



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

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Committee Against Torture  
Thirty-second session  
(3 – 21 May 2004)

**DECISION**

**Communication No. 214/2002**

Submitted by : M. A. K. (represented by counsel, Mr. Reinhard Marx))

Alleged victim: The complainant

State Party: Germany

Date of complaint: 10 September 2002 (initial submission)

Date of present decision: 12 May 2004

[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

**Thirty-second session**

Concerning

**Complaint No. 214/2002**

Submitted by : M. A. K. (represented by counsel, Mr. Reinhard Marx)

Alleged victim: The complainant

State Party: Germany

Date of complaint: 10 September 2002 (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 12 May 2004,

Having considered complaint No. 214/2002, submitted to the Committee against Torture under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following decision:

1.1 The complainant is M. A. K., a Turkish national of Kurdish origin, born in 1968, currently residing in Germany and awaiting expulsion to Turkey. He claims that his forcible return to Turkey would constitute a violation by the Federal Republic of Germany of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by counsel.

1.2 On 11 September 2002, the Committee forwarded the complaint to the State party for comments and requested, under Rule 108, paragraph 1, of the Committee's rules of procedure, not to extradite the complainant to Turkey while his complaint was under consideration by the Committee. The Committee indicated, however, that this request could be reviewed in the light of observations provided by the State party on the admissibility or on the merits. The State party acceded to this request.

1.3 On 11 November 2002, the State party submitted its observations on the admissibility of the complaint together with a motion asking the Committee to withdraw its request for interim measures, pursuant to Rule 108, paragraph 7, of the Committee's rules of procedure. In his comments, dated 23 December 2002, on the State party's observations on admissibility, counsel asked the Committee to maintain its request for interim measures until a final decision on the complaint has been taken. On 4 April 2002, the Committee, through its Rapporteur on new communications and interim measures, decided not to withdraw its request for interim measures.

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

2.1 The complainant arrived in Germany in December 1990 and claimed political asylum on 21 January 1991, stating that he had been arrested for a week in 1989 and tortured by the police in Mazgirt because of his objection to the conduct of superiors during military service. As a PKK sympathiser, he was being persecuted and his life was in danger in Turkey. On 20 August 1991, the Federal Agency for the Recognition of Foreign Refugees (*Bundesamt für die Anerkennung ausländischer Flüchtlinge*) rejected the complainant's application on the basis of inconsistencies in his counts.

2.2 The complainant appealed the decision of the Federal Agency before the Wiesbaden Administrative Court which dismissed the appeal on 7 September 1999. On 17 April 2001, the Higher Administrative Court of Hessen refused leave to appeal from that judgment.

2.3 On 7 December 2001, the City of Hanau issued an expulsion order against the complainant, together with a notification of imminent deportation. The expulsion was based on the fact that the complainant had been sentenced by penal order, dated 16 January 1995, of the District Court of Groß-Gerau to a suspended prison term of four months for participation in a highway blockade organized by PKK sympathisers in March 1994.

2.4 On 17 January 2001, the complainant applied to the Federal Agency to reopen proceedings in his case, arguing that he had been trained by the PKK in a camp in the Netherlands in 1994, with a view to joining the PKK's armed forces in Southeast Turkey, a duty from which he had been exempted at his subsequent request. He further claimed that the Turkish authorities knew about his PKK activities and, in particular, his participation in the highway blockade, on the basis of his conviction for joint coercion of road traffic.

2.5 By decision of 6 February 2002, the Federal Agency rejected the application to reopen asylum proceedings, stating that the complainant could have raised these fresh arguments in the initial proceedings, and that his submissions lacked credibility. On 26 February 2002, the complainant appealed this decision before the Frankfurt Administrative Court, where proceedings were still pending in this regard at the time of the initial submission of the complaint.

2.6 The complainant's application for provisional court relief against his deportation to Turkey was rejected by the Frankfurt Administrative Court on 21 March 2002, essentially based on grounds identical to those of the Federal Agency.

2.7 On 16 April 2002, an informational hearing of the complainant was held at the Federal Agency, during which the complainant stated that, prior to his training at the Dutch PKK camp, he had been introduced to the public of the Kurdish Halim-Dener-Festival, celebrated in September 1994 in the Netherlands, as part of a group of 25 "guerilla candidates". He had not raised the issue during initial asylum proceedings since he feared punishment for PKK membership (the PKK is illegal under German law).

2.8 The complainant's application to reconsider its decision denying provisional court relief was rejected by the Frankfurt Administrative Court on 18 June 2002. The court reiterated that the late submission, as well as various details in the description of his alleged PKK activities, undermined the complainant's credibility. Thus, it was considered questionable whether the PKK would publicly present its guerilla candidates, knowing that the Turkish secret service observed events such as the Halim-Dener-Festival. Moreover, following political and ideological training in Europe, PKK members were generally obliged to undergo immediate military training in Southeast Turkey.

2.9 On 22 July 2002, the complainant lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Frankfurt Administrative Court of 21 March and 18 June 2002, claiming violations of his constitutionally protected rights to life and physical integrity, equality before the law as well as his right to be heard before the courts. In addition, he filed an urgent application for an interim decision granting protection from deportation for the duration of the proceedings before the Federal Constitutional Court. By decision of 30 August 2002 of a panel of three judges, the Federal Constitutional Court dismissed the complaint as well as the urgent application, on the basis that "the complainant solely objects to the assessment of facts and evidence by the lower courts without specifying any violation of his basic rights or rights equivalent to basic rights".

### **The complaint**

3.1 The complainant claims that substantial grounds exist for believing that he would be at a personal risk of being subjected to torture in Turkey, and that Germany would, therefore, be violating article 3 of the Convention if he were returned to Turkey. In support of his claim, he submits that the Committee has found the practice of torture to be systematic in Turkey.

3.2 The complainant argues that the Federal Agency and the German courts overemphasized the inconsistencies in his statements during the initial asylum proceedings, which were not in substance related to his subsequent claim to reopen proceedings on the basis of new information. He admits his failure to mention his PKK activities during initial proceedings. However, he could have reasonably expected the Turkish authorities' knowledge of his participation in the highway blockade to establish sufficient grounds for recognition as a refugee. His participation

in the blockade could easily be inferred from his conviction of joint coercion in road traffic, since the judicial records exchanged between German and Turkish authorities indicate the date of a criminal offense. In the absence of witnesses of his participation in the PKK training course, which was to be kept secret, he claims the benefit of doubt for himself. He refers to the Committee's General Comment No. 1, which provides that, for purposes of article 3 of the Convention, the risk of torture "does not have to meet the test of being highly probable".

3.3 Moreover, the complainant refers to the written testimony by a Mr. F. S., dated 6 July 2002, in which the witness declared that he had traveled to the Kurdish festival in the Netherlands in 1994 together with the complainant, who had publicly declared to participate in the PKK.

3.4 The complainant explains the apparent contradiction between the PKK's policy of secrecy and the public presentation of 25 guerilla candidates in front of 60.000 to 80.000 people at the Halim-Dener-Festival with the campaign, initiated by Abdullah Öcalan in March 1994, of demonstrating the Organization's presence and capacity to enforce its policies throughout Europe. His exemption from the duty to undergo military PKK training was only temporary, pending a final decision to be taken in May 1995. In any event, inconsistencies in the official PKK policy could not be raised against him.

3.5 As regards the burden of proof within national proceedings, the complainant submits that, pursuant to section 86 of the Code of Administrative Court Procedure, the administrative courts must investigate the facts of a case *ex officio*. He was therefore under no procedural obligation to prove his PKK membership. By stating that he took part in a PKK training course from September 1994 to January 1995, the complainant considers to have complied with his duty to cooperate with the courts.

3.6 As to the Turkish authorities' knowledge of his PKK membership, the complainant contends that there can be no doubt that the Turkish secret service observed the events taking place at the Halim-Dener-Festival in 1994. Moreover, he claims to have seen one of his training officers at the Maastricht camp, called "Yilmaz", on Turkish television after his arrest by Turkish police. "Yilmaz" reportedly agreed to cooperate with Turkish authorities, thereby placing the participants of the training camp at risk of having their identities revealed. The complainant further claims that one of his neighbour villagers told him that another participant of the training camp, called "Cektar", to whom he had close contact during the course, was captured by the Turkish army. It can be reasonably assumed, according to the complainant, that "Cektar" was handed over to the police for interrogation and tortured in order to extract information on PKK members from him.

3.7 The complainant concludes that, upon return to Turkey, he would be seized by Turkish airport police, handed over to specific police authorities for interrogation, and gravely tortured by those authorities. From previous views of the Committee he infers that the Committee found instances of torture by Turkish police likely to happen when the authorities were informed about a suspect's collaboration with the PKK.

3.8 The complainant submits that even if he had committed a criminal offense under German law by adhering to the PKK, this could not absolve the State party from its obligations under article 3 of the Convention.

3.9 The complainant claims to have exhausted all available domestic remedies. His complaint is not being examined under another procedure of international investigation or settlement.

#### **The State party's observations on the admissibility of the complaint**

4.1 On 11 November 2002, the State party submitted its observations on the admissibility of the complaint, asking the Committee to declare it inadmissible for failure to exhaust domestic remedies, pursuant to article 22, paragraph 5, of the Convention.

4.2 The State party argues that domestic remedies which need to be exhausted include the remedy of a constitutional complaint, as held by the European Court of Human Rights in several cases concerning Germany<sup>1</sup>. Although the complainant lodged a constitutional complaint on 22 July 2002, he failed to exhaust domestic remedies, since this complaint was not sufficiently substantiated to be accepted for adjudication. In particular, the complainant failed to state why the challenged decisions infringed his constitutionally protected rights. It follows from the *ratio decidendi* of the decision of the Federal Constitutional Court, dated 30 August 2002, that he “solely object[ed] to the assessment of facts and evidence by the lower courts”.

4.3 The State party submits that domestic remedies cannot be exhausted by means of an inadmissible complaint which patently fails to comply with the admissibility criteria under national procedural law<sup>2</sup>. In the present case, the State party does not see any circumstances which would justify an exemption from the requirement to exhaust domestic remedies, given that the constitutional complaint combined with the application for a provisional order, pending the final decision of the Federal Constitutional Court, provided the complainant with an effective remedy.

#### **Complainant's comments on the State party's observations on admissibility**

5.1 In his response dated 9 December 2002, the complainant challenges the State party's interpretation of the Constitutional Court's decision of 30 August 2002. He argues that the Court explicitly or implicitly ruled his constitutional complaint inadmissible, arguing that it did not distinguish between aspects of admissibility and merits. However, as the complaint satisfied the admissibility criteria of Section 93 of the Federal Constitutional Court Act, indicating the basic rights claimed to be infringed as well as the manner in which the lower courts' decisions violated these rights, it follows that the Federal Constitutional Court did not reject it as inadmissible “but with reference to the merits of the case”.

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<sup>1</sup> *Djilali v. Germany*, Application No. 48437/99; *Thieme v. Germany*, Application No. 38365/97; *Teuschler v. Germany*, Application No. 47636/99; *Tamel Adel Allaoui et al. v. Germany*, Application No. 44911/98.

<sup>2</sup> See Section 92 of the Federal Constitutional Court Act.

5.2 The complainant submits that the constitutional complaint is not an additional appeal but constitutes an extraordinary remedy, allowing the Constitutional Court to determine whether basic rights have been infringed by the lower courts, when these fail to comply with their duty to ensure the enjoyment of such basic rights. However, the questions whether the requirement to exhaust all available domestic remedies includes recourse to this specific remedy, and whether this requirement is not met if a constitutional complaint is rejected as inadmissible, is immaterial in the complainant's opinion, since his constitutional complaint was not declared inadmissible by the Federal Constitutional Court in the first place.

5.3 The complainant argues that compliance with specific particularities of the German Constitution is not a prerequisite to lodge a complaint under a universal treaty-based procedure, such as the individual complaint procedure under article 22 of the Convention.

5.4 Lastly, the complainant submits that the domestic remedies rule must be applied with a certain degree of flexibility, and that only effective remedies must be exhausted. In the absence of a suspensive effect, the constitutional complaint cannot be considered an effective remedy in cases of imminent deportation.

#### **Additional observations by the State party on admissibility**

6.1 On 10 March 2003, the State party submitted its additional observations on the admissibility of the complaint. While conceding that the Federal Constitutional Court did not explicitly state whether the constitutional complaint was inadmissible or ill-founded, the State party reiterates that the wording of the operative part of the Federal Constitutional Court's decision of 30 August 2002 allowed the inference that the complainant's constitutional complaint was unsubstantiated and therefore inadmissible. Hence, the complainant failed to comply with the procedural requirements for lodging a constitutional complaint.

6.2 The State party objects to the complainant's argument that a constitutional complaint has no suspensive effect, arguing that such effect can be substituted by means of an urgent application for interim relief, under Section 32 of the Federal Constitutional Court Act.

#### **Decision on admissibility**

7.1 At its thirtieth session, the Committee considered the question of the admissibility of the complaint and ascertained that the same matter had not been, and was not being, examined under another procedure of international investigation or settlement. Insofar as the State party argued that the complainant had failed to exhaust domestic remedies, since his constitutional complaint did not meet the procedural requirements as to the substantiation of the claims, the Committee considered that, as an international instance which supervises States parties' compliance with their obligations under the Convention, it is not in a position to pronounce itself on the specific procedural requirements governing the submission of a constitutional complaint to the Federal Constitutional Court, unless such a complaint is manifestly

incompatible with the requirement to exhaust all available domestic remedies, laid down in article 22, paragraph 5 (b), of the Convention.

7.2 The Committee noted that the complainant had lodged a constitutional complaint with the Federal Constitutional Court on 22 July 2002, which had been dismissed by the Court by formal decision dated 30 August 2002. In the absence of a manifest failure to comply with the requirement in article 22, paragraph 5(b), of the Convention, the Committee was satisfied that, in the light of the circumstances of the case and in conformity with general principles of international law, the complainant had exhausted all available domestic remedies.

7.3 Accordingly, the Committee decided on 30 April 2003, that the complaint was admissible.

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

8.1 By note verbale of 24 February 2003, the State party submitted its observations on the merits of the complaint, arguing that the complainant had failed to substantiate a personal risk of torture in the event of his deportation to Turkey.

8.2 By reference to the Committee's General Comment 1 on the interpretation of article 3 of the Convention, the State party stresses that the burden is on the complainant to present an arguable case for establishing a personal and present risk of torture. It considers the complainant's Kurdish origin or the fact that he sympathizes with the PKK insufficient for that purpose.

8.3 The State party submits that the different versions about the severity of the torture allegedly suffered by the complainant after his arrest in Turkey raise doubts about his credibility. While he had first stated, before the Federal Agency, that he had been insulted and thrown into dirty water, he later, before the Wiesbaden Administrative Court, supplemented his allegations to the effect that he had been lifted up with his hands tied behind his back and a stick placed under his arms.

8.4 For the State party, the author failed to prove his PKK membership, or any remarkable political activities, during exile. In particular, the letter by Mr. F. S. merely stated that the complainant had participated in cultural and political activities in Germany, without specifying any of them. Moreover, the State party argues that the mere claim to be a PKK member is not as such sufficient to substantiate a personal danger of being tortured, in the absence of a prominent role of the complainant within that Organization. Out of the more than 100.000 persons proclaiming themselves PKK members during the "self-incriminating campaign" in 2001, not a single case of subsequent persecution by Turkish authorities was reported.

8.5 While conceding that participation in PKK training for a leadership role might subject a party member to personal danger upon return to Turkey, the State party denies that the complainant ever participated in such training; he did not raise this claim during his hearing before the Wiesbaden Administrative Court in 1999. It considers the complainant's explanation that he wanted to keep this participation



confidential, as required by the PKK, and because PKK membership was punishable under German law, implausible, because: a) the contradiction between the alleged confidentiality of his training and the fact that the complainant had allegedly been introduced to a wide Kurdish community at the Halim-Dener-Festival; b) the unlikelihood that the complainant would consider an imminent danger of torture the “lesser of two evils” compared to a conviction for PKK membership in Germany; c) the fact that, despite the dismissal of his asylum claim by the Wiesbaden Administrative Court on 7 September 1999, he did not reveal his participation in PKK training on appeal to the Higher Administrative Court of Hessen; and d) the obvious need to supplement his claims for purposes of a new asylum application after the expulsion order of 7 December 2001 had become final and binding.

8.6 The State party submits that, even assuming that the complainant had been introduced as a “guerilla candidate” at the festival in 1994, his subsequent failure to continue the training, let alone to fight in Southeast Turkey, prevented him from occupying a prominent position within PKK.

8.7 While not excluding the possibility that the complainant’s conviction of “joint coercion in road traffic” was communicated to the Turkish authorities under the international exchange of judicial records, the State party submits that the place of the offense could only be deduced indirectly from the information concerning the competent court. Even if his participation in the highway blockade could be revealed on the basis of this information, such low-profile activity was unlikely to trigger any action on the part of the Turkish authorities.

8.8 As to the burden of proof in national proceedings, the State party argues that the German courts’ obligation to investigate the facts of a case only relates to verifiable facts. The Federal Agency and courts complied with this obligation by pointing out inconsistencies in the complainant’s description of events and by providing him with opportunities to clarify these inconsistencies in two hearings before the Federal Agency and one before the Administrative Court of Wiesbaden.

### **Comments by the complainant**

9.1 On 27 March and 10 May 2003, the complainant commented on the State party’s merits submission, arguing that the issue before the Committee is not whether his allegations during the first set of asylum proceedings were credible, but whether knowledge by the Turkish authorities of his participation in the PKK training course would subject him to a personal and foreseeable risk of torture upon return to Turkey.

9.2 The complainant justifies inconsistencies between his initial and later submissions to the German authorities with the preliminary character, under the Asylum Procedure Law of 1982 (replaced in 1992), of his first statement before the immigration police. This, according to the police translator, had to be confined to one handwritten page, outlining the reasons for his asylum application. In his agent’s letter of 7 February 1991, as well as his interview of 5 May 1991, the complainant explained in detail that, after his military service, he became a PKK sympathizer and was arrested together with other PKK activists during a demonstration. The letter also

states that the police tortured him and the others during arrest to extract information on other PKK sympathizers.

9.3 The complainant recalls that complete accuracy can seldom be expected from victims of torture; his statements in the initial set of asylum proceedings should not be used to undermine his credibility with regard to his later claims.

9.4 With regard to the second set of asylum proceedings, the complainant submits that, in its decision of 18 June 2002, the Frankfurt Administrative Court itself recognized his dilemma, as he could not reveal his PKK membership without facing criminal charges in Germany. His expectation to be recognized as a refugee on the basis of his participation in the highway blockade rather than his PKK membership was therefore plausible and in conformity with the predominant jurisprudence at the time of his hearing before the Wiesbaden Administrative Court, under which refugee status was generally granted to Kurdish claimants who participated in PKK-related highway blockades.

9.5 Regarding his failure to continue PKK training after completing the course in the Netherlands, the complainant refers to a letter dated 16 February 2003 from the International Association for Human Rights of the Kurds (IMK), which confirms that the PKK had conducted training activities in the Netherlands from 1989 on, and that participants of training courses were often ordered to wait at their domicile for further instructions, or even exempted from the duty to undergo military training in Turkey.

9.6 While conceding that the Committee normally requires evidence of PKK membership, the complainant argues that the standard of proof must be applied reasonably, taking into consideration exceptional circumstances. He reiterates that the risk of torture that must be established by a complainant must not be one of high probability but rank somewhere between possibility and certainty. He claims that the written statement and a supplementary affidavit of 4 April 2003 by F. S., describing the complainant's introduction as a guerilla candidate at the Halim-Dener-Festival, corroborate his allegations. He concludes that his statements are sufficiently reliable to shift the burden of proof to the State party.

9.7 The complainant cites a number of German court decisions which are said to acknowledge the risk that PKK suspects run of being subjected to torture after deportation to Turkey. This risk was not mitigated by the fact that he failed to take part in the PKK's armed combat. Rather, the Turkish police would try, including through torture, to extract information from him concerning other participants of the training course, PKK officials in Germany and other European countries.

9.8 The complainant reiterates that the Turkish authorities know of his participation in PKK training, as he was a member of a relatively small group of guerilla candidates. He recalls that the Committee has repeatedly held that membership in an oppositional movement can draw the attention of the country of origin to a complainant, placing him at a personal risk of torture.

9.9 By reference to reports of, *inter alia*, the Human Rights Foundation of Turkey, the complainant submits that, despite the efforts of the new Turkish government to

join the European Union, torture is still widespread and systematic in Turkey, in particular with regard to suspected PKK members.

### **State party's additional submission and complainant's comments**

10.1 On 29 October 2003, the State party contests the complainant's credibility and that he faces a risk of torture in Turkey. It submits that the complainant did not describe the severity of the alleged torture to the Federal Agency for the Recognition of Foreign Refugees on 2 May 1991, but only eight and a half years later during the appeal proceedings. This raises fundamental doubts about his credibility, which is further undermined by his inability to explain the extent and prominence of his political activities for the PKK in exile.

10.2 The State party contests that the complainant's expectation to be recognized as a refugee merely on the basis of his conviction for participation in a highway blockage was reasonable. It cites two judgments denying refugee status to asylum seekers in similar circumstances.

10.3 As regards the standard of proof, the State party submits that a complainant should be expected to present the facts of the case in a credible and coherent manner, unlike in the present case.

10.4 Lastly, the State party argues that the human rights situation in Turkey has improved significantly. The Turkish Government has demonstrated its intention to facilitate the unproblematic return of former members or followers of PKK and to respect their fundamental rights by adopting the Act on Reintegration into Society on 29 July 2003. At the same time, the scope of application of Section 169 of the Turkish Criminal Code was reduced considerably, resulting in the discontinuance of numerous criminal proceedings against PKK supporters. In the past three years, not a single is reported where an unsuccessful asylum seeker who returned to Turkey from Germany was tortured "in connection with former activities". The State party indicates that it would monitor the complainant's situation after his return.

11.1 On 30 January 2004, the complainant reiterates that inconsistencies in his first application for asylum are irrelevant for the assessment of his new claims in the second set of proceedings. His second asylum application was based on his participation in a PKK training course as well as the Turkish authorities' knowledge of the same.

11.2 For the complainant, the State party has conceded that training for a PKK leadership role can place a member at danger upon return to Turkey. It should therefore accept his claim that his activities for the PKK and his introduction as a guerilla candidate place him at such risk.

11.3 As to the reasons for the late disclosure of his participation in the PKK training course, the complainant reiterates that, on the basis of the unanimous jurisprudence of the administrative courts in Hessen, where he resides, he could reasonably expect to be recognized as a refugee on account of his participation in the highway blockage. The diverging jurisprudence of administrative courts in other

regions of the State party was either of more recent date or was unknown to him at the material time during the first set of asylum proceedings.

11.4 The complainant argues that, in any event, the late disclosure of these activities does not undermine his credibility on the whole. He invokes the benefit of doubt, arguing that he presented sufficient evidence to substantiate his participation in the PKK training course in a credible and coherent manner.

11.5 Regarding the general human rights situation in Turkey, the complainant submits: (a) that the armed conflict between the Turkish army and PHH/Kadek forces is ongoing; (b) that, according to the *Human Rights Foundation of Turkey*, the number of reported cases of torture has increased in 2003 totaling 770; (c) that, despite the reduction of the maximum length of *incommunicado* detention to four days, torture is still widespread and systematic, although methods such as beating or “Palestinian hanging” have been replaced by more subtle methods which leave no trace, such as solitary confinement or denial of access to clean drinking water and sanitary facilities; (d) that none of the twenty complaints related to alleged cases of torture which had been submitted in 2003 by the “Izmir Bar Association Lawyers’ Group for the Prevention of Torture” were investigated; and (e) that the 2003 Act on Reintegration in Society requires former PKK members to disclose their knowledge about other PKK members and that persons refusing to disclose such information are often subjected to ill-treatment by the authorities.

11.6 The complainant concludes that there are no sufficient safeguards to ensure that he would not be tortured upon return, either during initial interviews by the police or if he refuses to cooperate with the Turkish authorities by disclosing information on the PKK.

11.7 The main proceedings concerning the complainant’s application to reopen asylum proceedings are still pending before the Administrative Court of Frankfurt. In the absence of suspensive effect, these proceedings would not stay his deportation, if the Committee decided to withdraw its request for interim measures. Since it is unlikely for the Frankfurt Administrative Court to order the re-opening of asylum proceedings, after having rejected the complainant’s application for interim relief, the only means to prevent his expulsion would be a final decision of the Committee, with a finding of a violation of article 3.

### **State party further observations**

12.1 On 15 March 2004, the State party confirmed that the Administrative Court of Frankfurt had not taken a decision on the complainant’s appeal against the Federal Agency’s decision of 6 February 2002 not to reopen asylum proceedings and that this appeal has no suspensive effect. Although the complainant was free to formulate another application for interim court relief, such application would have little prospects of success unless it was based on new facts.

12.2 The State party recalls that it has complied with the Committee’s request not to expel the complainant pending a final decision on his complaint, despite the final rejection of his first asylum application, the rejection by the Federal Agency to reopen

asylum proceedings and the dismissal by the Frankfurt Administrative Court of his request for interim relief. Against this background, the State party requests the Committee to adopt a decision on the merits of the complaint at its earliest convenience.

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

13.1 The issue before the Committee is whether the forced return of the author to Turkey would violate the State party's obligation under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

13.2 The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to Turkey. In reaching this decision, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. In this regard, the Committee notes the State party's argument that the Turkish Government acted to improve the human rights situation, including through the enactment of the Reintegration into Society Act in 2003 and the discontinuance of numerous criminal proceedings against PKK supporters. It also notes the complainant's argument recent legislative changes have not reduced the number of reported incidents of torture in Turkey (770 cases in 2003), and further recalls its conclusions and recommendations on the second periodic report of Turkey, in which it expressed concern about "[n]umerous and consistent allegations that torture and other cruel, inhuman or degrading treatment of detainees held in police custody are apparently still widespread in Turkey."<sup>3</sup>

13.3 The aim of the present determination, however, is to establish whether the complainant would be personally at risk of being subjected to torture in Turkey after his return. Even if a consistent pattern of gross, flagrant or mass violations of human rights existed in Turkey, such existence would not as such constitute a sufficient ground for determining that the complainant would be in danger of being subjected to torture after his return to that country; specific grounds must exist indicating that he would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.

13.4 In the present case, the Committee notes that the State party draws attention to a lack of evidence about the complainant's participation in a PKK training camp in the Netherlands in 1994, and to his failure to raise this claim until late in the asylum proceedings. It equally notes the complainant's explanations relating to the difficulty of presenting witnesses from the PKK, his fear to reveal his claimed PKK membership, punishable under German law, as well as the documentation and testimony he submitted in support of his claims.

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<sup>3</sup> Committee Against Torture, 30<sup>th</sup> Sess. (28 April-16 May 2003), Conclusions and recommendations of the Committee Against Torture: Turkey, UN Doc. CAT/C/CR/30/5, 27 May 2003, at para. 5 (a).

13.5 On the burden of proof, the Committee recalls that it is normally for the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory and suspicion. Although the risk does not have to meet the test of being highly probable, the Committee considers that the complainant has not provided sufficiently reliable evidence which would justify a shift of the burden of proof to the State party. In particular, it observes that the affidavit by F. S. merely corroborates the complainant's claim that he was introduced as a "guerilla candidate" at the Halim-Dener-Festival, without proving this claim, his participation in the training camp or PKK membership. Similarly, the letter dated 16 February 2003 of the International Association for Human Rights of the Kurds, while stating that it was not implausible that the complainant had temporarily been exempted from military PKK training in Turkey, falls short of proving these claims. In the absence of a *prima facie* case for his participation in the PKK training camp, the Committee concludes that the complainant cannot reasonably claim the benefit of the doubt regarding these claims. Moreover, the Committee observes that it is not competent to pronounce itself on the standard of proof applied by German tribunals.

13.6 With regard to the complainant's conviction for participation in a highway blockade by PKK sympathizers in March 1994, the Committee considers that, even if the Turkish authorities knew about these events, such participation does not amount to the type of activity which would appear to make the complainant particularly vulnerable to the risk of being subjected to torture upon return to Turkey.

13.7 Regarding the complainant's allegation that he was tortured during police arrest in Mazgirt (Turkey), the Committee observes that these allegations refer to events dating from 1989 and thus to events which did not occur in the recent past.<sup>4</sup> In addition, the complainant has not submitted any medical evidence which would confirm possible after-effects or otherwise support his claim that he was tortured by Turkish police.

13.8 The Committee emphasizes that considerable weight must be attached to the findings of fact by the German authorities and courts and notes that proceedings are still pending before the Frankfurt Administrative Court with regard to his application to reopen asylum proceedings. However, taking into account that the Higher Administrative Court of Hessen dismissed the complainant's first asylum application by a final decision, the complainant's fresh claims relating to his alleged participation in a PKK training camp have not been sufficiently corroborated (see para. 13.5) to justify further postponing the Committee's decision on his complaint, pending the outcome of the proceedings before the Frankfurt Administrative Court. In this regard, the Committee notes that both parties have requested the Committee to make a final determination on the complaint (see paras. 11.7 and 12.2) and emphasizes that the complainant exhausted domestic remedies in the proceedings for interim relief and that only this part of the second set of asylum proceedings had suspensive effect.

13.9. The Committee concludes that, in the specific circumstances of the case, the complainant has failed to establish a foreseeable, real and personal risk of being

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<sup>4</sup> See CAT, General Comment 1: Implementation of article 3 of the Convention in the context of article 22, 21 November 1997, at para. 8 (b).

tortured if he were to be returned to Turkey. The Committee welcomes the State party's readiness to monitor the complainant's situation following his return to Turkey and requests it to keep the Committee informed about said situation.

14. 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 State party's decision to return the complainant to Turkey does 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.]