



Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 747/2016*, **

<i>Communication submitted by:</i>	H.Y.
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	4 May 2016 (initial submission)
<i>Date of present decision:</i>	9 August 2017
<i>Subject matter:</i>	Extradition to Turkey
<i>Substantive issues:</i>	Torture; non-refoulement
<i>Procedural issue:</i>	None
<i>Article of the Convention:</i>	3

1.1 The complainant is H.Y., a national of Turkey of Kurdish ethnicity and Armenian Orthodox origin, born in 1967, who is currently being detained in Burgdorf, Bern, Switzerland, awaiting extradition to Turkey. He had acquired resident status in Switzerland when extradition proceedings against him were initiated in Turkey in 2011. In 2015, the Swiss authorities ordered his extradition on the basis of diplomatic assurances provided by Turkey. On 3 May 2016, the complainant's appeal against the extradition order was rejected by the Federal Supreme Court.

1.2 In accordance with article 22 (3) of the Convention, the Committee brought the complaint to the State party's attention on 6 May 2016. At the same time, in application of rule 114 (1) of its rules of procedure, the Committee asked the State party not to extradite the complainant to Turkey while the complaint was being considered.

1.3 On 9 May 2016, the State party informed the Committee that it had taken the necessary steps to stay the complainant's extradition until the Committee issued a decision on the merits of the case or on lifting the interim measures.

Facts as submitted by the complainant

2.1 The complainant's extended family have been engaged in the Kurdish cause in Turkey for a generation. His father was a first-generation fighter for the Kurdistan Workers Party (PKK) and was killed in a fight between PKK and village guards. The complainant supported PKK and was detained and tortured several times in this connection.

* Adopted by the Committee at its at its sixty-first session (24 July-11 August 2017).

** The following members of the Committee took part in the consideration of the communication:
Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Sébastien Touzé and Kening Zhang.

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2.2 On an unspecified date, the complainant and his twin brother, S.Y., were charged with murdering a village guard in 1988 in revenge for their father. The complainant denied involvement in the murder, claiming that the charges against him had been fabricated for political reasons and because of his family history. While in pretrial detention, police officers subjected him to torture for eight days, in particular *falaka* (beating on the soles of his feet), burning with cigarettes, beatings and electric shocks. He was not able to lie down or walk during those eight days, urinated blood for several days thereafter and still has scars on his wrists. On 23 October 1989, the second jury court in Gaziantep sentenced him to death on the murder charge, which was later commuted to life imprisonment. The sentence was based mainly on the testimony of his brother, M.Y., which was obtained under torture. Subsequently, M.Y. and two other witnesses withdrew their testimonies against the complainant. The complainant did not challenge the sentence as he could not find a competent lawyer. On an unspecified date, he managed to escape from prison with the help of S.Y., who remained in prison in his place.

2.3 In 1992, the complainant sought asylum in Switzerland on the grounds of the torture and related post-traumatic stress disorder that was first diagnosed in 1994.¹ On 26 August 1994, the Swiss Federal Office for Refugees denied his asylum request. On 5 January 1995, the Swiss Asylum Review Board rejected his appeal. Further to his application for re-examination, dated 10 May 1995, the Office granted him subsidiary protection and temporary admission to Switzerland on 17 September 1996. The Office found that the complainant would face a real risk of a breach of article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) if he were to be returned to Turkey. The complainant also claims that the Office established that he had a “political data sheet” in Turkey which characterized him as “an inconvenient or recalcitrant person” and that the Turkish authorities had monitored his political activities. On 19 September 2002, the Board upheld its decision on appeal.

2.4 In the meantime, in 1995, the complainant’s brother S.Y. was released from prison and fled Turkey. On 16 August 1996, S.Y. was granted refugee status in Switzerland. In his request for asylum he claimed that he had been tortured in September/October 1994 after he was arrested by the police. The complainant contends that his brother’s asylum application contained records of a proceeding brought against him under the Turkish anti-terrorist legislation listing the complainant as a PKK member. This confirms that the complainant had a political data sheet in Turkey, as recognized by the Swiss authorities.

2.5 In 2010, the complainant was granted residence “B” status in Switzerland. As he had not been able to work full time since 1999 due to his work-related injury and subsequent partial disability, he revived his interest in the PKK movement. He worked as a driver for PKK leaders, drove them on long journeys throughout Europe, hosted PKK members visiting Switzerland, participated in a number of PKK-related events, was interviewed and raised funds for Kurdish charities. He visited a PKK administrator who was under house arrest in Germany and surveillance by the German and Turkish authorities. He hosted a PKK leader from the Syrian Arab Republic and a cousin of the Turkish PKK leader Abdullah Öcalan in Switzerland. The Swiss authorities never contested the complainant’s political activities in Switzerland.

2.6 On 15 August 2011, the Attorney General of Gaziantep issued an extradition request for the complainant to serve the life sentence relating to his murder conviction. On 5 October, the Turkish Embassy in Bern transmitted the extradition request to the Federal Office of Justice. After three unanswered requests, the Turkish authorities provided diplomatic assurances to the Office on 22 March 2012. In the meantime, according to the complainant, the Turkish authorities replaced the complainant’s political data sheet with a regular data sheet.²

¹ The diagnosis has been reconfirmed several times. The report of 30 July 2014, among the eight medical reports dated between 2012 and 2014, on file in German, states that the post-traumatic stress disorder is directly linked to the torture the complainant suffered in custody in the period 1988-1990.

² Whereas a regular data sheet contains information about a person’s criminal record and common-law charges, a political data sheet marking someone as an inconvenient or recalcitrant person is said to be established if a person is suspected of anti-government activities.

2.7 On 7 June 2012, the Federal Office of Justice issued an arrest warrant, on the basis of which the complainant was arrested on 21 June. He was subsequently released on bail because of his severe psychiatric condition.

2.8 On 6 July 2012, the complainant challenged the extradition request before the Federal Criminal Court, arguing that the Turkish authorities were seeking his extradition for a political crime, which should nullify the extradition request.

2.9 On 6 August 2012, the complainant requested asylum. On 29 January 2014, the Federal Office for Refugees granted him temporary admission. It found that he fulfilled the criteria for refugee protection under article 1 A of the Convention relating to the Status of Refugees but was subject to the exclusion under article 1 F (b) for having committed a murder. It also stated that the complainant would face a real risk of torture or inhuman or degrading treatment or punishment if he were returned to Turkey, and on that basis ordered his temporary admission. On 19 February 2014, the Office amended its decision to reflect the fact that the complainant had enjoyed resident status in Switzerland.

2.10 On 18 July 2014, the Federal Office of Justice authorized the complainant's extradition pending a decision by the Federal Criminal Court on whether the extradition had political grounds. On 6 August, the complainant challenged the extradition decision before the Court.

2.11 On 7 May 2015, the Federal Criminal Court rejected the complainant's claims of 6 July 2012 and 6 August 2014. The Court stressed that the complainant had not been recognized as a political refugee. It considered that the complainant's claim that he was convicted on the basis of evidence obtained through torture had not been credible. If returned to Turkey, the complainant would have to serve his sentence, and therefore "a prognosis about persecution after the final release is impossible". The Court also noted that the reasons which had led to his being categorized as an "inconvenient person" remained unclear and that therefore the complainant's fear of persecution remained unsubstantiated. In the complainant's case, even if a political component existed, the Court maintained that the extradition was not a priori inadmissible. The complainant adds that the widespread practice of torture in Turkey at the time of his arrest in 1988 was undisputed. On 15 May, he was placed in extradition detention. On 22 May, he appealed. On 12 August, the Federal Supreme Court stated that there should be valid reasons to justify extradition after the asylum authorities had established that a risk of torture existed and that such reasons had not been established. Therefore, the Court partly reversed the 7 May 2015 decision and remitted the case to the Federal Office of Justice for new consideration and further investigation.

2.12 After the 7 May 2015 decision of the Federal Criminal Court, the complainant was admitted to a psychiatric clinic in Zurich because his health condition had deteriorated. While in the clinic, he attempted to commit suicide. He received special treatment for persons in custody who were at risk of suicide until 6 July, when he was transferred to a specialized prison in Burgdorf that provided facilities for persons at risk of suicide. On several occasions thereafter, he was admitted to a psychiatric clinic in Bern as an imminent risk of suicide. Doctors told counsel that the complainant was assessed in the clinic under the Istanbul Protocol to identify whether he was a victim of torture; however, the results of the assessment were never provided to the complainant or to his counsel.

2.13 On 17 September 2015, the Federal Office of Justice presented the results of its further investigation. In particular, Turkish authorities had explained that there was no "political data sheet" with respect to the complainant, and transmitted a decision of the second jury court of Gaziantep dated 22 June 2015 to maintain the extradition request. The Swiss Embassy in Ankara stated that there would be no risk of torture for the complainant in Turkey, even if safety problems persisted in Turkish prisons in relation to the war against the PKK insurgency that had been waged since July 2015; however, as the complainant had no connection with the conflict, he would not be at personal risk of torture. On 5 October, the complainant commented on the Office's findings. He argues that the Swiss Embassy was not fully familiar with his case and had ignored its political dimension, specifically his PKK involvement.

2.14 On 13 October 2015, the Federal Office of Justice authorized the complainant's extradition to Turkey. The author appealed on 13 November. On 16 March 2016, his appeal was rejected by the Federal Criminal Court. Regarding the risk of torture, the Court held that since in the extradition process it was possible to ask for guarantees and control mechanisms, it was possible that the extradition authorities could come to a different conclusion from that of the asylum authorities. The rejection of his appeal prompted another suicide attempt by the complainant on 5 April. His subsequent applications for release from extradition detention were rejected due to the high risk that he would abscond.

2.15 On 29 March 2016, the complainant appealed the 13 October 2015 decision of the Federal Office of Justice to the Federal Supreme Court. He stated in particular that in March 2016, his first cousin on his father's side, E.Y., was accused of founding and leading an illegal group and supporting PKK armed forces. Together with a rifle, political propaganda material was found in his house and on his Facebook page, including pictures of high-profile PKK members. The complainant transmitted the material relevant to the investigation to the Court.

2.16 On 28 April 2016, the Federal Supreme Court rejected his appeal. The Court concluded that in the light of the additional investigation carried out by the authorities, there was no indication that the complainant would be at risk of torture, since he would be imprisoned to fulfil his sentence for a non-political crime and guarantees were in place for his treatment. As consequence, the case no longer constituted a case of "extraordinary importance" and was therefore outside its competence.

The complaint

3.1 The complainant claims that his extradition to Turkey would violate his rights under article 3 of the Convention because he would be at risk of being tortured at the hands of the Turkish authorities.

3.2 With reference to the jurisprudence of the Committee and the European Convention on Human Rights as well as international reports, the complainant claims that Turkish security and police forces increasingly use torture and ill-treatment, specifically targeting suspected terrorists, Kurdish and Alevi minorities and activists as well as prisoners, with a view to extracting confessions or information about political activities.³ Furthermore, the complainant is at personal risk of torture if he were to be extradited to Turkey, based on the following grounds.

3.3 First, the complainant suffered torture in the past, was detained based on unfair proceedings and his conviction was politically motivated. Although in the course of the extradition proceedings the Swiss authorities declined to accept his claim about the use of torture as lacking credibility, international reports show that torture, particularly *falaka* and electric shocks, was practised systematically in Turkey from 1988 to 1990, the period when he was in custody.⁴ This conclusion is also supported by the Committee's jurisprudence⁵ and was not disputed by the Swiss authorities in the course of the extradition proceedings. The complaint's psychiatric reports indicate that his post-traumatic stress disorder is

³ See communication No. 373/2009, *Aytulun and Güclü v. Sweden*, decision adopted on 19 November 2010, para. 6.6; and communication No. 349/2008, *Güclü v. Sweden*, decision adopted on 11 November 2010, para. 6.6; the jurisprudence of the European Court of Human Rights in *Üzer c. Turkey* (requête n° 9203/03), arrêt du 21 septembre 2010; *Süleyman Demir and Hasan Demir v. Turkey* (application No. 19222/09), judgment of 24 March 2015; *Ateşoğlu v. Turkey* (application No. 53645/10), judgment of 20 January 2015; *Cüneyt Polat c. Turkey* (requête n° 32211/07, arrêt du 13 novembre 2014; and *Aktürk v. Turkey* (application No. 70945/10, judgment of 13 November 2014; Immigration and Refugee Board of Canada, "Turkey: frequency of torture used by authorities, particularly on Kurdish and Alevi protestors and activists, including instances when torture is used on temporary detainees (2012-August 2013)", 16 August 2013; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Report to the Turkish Government on the visit to Turkey (CPT/Inf(2015)6), published but subsequently withdrawn.

⁴ Human Rights Watch, *World Report 1990*; and report of the Committee against Torture on the summary account of the results of the proceedings concerning the inquiry on Turkey (A/48/44/Add.1).

⁵ See communication No. 21/1995, *Alan v. Switzerland*, Views adopted on 8 May 1996, para. 11.5.

directly linked to the torture he suffered in custody. The complainant claims that his brother S.Y. was granted asylum in Switzerland on the grounds that he had been tortured while detained on the same murder charge as the complainant. S.Y. described to the Swiss asylum authorities how the complainant, M.Y. and he himself had been tortured in detention. As the complainant had provided an identical description in his asylum application, the Swiss authorities should have considered his description of the torture to be credible as well. Furthermore, with regard to S.Y., the Swiss authorities implicitly admitted that M.Y. had been forced to testify against the complainant under torture. Hence, the criminal proceedings against the complainant were flawed and unfair.

3.4 Second, the complainant is particularly vulnerable due to his severe health condition, including the post-traumatic stress disorder, several suicide attempts during the extradition proceedings and partial disability. According to the psychiatric report dated 30 July 2014, it was necessary for him to continue treatment in Switzerland. According to the psychiatric report of 10 June 2015, his removal would almost certainly lead to retraumatization; his obvious fear and physical tension in relation to detention and eventual ill-treatment in Turkey were visible and noticeable.

3.5 Third, the complainant points out contradictions in the findings of the Swiss asylum and extradition authorities. The domestic courts disregarded the assessment by the Federal Office for Refugees that he would face a real risk of torture or inhuman or degrading treatment if he were returned to Turkey only because he was facing extradition, not expulsion. The Federal Criminal Court held that the extradition authorities were not bound by the determination of the asylum authorities. Furthermore, the domestic courts did not give due consideration to the fact that criminal proceedings had recently been brought against two of his relatives in relation to their PKK involvement.

3.6 Fourth, the complainant, an ethnic Kurd, belongs to a family of PKK supporters. His father died because of his political affiliation with PKK and his brother S.Y. was prosecuted for having supported PKK. Records of these proceedings refer to the complainant as a PKK supporter. Furthermore, the complainant's family members⁶ were questioned at the airport when they visited Turkey.

3.7 Fifth, the complainant was wanted by the Turkish authorities for political reasons. The fact that the Turkish authorities requested his extradition in 2011, although they knew that he had been residing in Switzerland since 1992, shows that they are interested in his connections with leading PKK members in Switzerland and elsewhere in Europe. The replacement of his political data sheet with a regular data sheet during the extradition proceedings also points in that direction. Records of the criminal proceedings against S.Y. refer to the complainant as a PKK member, on the basis of which the complainant was listed as an "inconvenient person".

3.8 Finally, the complainant is of particular interest to the Turkish authorities due to his political affiliation with PKK in Switzerland and elsewhere in Europe, and his close contact with prominent PKK leaders through his job as a driver. The complainant's political activities in Switzerland are reflected in the 7 May 2015 decision of the Federal Criminal Court, which is publicly accessible, and in the Swiss press. The Turkish authorities monitor PKK activities abroad. It is considered a terrorist organization in Turkey and in the European Union. Under the Turkish anti-terrorist laws, involvement in PKK is an aggravating circumstance that doubles the penalty in criminal proceedings.

3.9 The complainant further contends, with reference to the Committee's jurisprudence, that the diplomatic assurances provided by Turkey are not sufficient or reliable so as to eliminate the risk that he would be subjected to torture upon return.⁷ Furthermore, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has emphasized that in extradition cases the sending party should not rely on the diplomatic assurances of countries where there is a consistent pattern of human rights violations or a systematic practice of torture and, in the absence of such a pattern, the use of

⁶ Not specified.

⁷ See communications No. 233/2003, *Agiza v. Sweden*, decision adopted on 20 May 2015, paras. 13.4-13.5; and No. 281/2005, *Pelit v. Azerbaijan*, decision adopted on 1 May 2007, para. 11.

assurances should only be allowed when they are unequivocal and where there is an effective monitoring system.⁸ However, post-return monitoring mechanisms do little to mitigate the risk of torture and have proven ineffective in both safeguarding against torture and as a mechanism of accountability.⁹ In the complainant's case, the following factors demonstrate the ineffectiveness of the diplomatic assurances: they were provided only after three unsuccessful requests from the Swiss authorities, which shows the unwillingness of Turkey to comply with them; the fact that the Swiss authorities did not deny a risk of persecution after the complainant's release; that the Swiss asylum authorities had found that there was a real risk of torture for the complainant in Turkey; Turkey's poor human rights record, particularly the use of torture in custody and the ineffective investigation thereof;¹⁰ and difficulties related to monitoring the implementation of the assurances. The complainant claims that, due to his affiliation with high-level PKK members, there is a risk that he would be apprehended and tortured by members of the secret services before being handed over to the prison authorities. Furthermore, the fact that he had escaped from prison in Turkey would increase the risk of torture. Article 3 of the Convention places an absolute ban on extraditions, including of individuals with links to political parties considered as terrorist organizations such as PKK, if there are grounds to believe, as in his case, that the extradition would result in torture.¹¹

State party's observations on the merits

4.1 On 14 November 2016, the State party submitted its observations on the merits and reiterated the facts of the case.

4.2 The State party recalls that, under article 3 of the Convention, States parties are prohibited from expelling, returning or extraditing a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. Referring to the criteria established by the Committee in its general comment No. 1 (1997) on the implementation of article 3, which require the complainant to prove that he or she runs a personal, present and substantial risk of torture if deported to his or her country of origin, the State party recalls that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion and, furthermore, that facts must be adduced which indicate that the risk is serious.

4.3 The State party acknowledges that the human rights situation in Turkey is worrying, particularly in the south-eastern part of the country, owing to the confrontation between the Government and PKK. However, this situation does not as such constitute sufficient grounds for determining the risk that the complainant would be subjected to torture upon return.¹² The State party submits that the complainant has failed to demonstrate that he runs a personal, present and substantial risk of torture if extradited to Turkey. It adds that the State party's authorities have obtained diplomatic assurances from Turkey in this connection.

4.4 First, the complainant has not established that he was subjected to torture in the past. Even if torture was a widespread problem in Turkey in the past, it was not practised systematically and in relation to all criminal offences. The State party refers to the 7 May 2015 assessment of the Federal Criminal Court. In particular, according to the judgment convicting the complainant, the medical records did not show the presence of torture marks on the complainant or his two co-accused. Given that the complainant was represented by several lawyers of his choice, it is implausible that he had not had his torture marks medically recorded. Furthermore, he never claimed that he had been tortured while serving his prison term. It appeared unlikely that S.Y would have consented to remain in prison instead of the complainant if he had been tortured after his arrest, as the complainant claims.

⁸ See A/59/324, para. 35.

⁹ See A/60/316, para. 46.

¹⁰ Amnesty International, *Annual Report 2015/2016: The State of the World's Human Rights*, 23 February 2016.

¹¹ Reference is made to communication No. 63/1997, *Arkausz Arana v. France*, decision adopted on 9 November 1999, para. 11.5.

¹² See communication No. 106/1998, *N.P. v. Australia*, Views adopted on 6 May 1999, para. 6.4.

The Swiss psychiatric reports showing causality between the complainant's past torture and his present health condition rely on his own account and therefore were not considered to be reliable by the Swiss authorities.

4.5 Second, the State party submits that the complainant has failed to substantiate the risk of torture because of his political activities in Turkey, Switzerland or other European countries. The Swiss asylum authorities found contradictions in his account of political activities in Turkey. In the first asylum proceedings, he claimed that he and his family had provided food and financial support to guerrilla fighters. He also claimed that he had been arrested several times in connection with his support of PKK in 1976, 1978, 1985 and 1986. The asylum authorities found that his account lacked detail; in particular, he was not able to specify when and how many times he had been arrested. They also found that he had not faced any difficulties with respect to the Turkish authorities. In his application for re-examination dated 10 May 1995, the complainant submitted that the Security Court of Malatya had launched criminal proceedings for possession of PKK propaganda against his brother S.Y. and the latter confirmed having received the material from the complainant. Although investigations conducted by the Swiss Embassy in Turkey showed that S.Y. had indeed been accused of having supported PKK fighters by the Security Court and was acquitted on 19 January 1995, no proceedings had been launched against the complainant. S.Y. had been imprisoned for having helped the complainant to escape from prison and was released in 1991. The complainant did not claim before the asylum authorities that he had provided propaganda to S.Y. between 1990 and his departure for Switzerland in 1992, while in hiding in Turkey. Additional investigations by the Swiss Embassy in Turkey showed that no new proceedings were pending against him there. Furthermore, while emphasizing that the mere existence of a political data sheet for alleged support for an opposition group is sufficient grounds to fear torture upon return to Turkey, in the present case, investigations conducted by the Swiss Embassy in Turkey in 2012 and 2015 showed that no political data sheet based on the complainant's alleged link to the PKK existed in Turkey, no related data had been found and nothing demonstrated that such a document had been created but subsequently destroyed. There was, however, a regular data sheet reflecting the author's murder conviction. On 2 September 2015, the Federal Office for Refugees found that the complainant's extradition to Turkey would not expose him to a risk of torture or inhuman or degrading treatment, even in the light of recent developments in the country.

4.6 Regarding the complainant's political activities in Switzerland, the State party considers that they did not amount to serious political involvement and could not have attracted the attention of the Turkish security services. This is confirmed by the fact that no political data sheet has been created in connection with the complainant. Furthermore, his wife has returned to Turkey several times and although she was questioned about the complainant's whereabouts, no repressive measures were taken against her. The Turkish authorities explained that although the complainant had been residing in Switzerland since 1992, the extradition request was made in 2011 because his precise address was not known until then, although an arrest warrant had been issued several days after his escape from prison. The State party finds the explanation convincing and rejects the complainant's allegations as unsubstantiated.

4.7 Third, the State party argues that the complainant's conviction for the revenge murder of A.Y. was not politically motivated or manifestly flawed. It submits that A.Y.'s son was convicted of the complainant's father's murder in 1986. The Swiss authorities found that, due to the complainant's failure to substantiate his political involvement, he was not targeted as a political opponent and had been prosecuted under common law. The trial court is competent to deal solely with common-law offences. S.Y. was also accused of the murder but later acquitted; if the proceedings had been politically motivated, S.Y. would have been convicted as well. The complainant was convicted under article 450.10 of the Turkish criminal code, providing that revenge murder is punishable by death, but he was sentenced to life imprisonment. Should he have been persecuted, he would have received the maximum penalty. The complainant was represented by several lawyers of his choice and his conviction was affirmed by the Court of Cassation and the Supreme Court. The fact that the Supreme Court had doubts about the complainant's guilt, as he claimed, showed that his case had been examined impartially. The complainant's claim that his conviction

relied on M.'s testimony against him, which had been obtained under torture and later withdrawn, lacks substantiation. According to the trial court's decision, M.Y. initially confessed that he had committed the crime, while later he claimed that it had been committed by the complainant and subsequently withdrew his accusation. The trial court considered that M.Y. had withdrawn his testimony fearing reprisals from the family. The court referred to M.Y.'s medical certificate of 20 November 1988, according to which there were no torture marks on his body. Therefore, the Swiss asylum authorities considered that the complainant's allegations that he, M.Y. and S.Y. had been tortured lacked credibility. In the 22 June 2015 decision, the trial court established that the penalty imposed on the complainant was not subject to a statute of limitations. Furthermore, the Swiss asylum authorities considered that the complainant's statement that he had been working in the cotton field in Suruç village when A.Y. was murdered not to be credible, since he provided contradictory accounts at asylum interviews. The State party further submits that there has been no case of Turkey requesting extradition on common-law charges for the purpose of political persecution.

4.8 The State party notes that extraditions between Switzerland and Turkey are governed by the European Convention on Extradition of 1957, to which they are parties. Under this Convention, the parties undertake to surrender to each other, subject to the provisions and conditions laid down in the Convention, all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order (art. 1). Extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested party as a political offence or as an offence connected with a political offence or if the requested party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that the person's position may be prejudiced for any of these reasons (art. 3). Switzerland considers its obligations under the European Convention on Extradition in the light of its human rights obligations. Under article 2 of the Federal Law on International Cooperation in Extradition Matters of 20 March 1981, Switzerland would reject an extradition request if there were grounds to believe that the procedure in the receiving party was in breach of the requirements under the European Convention on Human Rights or the International Covenant on Civil and Political Rights; aimed at prosecuting persons for their political opinions or on other discriminatory grounds, or risked aggravating their situation; or had other serious defects. If there are serious grounds to believe that the person would be exposed to a risk of ill-treatment if extradited, diplomatic assurances allow this risk to be eliminated or reduced by allowing extradition under certain conditions, for instance the commitment of the requesting State to ensure visits of detainees without notice by representatives of the Swiss Embassy; to provide them unrestricted access to lawyers and medical care; and to ensure their right to visits from relatives. Regarding extraditions to Turkey, the State party does not in principle request diplomatic assurances but can do so in more sensitive political cases. It has a long-standing practice of cooperation in extradition matters with Turkey and the Federal Office of Justice has no record of cases where Turkey has violated the principle of speciality or human rights. The complainant has not disputed this.

4.9 The State party specifies that the diplomatic assurances provided by Turkey are as follows:

The conditions of detention of the prosecuted person would not be inhuman or degrading and would comply with the requirements of article 3 of the [European Convention on Human Rights]. The person's physical and psychological integrity would be respected. The person's conditions of imprisonment would not be aggravated for reason of his belonging to a social group or on grounds of race, religion or ethnicity. The person's health condition would be given due consideration, including through appropriate medical supervision. The person will have the right to unlimited and confidential contacts with his lawyer, chosen or appointed. The person will have the right to visits in detention. The Turkish authorities would not prosecute the person on political grounds in relation to his conviction or impose a penalty for this reason. The penalty imposed for the

extraditable offence cannot be increased or more severe than initially imposed. The Swiss Embassy in Ankara has the right to appoint representatives to visit the person at any time after the extradition, without surveillance, and the person has the right to unlimited contact with such representatives.

4.10 The State party disputes the complainant's claim that the Swiss extradition authorities did not take into account the risk of torture established by the asylum authorities. First, in its 29 January and 19 February 2014 decisions, the Federal Office for Migration did not consider the diplomatic assurances provided by Turkey. Further to the inquiry by the Federal Office of Justice as to whether there was a risk that the complainant would be treated contrary to article 3 of the European Convention on Human Rights, the State Secretariat for Migration responded that the complainant would be imprisoned to serve his sentence and that any ill-treatment could be excluded in the absence of aggravating circumstances or a political data sheet, and given that the offence was essentially apolitical and had been committed several decades ago and that the Turkish authorities had provided diplomatic assurances. The Swiss authorities would be able to monitor compliance with the assurances at any time. The asylum authorities could not rely on diplomatic assurances and therefore their assessment of risk could differ from the one made by the extradition authorities. The complainant's extradition would be compatible with article 3 of the European Convention on Human Rights, notwithstanding the political and social developments in Turkey since July 2015, which did not have any link to the complainant's personal situation. In the light of these elements, the extradition authorities discarded the assessment of the torture risk made by the asylum authorities.

4.11 The State party further submits that the complainant's health issues on their own should not be considered as a risk that he would be subjected to torture if extradited. The complainant has not claimed that his health condition precluded extradition. According to a medical certificate issued by the psychiatric services of Bern University dated 3 May 2016, he is fit, both physically and mentally, to travel. His health condition should be taken into account in organizing the extradition.

4.12 The State party notes that the complainant failed to substantiate his allegation before the extradition authorities that he feared interrogation and torture in connection with his cousin's arrest in March 2016 for founding and leading an illegal armed group. Therefore, the Federal Criminal Court decided not to conduct additional investigations.

4.13 In the light of the above, the State party submits that there are no serious grounds to believe that the complainant would be at a personal and real risk of torture should he be extradited to Turkey. Therefore, his extradition would not constitute a violation by Switzerland of its international obligations under article 3 of the Convention.

4.14 On 2 May 2017, the State party maintained its previous observations. It adds that the recent developments in Turkey have no connection with the case of the complainant, who faces extradition for a common-law criminal offence without any political context. Therefore, the recent developments have no bearing on his personal situation.

4.15 The State party recalls that the European Convention on Extradition remains in force for both Switzerland and Turkey. Therefore, Turkey is bound by the prohibition of torture and cruel, inhuman or degrading treatment. Turkey has never violated diplomatic assurances in an extradition procedure. The State party refers to a case where an extradition request was granted after the attempted coup d'état in Turkey in July 2016 in relation to a convicted person who alleged having been tortured in detention because he supported the Kurdish cause. The extradition authorities were satisfied by diplomatic assurances from Turkey. The person concerned asked to be extradited, as there was an opportunity for release in Turkey. The State party emphasizes that the Federal Criminal Court twice expressed opposition to the extradition, asking the Federal Office of Justice to investigate the person's allegations of torture and to assess the human rights situation in Turkey. In December 2016, the Court authorized the extradition. In February 2017, the Swiss Embassy in Turkey reported that the person had been placed under house arrest.

4.16 The State party stresses that, despite its long-standing cooperation with Turkey, all cases are assessed individually. The complainant's case has been carefully examined by the asylum and extradition authorities. The State party underlines that the complainant's

extradition is requested on the basis of his common-law conviction after his departure from Turkey for Switzerland and before his activities in relation to PKK. The Swiss authorities have duly addressed the complainant's concern that he would be subjected to treatment contrary to the Convention should he be extradited by requesting Turkey to provide diplomatic assurances to guarantee his integrity and to put a monitoring system in place.

Complainant's comments on the State party's observations

5.1 On 4 April 2017, the complainant challenged the State party's observations, reiterating the grounds against his extradition to Turkey. He urges the Committee to take into account political and constitutional developments in Turkey since the attempted coup in July 2016 and the subsequent state of emergency, which resulted in the more widespread use of torture, mass arrests and detentions of those suspected of cooperation with the Gülen movement or of supporting PKK, with implications for the independence of the judiciary. Furthermore, Turkey intended to suspend part of the European Convention on Human Rights in July 2016. Further to the declared state of emergency, the period of custody before bringing a detainee before a judge was extended to a maximum of 30 days and access to a lawyer for detainees was restricted, which eliminated an effective means of preventing cases of torture or inhuman or degrading treatment in the period preceding interrogations. Under the state of emergency, fair trial guarantees and human rights standards will be permanently lowered and all lawyers will be appointed by the Government.¹³ In the circumstances, there is a risk that the complainant would not have access to an independent lawyer.

5.2 The complainant emphasizes that the situation has changed since the Turkish authorities provided diplomatic assurances in 2012, which requires assessing anew the rule of law in Turkey and the value and reliability of the diplomatic assurances. The State party itself has acknowledged that the human rights situation in Turkey is alarming. In the light of these developments, European countries such as Germany, Italy and Greece stopped extraditions to Turkey, regardless of the diplomatic assurances provided, while Turkish diplomats have sought asylum in Switzerland. In December 2016, States members of the European Union requested that membership talks be frozen due to the assault on the rule of law in Turkey.

5.3 The complainant provides several press articles and international reports describing spying on Turkish nationals in Switzerland and other European countries. The complainant maintains that this demonstrates that the Turkish authorities know about his political activities abroad and his ties to PKK and explains why his extradition was requested many years after his conviction. He recalls that the Swiss press reported on the complainant's case and the decision of the Federal Criminal Court in detail, in particular that he had contacts with high-ranking PKK members as a driver. The President of Turkey would have been informed that he had participated in demonstrations against the Turkish Government.

5.4 The complainant adds that he is still in detention and experiencing severe psychological problems. After another suicide attempt, he was admitted to hospital, from which he was discharged in April 2017. His fear of extradition creates an agony which amounts to torture in itself.

5.5 On 2 May 2017, the complainant's counsel submitted that the complainant had been admitted to psychiatric custody in Station Etoine in Bern after trying to prepare to commit suicide. While visiting him, counsel observed two tattoos on his body: a 15-cm-long Orthodox cross on his back and a 10-cm-long inscription, "Fuck Erdogan", on his left arm. The complainant explains that he was tattooed in 2013 and that the Orthodox cross reflected his Armenian and Christian roots. He stresses that his asylum case is not related to religion and that he has never shown his tattoos to his family, which demonstrates that he has not used them as an argument against his extradition. However, the medical staff would have seen the tattoos and they must have documented them in the assessment undertaken

¹³ Reference is made to the report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, "Securing access of detainees to lawyers", doc. 14267, 15 February 2017.

under the Istanbul Protocol. Therefore, the State party should be aware of his tattoos, which put him at an additional risk of torture. Counsel reiterates that he has never been provided with a copy of the assessment, despite requests.

5.6 Counsel adds that the situation in Turkey has deteriorated since the 16 April 2017 referendum which approved the constitutional amendments, which he claims concentrates power in the office of the President and has serious effects on checks and balances and independence of the judiciary. The President announced that the death penalty would be reintroduced and ordered the arrest of over one thousand police officers across the country, in a new crackdown. According to counsel, the President intends to have the police forces composed exclusively of his supporters. This situation, coupled with the complainant's tattoos and his link with PKK, increases the risk that he would be tortured if extradited to Turkey, for instance by the police, and even before he is handed over to the prison authorities. In the circumstances, the diplomatic assurances will be ineffective.

Additional submissions by the parties

By the complainant

6. On 19 June 2017, counsel for the complainant requested the Committee to adopt interim measures that would allow the complainant's release from detention, if necessary under conditions that would enable the authorities to verify his whereabouts.

7. On 29 June 2017, the State party reported that the complainant had left the psychiatric clinic where he had been hospitalized on 10 May, and that he was now detained at the Burgdorf prison. The State party requested the Committee to decide on the case as soon as possible.

8.1. On 2 August 2017, the State party informed the Committee about the conditions of detention of the complainant. Following his release from the psychiatric clinic, he was placed for several days in a security cell of the Burgdorf prison used in cases of suicide risk. He is now in a section of the prison that allows for intense follow-up and monitoring and subjected to the regime for the execution of sentences, which is less strict than the regime of preventive detention to which he had been subjected earlier. The State party opposes counsel's request for interim measures in the form of release from detention, in the light of the elevated risk of escape.

8.2 The State party also refers to a note received from the Embassy of Turkey in Switzerland, according to which the complainant's sentence would become time-barred for execution at the latest on 6 July 2020. In the note, Turkey also submits that the complainant's time spent in prison in Switzerland will be deducted from his prison sentence in Turkey. It also indicates that if the complainant's health situation so requires, he will be transferred to a university or other public hospital.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

9.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the present case the State party has recognized that the complainant has exhausted all available domestic remedies. As the Committee finds no further obstacles to admissibility, it declares the communication admissible and proceeds with its consideration of the merits.

Consideration of the merits

10.1 The Committee has considered the communication in the light of all the information made available to it by the parties concerned, in accordance with article 22 (4) of the Convention.

10.2 With regard to the complainant's claim under article 3 of the Convention, the Committee must determine whether there are substantial grounds for believing that he would be personally in danger of being subjected to torture should he be extradited to Turkey. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would be returned.¹⁴ It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not, as such, constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

10.3 The Committee recalls its general comment No. 1, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being highly probable, it must be personal and present. The Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a foreseeable, real and personal risk.¹⁵ The Committee further recalls that, as set out in its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,¹⁶ while at the same time it is not bound by such findings and instead has the power, provided by article 22 (4) of the Convention, to freely assess the facts based upon the full set of circumstances in every case.

10.4 The Committee takes note of the complainant's claim that there is a foreseeable, real and personal risk that he will be tortured if extradited to Turkey because he was tortured in the past while in detention on murder charges and that his 1989 conviction was based on testimonies obtained under duress; that the extradition request is politically motivated due to his Kurdish ethnicity and his and his family's active support to PKK; that his political affiliation is known to the Turkish authorities; that the Turkish authorities only requested his extradition more than 20 years after his conviction although they were aware of his whereabouts in 1992; and that three of his relatives in Turkey have been prosecuted for having supported PKK; and that his family members were questioned about his whereabouts while visiting Turkey. The Committee also notes the complainant's claim that the risk of torture would increase because he escaped from prison in Turkey and has a Christian cross and "Fuck Erdogan" tattoos. The Committee further notes that the complainant has been diagnosed with post-traumatic stress disorder and that he has attempted to commit suicide while in detention pending extradition. It notes that according to his 2015 psychiatric report, his extradition would almost certainly lead to retraumatization.

10.5 The Committee takes note of the State party's observation that its extradition authorities found that the complainant lacked credibility. In this context, the State party argues that the medical reports from the time of his conviction do not mention torture marks; that the psychiatric reports showing causality between his torture and post-traumatic stress disorder were based mainly on the complainant's own statements; that the complainant did

¹⁴ See, inter alia, communication No. 470/2011, *X. v. Switzerland*, decision adopted on 24 November 2014, para. 7.2.

¹⁵ See, inter alia, communications No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003; and No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005.

¹⁶ See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

not claim to have been tortured after the conviction; that it appeared unlikely that his brother S.Y. would have consented to remain in prison in his place if he had experienced torture, as the complainant claims; and that there were contradictions in the complainant's account of his political activities in Turkey and in Switzerland.

10.6 The Committee refers to its consideration of the fourth periodic report submitted by Turkey, during which it expressed serious concern at numerous reports of law enforcement officials engaging in torture and ill-treatment of detainees while responding to perceived and alleged security threats in the context of the PKK insurgency since 2015 and at the reported impunity enjoyed by the perpetrators of such acts,¹⁷ particularly in the absence of an independent State body to investigate complaints of torture and ill-treatment against law enforcement officers.¹⁸ In the circumstances of the present case, the Committee has taken note of the State party's argument that Turkey has provided diplomatic assurances in support of the extradition request, that the Swiss authorities in Turkey would be able to monitor their implementation and that Turkey, as a party to the European Convention on Extradition, has never breached its diplomatic assurances. The Committee has also noted the complainant's contentions that diplomatic assurances are not sufficient or reliable to eliminate the risk of torture in his case due to the political motivation of the extradition request; that the use of torture in places of deprivation of liberty continues to be prevalent in Turkey; that it is difficult to monitor diplomatic assurances as the complainant allegedly did not enjoy the right to legal counsel preceding his conviction; that the Swiss authorities did not deny that the complainant risked persecution after his release; and that there was a heightened risk that he would be apprehended and tortured by members of the secret services before being handed over to the prison authorities due to his affiliation with high-level PKK members in Switzerland. It has taken note of the claim, undisputed by the State party, that the assurances were provided by Turkey only after three unsuccessful attempts, which shows unwillingness on the part of Turkey to comply with them; and that the human rights situation in Turkey has deteriorated significantly since the assurances were issued in 2012, particularly in the light of the 2015 elections and PKK insurgency, the attempted coup and state of emergency in 2016 and the ensuing large-scale arrests, detentions and dismissals of those suspected of subversive activities and the 2017 constitutional amendments.

10.7 The Committee notes that it is uncontested that the State party's asylum authorities had assessed that the complainant's refoulement would expose him to a risk of torture. The State party, however, argues that the diplomatic assurances given by Turkey eliminate any such risk. The Committee further notes that medical reports indicate that the complainant suffers from post-traumatic stress disorder due to the acts of torture suffered and that he has tried to commit suicide since his extradition was agreed to by the State party. On the basis of the information before it, the Committee finds that in the circumstances of the present case, diplomatic assurances cannot dispel the prevailing substantial grounds for believing that the complainant's extradition to Turkey would expose him to a danger of being subjected to torture, in violation of article 3 of the Convention.

11. In the light of the above, the Committee, acting under article 22 (7) of the Convention, is of the view that the State party has an obligation, in accordance with article 3 of the Convention, to refrain from extraditing the complainant to Turkey or to any other country where he runs a real risk of being returned to Turkey.

12. Pursuant to rule 118, paragraph 5, of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to the above observations.

¹⁷ See CAT/C/TUR/CO/4, para. 11

¹⁸ *Ibid.*, para. 9. The Committee also expressed concern at inadequate health-care services in the prison system (para. 31).