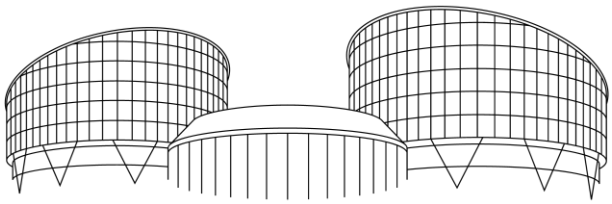

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF BARAN AND HUN v. TURKEY

(Application no. 30685/05)

JUDGMENT

STRASBOURG

20 May 2010

FINAL

20/08/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Baran and Hun v. Turkey**,**

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

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Danutė Jočienė,
Dragoljub Popović,
Nona Tsotsoria,
Işıl Karakaş,
Kristina Pardalos, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 29 April 2010,

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

PROCEDURE

1. The case originated in an application (no. 30685/05) 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 two Turkish nationals, Ms Gülderen Baran (San) and Mr Hacı Aziz Hun ("the applicants"), on 19 June 2001.

2. The applicants were represented by Mrs G. Tuncer, a lawyer practising in İstanbul. The Turkish Government ("the Government") were represented by their Agent.

3. On 17 November 2006 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1973 and 1965 respectively. At the time of lodging the application, they were in Bayrampaşa and Edirne prisons respectively.

A. The applicants' detention in police custody and the medical certificates concerning their alleged ill-treatment

5. On 21 July 1995 a hand grenade was thrown at a police service vehicle in the Gaziosmanpaşa district of Istanbul. Around fifteen police officers were injured. An illegal armed organisation, namely the TDP (the Turkish Revolutionary Party), took responsibility for the incident. Following this incident the police carried out an operation against members of the TDP.

1. The applicants' detention in police custody

6. On 4 and 5 August 1995 respectively, the applicants were arrested and taken into custody on suspicion of their involvement in the TDP. They remained in police custody until 17 August 1995.

7. On 11 and 13 August 1995 respectively, the second and first applicants were questioned by police officers at the Anti-Terrorist Branch of the Istanbul Security Headquarters, where they gave a detailed signed account of the activities in which they had taken part within the TDP. On 14 August 1995 the second applicant was questioned again. On that date the first applicant took part in a reconstruction of events concerning the bombing of the police vehicle. On various dates the applicants also took part in identification procedures via photographs.

8. In the application form the applicants complained that they had been subjected to torture while they were being held in police custody. In this connection, they maintained that they were put in a dirty and unventilated cell, deprived of sleep, food and water, blindfolded, sworn at and threatened, made to listen to loud music, beaten, stripped, hosed with water from a high-pressure hose, made to stand in front of a fan and suspended. The first applicant further claimed to have been subjected to sexual harassment, stripped and suspended, and that her hair and fingers had been pulled and a weight put on her feet.

2. The applicants' medical certificates

a) Gülderen Baran

9. On 17 August 1995 the applicant was examined by a doctor at the Forensic Medicine Institute at the State Security Court, who noted that she had a bleeding nose, pain in the groin, two 1-cm grazes on her right arm and a circular swelling on the right wrist, weakness and numbness on both arms, pain in two of the fingers of the right hand and a 2 x 1 cm graze on the right knee. The doctor further mentioned bleeding due to a gynaecological trauma which had occurred approximately fifteen days previously. However, he stated that the applicant had refused a gynaecological examination.

10. On 18 August 1995 the applicant was examined by the prison doctor, who noted, *inter alia*, that she had widespread back and waist pain, together with a loss of power and numbness in both arms. The doctor further found a number of bruised and swollen areas of various sizes on the applicant's body, notably under her armpits, right arm and wrist, left arm, knees, legs and ankles. Finally, he mentioned that the applicant had pain in her left ovary and bladder region.

11. On 30 October 1995 the applicant was examined by doctors at the Third Section of Expertise of the Forensic Medicine Institute. The doctors also checked the applicant's previous medical reports and the results of an EGM test[1]. They concluded that the applicant was suffering from bilateral brachial plexitis (damage to nerves).

12. According to a number of reports, consultation notes, a medical scan and the analysis contained in the case file, the applicant, who has been diagnosed with irreversible brachial plexitis in her right arm and reversible brachial plexitis in her left arm, was treated mainly with physical therapy for over one and a half years. As a result, her left arm improved. However, her right arm is irreversibly damaged.

13. On 19 October 1998 the applicant was examined by the doctors at the Third Section of Expertise of the Forensic Medicine Institute. On 18 December 1998, upon the request of the Istanbul Assize Court, the Third Section of Expertise (*Ihtisas Kurulu*) submitted their opinion, in which they considered that the applicant's left arm was near to normal but that her right arm was paralysed and that this constituted a permanent invalidity (*uzuv zaafi*).

b) Hacı Aziz Hun

14. On 17 August 1995 the applicant was examined by a doctor at the Forensic Medicine Institute at the State Security Court, who noted that he had pain and difficulty in moving his neck, pins and needles in the right hand and pain under his left arm.

15. On 2 July 1998 the applicant was examined by a doctor at the Medical Faculty of Istanbul University, who diagnosed him as suffering from cervical herniated disc syndrome. The applicant was treated with a neck brace and medication. However, the doctor noted that, since this condition was permanent, the applicant had to be monitored and treated continuously.

B. The criminal proceedings against the applicants

16. On 17 August 1995 the applicants were brought before a public prosecutor and a judge at the Istanbul State Security Court, where they

1. EGM - an electromyogram is a test used to record the electrical activity of muscles.

refused to give any statements as a protest, on the ground that they had been subjected to torture while in police custody.

17. On 21 September 1995 the public prosecutor at the Istanbul State Security Court filed a bill of indictment against the applicants and other suspects, charging them with undermining the constitutional order of the State under Article 146 of the Criminal Code. In particular, the first applicant was accused of having participated in the bombing of the police vehicle on 21 July 1995.

18. On an unspecified date the criminal proceedings commenced before the Istanbul State Security Court. The applicants were both represented by the same lawyer, Mrs G. Tuncer. At a hearing held on 19 December 1995 the applicants' lawyer maintained that her clients had been subjected to torture and asked the court to request the authorities to initiate a criminal investigation (*suç duyurusu*). The Istanbul State Security Court dismissed this request, stating that the applicants could lodge their complaints themselves with the public prosecutor's office and that there was no need for the court to do so.

19. In the course of the trial the court heard the accused, some of the police officers who had been injured during the bombing of the police vehicle and the police officers who had taken part in various measures during the applicants' detention. During the hearing of one such police officer, the first applicant and another co-accused asked the court not to hear him, alleging that this man was a torturer and had tortured them. The court further examined the video recordings of the reconstruction of events concerning the bombing of the police vehicle. On 19 December 1995, 22 May 1997 and 9 November 1999, the second applicant submitted his written statements to the court. Only in the first one did he claim that he had retracted his police statements because he had signed them under duress and torture without having had the opportunity to read them. In later submissions the applicant principally maintained that he was a revolutionary, but that he had no relationship with any illegal organisation. In particular, he submitted that the guns and bombs found at his house belonged to one of the accused, who had requested the use of a cupboard for his personal belongings, had brought them in a bag and had asked him to guard them. The applicant had had no prior knowledge of their existence.

20. On 19 December 1995, 1 September 1998 and 4 February 2000, the first applicant submitted her written statements to the court. Except for the second one in which she criticised the State Security Court system, the applicant submitted a detailed account of the ill-treatment she had been subjected to in police custody and denied involvement in any illegal organisation. She submitted that the materials found at the house where she was staying with the second applicant belonged to one of the co-accused and that she did not know what they were. Likewise she gave explanations regarding her fake identity card and marriage certificate.

21. On 22 May 1997 the Istanbul State Security Court found the applicants guilty of the accusations against them and convicted the first applicant under Article 146 of the Criminal Code and the second applicant under Article 168 of the Criminal Code.

22. On 27 March 1998 the Court of Cassation quashed the judgment of the first-instance court on the ground that the final hearing had been held in the absence of the first applicant despite the fact that she had had a valid medical report excusing her. The hearing had thus violated her defence rights. In view of the factual and legal relationship between the accused the court held that the first-instance court's judgment had to be quashed in respect of all the defendants.

23. On an unspecified date the case was remitted to the first-instance court whereupon the latter held regular hearings. It appears that after the capture of Abdullah Öcalan[1] the applicants and some of the accused informed the court that they were on an unlimited hunger strike in protest. Moreover, in a number of hearings held after 1 September 1998, the applicants refused to appear before the court on the ground that the European Court of Human Rights had found that State Security Courts lacked independence and impartiality. On 27 October 1998 the applicants' representative informed the court that she would no longer be attending the hearings and asked the court to discontinue the proceedings on the ground that they were not an independent and impartial tribunal, as the European Court of Human Rights had ruled.

24. In the meantime, on 21 December 2000, Law no. 4616 on Conditional Release, Deferral of Procedure and Punishments was promulgated. However, the benefits of this Law were not available to persons who had committed offences under Articles 146 and 168 of the Criminal Code. Thus, it was not applicable to the applicants' case. On 24 January 2001 the applicants unsuccessfully requested the Court of Cassation to send the case file to the Constitutional Court for an examination of the compatibility of this Law with the relevant provisions of the Constitution.

25. On 2 March 2000 the Istanbul State Security Court found the first applicant guilty of undermining the constitutional order of the State and sentenced her to life imprisonment under Article 146 of the Criminal Code. In its decision the court took into account the evidence in the case file, which included documents regarding the illegal organisation found at the applicant's house, expert reports, verbatim records regarding identification procedures, the photograph of her taken at the incident scene, the verbatim records of the reconstruction of events and the verbatim records of the video recording regarding the reconstruction of events. The court noted that there

1. Abdullah Öcalan, the former leader of the PKK (the Workers' Party of Kurdistan), an illegal armed organisation.

were proceedings pending before the domestic courts regarding the applicant's allegations of ill-treatment during police custody. However, it considered that it need not await their outcome since its decision to convict the applicant did not rely solely on her police statements but on material evidence.

26. The same day the court found the second applicant guilty of membership of an illegal armed organisation under Article 168 of the Criminal Code and sentenced him to twelve years and six months' imprisonment. In so doing, it took into account the evidence in the case file, including the applicant's statements given whilst in police custody, the verbatim records of the reconstruction of the events, the statements of other suspects, documents regarding the illegal organisation and other evidence, such as guns and chemical explosive materials found at his house. In its decision the court also noted that the accused had unnecessarily prolonged the criminal proceedings after the case was remitted by the Court of Cassation, by not appearing before the court, maintaining a hunger strike, requesting extensions and obtaining medical reports excusing their participation on hearing days.

27. The applicants appealed. They maintained, in particular, that the first-instance court had failed to conduct an additional investigation, that it had refused their request for the hearing of key witnesses or the conduct of a reconstruction of events so as to dispel factual contradictions. They criticised the manner in which the domestic court had interpreted evidence. Moreover, the applicants complained that the first-instance court had based itself on evidence obtained unlawfully. In this connection, they maintained that the domestic court had relied on their police statements despite medical reports attesting to their torture. They further submitted that the other documents secured by the police during the preliminary investigation had also been obtained unlawfully. Finally, the applicants maintained that the court had erred in the qualification of the offence.

28. On 29 January 2001 the Court of Cassation held a hearing and upheld the judgment of the Istanbul State Security Court.

C. Investigation instigated into the alleged ill-treatment of Ms Baran and the ensuing criminal proceedings against the accused police officers

29. Upon the first applicant's complaint, via her legal representative Ms G. Tuncer, an investigation was instigated by the Fatih public prosecutor.

30. Between 29 January 1996 and 6 March 1996, the Fatih public prosecutor heard evidence from five police officers who had taken part in the applicant's arrest and interview. They all denied the applicant's allegations of ill-treatment.

31. On 28 March 1996 the Fatih public prosecutor heard evidence from the applicant. She gave a detailed account of the alleged ill-treatment which included beating, being left wet in the cold, sexually molested and periodically suspended. The applicant also gave brief descriptions of the alleged perpetrators.

32. On 18 June 1996 the Fatih public prosecutor sent his opinion to the Istanbul public prosecutor with a view to criminal proceedings for ill-treatment being brought against five police officers working at the Anti-Terrorist Branch of the Istanbul Security Headquarters.

33. On 26 June 1996 the Istanbul public prosecutor filed a bill of indictment against the five officers for the ill-treatment of Ms Baran. The charges were brought under Article 243 of the Criminal Code.

34. On 15 October 1996 the criminal proceedings against the accused police officers commenced before the Istanbul Assize Court.

35. In the hearings held on 8 May and 11 October 1997, the court heard evidence from the applicant, who gave details regarding the ill-treatment and identified the accused police officers as those responsible, except for one about whom she was not sure. On the latter date, the court also heard the testimony of Mr K.Y., another detainee and witness on behalf of the applicant.

36. On 6 May 1998 the court heard testimony of Ms A.E., another detainee and witness on behalf of the applicant.

37. On 12 March 2002 the Istanbul Assize Court discontinued the proceedings against the accused police officers on the ground that the prosecution of the offence, five years at the time of the events, had become time-barred. This decision was upheld by the Court of Cassation on 19 February 2004.

D. Subsequent developments

38. On 17 June 2003 the President of the Republic, referring to a Forensic Medicine Institute's report dated 21 April 2003, remitted the remainder of Ms Baran's sentence on grounds of chronic illness, pursuant to Article 104 § b of the Constitution. The applicant was released from prison on 24 July 2003.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. The relevant domestic law and practice in force at the material time, as well as recent developments, can be found in the following judgments: *Kolu v. Turkey* (no. 35811/97, § 44, 2 August 2005), *Salduz v. Turkey* ([GC], no. 36391/02, §§ 27-31, 27 November 2008), *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, ECHR 2004-IV), and *Zeynep Özcan v. Turkey* (no. 45906/99, 20 February 2007).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 13 OF THE CONVENTION

40. The applicants complained under Articles 3 and 13 of the Convention that they had been subjected to ill-treatment while in police custody and that the domestic authorities had failed to conduct an effective investigation into their allegations.

41. The Court considers that these complaints should be examined from the standpoint of Article 3 alone, which provides:

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

A. Admissibility

1. Gülderen Baran

42. The Government asked the Court to dismiss the applicant's complaints as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention. They argued that the applicant could have sought reparation for the harm she had allegedly suffered by instituting an action in the civil or administrative courts. Alternatively, the Government argued that she should have lodged her application within six months of the date on which the incident had occurred.

43. The Court reiterates that it has already examined and rejected the same argument by the Government regarding exhaustion of domestic remedies in previous cases (see, for example, *Nevruz Koç v. Turkey*, no. 18207/03, § 31, 12 June 2007). The Court finds no particular circumstances in the present application which would require it to depart from that conclusion. Furthermore, the Court reiterates that the six-month time-limit imposed by Article 35 § 1 of the Convention requires applicants to lodge their applications within six months of the final decision in the process of exhaustion of domestic remedies and that the last stage of domestic remedies may be reached shortly after the lodging of the application, but before the Court is called upon to pronounce on admissibility (see, for example, *Sağat, Bayram and Berk v. Turkey* (dec.), no. 8036/02, 8 March 2007, and *Yıldırım v. Turkey* (dec.), no. 40074/98, 30 March 2006). In this connection, the Court observes that the proceedings concerning the applicant's allegations were concluded on 19 February 2004, which is before the Court had delivered its decision on admissibility and,

therefore, the application lodged by the first applicant on 19 June 2001 was in conformity with the six-month time-limit provided for in Article 35 § 1 of the Convention. Consequently, the Court dismisses the Government's preliminary objections.

44. Moreover, the Court finds that the applicant's 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.

2. Hacı Aziz Hun

45. The Court reiterates that if no remedies are available or if they are judged to be ineffective, the six-month time-limit in principle runs from the date of the act complained of (see *Hazar and Others v. Turkey* (dec.), no. 62566/00, 10 January 2002). However, special considerations could apply in exceptional cases where an applicant pursues or relies on an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective; in such a case it is appropriate to take as the start of the six-month period the date when he or she first became aware or ought to have become aware of those circumstances (see *Paul and Audrey Edwards v. the United Kingdom* (dec.), no. 46477/99, 7 June 2001).

46. The Court observes that, at the hearing held on 19 December 1995, the applicant submitted his allegations of ill-treatment to the Istanbul State Security Court and asked the latter to request the authorities to initiate a criminal investigation (*suç duyurusu*). The Istanbul State Security Court dismissed this request, stating that the accused could lodge their complaints themselves with the public prosecutor's office and that there was no need for the court to do so (see paragraph 18 above). Furthermore, in its decision of 2 March 2000, the Istanbul State Security Court made no reference to the applicant's allegations of ill-treatment. It is also noted that in his appeal petition the applicant solely challenged the use by the domestic court of his police statement obtained allegedly under torture, and did not repeat or give any details regarding his alleged torture with a view to requesting the authorities to initiate a criminal investigation. In the particular circumstances of the present case, the Court considers that the failure of the judicial authorities to act must have become gradually apparent to the applicant by 2 March 2000, the date on which the Istanbul State Security Court rendered its decision on the matter. Therefore the applicant should have been aware of the ineffectiveness of remedies in domestic law by that date. Accordingly, the six-month period provided for in Article 35 § 1 of the Convention should be considered to have started running no later than 2 March 2000 (see *Kanat v. Turkey* (dec.), no. 16622/02, 8 November 2007). However, the application was lodged with the Court on 19 June 2001. It follows that this part of the application has been introduced out of

time and must be rejected pursuant to Article 35 §§ 1 and 4 of the Convention

B. The merits of the first applicant's claim

47. The Government mainly quoted the Court's case-law regarding allegations of ill-treatment and submitted that a detailed and through investigation had been carried out in the instant case.

48. The first applicant maintained her allegations.

49. The Court reiterates that where an individual is taken into custody in good health but is found to be injured by 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 victim's allegations, particularly if those allegations were corroborated by medical reports, failing which a clear issue arises under Article 3 of the Convention (see *Yananer v. Turkey*, no. 6291/05, § 34, 16 July 2009, and the references therein).

50. In assessing evidence, the Court has generally applied the standard of proof "beyond reasonable doubt" (see *Avşar v. Turkey*, no. 25657/94, § 282, ECHR 2001). Such proof may however follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Ireland v. the United Kingdom*, § 161 18 January 1978, Series A no. 25). 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).

51. In the instant case, the Court observes that the applicant was detained in police custody for at least thirteen days. It notes that the ill-treatment complained of by the applicant consisted mainly of being beaten, stripped, hosed with pressurised water and made to stand in front of a fan, sexually harassed, having her hair and fingers pulled, hanged and having a weight put on her feet. In this connection, it considers that the applicant's version of events, except for a few details, has been consistent both before the Court and the domestic authorities**.**

52. As regards medical evidence, the Court notes that the applicant was not examined medically following her arrest. It further observes that the medical reports drawn up at the end of her stay in police custody and immediately after her remand in custody found a number of injuries, particularly to the applicant's arms (see paragraphs 9 and 10 above). Further medical examinations established that the applicant suffered from bilateral brachial plexitis (damage to nerves) and the Court observes that the damage

to her right arm is irreversible (see paragraphs 11, 12 and 13 above).These findings, in the Court's opinion, match and confirm the applicant's allegations of having been suspended.

53. The Court observes that the Government failed to provide an explanation as to the manner in which these injuries were sustained by the applicant. Considering the circumstances of the case as a whole, and the absence of a plausible explanation from the Government, the Court finds that it was the result of treatment for which the Government bore responsibility.

54. As to the seriousness of the treatment in question, the Court reiterates that, according to its case-law in this sphere (see, among other authorities, *Selmouni v. France* [GC], no. 5803/94, §§ 96-97, ECHR 1999-V), in order to determine whether a particular form of ill-treatment should be qualified as torture, it must have regard to the distinction, embodied in Article 3, between this notion and that of inhuman or degrading treatment. It appears that it was the intention that the Convention should, by means of this distinction, attach a special stigma to deliberate inhuman treatment causing very serious and cruel suffering.

55. Having regard to the nature and degree of the ill-treatment and to the strong inference which can be drawn from the evidence that it was inflicted in order to obtain information from the applicant about her suspected connection with an illegal armed organisation, the Court finds that the ill-treatment involved very serious and cruel suffering that may only be characterised as torture (see *Koçak v. Turkey*, no. 32581/96, § 48, 3 May 2007 and the cases referred to therein).

56. Consequently, there has been a substantive violation of Article 3 of the Convention.

57. The Court reiterates that Article 3 of the Convention also requires the authorities to investigate allegations of ill-treatment when they are "arguable" and "raise a reasonable suspicion" (see, in particular, *Ay v. Turkey*, no. 30951/96, §§ 59-60, 22 March 2005). The minimum standards as to effectiveness defined by the Court's case-law include the requirements that the investigation be independent, impartial and subject to public scrutiny, and that the competent authorities act with exemplary diligence and promptness (see, for example, *Çelik and İmret v. Turkey*, no. 44093/98, § 55, 26 October 2004). Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of the prohibition of ill-treatment. While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and moral integrity to go unpunished (see *Okkalı v. Turkey*, no. 52067/99, § 65, ECHR 2006-XII (extracts)).

58. In this connection, the Court reaffirms that when an agent of the State is accused of crimes which violate Article 3, the criminal proceedings and sentencing must not be time-barred and the granting of an amnesty or pardon should not be permissible (see *Erdoğan Yılmaz and Others v. Turkey*, no. 19374/03, § 56, 14 October 2008). It further reiterates that where a State agent has been charged with crimes involving torture or ill-treatment, it is of the utmost importance that he or she be suspended from duty during the investigation and trial, and should be dismissed if convicted (see *Abdülsamet Yaman v. Turkey*, no. 32446/96, § 55, 2 November 2004).

59. The Court has found above that the respondent State was responsible, under Article 3 of the Convention, for the injuries sustained by the applicant. An effective investigation was therefore required.

60. The Court notes in the instant case that the case against the police officers was dropped on 12 March 2002 as the statutory time-limit had elapsed. This judgment became final on 19 February 2004. Furthermore, there is no indication in the case file to demonstrate that the accused police officers were suspended from duty during this time. In this context the Court reiterates its earlier finding in a number of cases that the Turkish criminal-law system, as applied, can prove to be far from rigorous and to have no dissuasive effect capable of ensuring the effective prevention of unlawful acts perpetrated by State agents if criminal proceedings brought against the latter become time-barred (see, among other authorities, *Yeşil and Sevim v. Turkey*, no. 34738/04, § 42, 5 June 2007, and *Hüseyin Esen v. Turkey*, no. 49048/99, § 63, 8 August 2006). It finds no reason to reach a different conclusion in the present case.

61. In the light of the foregoing, the Court finds that the criminal proceedings brought against the police officers were inadequate, and therefore in breach of the State's procedural obligations under Article 3 of the Convention.

62. It follows that there has been a violation of Article 3 under its procedural limb.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

63. The applicants complained that they had been convicted on the basis of statements given under torture and ill-treatment and without the assistance of a lawyer while being held in police custody. They further complained that they had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge on the bench of the Istanbul State Security Court, and that the written opinion of the principal public prosecutor at the Court of Cassation had not been notified to them. They relied on Article 6 §§ 1 and 3 of the Convention, which, in so far as relevant, reads:

"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..."

A. Use by the Istanbul State Security Court of statements allegedly taken under torture and ill-treatment, in the absence of legal assistance

1. Admissibility

64. The Court considers 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.

2. Merits

65. 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 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*, 12 July 1988, §§ 45-46, Series A no. 140).

66. 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, *Jalloh v. Germany* [GC], no. 54810/00, § 95, 11 July 2006).

67. The Court has already held that the use of evidence obtained in violation of Article 3 in criminal proceedings could infringe the fairness of such proceedings even if the admission of such evidence was not decisive in securing the conviction (ibid., § 99, and *Söylemez v. Turkey*, no. 46661/99, § 23, 21 September 2006). It has further held that the absence of an Article 3 complaint does not preclude the Court from taking into consideration the applicant's allegations of ill-treatment for the purpose of

determining compliance with the guarantees of Article 6 (see *Örs and Others v. Turkey*, no. 46213/99, § 60, 20 June 2006, and *Kolu*, cited above, § 54).

68. Moreover, the Court reiterates that the privilege against self-incrimination or the right to remain silent are generally recognised international standards which lie at the heart of a fair procedure. Their aim is to provide an accused person with protection against improper compulsion by the authorities, and thus to avoid miscarriages of justice and secure the aims of Article 6 (see *John Murray v. the United Kingdom*, 8 February 1996, § 45, *Reports of Judgments and Decisions* 1996-I). This right presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained by coercion or oppression in defiance of the will of the accused (see *Jalloh*, cited above, § 100, and *Kolu*, § 51, both cited above). Early access to a lawyer is part of the procedural safeguards to which the Court will have particular regard when examining whether a procedure has extinguished the very essence of the privilege against self-incrimination (see *Salduz*, cited above, § 54).

69. As regards the first applicant, the Court notes that it has already found that she was subjected to torture in breach of Article 3 of the Convention while she was in police custody **(**see paragraph 56 above). Furthermore, it is not disputed between the parties that the applicant did not receive any legal assistance during this period and that she had made statements, including during the reconstruction of events and the identification procedures before the police in the absence of her lawyer. These elements were subsequently relied upon by the Istanbul State Security Court to convict her. In this connection, the Court reiterates that incriminating evidence – whether in the form of a confession or material evidence – obtained as a result of acts of violence or brutality or other forms of treatment which can be characterised as torture, should never be relied on as proof of the victim's guilt, irrespective of its probative value. Any other conclusion would only serve to legitimate indirectly the sort of morally reprehensible conduct which the authors of Article 3 of the Convention sought to proscribe or, in other words, to "afford brutality the cloak of law" (see *Harutyunyan v. Armenia*, no. 36549/03, § 63, ECHR 2007-VIII).

70. As to the second applicant, the Court observes that he was detained *incommunicado* by the police for twelve days, during which time he does not appear to have had any contact with a member of his family, a lawyer or a doctor. The medical report established at the end of his police custody makes certain findings which raise serious doubts, in the Court's view, as to the attitude adopted by the police officers during his questioning. In this connection, the Court notes that, even though the applicant denied the accuracy of the contents of the statement taken from him in the absence of legal assistance, and alleged, by referring to the medical reports contained in the case file, that he had been ill-treated in police custody where the

statement had been extracted from him, the Istanbul Assize Court relied on that statement when convicting him, despite the fact that Turkish legislation does not usually attach consequences to any confessions obtained during questioning, but later denied in court, which are decisive for the prospects of the defence (see paragraph 39 above).

71. Moreover, the Court observes that the restriction imposed on the applicants' right of access to a lawyer at that stage was systemic and applied to anyone held in custody in connection with an offence falling under the jurisdiction of the State Security Courts (see *Salduz*, cited above, § 56). In the *Salduz* judgment, the Court found that this in itself falls short of the requirements of Article 6 of the Convention (ibid.).

72. In these circumstances, the Court finds that the use of statements obtained under torture as regards the first applicant, and purportedly under ill-treatment as regards the second applicant, during the preliminary investigation, in the absence of their lawyer, rendered their trial as a whole unfair.

73. It follows that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1 in the present case.

B. Other alleged breaches of the fairness of the proceedings

74. The Government asked the Court to dismiss the applicants' complaint regarding the independence and impartiality of the State Security Court for failure to comply with the six-month rule (Article 35 § 1 of the Convention). In this connection, they argued that the applicants had failed to lodge their application within six months of the date on which Article 143 of the Constitution was amendment to exclude the military judges sitting on the bench of the State Security Court.

75. The Court considers the Government's objection to be so closely linked to the substance of the applicants' complaints under this head that it cannot be detached from it. Therefore, to avoid prejudging the merits of the said complaint, these questions should be examined together. As the applicant's complaints are not inadmissible on any other grounds, they must therefore be declared admissible.

76. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 6 §§ 1 and 3 (c) of the Convention above (paragraph 73), the Court considers that it has examined the main legal question raised under Article 6 of the Convention. It concludes therefore there is no need to make a separate ruling on the merits of the applicants' remaining complaints under this provision (see, for example, *Juhnke v. Turkey*, no. 52515/99, § 94, 13 May 2008, and *Getiren v. Turkey*, no. 10301/03, § 132, 22 July 2008 and the cases referred to therein).

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

77. In the application form the applicants raised a number of complaints under Articles 5, 6 and 14 of the Convention. In particular, they complained that their arrest, detention in police custody and remand in custody had taken place in complete disregard of the safeguards contained in paragraphs one to four of Article 5 of the Convention. Under Article 6 of the Convention they further challenged the independence and impartiality of the first-instance court on grounds such as the manner in which the civil judges were nominated. They submitted that the State Security Court had been biased, had invented facts, refused their requests for additional investigations and the confrontation of witnesses, and had been unduly influenced by prejudicial reports prepared by the police in breach of the right to be presumed innocent. In that connection, the applicants complained that, subsequent to their arrest, they were presented to journalists as criminals. They further complained about the length of the criminal proceedings brought against them and that the decision of the Court of Cassation was not reasoned. Finally, the applicants alleged under Article 14 of the Convention, in conjunction with Articles 3, 5, 6 and 13, that they had been discriminated against on account of their political opinions. In this connection, they pointed out the different rules of procedure applicable to those tried before State Security Courts, as opposed to ordinary criminals.

78. However, the Court finds, in the light of all the material in its possession that the applicants' above submissions do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

79. 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, costs and expenses

80. The applicants claimed pecuniary damages, costs and expenses, the amount of which they left to the discretion of the Court. In this connection, they strongly criticised the Court for requiring receipts and documents to attest for costs and expenses, as well as the amounts it awarded to Turkish lawyers.

81. In addition, Ms Baran claimed 60,000 euros (EUR) in respect of non-pecuniary damage. Mr Hun claimed EUR 35,000 in respect of non-pecuniary damage.

82. The Government contested the amounts.

83. The Court notes that the applicants have not specified any particular sum or produced any arguments or documents in support of their pecuniary damage claim. They have also not submitted any relevant documents in support of their costs and expenses claims, as required by Rule 60 of the Rules of Court. The Court accordingly makes no award under these heads.

84. Having regard to the nature of the violations found in the present case and ruling on an equitable basis, the Court awards Ms Baran the amount claimed in full and Mr Hun EUR 4,800 in respect of non-pecuniary damage.

85. It further considers that the most appropriate form of redress would be the retrial of the applicants in accordance with the requirements of Article 6 of the Convention, should they so request (see *Salduz*, cited above, § 72).

B. Default interest

86. 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 UNANIMOUSLY

1. *Declares* the complaints concerning the first applicant's allegations of ill-treatment and the lack of an effective remedy, the applicants' complaints regarding the use by the Istanbul State Security Court of their statements allegedly taken under torture in the absence of legal assistance, the lack of independence and impartiality of the State Security Court on account of the presence of the military judge and the non-communication of the written submissions of the public prosecutor at the Court of Cassation, admissible;

2. *Declares* the remainder of the application inadmissible;

3. *Holds* that there has been both a substantive and procedural violation of Article 3 of the Convention in respect of the first applicant;

4. *Holds* that there has been a violation of Article 6 §§ 1 and 3 (c) of the Convention;

5. *Holds* that there is no need to examine separately the applicants' other complaints under Article 6 of the Convention;

6. *Holds*

(a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable on the date of settlement:

(i) to Ms Gülderen Baran (San) EUR 60,000 (sixty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) to Mr Hacı Aziz Hun, EUR 4,800 (four thousand eight hundred euros) plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned 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;

7. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 20 May 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé
Registrar

Françoise Tulkens
President