CASE OF SALDUZ v. TURKEY

(Application no. 36391/02)

JUDGMENT

STRASBOURG

27 November 2008

This judgment is final but may be subject to editorial revision.

In the case of Salduz v. Turkey,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President,*
Christos Rozakis,
Josep Casadevall,
Rıza Türmen,
Rait Maruste,
Vladimiro Zagrebelsky,
Stanislav Pavlovschi,
Alvina Gyulumyan,
Ljiljana Mijović,
Dean Spielmann,
Renate Jaeger,
David Thór Björgvinsson,
Ján Šikuta,
Ineta Ziemele,
Mark Villiger,
Luis López Guerra,
Mirjana Lazarova Trajkovska, *judges,*
and Vincent Berger, *Jurisconsult*,

Having deliberated in private on 19 March and 15 October 2008,

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

PROCEDURE

1. The case originated in an application (no. 36391/02) 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 Yusuf Salduz ("the applicant"), on 8 August 2002.

2. The applicant alleged, in particular, that his defence rights had been violated in that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him and that he had been denied access to a lawyer while in police custody. In respect of his complaints, he relied on Article 6 §§ 1 and 3 (c) of the Convention.

3. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court).

4. By a decision dated 28 March 2006 the application was declared partly inadmissible by a Chamber from that Section composed of the following judges: Jean-Paul Costa, Andras Baka, Rıza Türmen, Karl Jungwiert, Mindia Ugrekhelidze, Antonella Mularoni, Elisabet Fura-Sandström, and Sally Dollé, Section Registrar.

5. In its judgment of 26 April 2007 ("the Chamber judgment"), the Chamber, made up of the following judges: Françoise Tulkens, Andras Baka, Ireneu Cabral Barreto, Rıza Türmen, Mindia Ugrekhelidze, Antonella Mularoni and Danute Jočienė, and also of Sally Dollé, Section Registrar, held unanimously that there had been a violation of Article 6 § 1 of the Convention on account of the non-communication of the Principal Public Prosecutor's written opinion and further held by five votes to two that there had been no violation of Article 6 § 3 (c) on account of the lack of legal assistance to the applicant while in police custody.

6. On 20 July 2007 the applicant requested that the case be referred to the Grand Chamber (Article 43 of the Convention).

7. On 24 September 2007 a panel of the Grand Chamber decided to accept his request (Rule 73).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24.

9. The applicant and the Government each filed written observations on the merits.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 19 March 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mr. M. Özmen, *co-Agent*,
Ms N. Çetin,
Ms A. Özdemir,
Ms İ. Kocayiğit
Mr C. Aydin, *Advisers*;

(b) *for the applicant*
Mr U. Kilinç, *Counsel*,
Ms T. Aslan, *Adviser*.

The Court heard addresses by Mr Kılınç and Mr Özmen, as well as their replies to questions by the Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

11. The applicant was born on 2 February 1984 and lives in İzmir.

A. The applicant's arrest and detention

12. On 29 May 2001 at about 10.15 p.m., the applicant was taken into custody by police officers from the Anti-Terrorism Branch of the İzmir Security Directorate on suspicion of having participated in an unlawful demonstration in support of an illegal organisation, namely the PKK (the Workers' Party of Kurdistan). The applicant was also accused of hanging an illegal banner from a bridge in Bornova on 26 April 2001.

13. At about 12.30 a.m. on 30 May 2001 the applicant was taken to the Atatürk Teaching and Research Hospital, where he was examined by a doctor. The medical report stated that there was no trace of ill-treatment on his body.

14. Subsequently, at about 1 a.m., the applicant was interrogated at the Anti-Terrorism Branch in the absence of a lawyer. According to a form explaining arrested persons' rights which the applicant had signed, he had been reminded of the charges against him and of his right to remain silent. In his statement, the applicant admitted his involvement in the youth branch of HADEP (*Halkın Demokrasi Partisi* – the People's Democracy Party). He gave the names of several persons who worked for the youth branch of the Bornova District Office. He explained that he was the assistant youth press and publications officer and also responsible for the Osmangazi neighbourhood. He further stated that it had been part of his job to assign duties to other members of the youth branch. He admitted that he had participated in the demonstration on 29 May 2001 organised by HADEP in support of the imprisoned leader of

the PKK. He said that there had been about sixty demonstrators present and that the group had shouted slogans in support of Öcalan and the PKK. He had been arrested on the spot. He also admitted that he had written “Long live leader Apo” on a banner which had been hung from a bridge on 26 April 2001. The police took samples of the applicant's handwriting and sent it to the police laboratory for examination.

15. On 1 June 2001 the İzmir Criminal Police Laboratory issued a report after comparing the applicant's handwriting to that on the banner. It concluded that although certain characteristics of the applicant's handwriting bore similarities to the handwriting on the banner, it could not be established whether or not the writing on the banner was in fact his.

16. At 11.45 p.m. on 1 June 2001 the applicant was again examined by a doctor, who stated that there were no traces of ill-treatment on his body.

17. On the same day the applicant was brought before the public prosecutor and subsequently the investigating judge. Before the public prosecutor, he explained that he was not a member of any political party, but had taken part in certain activities of HADEP. He denied fabricating an illegal banner or participating in the demonstration on 29 May 2001. He stated that he was in the Doğanlar neighbourhood to visit a friend when he was arrested by the police. The applicant also made a statement to the investigating judge, in which he retracted his statement to the police, alleging that it had been extracted under duress. He claimed that he had been beaten and insulted while in police custody. He again denied engaging in any illegal activity and explained that on 29 May 2001 he had gone to the Doğanlar neighbourhood to visit a friend and had not been part of the group shouting slogans. After the questioning was over, the investigating judge remanded the applicant in custody, having regard to the nature of the offence of which he was accused and the state of the evidence. The applicant was then allowed to have access to a lawyer.

B. The trial

18. On 11 July 2001 the Public Prosecutor at the İzmir State Security Court filed an indictment with that court accusing the applicant and eight other accused of aiding and abetting the PKK, an offence under Article 169 of the Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).

19. On 16 July 2001 the State Security Court held a preparatory hearing. It decided that the applicant's detention on remand should be continued and that the accused be invited to prepare their defence submissions.

20. On 28 August 2001 the State Security Court held its first hearing, in the presence of the applicant and his lawyer. It heard evidence from the applicant in person, who denied the charges against him. He also rejected the police statement, alleging that it had been extracted from him under duress. He explained that while he was in custody, police officers had ordered him to copy the words from a banner. He also stated that he had witnessed the events that had taken place on 29 May 2001; however, he had not taken part in the demonstration as alleged. Instead, he had been in the neighbourhood to visit a friend named Özcan. He also denied hanging an illegal banner from a bridge on 26 May 2001.

21. At the next hearing, which was held on 25 October 2001, the applicant and his lawyer were both present. The court also heard from other accused persons, all of whom denied having participated in the illegal demonstration on 29 May 2001 and retracted statements they had made previously. The prosecution then called for the applicant to be sentenced pursuant to Article 169 of the Criminal Code and the applicant's lawyer requested time to submit the applicant's defence submissions.

22. On 5 December 2001 the applicant made his defence submissions. He denied the charges against him and requested his release. On the same day the İzmir State Security Court delivered its judgment. It acquitted five of the accused and convicted the applicant and three

other accused as charged. It sentenced the applicant to four years and six months' imprisonment, which was reduced to two and a half years as the applicant had been a minor at the time of the offence.

23. In convicting the applicant, the State Security Court had regard to the applicant's statements to the police, the public prosecutor and the investigating judge respectively. It also took into consideration his co-defendants' evidence before the public prosecutor that the applicant had urged them to participate in the demonstration of 29 May 2001. The court noted that the co-defendants had also given evidence that the applicant had been in charge of organising the demonstration. It further took note of the expert report comparing the applicant's handwriting to that on the banner and of the fact that, according to the police report on the arrest, the applicant had been among the demonstrators. It concluded:

> "... in view of these material facts, the court does not accept the applicant's denial and finds that his confession to the police is substantiated."

C. The appeal

24. On 2 January 2002 the applicant's lawyer appealed against the judgment of the İzmir State Security Court. In her notice of appeal, she alleged a breach of Articles 5 and 6 of the Convention, arguing that the proceedings before the first-instance court had been unfair and that the court had failed to assess the evidence properly.

25. On 27 March 2002 the Principal Public Prosecutor at the Court of Cassation lodged a written opinion with the Ninth Chamber of the Court of Cassation in which he submitted that the Chamber should uphold the judgment of the İzmir State Security Court. This opinion was not served on the applicant or his representative.

26. On 10 June 2002 the Ninth Chamber of the Court of Cassation, upholding the İzmir State Security Court's reasoning and assessment of the evidence, dismissed the applicant's appeal.

II. RELEVANT LAW AND PRACTICE

A. Domestic law

1. The legislation in force at the time of the application

27. The relevant provisions of the former Code of Criminal Procedure (no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment they were taken into police custody. Article 138 clearly stipulated that for juveniles legal assistance was obligatory.

28. According to section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the state security courts.

2. Recent amendments

29. On 15 July 2003, by Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the state security courts was lifted.

30. On 1 July 2005 a new Code of Criminal Procedure entered into force. According to the relevant provisions of the new code (Articles 149 and 150), all detained persons have the right of access to a lawyer from the moment they are taken into police custody. The appointment of a lawyer is obligatory if the person concerned is a minor or if he or she is accused of an offence punishable by a maximum of at least five years' imprisonment.

31. Finally, section 10 of the Prevention of Terrorism Act (Law no. 3713), as amended on 29 June 2006, provides that for terrorist related offences, the right of access to a lawyer may be delayed for twenty-four hours on the order of a public prosecutor. However, the accused cannot be interrogated during this period.

B. Relevant international law materials

1. Procedure in juvenile cases

(a) Council of Europe

32. The recommendation of the Committee of Ministers to Member States of the Council of Europe concerning new ways of dealing with juvenile delinquency and the role of juvenile justice (Rec (2003)20), adopted on 24 September 2003 at the 853rd meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

> "15. Where juveniles are detained in police custody, account should be taken of their status as a minor, their age and their vulnerability and level of maturity. They should be promptly informed of their rights and safeguards in a manner that ensures their full understanding. While being questioned by the police they should, in principle, be accompanied by their parent/legal guardian or other appropriate adult. They should also have the right of access to a lawyer and a doctor..."

33. The recommendation of the Committee of Ministers to Member States of the Council of Europe on social reactions to juvenile delinquency (no. R (87)20), adopted on 17 September 1987 at the 410th meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

> "Recommends the governments of member states to review, if necessary, their legislation and practice with a view:
>
> 8. to reinforcing the legal position of minors throughout the proceedings, including the police interrogation, by recognising, *inter alia*:
>
> – the right to the assistance of a counsel who may, if necessary, be officially appointed and paid by the state."

(b) United Nations

(i) Convention on the Rights of the Child

34. Article 37 of the Convention on the Rights of the Child (CRC), in so far as relevant, reads as follows:

> "States Parties shall ensure that: ...
>
> (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

(ii) General comment no. 10 of the Committee on the Rights of the Child, dated 25 April 2007 (CRC/C/GC/10)

35. The relevant part of this text concerning legal assistance to minors in police custody provides as follows:

> "49. The child must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defence. CRC does require that the child be provided with assistance, which is not necessarily under all circumstances legal but it must be appropriate. It is left to the discretion of the States parties to determine how this assistance is provided but it should be free of charge...
>
> ...

52. The Committee recommends that the States parties set and implement time limits for the period between the communication of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body. These time limits should be much shorter than those set for adults. But at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected. In this decision-making process without delay, the legal or other appropriate assistance must be present. This presence should not be limited to the trial before the court or other judicial body, but also applies to all other stages of the process, beginning with the interviewing (interrogation) of the child by the police."

(iii) Concluding Observations of the United Nations Committee on the Rights of the Child: Turkey, dated 9 July 2001 (CRC/C/15/Add.152.)

36. The relevant part of this text provides as follows:

"66. The Committee recommends that the State party continue reviewing the law and practices regarding the juvenile justice system in order to bring it into full compliance with the Convention, in particular articles 37, 40 and 39, as well as with other relevant international standards in this area, such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), with a view to raising the minimum legal age for criminal responsibility, extending the protection guaranteed by the Juvenile Law Court to all children up to the age of 18 and enforcing this law effectively by establishing juvenile courts in every province. In particular, it reminds the State party that juvenile offenders should be dealt with without delay, in order to avoid periods of *incommunicado* detention, and that pre-trial detention should be used only as a measure of last resort, should be as short as possible and should be no longer than the period prescribed by law. Alternative measures to pre-trial detention should be used whenever possible."

2. Right of access to a lawyer during police custody

(a) Council of Europe

(i) Rules adopted by the Committee of Ministers

37. Rule 93 of the Standard Minimum Rules for the Treatment of Prisoners (Resolution (73)5 of the Committee of Ministers of the Council of Europe) provides: "An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions. At his request, he shall be given all necessary facilities for this purpose. ... Interviews between the prisoner and his legal adviser may be within sight but not within hearing, either direct or indirect, of a police or institution official."

38. Furthermore, the recommendation of the Committee of Ministers to Member States of the Council of Europe on the European Prison Rules (Rec (2006)2), adopted on 11 January 2006 at the 952nd meeting of the Ministers' Deputies, in so far as relevant, reads as follows:

"*Legal advice*

23.1 All prisoners are entitled to legal advice, and the prison authorities shall provide them with reasonable facilities for gaining access to such advice.

23.2 Prisoners may consult on any legal matter with a legal adviser of their own choice and at their own expense.

...

23.5 A judicial authority may in exceptional circumstances authorise restrictions on such confidentiality to prevent serious crime or major breaches of prison safety and security."

(ii) European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)

39. Following its visit to Turkey in July 2000, the CPT published its report dated 8 November 2001 (CPT/Inf(2001)25. It stated:

"61. Despite the many changes to legislation in recent years, certain weaknesses remain as regards formal safeguards against ill treatment. Perhaps the most important shortcoming is that persons detained on suspicion of collective offences falling under the jurisdiction of the State Security Courts are still not entitled to access to a lawyer during the first four days of their custody. Further, despite earlier affirmations to the contrary, the Turkish authorities made clear in their response to the report on the February/March 1999 visit that such persons are being denied during the first four days of their custody the possibility to inform a relative of their situation. Such incommunicado detention can only facilitate the infliction of ill treatment.

The CPT must therefore reiterate once again the recommendation that all persons deprived of their liberty by the law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted as from the outset of their custody the right of access to a lawyer. The CPT recognises that in order to protect the legitimate interests of the police investigation, it may exceptionally be necessary to delay for a certain period a detained person's access to a lawyer of his choice; however, in such cases, access to another independent lawyer should be arranged.

The implementation of the above recommendation will require legislative measures. However, in the meantime, immediate steps should be taken to ensure that existing legal provisions are complied with. Indeed, the information gathered during the July 2000 ad hoc visit clearly indicates that even after the first four days of police custody, access to a lawyer for persons suspected of State Security Court offences is in practice the exception rather than the rule. The CPT recommends that the officials responsible for carrying out checks and inspections under the previously-mentioned compliance monitoring procedure be instructed to pay particular attention to whether persons suspected of collective offences falling under the jurisdiction of the State Security Courts are being informed of their right to have access to a lawyer after the first four days of their custody and are being placed in a position effectively to exercise that right."

40. The CPT visited Turkey again in September 2001 and in its report dated 24 April 2002 (CPT/Inf (2002)8) stated:

"12. The amendments made to Article 16 of the Law on the Organisation and Trial Procedures of State Security Courts have also introduced an improvement as regards access to a lawyer for persons detained on suspicion of collective offences falling under the jurisdiction of State Security Courts. For such persons, the right of access to a lawyer becomes operative after the prosecutor has issued a written order for the extension of police custody beyond 48 hours; in other words, they are now denied access to a lawyer only for two days as compared to four days under the previous law.

Whilst welcoming this step forward, the CPT regrets that the opportunity was not taken to guarantee to persons detained for collective State Security Court offences a right of access to a lawyer as from the very outset of their custody (and hence align their rights in this respect with those of ordinary criminal suspects). The CPT trusts that the Turkish authorities will in the near future implement the Committee's long-standing recommendation that all persons deprived of their liberty by law enforcement agencies, including persons suspected of offences falling under the jurisdiction of the State Security Courts, be granted as from the outset of their custody the right of access to a lawyer.

...

46. Reference has been made earlier to recent positive legislative developments concerning the rights of access to a lawyer and to have one's custody notified to a relative (cf. paragraphs 12 to 14). They have further improved an already impressive legal and regulatory framework to combat torture and ill-treatment. Nevertheless, the CPT remains very concerned by the fact that persons detained on suspicion of collective offences falling under the jurisdiction of State Security Courts are still denied access to a lawyer during the first two days of their custody; its position on this point has been made clear in paragraph 12.

Further, the actual content of the right of access to a lawyer for persons suspected of State Security Court Offences remains less well developed than in the case of ordinary criminal suspects. In particular, as far as the CPT can ascertain, it is still the case that such suspects are not entitled to have the lawyer present when making a statement to the police and that the procedure allowing for the appointment of a lawyer by the Bar Association is not applicable to them. Similarly, the provision making obligatory the appointment of a lawyer for persons under 18 still does not apply to juveniles who are detained on suspicion of State Security Court offences. In this regard, the CPT reiterates the recommendation already made in the report on the October 1997 visit, that the relevant provisions of Articles 135, 136 and 138 of the Code of Criminal

Procedure be rendered applicable to persons suspected of offences falling under the jurisdiction of the State Security Courts."

(b) United Nations

(i) International Covenant on Civil and Political Rights

41. Article 14 § 3 (b) of the International Covenant on Civil and Political Rights (ICCPR) provides that everyone charged with a criminal offence is to be entitled "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".

(ii) United Nations Committee against Torture

42. In its conclusions and recommendations on Turkey, dated 27 May 2003 (CAT/C/CR/30/5), the Committee stated the following:

"5. The Committee expresses concern about:

(c) Allegations that persons in police custody have been denied prompt and adequate access to legal and medical assistance and that family members have not been promptly notified of their detention;

...

7. The Committee recommends that the State party:

(a) Ensure that detainees, including those held for offences under the jurisdiction of State Security Courts, benefit fully in practice from the available safeguards against ill-treatment and torture, particularly by guaranteeing their right to medical and legal assistance and to contact with their families;

..."

43. In its General Comment no. 2, dated 24 January 2008 (CAT/C/GC/2), the Committee stated:

"13. Certain basic guarantees apply to all persons deprived of liberty. Some of these specified in the Convention, and the Committee consistently calls upon the States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, *inter alia*, ... the right promptly to receive independent legal assistance..."

(c) European Union

44. Article 48 of the Charter of Fundamental Rights states that "[r]espect for the rights of the defence of anyone who has been charged shall be guaranteed". Article 52 § 3 further states that the right guaranteed under Article 48 is among those who have the same meaning and the same scope as the equivalent right guaranteed by the European Convention on Human Rights.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

A. Access to a lawyer during police custody

45. The applicant alleged that his defence rights had been violated as he had been denied access to a lawyer during his police custody. He relied on Article 6 § 3 (c) of the Convention, which provides:

"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."

1. The Chamber judgment

46. In its judgment of 26 April 2007, the Chamber held that there had been no violation of Article 6 § 3 (c) of the Convention. In that connection, it pointed out that the applicant had been represented during the trial and appeal proceedings by a lawyer and that the applicant's statement to the police was not the sole basis for his conviction. According to the Chamber, the applicant had had the opportunity of challenging the prosecution's allegations under conditions which did not place him at a substantial disadvantage *vis-à-vis* his opponent. The Chamber also noted that in convicting the applicant, the İzmir State Security Court had had regard to the circumstances in which the applicant was arrested, the expert report concerning the handwriting on the banner, and witness statements. In view of the above, it concluded that the fairness of the applicant's trial had not been prejudiced by the lack of legal assistance during his police custody.

2. The parties' submissions

(a) The applicant

47. The applicant contested the grounds on which the Chamber had found that there had been no violation of Article 6 § 3 (c) of the Convention. He stated that the assistance of a lawyer in police custody was a fundamental right. He reminded the Court that all the evidence which had been used against him had been collected at the preliminary investigation stage, during which he had been denied the assistance of a lawyer. At this point, the applicant also argued that although the domestic court had convicted him, there had been no evidence to prove that he was guilty. He also stated that he had been ill-treated during his police custody and had signed his statement to the police under duress. That statement had been used by the İzmir State Security Court although before the public prosecutor, the investigating judge and at the trial he had clearly retracted it. The applicant also stressed that he had been a minor at the material time and had no previous criminal record. In his submission, in view of the serious charges that had been brought against him, the lack of legal assistance had breached his right to a fair trial. He also argued that the Government had failed to submit any good reason to justify the lack of legal assistance.

(b) The Government

48. The Government asked the Grand Chamber to endorse the Chamber's finding that there had been no violation of Article 6 § 3 (c) of the Convention. They stated, firstly, that the legislation had been changed in 2005. Furthermore, in their submission, the restriction imposed on the applicant's access to a lawyer had not infringed his right to a fair trial under Article 6 of the Convention. Referring to the case-law of the Court (in particular, *Imbrioscia v. Switzerland*, 24 November 1993, Series A no. 275; *John Murray v. the United Kingdom*, 8 February 1996, *Reports of Judgments and Decisions* 1996-I; *Averill v. the United Kingdom*, no. 36408/97, ECHR 2000-VI; *Magee v. the United Kingdom*, no. 28135/95, ECHR 2000-VI, and *Brennan v. the United Kingdom*, no. 39846/98, ECHR 2001-X), they maintained that in assessing whether or not the trial was fair, regard should be had to the entirety of the proceedings. Thus, as the applicant had been represented by a lawyer during the proceedings before the İzmir State Security Court and the Court of Cassation, his right to a fair hearing had not been violated. The Government further drew attention to several Turkish cases (*Saraç v. Turkey* (dec.), no. 35841/97, 2 September 2004; *Yurtsever v. Turkey* (dec.), no. 42086/02, 31 August 2006; *Uçma and Uçma v. Turkey* (dec.), no. 15071/03, 3 October 2006; *Ahmet*

Yavuz v. Turkey (dec.), no. 38827/02, 21 November 2006, and *Yıldız and Sönmez v. Turkey* (dec.), nos. 3543/03 and 3557/03, 5 December 2006), in which the Court had declared similar complaints inadmissible as being manifestly ill-founded on the ground that, since the police statements had not been the only evidence to support the convictions, the lack of legal assistance during police custody had not constituted a violation of Article 6 of the Convention.

49. Turning to the facts of the instant case, the Government maintained that when the applicant was taken into police custody, he was reminded of his right to remain silent and that during the ensuing criminal proceedings his lawyer had had the opportunity to challenge the prosecution's allegations. They further emphasised that the applicant's statement to the police was not the sole basis for his conviction.

3. The Court's assessment

(a) The general principles applicable in this case

50. The Court reiterates that, even if the primary purpose of Article 6, as far as criminal proceedings are concerned, is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", it does not follow that the Article has no application to pre-trial proceedings. Thus, Article 6 - especially paragraph 3 – may be relevant before a case is sent for trial if and so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with its provisions (*Imbrioscia*, cited above, § 36). As the Court has already held in its previous judgments, the right set out in paragraph 3 (c) of Article 6 of the Convention is one element, amongst others, of the concept of a fair trial in criminal proceedings contained in paragraph 1 (*Imbrioscia*, cited above, § 37, and *Brennan*, cited above, § 45).

51. The Court further reiterates that although not absolute, the right of everyone charged with a criminal offence to be effectively defended by a lawyer, assigned officially if need be, is one of the fundamental features of fair trial (*Poitrimol v. France*, 23 November 1993, § 34, Series A no. 277-A, and *Demebukov v. Bulgaria*, no. 68020/01, § 50, 28 February 2008). Nevertheless, Article 6 § 3 (c) does not specify the manner of exercising this right. It thus leaves to the Contracting States the choice of the means of ensuring that it is secured in their judicial systems, the Court's task being only to ascertain whether the method they have chosen is consistent with the requirements of a fair trial. In this respect, it must be remembered that the Convention is designed to "guarantee not rights that are theoretical or illusory but rights that are practical and effective" and that assigning counsel does not in itself ensure the effectiveness of the assistance he may afford an accused (*Imbrioscia*, cited above, § 38).

52. National laws may attach consequences to the attitude of an accused at the initial stages of police interrogation which are decisive for the prospects of the defence in any subsequent criminal proceedings. In such circumstances, Article 6 will normally require that the accused be allowed to benefit from the assistance of a lawyer already at the initial stages of police interrogation. However, this right has so far been considered capable of being subject to restrictions for good cause. The question, in each case, has therefore been whether the restriction was justified and, if so, whether, in the light of the entirety of the proceedings, it has not deprived the accused of a fair hearing, for even a justified restriction is capable of doing so in certain circumstances (see *John Murray*, cited above, § 63; *Brennan*, cited above, § 45, and *Magee*, cited above, § 44).

53. These principles, outlined in paragraph 52 above, are also in line with the generally recognised international human rights standards (see paragraphs 37-42 above) which are at the core of the concept of a fair trial and whose rationale relates in particular to the protection of the accused against abusive coercion on the part of the authorities. They also contribute to

the prevention of miscarriages of justice and the fulfilment of the aims of Article 6, notably equality of arms between the investigating or prosecuting authorities and the accused.

54. In this respect, the Court underlines the importance of the investigation stage for the preparation of the criminal proceedings, as the evidence obtained during this stage determines the framework in which the offence charged will be considered at the trial (*Can v. Austria*, no. 9300/81, Commission's report of 12 July 1984, § 50, Series A no. 96). At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself. This right indeed presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused (see *Jalloh v. Germany* [GC], no. 54810/00, § 100, ECHR 2006-..., and *Kolu v. Turkey*, no. 35811/97, § 51, 2 August 2005). 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, *mutatis mutandis*, *Jalloh*, cited above, § 101). In this connection, the Court also notes the recommendations of the CPT (paragraphs 39-40 above), in which the committee repeatedly stated that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. Any exception to the enjoyment of this right should be clearly circumscribed and its application strictly limited in time. These principles are particularly called for in the case of serious charges, for it is in the face of the heaviest penalties that respect for the right to a fair trial is to be ensured to the highest possible degree by democratic societies.

55. Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above) Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction - whatever its justification - must not unduly prejudice the rights of the accused under Article 6 (see, *mutatis mutandis*, *Magee*, cited above, § 44). The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

(b) Application of the above principles in the present case

56. In the present case, the applicant's right of access to a lawyer was restricted during his police custody, pursuant to section 31 of Law no. 3842, as he was accused of committing an offence falling within the jurisdiction of the State Security Courts. As a result, he did not have access to a lawyer when he made his statements to the police, the public prosecutor and the investigating judge respectively. Thus, no other justification was given for denying the applicant access to a lawyer than the fact that this was provided for on a systematic basis by the relevant legal provisions. As such, this already falls short of the requirements of Article 6 in this respect, as set out at paragraph 52 above.

57. The Court further observes that the applicant had access to a lawyer following his detention on remand. During the ensuing criminal proceedings, he was also able to call witnesses on his behalf and had the possibility of challenging the prosecution's arguments. It is also noted that the applicant repeatedly denied the content of his statement to the police,

both at the trial and on appeal. However, as is apparent from the case file, the investigation had in large part been completed before the applicant appeared before the investigating judge on 1 June 2001. Moreover, not only did the İzmir State Security Court not take a stance on the admissibility of the applicant's statements made in police custody before going on to examine the merits of the case, it also used the statement to the police as the main evidence on which to convict him, despite his denial of its accuracy (see paragraph 23 above). In this connection, the Court observes that in convicting the applicant, the İzmir State Security Court in fact used the evidence before it to confirm the applicant's statement to the police. This evidence included the expert's report dated 1 June 2001 and the statements of the other accused to the police and the public prosecutor. In this respect, however, the Court finds it striking that the expert's report mentioned in the judgment of the first-instance court was in favour of the applicant, as it stated that it could not be established whether the handwriting on the banner matched the applicant's (see paragraph 15 above). It is also significant that all the co-defendants, who had testified against the applicant in their statements to the police and the public prosecutor, retracted their statements at the trial and denied having participated in the demonstration.

58. Thus, in the present case, the applicant was undoubtedly affected by the restrictions on his access to a lawyer in that his statement to the police was used for his conviction. Neither the assistance provided subsequently by a lawyer nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred during police custody. However, it is not for the Court to speculate on the impact which the applicant's access to a lawyer during police custody would have had on the ensuing proceedings.

59. The Court further recalls that neither the letter nor the spirit of Article 6 of the Convention prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to the guarantees of a fair trial (see *Kwiatkowska v. Italy* (dec.), no. 52868/99, 30 November 2000). However, if it is to be effective for Convention purposes, a waiver of the right to take part in the trial must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance (see *Sejdovic v. Italy* [GC], no. 56581/00, § 86, ECHR 2006-...; *Kolu*, cited above, § 53, and *Colozza v. Italy*, 12 February 1985, § 28, Series A no. 89). Thus, in the present case, no reliance can be placed on the assertion in the form stating his rights that the applicant had been reminded of his right to remain silent (see paragraph 14 above).

60. Finally, the Court notes that one of the specific elements of the instant case was the applicant's age. Having regard to a significant number of relevant international law materials concerning legal assistance to minors in police custody (see paragraphs 32-36 above), the Court stresses the fundamental importance of providing access to a lawyer where the person in custody is a minor.

61. Still, in the present case, as explained above, the restriction imposed on the right of access to a lawyer was systematic and applied to anyone held in police custody, regardless of his or her age, in connection with an offence falling under the jurisdiction of the state security courts.

62. In sum, even though the applicant had the opportunity to challenge the evidence against him at the trial and subsequently on appeal, the absence of a lawyer while he was in police custody irretrievably affected his defence rights.

(c) Conclusion

63. In view of the above, the Court concludes 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. The non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation

64. The applicant complained that the written opinion of the Principal Public Prosecutor at the Court of Cassation had not been communicated to him. In this respect, he relied on Article 6 § 1 of the Convention, the relevant part of which provides:

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

1. The Chamber's judgment

65. In its judgment of 26 April 2007, the Chamber found that, in the light of the established case-law on the matter, the non-communication to the applicant of the written opinion of the Principal Public Prosecutor at the Court of Cassation had infringed his right to adversarial proceedings. It therefore concluded that there had been a violation of Article 6 § 1 of the Convention.

2. The parties' submissions

66. The parties filed no further observations on this question.

3. The Court's assessment

67. The Court considers, for the reasons given by the Chamber, that the applicant's right to adversarial proceedings has been breached. There has therefore been a violation of Article 6 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

1. The parties' submissions

69. The applicant claimed 5,000 euros (EUR) in respect of pecuniary damage and EUR 10,000 in respect of non-pecuniary damage.

70. The Government contended that the amounts claimed were excessive and unacceptable.

2. The Chamber's judgment

71. The Chamber did not award any pecuniary compensation to the applicant, holding that he had failed to substantiate his claims. It considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

3. The Court's assessment

72. The Court reiterates that the most appropriate form of redress for a violation of Article 6 § 1 would be to ensure that the applicant, as far as possible, is put in the position in which he would have been had this provision not been disregarded (see *Teteriny v. Russia*, no. 11931/03, § 56, 30 June 2005; *Jeličić v. Bosnia and Herzegovina*, no. 41183/02, § 53, ECHR 2006-..., and *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 47, 17 July 2007). The Court finds that this principle applies in the present case as well. Consequently, it considers that the most appropriate form of redress would be the retrial of the applicant in accordance with the

requirements of Article 6 § 1 of the Convention, should the applicant so request (see, *mutatis mutandis, Gençel v. Turkey*, no. 53431/99, § 27, 23 October 2003).

73. As regards the remaining non-pecuniary damage, ruling on an equitable basis, it awards the applicant EUR 2,000.

B. Costs and expenses

1. The parties' submissions

74. The applicant had claimed EUR 3,500 for the costs and expenses incurred in the domestic proceedings and before the Chamber, without submitting any documents in support of his claims. It is to be noted that the applicant has not amended the initial claim he made before the Chamber, but submitted a legal-aid request for the expenses incurred before the Grand Chamber.

75. The Government contested the claim, arguing that it was unsubstantiated.

2. The Chamber's judgment

76. The Chamber awarded the applicant EUR 1,000 for costs and expenses.

3. The Court's assessment

77. The Court observes that the applicant had the benefit of legal aid for the costs and expenses incurred during the Grand Chamber proceedings. As a result, the costs and expenses only include those incurred in the proceedings before the domestic courts and the Chamber.

78. According to the Court's established case-law, costs and expenses will not be awarded under Article 41 unless it is established that they were actually and necessarily incurred and are also reasonable as to quantum. Furthermore, legal costs are only recoverable in so far as they relate to the violation found (see, among other authorities, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, § 27, 28 May 2002, and *Sahin v. Germany* [GC], no. 30943/96, § 105, ECHR 2003-VIII).

79. In the light of the above, the Court awards the applicant the sum already awarded by the Chamber, namely EUR 1,000.

C. Default interest

80. 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. *Holds* that there has been a violation of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while he was in police custody;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention, in respect of the non-communication of the written opinion of the Principal Public Prosecutor at the Court of Cassation;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into New Turkish liras at the rate applicable at the date of settlement:

(i) EUR 2,000 (two thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 1,000 (one 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;

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

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 27 November 2008.

Vincent Berger Nicolas Bratza
Jurisconsult President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following concurring opinions are annexed to this judgment:

(a) concurring opinion of Judge Bratza;

(b) joint concurring opinion of Judges Rozakis, Spielmann, Ziemele and Lazarova Trajkovska;

(c) concurring opinion of Judge Zagrebelsky, joined by Judges Casadevall and Türmen.

N.B.
V.B.

CONCURRING OPINION OF JUDGE BRATZA

The central issue in the present case concerns the use made in evidence against the applicant of a confession made during the course of police interrogation at a time when he had been denied access to a lawyer. The Grand Chamber has found that the restriction on such access irretrievably prejudiced the applicant's rights of defence and that neither the legal assistance subsequently provided to the applicant nor the adversarial nature of the ensuing proceedings could cure the defects which had occurred while the applicant was in police custody. The applicant's rights under Article 6 § 3 (c), read in conjunction with Article 6 § 1, were accordingly violated on account of this lack of legal assistance. I am in full agreement with this conclusion.

In paragraph 55 of the judgment, the Court states as a general principle that in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6 requires that, as a rule, access to a lawyer should be provided "as from the first interrogation of a suspect by the police". This principle is consistent with the Court's earlier case-law and is clearly sufficient to enable the Court to reach a finding of a violation of Article 6 on the facts of the present case. However, I share the doubts of Judge Zagrebelsky as to whether in appearing to hold that the right of access to a lawyer only arises at the moment of first interrogation, the statement of principle goes far enough. Like Judge Zagrebelsky, I consider that the Court should have used the opportunity to state in clear terms that the fairness of criminal proceedings under Article 6 requires that, as a rule, a suspect should be granted access to legal advice from the moment he is taken into police custody or pre-trial detention. It would be regrettable if the impression were to be left by the judgment that no issue could arise under Article 6 as long as a suspect was given access to a lawyer at the point when his interrogation began or that Article 6 was engaged only where the denial of access affected the fairness of the interrogation of the suspect. The denial of access to a lawyer from the outset of the detention of a suspect which, in a particular case, results in prejudice to the rights of the defence may violate Article 6 of the Convention whether or not such prejudice stems from the interrogation of the suspect.

JOINT CONCURRING OPINION OF JUDGES ROZAKIS, SPIELMANN, ZIEMELE AND LAZAROVA TRAJKOVSKA

1. We agree in all respects with the Court's conclusions as to the violation of Article 6 § 3 (c) in conjunction with Article 6 § 1 of the Convention.

2. We would, however, have liked the reasoning set out in paragraph 72 of the judgment, on account of its importance, to have been included in the operative provisions as well, for reasons which have already been explained to a certain extent in the joint concurring opinion of Judges Spielmann and Malinverni in *Vladimir Romanov v. Russia*, (no. 41461/02, judgment of 24 July 2008) as well as the concurring opinion of Judge Spielmann in *Polufakin and Chernyshev v. Russia*, (no. 30997/02, judgment of 25 September 2008), and are now repeated here.

3. Firstly, it is common knowledge that while the reasoning of a judgment allows the Contracting States to ascertain the grounds on which the Court reached a finding of a violation or no violation of the Convention, and is of decisive importance on that account for the interpretation of the Convention, it is the operative provisions that are binding on the parties for the purposes of Article 46 § 1 of the Convention.

4. And indeed, what the Court says in paragraph 72 of the judgment is in our view of the utmost importance. It reiterates that when a person has been convicted in breach of the procedural safeguards afforded by Article 6, he should, as far as possible, be put in the position in which he would have been had the requirements of that Article not been disregarded (the principle of *restitutio in integrum*).

5. The principle of *restitutio in integrum* has its origin in the judgment of 13 September 1928 of the Permanent Court of International Justice in the case concerning the *Factory at Chorzów* (claim for indemnity) (merits), where the Court held as follows:

> "The essential principle is ... that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed". (Series A, no. 17, p. 47)

6. This principle, i.e. that *restitutio in integrum* is considered to be the primary remedy for effecting reparation for breaches of international law has been constantly reaffirmed by international case-law and practice, and is recalled in Article 35 of the Draft Articles on State responsibility.

Article 35 of the Draft Articles reads as follows:

> "A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation."

There is no reason not to apply this principle to make reparation for international wrongful acts in the field of human rights (see Loukis G. Loucaides, "Reparation for Violations of Human Rights under the European Convention and *Restitutio in integrum*", [2008] *European Human Rights Law Review*, pp. 182-192).

In *Papamichalopoulos and Others v.* Greece ((Article 50), 31 October 1995, Series A no. 330-B) the Court held:

"34. The Court points out that by Article 53 of the Convention the High Contracting Parties undertook to abide by the decision of the Court in any case to which they were parties; furthermore, Article 54 provides that the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution. It follows that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.

The Contracting States that are parties to a case are in principle free to choose the means whereby they will comply with a judgment in which the Court has found a breach. This discretion as to the manner of execution of a judgment reflects the freedom of choice attaching to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1). If the nature of the breach allows of *restitutio in integrum*, it is for the respondent State to effect it, the Court having neither the power nor the practical possibility of doing so itself. If, on the other hand, national law does not allow - or allows only partial - reparation to be made for the consequences of the breach, Article 50 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate."

7. In the present case, and given that the absence of a lawyer while the applicant was in police custody irretrievably affected his defence rights (see paragraph 62 of the judgment), the best means of achieving this is the reopening of the proceedings and the commencement of a new trial at which all the guarantees of a fair trial would be observed, provided, of course, that the applicant requests this option and it is available in the domestic law of the respondent State.

8. The reason why we wish to stress this point is that it must not be overlooked that the damages which the Court orders to be paid to victims of a violation of the Convention are, according to the terms and the spirit of Article 41, of a subsidiary nature. This is in line with the subsidiary character attributed to compensation of damages in international law. Article 36 of the Draft Articles on State responsibility states:

"1. The State responsible for an internationally wrongful act is under an obligation to compensate the damage caused thereby, insofar as such damage is not made good by restitution. ..."

It is therefore right that, wherever possible, the Court should seek to restore the *status quo ante* for the victim. However the Court should also take into consideration that "Wiping out all the consequences of the wrongful act may ... require some or all forms of reparation to be provided, depending on the type and extent of the injury that has been caused" (see J. Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, 2002, p. 211, (2)) and in view of the remedies available at the domestic level (Article 41).

9. Admittedly, States are not required by the Convention to introduce procedures in their domestic legal systems whereby judgments of their Supreme Courts constituting *res judicata* may be reviewed. However, they are strongly encouraged to do so, especially in criminal matters.

10. In Turkey, Article 311 § 1(f) of the Turkish Criminal Procedure Code provides that the re-opening of domestic proceedings which are found to be unfair by the European Court of

Human Rights, can be requested within one year following the final decision of the European Court of Human Rights.

There is however a temporal limitation for the applicability of this provision. Paragraph 2 of Article 311 states that the above-mentioned provision is not applicable to applications which were lodged with the European Court of Human Rights before 4 February 2003 and for those judgments which became final before 4 February 2003. We believe that where, as in the present case, the respondent State has equipped itself with such a procedure it is the Court's duty not only to suggest timidly that reopening is the most appropriate form of redress, as paragraph 72 of the judgment does, but also to urge the authorities to make use of that procedure, however unsatisfactory it may appear, or to adapt existing procedures, provided, of course, that the applicant so wishes. However, this is not legally possible unless such an exhortation appears in the operative provisions of the judgment.

11. Moreover, the Court has already included directions of this nature in the operative provisions of judgments. For example, in *Claes and Others v. Belgium* (nos. 46825/99, 47132/99, 47502/99, 49010/99, 49104/99, 49195/99 and 49716/99, 2 June 2005) it held in point 5 (a) of the operative provisions of its judgment that "unless it grants a request by [the] applicants for a retrial or for the proceedings to be reopened, the respondent State is to pay, within three months from the date on which the applicant in question indicates that he does not wish to submit such a request or it appears that he does not intend to do so, or from the date on which such a request is refused", sums in respect of non-pecuniary damage and costs and expenses. Similarly, in *Lungoci v. Romania* (no. 62710/00, 26 January 2006) the Court held in point 3 (a) of the operative provisions of its judgment that "the respondent State is to ensure that, within six months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the proceedings are reopened if the applicant so desires, and at the same time is to pay her EUR 5,000 (five thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount, to be converted into Romanian lei at the rate applicable at the date of settlement".

12. By virtue of Article 46 § 2 of the Convention, supervision of the execution of the Court's judgments is the responsibility of the Committee of Ministers. That does not mean, however, that the Court should not play any part in the matter and should not take measures designed to facilitate the Committee of Ministers' task in discharging these functions. In fact, there is nothing in Article 41 or anywhere else in the Convention that would prevent the Court from assessing the issue of full reparation in accordance with the principles outlined above. Since the Court has jurisdiction to interpret and apply the Convention, it also has jurisdiction to assess "the form and quantum of reparation to be made" (see J. Crawford, p. 201). As was explained by the PCIJ in the *Factory at Chorzów* case: "Reparation ... is the indispensable complement of a failure to apply a convention ..." (p. 21).

13. To that end, it is essential that in its judgments the Court should not merely give as precise a description as possible of the nature of the Convention violation found but should also indicate to the State concerned in the operative provisions, if the circumstances of the case so require, the measures it considers the most appropriate to redress the violation.

CONCURRING OPINION OF JUDGE ZAGREBELSKY, JOINED BY JUDGES CASADEVALL AND TÜRMEN

(Translation)

To my vote in favour of the judgment's operative provisions, I would like to add a few words to explain the meaning of the Court's reasoning, as I understand it.

The Court found a violation "of Article 6 § 3 (c) of the Convention in conjunction with Article 6 § 1, on account of the lack of legal assistance to the applicant while he was in police custody" (point 1 of the operative provisions). It thus replied to the applicant's complaint "that his defence rights had been violated in that ... he had been denied access to a lawyer while in police custody". That complaint, raised by the applicant under Article 6 § 3 (c), was rightly formulated more precisely by the Court, which linked it with Article 6 § 1.

To my mind the meaning of the Court's judgment is quite clear. If there is any doubt at all, what the Court says in paragraph 53, referring back to paragraph 37, makes things clearer still. The generally recognised international standards, which the Court accepts and which form the framework for its case-law, provide: "An untried prisoner shall be entitled, as soon as he is imprisoned, to choose his legal representation ... and to receive visits from his legal adviser with a view to his defence and to prepare and hand to him and to receive, confidential instructions..."

It is therefore at the very beginning of police custody or pre-trial detention that a person accused of an offence must have the possibility of being assisted by a lawyer, and not only while being questioned.

The importance of interrogations in the context of criminal procedure is obvious, so that, as the judgment makes clear, the impossibility of being assisted by a lawyer while being questioned amounts, subject to exceptions, to a serious failing with regard to the requirements of a fair trial. But the fairness of proceedings against an accused person in custody also requires that he be able to obtain (and that defence counsel be able to provide) the whole wide range of services specifically associated with legal assistance, including discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support to an accused in distress, checking his conditions of detention and so on.

The legal principle to be derived from the judgment is therefore that, normally and apart from exceptional limitations, an accused person in custody is entitled, right from the beginning of police custody or pre-trial detention, to be visited by defence counsel to discuss everything concerning his defence and his legitimate needs. Failure to allow that possibility, regardless of the question of interrogations and their use by the courts, amounts, subject to exceptions, to a violation of Article 6 of the Convention.

I would add that, naturally, the fact that defence counsel may see the accused throughout his detention in police stations or in prison is more apt than any other measure to prevent treatment prohibited by Article 3 of the Convention.

The foregoing considerations would not have been necessary if the Court's reasoning had not contained passages capable of suggesting to the reader that the Court requires accused persons to be assisted by defence counsel only from the start of and during interrogation (or even only during an interview of which a formal record is to be produced to be used as evidence by the court). From paragraph 55 onwards the text adopted by the Court concentrates entirely on the answers given by the applicant when questioned which were later used against him.

I would find such a reading of the judgment too reductive. The importance of the Court's decision for the protection of an accused person deprived of his liberty would be severely weakened thereby. And wrongly so, to my mind, since the reasoning linked to the questioning of the applicant and the way his answers were used by the courts is easily explained by the Court's concern to take into consideration the specific facts of the case before it.

SALDUZ v. TURKEY JUDGMENT

SALDUZ v. TURKEY JUDGMENT – JOINT CONCURRING OPINION OF JUDGES ROZAKIS, SPIELMANN, ZIEMELE AND LAZAROVA TRAJKOVSKA

SALDUZ v. TURKEY JUDGMENT