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

FOURTH SECTION

CASE OF JUHNKE v. TURKEY

(Application no. 52515/99)

JUDGMENT

STRASBOURG

13 May 2008

FINAL

13/08/2008

This judgment may be subject to editorial revision.

In the case of Juhnke v. Turkey,

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

Nicolas Bratza, *President*,
Lech Garlicki,
Rıza Türmen,
Stanislav Pavlovschi,
Ljiljana Mijović,
David Thór Björgvinsson,
Päivi Hirvelä, *judges*,
and Fatoş Aracı, *Section Deputy Registrar*,

Having deliberated in private on 24 April 2008,

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

PROCEDURE

1. The case originated in an application (no. 52515/99) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Ms Eva Tatjana Ursula Juhnke[1] ("the applicant"), on 16 August 1999.

2. The applicant was represented by Mrs R. Yalçındağ Baydemir, Mr C. Aydın and Ms E. Keskin, lawyers practising in Diyarbakır and Istanbul respectively. The Turkish Government ("the Government") are represented by their Agent for the purposes of the proceedings before the Court.

3. On 5 July 2005 the Court decided to give notice of the application to the Government. In a letter of 3 April 2007, the Court informed the parties that, in accordance with Article 29 § 3 of the Convention, it would decide at the same time on both the admissibility and merits of the application.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicant was born in 1965 and lives in Germany.

[1] In the official documents the applicant's surname is written as Juhnke - Özkul or Juhnke (Özkul).

A. The applicant's arrest and detention

5. The applicant alleges that she was arrested by Turkish soldiers near Awaşin River in Northern Iraq within the context of a cross-border military operation conducted by the Turkish Army in the area on 5 or 6 October 1997.

6. According to the seizure protocol the applicant was arrested in a cave between the Ayranlı and Meşelik regions of Şemdinli, Hakkari on 15 October 1997. The official documents in the case file also mention that she was unarmed and carried a backpack which contained a first aid kit and photos and documents relating to the PKK (Workers' Party of Kurdistan), an illegal armed organisation[1].

7. On 24 October 1997 the applicant was handed over to gendarmes at the Hakkari Gendarmerie Command. According to the search report drafted on that day, twenty-six photographs, a notebook, some handwritten documents, a suture needle, eleven syringes and two lancets were found in her possession.

8. On the same day the applicant was questioned by two gendarmes in the presence of an interpreter. The applicant refused to sign the document allegedly containing her statements.

9. On the same day the applicant was examined by a doctor, Mr A.Y., an obstetrician, who found no signs of ill-treatment on her body. This doctor also performed a gynaecological examination. The report issued by the doctor described the applicant as aggressive and presenting signs of mild depression. The report indicated whether or not the applicant was a virgin.

10. On 26 October 1997 the applicant was examined by another doctor, Mr M.G. who found no signs of ill-treatment on her body.

11. Afterwards the applicant was brought before a judge at the Van State Security Court, where she gave a statement with the aid of an interpreter. She refused to answer a number of questions and stated that she had been arrested twenty-two days before in Awaşin. The applicant retracted the statements she had made in custody, claiming that they were confused statements written by the gendarmes themselves. The court remanded her in custody.

B. The criminal proceedings against the applicant

12. On 28 October 1997 the public prosecutor at the Van State Security Court filed a bill of indictment accusing the applicant of membership of an illegal armed organisation, namely the PKK (Workers' Party of Kurdistan). In this respect, the prosecutor stated that the applicant had been in possession of medical supplies used by members of the PKK and that in

[1] The Government submitted a copy of these photos and documents.

photographs found on her she was with the leader of the PKK and other terrorists. He requested that she be sentenced and convicted under Article 168 § 2 of the Criminal Code.

13. The first hearing, held before the Van State Security Court on 4 November 1997 in the applicant's absence, was taken up with procedural matters, such as the measures to be taken to secure the presence of the accused and of a translator, Mr E. A.

14. In a hearing held on 4 December 1997 the applicant appeared before the court where she refused to give information about herself save for her date of birth and her mother's name. A translator was present at the hearing. The applicant was not represented by a lawyer. She stated that she had been arrested on 6 October 1997 and not on 15 October 1997. She further submitted that she did not know where she had been caught but that it must have been somewhere called Awaşin near a river. The applicant did not respond to questions asked by the court. When asked about the documents and photographs found in her possession the applicant only answered that they were hers. The applicant also refused the court's request for a sample of her handwriting. At the end of this hearing the court took certain procedural decisions to secure a sample of the applicant's handwriting and to receive information about the place of the applicant's arrest. The court also ordered a psychiatric examination.

15. On 30 December 1997 the court noted that a lawyer who had previously examined the case file had informed them that he would not take on the case. The applicant requested the court to appoint her a lawyer. The court refused this request on the ground that this demand did not meet the conditions of Article 138 of Code of Criminal Procedure ("the CCP") as applied to State Security Courts. Instead the applicant was given leave to appoint a lawyer and told to contact Mr O. F. at the German Embassy. During this hearing, at the applicant's request, the indictment was translated orally to the applicant.

16. At the next hearing, held on 5 February 1998, Attorney M. K. appeared before the Court as the applicant's representative. Documents from various authorities were read out, including a medical report from the Van State Hospital; the applicant and her lawyer insisted that despite the recommendation in the latter report there was no need for the applicant to be subjected to a further physiological examination. The lawyer requested the court to give him more time to examine the case file and to talk to his client.

17. In the meantime, German Interpol submitted information regarding the applicant to the Turkish authorities, particularly the fact that she was a member of an extreme left-wing organisation.

18. On 19 March 1998 the applicant, referring to the information submitted by German Interpol, stated in Turkish that she was not a member of any organisation. The applicant stated, in German, that she had been caught near Awaşin River in Kurdistan. When the court told the applicant

that no such country existed under international law, the applicant stated that there was a country called Kurdistan and that she had been caught there. The applicant's defence submissions were read out by the translator, during which the court noted that the applicant interrupted constantly and stated that the translator was not translating her words properly. The applicant and her lawyer requested another translator and noted that there were close friends of the applicant in the room who could translate better. The applicant's lawyer claimed that the applicant had been caught in Iraq and that therefore Turkey did not have jurisdiction to try the applicant. The court dismissed the applicant's lawyer's allegations, noting in particular that in any event Turkey had jurisdiction to try the applicant, in view of the offence with which she had been charged under Article 4 of the Criminal Code.

19. In the meantime a certain Ms Hermanns' request to visit the applicant in prison was rejected by the authorities on the ground that detainees could only be visited by family members, their legal representatives or consular agents pursuant to Article 152 of the Directive on the Execution of Punishments.

20. At a hearing held on 30 April 1998 the applicant's lawyer requested the court to allow the trial to be filmed. The court noted that the hearings were public and that the press were allowed to take notes. It considered however that taking photographs and filming would disrupt the conduct of the hearing. They therefore refused the applicant's lawyer's request. The results of the graphology tests were read out, in response to which the applicant stated, in Turkish, that most of the documents were in her writing, although she did not know the exact number. The applicant's lawyer submitted that the applicant had been in detention more than the legal time allowed, and that she had been subjected to ill-treatment and a forced gynaecological examination in breach of her right to respect for private life. The court gave leave for the applicant's lawyer to complain about the alleged ill-treatment.

21. On 11 June 1998 the applicant's lawyers stated that the applicant had been subjected to a gynaecological examination without her consent and that she had been tortured during her detention. The prosecutor noted that the applicant had been arrested during security forces operations, which had also taken place in northern Iraq, and that she had been taken for a gynaecological examination because women terrorists claimed that they were raped when they were taken into custody. The prosecutor then submitted his observations on the merits. The applicant requested time to submit her final defence submissions.

22. On 23 July 1998 the applicant's lawyer claimed that the applicant had been questioned contrary to Article 135 of the Criminal Code and that therefore her statements given to the police should not be admitted to the case file. They relied on Article 3 of the Convention. The lawyer also stated that the applicant wanted to make a political defence in her own language.

The applicant, on the court's inquiry, stated that she knew how to speak and read and write to a limited extent in Turkish but that she wanted to defend herself in her mother tongue. The applicant then read out her defence submissions, first in German and then in Turkish. The court noted that the applicant shouted out "*Long live the PKK, long live our party leader Abdullah Öcalan*".

23. At the next hearing, held on 17 September 1998, the Van State Security Court, referring to the material evidence and the applicant's pro-PKK submissions before it, convicted the applicant as charged and sentenced her to fifteen years' imprisonment. Neither the applicant nor her lawyers attended this hearing.

24. On 6 January 1999 the applicant appealed.

25. On 10 March 1999 the Court of Cassation held a hearing and upheld the judgment of the first-instance court. This decision arrived at the registry of the Van State Security Court on 7 April 1999.

C. Investigation instigated into the applicant's allegations of forced gynaecological examination

26. In the meantime the applicant lodged a petition with the Hakkari public prosecutor's office, stating that she had been subjected to a gynaecological examination without her consent. She further claimed that she had been stripped naked and sexually harassed by six or seven gendarmes present during the examination. The applicant requested the prosecution of both the gendarmes and the doctor.

27. On 22 October 1998 the prosecutor requested the Security Directorate to establish the identity of the doctors on duty at Hakkari State Hospital on 24 October 1997, as well as of those gendarmes who had taken her for a gynaecological examination.

28. On 30 November 1998 the prosecutor heard Mr A.Y., the doctor who had examined the applicant, who stated that the examination had been requested by the Hakkari Provincial Gendarmerie Command and that no gendarmes had been present at the medical examination. He further stated that she had not been forced to undergo a medical examination.

29. On 8 January 1999 the prosecutor heard Mr Y.Y, one of the accused gendarmes, who denied the accusations against him. In particular, he stated that he had only been responsible for the applicant during her detention and that he had not accompanied her to the doctor.

30. On the same day the prosecutor also heard Mr A. K., one of the accused gendarmes, who denied the accusations against him. He stated in particular that the applicant had been sent for a gynaecological examination to prevent accusations of rape.

31. On 22 April 1999 the prosecutor heard Mr A. S., another gendarme, who stated that he had had no involvement with the applicant.

32. On 8 June 1999 the Hakkari public prosecutor gave a decision of incompetence *ratione materiae* and transferred the investigation file concerning the gendarmes to the Hakkari Administrative Council.

33. On 12 July 1999 statements from Mrs B. D., a midwife, were taken by gendarmes. Mrs B. D. stated that when the gendarmes had arrived with the applicant they had told the personnel that the applicant might try to escape or commit suicide. She noted that the applicant had refused a gynaecological examination until persuaded. The midwife maintained that the applicant had not been ill-treated or harassed by the gendarmes or the personnel and that the gendarmes had not been present during the examination.

34. On 13 July 1999 statements from Mrs N. A., a nurse, were taken by the gendarmes. She stated that the applicant had initially resisted the medical examination but that the doctor had talked with her and persuaded her. She claimed that no gendarmes had been present in the room during the examination and that the allegations of harassment were ill-founded.

35. On 28 July 1999 statements from Mrs S. K., a midwife, were taken by the Deputy Health Director. Mrs S. K. affirmed that the applicant had not been forced but persuaded to have a medical examination. She further maintained that no gendarmes had been in the room during her examination.

36. On 12 August 1999 statements from Mrs F. F. C., a midwife, were taken by the Deputy Health Director. She stated that she had no information regarding the matter at issue because she had not been there on the night of the applicant's medical examination.

37. On 13 August 1999 statements from Mr Y. Y. and Mr A. K. were taken by gendarmes in charge of the investigation. Mr Y. Y. stated that he did not know anything about the applicant's medical examination, since his sole responsibility had been to receive the applicant into detention after she had been medically examined. Mr A. K. affirmed that the applicant had not been forced to undergo a medical exam as alleged.

38. On 10 September 1999 Major C. V., in his capacity as investigator (*muhakkik*), drafted a recommendation report (*fezleke*) in which he suggested that a decision of non-prosecution should be given in respect of the three gendarmes, as there was no indication that they had abused their authority. In this report it was stated that the applicant had refused to give a statement.

39. In a letter dated 8 October 1999 then Provincial Gendarmerie Commander informed the investigator, *inter alia*, that the gendarmes, Mr A.K., Mr A.S. and Mr Y.Y., had requested the doctor to perform a gynaecological examination on the applicant without written permission from the prosecutor after she had been interrogated on the ground that she might later raise allegations of rape.

40. On 8 October 1999 statements from Mr A. K., one of the accused gendarmes, and Mrs H. A. and Mrs B. D., nurses on duty at the hospital on

the day of the events, were taken by gendarmes in charge of the investigation.

41. Mr A.K. stated that the applicant had consented to the medical examination and that none of the gendarmes had been present in the examination room.

42. Mrs H. A. stated that the applicant had initially resisted having a gynaecological examination but had later consented after being persuaded by the doctor. She affirmed that the gendarmes had not been in the examination room and that she had not seen anyone harassing the applicant.

43. Mrs B. D. reiterated her earlier statements given to the gendarmes.

44. On 13 October 1999 Major C. V. drafted another recommendation report, in which he reiterated his previous findings in identical terms, including that the applicant had refused to give a statement. He further considered that, since the Ministry of Justice's circular requiring written permission of a judge or a public prosecutor was issued on 21 October 1998, after the alleged incident, the gendarmes could not be considered to have abused their duty by sending the applicant for a gynaecological examination without such permission.

45. On 23 December 1999 Mr A. Y., the doctor who had examined the applicant, gave a statement to the Deputy Health Director. He maintained, in particular, that the applicant knew Turkish and was extremely aggressive. He stated that he had told her that such an examination was necessary according to the official documents ("*gelen evraklara göre*") and, at the same time, in order to safeguard her rights. He affirmed that only he and female nurses had been present during the medical examination, and that she had been examined ten to fifteen minutes after she had been persuaded.

46. On an unspecified date Major C. V., the investigator, submitted an additional recommendation report which was almost identical to the previous reports. Once again it noted that there was no statement from the applicant as she had refused to give one.

47. On 18 January 2000 the Hakkari Administrative Council decided not to authorise the prosecution of the three gendarmes for lack of evidence that they had abused their authority by forcing the applicant to undergo a gynaecological examination. It noted, in particular, that the Ministry of Justice's circular no. 27/123 concerning, *inter alia*, vaginal and anal examinations had been published after the alleged events. This decision was served on the applicant's lawyer Mrs Keskin on 20 February 2000 and on Mr Kılavuz on 3 April 2000. The applicant's lawyers did not lodge an objection to this decision as such decisions were automatically referred by law to the Regional Administrative Court.

48. On 18 April 2002 the Supreme Administrative Court suspended examination of the case file for five years, pursuant to Article 1 § 4 of the Conditional Release, Deferral of Procedure and Punishments Act (no. 4616).

D. Subsequent developments

49. Following the adoption of the new Criminal Code, the execution of the applicant's sentence was suspended by the Van Assize Court on 30 November 2004.

50. On 2 December 2004 the applicant was released from prison and deported to Germany.

51. On 29 July 2005 by an additional judgment the Van Assize Court reduced the applicant's original sentence to seven years and six months' imprisonment.

II. RELEVANT DOMESTIC AND INTERNATIONAL LAW AND PRACTICE

A. Domestic law and practice

52. The relevant domestic law and practice in force at the material time are outlined in the following judgments: *Batı and Others v. Turkey* (nos. 33097/96 and 57834/00, §§ 96-100, 3 June 2004), *Y.F. v. Turkey*, *(*no. 24209/94, §§ 23-26, ECHR 2003-IX), *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002), and *Gençel v. Turkey* (no. 53431/99, §§ 11 -12, 23 October 2003).

53. Law no. 5190 of 16 June 2004, published in the Official Journal on 30 June 2004, abolished the State Security Courts.

54. According to Article 70 of the Medical Practice Act (no. 1219) a medical intervention may only be carried out after the person concerned has given their consent.

55. Sections 24-31 of Regulation no. 23420 on patients' rights concerns consent to medical interventions. It stipulates, *inter alia*, that a medical intervention may only be carried out after the person concerned has given their consent and that the person concerned has the right to be informed of the nature and consequences of a medical intervention before giving his or her consent.

B. Relevant international material

56. The General Rule stated in Article 5 of the Council of Europe Convention on Human Rights and Biomedicine states as follows:

> "An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.

This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks.

The person concerned may freely withdraw consent at any time."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION

57. The applicant, first, complained under Article 3 of the Convention that she had been subjected to torture and inhuman treatment during her detention. In this respect the applicant stated, particularly, that she had been threatened with death, kept standing for long periods of time and blindfolded. She further claimed that the area of the cell in which she had been detained was six square metres, that there was no ventilation and that the lights were on twenty-four hours a day. Secondly, the applicant claimed that the circumstances in which she had been subjected to a gynaecological examination on 24 October 1997 constituted a breach of Articles 3 and 8 of the Convention. In this connection the applicant claimed that the examination had been performed by a male doctor during which the gendarmes took her clothes off, made her lie down and touched every part of her body and that she had not consented to it.

58. The applicable Articles of the Convention provide as relevant:

Article 3

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

Article 8

"1. Everyone has the right to respect for his private...life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The parties' submissions

1. The Government

59. The Government maintained under Article 35 § 1 of the Convention that the application must be rejected for non-exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule. In this respect, they argued, firstly, that the applicant had lodged her application before exhausting the remedies provided under criminal and civil law. They further submitted that the applicant should have lodged her application within six months of the date on which the incident occurred.

60. As regards the merits, the Government maintained that the applicant's allegations of ill-treatment were baseless. They noted that the applicant's gynaecological examination had been conducted with her consent and without the presence of the gendarmes. They stated that this examination pursued the aim of protecting the gendarmes from possible allegations of rape. The Government maintained therefore that this complaint failed to reach the threshold under Article 3 of the Convention.

61. In addition, under Article 8, the Government repeated that the gynaecological examination of the applicant was conducted in order to avoid possible false accusations of sexual violence against the security forces and that the medical reports prepared after such examinations constituted evidence that could be used to refute defamatory allegations. The Government further noted that the CPT report prepared following its visit to Turkey in 1999 had emphasised the importance of medical examination of detainees as a safeguard against sexual violence and that the latter had urged the national authorities to take the necessary measures with a view to protecting detainees against sexual violence. They considered that the alleged interference with respect to the applicant's private life in the instant case fell within the State's margin of appreciation. The Government repeated that the medical examination was conducted with her consent, as attested by witnesses.

2. The applicant

62. The applicant disputed the Government's arguments and reaffirmed her allegations under Articles 3 and 8 of the Convention.

B. The Court's assessment

1. Admissibility

a) Alleged forced gynaecological examination

63. As to the Government's objections regarding the failure to exhaust remedies under criminal law, the Court reiterates that the last stage of domestic remedies may be reached shortly after the lodging of the application, but before the Court is called upon to pronounce on admissibility (see, for example, *Sağat, Bayram and Berk v. Turkey* (dec.), no. 8036/02, 6 March 2007, and *Yıldırım v. Turkey* (dec.), no. 0074/98, 30 March 2006). The Court observes that the criminal proceedings concerning the applicant's allegations regarding her forced gynaecological examination were concluded on 18 April 2002, which is before the Court delivered its decision on admissibility. The Court therefore dismisses the Government's objection under this head.

64. As regards the Government's objections regarding the failure to exhaust remedies under civil law, the Court notes that, in the instant case, the applicant filed a petition with the Hakkari public prosecutor's office requesting the prosecution of both the gendarmes and the doctor who had examined her. The criminal investigation brought against the gendarmes was suspended by the Supreme Administrative Court on 18 April 2002 in accordance with Article 1 of Law no. 4616. No information has been provided by the Government as to the outcome of the investigation as regards the doctor, if any. In these circumstances, the Court dismisses the Government's argument and finds that the applicant was not required to embark on another attempt to obtain redress by bringing a civil-law action (see, for example, *mutatis mutantis*, *Akpınar and Altun v. Turkey*, no. 56760/00, § 68, ECHR 2007-... (extracts)).

65. In view of the above considerations and reiterating that the six-month time-limit imposed by Article 35 § 1 of the Convention requires applicants to lodge their applications within six months of the final decision in the process of exhaustion of domestic remedies, the Court considers that the application lodged on 16 August 1999 was introduced in conformity with the six-month time-limit provided for in Article 35 § 1 of the Convention. It also rejects the Government's objection in this connection.

66. The Court notes that the applicant's complaint under Articles 3 and 8 of the Convention concerning the alleged forced gynaecological examination she was subjected to on 24 October 1997 is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

b) Alleged ill-treatment in detention and the conditions of the applicant's detention

67. The Court observes that, without prejudice to the applicant's complaint above, the documentary evidence submitted by the parties does not substantiate the applicant's allegation that she was subjected to any kind of ill-treatment with a severity above the Article 3 threshold during her detention. Nor is there any *prima facie* evidence to support her allegations regarding the conditions in which she had been kept while she was in detention. Therefore, this part of the complaint under Article 3 is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 and 4 of the Convention.

2. Merits

68. It remains to be determined whether the applicant's complaints concerning the gynaecological examination disclose a violation of the relevant Articles of the Convention.

a) Relevant principles

69. As the Court has held on many occasions, Article 3 of the Convention enshrines one of the most fundamental values of a democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). In this connection, it reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among other authorities, *Mouisel v. France*, no. 67263/01, § 37, ECHR 2002-IX, and *Gennadi Naoumenko v. Ukraine*, no. 42023/98, § 108, 10 February 2004).

70. Treatment has been held by the Court to be "inhuman" because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita,* cited above, § 120). Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, Commission's report of 8 July 1993, Series A no. 280, p. 14, § 67), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the Greek case"), nos. 3321/67 *et al.*, Commission's report of 5 November 1969, Yearbook 12, p. 186, and

Keenan v. the United Kingdom, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is "degrading" within the meaning of Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22, § 55, and *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III). In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120). In this connection, the Court reiterates that it has found the mere fact of being taken to a hospital for a gynaecological examination does not attain the required minimum level of severity within the meaning of Article 3 of the Convention (see *Devrim Turan v. Turkey*, no. 879/02, § 21, 2 March 2006).

71. With respect to medical interventions to which a detained person is subjected against his or her will, Article 3 of the Convention imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty, for example by providing them with the requisite medical assistance. The persons concerned nevertheless remain under the protection of Article 3, whose requirements permit no derogation (see *Mouisel*, cited above, § 40, and *Gennadi Naoumenko*, cited above, § 112). A measure which is therapeutically necessary from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading (see, in particular, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A no. 244, pp. 25-26, § 82, and *Gennadi Naoumenko*, cited above, § 112).The Court must nevertheless satisfy itself that a medical necessity has been convincingly shown to exist and that procedural guarantees for the intervention, for example to force-feed, exist and are complied with (see *Nevmerzhitsky v. Ukraine*, no. 54825/00, § 94, 5 April 2005).

Where a measure falls short of Article 3 treatment, it may, however, fall foul of Article 8 of the Convention, which, *inter alia*, provides protection of physical and moral integrity under the respect of private life head (see, for example, *Wainwright v. the United Kingdom*, no. 12350/04, § 43, ECHR 2006-...). In this connection, the Court reiterates that a decision imposing a medical intervention in defiance of the subject's will would give rise to an interference with respect for his or her private life, and in particular his or her right to physical integrity (see, *mutatis mutandis*, *Glass v. the United Kingdom*, no. 61827/00, § 70, ECHR 2004-II, *Pretty v. the United Kingdom*, no. 2346/02, §§ 61 and 63, ECHR 2002-III, and *Y.F. v. Turkey*, cited above, § 33).

72. Even where it is not motivated by reasons of medical necessity, Articles 3 and 8 of the Convention does not as such prohibit recourse to a medical procedure in defiance of the will of a suspect in order to obtain from him or her evidence of his or her involvement in the commission of a criminal offence. However, any recourse to a forcible medical intervention in order to obtain evidence of a crime must be convincingly justified on the facts of a particular case and the manner in which a person is subjected to a forcible medical procedure must not exceed the minimum level of severity prescribed by the Court's case-law under Article 3 of the Convention (see *Jalloh v. Germany* [GC], no. 54810/00, §§ 70-71, ECHR 2006-...).

73. Finally, it must be reiterated that allegations of ill-treatment must be supported by appropriate evidence (see, in particular, *Tanrıkulu and Others v. Turkey* (dec.), no. 45907/99, 22 October 2002). To assess this evidence, the Court adopts the standard of proof "beyond reasonable doubt" but adds that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact (see *Labita*, cited above, § 121).

b) Application of those principles to the present case

74. In the instant case there is no dispute that the applicant had a gynaecological examination on 24 October 1997. The parties disagree on the manner the examination was conducted and whether the applicant had consented to it.

75. At the outset the Court finds the applicant's allegations as regards the forced nature of the gynaecological examination unsubstantiated. The Court finds no prima facie evidence to support the applicant's version of facts regarding the manner in which she was examined (see paragraph 57 above). Nor does the Court find, on the material before it, that in carrying out the examination the authorities overrode the decision of the applicant to refuse it. In this regard it notes that, in similar cases lodged against Turkey, where a person had refused to be examined the doctors had not in fact carried out any gynaecological examination (see, for example, *Devrim Turan v. Turkey*, cited above, *Özalp v. Turkey* (dec.), no. 74300/01, 11 October 2007, and *Sız v. Turkey* (dec.), no. 895/02, 26 May 2005). For that reason, the Court finds that the facts of the case do not disclose a breach of Article 3 of the Convention.

76. On the other hand, the Court finds it established that the applicant had resisted a gynaecological examination until persuaded to agree to it. It also accepts that, in certain circumstances, a person in detention cannot be expected to continue to resist submitting to a gynaecological examination, given her vulnerability at the hands of the authorities, who exercise complete control over her throughout her detention see *Y. F. v Turkey*, cited above, § 34). Whether this is the case will depend on the particular facts, including the alleged victim's personal circumstances and the context in

which the examination is carried out. The Court considers that, as in the *Y.F. v. Turkey* case itself, this issue is more appropriately addressed in the present case under Article 8 of the Convention and in the light of the Court's settled case-law, according to which any medical intervention against the subject's will, or without the free, informed and express consent of the subject, constitutes an interference with his or her private life (see, for example, *Glass*, cited above, § 82). Such an interference will give rise to a breach of Article 8, unless it can be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued (see *Wainwright,* cited above, § 43).

77. The Court notes that in the instant case the applicant was detained *incommunicado* for at least nine days prior to the impugned medical intervention and that at the time of the examination, she appeared to be in a particularly vulnerable mental state (see paragraph 9). It is not suggested that there was any medical reason for such an examination or that it was carried out in response to a complaint of sexual assault lodged by the applicant. Nor is it suggested that the applicant herself requested such an examination; on the contrary, as noted above, the applicant resisted such an examination until she was persuaded by Dr A.Y. (see paragraphs 33, 34, 35, 42 and 45). It is unclear from the material before the Court whether the applicant was adequately informed of the nature and the reasons for this examination. Moreover, in light of Dr A.Y.'s reference to the necessity of the examination with respect to official documents (see paragraph 45), the Court considers that the applicant might have been misled into believing that the examination was compulsory. When account is taken of all the facts above, it cannot be concluded with certainty that any consent given by the applicant was free and informed. The Court, therefore, considers that the imposition of a gynaecological examination on the applicant, in such circumstances, gave rise to an interference with her right to respect for her private life, and in particular her right to physical integrity (see, *mutatis mutandis*, *Glass*, cited above, § 70).

78. As regards the question whether the interference was "in accordance with the law", the Court reiterates that this expression requires firstly that the impugned measure should have some basis in domestic law; it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him, and be compatible with the rule of law (see, for instance, *Narinen v. Finland*, no. 45027/98, § 34, 1 June 2004). The latter implies that there must be a measure of protection in national law against arbitrary interferences with the rights safeguarded by paragraph 1 of

Article 8. If a law confers a discretion on a public authority, it must indicate the scope of that discretion, although the degree of precision required will depend upon the particular subject matter (see *Herczegfalvy v. Austria*, cited above, § 89).

79. The Court reiterates that in the above-mentioned *Y.F.* case, the Court found that the gynaecological examination of a female detainee, at the material time, was not in accordance with the law. The Court finds no particular circumstances in the instant case which would require it to depart from its findings in that case. Under Turkish law, any interference with a person's physical integrity is prohibited except in the event of medical necessity and in circumstances defined by law. In the instant case, the Government have not presented any arguments to the effect that the interference at issue was based on and in compliance with any statutory or other legal rule. It also appears from the facts of the case that the impugned medical examination was not part of the standard medical examination procedure applied to persons arrested and detained. Rather it appears to have been a discretionary decision - not subject to any procedural requirements - taken by the authorities in order to safeguard the members of security forces, who had arrested and detained the applicant, against a potential false accusation by the applicant of sexual assault.

80. The Court, accordingly finds that the interference in issue was not "in accordance with the law" for the purposes of paragraph 2 of Article 8 and was in violation of that Article on this ground. However, the Court considers it appropriate in the present case to go further and to examine whether the interference in question pursued a legitimate aim and was "necessary in a democratic society".

81. The only aim invoked by the Government in carrying out gynaecological examinations on those in custody is to protect the security forces against false allegations of sexual assault. Even if this could in principle be regarded as a legitimate aim, the Court cannot find that the examination carried out in the present case was proportionate to such an aim**.** While, in a situation where a female detainee complains of a sexual assault and requests a gynaecological examination, the obligation of the authorities to carry out a thorough and effective investigation into the complaint would include the duty promptly to carry out the examination (see, for example, *Aydın v. Turkey*, judgment of 25 September 1997, *Reports* 1997-VI, § 107), a detainee may not be compelled or subjected to pressure to such an examination against her wishes. As noted above, the applicant in the present case made no complaint of sexual assault against those who detained her and did not request a gynaecological examination. No reason has been advanced to suggest that she was likely to do so. The Court finds that the protection of the gendarmes against false allegations is, in any event, not such as to justify overriding the refusal of a detainee to undergo such an intrusive and serious interference with her physical

integrity or, as in the present case, seeking to persuade her to give up her express objection to such an examination.

82. In sum, the Court finds that the gynaecological examination which was imposed on the applicant without her free and informed consent has not been shown to have been "in accordance with the law" or to have been "necessary in a democratic society". There has accordingly been a violation of the applicant's rights under Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

83. The applicant first complained that her arrest in northern Iraq was unlawful. She further stated that she was not informed of the reasons for her arrest and the charges against her in German. Finally, the applicant maintained that she was held in detention for nineteen days without being brought before a judge, during which time she was threatened with death and had no access to a lawyer or to her family. The applicant relied on Article 5 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...;
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power...

84. The Government, relying on the same reasons as above (see paragraph 57), asked the Court to dismiss this part of the application as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule.

85. As regards the Government's objection regarding the exhaustion of domestic remedies, the Court notes that they have not explicitly pointed out a particular remedy capable of redressing the applicant's complaints under Article 5 of the Convention. It accordingly rejects the Government's objection under this head.

86. As to the Government's objection concerning the six-month rule, the Court reiterates that, according to the established case-law of the Convention organs, where there is no domestic remedy available, the six-month period runs from the date of the act alleged to constitute a

violation of the Convention; however, where it concerns a continuing situation, the period of six months runs from the end of the situation concerned (see, among other authorities, *Yüksektepe v. Turkey*, no. 62227/00, § 31, 24 October 2006).

87. The Court notes that the applicant's gendarmerie detention ended when she was remanded in custody on 26 October 1997, whereas these complaints were lodged with the Court on 16 August 1999, more than six months later. In these circumstances, the Court accepts the Government's objection that the applicant has failed to comply with the six-month rule. It follows that this part of the application must be rejected under Article 35 §§ 1 and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

88. The applicant complained that she had been denied a fair hearing by an independent and impartial tribunal on account of the presence of a military judge sitting on the bench of the Van State Security Court which tried and convicted her. She further complained under the same head that her right to a public hearing as well as free legal assistance had been infringed. Finally, the applicant claimed that the principle of "equality of arms" had not been respected, since the bill of indictment was not in a language she could understand. The applicant relied on Article 6 of the Convention, the relevant parts of which read as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal established by law.
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> ...
>
> (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;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

A. Admissibility

89. The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It

further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

90. The Government disputed the applicant's allegation.
91. The applicant maintained her claims.

1. Independence and impartiality of the Van State Security Court

92. The Court has examined a large number of cases raising similar issues to those in the present case and found a violation of Article 6 § 1 of the Convention (see *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003).

93. The Court finds no reason to reach a different conclusion in the instant case. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

2. Fairness of the proceedings

94. Having regard to its finding of a violation of the applicant's right to a fair hearing by an independent and impartial tribunal, the Court considers that it is not necessary to examine the remaining complaints under Article 6 of the Convention relating to the fairness of the proceedings before it (see, among other authorities, *Incal v. Turkey*, judgment of 9 June 1998, *Reports* 1998-IV, p. 1568, § 74).

IV. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

95. The applicant further complained under Article 13 that the prosecutor's inadequate response to her complaint regarding the events surrounding her arrest and detention hindered her right to bring compensation proceedings against the persons responsible for them. In addition, she claimed that the treatment which she suffered at the hands of the authorities was motivated by her sex and political opinions, in breach of Article 14 of the Convention.

96. The Court considers that the above complaint under Article 13 should be examined in conjunction with Articles 3 and 8 of the Convention.

97. The Government, relying on the same reasons as above (see paragraph 57), asked the Court to dismiss the applicant's complaint under 14 as being inadmissible for failure to comply with the requirement of exhaustion of domestic remedies or, alternatively, for failure to comply with the six-month rule.

98. The Court considers the Government's objection above to be so closely linked to the substance of the applicant's complaint under this head

that it cannot be detached from it. Therefore, to avoid, prejudging the merits of the said complaint, these questions should be examined together. As the applicant's complaints are not inadmissible on any other grounds, they must therefore be declared admissible.

99. Having regard to the facts of the case, the submissions of the parties and its finding of a violation under Article 8 above, the Court considers that it has examined the main legal question raised in the present application in so far as it concerns the applicant's gynaecological examination against her will. It concludes therefore that there is no need to give a separate ruling on the applicant's remaining complaints under Articles 13 and 14 of the Convention (see, for example, *Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007, *Mehmet and Suna Yiğit v. Turkey*, no. 52658/99, § 43, 17 July 2007, and *K.Ö. v. Turkey*, no. 71795/01, § 50, 11 December 2007[1]).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed 40,000 euros (EUR) in respect of pecuniary and non-pecuniary damage. In respect of pecuniary damage the applicant submitted that she was unemployed due to her mental and physical state.

102. The Government contested the amount.

103. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, having regard to all the elements before it, the Court finds that the applicant suffered non-pecuniary damage in the form of mental distress as a result of the gynaecological examination to which she had been subjected against her will. Ruling on an equitable basis, it therefore awards the applicant EUR 4,000 under this head.

B. Costs and expenses

104. The applicant also claimed EUR 9,301 for representation fees, costs and expenses incurred before the State Security Court and the Court. The applicant relied on the Diyarbakır Bar Association's recommended

[1] The judgment is not yet final.

minimum fees list and a schedule of costs prepared by her representatives. She also submitted a letter from Mr Bayhan, a translator, who claimed to have received 1,350 new Turkish liras (approximately EUR 726) for translation. The applicant, however, did not submit any receipts or any other relevant documents.

105. The Government contested the amount.

106. Since the applicant submitted no substantiation by way of vouchers or receipts of her costs claim, as required by Rule 60 of the Rules of Court, the Court makes no award under this head.

C. Default interest

107. 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 complaints concerning the alleged forced gynaecological examination (Articles 3, 8 and 14), the applicant's right to a fair hearing by an independent and impartial tribunal (Article 6) and the alleged lack of an effective domestic remedy in respect of her complaint regarding the forced gynaecological examination (Article 13) admissible and the remainder of the application inadmissible;

2. *Holds* by 5 votes to 2 that there has been no violation of Article 3 of the Convention;

3. *Holds* by 5 votes to 2 that there has been a violation of Article 8 of the Convention;

4. *Holds* unanimously that there has been a violation of Article 6 § 1 of the Convention as regards the lack of independence and impartiality of the State Security Court which tried and convicted the applicant;

5. *Holds* unanimously that it is not necessary to examine the applicant's other complaints under Article 6 of the Convention;

6. *Holds* unanimously that it is not necessary to examine the applicant's complaints under Article 13 and 14 of the Convention;

7. *Holds* unanimously
(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, EUR 4,000 (four thousand euros) in respect of non-pecuniary damage, free of any taxes or charges that may be payable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 13 May 2008, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Fatoş Aracı	Nicolas Bratza
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinion is annexed to this judgment:

Partly dissenting opinion of Judge David Thór Björgvinsson, joined by Judge Garlicki;

N.B.
F.A.

PARTLY DISSENTING OPINION OF JUDGE DAVID THÓR BJÖRGVINSSON JOINED BY JUDGE GARLICKI

The applicant claims that the circumstances in which she was subjected to a gynaecological examination constituted a breach of Article 3 and Article 8 of the Convention. The majority has found a violation of Article 8 on this account, but no violation of Article 3.

I, on the other hand, respectfully submit that Article 3 has been violated and that there is no need to examine the complaint under Article 8.

I agree with the majority that the only part of the applicant's complaint that raises questions as to whether a breach has occurred relates to the gynaecological examination imposed upon her while in police custody, and the other complaints based on Article 3 should be dismissed as manifestly ill-founded as they are not sufficiently substantiated (see paragraphs 67 and 68 of the judgment).

I also agree with the majority in finding that any consent given by the applicant was not free and informed (see paragraph 77 of the judgment).

Therefore, in the present case a gynaecological examination was imposed upon the applicant, while in police custody, without her free and informed consent. This is where the assessment must begin as to whether the treatment she was subjected to falls under Article 3 or Article 8 of the Convention.

Medical interventions to which a detained a person is subjected with or without his or her free and informed consent can be justified on different grounds. Firstly, and most obvious, is necessary medical assistance to detained persons. Secondly, recourse to a medical intervention or procedure against the will (or without the free or informed consent) of a detained person may, under certain conditions, be justified, in order to obtain evidence of his or her involvement in the commission of a criminal offence (see, however, *Jalloh* v. *Germany*, §§ 99 et seq.)

Nothing in the case file suggests that any specific need for medical assistance on the part of the applicant prompted the disputed intervention. It cannot be justified on this ground.

Even assuming that there may be situations in which a gynaecological examination without free and informed consent may be justified, no such situation was present in the case under consideration.

As explained in paragraph 61, the main motivation of the authorities in submitting the applicant to the examination was to protect them from possible allegations of rape or other sexual harassment or abuse. However, the applicant had not made any such allegations. It was therefore a purely preventive measure to protect the authorities from possible false accusations.

I would point out that this is not the first time the respondent Government in this case have advanced this argument, but that they have used it in similar cases which are cited in this judgment. In my view this reasoning does not justify the fact that female detainees may, as a matter of course, be subjected by the authorities to the kind of medical treatment at issue.

Then the question arises whether the treatment attains the level of severity required by Article 3. Regard must be had here to the whole psychological and physical nature of the intervention. In this case the authorities persuaded the applicant, who was in a very vulnerable situation, to give "consent" that was not "free and informed", "consent" to a treatment that in all likelihood was entirely repugnant to her. I believe that a gynaecological examination in such situations gives rise to feelings of inferiority and degradation and that, without any rationally acceptable justification, it will be understood by the subject as being aimed exclusively at debasing and humiliating her. I accordingly believe that the kind of treatment the applicant was subjected to in this situation was degrading and, as such, aroused feelings of fear, anguish and inferiority capable of humiliating and debasing her. Therefore I find that Article 3 of the Convention has been violated.

I would also add that if the applicant had only made her complaint under Article 8, I would certainly have followed the majority in finding a violation thereof. However, I find that the situation is more properly dealt with under Article 3 of the Convention.