



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. 846/2017*, **

<i>Communication submitted by:</i>	Elmas Ayden (represented by counsel, El kbir Lemseguem)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Morocco
<i>Date of complaint:</i>	16 October 2017 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 20 October 2017 (not issued in document form)
<i>Date of present decision:</i>	10 May 2019
<i>Subject matter:</i>	Extradition to Turkey
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issue:</i>	Risk of torture in the event of extradition on political grounds (non-refoulement)
<i>Articles of the Convention:</i>	3

* Adopted by the Committee at its sixty-sixth session (23 April–17 May 2019).

** The following members of the Committee participated in the examination of the communication: Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang. Pursuant to rule 109 of the Committee's rules of procedure, Essadia Belmir did not participate in the examination of the communication.



1.1 The complainant is Elmas Ayden, a Turkish national born on 14 April 1958. He is currently being detained in Morocco, pending extradition, pursuant to an extradition request from Turkey. The complainant states that his extradition to Turkey, where he claims to be at risk of torture, would constitute a violation by Morocco of its obligations under article 3 of the Convention. Morocco ratified the Convention on 21 June 1993 and declared that it recognized the competence of the Committee under articles 21 and 22 of the Convention on 19 October 2006. The complainant is represented by counsel, Mr. El kbir Lemseguem.

1.2 In his complaint, the complainant asked the Committee to take interim measures. On 20 October 2017, 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 15 November 2018, the Committee was informed that the complainant was reportedly suffering from serious health problems, was not receiving the care that he needed and, speaking neither Arabic nor French, did not have access to an interpreter during visits by health professionals, which prevented him from informing them of the symptoms and medical difficulties that he was experiencing. In accordance with rule 114 (1) of its rules of procedure, the Committee requested the State party to urgently adopt the necessary protective measures to ensure that the complainant had access to the medical care he required and to the assistance of an interpreter for communication with medical personnel. The Committee also requested the State party to transmit the complainant's medical report to his counsel as soon as possible so that his family could have access to it. On 1 February 2019, the State party informed the Committee that the complainant remained in detention and that he enjoyed all the safeguards necessary for the exercise of his rights, particularly regarding his health.

The facts as presented by the complainant

2.1 The complainant is a married businessman who, in 2016, moved to Tétouan in Morocco, where he set up a company that sold ice cream.

2.2 On 26 July 2017, while on his way to his shop, the complainant was arrested by the Moroccan police, pursuant to an arrest warrant issued by the Turkish authorities under registration No. 2754/2016, for being a member of the Hizmet movement. When his identity had been established, the Tétouan public prosecutor informed him of the reasons for his arrest and referred him to the Court of Cassation (the court responsible for ruling on extradition requests), which ordered that he be detained in Salé 2 prison. On 13 September 2017, the complainant appeared before the Moroccan Court of Cassation, assisted by his lawyer, Mr. El kbir Lemseguem. The defence essentially argued that the request for extradition was politically motivated, basing its arguments on the fact that the Turkish case file contained absolutely no evidence of his membership of the Hizmet movement, which had been classified as a terrorist organization by the Turkish State.

2.3 The Turkish authorities put forward evidence that was unsubstantiated both in law and in fact. They claimed that the complainant was an active member of the Hizmet movement and a member of the Makiad businessmen's association in Malatya and the Battalgazi educational foundation. The Turkish authorities reported that he subscribed to the *Zaman* newspaper and that books by Fethullah Gülen had been seized from his home in Turkey. They also accused him of making deposits in Bank Asya and of fleeing to the United States of America after the attempted coup in 2016. The complainant states that his membership of the Makiad and Battalgazi foundations, which were among the most prestigious associations in Malatya, was in compliance with Turkish law, and that he does not know whether the two foundations were working for the Hizmet movement.

2.4 The complainant's trips outside Turkey were for tourism or business purposes. He denies being an active member of the Hizmet movement and states that the Fethullah Gülen books that were seized at his home are readily available for purchase. As his passport shows, he never fled Turkey for the United States. His subscription to the *Zaman* newspaper is entirely in keeping with the law, as it would be for any citizen who takes a newspaper published in accordance with Turkish law. It is also legal for him to pay his

savings into Bank Asya, as it is for the thousands of citizens around the world who have accounts with this bank (with 1.6 million clients).

2.5 The defence concluded that the benign, non-serious nature of this evidence of the complainant's membership of the Hizmet movement showed that the request to extradite him to Turkey was politically motivated. The defence also invoked article 721 of the Moroccan Code of Criminal Procedure.¹

2.6 The defence also referred to the general human rights situation in Turkey, particularly after the attempted coup of July 2016, which was followed by a massive wave of arrests, trials and convictions that are continuing to arouse the indignation of the international community. The current political situation in Turkey following the attempted coup does not make it possible to ensure respect for the procedural rules of a State based on the rule of law and is thus an obstacle to extradition in accordance with international standards. This situation is characterized by reports of human rights violations from international institutions and organizations. The defence showed the court a document attesting to the fact that the complainant has submitted an application for asylum to the local representative office of the Office of the United Nations High Commissioner for Refugees (UNHCR) in Rabat.

2.7 On 19 September 2017, the Court of Cassation ruled in favour of the complainant's extradition to Turkey.

2.8 Lastly, the complainant states that he has not submitted the complaint to any other procedure of investigation or settlement, in accordance with article 22 (5) (a) of the Convention.

The complaint

3.1 The complainant claims that if he were extradited by Morocco to Turkey he would be in danger of being subjected to torture by the Turkish authorities, in violation of his rights guaranteed under article 3 of the Convention.

3.2 On 20 July 2016, following the attempted coup, Turkey declared a state of emergency in its territory. The complainant therefore faces a foreseeable, personal, present and real risk of being tortured if he is extradited to his country of origin.

3.3 Before the Court of Cassation, which was acting as an extradition court, the complainant firmly denied that he was a member of the Hizmet movement. The evidence presented by the Turkish authorities that the complainant has committed an offence by belonging to a terrorist organization, being weak and far from irrefutable and direct, should enable the Moroccan Court of Cassation to express serious doubts about the real basis of the extradition request and to conclude with certainty that it is politically motivated. Moreover, membership of an organization responsible for an attempted coup, which is a politically motivated act, should be considered a political offence and should therefore be an obstacle to the complainant's extradition. The complainant adds that the evidence underpinning the warrant for his arrest is allegedly based on statements obtained under duress.

3.4 The complainant also maintains that the provisions of article 721 of the Code of Criminal Procedure allow the Moroccan Court of Cassation to refuse extradition requests whenever there are doubts about the nature of such requests, including when they are based only on vague and abstract evidence.

¹ Article 721 stipulates that extradition shall not be authorized when the offence for which it is requested is considered to be a political offence, or an offence connected with a political offence, by the Moroccan State. This rule applies, in particular, when the Moroccan State has substantial grounds for believing that an extradition request apparently related to an ordinary offence has in fact been made for the purpose of prosecuting or punishing a person on grounds of his or her race, religion, nationality or political opinion, or may aggravate this person's situation for any of these reasons.

State party's observations on admissibility and the merits

4.1 In notes verbales dated 19 December 2017 and 30 April 2018, the State party submitted observations on the background to the complainant's detention and the request for his extradition.

4.2 The State party identifies the complainant as Ayden Elmas, a Turkish citizen born on 14 April 1958. He is the manager of the VAFA company in Tétouan, which specializes in managing a chain of retail establishments, including ice cream shops, bakeries, restaurants and fast-food outlets. He also has other business interests in the import-export sector.

4.3 On 26 July 2017, the complainant was arrested in Morocco, pursuant to international arrest warrant No. 2754/2016, issued by the court of first instance of Malatya on 6 August 2016, for his alleged membership of an armed terrorist group, the Hizmet movement. The complainant was brought before the Crown Prosecutor at the court of first instance of Tétouan, who ordered that he be placed in pretrial detention in the Salé 2 local prison.

4.4 The Turkish authorities submitted a written extradition request that was translated into Arabic in accordance with article 29 of the Agreement between the Kingdom of Morocco and the Republic of Turkey on Mutual Assistance in Criminal Matters and Extradition, concluded on 15 May 1989. The annex to the extradition request contained the following documents: the arrest warrant issued by the Turkish judicial authorities, a summary of the offences for which extradition was requested, a description of the person subject to the extradition request, along with all his personal details, and the legal provisions applicable to the case.

4.5 On 19 September 2017, the Criminal Division of the Court of Cassation adopted decision No. 1429/3, accepting the request for the complainant's extradition. In the view of the Court, the extradition request met all the procedural and substantive conditions established in the Agreement on Mutual Assistance.

4.6 Concerning the allegations that the complainant's extradition would expose him to torture in violation of article 3 of the Convention, the State party submits that the Court of Cassation, in its decision, considered the offences that are the subject of the extradition, including the commission of terrorist acts and the financing of terrorism, to be ordinary offences under Turkish law. There was no connection with political offences or offences associated with them. The charges brought against the complainant would therefore not lead to his being prosecuted or punished on grounds of race, religion, nationality or political opinion and would not risk aggravating his situation for any of those reasons.

4.7 In this regard, it is worth noting that the provisions of Moroccan law relating to torture adequately implement the provisions of the Convention. Article 721 of the Code of Criminal Procedure provides for the inadmissibility of an extradition request if the Moroccan authorities have serious reasons to doubt that the request relates to an ordinary offence. Thus, accused persons cannot be extradited for prosecution or punishment on grounds of race, religion, or political opinions or on the basis of their personal situation.

4.8 Even though the complainant did not invoke the risk of torture before the Court of Cassation, Turkey presented the necessary procedural safeguards relating to the complainant's rights, including the right to a defence, as stipulated in the international agreements ratified by Turkey and in its national legislation. Moreover, the fact that Turkey has accepted the procedure for submission of individual complaints under article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights) enables the complainant to file a complaint to the European Court of Human Rights if his rights are violated.

4.9 The State party is of the view that the complainant has not sufficiently substantiated the allegations that the evidence presented by the Turkish authorities is not convincing. Furthermore, it is not within the Court of Cassation's competence to rule on the question of the complainant's innocence or guilt. It is for the competent judicial authorities of the State requesting the extradition to hand down a decision in that regard, with full respect for the rules ensuring a fair trial.

4.10 The Court of Cassation also considered the complainant's claims that he has no relationship with the Hizmet movement and that this movement cannot be considered a terrorist organization. The Court recalled that Turkey is a sovereign State and that, under its law, the Hizmet movement is considered to be a terrorist organization that is accused of organizing the attempted coup of 15 July 2016. The State party further recalls that it is not within the Court of Cassation's competence to review the legality of this law since its remit is limited to ensuring that the legality of the extradition proceedings is respected. It must therefore ensure that the acts that are the subject of the extradition request constitute offences under the Moroccan Criminal Code, i.e., in this case, the first paragraph of article 218-1.

4.11 The Court of Cassation considered unfounded the allegations that the conditions set out in article 721 of the Code of Criminal Procedure had not been met and that the extradition was politically motivated. Article 27 (1) of the Agreement on Mutual Legal Assistance stipulates that extradition may not be granted if the offence for which it is requested is considered to be a political offence or is linked to political considerations. In the present case, the extradition request is intended for the prosecution of the complainant for membership of an armed terrorist group, which is not a political offence, but an offence under ordinary law. The complainant failed to prove to the Court of Cassation that the underlying reasons for the extradition request were issues of race, religion, nationality or political opinion.

4.12 The State party recalls that, as pointed out by the Court of Cassation, extradition proceedings are fundamentally different from proceedings for expelling foreign nationals who are residing unlawfully in the territory of the State party.² A State that does not recognize the principle of extradition does not waive its right to expel foreign nationals in general. Expulsion proceedings are initiated by the State in which the foreign national is residing and do not depend on the existence of a court decision issued by the State to which the person will be expelled.

4.13 As regards the complainant's claim that the evidence underpinning the arrest warrant is based on testimonies obtained under duress, the State party notes that the Court of Cassation is not permitted to express an opinion as to the innocence or guilt of the person whose extradition is requested and that the competent Turkish judicial authorities scrupulously comply with the rules of fair trial and international instruments. This claim was therefore deemed inadmissible by the Court of Cassation.

4.14 In conclusion, the Moroccan authorities inform the Committee that, despite the Court of Cassation's agreement to extradite the complainant, the extradition procedure has been suspended until the Committee has issued its decision regarding the case.

Complainant's comments on the State party's observations

5.1 On 26 May 2018, the complainant sent the Committee his comments in response to the State party's observations of 19 December 2017 and 30 April 2018.

5.2 The complainant submits that his complaint does not relate to the procedure for his arrest in the territory of the State party or to article 29 of the Agreement on Mutual Legal Assistance, which is binding on the State party with respect to Turkey. His complaint relates to the judicial decision by the State party's Court of Cassation and the procedural acts relating to extradition that would thus follow. In this regard, the complainant alleges that the State party has breached its obligations under article 3 of the Convention.

5.3 The State party maintains that, under the ruling issued by the Court of Cassation, the acts for which the judicial authorities of the complainant's country have requested his extradition are considered to be ordinary offences (terrorism offences), which are also offences under the Criminal Code of the State party, and that such offences cannot be

² In its decision, the Court of Cassation considered that the extradition procedure was fundamentally different from the expulsion procedures provided for in article 29 of Act No. 02-03 on the entry and residence of foreign nationals in the Kingdom of Morocco and irregular emigration and immigration. The provisions relating to expulsion in that article are applied in cases of unlawful residence, and not in cases of offences committed in another country.

considered to be political in nature or related to a political offence. The State party adds that it consistently denies extradition requests when the conditions set out in article 721 of the Code of Criminal Procedure are met. It claims that the complainant never invoked before the Court of Cassation his fear of being persecuted or tortured if extradited to his country of origin. The complainant adds that the State party's Court of Cassation did not apply article 721 of the Code of Criminal Procedure when it failed to verify the political nature of the request for the complainant's extradition. Moreover, the Turkish case file relating to the extradition shows that there is a glaring discrepancy between the unfounded evidence cited by Turkey³ and the serious terrorism-related charges. The complainant considers that this clear and significant discrepancy alone should prompt the State party to give greater consideration to the complainant's allegations and seriously question the disguised nature of the extradition request. Evaluating such a discrepancy would be very much within the spirit of article 721 of the Code of Criminal Procedure and article 3 of the Convention. Furthermore, before the Court of Cassation, the complainant very clearly expressed his fear that he would be persecuted if he was extradited to his country. For example, in the defence brief presented to the court on 13 September 2017, the complainant stated that he had submitted an application for asylum to the UNHCR office in Morocco, as he considers his fear of persecution if he returns to his country to be well-founded.

5.4 As for the State party's assertion that its national legislation adequately provides for the implementation of the principles of the Convention, the complainant states that he is not claiming to have been tortured, or to be at risk of being tortured, by the authorities of the State party. He reaffirms that the authorities of the State party have failed to comply with their obligations under article 721 of the Code of Criminal Procedure and article 3 of the Convention, thereby contributing to his extradition and, as a result, to the likelihood that he would be tortured.

5.5 In response to the argument that the Court of Cassation, as a court ruling on the question of extradition, is not competent to rule on the scope of evidence contained in the extradition request, the complainant submits that, even if the Court of Cassation is not competent to legally assess the scope of the evidence contained in the extradition request, it nonetheless has full leeway and legal competence to evaluate the evidence in relation to the other elements of the case, in accordance with article 721 of the Code of Criminal Procedure and article 3 of the Convention. The Court of Cassation has the right to consider the underlying reasons for the request to extradite the complainant and to take concrete steps in order to arrive at an informed decision.

5.6 In the light of the law declaring a state of emergency, promulgated on 21 July 2016 by Turkey, acting as a sovereign State, the State party submits that the Court of Cassation considered to be without legal foundation the complainant's contention that the Hizmet movement is not a terrorist association. In addition, the Court of Cassation, as a court ruling on the question of extradition, is not competent to rule on the legality of Turkish law. The complainant, for his part, considers that the Court of Cassation, which includes judges, legal practitioners and jurists, has the power to assess whether the law is just and consistent with the rules ensuring a fair trial, respecting, in particular, the right to a defence.

5.7 Pursuant to Decree-Law No. 667, which established the state of emergency, the maximum length of police custody was increased from 4 to 30 days, which automatically increases the risk of torture and ill-treatment. Furthermore, article 3 of Decree-Law No. 668 of 27 July 2016, which relates to investigation and prosecution procedures, provides that the right of a suspect to consult with counsel may be restricted for 5 days upon the decision of the prosecutor. The consequences of such a state of emergency should have been thoroughly evaluated by the State party, which would have been able to deduce that the complainant, as an alleged member of the Hizmet movement, which Turkey also calls the Fethullah Terrorist Organization, had no hope of receiving a fair trial in Turkey. Thus, in its report on the impact of the state of emergency on human rights in Turkey, the Office of the United Nations High Commissioner for Human Rights (OHCHR) pointed out that over

³ Seizure from the complainant's home of books by Fethullah Gülen that are accessible to the general public, having a lawful subscription to the *Zaman* newspaper, travelling outside his country and having an account at Bank Asya (along with 1.6 million other account holders worldwide).

4,200 judges were dismissed through executive orders of the High Council of Judges and Prosecutors and that some 570 lawyers were arrested. In addition, approximately 34 bar associations were shut down for alleged affiliation with the Hizmet movement. OHCHR also noted a pattern of persecution of lawyers representing individuals accused of terrorism, including members and supporters of the Hizmet movement. In other words, the complainant would not receive a fair trial if extradited, since the judges trying his case would themselves clearly not have the courage to acquit or release a person accused of affiliation with the Hizmet movement, for fear of being dismissed. The defenders of the accused in Turkey are subject to the same problem.

5.8 Regarding the argument that the extradition request is not political in nature because, according to the facts contained in the request, the complainant was involved in the attempted coup of 15 July 2016 in Turkey, and the assertion that he did not submit documents to the Court of Cassation proving the political nature of the extradition request, the State party does not explain how it was able to conclude that the complainant was involved in the attempted coup while, at the same time, arguing that the Court of Cassation cannot evaluate the merits of a case relating to an extradition request. The State party's contention that the complainant took part in the coup attempt is simply unfounded as he has not left Morocco since March 2016 and was in the city of Tétouan when the attempted coup took place. In addition, the State party has not explained how the complainant's previous activities in Turkey⁴ might have contributed, at a remove, to the attempted coup. The complainant presents authenticated, signed testimony from an acquaintance who describes him as a religious moderate who has nothing in common with the description put forward by his country's Government.

5.9 As to the claim that extradition and refoulement are essentially two completely different legal proceedings,⁵ the complainant responds that such a classification is incorrect in international law. Article 3 of the Convention places extradition and refoulement on the same level and gives them the same legal significance. In the spirit of that article, it is not the characterization of the proceedings that counts, but the actual consequences for the life, physical integrity and liberty of the person. The principle of non-refoulement prohibits extradition, expulsion and return. Like the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the principle of non-refoulement may in no case be subject to restriction.

5.10 As for the argument that the Court of Cassation cannot assess the worsening of the human rights situation in Turkey, which the complainant cites in support of his defence, the complainant believes that the State party cannot avoid carrying out such an assessment in extradition proceedings, even if the obligation is not set out in its domestic legislation. The Committee interprets article 3 of the Convention as a provision that imposes an obligation on the State party and the Committee to evaluate whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if expelled, returned or extradited. In this regard, all legal means of assessing the risk of torture, including the assessment of the general human rights situation in the requesting State, must be explored. The extension of the state of emergency declared in Turkey after the attempted coup of July 2016 has led to serious violations of the human rights of hundreds of thousands of people, some of whom have been tortured, as denounced by OHCHR in a report issued on 20 March 2018. These violations include torture and other forms of ill-treatment, arbitrary detention, arbitrary deprivation of the right to work and the right to freedom of movement, and violations of freedom of association and expression.

5.11 Such serious human rights violations against persons involved in the coup have continued, even after their death. The complainant points out that once they have been executed, they are buried in a so-called traitors' cemetery, set up near Istanbul. He adds that

⁴ Belonging to the Makiad businessmen's association and the Battalgazi educational foundation in Malatya, traveling abroad for meetings, belonging to the Hizmet movement and having books by Fethullah Gülen in his home.

⁵ Extradition relates to persons who have committed a crime under the ordinary law of the requesting State and have fled from its justice system while refoulement relates to persons whose administrative status is irregular.

articles 2 and 3 of the Constitution of INTERPOL require that Organization, and its national central bureaux in its member States, to act in the spirit of the Universal Declaration of Human Rights and to strictly prohibit any intervention or activity that may restrict freedom of expression or repress opponents abroad. On 20 August 2017, the Chancellor of Germany openly criticized the misuse of INTERPOL by Turkey after the attempted coup of 2016. The complainant believes that, if the INTERPOL National Central Bureau of the State party had been more aware of the massive abuse of the INTERPOL system by Turkey, it would have given more scrupulous consideration to the notification regarding the complainant and acted in conformity with articles 2 and 3 of the Constitution of INTERPOL, thereby following the example of the member States of the European Union and other countries in ignoring the wanted notification issued by the Turkish authorities.

State party's observations on the merits and on the complainant's comments

6.1 In a note verbale of 1 February 2019, the State party presented observations on the complainant's conditions of detention, including information on his health status and the medical follow-up he has had.

6.2 The State party reports that the complainant has been detained at the Salé 2 local prison, pending extradition, since 27 July 2017, as he is the subject of an extradition request issued by the Turkish judicial authorities. The complainant is subject to the provisions of Act No. 23/98 on the organization and operation of prisons and is detained in perfectly normal conditions that are fully in line with the relevant international instruments.

6.3 The State party adds that the complainant has full enjoyment of his rights, including the right to communicate with his family and his lawyer. He is in contact with his family by landline telephone and regularly receives visits from his brother and three sons, who bring him Turkish-language books. He also has the right to communicate with his lawyer when he visits with a Turkish interpreter, Mr. Barakat Allah.

6.4 Furthermore, the complainant is being held with other inmates and has been placed with four other detainees in a cell that meets the standards for hygiene, ventilation and exposure to sunlight. He also has the right to spend at least three hours outdoors every day and to take part in sports at the prison.

6.5 The complainant's state of health is regularly monitored by doctors inside and outside the prison. Since his incarceration, he has had 84 internal consultations (75 in general medicine and 9 in dentistry), 16 external consultations at the Avicenne University Hospital in Rabat (in endocrinology, cardiology, ophthalmology and urology) and dental treatment at the Faculty of Dentistry in Rabat. He has also undergone a liver ultrasound and laboratory tests that showed nothing out of the ordinary. The complainant is currently receiving appropriate treatment.

6.6 As for the allegation that the complainant has no access to an interpreter during visits by health professionals and is therefore unable to inform them of his medical symptoms and problems, the Moroccan authorities note that the doctors who have examined the complainant are professionals whose competence has thus far allowed them to carry out the necessary diagnoses on the basis of the physical and clinical signs that he has presented. Furthermore, the assessments and results of the tests that have been conducted have shown that the complainant's state of health is normal. In addition, the Moroccan authorities note that while all detainees have the right to have access to an interpreter during medical examinations, a request must be filed for this service to be provided.

6.7 With regard to the transmission of the complainant's medical report to his counsel, the report in question is available to such counsel at the Salé 2 local prison. Lastly, the State party points out that the complainant's case is also being monitored by the National Human Rights Council and that, on 6 June 2018, he was visited by representatives of the Council, who were able to observe his conditions of detention and who noted that his state of health was normal.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any complaint submitted 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.

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it cannot examine any individual's complaint without ascertaining whether he or she has exhausted all available domestic remedies, although this rule does not apply where remedy procedures exceed a reasonable length of time⁶ or are unlikely to bring effective relief to the alleged victim. The Committee notes the State party's argument that the complainant did not refer, before the Court of Cassation, to the risk of persecution or torture in the event of his extradition to Turkey. However, it also notes that the complainant was brought before the Court of Cassation, where he objected to his extradition, alleging, *inter alia*, that he would be in danger if extradited, that he was the subject of political persecution for his alleged membership of the Hizmet movement, described as a terrorist organization, and that he had applied for refugee status for those reasons. In the view of the Committee, the fact that the complainant made these arguments before the Court of Cassation is sufficient to consider that he did effectively invoke the risks in question.⁷ It notes that the State party has not claimed that other domestic remedies were available to the complainant. Accordingly, the Committee considers that the complainant has exhausted all available domestic remedies.

7.3 Having found no other obstacles to admissibility, the Committee finds that the complaint is admissible under article 22 of the Convention with respect to the alleged violation of article 3, and proceeds to consider it on the merits.

Consideration of the merits

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

8.2 In the present case, the issue before the Committee is whether the extradition of the complainant to Turkey would constitute a violation of the State party's obligation, under article 3 (1) of the Convention, not to extradite 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. The Committee recalls, first and foremost, that the prohibition against torture is absolute and non-derogable and that no exceptional circumstances may be invoked by a State party to justify acts of torture.⁸ The principle of non-refoulement of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture, set out in article 3 of the Convention, is similarly absolute.⁹

8.3 In assessing whether there are substantial grounds for believing that the alleged victim would be in danger of being subjected to torture, the Committee recalls that, under article 3 (2) of the Convention, States parties must take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the State of return. In the present case, the Committee must determine whether the complainant runs a personal risk of being subjected to torture if he is extradited to Turkey. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that the complainant would be in danger of being subjected to torture on

⁶ See *Asfari v. Morocco* (CAT/C/59/D/606/2014), para. 12.2.

⁷ See the Committee's general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, para. 34.

⁸ See the Committee's general comment No. 2 (2007) on the implementation of article 2 by States parties, para. 5.

⁹ See the Committee's general comment No. 4 (2017), para. 9.

extradition to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk.¹⁰ 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.¹¹

8.4 The Committee recalls its general comment No. 4 (2017) on the implementation of article 3 in the context of article 22, according to which the non-refoulement obligation exists whenever there are “substantial grounds” for believing that the person concerned would be in danger of being subjected to torture in a State to which he or she is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination. The Committee’s practice in this context has been to determine that “substantial grounds” exist whenever the risk of torture is “foreseeable, personal, present and real”.¹² Indications of personal risk may include, but are not limited to: (a) the complainant’s ethnic background; (b) political affiliation or political activities of the complainant or his family members; (c) previous torture; (d) incommunicado detention or another form of arbitrary and illegal detention in the country of origin; and (e) clandestine escape from the country of origin following threats of torture.¹³ The Committee also recalls that it gives considerable weight to findings of fact made by organs of the State party concerned; however, it is not bound by such findings and will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.¹⁴

8.5 In the present case, the Committee notes the complainant’s claim that his extradition would make him face a serious risk of persecution and torture in detention in Turkey owing to the perception that he is a member of the Hizmet movement and the allegations made against him that he committed acts of terrorism and financed terrorism. In this regard, the Committee notes that the complainant is the subject of an arrest warrant for membership of this movement, although he denies being a member, and that, according to reports in the case file, torture and ill-treatment are commonly used against persons with his profile when they are in detention. The Committee notes the complainant’s argument that the Court of Cassation has not implemented article 721 of the Code of Criminal Procedure and has not verified the political nature of the request to extradite the complainant. The Committee also notes that, according to the State party, Moroccan criminal law is in conformity with the Convention, as it establishes that no person may be extradited if he or she is at risk of being subjected to persecution for reasons of race, religion, political views or personal situation, or if that person may be in danger for any such reasons.

8.6 The Committee must take into account the current human rights situation in Turkey, including the impact of the state of emergency, which was lifted in July 2018 but whose restrictions have been extended through the adoption of a series of legislative measures. The Committee notes that successive extensions of the state of emergency in Turkey have led to serious violations of human rights against hundreds of thousands of people, including arbitrary deprivation of the right to work and freedom of movement, torture and ill-treatment, arbitrary detention and violations of the rights to freedom of association and expression.¹⁵

8.7 The Committee recalls its concluding observations on the fourth periodic report of Turkey (CAT/C/TUR/CO/4), issued in 2016, in paragraph 9 of which it noted with concern that despite the fact that the State party had amended its law to the effect that torture was no longer subject to a statute of limitations, it had not received sufficient information on prosecutions for torture, including in the context of cases involving allegations of torture that had been the subject of decisions of the European Court of Human Rights. It also noted

¹⁰ *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), para. 8.3; *R.A.Y. v. Morocco* (CAT/C/52/D/525/2012), para. 7.2; and *L.M. v. Canada* (CAT/C/63/D/488/2012), para. 11.3.

¹¹ *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), para. 15.3.

¹² See the Committee’s general comment No. 4 (2017), para. 11.

¹³ *Ibid.*, para. 45.

¹⁴ *Ibid.*, para. 50.

¹⁵ OHCHR, “Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017”, March 2018.

with concern the significant disparity between the high number of allegations of torture reported by non-governmental organizations and the data provided by the State party in its fourth periodic report (see CAT/C/TUR/4, paras. 273–276 and annexes 1 and 2), which suggested that not all allegations of torture were investigated during the reporting period. In paragraph 19 of the same concluding observations, the Committee highlighted its concern about recent amendments to the Code of Criminal Procedure, which gave the police greater powers to detain individuals without judicial oversight during police custody. In paragraph 33, the Committee expressed regret about the lack of complete information on suicides and other sudden deaths in detention facilities during the period under review. The Committee acknowledges that the concluding observations in question were issued prior to the declaration of the state of emergency. However, it notes that reports on the situation of human rights and the prevention of torture in Turkey published since the declaration of the state of emergency indicate that the concerns raised by the Committee remain relevant.¹⁶

8.8 In the present case, the Committee notes that the complainant claims to have been persecuted on account of his political activities, in that he was believed to be a member of the Hizmet movement, which is considered responsible for the attempted coup in July 2016. The Committee notes that, according to the report issued by OHCHR in 2018, OHCHR had access to reliable information indicating that torture and ill-treatment were used during pretrial detention as part of the Turkish authorities' response to the attempted coup.¹⁷ In the same report, OHCHR states that it has documented the use of various forms of torture and ill-treatment in detention, including beatings, threats of sexual assault, sexual assault, electric shocks and simulated drowning. Such torture generally had the purpose of extracting confessions or coercing denunciations of other individuals as part of the investigation of acts related to the attempted coup d'état.¹⁸ In his report on his mission to Turkey, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment notes that the use of torture was widespread in the aftermath of the attempted coup.¹⁹ The Special Rapporteur also denounces the fact that the low number of investigations and prosecutions initiated in response to allegations of torture or ill-treatment seemed grossly disproportionate to the alleged frequency of the violations, indicating insufficient determination on the part of the Turkish authorities to take such cases forward.²⁰

8.9 With regard to the direct impact of the state of emergency declared on 20 July 2016 on protection against torture and ill-treatment, the Committee notes that OHCHR refers to the restrictions that may be placed on communication between detainees and their lawyers, the extension of the maximum period of police custody, the closure of some independent mechanisms for the prevention of torture and the abusive use of pretrial detention.²¹ Following successive extensions declared by the Turkish authorities, the state of emergency formally ended on 19 July 2018. However, a series of legislative measures have been adopted that extend the application of the restrictive measures introduced during the state of emergency, such as the possibility of prolonging police custody for up to 12 days.²²

8.10 In the case of the complainant, the Committee notes that, in authorizing extradition, the Court of Cassation of Rabat made no assessment of the risk of torture that such an extradition would entail for him in view of the situation prevailing in Turkey since the attempted coup of July 2016, in particular for persons who, like the complainant, have some

¹⁶ OHCHR, "Report on the human rights situation in South-East Turkey: July 2015 to December 2016", February 2017; *ibid.*, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017", March 2018. and A/HRC/37/50/Add.1.

¹⁷ OHCHR, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017", March 2018, para. 7.

¹⁸ *Ibid.*, para. 77.

¹⁹ A/HRC/37/50/Add.1, para. 26.

²⁰ *Ibid.*, paras. 70–73.

²¹ OHCHR, "Report on the impact of the state of emergency on human rights in Turkey, including an update on the South-East: January–December 2017", March 2018, para. 83.

²² Human Rights Watch, "Turkey: Events of 2018". The report is available at www.hrw.org/world-report/2019/country-chapters/turkey.

real or perceived affiliation to the Hizmet movement. The Committee notes that, according to the State party, Turkey gave assurances that the complainant's rights would be respected in accordance with the international instruments it has ratified. However, no explanation was given as to how the State party had assessed the risk of torture that the complainant faced in order to ensure that he would not be at risk of treatment that violated article 3 of the Convention upon his return to Turkey. The Committee recalls that the primary aim of the Convention is to prevent torture, not to ensure the right to redress for torture once it has occurred.²³

8.11 In the light of the above, and having regard to the complainant's profile as a perceived or actual member of the Hizmet movement, the Committee considers that the State party should have conducted an individualized assessment of the real and personal risk to which the complainant would be exposed in Turkey, particularly bearing in mind the documented treatment by the Turkish authorities of persons related to this movement, rather than base its decision on the assumption that an extradition request had been made in accordance with an agreement between the two countries and that the offences for which the complainant has been accused are offences under ordinary law that are also covered by Moroccan criminal law. The Committee also considers that article 721 of the Moroccan Code of Criminal Procedure does not specifically mention the risk of torture and ill-treatment in the event of extradition, but only the risk of aggravating the personal situation of individuals who are the subject of extradition requests for reasons related to their race, religion, nationality or political opinions when the offence for which extradition is requested is considered by the State party to be political or related to such an offence.²⁴ The Committee concludes that, in this case, the Court of Cassation's evaluations do not make it possible to discount the argument that the complainant can be said to face a foreseeable, personal, present and real risk of being subjected to torture if he is extradited to Turkey, which would constitute a violation of article 3 of the Convention.²⁵

9. The Committee, acting pursuant to article 22 (7) of the Convention, therefore concludes that the complainant's extradition to Turkey would constitute a violation of article 3 of the Convention.

10. The Committee is of the view that, pursuant to article 3 of the Convention, the State party has an obligation to:

(a) Ensure that similar violations do not occur in the future, by carrying out individual assessments of the real risk of torture and ill-treatment – including consideration of the general human rights situation in the country of return – every time it considers an extradition request under an agreement or as part of extradition proceedings;

(b) Refrain from extraditing the complainant to Turkey and consider the request for the complainant's extradition to Turkey in the light of its obligations under the Convention, which include an assessment of the risk of torture in the event of extradition, and this decision. In view of the fact that the complainant has been in pretrial detention for almost two years, the State party has an obligation to release him.

11. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days of the date of transmittal of the present decision, of the steps it has taken in response to this decision.

²³ *Alan v. Switzerland* (CAT/C/16/D/21/1995), para. 11.5.

²⁴ See footnote No. 1.

²⁵ See *H.Y. v. Switzerland* (CAT/C/61/D/747/2016), para. 10.7.