CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FOURTH SECTION

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 32581/96
by Mehmet KOÇAK
against Turkey

The European Court of Human Rights (Fourth Section), sitting on 7 October 2003 as a Chamber composed of

Sir Nicolas BRATZA, *President*,
Mr R. TÜRMEN,
Mrs V. STRÁŽNICKÁ,
Mr R. MARUSTE,
Mr S. PAVLOVSCHI,
Mr L. GARLICKI,
Mr J. BORREGO BORREGO, *judges*,
and Mrs F. ELENS-PASSOS, *Deputy Section Registrar*,

Having regard to the above application lodged on 3 October 1995,

Having regard to the partial decision of 2 March 1999,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

The applicant, Mr Mehmet Koçak, is a Turkish national, who was born in 1965. At the time of the application, he was detained in Sağmalcılar prison, İstanbul. He is represented before the Court by Ms. Naciye Kaplan and Ms. Filiz Köstak from the İstanbul Bar Association and Ms Bedia Buran from the Ankara Bar Association.

A. The circumstances of the case

The facts of the case, as submitted by the parties, may be summarised as follows.

1. Facts as presented by the applicant

On 10 December 1993 the applicant was arrested by policemen and taken to the Anti-Terror branch of the İstanbul Security Directorate. However, the arrest and search minutes indicated the date of arrest as 12 December 1993.

On 12 December 1993 the Head of the Security Directorate requested authorisation from the Public Prosecutor of the İstanbul State Security Court to keep the applicant in police custody for fifteen days.

On 18 December 1993 the Public Prosecutor granted permission for the applicant's detention until 24 December 1993.

On 22 December 1993 the applicant was placed in a cell for interrogation. He was blindfolded and forced to listen to the cries of other detainees being tortured. He was threatened with torture and forced to admit to being a member of the terrorist organization PKK. When he denied to do so, the applicant was stripped naked, hosed with cold water and beaten with a truncheon on his body and the soles of his feet. He was then forced to walk on a salt-strewn floor. His hands were tied with a blanket, he was strung up by his arms and subjected to a form of torture known as "Palestinian hanging". In this position, electric shocks were administered to his genitals, his fingers and feet. He was subsequently obliged to sign a statement, of which he only signed the first two pages. The last page did not bear his signature. During his detention the applicant was kept in a cell, denied food and liquids and prevented from sleeping.

On 23 December 1993 the Public Prosecutor prolonged the applicant's detention until 27 December 1993 at the request of the Head of the Security Directorate.

On 27 December 1993 the applicant was seen by a doctor at the İstanbul Forensic Medical Institute. A medical report was issued stating that the applicant had ecchymoses measuring 2 and 3 cm on both sides of his hip and allergic dermatosis on his right hand. It was noted that these findings were not life-threatening but would prevent the applicant from work for one day.

On the same day the applicant was brought before the Public Prosecutor at the İstanbul State Security Court. He denied the charges against him. The statements which he had made at the police station were read out to him. The applicant contended that he had given the statement under duress and that he had not signed all its pages.

On 27 December 1993, after questioning by the Public Prosecutor, the applicant was brought before the İstanbul State Security Court. He pleaded not guilty. The statements he had made at the police station and at the

Public Prosecutor's office were read out to him. The applicant accepted the statement he made at the Public Prosecutor's office as true, but rejected the one he had made to the police as untrue and made under duress. The court subsequently ordered him to be detained on remand.

On 30 December 1993 the applicant petitioned the İstanbul State Security Court, complaining that he had been tortured during his detention in police custody. He stated that he had signed a statement under torture and asked the court to order his release.

On 14 January 1994 the applicant was seen by a doctor at the Forensic Medicine Institute in Eyüp, a district of İstanbul. The doctor drew up a medical report and noted the presence of pain in the applicant's shoulders, neck and armpits, a yellow coloured ecchymosis on the right armpit, another measuring 3 by 2 cm over the right arm, widespread abrasions and ecchymoses around the wrists and arms, hyperaemic lesions measuring 3 by 2 cm on the right hand and 2 cm long on the left hand, widespread yellow coloured ecchymoses over the loins, an ecchymosis over the groin, pain in the testicles, swellings over the right leg and foot, swellings and yellow coloured ecchymoses on the sole of the feet and bruises on various parts of the body. The doctor further noted that these findings were not life threatening but would prevent the applicant from work for up to seven days.

On 5 June 1995 the İstanbul Public Prosecutor issued a decision of non-prosecution in relation to security director Reşat Altay on the grounds that there was insufficient evidence that he had ill-treated the applicant. The Prosecutor further noted that criminal proceedings were pending against police officers Ömer Duman and Ümit Karabay, who had been charged with inflicting torture on the applicant.

On 29 June 1995 the applicant filed an objection with the Beyoğlu Assize Court against the decision of 5 June 1995.

On 4 August 1995 the Beyoğlu Assize Court dismissed the applicant's objection.

On 20 December 1995 the İstanbul Assize Court acquitted the police officers on the ground that there was insufficient evidence that they had inflicted torture on the applicant. The court stated, *inter alia*, that:

> "... the accused denied the charges against them. In the medical reports submitted by the complainant [the applicant], there is no indication as to which of the accused caused the symptoms. The complainant stated that he had been blindfolded and tortured during questioning. A person who is blindfolded cannot identify the persons torturing him. Accordingly, there is not sufficient evidence beyond subjective allegations... ."

The judgment of 20 December 1995 became final as the Public Prosecutor did not lodge an appeal against it. The applicant was unable to appeal against the judgment as he had failed to intervene in the criminal proceedings against the police officers.

In the mean time, on 4 February 1994 the Public Prosecutor filed a bill of indictment with the İstanbul State Security Court, charging the applicant with PKK membership. The charges were brought under section 168(2) of the Turkish Criminal Code and section 5 of the Prevention of Terrorism Act (Law no. 3713).

On 26 November 1996, the İstanbul State Security Court convicted the applicant of PKK membership and sentenced him to twelve years and six months' imprisonment. The applicant did not appeal against this judgment.

2. Facts as presented by the Government

On 12 December 1993 the İstanbul police started an investigation concerning the activities of the terrorist organisation PKK. On the same day, 30 suspects were detained. 10 handguns, 9 grenades, 25 Kalashnikov bullets and receipts used in the collection of forced levies as well as video equipment and cassettes used for propaganda purposes were confiscated. The applicant and six other persons were apprehended at the house of Mahmut Orhan, a meeting place for the PKK. The police found out that the applicant had been sentenced to imprisonment for eight years from 1978 to 1985 for manslaughter. In 1990, he was sentenced to 3 years' imprisonment for supporting the PKK.

In a testimony recorded by the police on 22 December 1993, the applicant admitted that he had been recruited and trained by PKK convicts while in prison and that, following his release, he had helped the PKK in various ways. Then, he rejected this statement.

According to the statement he made to the Public Prosecutor, the applicant took the police officers to a deserted location close to the Ümraniye Cemetery where he had hidden a gun, 2 cartridges and a cartridge clip.

The Public Prosecutor's report indicated that five other detainees identified the applicant as a PKK member. The prosecutor indicted 30 suspects. During the hearings, the applicant said he did not believe in the independence of the state security courts, that he was not a member of the PKK although he sympathised with their views and saw them as the legal representative of Kurds, and that he would keep supporting the Kurdish nation as well as other oppressed nations.

According to the Government, the applicant filed his first written complaint of ill-treatment on 11 July 1994, six months after the forensic doctor's report dated 14 January 1994. He filed his second written complaint on 27 March 1995. On 5 April 1995, the Public Prosecutor decided to join the two complaints. The police officers Ümit Karabay, Ömer Duman, and Reşat Altay were interrogated on 4 January, 19 April, 24 May 1995 respectively. They rejected the allegations of torture and claimed that PKK members always accuse police officers for ill treatment. They reminded that all detainees are examined by a Forensic Doctor before being

sent before the Public Prosecutor, and that the first report concerning the applicant did not mention any signs of ill-treatment. They contended that the conclusions drawn in the second report delivered by the prison doctor might be related to ill treatment inflicted in prison.

After a public case was filed against the police officers Ümit Karabay and Ömer Duman, the İstanbul Assize Court started held a hearing on 12 June 1995. On the same day, the court decided to invite the applicant to the following hearing to be held on 17 July 1995. The applicant was informed by prison officers thereof but refused to attend the hearing.

The İstanbul Assize Court listened to Ümit Karabay and Ömer Duman on 17 and 25 September 1995 respectively, in the absence of the applicant. The accused refused the torture allegations.

The applicant attended a hearing held on 27 November 1995 and stated before the Assize Court that he had been blindfolded and tortured during his detention in police custody. He added that from time to time his eye cover fell so that he could see the policemen.

On 20 December 1995 the Public Prosecutor declared that the evidence was insufficient to convict Ömer Duman and Ümit Karabay and the Assize Court acquitted them. The applicant did not attend this last hearing.

On 26 April 2003 the applicant was conditionally released.

B. Relevant domestic law and practice

1. Criminal prosecutions

Under the Turkish Criminal Code (TCC) it is an offence for a State employee to subject anyone to torture or ill-treatment (Article 243 in respect of torture and Article 245 in respect of ill-treatment). The authorities' obligations in respect of conducting a preliminary investigation into acts or omissions capable of constituting such offences that have been brought to their attention are governed by Articles 151 to 153 of the Code of Criminal Procedure. Offences may be reported to the authorities or the security forces as well as to public prosecutors' offices. The complaint may be made in writing or orally. If it is made orally, the authority must make a record of it (Article 151).

If the suspected offender is a civil servant and if the offence was committed during the performance of his/her duties, the preliminary investigation of the case is governed by the Law of 1914 on the prosecution of civil servants, which restricts the public prosecutor's jurisdiction *ratione personae* at that stage of the proceedings. In such cases it is for the relevant local administrative council (for the district or province, depending on the suspect's status) to conduct the preliminary investigation and, consequently, to decide whether to prosecute. Once a decision to prosecute has been taken, it is for the public prosecutor to investigate the case.

An appeal to the Supreme Administrative Court lies against a decision of the council. If a decision not to prosecute is taken, the case is automatically referred to that court.

2. Civil liability arising out of criminal offences

Under the Code of Obligations, anyone who suffers damage as a result of an illegal or tortious act may bring an action for damages (Articles 41 to 46) and non-pecuniary loss (Article 47). The civil courts are not bound by either the findings or the verdict of the criminal court on the issue of the defendant's guilt (Article 53).

3. Intervention of victims of ill-treatment in public prosecutions

a) Section 365 of the Turkish Code on Criminal Procedure (CCP)

"Any person who is injured by the offence may, at any phase of the investigation, intervene in the public prosecution.

Those so intervening in public prosecution may also submit their personal claims for adjudication."

The intervening party is entitled to request compensation for the prejudices arising from the offence. However, the exercising of this right is subject to procedural rules: the person who is injured by an offence shall intervene in the public prosecution and request explicitly the right to ask for compensation. The compensation request is not therefore automatic. It also has to be justified and as assessment of the amount shall accompany the request.

b) Section 371 of the CCP:

"An intervening party to a criminal proceeding can lodge an appeal being independent of the public prosecutor".

The intervening party is also entitled to exercise a procedural right: he/she may lodge an appeal against the decision given by the court at the end of a criminal prosecution. A person who did not intervene in the public prosecution does not hold the right to lodge an appeal.

COMPLAINT

The applicant alleges that he was tortured in violation of Article 3 of the Convention. He submits that the suffering he experienced, taken as a whole, amounted to torture. He claims that while in detention in the Anti-Terror branch of the İstanbul Security Directorate he was kept blindfolded during

questioning, was subjected to a form of torture known as "Palestinian hanging", given electric shocks which were exacerbated by throwing water over him, and was subjected to beatings, slapping and verbal abuse.

THE LAW

A. Arguments before the Court

a) The Government

The Government assert that the applicant should have exhausted domestic legal remedies governing claims for compensation. They contend that the applicant could have lodged a claim for compensation with an ordinary civil court on the basis of the Code of Obligations. They further assert that the applicant should have intervened in the public prosecution against the police officers. Thus, he could have lodged an appeal against the judgment that acquitted the accused police officers. The Government gives some examples of cases of intervention in criminal proceedings and allege that the applicant did not comply with the requirements of Article 35 § 1 of the Convention.

As to the merits of the case, the Government object to the racial implication of the application and to the applicant's presentation of his ethnic origin (Kurdish) as his nationality.

The Government also state that the two medical reports contradict each other. The first report delivered on 27 December 1993 does not mention any injury to the applicant. The latter did not complain of any subjective pain. He was examined 18 days later. This second examination made on 14 January 1994 revealed some scars. The Government allege that these scars might be due to some violence the applicant might have faced in the prison. They explain that his inmates might have ill-treated him in the belief that the applicant had disclosed information to the police.

The Government further argue that the official complaint filed by the applicant on 11 July 1994, i.e. six months after the end of the police custody, needs an explanation.

The Government allege that the torture allegations made by the applicant are part of a scenario aiming to dishonour security forces who struggle against terrorism.

b) The applicant

The applicant argues that the domestic legal remedies the Government put forward are not effective. He denounces that in spite of his initial

complaint dated 27 December 1993, the domestic authorities did not immediately start a public prosecution.

Concerning the merits, the applicant disputes the Government's arguments and denies the existence of a possible contradiction between the two medical reports. He argues that long police custody periods result in the disappearance of torture traces on the bodies of victims of ill treatment. He denies that he filed his first complaint on 11 July 1994. He notes that on 27 December 1993 he declared before the Public Prosecutor that he had signed a statement under duress during his police custody and that, on 30 December 1993 he repeated his allegations before the State Security Court. As the authorities did not respond, he had to file a third written complaint.

He protests that although they were of great importance, the two medical reports delivered by forensic doctors were not taken into account by the Assize Court who acquitted the police officers. He claims that the findings in the second medical report prove his torture allegations. He also alleges that the doctor who examined him on 27 December 1993 did not reveal torture traces in his medical report because he was under the pressure from security forces. He maintains that he saw the police officers who tortured him whenever his eye cover fell and asserts that torture is systematically inflicted to persons in police custody.

B. The Court's assessment

The Court notes that Turkish law provides civil remedies in respect of illegal and criminal acts attributable to the State or its agents.

The Court observes that on 27 December 1993 the applicant filed a criminal complaint with the Public Prosecutor at the İstanbul State Security Court against the police officers who allegedly tortured him during his detention in police custody. Although not immediate, a criminal prosecution was started and resulted in the acquittal of the police officers. The Court notes that recourse to the criminal law constitutes an adequate domestic remedy for allegations under Article 3 of the Convention and, in the circumstances of the case, an official complaint filed with the prosecutor's office can be considered "effective" for the purposes of Article 35 § 1 of the Convention (see, for instance, *Parlak, Aktürk and Tay v. Turkey* (dec.), no25125/94, 9 January 2001).

As regards a civil action for compensation, the Court notes that pursuant to the Code of Obligations, a plaintiff in such an action must, in addition to establishing a causal link between the tort and the damage he or she has sustained, identify the person believed to have committed the tort. In the instant case, however, it appears that the Istanbul Assize Court acquitted the police officers because of insufficient evidence: The court stated that the applicant could not have identified the persons who allegedly tortured him

since he was blindfolded and that the medical reports were not considered as sufficient evidence to prove ill-treatment. Such findings would not have constituted enough basis for a compensation claim to be successful.

Consequently, the Court considers that an applicant who files a criminal complaint with the competent authority is not further required to bring a civil proceeding in question, and the Government's preliminary objection must be dismissed in this respect.

As for the Government's claim regarding the intervention of the applicant in the criminal prosecution of police officers, the Court refers to its reasoning in cases where similar objections were dismissed (see, *inter alia*, *Orak c. Turquie* (dec.), no. 24936/94, 14 November 2000) and reiterates that the criminal prosecution originated from the applicant's complaint to the Public Prosecutor was, as noted above, sufficient to satisfy the exhaustion requirement.

Thus, the Government's preliminary objection must be also dismissed in this regard.

The Court considers, in the light of the parties' submissions, that the application raises complex issues of law and fact under Articles 3 of the Convention, the determination of which should depend on an examination of the merits. The Court concludes therefore that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established. It follows that the application should be declared admissible.

For these reasons, the Court unanimously

Declares the remainder of the application admissible.

Françoise ELENS-PASSOS Deputy Registrar	Nicolas BRATZA President