SECOND SECTION

CASE OF GÜLER AND ÖNGEL v. TURKEY

(Applications nos. 29612/05 and 30668/05)

JUDGMENT

STRASBOURG

4 October 2011

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

In the case of Güler and Öngel v. Turkey,

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

Françoise Tulkens, *President,*
Danutė Jočienė,
David Thór Björgvinsson,
Dragoljub Popović,
András Sajó,
Işıl Karakaş,
Guido Raimondi, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 14 September 2011,

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

PROCEDURE

1. The case originated in two applications (nos. 29612/05 and 30668/05) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by two Turkish nationals, Mr Serdar Güler and Mr Savaş Kurtuluş Öngel ("the applicants"), on 3 August 2005.

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

3. On 15 September 2009 the President of the Second Section decided to give notice of the applications to the Government. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

4. The applicants were born in 1977 and 1979 respectively.

5. On 29 June 2004 a large group of demonstrators, including the applicants, gathered in Istiklal Street in front of the Galatasaray High School in Istanbul to attend the reading out of a statement to the press in protest against the NATO summit which was being held in Istanbul on 28-29 June 2004. The demonstration was organised by KESK (*Kamu Emekçileri Sendikaları Konfederasyonu – The Confederation of Public Employees' Trade Unions).* A large group of police officers, all wearing helmets and gas masks and equipped with the necessary material, was also deployed to the area. Nearly 500 demonstrators took part in the demonstration and slogans were chanted against NATO. After the statement was read out by the representative of KESK, the demonstrators started to disperse. A small group of demonstrators, carrying the flags of their non-governmental organisation *Halkevleri Derneği (Peoples' Houses)*, walked towards the police officers who had blocked Istiklal Street to prevent the group from approaching Taksim Square. The demonstrators attacked the police officers with sticks and stones and the police officers used tear gas and truncheons to disperse the group.

Some of the nearby shops and vehicles were damaged during the incident. According to the incident report, six police officers were wounded during the incident.

6. The applicants, who had listened to the press statement, were arrested during this incident. According to the applicants, they were beaten and insulted during and after their arrest. The same day, they were taken to the Bayrampaşa Health Clinic for a medical examination. According to the applicants, the doctor examined them in the presence of the police officers. A copy of the medical report is not included in the case file.

7. On 30 June 2004 the applicants were taken to the Beyoğlu Forensic Medicine Institute for a further medical examination. The doctor who examined the applicants concluded that both of them were unfit to work for seven days. The following findings were noted in the medical report:

– *Serdar Güler*: Large bruises on the back of the upper left arm, bruises on the back, bruises on the shoulders and on the waist, bruises on the right shoulder, bruises on the left gluteal region, tenderness of the left leg.

– *Savaş Kurtuluş Öngel*: Several bruises on the back of the left shoulder, bruise on the upper side of the right shoulder blade, bruises on the left and right sides of the back, a bleeding wound on the left elbow, a bruise on the right knee, bruises on the left knee. The doctor also noted that the applicant had a nose bleed.

8. The same day, the applicants were released upon the order of the Beyoğlu Public Prosecutor.

9. On 18 July 2004 the applicants filed a petition with the Beyoğlu public prosecutor against the police officers who had carried out their arrest. In their petition, the applicants complained, *inter alia*, that their arrest had been unlawful and that the police officers had used excessive force during and after the arrest.

10. On 2 November 2004 the Beyoğlu public prosecutor issued a decision of non-prosecution in respect of the police officers who had been on duty at the relevant time. In his decision, the public prosecutor considered that the force used by the security forces had been in line with Article 16 of Law no. 2559 on the Duties and Powers of the Police and had not been excessive. In the public prosecutor's opinion, the injuries sustained by the applicants had been caused by a use of force which was proportionate. In delivering this decision, the public prosecutor had regard to the fact that after the press statement had been read out, a group of seventy people had not dispersed and had attacked the police officers with sticks and stones, also causing damage to nearby shops and vehicles. In the public prosecutor's opinion, the force used by the police had therefore been proportionate.

11. On 29 December 2004 the applicants filed an objection against the public prosecutor's decision.

12. On 13 December 2005 the Istanbul Assize Court dismissed the applicants' objection.

13. In the meantime, on 30 June 2004, the Beyoğlu public prosecutor filed a bill of indictment against eighteen accused, including the applicants, with the Beyoğlu Criminal Court and accused them under Article 32 of Law no. 2911 of taking part in an illegal demonstration without prior authorisation and of not dispersing despite the police officers' warning. Five police officers, who had been wounded during the incident, joined the proceedings as intervening parties.

14. On 7 March 2006 the Beyoğlu Criminal Court acquitted the applicants of the charges against them. In delivering its decision, the Criminal Court had regard to a video recording of the incident, to witness statements and to the submissions of the intervening parties. The court found it established that the applicants were not amongst

the demonstrators who had been carrying "*Halkevleri*" flags and had attacked the police officers. The court accordingly stated that there was no evidence in the file to support a finding that the applicants had violated Law no. 2911 or resisted the police officers as alleged.

II. RELEVANT DOMESTIC LAW

15. Article 16 of Law no. 2559 on the Duties and Powers of the Police provides:

> "The police may use firearms:
>
> (a) In self defence, ...;
>
> (h) if a person or a group resists the police and prevents them from carrying out their duties or if there is an attack against the police."

Additional Article 6 (dated 16 June 1985)

> "In cases of resistance by persons whose arrest is necessary or by groups whose dispersal is necessary, threat of attack or an attack, the police may use force to subdue these actions.
>
> Use of force refers to the use of bodily force, physical force and all types of weapons specified in the law and may gradually increase according to the nature and level of resistance or attack with a view to restoring calm.
>
> In cases of intervention by group forces, the extent of the use of force and the equipment and instruments to be used shall be determined by the commander of the intervening force."

THE LAW

I. JOINDER

16. Given the similarity of the applications, as regards both fact and law, the Court deems it appropriate to join them.

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

17. The applicants complained that they had been subjected to police brutality, which had caused them physical suffering. In this respect, they relied on Article 3 of the Convention, which reads:

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

18. The Government maintained that the applicants' allegations were unsubstantiated and that the force used against the applicants by the police had been proportionate.

A. Admissibility

19. The Government contended that the applicants had failed to exhaust the domestic remedies available to them under domestic law. In the first place, they submitted that the application had been lodged with the Court on 3 August 2005, while the domestic proceedings were still pending before the Istanbul Assize Court. The Government further submitted, in the alternative, that the applicants could also have initiated compensation proceedings before the administrative courts.

20. As regards the first limb of the Government's objections, the Court reiterates that applicants are required, in principle, to exhaust the different domestic remedies available to them before they apply to the Court. However, the last stage in the exhaustion of these remedies may be reached after the lodging of the application but before the Court is called upon to pronounce on the issue of admissibility (see *Mehmet Emin Yüksel v. Turkey* (dec.), no. 40154/98, 2 December 2003). The Court notes that the final decision in the prosecution of the accused police officers was delivered on 13 December 2005, which is before the Court had decided on admissibility. The Government's first objection must accordingly be dismissed.

21. As regards the second objection, the Court reiterates that it has already examined and rejected the Government's similar preliminary objections in previous cases (see, in particular, *Karayiğit v. Turkey* (dec.), no. 63181/00, 5 October 2004; *Balçık and Others v. Turkey*, no. 25/02, § 22, 29 November 2007; and *Biçici v. Turkey*, no. 30357/05, § 22, 27 May 2010). It finds no particular circumstances in the instant case which would require it to depart from its findings in the above-mentioned applications. Consequently, it rejects this part of the Government's preliminary objection as well.

22. The Court further 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

23. The applicants maintained that they had participated in the demonstration organised in protest against NATO and that following the reading of a statement to the press the police had used excessive force to disperse the crowd. In support of their submissions, the applicants relied on medical reports, which stated that both applicants had several bruises on their bodies and that they were unfit to work for seven days.

24. The Government denied the allegations and maintained that the use of force in the instant case had been proportionate and necessary.

25. As the Court has underlined 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 victim's behaviour (see *Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV). In this connection, it also notes that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention.

26. Furthermore, in assessing evidence, the standard of proof "beyond reasonable doubt" is generally applied. However, such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact. Further, where allegations are made under Articles 2 and 3 of the Convention, the Court must apply a particularly thorough scrutiny (see *Saya and Others v. Turkey*, no. 4327/02, § 19, 7 October 2008).

27. The Court observes that in the instant case there is no dispute between the parties that the applicants were injured during a demonstration due to the use of force by the police in order to disperse the protestors. According to the medical reports, the applicants had several bruises on their bodies and were found unfit to work for seven days. The Court is therefore convinced that these injuries are sufficient to bring the applicants' complaints within the scope of Article 3.

28. The Court reiterates that Article 3 does not prohibit the use of force in certain well-defined circumstances. However, such force may be used only if indispensable and

must not be excessive (see *Rehbock v. Slovenia*, no. 29462/95, §§ 66-78, ECHR 2000-XII).

29. The Court observes from the submissions of the Government and from the video recording of the incident that following the reading of the statement to the press, the demonstrators had started to disperse of their own accord without a forceful intervention on the part of the authorities. It is also noted that at this time a small group of demonstrators, carrying the flags of the NGO *Halkevleri Derneği* (*Peoples' Houses*), had a confrontation with the police. While they attacked the police officers with sticks and stones, the police used force to disperse them. The Court notes at this point that it has been established by the Beyoğlu Criminal Court that the applicants were not among the demonstrators who had attacked and resisted the police officers. In this connection, the Court also observes from the video recording of the incident that a very large group of police officers, all equipped with helmets, gas masks and other necessary equipment, had been deployed to the area prior to the demonstration. It is therefore not possible to conclude that the security forces were called upon to react without prior preparation (see *Balçık and Others*, cited above, § 32). Furthermore, the Government have not provided any information showing that the intervention of the security forces was properly regulated and organised in such a way as to minimise to the greatest extent possible any risk of bodily harm to the demonstrators. The Court concludes therefore that although a small group of demonstrators attacked the police officers after the press statement had been read out, it is not possible to conclude that the force used by the police against the applicants, who were not among the resisting demonstrators, was justified.

30. In these circumstances, the Court finds that the injuries sustained by the applicants were the result of treatment for which the State bears responsibility.

31. There has therefore been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment to which the applicants were subjected.

III. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

32. The applicants complained under Article 5 § 1 (c) of the Convention that their placement in police custody had been illegal.

33. The Court notes that the applicants were released from police custody on 30 June 2004, whereas the present applications were lodged with the Court on 3 August 2005. Consequently, this part of the application should be rejected for non-compliance with the six-month time-limit pursuant to Article 35 §§ 3 and 4 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLES 10 and 11 OF THE CONVENTION

34. Relying on Articles 10 and 11 of the Convention, the applicants complained that, as they had been arrested during a demonstration, their right to freedom of expression and assembly had been breached.

35. The Government denied that claim.

36. The Court notes that these complaints are linked to the ones examined above and must likewise be declared admissible.

37. However, having regard to the facts of the case, the submissions of the parties and its finding of a violation of Article 3 above, the Court considers that it has examined the main legal question raised in the present applications. It concludes, therefore, that there is no need to give a separate ruling on the remaining part of the application (see, for example, *Kamil Uzun v. Turkey*, no. 37410/97, § 64, 10 May 2007; *K.Ö. v. Turkey*,

no. 71795/01, § 50, 11 December 2007; *Juhnke v. Turkey*, no. 52515/99, § 99, 13 May 2008; *Çelik v. Turkey (no. 1)*, no. 39324/02, § 44, 20 January 2009; and *Yananer v. Turkey*, no. 6291/05, § 47, 16 July 2009).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

38. The applicants each requested 10,000 euros (EUR) in respect of compensation for pecuniary damage and EUR 20,000 in respect of compensation for non-pecuniary damage. Referring to the Istanbul Bar Association's scale of legal fees, the applicant's representative further claimed EUR 8,170 covering seventeen hours' legal work spent on the presentation of the present case before the Court.

39. The Government contested the claims.

40. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. As regards non-pecuniary damage, the Court finds that the applicants must have suffered pain and distress which cannot be compensated for solely by the Court's finding of a violation. Having regard to the nature of the violation found and ruling on an equitable basis, it awards the applicants EUR 9,000 each in respect of non-pecuniary damage.

41. Finally, as regards legal fees, according to the Court's case-law, an applicant is entitled to reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 jointly to the applicants under this head.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;

2. *Declares* the applicants' complaints concerning their alleged ill-treatment and their right to freedom of expression and assembly admissible; and the remainder of the application inadmissible;

3. *Holds* that there has been a violation of Article 3 of the Convention on account of the inhuman and degrading treatment to which the applicants were subjected;

4. *Holds* that there is no need to examine separately the applicants' complaints under Articles 10 and 11 of the Convention;

5. *Holds*

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

(i) EUR 9,000 (nine thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,000 (three thousand euros) jointly, plus any tax that may be chargeable to the applicants, 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;

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

Done in English, and notified in writing on 4 October 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith Françoise Tulkens
Registrar President

GÜLER and ÖNGEL v. TURKEY JUDGMENT