



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

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## Committee against Torture

Forty-sixth session

9 May–3 June 2011

### Decision

#### Communication No. 399/2009

<i>Submitted by:</i>	F.M-M. (represented by counsel, Bureau de conseil pour les Africains francophones de la Suisse (Office of Counsel for French-speaking Africans in Switzerland) (BUCOFRAS))
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	9 September 2009 (initial submission)
<i>Date of decision:</i>	26 May 2011
<i>Subject matter:</i>	Expulsion of the complainant to the Republic of the Congo
<i>Procedural issues:</i>	Exhaustion of domestic remedies
<i>Substantive issues:</i>	Non-refoulement
<i>Articles of the Convention:</i>	3, 22, paragraph (b)
<i>Rules of Procedure:</i>	107 (e)

[Annex]

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\* Made public by decision of the Committee against Torture.

## Annex

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

concerning

#### **Communication No. 399/2009**

*Submitted by:* F.M-M. (represented by counsel, Bureau de conseil pour les Africains francophones de la Suisse (Office of Counsel for French-speaking Africans in Switzerland) (BUCOFRAS))

*Alleged victim:* The complainant

*State party:* Switzerland

*Date of complaint:* 9 September 2009 (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 26 May 2011,

*Having concluded* its consideration of complaint No. 399/2009, submitted to the Committee against Torture by F.M-M. 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 of the communication, his counsel and the State party,

*Adopts* the following:

#### **Decision on admissibility**

1.1 The complainant is F.M-M., a national of the Republic of the Congo born in 1977 who currently resides in Switzerland. He claims that his forced repatriation to the Republic of the Congo would amount to a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He is represented by the Bureau de conseil pour les Africains francophones de la Suisse (BUCOFRAS).

1.2 On 18 September 2009, at the request of the complainant, the Committee, through its Special Rapporteur on New Complaints and Interim Measures, requested the State party not to deport the complainant to the Republic of the Congo pending the Committee's consideration of his complaint.

#### **Factual background**

2.1 Since 1995 the complainant has been an active member of the Pan-African Union for Social Democracy (UPADS) led by former Congolese President Pascal Lissouba. As part of his duties as an activist, the complainant played an important role in his party's campaign as a propagandist in the Lekoumou region in the run-up to the 1997 elections.

Following Sassou-Nguesso's victory over Pascal Lissouba, who was forced into exile along with other members of his party, the complainant joined the Conseil national de la résistance (National Resistance Council) (CNR) and fought in Dolisie and other parts of the country at the behest of Pascal Lissouba. Due to the armed conflict that broke out that year, the complainant was not able to return to Brazzaville. Fearing for his life, he eventually left the rebellion and moved to Pointe-Noire, where he found out that his name was on the list of rebels wanted by the Government of Sassou-Nguesso. Given the settling of scores that was taking place against Lissouba partisans and UPADS, the complainant left the Congo in fear for his life and headed to Angola, and later South Africa, with the intention of joining Pascal Lissouba in England. In 2003 he was apprehended while in transit at Zurich airport for possession of a false passport.

2.2 The complainant filed a request for asylum on 25 September 2003, which the Federal Office for Refugees (ODM) refused on 11 May 2004, saying that his statements were not credible, particularly regarding the date of the elections, the continuous presence of UPADS in the Congo after Pascal Lissouba's departure, and the period during which the complainant was said to have taken part in the fighting. ODM also deemed his military identity card to be a fake because it did not carry an official stamp. An order for removal from Switzerland was issued. On 23 April 2004 the complainant appealed the ODM decision to the Swiss Asylum Review Commission. By a decision dated 1 July 2004, ODM argued that his appeal should be rejected, noting that it was bound to fail from the outset as it did not contain any new elements or evidence.

2.3 On 26 August 2009, the Federal Administrative Tribunal rejected the complainant's appeal, highlighting the inconsistencies and implausibilities in his account that were noted in the initial ruling, the inauthenticity of the evidence submitted, and the fact that, even if that evidence (particularly a wanted notice from 2001) was authentic, it did not support the complainant's claims of persecution because the complainant was wanted for vandalism, which was not covered by article 3 of the Federal Asylum Act.<sup>1</sup> The Tribunal added that, even if the complainant had in fact fought with the opposition rebels, his fear of being sought by the Congolese authorities would no longer be justifiable, given the recent political changes in the Congo, in particular the peace accord that had been signed on 17 March 2003 between the two parties and the amnesty law adopted by the National Assembly in August 2003, which applied to all offences committed by all warring parties since January 2000. Despite the absolute majority won by Sassou-Nguesso in the latest National Assembly elections held in 2007, the opposition still won 11 seats, 10 of them taken by former President Lissouba's UPADS, which was the main opposition party, and which had nominated an official candidate in the presidential elections of 12 July 2009. Thus, according to the Tribunal, the complainant would not be exposed to persecution in the Congo, and his fears no longer seemed founded. While the Tribunal rejected his appeal, it allowed him until 28 September 2009 to leave Switzerland.

2.4 Since his arrival in Switzerland, the complainant has maintained close ties with UPADS and with former President Lissouba's family and entourage. He is one of the founding members of the Cercle d'études pour le retour de la démocratie au Congo (Discussion group for a return to democracy in the Congo) (CERDEC), an association that the main opposition parties in exile have recently created from abroad. He is well known in Congolese circles in Switzerland, including among Sassou-Nguesso's supporters. Several of the complainant's family members have been subjected to harassment by State agents. The complainant himself has received so many anonymous phone threats that his counsel is preparing to file a complaint against persons unknown with the authorities in Zurich.

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<sup>1</sup> Switzerland's law on asylum.

2.5 On 9 September 2009, when the complainant submitted his complaint to the Committee, he included an original copy of a search and arrest warrant signed by the chief examining magistrate of the Dolisie regional court. The complainant is wanted for illegally wearing a military uniform and possession of a weapon of war.

2.6 In a letter dated 18 December 2009, counsel submitted to the Committee additional evidence that the complainant would be at personal risk if he were to return to the Republic of the Congo. This evidence is an original copy of the Congolese newspaper *Maintenant* dated 19 November 2009 which includes an account of the harassment by Congolese authorities of certain members of the complainant's family.

### **The complaint**

3.1 The complainant maintains that his forced return to the Republic of the Congo would constitute a violation by the State party of article 3 of the Convention, as there is good reason to believe that he would be at risk of serious harm such as that described in article 1, paragraph 1, of the Convention, due to his continued allegiance to former President Lissouba, now in exile, and his involvement in CERDEC, which was recently established in Switzerland (he is one of the founders of the Swiss branch of the organization).

3.2 The complainant notes that all CERDEC sympathizers and individuals close to the Lissouba family would be at risk of torture and ill-treatment for the purpose of obtaining information and confessions if they were to return to the country. Despite the amnesty signed by the Government in Brazzaville, flagrant human rights violations still occur against members of the opposition who support democracy and social justice. Furthermore, the complainant asserts that new reasons to fear for his safety have emerged since he arrived in Switzerland, in particular a search and arrest warrant issued by the Dolisie Court of Appeal, as well as a warrant for his arrest from the Dolisie regional court. According to the complainant, this evidence establishes a serious and concrete personal risk of psychological and physical torture if he should return to the Congo, particularly given his relationship with the Lissouba family and opposition leader MOUNGOUNGA NGUILA, and the fact that he was a rebel soldier.

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

4.1 In a memo dated 13 November 2009, the State party contested the admissibility of the complaint on the grounds of non-exhaustion of domestic remedies, in accordance with article 22, paragraph 5 (b), and rule 107, paragraph (e), of the Committee's rules of procedure.

4.2 The State party points out that the complainant appealed the rejection of his request for asylum by the Federal Office for Migration (ODM) on 23 April 2004. On 26 April 2009 the Federal Administrative Tribunal upheld the ODM decision, primarily in view of the lack of credibility of the complainant's claims. It also found that, regardless of the issue of credibility, the complainant's fear of future persecution was no longer founded, given the changes that had taken place in his country of origin since his departure.

4.3 The State party emphasizes, however, that in his complaint to the Committee, the complainant asserts that after he left the Congo he became active in CERDEC, an association founded in Paris by members of the opposition in exile, and that he started a Swiss branch. As a result of his activism, particularly as secretary of the Swiss branch of CERDEC, he claimed to have become known in Congolese circles in Switzerland, which led, he says, to the harassment of his close relatives in Brazzaville by Congolese authorities. He claimed to have received threatening phone calls, for which he planned to file a complaint against persons unknown with the Zurich police. The complainant also asserts

his close ties to Pascal Lissouba's family and claims that he was the subject of a search and arrest warrant issued on 6 September 2004 for illegally wearing a military uniform and possession of a weapon of war.

4.4 The State party highlights the fact that none of these claims were presented to ODM or to the Federal Administrative Tribunal, and they were thus not examined by those authorities. As new facts, they could constitute grounds for an application under the extraordinary procedure to the authority of first instance (reconsideration) or to the appeal court (review), or even for a fresh asylum procedure (second application for asylum). The State party points to the Committee's case law,<sup>2</sup> according to which the State party should have the opportunity to examine new evidence before the matter is referred to the Committee in a communication under article 22 of the Convention. The State party therefore asks the Committee to declare the complaint inadmissible on grounds of non-exhaustion of domestic remedies in conformity with article 22, paragraph 5 (b), of the Convention.

#### **Complainant's comments**

5.1 In a reply dated 23 February 2010 to the State party's observations on the admissibility of the complaint, counsel insists on the fact that important evidence justifying the complainant's fears in the event of being returned to his country of origin — evidence that was submitted to the national courts — was not taken into account by the courts, in violation of article 3 of the Convention. The complainant further notes that the entry into force of the removal order puts him at risk of refoulement. According to article 112 of the Federal Asylum Act, an application under a special remedy does not suspend the enforcement of removal unless the authority decides otherwise.<sup>3</sup> There is thus no guarantee that the complainant will not be sent back to his country before the extraordinary procedure is completed. The complainant therefore asks the Committee to find the communication admissible.

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

6.1 Before considering any claim contained in a communication, 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 must ascertain whether the complainant has exhausted all available domestic remedies; this rule does not apply where it has been established that the application of those remedies has been unreasonably prolonged, or that it is unlikely to bring effective relief to the alleged victim.

6.3 The Committee notes that, in the State party's view, the complaint should be declared inadmissible under article 22, paragraph 5 (b), of the Convention because the main facts that the complainant submitted to the Committee were never presented to the national judicial authorities. These facts are that the complainant became actively involved in CERDEC in Switzerland, which led to him becoming known in Congolese circles in Switzerland and consequently to the harassment of his close relatives in Brazzaville by Congolese authorities, and that the complainant himself also received threatening phone

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<sup>2</sup> Communication No. 24/1995, *A.E. v. Switzerland*, inadmissibility decision of 2 May 1995, para. 4.

<sup>3</sup> Article 112 states: "The filing of extraordinary legal remedies does not suspend enforcement of removal, unless the authority responsible for handling the case decides otherwise."

calls and planned to file a complaint against persons unknown with the Zurich police. The State party also points out that the search and arrest warrant issued by the Congolese authorities on 6 September 2004 was never submitted to ODM or to the Federal Administrative Tribunal.

6.4 The Committee takes note of the complainant's argument that the State party's courts have already violated article 3 of the Convention by wrongly rejecting the evidence provided by the complainant during the asylum procedure, and that consequently the State party should not be allowed to hide behind the argument that this new evidence was not brought to the attention of ODM and the Federal Administrative Tribunal. The Committee notes that, according to the complainant, going back to the national courts to submit the new evidence would not lead to a stay of removal unless the authority decides otherwise.

6.5 The Committee recalls its case law,<sup>4</sup> according to which the State party must have the opportunity to examine new evidence covered by article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment before it is considered by the Committee as a communication under article 22 of the Convention. In this instance, the national courts have not been able to consider new and important evidence, namely proof of the complainant's political activity within CERDEC in Switzerland and the resulting threats made against him and his family, and a copy of an arrest warrant dated 6 September 2004 for illegally wearing a military uniform and possession of a weapon of war. The complainant has failed to provide any valid reason for not submitting this evidence, which he knows to exist, to the national authorities during national proceedings. The Committee is therefore of the view that the conditions set forth in article 22, paragraph 5 (b), of the Convention have not been met and that the complaint is therefore inadmissible. The Committee also notes that, in addition to the extraordinary procedure, the complainant also has the right to file a new request for asylum on the basis of the new evidence.

7. Accordingly, the Committee decides:

- (a) That the communication is inadmissible;
- (b) That this decision shall be communicated to the State party and to the complainant.

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

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<sup>4</sup> Communication No. 24/1995, *A.E. v. Switzerland*, inadmissibility decision of 2 May 1995, para. 4.