

**X.Y. (name deleted) v. Switzerland,
Communication No. 128/1999,
U.N. Doc. CAT/C/26/D/128/1999 (2001).**

Communication No. 128/1999

Submitted by: X.Y. (name deleted) [represented by counsel]

Alleged victim: The author

State party: Switzerland

Date of the communication: 2 March 1999

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

Meeting on 15 May 2001,

Having concluded its consideration of communication No. 128/1999, 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 all information made available by the author of the communication and the State party,

Adopts the following decision:

1.1 The author of the communication, Mr. X.Y., born on 20 March 1960, is a Syrian national of Kurdish origin. He currently resides in Switzerland, where he applied for political asylum. His application was rejected, and he maintains that his forcible repatriation to the Syrian Arab Republic would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He has asked the Committee to take emergency measures, since at the time he submitted his communication he was liable to imminent expulsion. He is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee transmitted the communication to the State party on 12 March 1999. At the same time the State party was requested, pursuant to rule 108, paragraph 9, of the Committee's rules of procedure, not to expel the author to the Syrian Arab Republic while his communication was under consideration by the Committee. In a submission dated 12 May 1999 the State party informed the Committee that steps had been taken to ensure that the author was not returned to the Syrian Arab Republic while his case was pending before the Committee.

The facts as submitted by the author

2.1 The author claims that he has been a member of the Kurdistan Democratic Party in Iraq (KDP-Iraq) (1) since 1980. As such, he allegedly participated in various activities of that organization, chiefly by transporting funds to support Kurds in Iraq and by distributing pamphlets deploring the situation of the Syrian Kurds, who had been stripped of their nationality by the Syrian State.

2.2 The author claims that he was twice arrested by the Syrian security forces. The first time, during the Iraqi invasion of Kuwait, he was in possession of funds intended for Iraq. He was freed after 18 days, only after a large sum of money had been paid by his family for his release. The second arrest reportedly took place in 1993. On that occasion, the author was held for 96 days in Mezze prison near Damascus and was reportedly tortured. He was released only after swearing to forgo any political activities in the future. His family again paid approximately 6,000 United States dollars to secure his release.

2.3 Subsequently, however, the author continued his political activities. In March 1995 he was warned by a family member who had reportedly received information from the security services that he was going to be arrested once again. The author then decided to flee the country and crossed the border into Lebanon illegally. He left Lebanon by boat in March, but it is not clear when he arrived in Europe. Nevertheless, on 10 April 1995 he applied for political asylum in Switzerland, largely on the basis of his alleged persecution in the Syrian Arab Republic.

2.4 The author's request for asylum was turned down on 28 May 1996 by the Federal Office for Refugees as being implausible, and 15 August 1996 was set as the deadline for the author's departure from Swiss territory. Subsequently the author appealed against that

decision to the Swiss Appeal Commission on Asylum Matters, supporting his appeal with a medical report certifying that he might have been tortured in the past. The Appeal Commission dismissed the appeal on 8 July 1996, declaring it inadmissible on the grounds that the deadline for submission of an appeal had not been met.

2.5 On 8 August 1996 the author submitted a request for reconsideration of his case (an extraordinary recourse allowing for review of decisions that had already been executed) by the Federal Office for Refugees. The applicant specifically requested that it should be noted that execution of his expulsion from Switzerland constituted a violation of the principle of non-refoulement set out in the Convention on the Status of Refugees (art. 33), the prohibition of torture contained in article 3 of the European Convention on Human Rights and articles 2 and 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Federal Office for Refugees rejected the request for reconsideration on 9 August 1996, maintaining that the applicant had not presented any new facts or evidence but was merely seeking to have the facts set out in his initial appeal considered in a different light. (The Federal Office for Refugees also ordered the immediate execution of the applicant's expulsion from Switzerland, on the grounds that it was not contrary to Switzerland's legislative or treaty obligations.)

2.6 On 8 September 1996 the author appealed against the decision of the Federal Office for Refugees. In the light of the new appeal, in which the author sought to prove that execution of his expulsion was wrongful under the Convention relating to the Status of Refugees and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Swiss Appeal Commission on Asylum Matters suspended execution of the expulsion and authorized the author to remain in Switzerland pending the outcome of his appeal. The Federal Office for Refugees was consulted in the context of that appeal, and on 29 April 1997 it upheld its position that the applicant's expulsion to the Syrian Arab Republic would place him in physical danger. As part of the same appeal, the author's counsel maintained his conclusions on 20 May 1997.

2.7 The appeal was considered on the merits and rejected by a decision of the Appeals Commission dated 18 June 1998; the Commission held that the applicant had not provided grounds for reconsideration of his case and that he faced no real risk of torture should he be sent back to the Syrian Arab Republic. Following that decision the author was invited to leave Swiss territory by 15 February 1999.

Merits of the complaint

3. The author bases his complaint on the allegation that if he is sent back to the Syrian Arab Republic by Switzerland he risks being subjected to cruel, inhuman and degrading treatment; specifically, he risks being tortured by the authorities. He also believes that, if sent back, he would risk torture because he left the Syrian Arab Republic illegally. In the author's view, it is clear that a consistent pattern of gross, flagrant and massive violations of human rights exists in that country which, under article 3, paragraph 2, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, constitute circumstances that a State party must take into account when deciding to expel someone. Consequently, the author believes that Switzerland should not expel him, or else risk violating the Convention.

Observations by the State party on admissibility

4.1 In its note dated 12 May 1999, the State party describes the various stages of the process followed by the author in seeking asylum. It specifically faults the author for not meeting the deadlines for appealing against the decision by the Federal Office for Refugees not to grant political asylum. The State party claims that failure to meet the deadline for filing an appeal made it necessary for the Swiss Appeal Commission on Asylum Matters to conduct an extraordinary review of the case, based solely on the existing case file, in order to determine whether the applicant faced an obvious risk of persecution or treatment that violated human rights in his country of origin. That review, according to the State party, was narrower in scope than the review that the Appeal Commission would have conducted had the appeal been filed through regular channels. Nevertheless, the State party declares that it does not contest the admissibility of the communication.

The author's comments on the State party's observations on admissibility

5.1 The author addresses his comments to the observations made by the State party on 28 June 1999. He acknowledges that the review process focused exclusively on whether Switzerland had complied with its international obligations and not on Swiss legislation governing asylum. The author refers to the jurisprudence of the Swiss Appeal Commission on Asylum Matters (JICRA 1995, No. 5), which states that "an applicant for asylum had the right, independently of formal questions of deadlines, to have the question of whether his or

her expulsion was executed in accordance with the principle of non-refoulement (article 33 of the Convention relating to the Status of Refugees) or the prohibition of torture and other inhuman treatment (article 3 of the European Convention on Human Rights or article 3 of the Convention against Torture) considered at any time. These principles are in fact held to be absolute, and the expiry of a procedural deadline cannot be used to justify their violation".

5.2 Accordingly, the author declares that the decision issued by the Swiss Appeal Commission on Asylum Matters on 18 January 1999, from the standpoint of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concerned the question of the risk of torture he faced if he was sent back to the Syrian Arab Republic. This proves, in the author's view, that the question on which the Committee was being asked to rule had already been considered by the competent national authority.

Observations by the State party on the merits

6.1 The State party transmitted its remarks on the merits of the communication on 13 September 1999. It reviewed the procedure followed in the case and stated that with regard to the final decision - that taken by the Appeal Commission on 18 January 1999 - the Appeal Commission had conducted a review that was narrower in scope than would have been the case had the author followed the ordinary appeal procedures.

6.2 The State party contends that the communication contains no new information beyond that considered when the case was dealt with through national procedures.

6.3 Secondly, the State party points out that the author had not provided any evidence to support several of his allegations, particularly with regard to the statement that he had been detained in a prison in Damascus for 96 hours for having criticized the regime and that he had been released only after his family had paid money and he had signed a statement renouncing politics. The author's release was not documented. The State party also maintains that the act of distributing anti-Government pamphlets ought to have resulted in a heavy prison sentence. Given that the payment of money by his family was not proved and that the author had been released after only three months of detention, the State party believes that this can be taken to indicate the unlikelihood of the author's alleged KDP activities.

6.4 The State party then proceeds to review the overall human rights situation in the Syrian Arab Republic and comment on several of the documents submitted by the author with regard to the situation of Kurds in that country. While giving credence to some of the information provided, it recalls the Committee's practice, which holds that the existence in a country of gross, flagrant or massive violations of human rights does not in itself constitute grounds for stating that a person risks being subjected to torture upon his or her return to that country.

6.5 Next the State party considers the author's personal situation with a view to confirming whether there were serious grounds for admitting that he was likely to be subjected to human rights violations in the Syrian Arab Republic. According to the State party, KDP-Iraq was not an illegal organization in Iraq; moreover, it appears to have enjoyed the support of the authorities. According to various sources, the Syrian security forces persecuted KDP activists only if the security of the Syrian State was threatened by their actions - for example, activities hostile to the Syrian regime, which does not seem to apply in the present case. The State party concludes that under these circumstances it can be concluded that the author ran no special risk of being subjected to treatment in violation of article 3 of the Convention if he returned to the Syrian Arab Republic, particularly as the alleged arrests dated back six and eight years.

6.6 The State party maintains that the documents from KARK-Switzerland (2) and KDP-Europe submitted by the author certifying that he was a member of KDP-Iraq cannot in themselves prove that the author was likely to be subjected to prosecution or treatment that contravened article 3 of the Convention if he was sent back to his country.

6.7 According to the State party, the author never reported that he had been subjected to torture, either during the hearings at the transit centre or to the Federal Office for Refugees. The author's counsel apparently reproached the authorities with failing to question the petitioner on that specific point. The State party replies that it could "legitimately be expected that a person who subsequently claimed he had to leave his country for fear of being subjected again to torture would at least mention this circumstance when questioned in the host country about the reasons for applying for asylum".

6.8 The State party queries the fact that the author only produced a medical certificate dated 20 August 1996 (3) stating that he could have been subjected to torture in the past when he appeared before

the Swiss Appeal Commission on Asylum Matters and not when filing his initial application for asylum. The State expresses surprise that a seeker of asylum on grounds of torture waited to have his application turned down before producing a medical certificate, whose evidential status was, moreover, compromised by the fact that three years had passed since the alleged facts. The State adds that, even if one considered the author's allegation that he had been subjected to torture in the past to be well founded, it did not follow that he ran a foreseeable personal and present risk of being subjected to torture again if he was returned to the Syrian Arab Republic. (4)

6.9 With regard to the author's fears of being exposed to inhuman and degrading treatment for having left Syrian territory illegally, the State party notes that the author's allegations that he had left the Syrian Arab Republic under threat of reprisals by the Syrian authorities lacked credibility. There is no evidence to back the claim that the author's uncle had been warned of his imminent arrest. However, evidence that the petitioner was under threat at the time of leaving his country is, the State party notes, a prerequisite for the granting of asylum. Moreover, the author has not furnished proof of having left Syrian territory illegally. And even if he had, the penalty for such an offence would be a fine or term of imprisonment, which cannot be considered to be a breach of article 3 of the Convention.

6.10 With regard to the risks incurred by the author for having applied for asylum in Switzerland, the State party considers that the Syrian authorities would not subject him to inhuman or degrading treatment solely on that account, since they are aware of the fact that many of their nationals try in this way to obtain residency permits in Europe. The State has no concrete evidence to the effect that asylum-seekers returned to the Syrian Arab Republic are subjected to treatment that violates article 3 of the Convention.

6.11 Lastly, the State party considers the author's allegation that he would risk persecution because of his close links in Switzerland with movements that opposed the Syrian regime. The State party notes that the author's statements on the subject are very vague and insubstantial, indicating that the activities in question were on a very limited scale; otherwise, the author would have described them in detail to the Swiss asylum authorities in his own interest.

6.12 The State party concludes that, under the circumstances and following careful scrutiny of the case, substantial grounds do not exist for believing that the author would be in danger of being subjected to torture if he was returned to the Syrian Arab Republic. The State

party refers to the Committee's general comment of 21 November 1997 in support of its argument that the communication does not contain the minimum factual basis needed to back up the author's allegations. The State requests the Committee to find that the return of the author to his country of origin would not constitute a violation of Switzerland's international obligations.

The author's comments on the State party's observations

7.1 The author submitted his comments on 14 January 2000. With regard to the lack of evidence of arrest and torture, he states that the practical difficulties involved in gathering such evidence have been overlooked. Any attempt to obtain such documents at present would place his family and those connected with him in danger. He claims not to have received any document on his release that could serve as proof of his imprisonment.

7.2 The author draws attention to a number of reports concerning the situation of the Kurds in the Syrian Arab Republic. In particular, he claims that, according to the Amnesty International Report 1999, although some Kurds arrested in 1997 were released in 1999, others were still in prison for distributing pamphlets hostile to the regime.

7.3 With regard to the delay in making the allegation of torture, the author claims that the Committee itself has repeatedly emphasized that it is quite understandable for a torture victim initially to remain silent about his sufferings. As to the certificate containing the findings of torture, the author argues that the Committee does not, in any case, require absolute proof of a risk of future persecution but is satisfied with substantial grounds for fearing a violation of the Convention. The medical report meets the criteria usually required and was issued by an institution of the highest standing (Hôpitaux universitaires de Genève), so that no doubt can be cast on the conclusions of the medical examination.

7.4 With regard to his illegal departure from the Syrian Arab Republic, the author states that he agrees with the State party's comment about the consequences of illegal departure in most cases. In his own case, however, given his political activities, his Kurdish origin and the circumstances of his departure, it should be borne in mind that his illegal departure could be used against him and lead to assaults on his person, in contravention of article 3 of the Convention.

Issues and proceedings before the Committee

8.1 Before considering any of the allegations in a communication, the Committee against Torture must decide whether or not the communication is admissible under article 22 of the Convention. It 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. It notes also that all domestic remedies have been exhausted and that the State party has not contested the admissibility of the communication. It therefore considers that the communication is admissible. As both the State party and the author have provided observations on the merits of the communication, the Committee proceeds to consider those merits.

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

8.3 The Committee must decide, pursuant to article 3, paragraph 1, whether there are substantial grounds for believing that the author would be in danger of being subjected to torture upon return to the Syrian Arab Republic. 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. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he or she would return. The existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to the country. There must be other grounds indicating that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances.

8.4 The Committee recalls its general comment on the implementation of article 3, which reads: "Bearing in mind that the State party and the Committee are obliged to assess whether there are substantial grounds for believing that the author would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, 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, para. 6).

8.5 The Committee expresses doubts about the credibility of the author's presentation of the facts, since he did not invoke his allegations of torture or the medical certificate attesting to the possibility of his having been tortured until after his initial application for political asylum had been rejected (paras. 6.7 and 6.8 of the present decision).

8.6 The Committee also takes into consideration the fact that the State party has undertaken an examination of the risks of torture faced by the author, on the basis of all the information submitted. The Committee considers that the author has not provided it with sufficient evidence to enable it to consider that he is confronted with a foreseeable, real and personal risk of being subjected to torture in the event of expulsion to his country of origin.

9. Consequently, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the decision of the State party to return the author to the Syrian Arab Republic constitutes no violation of article 3 of the Convention.

Notes

1. The file contains a document dated 12 July 1995 certifying the author's membership in KDP-Europe, based in London; the document states that the author, whose name is misspelled, was a party member and had "taken part in the resistance movement and in the struggle for peace and democracy".

2. KARK appears to be a Kurdish academic and intellectual society. The file contains the association's statutes and written testimony from Mr. A. M., a resident of Lausanne, who on 6 March 1996 said that he had visited the Syrian Arab Republic in July 1991 in order to collect material on the human rights situation of the Kurds. He states that to that end he sought the help of KDP-Iraq local offices. He was accompanied on his travels by the author (whose name is again misspelled), who had been introduced to him as someone who was very active in the KDP-Iraq movement and who had therefore been followed and arrested several times by the Syrian security services. The author had told him that because of his membership in KDP-Iraq, his life and the lives of his family members were in danger, and that

he could no longer remain in the country because he was constantly being followed by the secret service.

3. The certificate was drawn up by the Hôpitaux universitaires de Genève on 20 August 1996 at the request of the author's counsel. It is based on two interviews with the author and sets forth the facts as presented by him with details of the acts of torture to which he was allegedly subjected. With regard to his physical condition, the doctors describe it as being within the bounds of normality but mention a number of scars on his body (a fine bow-shaped scar at the base of the first toe of his right foot, three round scars on his left hand and wrist, and a star-shaped scar on his left cheek). With regard to his psychological condition, they say that the author was cooperative, with sound temporal and spatial orientation and without major memory disorders, but that he had trouble remembering specific dates accurately. They note a tendency towards dissociation when scenes of violence were mentioned. A reading of the medical report provoked considerable nervousness and agitation. The doctors consider that the author's description of the scenes of torture are compatible with what is known about the treatment of opponents of the regime in Syrian prisons, especially Mezze prison (see Amnesty International Report 1994, pp. 319-322). The scars correspond to his description of the torture he allegedly suffered, and the lesions are probably the sequelae of torture. Taking this and his psychological condition into account, the doctors diagnose post-traumatic stress syndrome (PTSS), a characteristic disorder of torture victims. The doctors go on to state that "we therefore conclude that there has been a flagrant violation of human rights. Under these circumstances and in view of the fact that the Kurdish issue in Syria has not been settled, the return of [the author] to his country would condemn him to renewed acts of violence ...". The doctors further conclude that the PTSS is in remission for the time being because the author feels safe in Switzerland. His refoulement would probably lead to a return of the symptoms, whose seriousness should not be underestimated. Moreover, as far as treatment is concerned, the doctors state that, to their knowledge, the type of medical care needed to stabilize the author's condition (physiotherapy and supportive psychotherapy) do not exist in the Syrian Arab Republic.

4. In this connection, the State party refers to the Committee's jurisprudence, in particular communications I.A.O. v. Sweden (65/1997) and X, Y and Z v. Sweden (61/1996), in which the Committee, while finding that medical certificates established that the authors had been subjected to torture, nevertheless considered that it

had not been shown that the authors would be in danger of being subjected to torture if they were returned.