



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

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Committee Against Torture
Forty-fourth session
26 April – 14 May 2010

Decision

Communication No. 356/2008

<u>Submitted by:</u>	N.S. (represented by counsel)
<u>Alleged victim:</u>	The complainant
<u>State party:</u>	Switzerland
<u>Date of the complaint:</u>	19 September 2008 (initial submission)
<u>Date of present decision:</u>	6 May 2010
<i>Subject matter:</i>	Risk of torture in case of expulsion to Turkey
<i>Procedural issues:</i>	None
<i>Substantive issues:</i>	Expulsion to another State where there are substantial grounds for believing that the complainant would be in danger of being subjected to torture
Article of the Convention:	3

[Annex]

* Made public by decision of the Committee against Torture.

Annex

Decision of the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-fourth session)

concerning

Communication No. 356/2008

Submitted by: N.S. (represented by counsel)

Alleged victim: The complainant

State party: Switzerland

Date of the complaint: 19 September 2008 (initial submission)

The Committee against Torture, established under Article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Meeting on 6 May 2010,

Having concluded its consideration of complaint No. 356/2008, submitted to the Committee against Torture by N.S. under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

Having taken into account all information made available to it by the complainant, his counsel and the State party,

Adopts the following:

Decision under article 22, paragraph 7, of the Convention against Torture.

1.1 The complainant is Mr. N.S., a Turkish national of Kurdish origin born in 1975. He sought political asylum in Switzerland, his application was rejected, and he risks deportation to Turkey. He claims that if Switzerland proceeds with his forcible return, it would breach its obligations under article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Convention" hereafter). He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, while transmitting the communication to the State party, on 29 September 2009, the Committee requested it, under rule 108, paragraph 1, of the Committee's rules of procedure, not to expel the

complainant to Turkey while his communication was under consideration. On 3 October 2008, the State party informed the Committee that measures have been taken in order to comply with the Committee's request for interim measures.

The facts as presented by the complainant

2.1 On 4 October 1993, the complainant, his cousin, and a friend, witnessed an attack on the village of Daltepe, near Siirt, in Turkey. From a hill near the village, they saw soldiers in uniform approaching the village in the afternoon. According to the complainant, the soldiers changed their uniforms to clothes used normally by the PKK groups. When it became dark, they heard shooting and screaming from the village. According to the media and NGOs reports, between 24 and 33 people were killed in this action. In contrast to what the complainant and his two friends had seen, media and some NGOs presented the attack as being committed by a rebel group.

2.2 The complainant and his friends told people in the neighbourhood what they had seen. The authorities reacted by arresting the complainant and detaining him for forty days. According to the complainant, he was tortured by security services during his detention. The complainant explains that the officials dropped melting plastic on his legs and arms; the scars are still visible¹. He was also forced to stand on his tiptoes and to hold his chin through a hole. While in this position, he was hit with a metal bar on the head and he fainted as a result. Finally, the complainant claims that he had been blindfolded and sexually abused by a soldier.

2.3 After his release, the complainant was under the control of the security forces. One of the other two witnesses disappeared while he was doing his military service; no information about his whereabouts is available. The second witness – the complainant's cousin - allegedly received a serious knock on the back of the head during his imprisonment to the point that he had mental disorders; he had spent around seven years in prison. For all these reasons, and due to his fear of being caught and tortured again, the complainant decided to hide and refused to perform his military service.

2.4 In 1994 or 1995, he moved to Istanbul, where he stayed unregistered for more than seven years without a permanent address, moving from one location to another, and working in the building sector. After his departure, in 1994/1995, his family was under surveillance by the security services and was questioned about his whereabouts. According to the complainant, the security forces assumed that he had joined the PKK. His father was allegedly tortured by authorities; he subsequently died in 1997, allegedly as a result of his injuries. For this reason, the complainant's mother and his four brothers and sisters also moved to Istanbul.

2.5 The complainant adds that in the meantime, in July 2003, his uncle (and father of the cousin who had also witnessed the 1993 attack) had died after a strange conflict with two villagers. The complainant contends that subsequent to the 1993 attack, his uncle was also under surveillance and was ill-treated by security forces' agents².

¹ The complainant provides photographs of his legs and arms, which disclose a number of scars.

² According to the complainant, the report on the circumstances of his uncle's death states that his uncle was injured but he was first transported to the police station, and was transferred to a hospital only later, and he had died during the transportation. No explanation on the reasons not to take the

2.6 On 9 October 2002, the complainant left Turkey. He applied for political asylum in Switzerland on 11 November 2002. His application was rejected by the Federal Office for Migration (FOM)³ on 16 June 2003, as a non-credible. On 18 August 2008, the Federal Court for Administrative Matters rejected (CAM) the complainant's appeal against the negative decision of the Federal Office for Migration.

2.7 The complainant points out that the Federal Court had argued, *inter alia*, the reports of independent human rights organizations (such as Amnesty International and the Human Rights Foundation of Turkey) attributed responsibility to the PKK, contrary to the complainant's allegations. According to the complainant, however, there was no guarantee that the NGOs' information was correct, and in addition, over the years, more and more incidents involving security forces covert operations outside of the hierarchy of command⁴ have become known.

2.8 The complainant adds that, according to the Federal Court, there were no details about the situation of his cousin and their friend or the death of his father. The Federal Court has also concluded that the complainant's uncle's death was not related to the authorities and was thus not relevant to the case. According to the complainant, he could not provide supporting information, as (1) his friend disappeared during his military service and there was no information on his whereabouts; (2) he did not witness his father's torture, but was informed about it by his relatives; (3) he was now in a possession of a testimony of a person who was granted asylum in Switzerland in 2006, who confirmed having spent about three years in the same prison as his cousin (who had witnessed the 1993 attack); the complainant points out, in particular, that this person recalls the bad physical and psychological condition of the complainant's cousin in prison; (4) his uncle's death was suspicious, as his uncle was initially brought to a police station, and he was transported to a hospital only later, and died during the trip.

2.9 The complainant notes further that the Federal Court has finally noted the long period between the attack of the village (1993) and the complainant's father's death (1997) on the one hand, and the complainant's departure to Switzerland (2002) on the other hand. Lastly, the Court considered that there would be no risk for the complainant during his presumable future military service in Turkey. The complainant claims that the Swiss authorities have failed to take into account his poor education, and he explains that he was never informed on what exact grounds he was released in 1993, and whether his release was ordered by a court. He claims that he would face problems in Turkey. His torture in 1993, his sympathy to the Kurdish cause, the long life underground and his absence from the country would, according to the complainant, make him suspicious. According to the complainant, at present, torture remains widespread in Turkey, with respect to people suspected of being

uncle directly to the hospital were provided in the report, and, at the same time, his uncle's aggressors had allegedly been released shortly afterwards by the police.

³ Called Federal Office for Refugees at that time.

⁴ The complainant invokes a report by the Geneva Centre for the Democratic Control of Armed Forces and to a report of Amnesty International of 1996. He adds that two Turkish attorneys have tried to get information about the 1993 Daltepe incident from both TIHV (Human Rights Foundation of Turkey) and IHD (Human Rights Association) had recently learned that there was no relevant information in the archives of these organisations.

involved with the PKK. Moreover, in the army, he wouldn't have any protection against persecution.

2.10 According to the complainant, in general, the Swiss authorities have failed to examine the evidence in his case in its totality, and they instead have concentrated on specific elements, which were declared non-established. The complainant's torture allegations were not sufficiently addressed by the authorities, even if he had described them in a sufficiently detailed manner. Although his torture scars are still visible, nobody from either the Federal Office of Migration or the CAM examined them in person or provided comments on them.

The complaint

3. The complainant claims that his forcible return to Turkey would constitute a breach by Switzerland of its obligations under article 3 of the Convention.

State party's observations on admissibility and merits

4.1 The State party presented its observations on admissibility and merits by Note verbale of 13 March 2009. It recalls the facts of the case and notes that, with one exception, the complainant presents to the Committee exactly the same allegations as those presented to and examined by the Swiss asylum authorities and the Federal Court for administrative matters. The new element is a letter signed by an individual who alleges that he has been kept in the same prison with one of the complainant's cousins.

4.2 The State party affirms that its asylum authorities' decisions are correct and legally grounded. The Federal Office of Migration has found the complainant's allegations as lacking in credibility and contradictory. It had noted that the complainant never documented the judicial proceedings under which he allegedly had been released, in 1993, even though the Swiss authorities had asked him, on several occasions, to provide evidence in this respect. Another element that weakened the complainant's credibility was his behaviour which did not correspond to that which one could reasonably expect from an individual who was sought by the police in Istanbul, Siirt, Ankara or Izmir. The FOM found it surprising that the complainant went to Istanbul to live there secretly for seven years, and his explanations that he needed to save money there in order to flee were not convincing. The FOM also found other contradictions in the complainant's description of the facts. Thus, at his second interview, he had contended having been arrested and tortured every two-three days after his release, following the above-mentioned judicial proceedings. At the same time, however, during his first interview, the complainant contended that he had been arrested, one first time following the proceedings, and a second time, around one month later.

4.3 According to the State party, the Federal Administrative Court did not simply confirm the FOM's conclusions. It noted also that several independent sources had reported about the events that the complainant allegedly had witnessed. The Court did, inter alia, refer to a detailed report of Amnesty International ([http://asiapacific.amnesty.org/library/pdf/EUR440841996ENGLISH/\\$File/EUR4408496.pdf](http://asiapacific.amnesty.org/library/pdf/EUR440841996ENGLISH/$File/EUR4408496.pdf) ; p.25) attributing explicitly the responsibility of the 1993 attack to the PKK, contradicting the complainant's allegations. The Court emphasized that the complainant failed to adduce any proof with respect to his judicial proceedings in relation to his release.

4.4 The CAM also assessed the rest of the complainant's allegations. On the complainant's fear to serve in the army, the Court observed that the problems experienced

by other acquaintances of the complainant were irrelevant to the present case. As to hypothetical sanctions for desertion, the Court noted that the complainant had never claimed having received any convocation to enrol in the army.

4.5 According to the CAM, neither the death of his father nor of his uncle indicates that there is a risk of persecution for the complainant. His father died two years after the complainant's arrival in Istanbul, and his uncle died as a consequence of the injuries received during a virulent argument with two individuals who were subsequently arrested. The inexistence of a risk of persecution is corroborated by other elements: the death of the complainant's father took place four years after the 1993 attack; the complainant did not encounter any problems with the authorities during his stay in Istanbul; and his mother, sisters, and brothers are officially registered in Istanbul, where they settled after the death of his father.

4.6 The State party refers to the Committee's General Comment No.1⁵ and observes that article 3 of the Convention prohibits States parties from extraditing an individual to a State if there are serious grounds to believe that the individual would be at risk of torture. It also recalls that the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not constitute sufficient reason for concluding that a particular individual is likely to be subjected to torture on return to his or her country, and that additional grounds must exist before the likelihood of torture can be deemed to be, "foreseeable, real and personal", for the purposes of article 3, paragraph 1; the risk in question must also be serious.

4.7 The State party recalls that paragraph 8 of the general comment requires, *inter alia*, to take into account the following information when assessing the risk of expelling someone: information on the changes in the internal situation in the receiving State; allegations on the complainant's torture in the recent past and information from independent sources in this regard; the complainant's political activities in and outside his/her country of origin; existence of evidence on the credibility of the complainant; and existence of relevant factual inconsistencies in the complainant's claim.

4.8 The State party recalls that in order to assess whether there are serious grounds to believe that a complainant would be at risk of torture in case of forcible removal, the Committee must take into account all pertinent considerations, in particular proof on the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the receiving State. The complainant, however, has to face a personal risk of being subjected to torture. Therefore, the sole existence of a consistent pattern of gross, flagrant or mass human rights violations does not constitute sufficient ground to believe that an individual would be subjected to torture in the receiving State. The State party recalls that additional grounds must exist.

4.9 The State party recalls that the Committee has already dealt with a number of cases relating to forcible return to Turkey. It notes that the Committee had concluded that the human rights situation there was most problematic, in particular in relation to PKK militants who have often been tortured by the authorities, and this practice was not limited to a particular region. When the Committee had concluded in such communications that complainants would be at a personal and real risk of being tortured, it was established that the complainants had been engaged politically in favor of the PKK, that they had been detained and tortured prior to their departure from Turkey, and that their allegations were confirmed by independent sources, such as medical certificates. The State party further

⁵ General Comment No.1, 21 November 1997, A/53/44, annex IX.

notes that the Committee had also concluded, in two cases against Switzerland, that the complainants' removal to Turkey would not expose the latter to any real risk of torture⁶.

4.10 The State party explains that both the CAM and the FOM had considered that the complainant's allegations in respect to the attack of the Dartepe Köyü village, and the harassments, ill-treatments, and alleged arrests and detentions lacked credibility. In addition, the complainant was never prosecuted or encountered any problems with the authorities.

4.11 The State party further notes the complainant's contention that his marks of torture confirm the veracity of his allegations. According to the State party, however, these scars do not by themselves prove that he had been subjected to torture. The CAM had qualified as not credible the complainant's allegations. Such marks could have had other origins, for example a car accident or a work accident. The State party notes also that the complainant had not provided any medical evidence in relation to the potential origins of the abuses to which he was allegedly subjected.

4.12 According to the State party, in his communication, the complainant tries to establish that the independent sources used by the CAM in assessing the circumstances of the 1993 attack were wrong. However, the complainant had not provided until now the HADEP report which, according to him, confirms his version of the attack. In addition, no independent sources confirming the complainant's version exist. The newly presented allegation that two Turkish lawyers had recently learned that no information in respect to the Daltepe Köyü attack existed in the archives of the two human rights organisations is not documented in any way.

4.13 The 1993 report of the Turkish human rights foundation indicated that during the attack in question, 25 houses belonging to the village guards had been destroyed and nine guards were killed. Thus, it cannot be deduced that the army was responsible for the attack. The State party explains that it cannot understand how secret entities in Turkey and/or their activities could have influenced the conclusions made by experienced, independent, and impartial human rights organisations. In addition, according to the State party, the complainant has failed to explain how such entities were implicated in the attack of the Daltepe Köyü village and in his alleged persecution.

4.14 The complainant had affirmed in his appeal to the CAM that his uncle was arrested by the police when he sought information in support of the complainant's asylum proceedings. According to the complainant, his uncle had been ill-treated during his detention and he died as a result of his injuries. At the same time, in the present communication, the complainant has affirmed that his uncle had died after a strange incident with two villagers in July 2003. This new version is an apparent contradiction with the one presented to the CAM.

4.15 The State party fully endorses the conclusions of the FOM and the CAM on the lack of credibility of the complainant's allegations. According to the State party, the complainant's declaration do not indicate existence of serious grounds to believe, in

⁶The State party notes that in the communication of H.D. vs. Switzerland, the Committee noted, *inter alia*, that the complainant had never been the object of prosecution on specific facts or that the proceedings in question were not directed personally against him but rather against his relatives, who were members of the PKK. The Committee further noted that nothing indicated that the complainant had collaborated with PKK members after his departure from Turkey, or that he or his relatives had been intimidated by the authorities (communication No. 112/1998, § 6.5). In another case, K.M. vs. Switzerland, the Committee has considered that nothing indicated that the complainant had collaborated with the PKK after his departure from Turkey (communication No. 107/1998, § 6.6).

accordance with article 3 of the Convention, that the complainant would be tortured in case of his forcible removal. The complainant's inconsistent statements, as mentioned above, relate to essential points of the present communication.

4.16 The State party therefore concludes that nothing indicates that serious grounds exist to fear that the complainant personally would be exposed to torture in Turkey. His allegations do not establish that his return would expose him to a foreseeable, real, and personal risk of being tortured, and his forcible removal would not be in breach of the State party's obligations under the Convention.

Complainant's comments on the State party's observations

5.1 The complainant submitted his comments on 20 May 2009. He contends, first, that his imprisonment was "extra-legal". The Turkish authorities had not "examined his rights" and there had been no legal proceedings whatsoever, and thus, no judicial documents exist.

5.2 According to the complainant, the fact that he had spent seven years in Istanbul prior to his departure, does not establish anything. Many refugees remain in Turkey before leaving the country and it is difficult to leave his/her family and collect the money necessary to flee. The complainant alleges that persons in his circumstances live underground for years prior to their departure, and the fact that he had no problems with the authorities while hiding in Istanbul does not indicate anything. In addition, his family only officially registered itself in Istanbul subsequent to his departure.

5.3 The complainant adds that the contradictions in his initial and second interviews in Switzerland were due to the fact that the record of his first and very short interview was not sufficiently precise. Even if he had explained that he had been arrested again and tortured one month after his initial arrest, this does not mean that he had not been arrested in the meantime too. In addition, he was never asked in his first interview for the exact number of his arrests.

5.4 As far as his military service is concerned, the complainant contends that his mother had been contacted by the authorities in this regard but she had refused to receive the convocation issued to him⁷.

5.5 According to the complainant, contrary to the State party's affirmations, the death of his father, four years after the attack on the Daltepe Köyü village, constitutes an indication that a risk, for the complainant, still exists despite the time elapsed.

5.6 As to his torture marks, the complainant admits that such marks could have had a different origin, but, given the time elapsed, no plausible evidence could be provided. However, taking into account his affirmations, it could be concluded that his marks are the consequence of the torture suffered⁸.

5.7 The complainant adds that the rejection of his asylum application in Switzerland has caused him a lot of stress, to the point that he had to seek psychiatric assistance. For more than half a year, since October 2008, the complainant has been under treatment with a psychiatrist⁹.

⁷ The complainant explains that it is probable that a record on this matter was placed in his family register, and that, at present, he is trying to obtain a copy of the register in question.

⁸ The complainant adds that several weeks ago, he had sought to pass a medical examination in the « Ambulatorium für Folter-und Kriegsopfer » at Zurich University Hospital, but he was not given an appointment.

⁹ The complainant adds that a report of the medical doctor in question would be presented to the Committee.

5.8 The complainant further notes that HADEP was banned by the Turkish authorities in 1997. DEHAP was its successor organisation, but it was also banned, in 2005. The political parties' archives having been confiscated, no documents could be obtained¹⁰.

5.9 Finally, the complainant claims that as far as the death of his uncle is concerned, there is no contradiction in his statements. The mysterious "conflict between villagers" is a reference taken directly from the police report in this connection¹¹. The complainant reiterated that his uncle died after the authorities attempted to obtain from him information on the complainant's whereabouts.

5.10 On 18 June 2009, the complainant submitted a copy of a medical report on his health status prepared by a psychiatrist on 3 June 2009. According to the medical expert the complainant is highly traumatized, has panic attacks, is very depressed and has Post-traumatic stress disorder, and his state has significantly deteriorated¹².

Issues and proceedings before the Committee

Consideration of admissibility

6. Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 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. The Committee further notes that it is uncontested that domestic remedies have been exhausted and that the State party does not challenge the admissibility of the communication. Accordingly, the Committee finds the complaint admissible and proceeds with its consideration on the merits.

Consideration on the merits

7.1 The issue before the Committee is whether the complainant's removal to Turkey would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return a person to a State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

7.2 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture if returned to Turkey, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the aim of such an analysis is to determine whether the complainant runs a personal risk of being subjected to torture in the country to which he would be returned. The Committee reiterates 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

¹⁰ The complainant adds that he still expects written information from the two Turkish attorneys (see paragraph 4.12 above) from TIHV and IHD. In any case, the lawyers have allegedly indicated that IHD possess no information on the Daltepe Köyü incident.

¹¹ A copy of the report in question, in Turkish and German, is submitted to the Committee.

¹² It transpires from the report that the complainant was in psychiatric care from 7 to 27 March 2009.

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.

7.3 The Committee recalls its general comment on the implementation of article 3, that "the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being "highly probable" (A/53/44, annex IX, paragraph 6), but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal¹³. Furthermore, the Committee observes that considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of facts that are made by organs of the State party concerned.

7.4 In the present case, the Committee considers that the facts as presented do not permit it to conclude that the complainant would be at personal, foreseeable, present and real risk of torture in case of his return to Turkey. In reaching this conclusion, the Committee has noted that the attack – which is, according to the complainant, the main cause of the authorities' attention on him – has taken place in 1993, i.e. long time ago, while he has not sufficiently explained its relevance in the current situation. It also has noted the complainant's allegations on the tortures suffered, in 1993, and his failure to produce a recent medical certificate on the matter. It also notes the allegations that the father and the uncle of the complainant had been persecuted by the authorities in an attempt to locate him and they had allegedly lost their lives as a consequence. In this respect, the Committee notes that at the same time, however, other members of the complainant's family, including the complainant himself, have lived in Istanbul for many years, after the alleged attacks in 1993. The Committee has also noted that the complainant has also alleged that in Turkey, he would be at risk to be enrolled in the army and would have no protection there, but it does not consider that this has been sufficiently substantiated, so as to be of pertinence and to be taken into account in the evaluation of the risk for the complainant in the present case.

7.5 The Committee has finally noted the conclusions of the psychiatric expert as submitted by the complainant subsequent to the registration of his communication. However, it is of the opinion that the very fact that the complainant suffers, at present, from psychological problems as reported by a medical expert, cannot be seen as constituting sufficient grounds to justify an obligation, for the State party, to refrain from proceeding with the complainant's removal to Turkey.

7.5 In light of all the above, the Committee is not persuaded that the facts as submitted are sufficient to conclude that the complainant would face a foreseeable, real and personal risk of being subjected to torture if returned to Turkey. Accordingly, the Committee concludes that the complainant's removal to that country would not constitute a breach of article 3 of the Convention.

8. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or

¹³ See, inter alia, Communication No. 258/2004, *Moistafa Dadar v. Canada*, Decision adopted on 23 November 2005, and Communication No. 226/2003, *T.A. v. Sweden*, Decision adopted on 6 May 2005.

Punishment, concludes that the complainant's removal to Turkey by the State party would not constitute a breach of article 3 of the Convention.

[Adopted in English, French, Russian and Spanish, the English text being the original version. Subsequently to be issued also in Arabic and Chinese as part of the Committee's annual report to the General Assembly.]