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

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

Decision

Communication No. 322/2007

Submitted by:	Eveline Njamba and her daughter Kathy Balikosa (represented by counsel, Mr. Manuel Boti Flid)
Alleged victim:	The complainants
State party:	Sweden
Date of the complaint:	11 June 2007 (initial submission)
Admissibility decision:	CAT/C/41/D/322/2007
Date of present decision:	14 May 2010
Subject matter:	Deportation of the complainants from Sweden to Democratic Republic of the Congo
Procedural issues:	None
Substantive issues:	Deportation of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture.
Article of the Convention:	3 and 16

[Annex]

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Annex

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

concerning

Communication No. 322/2007

Submitted by:	Eveline Njamba and her daughter Kathy Balikosa (represented by counsel, Manuel Boti Flid)
Alleged victim:	The complainants
State party:	Sweden
Date of the complaint:	11 June 2007 (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 14 May 2010,

Having concluded its consideration of complaint No. 322/2007, submitted to the Committee against Torture by Eveline Njamba and her daughter Kathy Balikosa under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following:

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

Decision

1.1 The complainants are Eveline Njamba and her daughter Kathy Balikosa, nationals of the Democratic Republic of the Congo (DRC) and born on 10 April 1975 and 4 March 2001 respectively. They are the subject of an order for deportation from Sweden to the DRC. While they do not invoke any particular provision of the Convention, their complaint appears to raise issues under article 3 and possibly article 16. They are represented by counsel, Mr. Manuel Boti Flid.

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1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 14 June 2007. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainants to the DRC while their complaint is being considered. On the same day, the State party acceded to the request.

The facts as presented by the complainants

2.1 The complainants are from Gemena in the province of Equateur. In 2004, they moved to Goma where Ms. Njamba's husband had started a small business. At that time, her husband's brother was a commander in the Congolese military. In Goma, Ms. Njamba discovered that the small business served as a cover for her husband's real activities which involved providing support for the rebels in the Equateur province and Goma. Her husband had been implicated in acts of treason and espionage on behalf of rebels since 1998, including purchasing of arms for rebels in Equateur. For this reason, many families wanted her husband dead and had threatened him. Ms. Njamba knew about her husband's and her brother-in-law's activities and was thus considered by many to have been their accomplice and involved herself in pro-rebel activities. The police would not protect her. On the contrary, they had helped expose her husband's activities to the families seeking revenge against him.

2.2 In December 2004, while the complainants were in church, fighting broke out. When they returned home after hiding for a few days in other people's homes, Ms. Njamba's husband and three of her children had disappeared. Ms. Njamba suspects that they were killed by Congolese militia. She believes that she and her daughter survived only because they were hiding in a different place. During the fighting, the complainants witnessed executions, rapes and other acts of torture. Ms. Njamba's brother-in-law was killed for suspected treason.

2.3 Following this incident, the complainants fled the DRC and arrived in Sweden on 29 March 2005. They applied for asylum on the same day. On 21 March 2006, their application was rejected by the Migration Board which concluded that the circumstances referred to by the complainants were not sufficient to entitle them to refugee status. The Board considered that there was no personal threat to the complainants' lives. Moreover, it considered that the complainants were from the province of Equateur where they could return. The complainants appealed against this decision submitting that Ms Njamba was HIV positive and that no medical treatment was available in the DRC.

2.4 On 1 September 2006, the complainants' appeal was rejected by the Migration Court. It shared the conclusions of the Migration Board that the circumstances invoked by the complainants were not sufficient to show that they were in need of protection. With regard to Ms Njamba's health condition, the Court stated that it was not considered to be of such a character as to amount to the exceptionally distressing circumstances that are required to apply Chapter 5, Section 6, of the 2005 Aliens Act. On 10 October 2006, the complainants lodged a further appeal before the Migration Court of Appeal, but leave to appeal was denied on 8 January 2007.

2.5 In a request to the Migration Board on 21 March 2007, the complainants called for a new examination of their application under Chapter 12, Section 19, of the 2005 Aliens Act. They added to their request that they would be in danger if they were to be sent back to the DRC because people who were returned from Europe were automatically arrested and interrogated upon arrival. On 30 May 2007, the Migration Board decided not to stay the execution of the expulsion order. On 7 June 2007, it also decided not to re-examine the complainants' application.

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The complaint

3.1 The complainants claim that they would be victims of a violation of the Convention if they were deported to the DRC where they fear they will be subjected to torture. Ms Njamba believes that, if returned, she would be tortured and/or killed by the security services, or in revenge by the families who felt betrayed by her, her husband, and her brother-in-law. The complainants also allege that, in practice, the secret police detain and interrogate everyone returned to the country and often tortures, arbitrarily imprisons, and/or kills them. In addition, they allege that the security situation in the DRC is precarious and that the Government is thus unable to guarantee protection of their human rights.

3.2 Ms Njamba has been confirmed as HIV-positive by doctors in Sweden.[1] She claims that, given the lack or rarity of treatment in the DRC, returning her there would result in her death from AIDS. Upon return to the DRC, she would face a "painful death" from the disease and suffering due to the knowledge that her young daughter would grow up an orphan.

3.3 The complainants claim to have exhausted domestic remedies, as all of their appeals have been rejected.

State party's observations on admissibility and merits

4.1 On 11 December 2007, the State party filed observations on the admissibility and the merits of the complaint. It acknowledges that all available domestic remedies have been exhausted. Nevertheless, it maintains that the communication should be considered inadmissible in accordance with article 22, paragraph 2, of the Convention. It recalls that article 3 is only applicable if the complainant is in danger of being subjected to torture as defined in article 1. Accordingly, since any possible deterioration of Ms. Njamba's health after deportation cannot be considered to constitute torture as defined by article 1, the State party contends that the issue of whether the execution of the expulsion order would constitute a violation of the Convention in view of Ms. Njamba having been diagnosed as HIV-positive falls outside the scope of article 3. Moreover, the State party maintains that the complainants' claim that they will be subjected to treatment in breach of article 3 fails to rise to the basic level of substantiation required for purposes of admissibility. It submits that the complaint is manifestly unfounded.[2]

[1] An affidavit addressed to the Committee is attached from a Swedish nurse specializing in HIV treatment, who worked 11 years in the DRC as a missionary. She notes that she personally knows of several persons returned to the DRC, who were detained without process upon arrival by DRC security forces and were forced to bribe their way out of prison. She predicts that Ms Njamba's health would deteriorate rapidly upon arrival although she does not currently require HIV medication; this prediction she ascribes to conditions in the DRC as well as Ms Njamba's precarious conditions were she to be returned without money or contacts and having to resort to her ominous job as a sex worker She notes that, "it is a known fact that the time span between HIV virus infection to fully blown Aids is significantly shorter in Africa than in Sweden," and that she would not receive retroviral medication in the DRC.

[2] See for instance Communication No. 216/2002, *H.I.A. v. Sweden*, Views adopted on 2 May 2003, para.6.2.

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4.2 The State party concedes that the complaint may raise issues under article 16 of the Convention.[3] However, it recalls the Committee's prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16.[4] It maintains that no such factors have been revealed by the complainants in their case. Accordingly, the complaint, as far as it relates to article 16, should be declared inadmissible *ratione materiae*. If the Committee were to find that article 16 applies to the issue of the implementation of the complainants' expulsion, the State party maintains that their complaint fails to rise to the basic level of substantiation required for purposes of admissibility. The complaint is considered manifestly unfounded in this respect too.

4.3 On the merits, the State party notes that there have been positive developments towards democracy and stability in the DRC. In particular, the first democratic election in 46 years was held in 2006. The DRC has ratified most major international human rights instruments. While the State party concedes that human rights abuses are still commonly reported in the country, they happen mostly in areas not controlled by the Government, primarily in the eastern parts of the country. The State party thus maintains that the current situation in the DRC does not appear to be such that a general need to protect asylum seekers from that country exists.

4.4 As for the personal risk of the complainants of being subjected to torture in the DRC, the State party notes that the national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum seeker and to estimate the credibility of his or her claims. In the present case, the asylum interview lasted two hours and the Migration Board thus had sufficient information, which, taken together with the facts and documentation in the case file, ensured that it had a solid basis for its assessment of the complainants' need for protection in Sweden. The State party relies on the decisions of the Migration Board and the Migration Court and on the reasoning set out in their respective decisions.

4.5 Considering the complainants' claim that their expulsion would constitute a violation of the Convention because of the hostilities in the DRC, the State party disputes that this claim has been substantiated. While the complainants submit that they witnessed terrible human rights abuses, they have not been assaulted or abused themselves. Accordingly, their statements about risks of torture are general in nature and based only on the general country situation. Nothing in these statements demonstrates that there is any foreseeable, real and personal risk of the complainants being subjected to torture. Furthermore, the State party notes that the complainants will not be returned to the eastern parts of the DRC, but to the province of Equateur in the western parts of the country where the security and human rights situation are far better. It recalls that the complainants were born in that province and were registered as living there when leaving the country. While the complainants had moved to Goma before leaving the country, this was only for a short period of time. The complainants can avoid any alleged risk of torture due to possible hostilities in the eastern part of the DRC by moving back to the Equateur province.

[3] See for instance Communication No. 220/2002, *R.D. v. Sweden*, Views adopted on 2 May 2005; and Communication No. 221/2002, *M.M.K. v. Sweden*, Views adopted on 3 May 2005.

[4] See for instance Communication No. 49/1996, *S.V. v. Canada*, Views adopted on 15 May 2001, para.9.9; Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.5; Communication No. 220/2002, *R.D. v. Sweden*, Views adopted on 2 May 2005, para.7.2; and Communication No. 221/2002, *M.M.K. v. Sweden*, Views adopted on 3 May 2005, para.7.3.

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4.6. Considering the complainants' claim that their forced return to the DRC would put them at risk of being arrested, interrogated, imprisoned and possibly being subjected to torture and then killed by the security services, the State party submits that this claim is equally general and that the complainants have not presented any circumstances which would explain why they face a personal risk. While the complainants submit that persons forcibly returned to the DRC are subjected to abuses, the State party does not find support for this contention in the generally available information on the country. Examples of interrogations upon return to the DRC exist, but no further abuses are reported to have been committed by the authorities in these cases. Moreover, the State party notes that the complainants came to mention these specific circumstances for the first time in their new application to the Migration Board, as late as 21 March 2007.

4.7 With regard to a possible claim under article 16, the State party invokes the Committee's prior jurisprudence and noted that no violation of this provision was ever found in cases regarding expulsion. Invoking the case law of the European Court of Human Rights, the State party notes that the Court has only found a violation of article 3 of the European Convention of Human Rights in very exceptional circumstances when the person to be expelled had reached the advanced stages of AIDS and would face a lack of treatment as well as a lack of social and moral support in the receiving country.[5] In the present case, the State party submits that no such exceptional circumstances exist. Indeed, anti-retroviral medicines are available, in principle free of charge. Considering Ms. Njamba's health condition, the State party notes that she has not reached the stage of AIDS, nor does she suffer from any HIV-related illnesses. Her medical certificate shows that she will be in no need of medication within the next few years.

Complainants' comments on the State party's observations

5.1 On 20 February 2008, the complainants submitted that they did not have any comments on the State party's observations.

5.2 On 24 June 2008, the complainants reiterated that the whereabouts of Ms. Njamba's husband are still unknown and that they believe him to be dead. They explain that they did not want to mention his political activities in the asylum procedure because they were traumatised by the events they had witnessed. Moreover, Ms. Njamba did not want to put her husband in danger by revealing details of his political activities to the asylum authorities.

Additional comments by the State party

6.1 On 8 October 2008, the State party points out that the new circumstances concerning the disappearance of the complainants' family members had never been presented to the domestic migration authorities, but were introduced for the first time in their complaint to the Committee, i.e. more than two years after their initial asylum application. The complainants did not invoke these circumstances before the Migration Court in an appeal against the Migration Board's decision. The State party recalls that in cases where the asylum seeker wishes to invoke new circumstances as ground for their asylum application, there is a domestic remedy available to them under Chapter 12, Sections 18 and 19 in the 2005 Aliens Act. It notes that the complainants did not appeal against the Migration Board's decision not to grant them a residence permit. In their appeal, they could have invoked the new circumstances they invoked before the Committee. Since they have not

[5] See European Court of Human Rights, *D. v. United Kingdom*, judgment of 2 May 1997, Reports of Judgments and Decisions, 1997-III, p.794, para.54.

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done so, the State party considers that the communication should be declared inadmissible for failure to exhaust domestic remedies.

6.2 In any event, the State party argues that the complainants' assertion that they are at risk of being treated in a manner that would amount to a breach of the Convention on account of their husband/father's activities in Goma fails to rise to the level of substantiation required for purposes of admissibility. It thus submits that the communication is manifestly unfounded.[6] In particular, it considers that there are strong reasons to question the veracity of the new allegations and that presenting before the Committee a whole new account of the events in the DRC, which has not been presented before the domestic authorities, calls for close scrutiny of that account. This new account of events has to be substantiated by more facts and details. In any case, the account of facts presented by the complainants is contradictory and confusing even in its lack of details. Moreover, the State party finds it remarkable that the complainants mentioned none of these new circumstances in their original complaint to the Committee. At the time of submission of their complaint, the complainants did not even try to explain why these new circumstances had not previously been submitted. It was only in June 2008 that they provided some explanations as to why they had not previously presented these circumstances (see para.5.2 above). With regard to these explanations, the State party wishes to point out that at the initial stages of the domestic proceedings before the Migration Board, Ms. Njamba was informed of the consequences of deliberately stating incorrect information and of excluding information in the case. She was also informed that the officials of the Migration Board as well as the interpreter and the legal counsel were under an obligation of secrecy. Furthermore, the reasons put forward by the complainants still do not explain why the new circumstances were not invoked before the domestic authorities, e.g. in an appeal of the Migration Board's decision of 7 July 2007.

6.3 The State recalls that article 3 of the Convention is only applicable if the person is in danger of being subjected to torture as defined in article 1 of the Convention.7 It also recalls that the Committee has emphasised in its jurisprudence that the issue of whether a State party is under an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent of acquiescence of the Government, falls outside the scope of article 3 of the Convention.8 As the recent claim by the complainants seems to be that they risk being killed by private individuals as revenge for the activities allegedly carried out by their husband/father, this issue in any event falls outside the scope of article 3 of the Convention.

6.4 Concerning the alleged disappearance of the complainants' family members, the State party reiterates that before the national migration authorities, Ms. Njamba neither claimed that her husband was working undercover for the rebels nor that he would be killed for that reason. The reasons the complainants submitted in their asylum claim were the general conflict in the DRC and Ms. Njamba's HIV positive status. For the examination of these issues, the alleged disappearance of the rest of the family members was not relevant. Furthermore, the issue of availability of family support upon return was not relevant for the determination of whether Ms. Njamba could return to the DRC despite the fact that she had been diagnosed as HIV positive. It was not relevant because her health was considered to be good and there is adequate HIV treatment in the DRC. Even so, the Migration Court of Appeal examined the issue of the alleged disappearance of the family members. In its judgment, it held that Ms. Njamba's husband and other children were still somewhere in the

[6] See for instance Communication No. 216/2002, *H.I.A. v. Sweden*, Views adopted on 2 May 2003, para.6.2.
[7] See for instance Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.5.
[8] *Ibid.*

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DRC. The State party adds that when applying for asylum, Ms. Njamba stated a name and address of a maternal uncle in the Equateur province. In the domestic proceedings, she also mentioned that her husband's brother was alive and has been known to help them in the past. It is thus surprising that she now claims before the Committee that he has been killed due to suspicions of treason. The State party notes that the International Committee of the Red Cross offers assistance to trace family members dispersed by the conflict in the DRC, but that the complainants do not seem to have used this service, although it is available from Sweden. The State party therefore maintains that it still cannot be excluded that Ms. Njamba's husband and other children are still alive in the DRC today.

6.5 Concerning Ms. Njamba's HIV diagnosis, the State party recalls that anti-retroviral (ARV) medicines are available, in principle free of charge, in all eleven of the provincial capitals of the DRC, which have all joined the national HIV programme. Ms. Njamba would therefore have access to ARV therapy upon return to the Equateur province from where she and her daughter originate. The State party provides details about the availability of health care in general in the DRC. It notes that, according to UNAIDS, ARV therapy coverage over the world, including in Africa, has undergone remarkable improvements in the last few years. With regard to HIV treatment in the DRC specifically, the State party provides details about the availability of such treatment in the various regions of the DRC. In particular, it notes that Médecins sans Frontières (MSF) runs HIV/AIDS projects in, inter alia, Kinshasa, Goma in North-Kivu and Bukavu in South-Kivu. In addition, the German aid organisation GTZ has treatment centres in Kinshasa, Lubumbashi, Bukavu, Kisangani and Mbuji Mayi. Moreover, inter alia, the World Bank contributes towards covering the Government's costs for distributing free ARV drugs in the DRC.

6.6 Bearing in mind the lack of jurisprudence from the Committee on the issue of whether the expulsion of an alien diagnosed as HIV-positive or suffering from AIDS would constitute a violation of the Convention, the State party invokes a recent Grand Chamber judgment from the European Court of Human Rights.9 In that case, the applicant was a Ugandan national who suffered from AIDS. She claimed that returning her to Uganda would cause her suffering and lead to her early death. Although the Court accepted that her quality of life and life expectancy would be affected if she were returned to Uganda, it found that her removal to Uganda would not give rise to a violation of article 3 of the European Convention on Human Rights. In the present case, the State party points out that Ms Njamba has still not presented any evidence in support of her statement that her health is deteriorating. In view of the available evidence before the Committee, there is nothing to suggest otherwise than that her health condition is good since the HIV infection has not yet affected her immune system and that she is still in no need of medication.

Decision on admissibility

7.1 On 14 November 2008 during the 41st session, the Committee considered the admissibility of the communication. It ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement.

7.2 With regard to the requirement, under article 22, paragraph 5 (b), of the Convention, that all available domestic remedies be exhausted, the Committee noted that the complainants had applied for asylum on 29 March 2005. Their application had been examined by the Migration Board on 21 March 2006 and their appeal against this decision was rejected by the Migration Court of Stockholm on 1 September 2006. The complainants had lodged a further appeal before the Migration Court of Appeal, but leave to appeal was

[9] See *N. v. the United Kingdom*, application no.26565/05, judgment of 27 May 2008.

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denied on 8 January 2007. They had requested a re-examination of their asylum application, which was denied by the Migration Board on 7 June 2007. In these circumstances, the Committee considered that the complainants had exhausted domestic remedies.

7.3 Concerning the claim relating to Ms Njamba's expulsion in light of her condition as HIV-positive, the Committee recalled its prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16.10 The Committee noted the medical evidence presented by Ms. Njamba, stating that she was HIV-positive and that AIDS treatment was not readily available in the DRC. It also noted that the same medical evidence mentioned that Ms. Njamba did not require HIV treatment. In any case, the Committee took note of the detailed information provided by the State party on the availability of HIV treatment in the DRC (see para.6.5 above). In the circumstances, the Committee considered that the aggravation of Ms. Njamba's health which might occur following her return to the DRC is in itself insufficient to substantiate this claim, which is accordingly considered inadmissible.

7.4 With respect to the complainants' claim under article 3, paragraph 1, of the Convention, the Committee found that no further obstacles to the admissibility of the complaint existed and that this case should be considered on the merits. While noting that the State party and the complainants had already provided submissions on the merits of this case, prior to making a decision on the merits, the Committee wished to receive further information on how the current developments in the Democratic Republic of the Congo bear upon the decision to deport the complainants from the State party.

State party's submission on the merits

8.1 On 19 May 2009, the State party provided further comments on the merits in response to the questions posed by the Committee in its admissibility decision. With respect to the general situation in the DRC, the State party submits that it continues to be affected by violence and insecurity, especially in the east. In January 2008, a peace conference took place in Goma and a peace accord was signed, however violent clashes continued and in August 2008 there was renewed fighting between the government and rebel groups. General Nkunda called a ceasefire at the end of October 2008, but reports of fighting continued. However, the fighting was mainly concentrated in the North Kivu and South Kivu provinces, and the Ituru district in the Orientale province; all in the east of DRC11. In January 2009, the DRC and Rwanda launched a joint military operation against the Rwanda Hutu rebels of the Forces Démocratiques pour la Libération du Rwanda (FDLR) in North Kivu. Moreover, General Nkunda – leader for the Congrés National pour la Défense du Peuple (CNDP) – was arrested. Furthermore, in March 2009, a peace agreement between the DRC government and the CNDP was reached.

8.2 The State party reiterates that numerous human rights abuses are still being committed by different armed groups in the country, including government soldiers. Torture, abductions and sexual abuse by militia groups and government forces continue to be reported. However, the security and human rights situation is still most precarious in the areas of the DRC which are not controlled by the government.

8.3 The State party submits that under the Aliens Act, an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence

[10] See Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.7; Communication No. 183/2001, *B.S.S. v Canada*, Views adopted on 12 May 2004, para.10.2; and Communication No. 245/2004, *S.S.S. v Canada*, Views adopted on 16 November 2005, para.7.3.
[11] US Department of State, « 2008 Human Rights Report : Democratic Republic of the Congo ».

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permit in Sweden. The term "an alien otherwise in need of protection" has been exemplified previously, but it might be added that it also includes a person who needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuse.

8.4 In November 2008, the Swedish Migration Board adopted a guidance note regarding the situation in the DRC and how it affected the examination of asylum claims of DRC nationals. The note confirmed that there is internal conflict in the eastern part of the DRC, held that internal relocation is possible to the stable parts of the DRC but that such a possibility should be considered on an individual basis. Especially regarding single woman, the note prescribed that the existence of a social network and a connection to other parts of the DRC had to be taken into account when assessing whether internal relocation was a possibility. In fact, in November 2008, the Migration Board also granted a permanent residence permit to a single woman from the North Kivu province for whom it found internal relocation was not an option, as she had no connection to and no social network in another part of the DRC.

8.5 As to the present case, the State party reiterates that the complainants originate from and have a strong connection to the Equateur province where, apart from a few months prior to their flight from the DRC, they have always lived. Thus, for the complainants the question of internal relocation does not arise, as they do not come from an area in conflict and would be returning to their home province. The State party reiterates that it still cannot be excluded that Ms. Njamba's husband and three other children are still alive and could be found in the DRC. Even if they have no close relatives left in their village, given that they have lived there all their lives it is reasonable to expect that there are people there who would be willing to assist them. In any event, the complainants may request a re-examination of their application by the Migration Board if they claim that the current situation has significantly changed since the filing of their initial application and there are impediments to the enforcement of the expulsion decisions.

8.6 The State party reiterates that since the initial submission to the Committee the reasons upon which the complainants submit they need asylum have changed. In addition, their account of events completely changed upon submission of their case to the Committee. It submits that according to article 3, it is for the complainants to present an arguable case. In any event, in the State party's view, the claim that they are likely to be subjected to torture on account of their husband's/father's activities in Goma are neither credible nor consistent and lack veracity. It also refers to the fact that the complainants have not responded to these arguments made by the State party in its last submission. The State party highlights that the complainants will not be returned to Goma where they claim they will risk being killed in revenge for the activities allegedly carried out by their husband/father.

State party's supplementary submission on the merits

9.1 On 19 March 2010, the State party provided information in response to questions posed by the Secretariat on behalf of the Committee, in particular with respect to how five United Nations reports[12] would bear upon the decision to deport the complainants from

[12] Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country, A/HRC/10/59, 5 March 2009; Report of the independent expert on the situation of human rights in the Democratic Republic of the Congo, Mr. Titinga Frédéric Pacéré, A/HRC/7/25, 29 February 2008; Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, A/HRC/7/6/Add.4, 28 February 2008; and Report of the

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Sweden. Given that the Government has no power to influence decisions on expulsion cases, as this lies exclusively with the migration authorities, the Migration Board was asked to respond to the Committee's request. The Board maintains its view that there is currently no foreseeable risk that the complainants would be subjected to violence upon return to the DRC. It submits that the complainants have not sufficiently substantiated that they risk torture in Gemena, Equateur, which is not in a conflict area. They would have access to a social network, as it is the town where Ms. Njamba grew up. It is a large town safe enough to live there without ending up in a camp for Internally Displaced Persons. Several humanitarian organisations are stationed there because of the stable security situation. Living in a large town also reduces the risk of abuse compared with rural areas. The Migration Board reiterates that it adopted a guidance note (para. 8.4) in November 2008, regarding the situation in the DRC and how it affected the examination of asylum claims there. It suggests that if the complainant's had been from such a conflict zone, they may have been entitled to a residence permit upon re-examination of their application if internal relocation would not have been possible. Indeed, it submits that if the complainants believe that they meet the criteria in this guidance note or that the situation in the DRC, especially in their home province, has changed significantly so that there are impediments to the enforcement of their decisions on expulsion, it remains open to them to request a re-examination of their application by the Board under chapter 12, section 19 of the Aliens Act.

9.2 As to whether, given the information in the reports in question, enforced deportation would constitute a violation of article 3, the State party reiterates earlier arguments and supports the views expressed by the Migration Board. It emphasizes that the complainants would not be returned to Goma, where they claim that they will risk being killed in revenge for the activities allegedly carried out by their husband/father, but to the Equateur province. The reports in question largely relate to the eastern parts of the DRC and are thus irrelevant. They confirm that there has been no armed conflict in Equateur for many years. Although the State party acknowledges that there is information in these reports that sexual violence occurs in Equateur too, especially in the form of abuse by the police and the military as a form of revenge against rebellious villages, it is clear that women in rural areas and small villages are more exposed to violence that women in towns. Women who are IDPs are also more exposed to violence than women with a permanent abode. In this context, the State party refers to a decision of the European Court of Human Rights, in *S.M. v. Sweden*[13], which indicates that even though the reports of violence against women are alarming, an individual assessment must be made of each case and the complainants' personal situation must determine his or her risk of being subjected to violence or torture on return. In the State party's view, the information in the reports is not sufficient to establish that the complainants upon return to the DRC would face a forseeable, real and personal risk of abuse – sexual or otherwise. In addition, the State party reiterates that there are strong reasons to question the veracity of the new allegations presented by the complainants,

United Nations High Commissioner on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, A/HRC/10/58, 2 April 2009; Twenty-ninth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2009/472, 18 September 2009; Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009.

[13] Application no. 47683/08, 10 February 2009. "As concerns the general situation in the DRC, the Court is aware of the occurrence of reports of continuous, serious human rights violations, in particular, against women, in that country. However, it has to establish whether the applicant's personal situation was such that her return contravened Article 3 of the Convention."

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which were presented for the first time in their submissions of 11-12 June 2007, as well as the complainants' failure to response to the State party's observations of 8 October 2008 and 19 May 2009.

9.3 Finally, the State party makes a procedural request. It submits that according to chapter 12, section 22, of the 2005 Aliens Act, an expulsion order which has not been issued by a general court expires four years after the order becomes final and non-appealable. This is applicable with respect to expulsion orders not issued on account of a criminal offence, as in the present case. The decision on expulsion regarding the complainants became final and non-appealable on 20 December 2006, when the Aliens Appeals Board rejected their appeal against the Migration Boards decision. The expulsion decision will thus become statue-barred on 20 December 2010. In light of this, and given that this case has already been before the Committee, the State party specifically requests the Committee to decide upon this complaint at its upcoming 44th session in April-May 2010. It also points out that despite being represented by counsel, the complainants have only responded briefly to the State party's observations, in contrast to its own lengthy submissions.

Consideration of the merits

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

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

9.3 In assessing whether there are substantial grounds for believing that the complainants would be in danger of being subjected to torture upon return, 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 in the Democratic Republic of the Congo. 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. It follows 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.

9.4 The Committee recalls its General Comment No.1 on article 3, which states that the Committee is obliged to assess whether there are substantial grounds for believing that the complainant 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. The risk need not be highly probable, but it must be foreseeable, real and personal, and present, as confirmed by the Committee in its previous decisions. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal. The Committee recalls that, while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled to freely assess the facts of each case, taking into account the circumstances.

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9.5 The Committee finds that while some factual issues of this case are disputed, including the claims relating to the complainants' husband's political activities, the Committee observes that the most relevant issues raised in this communication relate to the legal effect that should be given to undisputed facts, such as the risk of danger to the complainants' security upon return. The Committee notes that the State party itself acknowledges that sexual violence occurs in Equateur Province, to a larger extent in rural villages (para. 9.2). It notes that since the State party's last response of 19 March 2010, relating to the general human rights situation in the Democratic Republic of the Congo, a second joint report from seven United Nations experts on the situation in the Democratic Republic of the Congo was published, which refers to alarming levels of violence against women across the country and concludes that, "Violence against women, in particular rape and gang rape committed by men with guns and civilians, remains a serious concern, including in areas not affected by armed conflict."[14] In addition, a second report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo as well as other UN reports, also refers to the alarming number of cases of sexual violence throughout the country, confirming that these cases are not limited to areas of armed conflict but are happening throughout the country".[15] In reviewing this information, the Committee is reminded of its General Comment no. 2 on article 2, in which it recalled that the failure, "to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity…". Thus, in light of all of the abovementioned information, the Committee considers that the conflict situation in the Democratic Republic of the Congo, as attested to in all recent United Nation reports, makes it impossible for the Committee to identify particular areas of the country which could be considered safe for the complainants in their current and evolving situation.

9.6 Accordingly, the Committee finds that, on a balance of all of the factors in this particular case and assessing the legal consequences aligned to these factors, substantial grounds exist for believing that the complainants are in danger of being subjected to torture if returned to the Democratic Republic of the Congo.

10. 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 deportation of the complainants to the Democratic Republic of the Congo would amount to a breach of article 3 of the Convention.

11. The Committee urges the State party, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it, within 90 days from the date of the transmittal of this decision, of the steps taken in response to the decision expressed above.

[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.]

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[14] A/HRC/13/63, 8 March 2010.

[15] A/HRC/13/64, 28 January 2010.

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