69. The Court does not in this instance have to speculate as to the motives of the prosecution at the National Security Court. It notes merely that between 22 January 1990 and 9 July 1992 that court held only twenty hearings in the case at regular intervals (less than thirty days), only one of which lasted for longer than half a day.

Moreover, after the Antiterrorist Act of 12 April 1991, repealing Articles 141-43 of the Criminal Code, had come into force (see paragraph 25 above), the National Security Court waited nearly six months before acquitting the applicants on the charges based on those provisions.

70. In conclusion, the length of the criminal proceedings in question contravened Article 6 para. 1 (art. 6-1).

V. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

71. Under Article 50 (art. 50) of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damages

72. Mr Yagci and Mr Sargin firstly claimed compensation to be calculated in European Currency Units and having regard to the date of actual payment by Turkey. They did not quantify it but said that the amount should be a large one in order to act as a deterrent. They relied on their suffering throughout detention and trial, the impossibility of carrying on their occupation and the slur on their honour.

73. The Government referred to their preliminary objections based on non-exhaustion of domestic remedies and loss of victim status (see paragraphs 41 and 45 above) and asked the Court to dismiss the claims.

74. The Delegate of the Commission did not make any submissions.

75. While reiterating that in the instant case its jurisdiction ratione temporis began on 22 January 1990, the Court considers, having regard to the particular circumstances of the case, that the applicants sustained non-pecuniary damage which the findings of violations in paragraphs 55 and 70 of this judgment cannot make good. It awards them each 30,000 French francs (FRF) under this head.

As to pecuniary damage, it is not apparent from the evidence that any was sustained.

B. Costs and fees

76. The applicants also sought reimbursement of the costs and expenses incurred in both sets of proceedings before the Convention institutions, which they estimated at FRF 38,000 in all. As to the fees of their counsel, they wished to leave it to the Court's discretion to assess the amount, having due regard to "the rates applied in the profession for similar services".

77. No observations were made on the matter by either the Government or the Commission.

78. On the basis of its case-law and the evidence before it, the Court considers the amount for costs and expenses to be reasonable. As to the fees, it decides to award FRF 30,000 for the two lawyers on an equitable basis.

C. Other claims

79. The applicants asked the Court, lastly, to request the respondent State to comply with the undertakings it made when ratifying the Convention. They suggested a number of remedies for the shortcomings in Turkish law.

In the first place, they considered it necessary to repeal section 31 of Law no. 3842 of 1 December 1992, which precluded application of the other provisions of the Law - limiting the length of detention - to offences over which the National Security Court continued to have jurisdiction.

Secondly, they deplored the lack of any procedure for speeding up the handling of cases and for providing compensation where a reasonable time had been exceeded.

Thirdly, they considered that Turkey should make greater efforts to ensure that the Strasbourg institutions' interpretations of the Convention's substantive provisions were known, especially in academic and judicial circles.

80. The Government and the Delegate of the Commission did not make any submissions.

81. The Court notes that the Convention does not empower it to accede to such a request. It reiterates that it is for the State to choose the means to be used in its domestic legal system in order to comply with the provisions of the Convention or to redress the situation that has given rise to the violation of the

Convention (see, mutatis mutandis, the Zanghì v. Italy judgment of 19 February 1991, Series A no. 194-C, p. 48, para. 26, and the Demicoli v. Malta judgment of 27 August 1991, Series A no. 210, p. 19, para. 45).

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the preliminary objection of lack of jurisdiction ratione temporis;

2. Dismisses unanimously the objection that domestic remedies were not exhausted;

3. Dismisses unanimously the objection based on loss of victim status;

4. Holds by eight votes to one that there has been a breach of Article 5 para. 3 (art. 5-3) of the Convention on account of the length of the applicants' detention;

5. Holds by eight votes to one that there has been a breach of Article 6 para. 1 (art. 6-1) of the Convention on account of the length of the criminal proceedings;

6. Holds by eight votes to one that the respondent State is to pay each of the applicants, within three months, 30,000 (thirty thousand) French francs in respect of non-pecuniary damage;

7. Holds unanimously that the respondent State is to pay the two applicants jointly, within three months, 38,000 (thirty-eight thousand) French francs in respect of costs and expenses and 30,000 (thirty thousand) francs in respect of lawyers' fees;

8. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 8 June 1995.

Signed: Rolv RYSSDAL
President

Signed: Herbert PETZOLD
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of Rules of Court A, the dissenting opinion of Mr Gölcüklü is annexed to this judgment.

Initialled: R. R.

Initialled: H. P.

DISSENTING OPINION OF JUDGE GÖLCÜKLÜ

(Translation)

1. I maintain the position I expressed in my dissenting opinion in the case of Loizidou v. Turkey (judgment of 23 March 1995, Series A no. 310) concerning the question of the validity of Turkey's declarations under Articles 25 and 46 (art. 25, art. 46) of the Convention.

2. Article 5 para. 3 (art. 5-3). When, on 22 January 1990, Turkey recognised the Court's jurisdiction over "matters raised in respect of facts, including judgments which are based on such facts which have occurred subsequent to" that date, its intention was to remove from the ambit of the Court's review events that had occurred before the date on which the declaration made under Article 46 (art. 46) of the Convention was deposited. The Court acknowledges this: "Having regard to the wording of the declaration Turkey made under Article 46 (art. 46) ..., the Court ... cannot entertain complaints about events which occurred before 22 January 1990 and ... its jurisdiction ratione temporis covers only the period after that date" (see paragraph 40). That is correct and is patently obvious in view of the explicit wording of Article 46 (art. 46).

3. However, the Court goes on to say: "... when examining the complaints relating to Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1) of the Convention, [the Court] will take account of the state of the proceedings at the time when the above-mentioned declaration was deposited" (see paragraph 40).

4. This assertion raises the question of the practical consequences of this case-law, in other words the effect it has on the merits of the case under consideration.

5. The Turkish declaration was made on 22 January 1990. The applicants, who had been detained since 16 November 1987, lodged an application for their release for the first time on 29 August 1988, that is to say nine months and thirteen days after being deprived of their liberty (see paragraph 13); they were provisionally released on 4 May 1990 (see paragraph 23), only three months and eleven days after Turkey's declaration under Article 46 (art. 46) of the Convention - a relatively short period of time.

6. Article 6 para. 1 (art. 6-1). On 11 March 1988 the public prosecutor's office brought proceedings against the applicants; the trial opened on 8 June 1988. The case file was very bulky. The defendants were represented by 400 lawyers (see paragraphs 10-11).

7. At the time of the applicants' provisional release, the legislative changes that were already under way with the aim of repealing the Acts on which their indictment had been based were making progress (see paragraph 23).

Articles 141, 142 and 143 of the Turkish Criminal Code, under which Mr Yagci and Mr Sargin had been prosecuted, were repealed, and as a result the court decided, on 10 June 1991, to interrupt the reading out of the documents in the file relating to those provisions and to read out the evidence relating to the other charges. This process ended on 10 July 1991, one year, four months and eighteen days after the Turkish declaration in question. The proceedings could be considered as having really ended on that date, since what happened subsequently was a mere formality. And everything connected with the prosecution of the applicants ended on 9 July 1992. Even if the proceedings are regarded as having ended on the latter date, the trial lasted in all for two years, five months and seventeen days after Turkey's declaration under Article 46 (art. 46), which to my mind is not excessive for a trial on such a scale.

8. It should be noted that on 11 July 1990 the applicants themselves had asked the court to defer judgment, on the ground that it would be advisable to await the outcome of the proceedings brought in the Constitutional Court concerning the dissolution of the Turkish Communist Party (see paragraph 24).

9. Even if one regards as appropriate and consistent with the spirit of the Convention the Court's case-law to the effect that, when assessing reasonableness for the purposes of Articles 5 para. 3 and 6 para. 1 (art. 5-3, art. 6-1), it will take into account the period prior to the declaration made by Turkey, the rule will, in my opinion, affect the outcome only where the pointer of the scales is hovering on the line that separates "reasonable" from "unreasonable".

10. We must bear in mind the fact that the provisions of Article 25 and Article 46 (art. 25, art. 46) concerning time limitations on them are totally and completely independent of each other, and that a State may very well recognise the right of individual petition without recognising the Court's jurisdiction.

11. In the present case, the lines formed by the applicants'

provisional release after three months and eleven days (Article 5 para. 3) (art. 5-3), and by the end of the proceedings, one year, four months and eighteen days (or, if preferred, two years, five months and seventeen days) after the declaration made by Turkey under Article 46 (art. 46), cannot be regarded as boundaries between "reasonable" and "unreasonable" if account is taken of the conditions in which this trial was conducted. Any other approach would mean confusing in an unacceptable way the provisions of Articles 25 and 46 (art. 25, art. 46) on limitations ratione temporis on the application of those Articles (art. 25, art. 46).

12. I take the view that neither by applying the "evolutive and progressive" method of interpretation it has adopted nor by applying the principle of implementing the Convention in a "useful" way, does the European Court of Human Rights have power to modify the provision of Article 46 (art. 46) concerning limitations ratione temporis to the point of rendering it ineffective or negating its existence.

13. I therefore reach the conclusion, contrary to the opinion of the majority, that Turkey has violated neither Article 5 para. 3 nor Article 6 para. 1 (art. 5-3, art. 6-1) of the Convention.