CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

THIRD SECTION

CASE OF HACİ[1] ÖZEN v. TURKEY

(Application no. 46286/99)

JUDGMENT

This version was rectified on 7 September 2007
under Rule 81 of the Rules of Court

STRASBOURG

12 April 2007

FINAL

12/07/2007

[1] Rectified on 7 September 2007: The applicant's first name read "Hacı" in the former version of the judgment.

In the case of Haci[1] Özen v. Turkey,

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

Mr B.M. ZUPANČIČ, *President*,
Mr C. BÎRSAN,
Mr R. TÜRMEN,
Mrs A. GYULUMYAN,
Mr E. MYJER,
Mr DAVID THÓR BJÖRGVINSSON,
Mrs I. BERRO-LEFÈVRE, *judges*,
and Mr S. QUESADA, *Section Registrar*,

Having deliberated in private on 22 March 2007,

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

PROCEDURE

1. The case originated in an application (no. 46286/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Mr Haci[1] Özen ("the applicant"), on 22 December 1998.

2. The applicant, who was granted legal aid, was represented by Mr M. Batı, a lawyer practising in Diyarbakır. The Turkish Government ("the Government") did not designate an Agent for the purposes of the proceedings before the Court.

3. On 10 April 2003 the Court declared the application partly inadmissible and decided to communicate the complaints concerning the alleged ill-treatment of the applicant, his right to be brought promptly before a judge, his right to a fair hearing by an independent and impartial tribunal, his right to legal assistance and his right to an effective remedy to the Government. On 30 June 2005, under the provisions of Article 29 § 3 of the Convention, it further decided to examine the merits of these complaints at the same time as its admissibility.

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THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1943 and lives in Şırnak.

A. The arrest and detention of the applicant in the custody of the gendarmerie

5. The facts surrounding the arrest and detention of the applicant are disputed between the parties.

1. Facts as presented by the applicant

6. On an unspecified date, the applicant was contacted by two persons in the centre of Şırnak who asked him either to give them money or to help them. They did not specify what they wished the applicant to do. The applicant refused their request. On 11 June 1998, one week after this incident, they again contacted the applicant, asked him to help them and threatened him with death. As the applicant was scared, he followed their instructions. He went near to a cemetery outside the city centre where two armed men appeared. They asked him about the supplies and when the applicant told them that he did not know about the supplies, they beat him. Subsequently, four or five other plain-clothes persons carrying weapons arrived. They tied the applicant's hands and covered his mouth. One of them had a radio with which he talked to someone whom he addressed as "my commander". The applicant was then blindfolded, put in a vehicle and taken to the Şırnak provincial gendarmerie command.

7. During his detention in the custody of the gendarmerie the applicant was subjected to ill-treatment. In particular he was stripped naked and beaten. He was also deprived of food and water and was prevented from going to the toilet. The applicant was kept in a small and dark cell, threatened with death and insulted. Furthermore, the gendarmerie officers attempted to rape him.

8. In the evening of 11 June 1998, the applicant's son, Mehmet Özen, applied to the Şırnak Security Directorate claiming that his father left home at around 8 - 8.30 a.m. to go to their farm and that he was seen by one of their neighbours, Ömer Katar, at around midday being abducted by an armed group of six or seven persons. On 12 June 1998 an official report was drawn up concerning Mehmet Özen's claim.

9. On 13 June 1998 a similar protocol was drawn up containing Ömer Katar's statement about the applicant's arrest. He stated that he had seen the applicant being taken away by seven men who were carrying rifles.

Ömer Katar testified that Haci[1] Özen's hands were tied and that he was being beaten by these men.

10. On 15 June 1998 the applicant was brought before a forensic doctor, Mr Veli Gül. The medical report drafted by the doctor at 1.45 p.m. on the same day referred to the following marks on the applicant's body: a bruise on the right shoulder, scratches and bruises on the front of his right arm, bruises on the right part of his back, bruises of 2 x 2 cm on his waist, bruises on the front of his left arm, a bruise on the back of his left shoulder, bruises of 2 x 2 cm on his left hip and a trauma of 2 x 0,5 cm on his parietal bone. All the bruises on the applicant's body were described as purple in colour.

11. On 23 June 1998 the gendarmerie officers drafted a document allegedly containing the applicant's statements, according to which the applicant admitted to have willingly acted as a courier for the PKK and have fallen and sustained other injuries while trying to escape from the gendarmerie officers on 15 June 1998, the day of his arrest. The applicant was forced to apply his thumbprint to this document.

12. On 24 June 1998 the applicant was examined by the same doctor who noted the presence of the traces of old bruises on his shoulders and arms.

13. On the same day the applicant was brought before the Şırnak public prosecutor. He denied the accusations against him. The statements that he had allegedly made at the gendarmerie command were read to him. The applicant denied that he had made these statements and maintained that he had been forced to sign them. He claimed that he had been threatened with death by two men unless he delivered a bag to some people whose identity was not known to him.

14. After being questioned by the public prosecutor he was brought before the Şırnak Magistrates' Court *(Sulh Ceza Mahkemesi),* where he denied the charges against him. He further pleaded not guilty and reiterated his statement that he had made before the Chief Public Prosecutor. The Şırnak Magistrates' Court ordered the applicant's detention on remand. The court also took note of the applicant's allegation that he was threatened with death and decided to refer his complaint to the public prosecutor's office.

15. On 30 June 1998 the Şırnak public prosecutor issued a decision of non-jurisdiction in respect of the investigation against the applicant holding that the public prosecutor's office at the Diyarbakır State Security Court had the jurisdiction to conduct this investigation.

16. On 17 August 1998 the Şırnak public prosecutor decided to discontinue the investigation based on Mehmet Özen's allegation. The public prosecutor found that the applicant had not been abducted as alleged

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by Mehmet Özen but taken into custody on 15 June 1998 on suspicion of aiding the PKK.

2. Facts as presented by the Government

17. On 15 June 1998 the applicant was arrested by officers from the Şırnak provincial gendarmerie command on suspicion of aiding the PKK. Although on 11 June 1998 the applicant's son lodged a petition with the security directorate and on 13 June 1998 the applicant's neighbour stated that he had seen the applicant being taken away by seven men, there is no statement indicating that the persons who abducted the applicants had been gendarmerie officers.

18. According to the arrest report signed by four gendarmerie officers, on 15 June 1998, at around 8.30 a.m., following information received by the gendarmerie officers the applicant was captured in a rural area while carrying a bag containing clothes that he was taking to members of the PKK. The applicant was told twice to stop by the officers but he tried to escape. While running, he fell, hit his head and sustained injuries to various parts of his body.

19. On the same day, three officers further drafted a scene of the incident report. According to this report, the applicant was captured at around 4 a.m. following the receipt of information that the applicant was taking supplies to members of the PKK. The officers noted that the applicant had been carrying two bags containing clothes, soap and a carpet and that he had sustained injuries when he fell from a height of 8-10 metres. It is to be noted that neither the arrest report nor the scene of the incident report bears the signature of the applicant.

20. Following his arrest, the applicant was examined by a doctor (see paragraph 10 above) and, subsequently, taken to the Şırnak gendarmerie command where he made statements admitting that he had aided the members of the PKK. The applicant was kept in custody until 24 June 1998.

B. Criminal proceedings against the applicant

21. On 9 July 1998 the public prosecutor at the Diyarbakır State Security Court filed a bill of indictment charging the applicant with aiding and abetting an illegal organisation under Article 169 of the Criminal Code.

22. The first hearing, held before the Diyarbakır State Security Court composed of three judges including a military judge, on 13 July 1998, in the applicant's absence, was taken up with procedural matters, such as the measures to be taken for securing the presence of the accused.

23. On 21 December 1998 the applicant's representative stated before the Diyarbakır State Security Court that the applicant was arrested on 11 June 1998. He alleged that the protocols prepared by gendarmerie

officers contained false information. He maintained that the medical report of 15 June 1998 established the ill-treatment of the applicant received at the hands of gendarmerie officers. He further complained that the length of the applicant's detention was excessive. He made an oral complaint against the gendarmerie officers in relation to the ill-treatment of the applicant before the State Security Court and requested the court to notify the public prosecutor's office concerning their complaint. In reply to the request of the applicant's representative the State Security Court stated:

> "It has been decided that the representative of the accused be authorised to lodge a complaint with the public prosecutor's office where the act took place and that the copy of the hearing minutes be provided if needed."

24. On the same day, the first-instance court decided to request the Şırnak Assize Court to issue a summons requiring the gendarmerie officers who had signed the arrest and scene of the incident reports to give evidence.

25. At the beginning of the hearing of 8 February 1999, the Diyarbakır State Security Court appointed an interpreter to assist the applicant, noting that he did not have a good command of the Turkish language.

26. On the same day, the applicant made statements before the court with the assistance of the interpreter. He maintained, *inter alia*, that he was at his farm on the day of his arrest when two persons arrived and asked him to give them money. When he refused their request, they beat him. Subsequently, they tied his hands and covered his mouth and took him to a place, where there were supplies. They then asked him to accept that the supplies belonged to him but he refused. The applicant further denied the accuracy of the arrest and scene of the incident reports. The first-instance court decided to postpone the hearing as the statements of the gendarmerie officers had not been taken. It further ordered the applicant's release pending trial.

27. On 22 March 1999 the Diyarbakır State Security Court postponed the hearing as the statements of the gendarmerie officers had not been taken.

28. On 10 May 1999 the statements of one of the gendarmerie officers were read out. The applicant's lawyer maintained before the Court that the contents of these statements and the arrest and scene of the incident reports were contradictory. The court once again postponed the hearing as it had not received the statements of two gendarmerie officers.

29. On an unspecified date, the statements of the two officers were sent to the Diyarbakır State Security Court.

30. On 18 June 1999 Turkey's Grand National Assembly amended Article 143 of the Constitution and excluded military members from State Security Courts. Following similar amendments made on 22 June 1999 to the Law on the State Security Courts, the military judge sitting on the Diyarbakır State Security Court hearing the applicant's case was replaced by a civilian judge.

31. At the hearing held on 13 September 1999, the public prosecutor read out his observations on the merits of the case. The hearing was postponed for the preparation of the applicant's final submissions on the merits of the case.

32. At the hearing held on 27 September 1999 the first-instance court heard the applicant's lawyer's final submissions on the merits of the case. On the same day, the court noticed that the applicant's statements of 8 February 1999 had been taken without the bill of indictment having been read to him. The court therefore requested the Şırnak Assize Court to read out the bill of indictment to the applicant and to take his statements with the assistance of an interpreter.

33. On an unspecified date the applicant made statements before the Şırnak Assize Court with the assistance of an interpreter. These statements were sent to the Diyarbakır State Security Court.

34. At the hearing of 13 December 1999 the public prosecutor and the applicant's lawyer made their final submissions on the merits of the case. The applicant's lawyer maintained, *inter alia*, that the applicant's arrest and the length of his detention in custody had been unlawful and that he had been subjected to ill-treatment while in custody.

35. On the same day, the Diyarbakır State Security Court convicted the applicant of aiding and abetting the members of the PKK and sentenced him to three years and nine months' imprisonment. In its judgment, the court relied on the applicant's confession statements made in the custody of the gendarmerie, the statements of the gendarmerie officers who had drafted the arrest and scene of the incident protocols and the content of the bag that the applicant was allegedly carrying when he was arrested.

36. The military judge sitting on the bench of the Diyarbakır State Security Court was present at one preliminary hearing and six hearings on the merits until June 1999. After the replacement of the military judge with a civilian judge, the first-instance court held four hearings before rendering its judgment in the case.

37. On 20 March 2000 the applicant appealed against the judgment of 13 December 1999.

38. On 18 October 2000 the Court of Cassation dismissed the applicant's appeal and upheld the judgment of the Diyarbakır State Security Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 95-100, ECHR 2004-... (extracts)); *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002); and *Öcalan v. Turkey* ([GC], no. 46221/99, §§ 52-54, ECHR 2005-...).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

40. The applicant complained under Articles 3 of the Convention that he had been subjected to ill-treatment while in detention in the Şırnak provincial gendarmerie command. Article 3 reads as follows:

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

A. Admissibility

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

B. Merits

1. Submissions of the parties

42. The applicant submitted that he had been ill-treated during his arrest on 11 June 1998. He further alleged that he had been blindfolded, stripped naked, deprived of food and had been prevented from going to the toilet while in custody. He contended that he had been subjected to beatings and verbal abuse and that he had been detained *incommunicado* in a dark cell. He finally submitted that the gendarmerie officers had attempted to rape him.

43. The Government contended that the applicant had been taken into custody on 15 June 1998 and that on the same day, subsequent to his arrest, he had been examined by a doctor, who noted marks on his body. They submitted, in this connection, that the marks had existed prior to the applicant's arrest. The Government maintained that the applicant's medical examination at the end of his custody period revealed no trace of ill-treatment on his body. The Government therefore concluded that the applicant's allegations of ill-treatment were unsubstantiated.

2. The Court's assessment

a. General principles

44. The Court reiterates that Article 3 of the Convention ranks as one of the most fundamental provisions in the Convention, from which no derogation is permitted. It also enshrines one of the basic values of the democratic societies making up the Council of Europe. The object and purpose of the Convention as an instrument for the protection of individual human rights requires that these provisions be interpreted and applied so as to make its safeguards practical and effective (see *Avşar v. Turkey*, no. 25657/94, § 390, ECHR 2001-VII (extracts)). Where allegations are made under Article 3 of the Convention, the Court must conduct a particularly thorough scrutiny (see *Ülkü Ekinci v. Turkey*, no. 27602/95, § 135, 16 July 2002) and will do so on the basis of all the material submitted by the parties.

45. The Court further reiterates that, where an individual is taken into custody in good health but is found to be injured at the time of release, it is incumbent on the State to provide a plausible explanation of how those injuries were caused and to produce evidence casting doubt on the veracity of the victim's allegations, particularly if those allegations are backed up by medical reports. Failing this, a clear issue arises under Article 3 of the Convention (see *Çolak and Filizer v. Turkey*, nos. 32578/96 and 32579/96, § 30, 8 January 2004; *Selmouni v. France* [GC], no. 25803/94, § 87, ECHR 1999-V; *Aksoy v. Turkey*, judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, p. 2278, § 61; and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

46. In assessing evidence, the Court has adopted the standard of proof "beyond reasonable doubt" (see *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002, and *Avşar*, cited above, § 282). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ülkü Ekinci,* cited above, § 142).

47. Furthermore, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, as in the case of persons within their control in custody, strong presumptions of fact will arise in respect of injuries occurring during detention. Indeed, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII).

b. The establishment of the facts

48. Since the facts surrounding the arrest and detention of the applicant are in dispute between the parties, the Court considers it appropriate to

establish the facts by making its own assessment in the light of all the material before it, before examining the merits of the applicant's allegations of ill-treatment.

49. In this connection, the Court observes that the Government claimed that the applicant had been taken into custody on 15 June 1998 and that therefore the marks noted in the medical report of 15 June 1998 had existed prior to his arrest. The applicant alleged that he had been arrested on 11 June 1998 and that he had been ill-treated during his arrest and his detention period.

50. The Court notes, at the outset, that the Şırnak public prosecutor initiated an investigation into the abduction of the applicant and, subsequently, issued a decision of non-prosecution, holding that the applicant had not been kidnapped, but arrested by the gendarmerie on 15 June 1998 (see paragraph 16 above). In this regard, the Court finds it peculiar that the public prosecutor did not attempt to conduct further enquiries concerning the applicant's whereabouts between 11 and 15 June 1998. Moreover, he based his decision on the arrest report drawn up by the gendarmerie officers without having questioned its accuracy although there were other elements in the investigation file which cast doubt on its credibility.

51. In this connection, the Court observes that the applicant's son, Mehmet Özen, applied to the Şırnak Security Directorate and informed the latter that his father had been seen by one of their neighbours while being abducted by a group of armed men on 11 June 1998 (see paragraph 8 above).

52. Furthermore, on 13 June 1998 the applicant's neighbour who had allegedly witnessed the applicant's arrest stated before the police that the applicant had been taken by an armed group of six or seven persons (see paragraph 9 above).

53. Moreover, the arrest and the scene of the incident reports are also contradictory. While the time of the arrest was mentioned as 8.30 a.m. in the arrest report, the scene of the incident report referred to the time of arrest as 4 a.m. Besides, the findings of the medical report of 15 June 1998 do not appear to be wholly consistent with the content of the arrest report drafted by the gendarmerie. According to the latter, the applicant had sustained injuries to his head whereas the medical report does not refer to any mark on the applicant's head. In this connection, the Court emphasises that the arrest and scene of the incident reports did not bear the signature of the applicant.

54. The Court recalls its earlier findings and those of the Commission concerning the inadequacy and unreliability of the custody records of the gendarmerie in south-east Turkey in the nineties (see *Çakıcı v. Turkey* [GC], no. 23657/94, § 105, ECHR 1999-IV; *Timurtaş v. Turkey*, no. 23531/94, § 105, ECHR 2000-VI; *Çiçek v. Turkey*, no. 25704/94, §§ 137-142, 27 February 2001; *Orhan,* cited above*,* §§ 371-372; *Tepe v. Turkey*,

no. 27244/95, § 148, 9 May 2003; and *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 206, 6 April 2004). The Court found in all these judgments that such records cannot in general be relied upon to prove that a person was not taken into custody.

55. Having regard to the Court's findings in these judgments and to the material before the Court, the Court considers that the facts that the public prosecutor decided to discontinue the investigation into the applicant's alleged abduction and that the official reports concerning the applicant's arrest are dated 15 June 1998 do not prove that the applicant was not taken into custody before this date. On the contrary, in the light of the aforementioned elements (see paragraphs 50-53), the Court finds it established that the applicant was arrested on 11 June 1998 by officers from the Şırnak gendarmerie command and kept in custody until 15 June 1998 without his detention being officially recorded. The Court thus accepts that the applicant sustained the injuries noted in the medical report of 15 June 1998 between 11 and 15 June 1998 while in the State authorities' control.

c. Application of the general principles in the circumstances of the present case

56. The Court observes that the applicant was not examined medically at the beginning of his detention on 11 June 1998 and did not have access to a lawyer or doctor of his choice while in custody. On 15 and 24 June 1998 he underwent two medical examinations which resulted in two medical reports. Both reports referred to bruises and lesions on various parts of the applicant's body (see paragraphs 10 and 12 above) which were consistent with the applicant's allegations of ill-treatment. In this connection, the Court observes that the Government have not provided a plausible explanation for the marks and injuries identified on the applicant's body.

57. In the light of the above and in the absence of a plausible explanation by the Government, the Court concludes that the injuries noted in the medical reports were the result of inhuman treatment for which the Government bore responsibility.

58. It follows that there has been a violation of Article 3 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

59. The applicant alleged that he was denied an effective domestic remedy in respect of his complaint of ill-treatment, in violation of Article 13 of the Convention which provides:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

A. Admissibility

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

B. Merits

1. Submissions of the parties

61. The applicant contended that he had raised his allegation of ill-treatment before the public prosecutor and the Magistrates' Court on 24 June 1998 as well as the Diyarbakır State Security Court. He submitted that he had taken all reasonable steps to ensure that his allegation could be properly and thoroughly investigated by the State. However, the response of the authorities was totally inadequate.

62. The Government contended that the applicant's lawyer raised the allegation of ill-treatment only before the Diyarbakır State Security Court and as late as 21 December 1998. That court advised the applicant to lodge his complaint with the competent public prosecutor given that the public prosecutor attached to the State Security Court, like the trial judge, was not competent to investigate such allegations. Neither the applicant nor his lawyer applied to the public prosecutor's office.

2. The Court's assessment

63. The Court reiterates that the nature of the right safeguarded under Article 3 has implications for Article 13. Where an individual has an arguable claim that she or he has been subjected to ill-treatment by agents of the State, the notion of an "effective remedy" entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure (see *Çelik and İmret v. Turkey*, no. 44093/98, § 54, 26 October 2004).

64. A requirement of promptness and reasonable expedition is implicit in this context (see *Yaşa v. Turkey*, judgment of 2 September 1998, *Reports* 1998-VI, pp. 2439-40, §§ 102-04; *Çakıcı,* cited above, §§ 80, 87 and 106; and *Çelik and İmret*, cited above, § 55). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating ill-treatment may generally be regarded as essential in maintaining public confidence in their adherence to the rule of

law and in preventing any appearance of collusion in or tolerance of unlawful acts.

65. On the basis of the evidence adduced in the present case, the Court has found that the respondent State is responsible under Article 3 of the Convention for the ill-treatment suffered by the applicant in the custody of the gendarmerie. The applicant's complaint in this regard is therefore "arguable" for the purposes of Article 13 in connection with Article 3 of the Convention (see *McGlinchey and Others v. the United Kingdom*, no. 50390/99, § 64, ECHR 2003-V, *Çelik and İmret*, cited above, § 56).

66. The Court notes that the applicant complained before the Şırnak public prosecutor, the Şırnak Magistrates' Court and the Diyarbakır State Security Court that he was beaten during his arrest and was under duress during his custody period. The Court is struck by the fact that although the applicant's medical examinations of 15 and 24 June 1998 revealed that the applicant had sustained injuries to various parts of his body and, despite his serious allegations before several judicial authorities, no attempts were made to investigate his allegations.

67. The Court therefore concludes that the applicant was denied an effective remedy in respect of his ill-treatment, and was thereby denied access to any other available remedies at his disposal, including a claim for compensation.

68. Consequently, there has been a violation of Article 13 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION

69. The applicant alleged under Article 5 § 3 of the Convention that he had been arrested on 11 June 1998 and kept in the custody of the gendarmerie until 24 June 1998 without being brought before a judge or other officer authorised by law to exercise judicial power. Article 5 § 3 of the Convention reads as follows:

> " 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."

A. Admissibility

70. The Government submitted that this complaint should be rejected for failure to exhaust domestic remedies as required by Article 35 § 1 of the Convention. The Government maintained that the length of the applicant's detention in police custody was in conformity with the legislation in force at the material time as the statutory limit for the period that suspects could be

held in custody was ten days whereas the applicant was detained nine days. Nevertheless, he could have challenged the lawfulness and length of his detention in custody pursuant to Article 128 of the Code of Criminal Procedure.

71. The Court notes at the outset that it has already examined and rejected the Government's similar objections in cases where the applicants' custody periods were in conformity with the domestic legislation, holding that the remedy which exists in theory provided under Article 128 of the Code of Criminal Procedure was not an effective one in practice within the meaning of Article 35 of the Convention (see, for example, *Öcalan,* cited above, §§ 66-71; *Maçin v. Turkey*, no. 52083/99, §§ 30-33, 4 May 2006; and *Bulduş v. Turkey*, no. 64741/01, §§ 10-14, 22 December 2005). Therefore, even assuming that the applicant's custody period was in conformity with the domestic law, the remedy in question was not a remedy that he was required to exhaust.

72. Nonetheless, the Court has already established that the applicant was deprived of his liberty on 11 June 1998 and kept in custody until 15 June 1998 without his detention being registered (see paragraph 55 above).

73. The Court observes in this connection that the applicant maintained before the judicial authorities that he had been arbitrarily deprived of his liberty for four days. However, not only was his allegation not investigated, but also the Şırnak public prosecutor issued a decision not to prosecute in respect of the allegations of abduction (see paragraph 17 above).

74. In these circumstances, the Court is not convinced that where the unacknowledged detention of a person by the security forces is allowed, that person has a real possibility to challenge the lawfulness or the length of the detention in question.

75. The Court therefore rejects the Government's objection.

76. The Government further maintained, in relation to the complaint under Article 5, that the applicant's custody period had ended on 24 June 1998, whereas he had submitted his application form to the Court on 23 January 1999, thus, failing to comply with the six-month's rule.

77. The applicant submitted, in reply, that he had sent his first letter to the Court on 22 December 1998 and had, therefore, complied with the six-month's rule.

78. The Court recalls that the running of the six-month period is interrupted by the first letter from an applicant summarily setting out the object of the application, unless the letter is followed by a long delay before the application is completed (see *Buscarini and Others v. San Marino* [GC], no. 24645/94, § 23, ECHR 1999-I, and *Çelik v. Turkey* (dec.), no. 41993/98, 6 May 2003). The Court observes that the first letter setting out the substance of the applicant's complaints was dated 22 December 1998 and was sent to the Court by fax on the same day. The Registry of the Court was

informed in that letter that the formal application would be submitted shortly. The application form was subsequently submitted on 11 February 1999, i.e. one month and twenty days after the first letter. The Court therefore finds that the application was introduced on 22 December 1998, and therefore in time.

79. Consequently, this part of the application cannot be rejected for non-exhaustion of domestic remedies or for non-compliance with the six-month rule.

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

B. Merits

81. The applicant complained under Article 5 § 3 of the Convention that he had been kept in police custody for thirteen days without being brought before a judge or other officer authorised by law to exercise judicial power.

82. The Government submitted that the applicant's custody period was in absolute conformity with the domestic legislation in force at the time.

83. The Court reiterates that Article 5 in general aims to protect the individual against arbitrary interference by the State with the right to liberty. Article 5 § 3 is intended to secure the rule of law by requiring the judicial control of the interference by the executive (see *Sakık and Others v. Turkey,* judgment of 26 November 1997, *Reports* 1997- VII, p. 2623, § 44).

84. The Court has already noted that the applicant's detention in police custody lasted thirteen days. It recalls that in the case of *Brogan and Others v. the United Kingdom*, (judgment of 29 November 1988, Series A no. 145-B) it held that detention in police custody which had lasted four days and six hours without judicial control fell outside the strict time constraints of Article 5 § 3 of the Convention, even though its purpose was to protect the community as a whole against terrorism (see, also, *Keklik and Others v. Turkey*, no. 77388/01, § 41, 3 October 2006).

85. In the light of the principles enunciated in the *Brogan* case, the Court cannot accept that it was necessary to detain the applicant for thirteen days without judicial intervention.

86. There has accordingly been a violation of Article 5 § 3 of the Convention.

IV. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

87. The applicant complained under Article 6 § 1 of the Convention that he had been denied a fair hearing on account of the presence of a military judge on the bench of the Diyarbakır State Security Court, which tried him.

He further alleged under Article 6 §§ 1 and 3 (c) of the Convention that he had been deprived of his right to legal assistance while in custody and that the judgment of the Diyarbakır State Security Court was based on his statements obtained as a result of ill-treatment. The relevant parts of Article 6 of the Convention provide as follows:

> "1. In the determination of ...any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.
>
> ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> ..."

A. Admissibility

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

B. Merits

1. Independence and impartiality of the Diyarbakır State Security Court

89. The Government maintained that, by Law no. 4388 of 18 June 1999, amendments were made to remove military judges from the bench of the State Security Courts with a view to complying with the requirements of the Convention. In this connection they pointed out that, in the present case, the military judge sitting on the bench of the Diyarbakır State Security Court had already been replaced by a civilian judge before the applicant's lawyer had put forward his submissions on the merits of the case and that the applicant was therefore convicted by a State Security Court which was composed of three civilian judges.

90. The applicant repeated his initial submissions.

91. The Court has consistently held that certain aspects of the status of military judges sitting as members of the State Security Courts rendered their independence from the executive questionable (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports*, 1998-IV, § 68, and *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 39). The Court also found in *Öcalan v. Turkey* (cited above, §§ 114-115) that, when a military judge participated in one or more interlocutory decisions that continued to remain in effect in the criminal proceedings concerned, the military judge's replacement by a civilian judge in the course of those proceedings before the verdict was delivered failed to dissipate the applicant's reasonably held concern about that trial court's independence and impartiality, unless it was established that the procedure subsequently followed in the state security court sufficiently allayed that concern.

92. In the instant case, the Court notes that before his replacement in June 1999, the military judge was present at one preliminary hearing and six hearings on the merits. During these hearings, the first-instance court heard the applicant, received one of the gendarmerie officers' statements concerning the applicant's arrest and took a number of procedural decisions. At one of these hearings, on 21 December 1998, the applicant's lawyer maintained that the applicant had been subjected to ill-treatment while in custody and requested the court to inform the public prosecutor's office of the applicant's allegation of ill-treatment. The first-instance court, however, neither heard the applicant nor made any decision as to the admissibility of the applicant's statements taken by the gendarmerie allegedly obtained as a result of ill-treatment. It simply decided to authorise the applicant to lodge a complaint with the public prosecutor's office. After the replacement of the military judge with a civilian judge, the Diyarbakır State Security Court held four more hearings on the merits during which the final submissions of both the public prosecutor and the applicant were read out before the court, composed of three civilian judges. The first-instance court also ordered that the applicant be notified of the bill of indictment and his statements be taken with the assistance of an interpreter. It did not, however, take any decision as regards the admissibility to the case-file of the applicant's statements taken by the gendarmerie. Nor did it renew its decision concerning the applicant's allegations of ill-treatment. The court further failed to order the gendarmerie officers to make new statements.

93. In these circumstances, the Court cannot accept that the replacement of the military judge before the end of the proceedings disposed of the applicant's reasonably held concern about the trial court's independence and impartiality (see *Öcalan,* cited above, § 118; *a contrario*, *Ceylan v. Turkey*, (dec.), no. 68953/01, 30 August 2005; and *Kabasakal and Atar v. Turkey*, no. 70084/01 and 70085/01, § 34, 19 September 2006).

94. There has accordingly been a violation of Article 6 § 1 of the Convention on this point.

2. Fairness of the proceedings

95. The Government submitted that the applicant had not been subjected to ill-treatment while in custody and that, therefore, his statements could not be considered as having been taken under duress. They further contended that the trial court had also taken other evidence into consideration in establishing the applicant's guilt. The Government finally maintained that the applicant could have requested to have access to his lawyer after the prolongation of his custody period by the judge - that is to say after the seventh day of his detention.

96. The applicant repeated his initial submissions.

97. The Court notes at the outset that it has already held in previous cases that a court whose lack of independence and impartiality has been established cannot in any circumstances guarantee a fair trial to the persons under its jurisdiction and that, accordingly, it is not necessary to examine complaints regarding the fairness of the proceedings before that court (see, among other authorities, *Çiraklar*, cited above, §§ 44-45).

98. Having regard, nonetheless, to the particular circumstances of the case and, in particular, to the fact that the main evidence which led the court to convict the applicant was disputed by the latter, as well as to the conclusion it has reached under Article 3 of the Convention, the Court considers in the instant case that it must proceed with its assessment of the applicant's complaint that his trial was unfair for reasons unrelated to the question of the status of members of the state security courts. Only in this way will it be able to examine the substance of the applicant's main allegation that the charges against him could not have been found to have been made out if he had had a fair trial (see *Hulki Güneş v. Turkey*, no. 28490/95, § 85, ECHR 2003-VII (extracts), and *Göçmen v. Turkey*, no. 72000/01, § 68, 17 October 2006).

99. The Court reiterates that its duty, according to Article 19 of the Convention, is to ensure the observance of the engagements undertaken by the Contracting States to the Convention. In particular, it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see *Schenk v. Switzerland*, judgment of 12 July 1988, Series A no. 140, p. 29, §§ 45-46).

100. It is therefore not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, evidence obtained unlawfully in terms of domestic law – may be admissible or,

indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found (see, among others, *Khan v. the United Kingdom*, no. 35394/97, § 34, and *Jalloh v. Germany* [GC], no. 54810/00, § 95, 11 July 2006).

101. In this connection, as regards the nature of the Convention violation found, the Court recalls that it has already held that the use of evidence obtained in violation of Article 3 in criminal proceedings infringed the fairness of such proceedings even if the admission of such evidence was not decisive in securing the conviction (see *Jalloh,* cited above, § 99; *Söylemez v. Turkey*, no. 46661/99, § 23, 21 September 2006; and, mutatis mutandis*, Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006).

102. In the present case, the Court notes at the outset that it has already found that the applicant was subjected to ill-treatment in breach of Article 3 of the Convention while he was in the custody of the gendarmerie (see paragraph 58 above). Furthermore, it is not disputed between the parties that the applicant did not receive any legal assistance during his custody period and that he had made statements before the gendarmerie in the absence of his lawyer. The Court further observes that the applicant denied the accuracy of those statements, alleging that he had been subjected to ill-treatment, before the public prosecutor and the Magistrates' Court on 24 June 1998 as well as throughout the proceedings before the Diyarbakır State Security Court.

103. In this connection, the Court observes that Turkish legislation does not appear to attach to confessions obtained during questioning but denied in court any consequences that are decisive for the prospects of the defence (see *Hulki Güneş,* cited above, § 91, and *Dikme v. Turkey*, no. 20869/92, § 111, ECHR 2000-VIII). However, not only did the Diyarbakır State Security Court not determine the admissibility of the applicant's statements made in the custody of the gendarmerie before going on to examine the merits of the case, but also used these statements as the main evidence in its judgment convicting the applicant, despite his denial of their accuracy.

104. In these circumstances, the Court finds that the use of the applicant's statements obtained during his custody period in the absence of his lawyer in the criminal proceedings brought against him rendered his trial as a whole unfair.

105. It follows that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

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

A. Damage

107. The applicant claimed 50,000 euros (EUR) for pecuniary damage and EUR 100,000 for non-pecuniary damage.

108. The Government contested these claims

109. As regards the alleged pecuniary damage sustained by the applicant, the Court notes that this claim has not been substantiated by any evidence whatsoever. It therefore makes no award under this head.

110. The Court notes that it has found a violation of Articles 3, 5 § 3, 6 §§ 1 and 3 (c) and 13 of the Convention. Having regard to the circumstances of the present case, and deciding on an equitable basis, it awards the applicant EUR 15,000.

111. Nevertheless, the Court considers that where an individual, as in the instant case, has been convicted by a court which did not meet the Convention requirements of independence and impartiality, a retrial or a reopening of the case, if requested, represents, in principle an appropriate way of redressing the violation (see *Öcalan*, cited above, § 210).

B. Costs and expenses

112. The applicant also claimed EUR 1,800 for the costs and expenses incurred before the Court.

113. The Government submitted that the claim was excessive and unsubstantiated. They argued that no receipt or any other document had been produced by the applicant to prove his claim.

114. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum claimed in full, less the sum of EUR 685 received in legal aid from the Council of Europe, under this head.

C. Default interest

115. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* unanimously the remainder of the application admissible;

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention;

3. *Holds* unanimously that there has been a violation of Article 13 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 5 § 3 of the Convention;

5. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention in that the applicant was not tried by an independent and impartial tribunal;

6. *Holds* by six votes to one that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention in that the applicant did not have a fair trial;

7. *Holds*
   (a) by six votes to one that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable at the date of settlement;
   (b) unanimously that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 1,800 (one thousand eight hundred euros) in respect of costs and expenses, less EUR 685 (six hundred and eighty-five euros) granted by way of legal aid, plus any tax that may be chargeable, to be converted into new Turkish liras at the rate applicable at the date of settlement;
   (c) unanimously that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above

amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 12 April 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago QUESADA
Registrar

Boštjan M. ZUPANČIČ
President

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

B.M.Z.
S.Q.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEN

1. To my regret, I am unable to agree with the majority of the Court that the applicant was arrested on 11 June 1998 by officers from the Şırnak gendarmerie command and kept in custody until 15 June 1998 without his detention being officially recorded and that he was subjected to inhuman treatment during this period, in violation of Article 3 of the Convention.

2. In assessing evidence, the Court adopts the standard of proof "beyond reasonable doubt" (see, for example, *Orhan v. Turkey*, no. 25656/94, § 264, 18 June 2002). Such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see, for example, *Ülkü Ekinci v. Turkey*, no. 27602/95, § 142, 16 July 2002).

3. It appears from the facts of the case that on the day of the applicant's abduction, his son filed a petition with the national authorities, maintaining that the applicant had been kidnapped by six or seven persons and that a neighbour, Ö.K., had witnessed the abduction. Furthermore, on 13 June 1998 Ö.K. testified before the police that he had seen the applicant being taken away by seven men who were carrying rifles. He also stated that the applicant's hands had been tied and that he had been beaten by these men. It also appears that according to the medical report dated 15 June 1998, the applicant bore signs of ill-treatment on his body after his release from his kidnappers.

4. However, unlike the majority, I am unable to conclude that the applicant has laid the basis of a prima facie case that the armed persons who kidnapped him on 11 June 1998 were State officials or that State officials were implicated in the abduction. I therefore consider that the actual circumstances remain a matter for speculation and assumption. I am of the opinion that there is insufficient evidence on which to conclude that the applicant was, beyond reasonable doubt, taken into the custody of the gendarmerie and that the injuries noted in the medical report of 15 June 1998 were the result of inhuman treatment for which the Government bore responsibility.

5. In the light of the above, I conclude that there has not been a violation of Article 3 of the Convention.

6. Having regard to my conclusion in point 5 and to the Court's finding of a violation of the applicant's right to a fair hearing by an independent and impartial tribunal, I am also of the opinion that it was not necessary to examine the applicant's complaint under Article 6 §§ 1 and 3 (c) of the Convention (see, for example, *İncal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, § 74).

7. Finally, as I consider that there has not been a violation of Article 3 of the Convention, I find the sum awarded to the applicant for non-pecuniary damage excessive.