APPLICATIONS/REQUÊTES N° 14116/88 et 14117/88 (joined/jointes)

Nihat SARGIN and Nabi YAGCI v/TURKEY

Nihat SARGIN et Nabi YAGCI c/TURQUIE

DECISION of 11 May 1989 on the admissibility of the application

DÉCISION du 11 mai 1989 sur la recevabilité de la requête

Article 3 of the Convention : *Allegations of torture and ill-treatment during police custody lasting 19 days, lack of contact between the applicants and their lawyers, families and friends, and doctor of their choice (complaints declared admissible).*

Article 5, paragraph 1 (c) and paragraphs 3 and 4, of the Convention : *Question whether police custody of 19 days constituted lawful detention for the purpose of bringing before a competent legal authority, whether the applicants were brought promptly before a judge and whether they were able to take proceedings to have the lawfulness of their detention decided by a court (complaints declared admissible).*

Articles 3 and 26 of the Convention : *In order to complain about treatment suffered during police custody (Turkey), the lawfulness of which has been confirmed by the competent judicial authorities, lodging of a criminal complaint constitutes an effective and sufficient remedy. Where the complaint has not been pursued by the prosecuting authorities, the person concerned is not required in addition to bring administrative or civil proceedings for compensation or to challenge the decision not to pursue the complaint by invoking Article 343 of the Code of Criminal Procedure.*

Articles 5 and 26 of the Convention : *In order to complain about a decision ordering police custody (Turkey), the lawfulness of which has been confirmed by the competent judicial authorities, lodging of a criminal complaint constitutes an effective and sufficient remedy. Where the complaint has not been pursued by the prosecuting authorities, the person concerned is not required to try the following remedies, which are not accessible or are ineffective :*

- *a request for compensation based on Act N° 466 on the compensation of persons unlawfully arrested or detained, or an administrative appeal on the grounds of an administrative error on the basis of Article 41 of the Code on Obligations ;*

- *an appeal to the District Judge on the basis of Article 19 of the Constitution ;*

- *an action for compensation based on Article 5 para. 5 of the Convention ;*

- *an objection to the decision not to pursue the criminal complaint, based on Article 343 of the Code of Criminal Procedure ;*

- *a request that the matter be referred to the Constitutional Court in application of Article 152 of the Constitution.*

(TRANSLATION)

THE FACTS

The facts, as submitted by the parties, may be summarised as follows.

The first applicant, Mr. Sargin, of Turkish nationality, born in 1926, has a permanent address in Istanbul. He is a doctor of medicine and the Secretary General of the Turkish Workers' Party, which is illegal in Turkey. He has been in detention in Ankara since 16 November 1987.

The second applicant, Mr. Yagci, of Turkish nationality, born in 1944, has a permanent address in Berlin. He is a journalist and Secretary General of the Turkish Communist Party, which is illegal in Turkey. He has been in detention in Ankara since 16 November 1987.

In the proceedings before the Commission they were represented by Mrs. Necla Fertan, a lawyer practising in Istanbul, and Mr. Ersen Sansal, a lawyer

practising in Ankara, together with Mr. Güney Dinç and Mrs. Sibel Uslu, lawyers practising in Izmir.

In October 1987, the applicants held a press conference in Brussels to announce their intention of returning to Turkey, after a long absence, to support the "legalisation" of their parties and to set up a new party : the "United Communist Party of Turkey".

On 30 October 1987, the Public Prosecutor attached to the State Security Court in Ankara asked the Ankara Security Department for the applicants to be arrested immediately upon their return to Turkey, since they were leaders of a Communist organisation, to be questioned by the prosecuting authorities and placed in police custody so that the necessary evidence could be obtained. The Prosecutor reiterated his request on 14 November 1987.

The applicants were arrested on their arrival in Turkey, on 16 November 1987, on the basis of an order issued by the Public Prosecutor attached to the State Security Court stating that they should be kept in police custody until 23 November 1987.

At the request of the Ankara Security Department, lodged in writing on 23 November 1987, the Public Prosecutor attached to the State Security Court ordered the period of the applicants' detention to be extended until 30 November 1987.

At 5 o'clock on the morning of 2 December 1987, the applicants were taken from the Security Department to the Public Prosecution Department of the Security Court. They appeared before the Public Prosecutor on both 2 and 3 December 1987, their statements being recorded on video cassette.

At 2 p.m. on 4 December 1987 the Public Prosecutor attached to the State Security Court requested the investigating judge to have the applicants detained on remand. The Prosecutor accused them of being the leaders of an organisation whose aim was to establish the domination of one social class over others, of carrying out propaganda to this end, of spreading false information damaging to the honour of the State, of inciting the population to hostility and hatred based on class distinctions and of prejudicing the honour of the legal personality of the Turkish Republic and its governmental institutions. These offences are punishable under Articles 141/1, 141/1-6, 140, 312/2-3, 158/2-3 and 159/1 of the Turkish Criminal Code.

At 8.30 a.m. on 5 December 1987, the applicants appeared before the investigating judge, who, after hearing them, charged them and ordered that they should be detained on remand. On 10 December 1987, counsel for the applicants appealed against the order of detention on remand. On 16 December 1987, the appeal was rejected unanimously by the State Security Court, which considered that the order of 5 December 1987 was in accordance with the laws and procedures in force.

Documents in the file reveal that while they were in police custody the applicants were examined three times, on 17 and 18 November and 1 December 1987, by doctors from the Forensic Medical Service, at the request of the Ankara Security Department. The three expert reports stated that no trace of physical torture had been found. The report dated 1 December 1987, mentioned that the applicants had complained of shoulder pains.

After being placed in detention on remand, the applicants lodged a complaint, dated 9 December 1987, with the Public Prosecution Department of Yenimahalle-Ankara relating to both ill-treatment they said they had received during police custody and to the length of that custody.

The applicants requested the Public Prosecution Department to take proceedings against the police officers who, they alleged, had ill-treated them and had unlawfully deprived them of their liberty.

Counsel for the applicants requested further information on 18 December 1987, stating that the applicants had been kept in police custody unlawfully between 16 November 1987 and 5 December 1987, during which period they had been unable to contact their legal representatives, families or any outside persons. Counsel argued that the prolongation of custody, together with police questioning for 19 days, were contrary to the provisions of Act No. 2845 concerning the State Security Courts. Indeed, under the terms of Section 16 of this law, the maximum period of police custody is, in the case of an "individual" offence, 48 hours and in the case of a "public" offence 15 days. They added that the sole purpose of police custody was to extract confessions by ill-treatment and allow any traces of such treatment to disappear. Counsel for the applicants also asked the judicial authorities to visit the location where the events had occurred, without prior notice to the police, so as to seek out the instruments alleged to have been used in inflicting ill-treatment on the applicants. They also asked that the applicants be examined by independent doctors, Turkish or otherwise, with experience in the field of torture, in view of the difficulty of easily diagnosing visible signs of torture. Counsel for the applicants concluded that there was sufficient evidence to bring charges against the police officers alleged to be responsible for these acts.

On 21 December 1987, the Public Prosecution Department of Yenimahalle-Ankara dismissed the allegations, after hearing on 14 December 1987 the applicants appearing as plaintiffs, together with the doctors of the Forensic Medical Service, the head of the Cardiology Institute, the Professor of Forensic Medicine at the Faculty of Medicine, University of Ankara, the Ankara Chief of Police and a doctor specialising in drugs, appearing as witnesses.

In dismissing the allegations, the Public Prosecution Department pointed out that none of the three expert reports had mentioned any trace of torture, while the Chief of the Political Police responsible for questioning the applicants had declared that he had been with them throughout their questioning, which in his words had been like a "friendly discussion". The dismissal also referred to the

declarations by the Professor of Forensic Medicine, according to whom only sodium penthanol could have caused the problems described by the applicants; although the doctor stated that this substance could not be injected without medical supervision. The Public Prosecution Department was of the opinion that since police custody was on the orders issued by the Public Prosecutor attached to the Ankara State Security Court on 16 November and 23 November 1987, there was no improper infringement of freedom.

On 7 January 1988, counsel for the applicants applied to the President of the Assize Court of Altindag-Ankara to have the dismissal order by the Public Prosecution Department of Yenimahalle set aside. They argued that the Yenimahalle Public Prosecution Department had failed to examine the merits of the allegations made in their complaints and that further information should have been sought. Counsel for the applicants also pointed out that the medical examinations took place without any prior analysis or X-rays although according to the medical reports, the physical and mental state of the applicants required further and more detailed medical examination. They also indicated that the Public Prosecution Department had limited itself to questioning the Chief of Police and had taken into account only his personal opinion, without questioning other police officers or witnesses. Lastly, they criticised the Public Prosecution Department for not ordering a visit to the location or confronting the applicants with those who were alleged to have ill-treated them.

In conclusion, counsel for the applicants asked the President of the Assize Court of Altindag to instruct the competent judge to carry out further enquiries and to bring criminal charges against the police officers.

On 18 January 1988, the President of the Assize Court of Altindag-Ankara, deciding on the elements submitted to the Court, delivered a judgment rejecting counsel's application to have the dismissal order by the Public Prosecution Department set aside. In the decision it was stated that the applicants had lodged a complaint with the Yenimahalle Public Prosecution Department on 9 December 1987, claiming they had been ill-treated and tortured and had been unlawfully deprived of their freedom during the enquiries carried out at the Ankara Security Department. It was also stated that the Public Prosecution Department had questioned the applicants, heard witnesses, received the expert report and examined the reports on the medical examinations carried out while they were held in police custody. Considering that the Public Prosecution Department had therefore obtained evidence in accordance with procedure, the President of the Assize Court concluded that in the absence of sufficient evidence of the alleged torture, ill-treatment and unlawful deprivation of freedom, the acts carried out by the Public Prosecution Department were in keeping with the law and procedure.

COMPLAINTS

The applicants' complaints may be summarised as follows :

1. Firstly, the applicants allege violation of Article 3 of the Convention and claim that they were subjected to torture by Ankara police officers while they were held in police custody. Furthermore, the fact that they were unable to have criminal proceedings instituted against the persons who had carried out these acts confirms, in their opinion, that torture is a systematic, administrative practice.

In this context, the applicants complain that while they were in detention in police premises, they were questioned continuously by three teams of interrogators without being able to sleep, constantly seated on chairs, usually blindfolded and when not with a very bright light shining into their eyes.

During questioning, names of Communist Party or Workers' Party sympathisers were extracted from them, these individuals subsequently being charged on the basis of information provided by the applicants.

The applicants also claim that their tea was laced with narcotics and that they were given injections in order to wear down their mental resistance.

The applicants further allege that twice high-pressure jets of cold water were directed at their heads and testicles and that they were also suspended, their arms tied behind their backs, from a hook fixed in the ceiling. The second applicant complains that electric shocks were administered while he was in this position. The first applicant also claims that he was threatened with being thrown out of a window.

2. The applicants also allege violation of Article 5 paras. 1, 3 and 4 of the Convention taken both alone and in combination with Article 3 of the Convention. In particular, they allege :

- that police custody for a period of 19 days without judicial decision is in breach of Article 5 para. 1 (a) ;

- that there has also been a violation of Article 5 para. 1 (c) of the Convention in that despite their declaration before their return to Turkey, when there was no state of emergency and no offence was in the course of being committed, they were arrested not in order to be brought before a judge but rather to undergo arbitrary punishment ;

- that there has been a violation of Article 5 para. 1 (a) and (c) in combination with Article 3 in that they were questioned under torture ;

- that it was impossible for them to complain about the ill-treatment received during police custody, since they were unable either to contact their legal representatives or to lodge a complaint with the Public Prosecution Department,

in violation of Article 5 para. 4 of the Convention, taken alone or in combination with Article 3.

3. Furthermore, the applicants claim that there has been a violation of Article 6 para. 3 (c) of the Convention in that it was impossible to communicate with their legal representatives and that their right to remain silent was not observed. The applicants add that there has been a violation of Article 6 para. 3 (c) in combination with Article 3 as they were prevented from making contact with their legal representatives, which facilitated their ill-treatment.

The applicants also allege a violation of Article 6 para. 3 (d) of the Convention, taken alone or in combination with Article 3, in that it was impossible for them to question defence witnesses in relation to their complaint against the authors of the ill-treatment and torture which they had undergone, to be examined by independent doctors (specialists at the Centre for the Rehabilitation of Torture Victims in Denmark) instead of official doctors and by such means to prove the existence of torture as an administrative practice.

The applicants go on to allege a violation of Article 6 para. 1 of the Convention since the proceedings relating to the complaint against the police took place without a public hearing.

4. Lastly, the applicants allege violation of Articles 9 para. 1, 10 and 14 of the Convention taken alone or in combination with Article 3 in that the alleged ill-treatment and the investigations carried out were the direct consequence of conflicting views between the applicants and the Turkish authorities on the current political system.

.....

THE LAW

1. In view of the connection between the applications, the Commission orders their joinder pursuant to Rule 29 of its Rules of Procedure.

2. The applicants complain before the Commission of the conditions of their detention between 16 November and 5 December 1987, and in particular of treatment contrary to Article 3 of the Convention, of being unlawfully deprived of their freedom in violation of the requirements of Article 5 of the Convention, of violation of the rights of the defence guaranteed by Article 6 of the Convention and of being subjected to proceedings in violation of Articles 9 and 10 in combination with Article 14 of the Convention.

I. *As to the complaints invoking Article 5 of the Convention*

The applicants complain of a violation of Article 5 para. 1 (a), 1 (c), 3 and 4. More specifically, they allege :

– that police custody lasting 19 days without a judicial decision is in breach of Article 5 para. 1 (a) ;

– that there is also a violation of Article 5 para. 1 (c) of the Convention in that despite their declaration before their return to Turkey, when there was no state of emergency and no offence was in the course of being committed, they were arrested not in order to be brought before a judge but rather to undergo arbitrary punishment ;

– that there was a violation of Article 5 para. 1 (a) and (c) in combination with Article 3 because they were questioned under torture ;

– that it was impossible for them to complain about the ill-treatment received during police custody, since they were unable either to contact their legal representatives or to lodge a complaint with the Public Prosecution Department, in violation of Article 5 para. 4 of the Convention, taken alone or in combination with Article 3.

– the relevant provisions of Article 5 read as follows :

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law :

(a) the lawful detention of a person after conviction by a competent court ;

.....

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so ;

.....

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

....."

The Government raise two preliminary objections to these complaints, based respectively on non-exhaustion of domestic remedies and, subsidiarily, non-observance of the six month period. They refer to Article 26 of the Convention which provides that :

"The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken."

A. As to exhaustion of domestic remedies

In general terms, the respondent Government consider that reparation, understood as the payment of compensation, is the only means of acknowledging the unlawfulness of detention and, where appropriate, of reversing the consequences. Reparation is not therefore optional in relation to other forms of redress but constitutes the best means which must be used in seeking acknowledgement of a wrong undergone and remedy for it (Donnelly and six others, No. 5577–5583/72, Dec. 15.12.75, D.R. 4 p.4).

The respondent Government argue that the applicants did not exhaust the following domestic remedies :

a. The Government firstly argue that the applicants did not seek compensation for the alleged unlawfulness of the deprivation of their freedom, under the terms of Act No. 466 on the compensation of persons unlawfully arrested or detained (first part of the objection).

b. The Government then point out that the applicants did not lodge an administrative appeal against the alleged acts on the grounds of an administrative error (second part of the objection).

c. They then argue that the applicants failed to take civil proceedings for damages on the basis of Article 41 of the Code on Obligations (third part of the objection).

d. The Government add that the applicants failed to lodge an appeal with the District Judge on the basis of Article 19 in combination with Articles 138, 11 and 36 of the Turkish Constitution (fourth part of the objection).

Under the terms of Article 90 of the Turkish Constitution, duly ratified international treaties have force of law. The Government therefore point out that the Convention, ratified by Act No. 6366 of 10 March 1954, is directly applicable in Turkish law. They furthermore stress that in a judgment of 29 January 1980, the Constitutional Court declared that the Convention had peremptory and compulsory standing in Turkish law. The means of redress existing in Turkey and deriving from the Convention include that expressed in the penultimate paragraph of Article 19 of the Turkish Constitution of 1982, largely based on Article 5 para. 4 of the Convention. Article 19, establishing a new means of redress in Turkish

law, lays down that "everyone who is deprived of his liberty for any reason whatsoever shall be entitled to take proceedings before a competent judicial authority by which a decision shall be made speedily and, where such deprivation of liberty is illegal, release shall be ordered". The Government claim that this provision, which includes a guarantee of *habeas corpus*, may be directly invoked before the courts, under the terms of Articles 138, 11 and 36 of the Turkish Constitution.

e. The Government further point out that the applicants failed to take proceedings for compensation based on Article 5 para. 5 of the Convention, which has force of law in Turkey (fifth part of the objection).

f. The Government also add, as a purely secondary argument, that the applicants did not make use of the remedy provided for in Article 343 of the Turkish Code of Criminal Procedure, particularly with regard to the decision delivered on 18 January 1988 by the President of the Assize Court rejecting their application to have the dismissal order set aside (sixth part of the objection).

This procedure empowers the Minister of Justice to send a written order to the Public Prosecutor at the Court of Cassation to make an appeal against orders and judgments delivered by a judge or the courts which have become final and have not been referred to the Court of Cassation. According to the Government, basing their arguments on Turkish practice and case-law, this means of redress is accessible, adequate and effective within the meaning of the case-law of Convention organs. They specify that any judgment by the Court of Cassation annulling a judgment made on questions of procedure would represent a new fact or new evidence, which would prompt the Public Prosecution Department to bring criminal proceedings.

g. In their written observations, the Government said that the applicants should have appealed on the basis of Article 126 of the Turkish Code of Criminal Procedure against the order by the Public Prosecutor attached to the State Security Court ordering them to be held in police custody (seventh part of the objection).

They point out that according to this provision, the Prosecutor could have released the applicants if he had considered that an extension of detention on remand was not necessary.

This part of the objection was not maintained to at the hearing.

h. Also as part of their written observations, the Government referred to the opportunity available to the applicants to ask the judge to refer the case to the Constitutional Court, in accordance with Article 152 of the Turkish Constitution, in order to obtain a preliminary judgment on the constitutionality of the rules governing their detention. This remedy, which must be initiated by a judge, to whom a party in the case may address a request for referral, would permit direct and speedy protection of the rights guaranteed by Article 19 of the Constitution (eighth part of the objection).

The respondent Government also argue that the complaint of criminal behaviour lodged by the applicants, which could have led to a public prosecution, cannot replace the other means of redress indicated above, through which the applicants could have obtained compensation. The means of redress to which the applicants had recourse were all the more inappropriate in that the judge, who was made aware of the allegations through other means of redress, had no need of the possible conclusions in criminal proceedings in order to decide on the lawfulness of their detention.

The applicants consider that they exhausted domestic remedies. They argue that they used the normal means of redress under Turkish law in order to put forward their allegations of torture and ill-treatment, that is, a request for criminal proceedings to be initiated against the alleged perpetrators of the acts, relying on a series of examples drawn from judicial practice.

With regard to the objection of non-exhaustion raised by the Government, they rely on the following arguments in particular.

With regard to the possibility of invoking the provisions of the Convention, a violation of which is alleged, directly before the domestic courts (fifth part of the objection), the applicants consider that it was the duty of the domestic courts to apply all current legislation, including the Convention, without being obliged to do so by requests from the parties to the case.

With regard to the possibility of seeking redress against the decisions of the Altindag judge on the basis of Article 343 of the Code of Criminal Procedure (sixth part of the objection), the applicants argue that the written injunction referred to in this provision does not constitute a legal means in the strict sense of the term. Only the Minister of Justice is in fact entitled to order the Public Prosecutor to make an appeal. Furthermore, even if the decision challenged had been set aside following such a procedure, it would not have resulted in proceedings being taken against those alleged to be responsible.

With regard to the possibility of opposing the order by the Public Prosecutor attached to the State Security Court (seventh part of the objection), the applicants maintain that such opposition can only protect the rights of persons detained following an order made by a judge. The Article could not be applied in this case, since no detention order was made by a judge for the period of police custody.

As to the possibility of referring the case to the Constitutional Court (eighth part of the objection), the applicants emphasise that in Turkish law individuals are not entitled to make direct appeals to this Court. They add that they could not invoke the unconstitutional nature of the laws applied to them since their complaints of criminal behaviour had been dismissed. They also point out that the provisions laying down a maximum period of police custody of 15 days could not be challenged before the Constitutional Court because it is the Constitution itself which sets this period.

The Commission has examined the arguments put forward by the parties on the subject of exhaustion of domestic remedies.

With regard to the first three parts of the objection of non-exhaustion, all referring to the possibility of seeking compensation for unlawful detention, the Commission notes that the legal authorities to which the complaint of criminal behaviour was referred, in this case the Public Prosecution Department and the President of the Assize Court, considered that the decisions on detention were in conformity with law and procedure. It also notes that according to the case-law quoted by the Government, Turkish courts only grant compensation in cases where those responsible for criminal acts of the kind in question have previously been found guilty in a criminal prosecution.

In these conditions, the Commission is of the opinion that the applicants were not bound to attempt the means of redress indicated by the Government, given that the legal authorities to which the question of the lawfulness of their detention was referred had already decided in the affirmative, so rejecting the idea that the applicants' deprivation of freedom was at all illegal.

In the circumstances, it would have served no purpose had the applicants undertaken proceedings for compensation.

With regard to an appeal before the District Judge on the basis *inter alia* of Article 19 of the Turkish Constitution (fourth part of the objection), the Commission notes that the provision mentioned by the Government is broadly similar to Article 5 para. 4 of the Convention, which is also directly applicable in Turkish law. The Commission recalls, nevertheless, that the remedies indicated by the Government must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness, and that it falls to the respondent State to establish that these various conditions are satisfied (Eur. Court H.R., De Jong, Baljet and Van den Brink judgment of 22 May 1984, Series A no. 77, para. 39). In this case, however, the Government have not provided a single example of anyone held in police custody being released following an appeal lodged before a judge on the basis of Article 19 of the Constitution. The existence of this remedy is far from being established with adequate certainty.

Moreover, the Commission notes that the applicants question both the lawfulness of their detention by the police under Turkish law and in general the maximum duration of such custody as laid down by the Constitution and Code of Criminal Procedure. Even if a remedy other than a complaint of criminal behaviour existed which would decide on the lawfulness of police custody, such a remedy could not be considered to be effective and adequate with regard to the specific complaint concerning the maximum period of police custody as laid down by the Constitution itself.

With regard to the possibility of taking proceedings for compensation based on Article 5 para. 5 of the Convention (fifth part of the objection), the Commission considers that in the specific circumstances of the case such a remedy, in support of which the Government quote no decision of a Turkish court, is not effective for the reason indicated above, that is, that the detention had been judged lawful according to Turkish legislation.

With regard to the written injunction under the terms of Article 343 of the Code of Criminal Procedure (sixth part of the objection), the Commission notes that the applicants could not appeal to the Court of Cassation against the decision delivered by the President of the Altindag Assize Court on 18 January 1988. Any appeal to this court is at the discretion of the Minister of Justice. The Commission considers that a request to the Minister of Justice to order the Public Prosecutor attached to the Court of Cassation to lodge an appeal is an extraordinary remedy, and not one which is automatically accessible and which the applicants ought to have exhausted in order to fulfil the requirements of Article 26 of the Convention (see, *mutatis mutandis*, No. 1053/61, Dec. 19.9.61, X. v. Austria, Collection 8 p. 6 ; No. 9136/80, X. v. Ireland, Dec. 10.7.81, D.R. 26 p. 242 ; No. 8395/78, X. v. Denmark, Dec. 16.12.81, D.R. 27 p. 50).

As to an appeal to the Constitutional Court (eighth part of the objection), the Commission recalls that the remedies which must be used must not only be effective, but effectively accessible to those concerned.

In the particular circumstances of this case, the Commission considers that an appeal to the Constitutional Court does not constitute an accessible remedy in that it is the exclusive competence of the court examining the case to decide whether an objection of unconstitutionality appears sufficiently serious to merit referral to the Court. The party concerned can make no direct approach to this Court. Moreover, the Commission notes that in any case, no such request could have been submitted, since no proceedings had been initiated by the Public Prosecution Department.

In conclusion, the Commission is of the opinion that in order to challenge the lawfulness of their period in police custody, the applicants sought a remedy which, in view of their complaints, is that normally used under Turkish law and, therefore, constitutes an adequate and sufficient means of redress.

The Government, for their part, have not demonstrated that other remedies exist under Turkish law which, in the circumstances, could be regarded as adequate and sufficient.

Indeed, as the Commission has noted above, the Turkish judicial authorities to which the applicants referred their case had already concluded that the detention in question was lawful. There is therefore no apparent reason why, in order to comply with Article 26 of the Convention, the applicants should have been expected to use other remedies with the same object which were virtually

bound to result, on the basis of the same factual elements, in a reiteration of the decision already made (cf., *mutatis mutandis,* No. 2686/65, Kornmann v. the Fed. Rep. of Germany, Dec. 13.12.66, Yearbook 9 p. 495).

It follows that the objections raised by the Government must be rejected.

B. As to the six month period

The respondent Government maintain that if the argument that there is no remedy in Turkish law to decide on the lawfulness of detention in police custody is accepted, then it must be considered that the applications are late under the terms of Article 26 of the Convention, having been introduced outside the six month period. In this case, the period begins on 7 December 1987, the date on which the applicants were authorised to contact their legal representatives, whereas the applications were not introduced until 3 July 1988, more than six months later.

The Commission notes that the dismissal rejecting the complaints of criminal behaviour lodged by the applicants was confirmed on 18 January 1988 by the President of the Assize Court, in a final judgment. As the Commission has just noted, the remedy used by the applicants was in this case effective, the date of the final decision in this case consequently being that of the decision by the President of the Assize Court. Since the applicants accordingly complied with the six month period for the presentation of their applications, the Government's objection cannot be accepted.

C. As to the merits

With regard to the complaints based on Article 5 para. 1 (c), the Government recall that the applicants were arrested on the written orders of the Public Prosecutor attached to the Ankara State Security Court and were placed in police custody in accordance with two written orders issued by the Public Prosecutor. The Prosecutor, who possesses the same statutory guarantees as the judiciary, is empowered by law to order detention in police custody or release. The applicants were therefore arrested quite legally. Since precise charges had been laid against them, it was reasonable to suspect that they had violated the Turkish Criminal Code.

On this point, the applicants argue that the conditions listed in the above-mentioned provision were not met and that their detention therefore constitutes a violation of the Convention. They maintain that the offences of which they were accused concerned in particular the exercise of their freedom of political opinion. The applicants consider that these facts cannot be considered as criminal offences within the meaning of Article 7 of the Convention, justifying deprivation of liberty.

The applicants also argue that they cannot be accused of having intended to evade prosecution, since well before they returned to Turkey they had declared at a press conference that they wanted to go back to their country in order to seek the legalisation of their parties.

With regard to complaints arising from Article 5 para. 3 of the Convention, the Government argue that the applicants were in fact brought before a judge as prescribed in the above-mentioned Article. Following preliminary questioning, which ended on 30 November 1987, and after examination by a police doctor on 1 December and transfer on 2 December to the State Security Court, the applicants were questioned by the prosecutor on 2 and 3 December, being detained on remand on 5 December 1987.

The applicants maintain that the 19 days of custody were contrary both to national law and to the Convention, in the light of the case-law of the Convention organs. They refer to Article 19 para. 5 of the Constitution which provides that an arrested or detained person must be brought before a judge within 48 hours at most, and in the case of "public" offences, within 15 days, excluding travelling time. Article 129 of the Code of Criminal Procedure contains the same provisions as those appearing in the Constitution, but provides that in the case of a "non-public" offence, the period of police custody must not exceed 24 hours.

The Government point out that the applicants complained to the Yenimahalle Public Prosecutor with regard to the deprivation of their liberty. The prosecutor having dismissed their complaint, they applied to the President of the Altindag Assize Court to have this decision set aside. Twice therefore they used the remedy provided by Article 5 para. 4 of the Convention.

The Government also stress the guarantees of *habeas corpus* contained in the penultimate paragraph of Article 19 of the 1982 Constitution, which is directly applicable in Turkish law. This provision, which did not appear in the 1961 Constitution, is largely parallel to Article 5 para. 4 of the Convention. The applicants did not, however, make use of this remedy.

The applicants contest this argument, claiming that the Code of Criminal Procedure contains neither provisions specifying the court before which steps to decide on the lawfulness of detention could be taken, nor provisions governing such a procedure, which they argue is a lacuna in the Turkish legal system.

The Commission notes that the applicants were deprived of their liberty on 16 November 1987, and that they were brought before the Public Prosecutor on 2 and 3 December and on 5 December before the investigating judge, who ordered them to be detained on remand. They were therefore in police custody for 19 days.

The Commission has carried out a preliminary examination of the parties' arguments. It considers that in this respect the applications raise complex issues of fact and law that cannot be resolved without an examination of the merits.

II. *As to the complaints based on Article 3 of the Convention*

The applicants complain of a violation of Article 3 of the Convention and claim that they were subjected to torture and inhuman and degrading treatment while in police custody at the Ankara Security Department.

Article 3 of the Convention reads as follows :

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. As to exhaustion of domestic remedies

The respondent Government argue, on this point, that the applicants failed to exhaust the domestic remedies available to them under Turkish law. Firstly, since acts contrary to Turkish law were involved, the applicants should have complained by lodging an administrative appeal with the Council of State on the grounds of an administrative error, requesting compensation for both material and non-material damage. In this case, the Council of State does not need to identify the authors of unlawful action before granting compensation, since the error is directly attributable to the State.

Secondly, the Government point out that the applicants could have taken civil proceedings for damages under the terms of Article 41 of the Turkish Code of Obligations, basing their argument on the prohibition in Article 172 para. 3 of the Constitution against inflicting the type of treatment of which the applicants complain.

Thirdly, they state that the applicants could have used the remedy provided by Article 343 of the Code of Criminal Procedure.

Lastly, the Government once more argue that the possibility of seeking compensation may be considered as sufficient remedy for any alleged violation of Article 3. With regard to the existence of an administrative practice consisting of the authorisation or toleration of such violations, the Government emphasise that this cannot be so in the present case, the Turkish authorities having taken all reasonable measures to fulfil their obligations under the Convention.

According to the applicants, the conditions in which they were held in custody constitute instances of an administrative practice and cannot be resolved by the award of compensation. With regard to an administrative appeal on the basis of an administrative error and civil proceedings for damages, they further argue that such remedies had no chance of success, since the identity of those alleged to have ill-treated them was not known.

The Commission recalls that, as stated above, the remedies indicated by the Government, that is, an administrative appeal on the basis of an administrative error and civil proceedings for damages against police officers responsible for

ill-treatment, are not effective. It recalls that the legal authorities to which the complaint of criminal behaviour was referred, in this case, the Public Prosecution Department and the President of the Assize Court, considered that the decisions to place them in custody and the conditions of detention were in conformity with law and procedure.

The Commission observes that with regard to allegations concerning Article 3 of the Convention, the case concerns primarily a question of evidence and that the reason why the applicants were unsuccessful in lodging a criminal complaint was that neither the Public Prosecutor nor the President of the Assize Court considered that there was sufficient evidence to support their allegations. Consequently, the applicants' failure to prove their allegations creates a presumption to the effect that neither civil nor administrative proceedings would have had any chance of giving them satisfaction (cf., *mutatis mutandis*, No. 2686/65, Kornmann v. the Fed. Rep. of Germany, Dec. 13.12.66, Yearbook 9 p. 495).

As to the written injunction (Article 343 of the Code of Criminal Procedure), the Commission recalls, as stated above, that this is not an ordinary automatically accessible remedy which could in this case be considered as effective within the meaning of Article 26 of the Convention.

It follows that the objection of non-exhaustion of domestic remedies invoked by the Turkish Government must be rejected.

B. As to the merits

The Government's only comment on this aspect of the application is to argue that it is "manifestly ill-founded" under the terms of Article 27 para. 2 of the Convention.

The Government are of the opinion that the applicants have produced no evidence whatsoever to support their allegations of a violation of Article 3. Indeed, they argue that sufficient evidence exists to establish the contrary. During the period of detention, the questioning of the applicants was recorded on video cassette. They were also examined by doctors on three occasions: at the beginning of detention, two days after arrest, and on 1 December, immediately before their transfer to the Public Prosecution Department at the State Security Court. These medical reports showed nothing which might suggest ill-treatment. The Government also submitted photographs of the applicants taken during their detention on police premises and expert reports intended to demonstrate the practical impossibility of inflicting the alleged ill-treatment without leaving marks.

The applicants maintained that they underwent the ill-treatment as detailed in their complaints. They claim they are unable to identify the police officers alleged to have inflicted the ill-treatment, because they were blindfolded for most of the time and because in the statement of charges the officers were identified only by their numbers.

The applicants also claim that they were prevented from having outside contacts while they were in custody and that they were unable to see either their legal representatives or family and friends. They allege further that they were unable to lodge an appeal with a competent authority, be assisted by a notary public so as to give authority to a counsel or seek the services of a doctor of their choice.

The Commission has carried out a preliminary examination of the parties' arguments. It considers that in this respect the applications raise complex issues of law and fact, the resolution of which requires an examination of the merits.

III. *As to the complaints based on Articles 6, 9, 10 and 14 of the Convention*

The Commission has examined the applicants' complaints based on Articles 3 and 5 of the Convention, on which the Government were invited to submit their observations on the admissibility and merits and to which the oral observations of the parties at the hearing related.

The Commission considers that it cannot decide immediately upon the applicants' other complaints, the examination of which it therefore adjourns.

For these reasons, the Commission

DECIDES TO JOIN APPLICATIONS No. 14116/88 and 14117/88 ;

DECLARES ADMISSIBLE, without prejudging the merits of the case, the applicants' complaints concerning the conditions of their detention during police custody and the way in which this was carried out ;

DECIDES TO ADJOURN the examination of the remainder of the application.