



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

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Forty-fifth session

1–19 November 2010

Decision

Communication No. 344/2008

<i>Submitted by:</i>	A.M.A. (represented by the Service d'Aide Juridique aux Exilé-e-s (SAJE))
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of the complaint:</i>	22 May 2008 (initial submission)
<i>Date of present decision:</i>	12 November 2010
<i>Subject matter:</i>	Risk of complainant's deportation to Togo
<i>Substantive issues:</i>	Risk of torture following removal to country of origin
<i>Procedural issue:</i>	Coercive measures incompatible with the granting of interim measures
<i>Articles of the Convention:</i>	3 and 22

[Annex]

* Made public by decision of the Committee against Torture.

Annex

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

concerning

Communication No. 344/2008

Submitted by: A.M.A. (represented by the Service d'Aide Juridique aux Exilé-e-s (SAJE))

Alleged victim: The complainant

State party: Switzerland

Date of the complaint: 22 May 2008 (date of 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 November 2010,

Having concluded its consideration of complaint No. 344/2008, submitted by A.M.A. 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, the counsel and the State party,

Adopts the following:

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

1.1 The complainant, A.M.A., born on 1 January 1983, submitted his complaint to the Committee on 22 May 2008. A Togolese national residing in Switzerland, he is currently awaiting deportation to his country of origin. He claims that his forced return to Togo would constitute a breach by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by the Service d'Aide aux Exilé-e-s (SAJE), an association providing legal assistance to asylum-seekers.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the attention of the State party in a note verbale dated 3 July 2008, attaching a request for interim protection measures.

The facts as presented by the complainant

2.1 The complainant is a fisherman from Lomé, Togo. He has never been involved in politics. On 27 February 2005, a demonstration took place, organized by several women's associations and calling for revision of the Togolese Constitution. The demonstration was suppressed by law enforcement personnel. That evening, the complainant and his father

took their canoe fishing in the Bé lagoon. They noticed two lorries parked near the lagoon. Hearing the sound of items falling into the water, they switched on their electric torches. It was then that the complainant and his father saw men in military uniform throwing bodies into the water. Of the seven or eight soldiers present, they recognized two who lived in the same neighbourhood as themselves, behind Bé Château. Distressed, the complainant and his father called out to the soldiers, who then shone a torch at them. The two soldiers known to the complainant and his father also recognized them and called out to them by name. Three soldiers jumped into the water and headed towards them. The complainant and his father also jumped into the water in an attempt to swim away. As he escaped, the complainant looked over his shoulder and saw his father between two soldiers. He heard his father call out for help, but, believing that he could not be of any help to him, he continued swimming. When the complainant reached the opposite bank, he threw off his clothes. He then ran all the way to the home of one of his friends in Bé. The friend advised him to visit the headquarters of the opposition party Union des Forces de Changement (UFC) in Bé-Kpehenou. They both went there the next day.

2.2 On 28 February 2005, at UFC headquarters, the complainant and his friend were received by a woman to whom they related the events of the previous night. Three men then accompanied them back to the scene of the incident. Together, they fished four bodies out of the lagoon, including that of a child between 10 and 12 years of age. The complainant found no trace of his father. On the evening of 28 February 2005, the complainant left Bé to visit a friend in another town. Upon his arrival, the complainant renewed contact with M.A. and asked him to inform his (the complainant's) uncle A.D. of the situation and to fetch the savings that he and his father had been hiding in his room. On 2 March 2005, M.A. visited the complainant's home. Neighbours told him that the previous day, 1 March 2005, three strangers had arrived at the complainant's home, broken the door down and searched his room.

2.3 On 3 March 2005, the complainant's aunts called him and advised him to leave the country. The complainant decided, however, to await the outcome of the elections, hoping for an opposition victory. He remained concealed at his friend S.'s house and never left it. On 26 April 2005, upon learning of Faure Gnassingbé's election victory, the complainant decided to leave the country. His friend made contact with an acquaintance who had emigrated to Switzerland and who was in Togo at the time; the acquaintance had previously helped someone to escape the country. For a payment of 3 million CFA francs, this individual agreed to help him to leave the country, offering to lend him his own son's passport. The complainant sent his friend home to look for his identity card, but S. found only an old card that had already expired. It was this document that the complainant submitted to the Swiss authorities.

2.4 On 28 April 2005, the complainant left Togo for Cotonou, Benin, where he boarded a plane for Switzerland. On 29 April 2005, he submitted an application for asylum in Switzerland to the Vallorbe Registration Centre. On 3 May 2005, he was interviewed in the centre for the first time. Two other interviews were held on 24 May and 22 August 2005.

2.5 From Switzerland, the complainant telephoned his uncle, who told him that he had visited Lomé prison in the hope of locating the complainant's father, but without success. On 30 July 2005, in another telephone call, the uncle told the complainant that the previous day, law enforcement personnel had returned to his home to ask the other residents questions about the complainant. They had assaulted the residents, beating them with weapons; all the residents had left the house. In a letter dated 13 February 2006, the uncle said that he had resigned himself to looking for the complainant's father in the town's mortuaries. He said that he had visited the Tokoin teaching hospital and the Tsevié and Kpalimé mortuaries. It was in Aného, on 7 February 2006, that he finally found the body of the deceased. According to the death certificate signed by the chief of the special delegation

of the Aného commune, the body had been brought to the mortuary on 15 November 2005. An autopsy had been carried out on the day the complainant's uncle located the body, i.e., 7 February 2006. Upon examination, the body had been found to be covered in wounds and bruises. It had also been established that the deceased's head had been crushed. The complainant's father was buried on 11 February 2006.

2.6 By decision of 19 February 2007, the Swiss Federal Office for Migration (ODM) rejected the complainant's application for asylum. It found the complainant's account to be implausible, and set his removal for 18 April 2007. On 23 February 2007, the complainant filed an appeal with the Federal Administrative Tribunal (TAF), requesting annulment of the Federal Office's decision, the granting of asylum and, as an ancillary measure, temporary admission. On 8 June 2007, the complainant filed an additional submission. On 12 December 2007, the Tribunal rejected his appeal. On 17 January 2008, the complainant filed an application for review of the judgement of 12 December 2007, but on 30 January 2008 the Tribunal ruled the application inadmissible.

2.7 In additional submissions dated 17 November and 9 December 2008, counsel informed the Committee that by decision of 27 October 2008, the Etablissement vaudois d'accueil des migrants (EVAM) (Vaud Department for the Reception of Immigrants) had allocated accommodation to the complainant in the collective emergency support centre in Vennes, in the canton of Vaud. The complainant challenged this decision on the grounds that the support centre in question was an emergency centre that received only rejected asylum-seekers who fell under the special "emergency assistance" procedure. This procedure was allegedly introduced by the authorities in the State party with the aim of inducing the most recalcitrant asylum-seekers to leave Swiss territory for lack of prospects. In this support centre, the complainant no longer enjoyed basic necessities and found himself in a communal environment which was noisy and makeshift, which was guarded round the clock by the administration police responsible for deportations, and which was consequently hostile. By decision of 11 November 2008, EVAM rejected the complainant's challenge and upheld the decision of 27 October 2008 to place him in the Vennes support centre. The complainant appealed on 25 November 2008.

The complaint

3.1 The complainant submits that his deportation to Togo would constitute a violation of article 3 of the Convention against Torture. As a witness to the acts committed during the night of 27 to 28 February 2005, he would be in danger in his own country, as confirmed by his father's dramatic death. He considers that he would run a foreseeable, real and personal risk of torture if returned to Togo. Moreover, he claims that the emergency assistance procedure consisting of minimum assistance coupled with surveillance by the Swiss administration police pending removal violates article 22 of the Convention.

3.2 Under article 3, the complainant notes that the Swiss authorities have not challenged the authenticity of the documents he submitted, which, contrary to the assessment made by TAF, confirm the credibility of his account, the circumstances surrounding his father's death and the risks he would personally run in the event of his return to Togo. The complainant highlights the fact that the archives of the UFC website cite the Togolese Human Rights League as referring on 28 February 2005 to at least four bodies being fished out of Bé lagoon, including that of a 12-year-old child.

3.3 The complainant stresses that all international stakeholders have denounced the abuses carried out by Togolese law enforcement personnel during the 2005 presidential elections. He recalls that the Committee itself, in its report on Togo dated 28 July 2006, said it was "concerned by allegations received, in particular following the April 2005 elections, of the widespread practice of torture, enforced disappearances, arbitrary arrests and secret detentions". The Committee also criticized "the lack of impartial inquiries to

establish the individual responsibility of the perpetrators of acts of torture and cruel, inhuman or degrading treatment, in particular following the April 2005 elections, which contributes to the climate of impunity prevailing in Togo”, while taking note of the report of the national independent commission of inquiry (CNSEI). The complainant contends that the Togolese authorities appear to wish to forget about the abuses committed by law enforcement personnel during the 2005 elections, ignoring the victims of the many violations of human rights. According to a report on Togo issued on 11 March 2008 by the Bureau of Democracy, Human Rights, and Labor in the United States Department of State, serious problems continue in the field of violation of human rights, even though the situation has improved.

3.4 Under article 22, the complainant submits that the purpose of proceedings before the Committee against Torture and the granting of interim protection measures is to suspend the removal procedure pending the Committee’s decision on the merits. However, the emergency assistance procedure could be regarded as a coercive procedure designed to make a continued stay in Switzerland less attractive and break the morale of unwanted aliens considered to be residing illegally in Switzerland, causing them to take the necessary steps to leave the country or go into hiding.

State party’s observations on the merits

4.1 On 9 December 2008, the State party submitted its observations on the merits of the complaint. Briefly recalling the facts as presented by the complainant, the State party contends that he has not provided the Committee with any new evidence. On the contrary, the complainant first contests the domestic authorities’ assessment of the facts and then gives a general description of the human rights situation in Togo. Lastly, he makes his own assessment of the facts in order to claim that he would be exposed to a real, personal and immediate risk of being tortured in the event of his removal to Togo.

4.2 Recalling the provisions of article 3 of the Convention, the State party refers to the case law of the Committee and its general comment No. 1, of which paragraph 6 and subsequent paragraphs stipulate that the complainant must prove that there is for him a personal, actual and serious risk of being subjected to torture if he is deported to his country of origin. The State party notes that this provision means that the facts alleged must go beyond mere suspicion and that they must demonstrate a serious risk. Comparing the elements to be considered when assessing risk with the complainant’s situation, the State party states that he has never been involved in political activities and that his religious activities were limited to membership of a prayer group, which did not get him into any trouble. As the complainant has also not made any allegations of torture, the State party has limited its observations to paragraphs 8 (a), (d) and (g) of the general comment.

4.3 The State party states that the events the complainant claims he witnessed on 27 February 2005 were related to the April 2005 presidential elections, which were accompanied by violence. According to the State party, the situation in Togo has improved considerably since the complainant left the country. In August 2006, the five main opposition parties signed a Global Political Accord with the ruling party, the Rassemblement du peuple togolais (RPT), establishing a government of national unity. This led to the appointment of a long-standing member of the opposition to the post of prime minister, the establishment of a government that included opposition parties, and the formation of the Independent National Electoral Commission, in which the Union des Forces de Changement (UFC) was represented, although it remained in the opposition. The State party adds that a tripartite agreement between Togo, Ghana and Benin was concluded in April 2006 under the auspices of the United Nations High Commissioner for Refugees. In this agreement, the Togolese Government undertook to take the necessary measures to ensure that refugees could return to their homes in secure and dignified conditions. In June

2008, some of those who had fled Togo during the presidential elections returned to their country, and no persecution was reported.

4.4 The State party adds that legislative elections were held on 14 October 2007 and that, according to several independent sources, the electoral process was carried out in a broadly satisfactory way. The State party considers that it was this development and the improvement of the human rights situation in Togo that had led the European Commissioner for Development and Humanitarian Aid to consider that the conditions for re-establishing full cooperation between the European Union and Togo had been fulfilled. The impunity that the complainant refers to remains a problem, but several signs of improvement have been observed, with more than 30 State officials reportedly having been brought to justice for their involvement in robberies. Lastly, the State party notes that the existence of impunity does not as such mean that people who have seen or reported atrocities are currently persecuted by the authorities. Assuming that the complainant's presentation is credible, this alone is not a substantial ground for believing that he would be subject to torture in the event of his return to Togo. However, the State party contests the credibility of the complainant's allegations.

4.5 The State party refers to the views of domestic bodies such as the Federal Office for Migration (ODM) and the Federal Administrative Tribunal (TAF), which pointed out factual discrepancies that made the presentation implausible. The complainant submitted to the TAF a copy of an article from the magazine *Le Point*, dated 2 March 2005, which was supposed to attest to the truthfulness of his account. According to this article, following the violence of the day before, four bloody corpses were fished out of the Bé lagoon on 28 February 2005. However, this article describes only this specific incident, and the complainant and his father are not mentioned. The article also does not describe the nature of the violence that occurred, while the report by the Togolese Human Rights League (LTDH), to which the Swiss authorities referred, describes these events in detail and gives an alternative version to that described by the complainant. The TAF took into account the statements made by the complainant, to the effect that he did not witness a murder, but simply bodies being carried and then thrown into the water. Furthermore, the complainant did not give the same version of events as the LTDH. According to the LTDH, the soldiers who controlled the area surrounding the lagoon reportedly fired gunshots, used tear-gas grenades and committed several murders at the Bé lagoon itself. The State party also considers it unlikely that the complainant heard about these events only the day after, even though these were large-scale events that took place in the area where he lived. The TAF also pointed out time discrepancies – according to the LTDH, the bodies were reportedly fished out in the afternoon of the following day, not the morning. The victims reportedly drowned, but this does not tally with the complainant's testimony. Lastly, although the death of the complainant's father has been proven, the date of his death does not seem to coincide with the sequence of events as presented by the complainant. The State party doubts that the army imprisoned the complainant's father for six months before killing him. It would seem therefore that the complainant's father certainly died in violent circumstances, but not those described by the complainant. The discrepancies between the complainant's testimony and the descriptions provided by the LTDH, as well as the gaps in his testimony, led the TAF to dismiss any risk to the complainant if he were to return to his country of origin.

4.6 With regard to the allegation of a violation of article 22 of the Convention, the State party recalls that no removal order for the complainant has been issued or envisaged since the Committee's request for interim protection measures. Article 3 protects people from being returned when there is a risk of torture. This provision does not guarantee a high standard of living in the State where the complainant is located. The State party adds that the obligations that may be inferred from article 22 of the Convention cannot go beyond the substantive provisions of the Convention. At all events, in the light of the benefits granted

to the complainant by the cantonal authority in this case, the granting of emergency assistance does not contradict any obligation that might arise under article 22 of the Convention. The State party further recalls that emergency assistance is granted on request and is designed to provide anyone in a situation of hardship with the essential means of living a life of human dignity. The State party concludes that, insofar as the author considers that the benefits granted are not enough for a decent life, he may bring the matter before the appeal bodies, which was what he did on 6 November 2008.

Author's comments on the State party's observations

5.1 On 16 February 2009, counsel informed the Committee that he had no particular remarks to make on the position of the State party, as all the arguments relating to article 3 of the Convention had been set out in the initial communication. However, counsel sent the Committee a letter written by the complainant's uncle, A.D., attesting to the searches made for his father. The uncle explained that he had found the father's body in the Aného mortuary on 7 February 2006. According to staff at the mortuary, the body was left there on 15 November 2005 by unknown persons. The letter also attests to the fact that soldiers in civilian clothes harassed the tenants in the complainant's house.

5.2 On 15 June 2009, the complainant raised the issue of the interim measures requested by the Committee. The two appeals filed by the complainant against being placed in the Vennes emergency support centre (in the canton of Vaud), where he received only benefits in kind, were rejected by the Department of Home Affairs on 11 May 2009 and by the Vaud cantonal court on 21 April 2009. The cantonal court decision stated that, in accordance with domestic legislation, the complainant had no right to social assistance.¹ He was not, however, illegally in the country and could receive emergency assistance. The complainant did not appeal against this decision in the Federal Court because of the Court's recent case law dating from March 2009, in which it confirmed the principle that emergency assistance stems from the fundamental right to minimum means of subsistence income and cannot be likened to a coercive measure preparatory to expulsion. Before the Committee, the complainant maintains that, contrary to what has been laid down by the domestic courts, emergency assistance is a coercive measure and that its main purpose is to induce asylum-seekers to leave Switzerland.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not examine any communication without being assured that the complainant has exhausted all available domestic remedies. The Committee notes that the State party recognizes that domestic remedies have been exhausted and therefore finds that the complaint complies with article 22, paragraph 5 (b), of the Convention.

6.3 With regard to the allegations under article 22 of the Convention, the Committee notes the complainant's allegation that the emergency assistance system to which he is

¹ Article 49 of the Law on assistance for asylum-seekers and certain categories of foreigners (LARA).

subject is comparable to a coercive measure which would ultimately induce asylum-seekers to leave Switzerland. It also notes the State party's argument that the emergency assistance, which is granted only on request, is designed to meet an individual's basic needs, and that the obligation under article 3 is one of non-return (non-refoulement), not one of ensuring a high standard of living in the host country. In this case, the Committee considers that the complainant has not sufficiently substantiated his allegations under article 22 of the Convention. This part of the communication is therefore inadmissible.

Consideration of the merits

7.1 The issue before the Committee is whether the removal of the complainant to Togo would violate the State party's obligation under article 3 of the Convention not to expel or return (*refouler*) 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.

7.2 In assessing the risk of torture, the Committee takes into account all relevant considerations, in accordance with article 3, paragraph 2, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of such assessment, however, is to determine whether the individual concerned would personally risk torture in the country to which he or she would be returned. It follows that the existence in a country of a consistent pattern of gross, flagrant or mass violations of human rights does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture on his or her return to that country. Additional grounds must be adduced to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person may not be subjected to torture in his or her specific situation.

7.3 The Committee recalls its general comment No. 1 on implementation of article 3 of the Convention in the context of article 22, which states that the Committee must assess whether there are substantial grounds for believing that the complainant would be in danger of torture if returned to the country in question. The risk of torture need not be highly probable, but it must be personal and present. In this regard, the Committee has established in previous decisions that the risk of torture must be "foreseeable, real and personal".²

7.4 As to the burden of proof, the Committee again recalls its general comment and its case law, which provide that the burden is generally on the complainant to present an arguable case and that the risk of torture must be assessed on grounds that go beyond mere theory or suspicion.

7.5 In assessing the risk of torture in the case under consideration, the Committee has noted the complainant's claim that he and his father saw soldiers throw bodies into the Bé lagoon. It also notes that two of the soldiers recognized them and started to chase them; that the complainant's father was reportedly captured, while the complainant was apparently able to escape; and that his father's beaten body was reportedly found some months after the events of 27 February 2005. The Committee notes the complainant's claim that these events and the later raids on his home by soldiers in civilian clothes mean that returning to his country of origin would entail a risk for him. Lastly, the Committee notes the allegation that serious human rights problems continue to exist in Togo, and that those responsible for the violent acts committed during the 2005 elections are still at large.

² Communication No. 203/2002, *A.R. v. the Netherlands*, Views adopted on 14 November 2003, para. 7.3; communication No. 285/2006, *A.A. et al. v. Switzerland*, Views adopted on 10 November 2008, para. 7.6.

7.6 The Committee notes the State party's argument that the events at which the complainant was reportedly present took place in the context of the presidential elections, and that, since that time, the human rights situation has considerably improved. It also notes that, according to the State party, the existence of impunity does not as such mean that those who have witnessed atrocities are now persecuted in Togo. It notes that domestic bodies have pointed out a series of implausibilities in the complainant's account, such as the inconsistencies between the numerous testimonies collected by the LTDH and the complainant's testimony, which give opposing versions of the same events; that, given the extent of the protests and the violent acts that were committed, it would not have been possible for the complainant not to have heard about these events until the day after, especially if they took place at the Bé lagoon; that the way in which the complainant reportedly surprised the soldiers, the fact that the soldiers went into the water in order to chase him even though he was in his canoe, and that he then reportedly got into the water even though it would have been easier for him to get away in the boat are particularly implausible; and, lastly, that the date of his father's death does not coincide with the sequence of events as described by the complainant. The Committee notes the State party's argument that, assuming that his testimony is credible, it does not mean that this one fact would constitute a substantial ground for believing that, if returned to Togo, he would be subjected to torture.

7.7 Having taken into account the arguments set out by the parties, the Committee notes that the complainant has not provided evidence of a real, present and foreseeable risk. It considers that the complainant's account contains factual discrepancies that make it implausible, in particular with regard to the allegation that he was not aware of the violence that took place on the day he was actually present; and that only his uncle's testimony saying that soldiers in civilian clothes continue to harass the tenants in his house could substantiate the claim of present risk. The Committee further notes that the complainant was heard by the Swiss authorities on three occasions and that they tried, despite the lack of documentation or testimony in support of the complainant's claims, to shed light on the facts of the case; and that the complainant was also heard by the domestic courts, which substantiated the denial of his request for asylum. The main issue being whether the complainant currently runs a risk of being tortured if he was deported to Togo, there is no substantive evidence that, several years after the events in question, a real, personal and foreseeable risk still exists.³

7.8 Taking into account all information made available to it, the Committee considers that the complainant has failed to provide sufficient evidence to demonstrate that he would face a foreseeable, real and personal risk of being subjected to torture if deported to his country of origin.

8. 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 complainant to Togo would not constitute a breach of article 3 of the Convention.

[Adopted in English, French, Russian and Spanish, the French 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.]

³ See communication No. 309/2006, *R.K. et al. v. Sweden*, Views adopted on 16 May 2008, paragraph 8.5.