



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

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**Committee against Torture**  
**Forty-sixth Session**  
9 May – 3 June 2011

**Decision**

**Communication No. 352/2008**

<i>Submitted by:</i>	M. S. G. et al. (represented by counsel)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	15 August 2008 (initial submission)
<i>Date of present decision:</i>	30 May 2011
<i>Subject matter:</i>	Deportation of complainants to Turkey
<i>Substantive issue:</i>	Risk of torture upon return to country of origin
<i>Procedural issue:</i>	Request for interim measures of protection; non-substantiation of claim
<i>Article of the Convention:</i>	3

[Annex]

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\* 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-sixth session)**

concerning

#### **Communication No. 352/2008**

*Submitted by:* Mr. S. G. et al. ( represented by counsel)

*Alleged victims:* The complainants

*State party:* Switzerland

*Date of complaint:* 15 August 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 30 May 2011,

*Having concluded* its consideration of complaint No. 352/2008, submitted to the Committee against Torture on behalf of S. G. et al. 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:

1.1 The complainants are Mr. S. G. (“the complainant”), his wife Ms. D.G.- and their son , all nationals of Turkey, awaiting deportation from Switzerland. They claim that their deportation to Turkey would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“the Convention”). They are represented by a lawyer.

1.2 Under rule 114 (former rule 108)<sup>1</sup>, of its rules of procedure, the Committee requested the State party, on 28 August 2008, not to expel the complainants to Turkey while their communication was under consideration by the Committee. On 29 August 2008, the State party informed the Committee that it would comply with this request.

#### **The facts as presented by the complainant**

2.1 The complainants are Turkish nationals of Kurdish origin. After completing his education, the complainant opened a store where he sold electrical devices in Gaziantep city, an area where the Kurish political party PKK is active. He was neither a member of the PKK nor in any other way active in it. He supported it only with an annual amount of money, because members of the party visited him to collect funds and he felt obliged to contribute. The PKK also regularly left party newspapers in his shop, for him to distribute

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<sup>1</sup> Rules of procedure CAT/C/3/Rev. 5, dated 21 February 2011.

them. The complainant declares that he used to dispose of the newspaper as soon as the party members had left.

2.2 On 15 July 2000, the complainant was arrested, blindfolded, and brought to a police station where he was beaten up and questioned about his connection with PKK. He was released after one or two days. He was detained and taken to the police station several times after that and was kept there, for another day or two.

2.3 In September 2000, the complainant was informed by one of the PKK members who visited his shop of the arrest of another PKK member in possession of a list of PKK supporters. The complainant's name appeared on that list too. As a result, he and his wife left for Istanbul. They borrowed from a friend a mountain house outside the city, where they stayed for two years. The owner used to bring them food periodically from time to time and they had planted vegetables in the garden. On 25 March 2001, their son was born.

2.4 In August 2002, the complainant's brother visited them in Istanbul. He brought with him the 2 October 2000 edition of the newspaper "Dogus". The front page of the newspaper carried an article about the complainant being searched by the police and included a picture of him.

2.5 On 25 August 2002, the complainants left Turkey. They were smuggled into Switzerland, where they applied for asylum on 2 September 2002. The complainant explains that he was first heard on his asylum request on 9 September 2002, and he presented the newspaper "Dogus" of 2 October 2000 in support of his case. According to him, the Federal Office for Refugees (F.O.R.) sent the newspaper to the Swiss Embassy in Ankara to have its authenticity verified. On 21 July 2003, the Embassy informed that, according to their investigations, the copy of the newspaper was forged. The complainant contends that the Embassy noted that it had contacted an employee of the newspaper, who could not deliver a copy of the 2 October 2000 edition as the newspapers of the year 2000 were already archived; the person in question had however denied that the 2 October 2000 edition contained any report about the police ever having searched the complainant.

2.6 After being informed by the F.O.R. that the newspaper was considered to be false, the complainant asked his father to send him a copy of the arrest warrant against him. His father sent him the original arrest warrant, issued on 18 January 2005, by a criminal judge in Gaziantep. The complainant notes that the F.O.R. also considered this document to be forged, because it was not possible in general to get such document in an original form, and because the stamp used was that of a prosecutor and not of a judge. The complainant notes in addition, that according to the Swiss Embassy in Ankara, he was not wanted by the police in Turkey, and there was no data about him in the police registers there.

2.7 Based on the lack of credibility of the complainant, the Swiss authorities also dismissed medical reports, both by State and private doctors, which attested to the complainant suffering P.T.S.D. as a consequence of the torture suffered, as well as a certified court statement made by a P.K.K. member in Turkey, which designated the complainant as a P.K.K. supporter. The complainant notes that the State party's authorities dismissed allegations of mistreatment against him and his wife, as they had not raised them during their initial asylum hearings.

2.8 On 4 April 2008, the complainant requested the F.O.R. to revise its decision not to grant him asylum, on the basis of new elements – i.e. the copy of the statement by the P.K.K. member, designating him as a P.K.K. supporter, the authenticity of which was certified by a Turkish lawyer in a letter. On 17 April 2008, the judge in charge of the complainant's case refused to grant legal assistance, and ordered the complainant to pay 2400 CHF as advance fees for the revision of the case. The judge pointed out, *inter alia*, that the appeal appeared "Mutwillig", i.e. somehow frivolous, with very limited chances of success, and that the new elements – the statement of the P.K.K. member to the effect that

he had supplied the complainant with P.K.K. newspapers – have in fact already been brought to the attention of the F.O.R. on previous appeals. As the complainant refused to pay the fees, the F.O.R. rejected the request for revision on 19 May 2008.

### **The complaint**

3. The complainants claim that they would be at risk of being subjected to torture if returned to Turkey, in particular the complainant, because of his past beatings by the police and because the Turkish authorities believe that he is a member of the P.K.K.

### **State party's observations on admissibility**

4.1 On 28 October 2008, the State party explained that the complainants have applied for asylum on 3 September 2003. Their request was rejected by the former Federal Office for Refugees (at present called Federal Office for Migrations, F.O.M.) on 29 December 2003. An appeal against this decision was filed with the former Federal Commission on Asylum (replaced in 2007 by the Federal Administrative Tribunal, F.A.T.). Subsequently, the complainants have introduced several requests for reconsideration and/or revision. The fifth request for a revision was made on 7 April 2008, before the F.A.T. On 17 April 2008, the competent judge has rejected the complainants' request for legal assistance. The judge considered the revision request to have minimal chances of success, if not to be abusive, and ordered the complainants to pay 2 400 CHF as guarantee fees. As the complainants did not pay the fees, their request for revision was rejected by the F.A.T., on 19 May 2009.

4.2 The State party recalls that the Committee may not examine communications if domestic remedies have not been exhausted. It refers to the Committee's jurisprudence and recalls that States' authorities must be given an opportunity to assess new elements of proof before these are submitted to the Committee under article 22 of the Convention. In the present case, the decision by a judge on the prospect of success of the complainant's appeal or to request and advance payment does not, according to the State party, pre-judge the case. If the advance payment is made, the judge can decide on the merits of the case only after consultation with a second judge. If the two judges disagree, the decision has to be taken by a commission of three judges. In addition, nothing in the present communication indicates that the request for an advance payment prevents the complainant from exhausting domestic remedies. Thus, in the present communication, the complainant has not exhausted the available domestic remedies, and the communication should be declared inadmissible.

### **Complainant's comments to the State party's observations**

5.1 The complainants submitted their comments on the State party's observations on 5 January 2009. They note, first, that according to the State party, they would have had a chance to succeed with their motion for revision of 4 April 2008. They claim, however, that there was no guarantee that the judge in charge of their case would not have declared the case inadmissible once the payment of the 2 400 CHF is made – a particularly high sum for the complainants without any income. They claim that the request to pay the above sum was intended to bar them finishing their appeal in the asylum procedure. In addition, the judge wrote to them that the petition (appeal) in question was launched "mutwillig" in German, i.e. it was not totally unfounded but was, in a way, malicious. The judge has also declared that the grounds of their petition (...) and the evidence to support it are not credible and would not lead to a modification of the previous decisions – i.e. not to grant them refugee status. According to the complainants, this unequivocally meant that their appeal simply had no prospect of success.

5.2 The complainants note further that the State party has not focused on these specific circumstances or the statements of the judge, but limited itself in quoting the legal provisions in general. The reality, according to the complainants, is that the asylum judges

are under pressure to render quick decisions to the vast number of cases attributed to each of them.

#### **State party's observations on the merits**

6.1 By Note Verbale of 20 March 2009, the State party presented further observations. Preliminary, it recalls its previous observations challenging the admissibility of the communication, and adds that it has studied the complainant's comments of 5 January 2009. It notes that the complainants recognize that the State party has described the judicial situation correctly. Thus, the judge examining the case could not reject it without the consent of a second judge. Therefore, one could not affirm, as advanced by the complainant, that the decision of 17 April 2008 has pre-judged the outcome of the eventual examination of the merits of the case. As far as the amount of advance payment is concerned – 2400 CHF – the State party contends that the amount in question was determined in accordance with the pertinent rates adopted on 14 September 2007 by the judges of the Federal Administrative Tribunal (a list of the rates in question is provided).

6.2 According to the State party, in any event, the Committee may examine a communication presented by an individual under the jurisdiction of a State party recognizing the Committee's competence under article 22 of the Convention. In the present case, the complainants contend that they are still in Switzerland. The decisions of the F.A.T. (for example the one of 29 June 2007) make it clear, however, that the residence of the complainants is unknown as of 6 July 2005. The F.A.T. has thus concluded that the presence of the complainants in Switzerland could not be established and there were no proof thereon. The complainants, who do not risk a forced removal from Switzerland while their case is considered by the Committee, do not adduce any element to refute the above conclusions. In light of the fact that the last medical report submitted to the Committee is dated 16 January 2006, the State party cannot but align itself to the F.A.T.'s conclusions. Therefore, the State party considers that the present communication is inadmissible on this second ground two.

6.3 On the merits, the State party notes that before the Committee (and as they had already done before the Swiss asylum authorities), the complainants claim that their forcible return to Turkey would amount to a breach, by the State party, of its obligations under article 3 of the Convention. The complainants consider that the Swiss asylum authorities have wrongly qualified as false or irrelevant a number of evidentiary elements and have concluded that they lacked credibility. The complainant has claimed that on 15 July 2000, he had been arrested and ill-treated by officials of the security forces, as he was suspected of having cooperated with the P.K.K; he was helped by a friend and lived with his wife in Istanbul for two years. In August 2002, he received a copy of a newspaper "Dogus", containing an arrest warrant for him on the cover page. The complainant, his wife, and their sons escaped from Turkey and arrived in Switzerland on 25 August 2002.

6.4 According to the State party, in his communication to the Committee, the complainant repeats the same claims he formulated in his asylum claim, without adducing new elements. According to the State party, thus there is no reason to question the grounds for decision of the national authorities in this case but rather the complaint challenges the evaluation of facts and evidence as made by the authorities.

6.5 The State party recalls the numerous proceedings undertaken by the complainants in Switzerland. Thus, the complainant applied for asylum on 3 September 2003. The Federal Office of Refugees (F.O.R.) rejected his application on 29 September 2003. The F.O.R. took into consideration the verifications carried out by the Swiss Embassy in Turkey; it qualified as non credible the complainant's allegations and concluded that the complainant has used false evidence – including a faked copy of a newspaper. The complainant filed an

appeal against this decision on 2 January 2004 with the Federal Commission of Refugees (F.C.R.). On 28 June 2005, the F.C.R. confirmed the F.O.R.'s initial conclusions.

6.6 On 10 June 2005, the complainant submitted a request for re-consideration of his case with the F.O.R., which was qualified as a request for a revision and was transmitted to the F.C.R. As the complainant did not pay in advance the corresponding fees, the F.C.R. rejected his request without examination.

6.7 On 6 February 2006, the complainant submitted a second request for revision, but subsequently he withdrew it<sup>2</sup>. Also in February 2006, the complainant introduced a third request for revision, rejected by the F.C.R. on 28 March 2006. The F.C.R. considered on this occasion that the medical certificates provided in support of his allegations of past acts of torture having been committed against the complainant were of no relevance and did not allow for the past conclusions of the F.C.R. as to the complainant's credibility to be refuted. Contrary to what is submitted by the complainant, on this occasion the F.C.R. did not limit itself to rejecting the request for revision. According to the State party, the F.C.R. took note of the new medical certificates indicating that the complainant's wife had suffered psychical problems after the rejection of the complainant's asylum claim, and it decided to transmit the case to the F.O.M., for further verification. On 3 May 2006, the F.O.M. rejected the request for re-examination of the complainants' case, considering that the problems in question were not the consequence of persecution by the Turkish authorities, and that an adequate medical treatment was available in Turkey. The State party notes that no appeal was filed against this decision.

6.8 On 11 December 2006, the complainant submitted a fourth request for re-examination of his case. He adduced an interrogation record dated 18 April 2001, according to which, first, an accused, Mr. A.A. confessed having collaborated with the P.K.K. by distributing newspapers, magazines, etc. and that he had transmitted such documents inter alia to the complainant, and, second, that the inquiry authorities have asked Mr. A.A. to provide them with the address of the complainant. The Federal Administrative Tribunal – which replaced the F.C.R. in January 2007 – rejected this request on 29 June 2007 (copy provided). The F.A.T. declared that this interrogation record was of no relevance, especially given that its content was in contradiction with the conclusions of both the F.O.M. and the F.C.R. on the lack of credibility of the complainant in light of the results of the inquiries carried out by the Swiss Embassy in Turkey. The State party notes in this respect, that on 21 July 2003, the Swiss Embassy confirmed that no record on the political activities of the complainant existed with the police, that he was not under an arrest warrant by the police or the gendarmerie, and that he was not under an interdiction to be issued with a passport. In addition, the F.A.T. expressed serious doubts as to the authenticity of the interrogation record in question.

6.9 The State party explains further that the complainants have submitted a fifth request for a revision, dated 8 April 2008. The complainants apparently tried to demonstrate the authenticity of the investigation record of 2001, without, according to the State party, commenting on its relevance in light of the conclusions of the Swiss Embassy in Turkey. On 17 April 2008, the F.A.T. rejected this request, as frivolous, and, in fine, did not examine it on the merits, due to the non-payment of the correspondent procedure fees. The State party concludes that the complainant's allegations have been examined thoroughly by the Federal Office of Migrations, and, on numerous occasions, by the F.C.R. and the F.A.T.

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<sup>2</sup> The State party supplies the Committee with the copy of two decisions of the F.C.R. on the matter, dated 10 February 2006 and 16 February 2006, respectively.

6.10 The State party further examines the complainants' allegations in lights of article 3 of the Convention. It recalls that States parties to the Convention have the obligation not to expel an individual, under their jurisdiction, if there are grounds to believe that he or she would face a serious risk of torture. If a complainant is not under the jurisdiction of a State party, he or she cannot be expelled by this State, and thus article 3 of the Convention does not apply. In the present case, the continuous presence of the complainants in Switzerland could not be established. Thus, according to the State party, article 3 of the Convention does not apply to the complainants, and no violation of this provision could take place in this case.

6.11 Having recalled the Committee's jurisprudence and its general comment No. 1 on the implementation of article 3, the State party endorses the grounds cited by the F.O.R. and the Federal Administrative Tribunal substantiating their decisions to reject the complainants' application for asylum. It recalls the Committee's jurisprudence whereby 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 therefore exist before the likelihood of torture can be deemed to be, for the purposes of article 3, paragraph 1, "foreseeable, real and personal".

6.12 The State party recalls that the Committee has examined a number of communications on behalf of complainants claiming that they would be at risk of torture in Turkey. It notes that the Committee has concluded in the past that the human rights situation there was of concern, in particular in relation to P.K.K. militants, who could suffer torture by officials of the security services<sup>3</sup>. However, when concluding that a violation of article 3 of the Convention would occur in case of forcible return, the Committee has established that the complainants were engaged politically in favor of the P.K.K., that they had been detained and tortured prior to their departure from Turkey, and that their allegations of torture were substantiated by independent sources, such as medical certificates. In two previous communications against Switzerland, however, the Committee concluded that the complainants' forcible return to Turkey would not breach article 3 of the Convention.

6.13 The State party notes that in the first case, H.D. v. Switzerland, Communication No. 112/1998, Views adopted on 30 April 1999, the Committee noted, inter alia, that the complainant was never subjected to prosecution for precise facts, and that the prosecutions invoked in the communication concerned his relatives, who belonged to the P.K.K., not himself. The Committee also noted that nothing indicated that the complainant had cooperated with the P.K.K. after his departure from Turkey, or that his relatives were intimidated by the Turkish authorities. In Communication No. 107/1998, K.M. v. Switzerland, the Committee took into consideration the fact that nothing showed that the complainant had cooperated with the P.K.K. after his departure from Turkey.

6.14 The State party recalls that in the present case, its competent authorities have concluded, after a thorough analysis of all pertinent elements, that the complainant's allegations to the effect that he had been arrested, ill-treated and persecuted by the Turkish authorities because of his suspected links with the P.K.K, were not plausible. The State party recalls, first, that the Swiss Embassy in Turkey has conducted an inquiry and that thus a Turkish lawyer confirmed after verifications that in 2003, no political record existed with the Turkish police against the complainant, he was not under an arrest warrant by the police, and has no interdiction to have a passport issued. The interrogation recorded on 18

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<sup>3</sup> The State party refers, inter alia, to Communication No.97/1997, Orhan Ayas v. Sweden, paragraph 6.4, Views adopted on 12 November 1998.

April 2001, as supplied by the complainant, has thus not resulted in the launch of a search/arrest warrant against the complainant. This was also noted by the F.A.T. in its decision of 29 June 2007. The F.A.T., contrary to what is alleged by the complainant, did not reject his fourth request for a revision based only on its doubts about the authenticity of the record in question.

6.15 According to the State party, if the complainant were wanted by the authorities, he would have been able to present other documentary evidence, such as, for example, confirmations of his arrests, official arrest warrants, police investigation records, accusation acts, or correspondence with his lawyer(s). In addition, as far as the interrogation record provided by the complainant is concerned, the State party contends that the name of the Prosecutor who had signed it remains unknown to it. This reinforces the subsisting doubts as to the authenticity of the record in question.

6.16 The State party further notes that the complainant has provided the F.O.M. with the copies of two arrest warrants (so called "Örnek 29"), in substantiation of his claims. The authenticity of the first one, dated 4 August 2000 (copy provided), was examined scrupulously by the F.O.M. The State party notes that arrest warrants are issued by courts in Turkey. The document supplied by the complainant contains a header of a tribunal, and is apparently signed by a judge. However, the document is stamped with the stamp of the Prosecution Office. The State party finds it difficult to imagine that a judge would use a stamp of a prosecutor. It is also difficult to understand, according to the State party, how an individual with a warrant against him/her is in possession of the original of his arrest warrant. As noted by the Swiss Embassy, the complainant was never wanted by the police. The complainant presented the copy of the above mentioned arrest warrant only once he was provided with the copy of the Swiss Embassy's report. Therefore, the State party finds it unnecessary to proceed with the complainant's request to verify the authenticity of the arrest warrant in question with a Turkish lawyer. According to the State party, the second form "Örnek 29" presents the same characteristics as the first one, i.e. contains a stamp by a Prosecutor.

6.17 In relation to the hard copy of the newspaper "Dogus" of 2 October 2000, as provided by the complainant, the State party explains that the Swiss Embassy in Turkey has contacted an employee of the newspaper. It transpired, after verification in the archives, that the copy was false. The original issue of 2 October 2000 did not contain a search warrant for and a picture of the complainant. The content of the first page of the original newspaper differed completely from the one submitted by the complainant. In addition, the compulsory requisites about periodicals "Impressum", contained on the fourth page, were incorrect in the copy provided by the complainant. Finally, the original newspaper has its title on the first page in red, but these letters appear in white in the copy provided by the complainant. Therefore, the State party believes that no arrest warrant concerning the complainant was published in the newspaper, what corroborates the findings, as already laid out by, of the Turkish lawyer contacted by the Swiss Embassy.

6.18 The State party adds that the complainant's allegations on his persecution are contradicted by the circumstances surrounding the closure of his shop. In his testimony to the police as an asylum seeker, the complainant had claimed that his shop was closed by the police in September 2000. As revealed by the F.C.R., the Swiss Embassy in Turkey has reported in July 2003, that the complainant's shop was in fact closed in July 2002 by his brother, and not by the police. The complainant has provided no observations thereon.

6.19 The State party recalls that its asylum authorities have qualified as non credible the allegations of the complainant that he has been persecuted. His and his wife's medical troubles are not the consequence of past persecution, but had different cause. This is confirmed by the fact that, in particular, the complainant's mental troubles (such as

domestic violence) manifested themselves after the refusal to grant him political asylum, in December 2003.

6.20 The State party declares that in light of all these considerations, it aligns itself with the grounds put forward by the F.O.R. and the F.A.T., when concluding that the complainant's allegations lacked credibility. It also contends that the presentation made by the complainant does not lead to believing that there exist serious grounds that he would be subjected to torture in Turkey. Thus, nothing indicates that there exist serious grounds to consider that the forced removal of the complainants would expose them to a foreseeable, real, and personal risk of torture in Turkey.

6.21 The State party concludes by inviting the Committee to declare the communication inadmissible for both non-exhaustion of domestic remedies and because of the non-applicability of article 3 of the Convention in the present case, or, subsidiary to reject the communication on the grounds that the complainant has not a standing as a victim, or to find that the forcible return of the complainants to Turkey would not constitute a violation, by Switzerland, of its obligations under article 3 of the Convention.

#### **Complainant's observations on the State party's submissions**

7.1 On 26 May 2009, the complainant's counsel presented his comments to the State party's observations. On the State party's argumentation on the issue of exhaustion of domestic remedies, he contends that the explanation that a second judge would co-examine the case is purely theoretical. According to him, the workload of the Federal Administrative Tribunal is such, that judges requested to provide a second opinion in a particular case cannot sufficiently familiarize themselves with the merits of each case dealt with by another judge.

7.2 The counsel further explains that he is in contact with the petitioners, and receives regular phone calls. The last meeting in person took place when they provided him with additional elements for their last request for a revision of their case. He adds that in the circumstances of the present case, the address of the petitioners cannot be provided to the State party's authorities.

7.3 On the State party's conclusion that the arrest warrants "Örnek 29" of 4 August 2000 and 10 January 2005 are false as they contained a stamp from a prosecutor, the counsel explains that the complainants did not bring these documents themselves, but that they were provided to them by their relatives in Turkey. The warrants were not examined by the Turkish lawyer working for the Swiss Embassy, but only analyzed by an official in Switzerland, who concluded that, since the complainant provided originals, and they were stamped by a prosecutor, they were false. But the official did not contend that the forms themselves were false. The counsel adds that the complainant knew that the Swiss authorities had doubts about the authenticity of the first arrest warrant, when he requested his relatives in Turkey to provide him with the copy of the second arrest warrant, and he probably has informed his relatives about the problematic prosecutor's stamp on a court document. Notwithstanding this, his relatives provided him with similarly stamped arrest warrant.

7.4 The counsel further claims that, on the closing of the complainant's shop, the Swiss Embassy has relied on the statements of a district Mayor, who, according to counsel was unaware of the circumstances of the complainant's case. The Mayor had stated that the shop in question was ran by the complainant and his brother for one or two years, and that he had heard around a year earlier that the brothers had closed it and that the complainant had travelled abroad. This only confirms, according to the counsel, that the petitioner has had a shop. In addition, the Mayor has also contended that he was unable to find out for what reasons the complainant had left the country. Therefore, there is no contradiction with what the complainant has explained before the Swiss asylum authorities.

7.5 As to the State party's contention that the complainant's health problems had occurred after the rejection of his asylum request, counsel explains that a psychiatric doctor, M. E. B., has concluded that the complainant suffered Post-Traumatic Stress Disorder, as a consequence of serious torture. According to counsel, it is clear that the petitioner was depressed after the rejection of his asylum application and the treat of having to leave the country, without protection of not being subjected once more to torture. The State party, according to the counsel, did not pay sufficient attention to the report of the psychiatric expert.

7.6 On 12 February 2010, the complainant's counsel provided the Committee with four reports prepared by medical doctors and the Swiss Red Cross ("Ambulatorim Für Folter-und Kriegsopfer SRK"), in 2009-2010, concerning the complainant, and a medical doctor's report of 2009 concerning his wife. The counsel explains that in 2008, the complainant started consulting the Ambulatorim Für Folter-und Kriegsopfer SRK, as his "psychic suffering was not anymore bearable to him and his family". The complainant also suffered extreme pain in his genitals, burning and itching of his body, and headaches. The medical report of the Ambulatorim Für Folter-und Kriegsopfer SRK of 12 December 2009 states that the complainant suffered flashbacks due to the torture suffered. At the end of 2009, the complainant was treated in a psychiatric clinic (12 November 2009 – 7 January 2010). A report dated 1 January 2010, prepared in the clinic, states that the complainant suffered flashbacks due to the torture he had been subjected to, and that the petitioner had suicidal ideas. At times, he behaved very aggressively in the clinic and refused to interact with anyone.

7.7 According to counsel, the reading of the medical reports implied that the complainant also suffered "of other things as hopelessness, desperateness, problems to concentrate, nightmares, etc".. In addition, he has a great fear of policemen.

7.8 The complainant's counsel further notes that an urologist, Dr. G., did not find any problems in the complainant's genitals. According to counsel, in his report of 14 September 2009, the urologist had expressed the view that the complainant was "a man destroyed by torture" and suggested that his pains had psychological rather than physical origins<sup>4</sup>.

7.9 The counsel contends that in light of this information, it is clear that the complainant's problems are the result of past torture, and he and his family suffer from the present uncertain situation. The counsel also points out that the medical reports submitted are the result of emergency assistance. The medical doctors did not investigate the root causes of the complainant's problems, but rather tried to provide him with temporary relief. In any event, the complainant has repeated to all the doctors that he had been subjected to torture in Turkey. As far as the complainant's wife is concerned, a report of the Swiss Red Cross of 25 November 2010 states that she also suffers, because of the state of health of her husband, his aggressive behaviour, and the situation of uncertainty.

#### **Additional information from the State party**

8.1 On 19 March 2010, the State party reiterated its previous position and reacted to counsel's submission of 12 February 2010. It notes that, as far as the complainant's pain in the genitals is concerned, the medical specialist examining the complainant has concluded that the latter does not suffer from injuries which could show that he had been subjected to ill-treatment.

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<sup>4</sup> It transpires from the documents on file, that Dr. G. was requested by the "Ambulatorim Für Folter-und Kriegsopfer SRK", Swiss Red Cross, to provide an opinion on the complainant's case.

8.2 The State party also notes that the different medical reports submitted to the Committee mention that the complainant has declared having been tortured in Turkey. It contends, however, that the report of the “Ambulatorim Für Folter-und Kriegsopfer SRK” (Swiss Red Cross) of 16 December 2009 mentions that the complainant has explained that he had been detained and tortured, at the age of 25, for three months in a Police Office, and that he was administrated electroshocks on the genitals. The State party notes that this description is in contradiction with what the complainant has declared to the Swiss asylum authorities – i.e. that he has been arrested and ill-treated on several occasions, for one to two days, without mentioning having been tortured on his genitals. Therefore, the medical reports submitted by the complainant do not contradict the conclusion that the complainant’s mental problems are not caused by past torture.

#### **Additional information by the complainant**

9.1 On 31 August 2010, the complainant’s counsel provided further clarifications. He admits that the State party was correct in noting that the report of the Ambulatorim Für Folter-und Kriegsopfer SRK (Swiss Red Cross) of December 2009 indicates that the complainant was arrested and tortured for three months. He explains, however, that the report reflected what was discussed with the complainant, in the absence of an interpreter. The counsel believes that the psychologist examining the complainant probably misunderstood his explanations. This is confirmed, according to counsel, by the text of a letter from two officials of the Ambulatorim Für Folter-und Kriegsopfer SRK dated 10 August 2010, according to which, it was assumed that the complainant has, at the time, said that he was imprisoned several times over a period of three months, and not for three full months. According to the officials in question, the complainant had refused the services of an interpreter, as he had no trust in his compatriots.

9.2 According to counsel, this is consistent with what the complainant has always claimed – his first arrest took place on 15 July 2000, and his last arrest was at the end of August 2000. Even if this period covers one and a half months, it should be remembered, according to counsel that these events took place more than ten years ago and a certain deviation in the complainant’s mind should be considered normal.

9.3 As to the alleged torture with electricity of the complainant, as reported by Dr. G., counsel, once again, considers that it is the result of a misunderstanding, due to the poor German language proficiency of the complainant and the absence of an interpreter. In a new letter, the Ambulatorim Für Folter-und Kriegsopfer SRK explained that the patient, at the time, described feeling pain as if he was receiving electricity in his genitals, what was interpreted to be a description of past torture. The counsel assumes that when examining the complainant, Dr. G. was misled similarly, as the consultation again took place in the absence of an interpreter.

9.4 On 9 September 2010, the counsel submitted a letter from Dr. G., dated 7 September 2010. Dr. G. confirms that the consultation of the complainant in 2009 was held in the absence of an interpreter. Dr. G. explains that he might have misunderstood that the complainant had been tortured, while in reality he had told him that he feels a pain like receiving electricity on the genitals. According to counsel, this information is very important, given that the Ambulatorim Für Folter-und Kriegsopfer SRK studied the 2009 report of Dr. G. at the time, and may have been influenced by it.

#### **Issues and proceedings before the Committee**

10.1 Before considering a claim contained in a communication, the Committee must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, first, as it is required to do under article 22, paragraph 5 (a), that the same

matter has not been, and is not being, examined under another procedure of international investigation or settlement.

10.2 The Committee has noted that the State party has challenged the admissibility of the communication, as the complainant has failed to exhaust available domestic remedies, as his fifth request for a revision by the Federal Administrative Tribunal was dismissed without examination, because he did not pay the corresponding fees in advance. The Committee notes further, as acknowledged by the State party, that the judge in charge of the complainant's case, when rejecting his request for legal aid, preliminarily assessed the complainant's revision request as presenting minimal chances of success, and expressed doubts as to the possible abusive nature of the request.

10.3 The Committee notes that the complainant has filed a number of previous appeals, including requests for revision, and that the majority of these were rejected. It also notes that the complainant has requested the revision in question on the basis of a letter confirming the authenticity of a court record where a P.K.K. supporter had invoked his name. The Committee notes that, in any event, the court record in question was already submitted and examined by the Swiss asylum authorities in the context of the complainants' previous appeals. In light of this, and in spite of the State party's explanation that the judge in charge did not assess the merits of the case and that if the case was to be rejected, the judge in question would have had to seek an additional opinion of another judge, the Committee is not convinced that this particular remedy constitutes sufficient ground to prevent it from examining the merits of the communication, as far as the complainant's allegations are sufficiently substantiated for purposes of admissibility.

10.4 The Committee further notes that the State party does not explain why the particular remedy invoked – a fifth request for revision - would be pertinent to the case under examination. It considers that the State party has limited itself to invoke the availability of the remedy in question and its potential effectiveness, without providing further explanation. In the circumstances, and in light of the information on file, the Committee considers that, in the present case, the complainants have provided sufficient information to permit it to proceed with the examination of the merits of the case.

10.5 The State party has invoked a second ground for the inadmissibility of the communication, namely that its authorities have concluded that the presence of the complainants in Switzerland was not established, and that therefore article 3 does not apply in the present case. The Committee has also noted the complainant's counsel reply (see paragraph 7.2 above) - i.e. that he is in constant contact with the complainants and receives regular phone calls from them. In the circumstances, the Committee does not consider that the provisions of the Convention do not apply in the present case.

10.6 In light of the above considerations, the Committee decides that the communication is admissible, as far as it raises issues under article 3 of the Convention, and decides to proceed with its examination on the merits.

#### **Consideration of the merits**

11.1 The Committee must determine whether the forced return of the complainants to Turkey would violate the State party's obligations under article 3, paragraph 1, of the Convention not to expel or return ('refouler') an individual to another State, where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

11.2 In assessing whether there are substantial grounds for believing that the complainant and his wife 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 complainants run a personal risk of being subjected to torture in the country to which they 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 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.

11.3 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 personal<sup>5</sup>. 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.

11.4 In the present case, the Committee considers that the facts as presented do not permit it to conclude that the complainant and his wife would be at personal, foreseeable, present and real risk of torture in case of their return to Turkey. In reaching this conclusion, the Committee has noted, in particular, the State party's observations on the conclusions of the Swiss asylum authorities on the lack of credibility of the complainant, the conclusions on the use of false evidence, such as an issue of a newspaper containing an arrest warrant and the picture of the complainant, and the use of two arrest warrants allegedly signed by a judge but carrying the stamp of a prosecutor's office, and the information emanating from the Swiss Embassy through a Turkish lawyer to the effect that no police records or arrest/search warrants existed with the Turkish authorities against the complainant in connection to political activities. The Committee has given due attention to the complainant's and his wife's comments, but it considers that the complainants have failed to sufficiently substantiate the arguments in refuting or clarifying the contradictions as pointed out by the State party in its replies.

11.5 Finally, the Committee has noted the conclusions of the medical and psychiatric experts as submitted by the complainants subsequent to the registration of the communication, and the existence of contradiction or misunderstandings with what the complainants have claimed before the Swiss asylum authorities. However, it is of the opinion that the very fact that the complainant suffers, at present, from psychological problems as reported by medical experts, cannot be seen as constituting sufficient grounds to impose an obligation, on the State party, to refrain from proceeding with the complainant's and his wife's removal to Turkey, where, as indicated by the State party's authorities, adequate medical care is available.

11.6 In light of all the above, the Committee is not persuaded that, read as a whole, the facts before it are sufficient to allow it to conclude that the complainants would face a foreseeable, real and personal risk of being subjected to torture if returned to Turkey. Accordingly, the Committee concludes that their removal would not constitute a breach of article 3 of the Convention.

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<sup>5</sup> See, *inter alia*, Communication No. 258/2004, Mostafa Dadar v. Canada, Decision adopted on 23 November 2005; Communication No. 226/2003, T.A. v. Sweden, Decision adopted on 6 May 2005; Communication No. 356/2008, N.S. v. Switzerland, Decision adopted on 6 May 2010.

12. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the complainants' removal to Turkey by the State party would not constitute a breach of article 3 of the Convention.

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

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