



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

FORMER THIRD SECTION

CASE OF SATIK v. TURKEY (n°2)

(Application no. 60999/00)

JUDGMENT

STRASBOURG

8 July 2008

FINAL

08/10/2008

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Satık v. Turkey (n°2),

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

Boštjan M. Zupančič, *President*,
Corneliu Bîrsan,
Rıza Türmen,
Elisabet Fura-Sandström,
Alvina Gyulumyan,
Egbert Myjer,
Ineta Ziemele, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 17 June 2008,

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

PROCEDURE

1. The case originated in an application (no. 60999/00) 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 Kadir Satık (“the applicant”), on 14 July 2000.

2. The applicant, who had been granted legal aid, was represented by Mrs A. Topuz, a lawyer practising in Istanbul. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that he had been subjected to ill-treatment in police custody and that he had also been denied a fair hearing by an independent and impartial tribunal in violation of Articles 3 and 6 of the Convention.

4. On 25 April 2005 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. On 1 February 2008 the Court changed the composition of its Sections (Rule 25 § 1). However this case remained in the Third Section as composed before that date.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1966 and lives in Ankara.

7. On an unspecified date, the National Intelligence Service (*Milli İstihbarat Teşkilatı*, hereinafter MIT) began to record the telephone conversations of S.K., a Greek attaché working at the Consulate of Greece in Izmir and allegedly a member of the Greek Intelligence Service (EIP). The authorities noticed suspicious telephone conversations between S.K. and the applicant and initiated an investigation concerning the applicant.

8. On 18 February 1998 a military prosecutor and MIT officers searched the applicant's shop in Istanbul. According to the preliminary investigation report, several photographs of military bases, two maps (one of which was marked as "top secret") and telephone and credit cards were found in the shop. V.A.Ö. was present when MIT officers carried out a search in the applicant's shop and told them that the photos of the military bases did not belong to him but to the applicant. The latter was then taken into custody on suspicion of transmitting official and confidential information to Greek intelligence service members. He was brought before a doctor, N.A., who noted that he was in good health. During his custody period, the applicant was allegedly subjected to ill-treatment by the MIT officers.

9. On 20 February 1998 the applicant was brought before the 3rd Army Corps Command Military Court. Before this court, he maintained that he had met someone who worked at the Consulate of Greece in Istanbul and that he had sold this person books and silver accessories. He received money from this person for what he had sold. The applicant further contended that this person asked him to provide military information about Turkey. The applicant denied the allegation that he had given confidential information to this person. He stated that the maps and the photographs found in his shop did not belong to him.

10. On the same day, the court ordered the applicant's detention on remand. He was then examined by N.A. who once again noted that there was no trace of ill-treatment on the applicant's body. The applicant was then remanded in the Davutpaşa Military Prison. He filed an objection to the detention order.

11. On 23 February 1998, following his objection to the findings contained in the previous medical reports, the applicant underwent a third medical examination in prison. According to the prison doctor's report, the applicant had ecchymoses on both arms, which were possibly three to four days old.

12. On 5 March 1998 the applicant filed a further objection to the detention order. On the same day the Navy Command Military Court dismissed his objection.

13. On 19 March 1998 the General Staff Military Prosecutor filed a bill of indictment with the General Staff Military Court, charging the applicant under Article 56 § 1 (D) of the Military Criminal Code and Articles 133 § 1, 31, 33 and 36 of the Criminal Code, with disloyalty to national defence by way of espionage.

14. The applicant maintained before the General Staff Military Court that he had been coerced by MIT officers into signing a statement while in custody. He claimed that he had sold the shop to V.A.Ö. and that the photographs and maps did not belong to him. He requested that V.A.Ö. be heard by the court. He further contended that the search in the shop was illegal and that he had not been informed of the charges against him by the officials who had conducted the search. The applicant reiterated that he had sold books and silver accessories to a Greek official, L.K. and that this person had requested him to provide confidential information. He also contended that he had contacted L.K. and another Greek official, S.K., whom he knew as "*Yorgo*", in order to maintain his business and that the information that he had given was false. The applicant's representative stressed that the applicant's statements had been taken under torture by MIT officers. She referred in this connection to the medical report dated 23 February 1998 prepared by the Davutpaşa military prison doctor who noted the presence of three to four day-old ecchymoses on the applicant's arms. The applicant's representative also argued that the telephone conversations of the applicant, which were the sole evidence against him, had been obtained unlawfully by the MIT officers since there was no decision of a judge permitting them to tap his conversations on a public telephone. She therefore claimed that, in the absence of sufficient evidence, the applicant was innocent of the alleged crime.

15. During the proceedings, the General Staff Military Court issued a summons requiring V.A.Ö. to give evidence. However, this person could not be found.

16. On an unspecified date, a fingerprint expert conducted an analysis on the photographs and maps from the applicant's shop. He observed that none of the fingerprints found belonged to the applicant.

17. On 15 June 1999 the General Staff Military Court convicted the applicant as charged. The court considered that the information that the applicant had given could not be considered to be confidential. However, it held that, although the applicant had provided non-confidential or imaginary information in order to maintain his business contacts with the Greek officials, he had committed the offence of disloyalty to national defence by accepting their proposal to provide information. The court sentenced the applicant to twelve years and six months' imprisonment, which was the

minimum penalty prescribed by Article 56 § 1 (D) of the Military Criminal Code and Articles 133 § 1, 31, 33 and 36 of the Criminal Code. While the court dismissed the applicant's defence submissions, it did not address directly his allegations that his statements to the MIT officers had been obtained under torture and that his telephone conversations were unlawfully tapped by the MIT officers.

18. On 2 August 1999 the applicant appealed. He claimed that he was innocent of the crime since he had given false information to the Greek Intelligence Service and that he had never intended to betray his country. Relying on Article 6 of the Convention, the applicant further argued that the first instance court had convicted him on the basis of unlawfully obtained evidence, in particular the unlawful tapping and recording of his telephone conversations by the MIT. He also complained that the court had not secured the attendance of V.A.Ö as a witness. Referring to the medical report dated 23 February 1998 indicating ecchymoses on his arms, the applicant noted that the security forces had resorted to habitual methods to secure his conviction.

19. On 17 November 1999 the Military Court of Cassation upheld the judgment of 15 June 1999. It approved the reasoning of the first instance court's judgment and noted that the latter had already accepted that the maps and photos had not belonged to the applicant and that it had not relied on the statements given by V.A.Ö. in the course of the preliminary investigation since he had not attended the trial. Accordingly, there was no deficiency or unlawfulness in the investigation leading to the applicant's conviction. The court therefore rejected the applicant's appeal.

20. On 24 January 2000 the Military Court of Cassation's decision was served on the applicant.

II. RELEVANT DOMESTIC LAW AND PRACTICE

21. A full description of the domestic law at the relevant time may be found in *Bati and Others v. Turkey*, nos. 33097/06 and 57834/00, §§ 95-99, ECHR 2004-IV; and *Ergin v. Turkey (no. 6)*, no. 47533/99, §§ 15-18, 4 May 2006.

22. Section 11 of the Constitution of Military Courts Act then in force read as follows:

Section 11

"Trial of civilians by military courts:

... the offences referred to in Articles ... and 56 of the Military Penal Code [come within the jurisdiction of the military courts]."

23. According to Article 138 of the Constitution of Military Courts Act, hearings to be held by military courts shall be open to public. However, the

military court may decide to close a part or whole of the hearing to the public if public morality or security so requires. Article 139 further provides that the military court may also decide to remove the public when it holds a hearing to consider a request to close the hearings to the public.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

24. The applicant complained that he had been subjected to ill-treatment during his detention in police custody in violation of Article 3 of the Convention, which reads as follows:

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

A. Admissibility

25. Relying on the Court’s judgments in the cases of *Ahmet Sadık v. Greece* (judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, § 34) and *Cardot v. France* (judgment of 19 March 1991, Series A no. 200, § 30), the Government claimed that the applicant had failed to raise, even in substance, his complaints of ill-treatment before the national authorities and that therefore he had not availed himself of the remedies in domestic law.

26. The applicant submitted that he had raised his complaint of ill-treatment before the domestic authorities in the course of the criminal proceedings against him but no action had been taken to investigate his allegations.

27. The Court reiterates that the rule of exhaustion of domestic remedies referred to in Article 35 § 1 of the Convention obliges applicants to use first the remedies which are normally available and sufficient in the domestic legal system to enable them to obtain redress for the breaches alleged. The existence of the remedies must be sufficiently certain, in practice as well as in theory, failing which they will lack the requisite accessibility and effectiveness. However, Article 35 § 1 does not require that recourse should be had to remedies which are inadequate or ineffective (see *Aksoy v. Turkey* judgment of 18 December 1996, *Reports of Judgments and Decisions* 1996-VI, pp. 2275-76, §§ 51-52).

28. The Court notes that, contrary to the Government’s assertion, the applicant can be considered to have brought the substance of his complaint to the notice of the national authorities when he challenged the admissibility

of his statements taken by the MIT officers as evidence (see paragraph 13 above). The applicant's representative also claimed that the applicant's statements had been obtained under torture and drew the General Staff Military Court's attention to the medical report issued by the prison doctor who noted the presence of ecchymoses on the applicant's arms (*ibid.*). However, although the court took note of the applicant's complaints, the authorities did nothing to follow-up the allegation that he had been tortured while in custody (see paragraph 17 above).

29. In the Court's opinion, these allegations should have been sufficient in themselves to alert the authorities to the need for action, especially since there was medical evidence in the file indicating bruising to his arms. Having regard to these circumstances, the Court considers that the applicant can be considered to have done all that could be expected of him to bring his complaint to the attention of the authorities with a view to obtaining an investigation into his allegation. In the light of the foregoing reasons the Court dismisses the Government's objection to the admissibility of the complaint under Article 3 of the Convention. It also considers 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.

B. Merits

30. The Government alleged that it had not been established with sufficient certainty that the ecchymoses observed on the applicant's body had occurred during his detention in police custody since the prison doctor stated the ecchymoses were *possibly* three to four days old. They therefore denied that the applicant had suffered ill-treatment during his detention in custody.

31. 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 *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, § 62; *Tomasi v. France*, judgment of 27 August 1992, Series A no. 241-A, pp. 40-41, §§ 108-111; and *Ribitsch v. Austria*, judgment of 4 December 1995, Series A no. 336, p. 26, § 34).

32. 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-VII (extracts)). Such proof may, however, follow from the coexistence of sufficiently strong, clear and concordant inferences or of

similar un rebutted presumptions of fact (see *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). 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).

33. In the instant case, the Court observes that the applicant underwent three medical examinations prior to and subsequent to his detention in police custody (see paragraphs 8, 10 and 11). Dr N.A. who carried out the first two examinations noted in his reports that the applicant was in good health and that there was no sign of ill-treatment on his body. However, following the applicant's objection to his findings, a third examination was carried out by the prison doctor who observed ecchymoses on the applicant's arms which were possibly three to four days old (see paragraph 11 above). According to the applicant, the third medical report confirmed his allegation that he had been subjected to torture while in detention in police custody. However, the Government denied this allegation.

34. The Court observes that in the proceedings before the General Staff Military Court the applicant confined himself to challenging the admissibility of his statements to the police officers. Apart from the allegation that his statements were taken under torture, he did not at any stage give any indication of the sort of ill-treatment which he allegedly suffered. Furthermore, the applicant did not specifically set out in his application form to the Court the details of the alleged ill-treatment inflicted upon him during his detention in police custody. In particular, he failed to explain the type of ill-treatment which caused the ecchymoses on his arms. This being so, the Court is of the opinion that the applicant has not laid the basis of an arguable claim that he had been subjected to ill-treatment, as alleged.

35. It follows that there has been no violation of Article 3 of the Convention.

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

36. The applicant complained that he had been denied a fair hearing by an independent and impartial tribunal since he had been tried by a military court. He maintained that he had been convicted on the basis of tape-recorded telephone conversations which had been unlawfully obtained. He also alleged that the court had failed to hold a public hearing and to secure the attendance of a witness who was important for his defence. In

this connection, he relied on Article 6 § 1 of the Convention which provides as relevant:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. Alleged lack of independence and impartiality of the General Staff Military Court

1. Admissibility

37. The Government alleged that the applicant had failed to exhaust domestic remedies since he had not raised this complaint before the domestic authorities.

38. The applicant maintained that, even if he had raised his complaint concerning the independence of the General Staff Military Court before the domestic authorities, this would have had no prospect of success.

39. The Court observes that the establishment and composition of the general staff military courts were expressly prescribed by law. The applicant has never argued that this legislation was incorrectly applied in his case. Accordingly, any challenge by the applicant to the composition of the court for the simple reason that the judges sitting on the bench were members of the army would have been doomed to failure. Thus, such a request before the national authorities would not have remedied the situation complained of. It follows that this objection should be dismissed. The Court also considers that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. Nor is it inadmissible on any other grounds.

2. Merits

40. The applicant alleged that the General Staff Court which tried him could not be regarded as an independent and impartial tribunal, given that it was composed of two military judges and an officer, all of whom were bound by the orders and instructions of the Ministry of Defence and the general staff which appointed them. In that connection he submitted that, as a civilian, he should not have been tried in a military court.

41. The Government submitted that only in exceptional circumstances was a civilian tried in a military court in Turkey. On that point, they maintained that the applicant was tried by a military court because he was charged with an offence concerning national security. The Government further maintained that the domestic law provided necessary safeguards to guarantee the independence and impartiality of military courts. Finally, they pointed out that, with the adoption of Law no. 4963, Turkish legislation had been amended to bring it into line with the Convention.

42. The Court notes that it has examined a similar grievance, finding a violation of Article 6 § 1 of the Convention in its *Ergin v. Turkey* (no. 6) judgment (no. 47533/99, § 54, 4 May 2006). In that judgment, the Court held that it was understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to propaganda against military service, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings. On that account the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. Consequently, the applicant's doubts about that court's independence and impartiality may be regarded as objectively justified (*ibid*).

43. Although the Court accepted that the Convention did not absolutely exclude the jurisdiction of military courts to try cases in which civilians were implicated, it affirmed that only in very exceptional circumstances could the determination of criminal charges against civilians in such courts be held to be compatible with Article 6. In this connection, it held that the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation. The existence of such reasons had to be substantiated in each specific case. It was not sufficient for the national legislation to allocate certain categories of offence to military courts *in abstracto* (see, *Ergin* (no. 6), cited above, §§ 42-47).

44. Furthermore, having examined the decisions or practices of international judicial bodies over the last decade, the Court found that there was an emerging international consensus against any military jurisdiction over civilians (see, *Ergin* (no. 6), cited above, §§ 22-25).

45. As regards the situation in Europe, it appears that there is a prevailing view among the member States of the Council of Europe that civilians should not be tried by military courts in peace time. Although there is some diversity in legislation governing the jurisdiction of military courts to try civilians, in the great majority of legal systems that jurisdiction is either non-existent or limited to certain very precise situations, such as complicity between a member of the military and a civilian in the commission of an offence punishable under the ordinary criminal code or the military penal code (see, *Ergin* (no. 6), cited above, § 21).

46. In the instant case, however, Article 145 of the Constitution of Turkey explicitly provides that military courts may try civilians in peacetime. Moreover, former Article 11 of the Military Courts Act stated that the offence under Article 56, with which the applicant was charged and convicted of, came within the jurisdiction of the military courts.

47. In the light of the foregoing, and particularly of the prevailing view at international and regional level, the Court considers that it is understandable that the applicant, a civilian standing trial before a court composed exclusively of military officers, charged with offences relating to

his purported agreement to betray information prejudicial to army concerns, should have been apprehensive about appearing before judges belonging to the army, which could be identified with a party to the proceedings.

48. Accordingly, the applicant could legitimately fear that the General Staff Court might allow itself to be unduly influenced by partial considerations. The applicant's doubts about the independence and impartiality of that court can therefore be regarded as objectively justified (see, *mutatis mutandis*, *Incal*, cited above, p. 1573, § 72 *in fine*).

49. There has therefore been a violation of Article 6 § 1 of the Convention.

B. Alleged use of unlawfully obtained evidence

50. The applicant also complained under Article 6 § 1 of the Convention that the domestic courts had convicted him on the basis of his tape-recorded telephone conversations which had been unlawfully obtained by the MIT officers.

51. The applicant claimed that the MIT tapped his conversations in non-compliance with the domestic law *i.e.* there was no decision given by a judge authorising listening in to his conversations.

52. The Government contended that the applicant's telephone conversations had been tapped in the framework of the MIT's counter-intelligence activities as permitted by Article 4 of Law no. 2937. Article 6 of the said law permitted MIT members to carry out counter-intelligence activities and granted them the rights and powers enjoyed by the regular police. The MIT officers had decided to intercept and record the applicant's conversations with a view to protecting national security. The measure in question had complied with the requirements of proportionality. Furthermore, the recorded telephone conversations of the applicant were not the sole evidence against him. The photographs of military bases, two maps, one of which was designated "top secret", telephone and credit cards found in the applicant's possessions had constituted the basis of his conviction. Given that the applicant's defence rights protected by Article 6 of the Convention had been respected, his complaints under this heading should be declared inadmissible.

53. 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; *Teixeira de Castro v. Portugal*, judgment of 9 June 1998, Reports 1998-IV, p. 1462, § 34).

54. 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, *inter alia*, *Khan v. the United Kingdom*, no. 35394/97, § 34, ECHR 2000-V; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 76, ECHR 2001-IX; *Allan v. the United Kingdom*, no. 48539/99, § 42, ECHR 2002-IX).

55. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubts on its reliability or accuracy. While no problem of fairness necessarily arises where the evidence obtained was unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable, the need for supporting evidence is correspondingly weaker (see, *inter alia*, *Khan*, cited above, §§ 35, 37; *Allan*, cited above, § 43).

56. As regards, in particular, the examination of the nature of the Convention violation found, the Court recalls that notably in the cases of *Khan* (cited above, §§ 25-28) and *P.G. and J.H. v. the United Kingdom* (cited above, §§ 37-38) it has found the use of covert listening devices to be in breach of Article 8 where recourse to such devices lacked a legal basis in domestic law and the interferences with those applicants’ right to respect for private life were not “in accordance with the law”. Nonetheless, the admission in evidence of information obtained thereby did not in the circumstances of the cases conflict with the requirements of fairness guaranteed by Article 6 § 1.

57. In the instant case, the Government relied on Articles 4 and 6 of Law no. 2937 as the legal basis of tapping and recording the applicant’s telephone conversations and argued that the impugned measure was justified in the circumstances for protection of national security. However, the Court has already found that at the time of the facts giving rise to the present application there was no domestic law which regulated telephone tapping and recording (see *Ağaoğlu v. Turkey*, no. 27310/95, §§ 54-55, 6 December 2005). Thus the lack of legal basis for such interference lead

the Court to conclude that the telephone recordings in question were unlawfully- obtained evidence in the circumstances of the case.

58. Nonetheless, the Court cannot exclude as a matter of principle and in the abstract that unlawfully obtained evidence of the present kind may be admissible (see, *Schenk*, cited above, p. 29, § 46). It must therefore ascertain whether the proceedings as a whole were fair, regard being had to whether the rights of the defence have been respected. In this connection, it notes that the applicant was given opportunity to challenge the way this evidence was obtained and opposed its use against him in the course of his trial (see paragraph 14 above). Although the trial court did not address the applicant's challenge directly, it dismissed his defence submissions and convicted him on the basis of other available evidence, such as the applicant's admission of having provided non-confidential information to the Greek officials (see paragraphs 14 and 17 above).

59. Having regard to the foregoing, the Court considers that the use of at the admission of the secretly taped material did not conflict with the requirements of fairness guaranteed by Article 6 § 1 of the Convention.

60. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must be rejected pursuant to Article 35 § 4.

C. Alleged failure to hold a public hearing

61. The applicant complained that his right to a public hearing enshrined in Article 6 had also been violated.

62. The Government noted that, according to Article 138 of the Military Court Organisation and Proceedings Law, hearings before military courts were public. However, the military court could hold hearings *in camera* if public morality and safety so required. In the instant case, since the applicant had been tried on charges of military espionage, exclusion of public was necessary for the purposes of national security.

63. The Court reiterates that the purpose of the exhaustion rule, contained in Article 35 § 1 of the Convention, is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court. Accordingly, this rule requires applicants first to use the remedies provided by the national legal system, thus dispensing States from answering before the European Court for their acts.

64. In the instant case, however, it does not appear from the applicant's submissions that he has raised this complaint before the domestic courts. Nor does it transpire from the documents that the applicant challenged the decision to hold hearings *in camera* before the trial court or in his appeal to the Court of Cassation. It follows that this complaint must be rejected for

non-exhaustion of domestic remedies pursuant to Article 35 §§ 1 and 4 of the Convention.

D. Alleged failure to secure the attendance of a witness

65. The applicant complained that he had been denied a fair hearing since the trial court had failed to secure the attendance of V.A.Ö. who could have testified for his defence.

66. The Government contended that the trial court had made sufficient efforts to secure the attendance of the witness in question. However, he could not be found.

67. The Court reiterates that as a general rule, it is for the national courts to assess the evidence before them, as well as the relevance of the evidence which an accused seeks to adduce, and in particular whether it is appropriate to call witnesses in autonomous sense given to that term in the Convention system (see *Perna v. Italy*, no. 48898/99, § 26, 25 July 2001). Furthermore, the purpose of Article 6 § 3 (d) is to place the defendant on an equal footing with the prosecution regarding the hearing of witnesses (see *Touvier v. France*, no. 29420/95, Commission decision of 13 January 1997, Decisions and Reports (DR) 88, p. 148).

68. The Court notes that the General Staff Court summoned V.A.Ö. at the applicant's request but he could not be found. Furthermore, as observed by the Military Court of Cassation, the trial court disregarded V.A.Ö.'s statements made to the police officers since he could not be questioned in relation to his allegations (see paragraph 19 above). The Court, noting that the trial court did not consider it necessary to examine that witness in order to ascertain the truth, does not find any particular failure to respect the applicant's right to a fair hearing.

69. It follows that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and must also be rejected pursuant to Article 35 § 4.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

70. 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

71. The applicant claimed 118,000 euros (EUR) in respect of pecuniary damage and EUR 120,000 for non-pecuniary damage.

72. The Government submitted that the amounts claimed were excessive and unjustified.

73. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, it accepts that the applicant must have suffered non-pecuniary damage, such as distress and frustration in the circumstances of the case, which cannot be sufficiently compensated by the finding of a violation alone. Taking into account the circumstances of the case and having regard to its case-law, the Court awards the applicant EUR 1,000 for non-pecuniary damage.

74. The Court considers that where an individual, as in the present case, has been convicted by a court which did not satisfy the conditions of independence and impartiality required by the Convention, an appropriate form of redress would, in principle, be for the applicant to be given a retrial or for the proceedings to be reopened if he or she so requests (see *Öcalan v. Turkey* [GC], no. 46221/99, § 210 *in fine*, ECHR 2005-...).

B. Costs and expenses

75. The applicant also claimed EUR 19,000 for the costs and expenses incurred before the Court.

76. The Government contended that no award should be under this heading since the applicant had failed to furnish any documents in support of his claim.

77. 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 and documents in its possession as well as the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for costs and expenses before the Court.

C. Default interest

78. 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 applicant's complaints concerning the alleged ill-treatment inflicted on him during his detention in police custody and

his conviction by a tribunal which lacked independence and impartiality admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been no violation of Article 3 of the Convention;
3. *Holds* by 6 votes to 1 that there has been a violation of Article 6 § 1 of the Convention as a result of the applicant's trial and conviction by the General Staff Military Court;
4. *Holds* by 6 votes to 1
 - (a) 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, the following sums, to be converted into new Turkish liras at the date of settlement:
 - (i) EUR 1,000 (one thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 3,000 (three thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (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;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 8 July 2008, 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 separate opinions are annexed to this judgment:

- concurring opinion of Judge Ziemele;
- dissenting opinion of Judge Türmen.

B.M.Z.
S.Q.

CONCURRING OPINION OF JUDGE ZIEMELE

I voted for the finding of a violation of Article 6 § 1 on the grounds that the applicant was tried and convicted by the General Staff Military Court. However, I do not fully share the reasoning of the majority on this point. The judgment relies heavily on the case of *Ergin v. Turkey* (no. 6), no. 47533/99, ECHR 2006- (extracts). In the *Ergin* case the applicant was the editor of a newspaper and was charged with incitement, by publication of an article, to evade military service. In the present case, the applicant was convicted of espionage (§§ 12, 16). Clearly, the two offences are of a very different nature. The judgment takes note of the prevailing practice in the Council of Europe Member States and points to a strong trend at the international level to limit the jurisdiction of military courts (§§ 43 – 44). However, it does not go as far as to say that in times of peace military courts should not try civilians no matter what the offence is. The Court's position is that "the power of military criminal justice should not extend to civilians unless there are compelling reasons justifying such a situation. The existence of such reasons [has] to be substantiated in each specific case. It [is] not sufficient for the national legislation to allocate certain categories of offences to military courts *in abstracto*" (§ 42).

If the jurisdiction of military courts over civilians in some circumstances may still be accepted by the Court, it remains unclear where the line should be drawn. Normally, it is necessary to have a clear delimitation in national legislation of the jurisdiction of courts by defining in criminal codes the types of offences that might fall within the system of military justice or at least its competence in times of state of emergency. It would have been preferable if the Court had further elaborated on the meaning of the "compelling reasons" approach. A case of espionage was a good opportunity to do so. However, if the Court considered that military courts should not try civilians in peacetime since it was incompatible with the fair trial guarantees of Article 6 § 1, it ought to have ruled on that principle.

DISSENTING OPINION OF JUDGE TÜRMEEN

I regret that I am unable to agree with the majority in finding a violation of Article 6 § 1 of the Convention.

I do agree that in principle military criminal justice should not be extended to civilians. However, this is not an absolute rule and decisions should be reached on a case-by-case basis after examination of the circumstances of each case. Elements such as the nature of the offence and the guarantees provided by the national legislation to ensure the independence and impartiality of the judges certainly play an important role.

The case-law of the Court also supports this view. In *Ergin v. Turkey* (no. 6), no. 47533/99, ECHR 2006- (extracts), the Court stated that the Convention did not absolutely exclude the jurisdiction of military courts to try cases in which civilians were implicated. It held however that the existence of such jurisdiction should be subjected to particularly careful scrutiny. The Court also considered that the power of military criminal justice should not extend to civilians unless there were compelling reasons justifying such a situation, and if so, only on a clear and foreseeable legal basis. The existence of such reasons must be substantiated in each specific case (see *Ergin*, cited above, §§ 46 and 47).

It is to be recalled that the applicant was convicted of disloyalty to national defence by way of espionage, an offence which was prescribed by Article 56 § 1 (D) of the Military Criminal Code and Article 133 § 1 of the Criminal Code. In convicting the applicant, the General Staff Court had to assess the nature of the acts he had committed and found that the information he had provided to the Greek officials was not confidential military information. On that basis the court mitigated the applicant's sentence and imposed the minimum period of imprisonment foreseen by the above-mentioned provisions.

The issues to be determined by the General Staff Court required a measure of professional knowledge or experience since the acts committed by the applicant were exclusively related to military information and consequently to national security (see *mutatis mutandis*, *Tsfayo v. the United Kingdom*, no. 60860/00, §§ 43 and 45, 14 November 2006). In this respect, the circumstances of the present case differ from those of the *Ergin* case and other similar cases (see *Düzgören v. Turkey*, no. 56827/00, 9 November 2006) where the assessment of the acts at issue did not require special expertise and did not concern national security.

On the other hand, "espionage" in criminal law has a special status as it constitutes a threat to the defence and security of the State.

In the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land it is stated that a spy will be treated as a prisoner of war, that is to say, a combatant (Article 31).

The 1949 Geneva Convention IV on Protection of Civilian Persons in Time of War stipulates that a civilian person detained as a spy shall be regarded as having forfeited rights of communication, meaning that he will be regarded as a prisoner of war, a member of the military (Article 5).

Moreover, under Article 68 of the same Convention, the Occupying Power may impose the death penalty on a protected person (a civilian) in cases where the person is guilty of espionage.

It is true that all these provisions are applicable in time of war and not in time of peace. Nevertheless, they are indications as to the special character of the offence where a civilian convicted of espionage is treated as a person belonging to the military.

Accordingly, in the instant case, I find there are sufficient compelling reasons that justify the trial of the applicant by a military court on charges of military offences which had a clear and foreseeable basis in domestic law.

It is to be noted that the Court has already had occasion to look into the question of the General Staff Court's organic independence from the executive, and has held that the appointment of military judges and the safeguards accorded to them in the performance of their duties were compatible with the requirements of Article 6 § 1 of the Convention (see *Hakan Önen v. Turkey* (dec.), no. 32860/96, 10 February 2004).

Against this background, and having regard to the special circumstances of the present case, I conclude that there has been no violation of Article 6 § 1 of the Convention in respect of the applicant's trial.