



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

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Committee against Torture

Communication No. 351/2008

**Decision adopted by the Committee at its forty-seventh session,
31 October to 25 November 2011**

<i>Submitted by:</i>	E.L. (not represented by counsel)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	9 May 2008 (initial submission)
<i>Date of present decision:</i>	15 November 2011
<i>Subject matter:</i>	Deportation of the complainant to the Democratic Republic of the Congo
<i>Procedural issues:</i>	Insufficiently substantiated allegations; failure to establish prima facie violation of article 3; absence of personal, real and concrete risk of torture in the Democratic Republic of the Congo
<i>Substantive issues:</i>	Risk of torture following deportation of the complainant
<i>Articles of the Convention:</i>	3 and 22

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-seventh session)

concerning

Communication No. 351/2008

Submitted by: E.L. (not represented by counsel)

Alleged victim: The complainant

State party: Switzerland

Date of complaint: 9 May 2008 (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 15 November 2011,

Having concluded its consideration of complaint No. 351/2008, submitted on behalf of Ms. E.L. 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 and the State party,

Adopts the following:

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

1.1 The complainant is E.L., a national of the Democratic Republic of the Congo, born in 1988, who faces deportation from Switzerland. She maintains that her removal to the Democratic Republic of the Congo would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is not represented by counsel.

1.2 On 18 August 2007, the Special Rapporteur on New Communications and Interim Measures, acting under rule 108, paragraph 1, of the Committee's rules of procedure, requested the State party not to deport the complainant to the Democratic Republic of the Congo while her complaint was being considered.

Factual background¹

2.1 The complainant alleges that after her mother's death in 1998 — which followed her father's death in 1990 — she lived with her two elder brothers until they left for Rwanda to join the rebel forces in 2002. After their departure, she lived with her neighbours. On 22 June 2003, when the complainant was aged 15, she started to work as a receptionist in the office of the rapporteur to the Congolese National Assembly in Kinshasa, Raphaël Luhulu Lunghe. Her work included receiving distinguished visitors to the Parliament, preparing documents for the sittings and cleaning the rapporteur's office.

2.2 In 2004,² the complainant allegedly received a telephone call from one of her brothers, who apparently told her that he had joined the rebel forces and that he had asked her to pass on all the information she had access to in the course of her work, especially concerning any pending legislation or the composition and positions of the Congolese armed forces. The complainant allegedly did as her brother asked and gave him a considerable amount of information over the telephone.³

2.3 On 26 January 2005, the complainant reportedly received a warning from a member of the National Intelligence Agency (ANR),⁴ who allegedly told her that he was aware of her contacts with the rebel forces and the secret information she was passing on to them. On the next day, the rapporteur allegedly summoned all the members of his staff to his office and informed them that the Intelligence Agency was conducting an investigation and that the informer would be found out sooner or later.

2.4 The complainant allegedly immediately informed her brother of the warning given by the rapporteur in his office. In response, her brother supposedly took immediate steps to help the complainant leave the country. The following day, the complainant allegedly travelled by canoe to Brazzaville with the help of one of her brother's contacts. She is said to have stayed in hiding there in a house for a few days before flying to Switzerland on 22 March 2005.

2.5 On 23 March 2005, the complainant submitted an application for asylum. In a decision dated 23 March 2005, the Swiss Federal Office for Migration (ODM) expressed the view that the complainant's statements did not meet the credibility requirement. ODM considered in particular that it was unlikely that the complainant should have had access to secret information, especially of a military nature, through her work in the rapporteur's office. Moreover, the complainant was unable to specify the content of the supposedly secret information she passed on to her brother or to explain how the latter had heard about her new job in the rapporteur's office, considering that he had not been in touch with her for years. Lastly ODM considered that the situation in the Democratic Republic of the Congo, which was not experiencing a civil war or generalized violence throughout the country, did not warrant the complainant being deemed at risk in the meaning of article 14a, paragraph 4, of the Swiss Federal Law on the Residence and Settlement of Foreigners.

2.6 On 4 July 2007, the complainant lodged an appeal against that decision with the Federal Administrative Court (TAF). On 26 July, the complainant produced a copy of a press article taken from the Congolese twice-weekly newspaper *La Manchette*, dated 28 January 2005, according to which the complainant was wanted by the political police,

¹ The facts as stated are based on the complainant's submissions and on the decisions concerning her adopted in the course of asylum proceedings in Switzerland.

² The exact date of this telephone call is not specified.

³ The content of this information is not specified.

⁴ The National Intelligence Agency of the Democratic Republic of the Congo acts as both an internal and an external intelligence service.

which accused her of “information trafficking and spying”. The complainant maintained that this document showed that her fear of future persecution was real.⁵ On 6 September 2007, the Federal Court rejected the appeal, handing down a final decision on ODM’s rejection of the complainant’s asylum application and deportation order. The Federal Court concluded that it was not believable that the complainant should be unable to supply the least substantiated details of the nature and content of the sensitive, confidential information that she was supposed to have passed on for months to her brother. The Federal Court considered that the manner in which she was supposedly informed that she was suspected by the Intelligence Agency of passing information to the rebels appeared highly unlikely, just like the fact that a member of the Agency should have run the risk of warning her of the danger she was in rather than arresting her, or that her two brothers, who had been in exile in Rwanda for several years, should have been able, with just a phone call and in less than a day, to organize her instant flight from the country. As for the newspaper article submitted by the complainant, the Federal Court found that it had no probative value considering that a copy like the one produced could be falsified and that the type used for the article that appeared on the page of the newspaper was of a different size from that of the other articles printed on the same page.

2.7 On 29 November 2007, the Federal Court found the complainant’s appeal inadmissible on the ground that she had put forward no relevant new facts or conclusive evidence. On 1 February 2008, the complainant lodged an application for a reconsideration of ODM’s decision of 5 June 2007, which was declared inadmissible by the Federal Court on 18 March 2008 on the ground that it was manifestly time-barred.

The complaint

3.1 The complainant alleges that if she were sent back to the Democratic Republic of the Congo she would be in danger of being subjected to torture or ill-treatment. She points out that she was engaged in political work in the country, involving several secrets regarding the political and security situation, and she opted for exile in a foreign country, which in the eyes of the Congolese authorities placed her in the position of a “deserter”. She maintains that if returned to her country she would be in real and serious danger, since it was very likely that she would be subjected to thorough questioning and possibly to ill-treatment.

3.2 According to the complainant, the existence of such a risk of torture or ill-treatment is supported by the minutes of her hearings, the conclusions of her appeals and the evidence submitted in the course of internal proceedings, including the aforementioned newspaper article,⁶ a written statement by Mr. Luhulu Lunghe, which she alleges was not taken into account, and her pass, which showed that she had worked for the National Assembly.

3.3 The complainant refers to specific female reasons for escape in asylum applications, but does not substantiate this argument.

State party’s observations on the merits

4.1 On 17 February 2009, the State party submitted that the complainant had failed to establish that she would face a foreseeable, personal and real risk of torture if returned to the Democratic Republic of the Congo. It points out that the complainant has not shown that she was ever subjected to ill-treatment in the past. Moreover it suggests that the facts she alleges about the passing of secret information to her brothers, in connection with a rebel movement, lack any credence. For example, she had apparently been unable to

⁵ A copy of the said article was attached to the complainant’s initial complaint.

⁶ See paragraph 2.6.

explain how her brother had found out about her job with the Parliament and her whereabouts several years after he had left Kinshasa. The State party adds that it would be surprising if the complainant on a mere phone call would have taken the risk of losing her employment and facing serious consequences, especially since her alleged activity was directed against the very person who had apparently offered her the post she held. Similarly, the complainant seemed unable to say just when her brother had contacted her and even appeared to contradict herself by saying at the first interview that she had not been in touch with her brothers since a final telephone call when she was 15 years old until the day of her departure, while claiming later that she had passed information to them by telephone. The State party also points out that the complainant has been unable to give any details about the information she alleges she passed on and argues that the explanation she gave, saying that she was afraid to remember, was hardly convincing.

4.2 The State party also draws attention to factual inconsistencies in the complainant's statements and her credibility. According to the State party, the information she gave about her family background rested on little evidence and did not resemble the sort of social relations that were common in Africa. For example, it appears unlikely that the complainant should have had no information about her parents' relatives or that she should be unaware of her mother's ethnic origin or approximate date of birth, or of her brothers' whereabouts. The State party adds that the reasons she gives for her flight do not tally with what is common experience or logical behaviour. Thus it seems unlikely that a secret service agent would have taken the risk of warning the complainant that she was being investigated, especially in view of the situation prevailing in the Democratic Republic of the Congo. They suggest such doubts are only aggravated by the fact that she first said that the agent had called her, before giving a new version, according to which she had spoken to him personally. The State party points out that the complainant gave only a superficial account of her flight, without being able to say who might have helped her, who might have paid for her trip, how her departure had actually taken place or how her brothers could have set it up from Rwanda in a matter of hours.

4.3 According to the State party, the doubts raised by the complainant's account were only made worse when, at the appeal stage, she produced a newspaper article which was clearly not authentic and the content of which was peculiar and in apparent contradiction on several points with the complainant's own allegations. Thus, the article reports that she was constantly being followed by uniformed men, a fact she had completely omitted to mention. The article also mentions that the complainant's parents were making enquiries, whereas they were apparently already deceased. In addition, the complainant handed the Court a confirmation by the publisher of the newspaper *La Manchette* of the validity of the said article, except that the confirmation was drafted on headed notepaper that did not correspond to the name of the newspaper, which was given as *La Machette*. The State party believes it is unlikely that the headed paper of printed media would contain such a spelling mistake.

4.4 Lastly, the State party argues that the submission at the appeal stage of a written "statement" by Mr. Luhulu Lunghe raises still further doubts. According to the State party, it is unlikely that Mr. Luhulu Lunghe would explicitly admit responsibility for a major information leak occurring in his department. They add that it would be surprising if the statement had been furnished by the very person who apparently disapproved of the complainant for passing confidential information. The fact that the document contains a reference to the article that appeared in *La Manchette* and which was considered a forgery casts further doubt on the reliability of the testimony.

4.5 The State party concludes that the allegations and evidence submitted by the complainant offer no substantial grounds for believing that the complainant's return would expose her to a real, concrete and personal risk of torture.

Complainant's comments on the State party's observations

5.1 On 24 April 2009, the complainant reiterates her earlier conclusions and asks the Committee to ignore the State party's observations. She submits a copy of a search warrant, dated 25 January 2009, according to which the National Intelligence Agency had allegedly launched an immediate search operation against her in Kinshasa. According to the complainant, the document shows that she ran a foreseeable, real and personal risk of being exposed to treatment that violated article 3 of the Convention. This risk was supposedly due to the work she was doing in the Parliament prior to leaving the Democratic Republic of the Congo, to the sensitive State information to which she had access, and to her application for asylum in Switzerland. The complainant points out that the State party has not queried the fact that she worked for the Congolese Parliament. She stresses the importance of the statement made by the rapporteur Luhulu Lunghe and the newspaper article — despite a few formal inconsistencies — as evidence of the serious risk she would run if returned to the Democratic Republic of the Congo.

Additional observations by the State party

6. On 12 May 2009, the State party reiterates its previous observations, pointing out that the complainant's comments contain no new elements. The State party contends that the search warrant submitted by the complainant is clearly a forgery. According to the State party, it is unlikely that such a warrant should have been issued in January 2009, considering that by then the complainant had been gone from the Democratic Republic of the Congo for almost four years. It would also be inconsistent for the Congolese authorities to issue a search warrant in Kinshasa when, according to the complainant, they were quite aware that she had applied for asylum in Switzerland.

Additional comments by the complainant

7. On 24 May 2009, the complainant states that the State party's argument that the search warrant is a forgery is based on mere supposition lacking any objectivity. According to the complainant, the warrant is valid both in form and in substance. She asserts that she obtained a copy of it through an acquaintance with whom she stayed in touch and who kept her informed of the risk she ran in the event of return.

Issues and proceedings before the Committee*Consideration of admissibility*

8. Before considering any claim 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. The Committee further notes that domestic remedies have been exhausted and that the State party does not contest admissibility. Accordingly, the Committee finds the complaint admissible and proceeds to its consideration on the merits.

Consideration on the merits

9.1 The Committee must ascertain whether the return of the complainant to the Democratic Republic of the Congo would violate the State party's obligation under article 3, paragraph 1, of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

9.2 In so doing, the Committee must take account of all relevant considerations, including the existence in the State to which the complainant would be returned of a consistent pattern of gross, flagrant or mass violations of human rights. However, it must also determine whether the complainant runs a personal risk of being subjected to torture in the country to which she would be returned. The Committee reiterates that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not in itself constitute sufficient reason for concluding that a particular person would be in danger of being subjected to torture upon returning 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 gross and flagrant violations of human rights does not mean that in particular circumstances a person might not be in danger of being subjected to torture.

9.3 The Committee recalls its general comment on the implementation of article 3 of the Convention and reasserts that "... 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",⁷ but it must be personal and present. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal.⁸ Furthermore, the Committee observes that considerable weight will be given, in exercising the Committee's jurisdiction pursuant to article 3 of the Convention, to findings of facts that are made by organs of the State party concerned.

9.4 The Committee is aware of the human rights situation in the Democratic Republic of the Congo and of the many violations which continue to be reported in the country, including torture, arbitrary arrests and violence against women.⁹ The Committee recalls, however, that this situation in itself is not a sufficient reason to establish that the complainant is at risk of being subjected to torture on her return to the country; there have to be other reasons for believing that she personally runs such a risk.

9.5 The Committee notes the complainant's argument that the fact that she supposedly passed secret information to the Rwandan rebels when employed as a receptionist at the Congolese Parliament in 2004, added to the fact that she has requested political asylum in Switzerland, would expose her to the risk of ill-treatment if she were to return to the Democratic Republic of the Congo. The Committee also notes that the complainant has not reported undergoing any ill-treatment in the Democratic Republic of the Congo and that her allegations were not deemed to be credible by the national authorities.

⁷ General comment No. 1, annex IX, para. 6 (see HRI/GEN/1/Rev.9, vol. II).

⁸ See, inter alia, the Committee's decisions in *Mostafa Dadar v. Canada* (communication No. 258/2004), of 23 November 2005; *T.A. v. Sweden* (communication No. 226/2003), of 6 May 2005; and *N.S. v. Switzerland* (communication No. 356/2008), of 6 May 2010.

⁹ See, inter alia, the 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, of 10 January 2011 (A/HRC/16/27); the Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, of 17 January 2011 (S/2011/20); the conclusions of the Committee on the report of the Democratic Republic of the Congo under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/C/DRC/CO/1/CRP.1 (2006)); the concluding observations of the Human Rights Committee on the report submitted by the State party under the International Covenant on Civil and Political Rights (CCPR/C/COD/CO/3 (2006)); and the report on Technical Assistance and Capacity-building: 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).

9.6 While at the conclusion of its general comment the Committee is at liberty to appreciate the facts in the light of all the circumstances of each case, it recalls that it is not an appellate judicial body and that it must attach considerable weight to findings of fact made by organs of the State party concerned.¹⁰ In this particular case, the Committee gives the requisite weight to the conclusions of the State party's organs, which considered the facts and evidence submitted by the complainant for the asylum procedure and concluded that the complainant lacks credibility. The conclusions are based on the unlikelihood and inconsistencies of her account, particularly with regard to the secret information she allegedly passed to the Rwandan rebel forces, the contacts with her brothers, the supposed warning by the National Intelligence Agency official, her flight from the country and the details regarding the members of her family. The conclusions also rest on the use of evidence which is considered to be forged – such as the above-mentioned newspaper article¹¹ and the written statement by Mr. Luhulu Lunghe, rapporteur for the Congolese Parliament. The Committee has paid due attention to the complainant's comments, but nonetheless considers that her arguments have not been sufficiently substantiated to refute or clarify the contradictions noted by the State party in her observations.

9.7 In light of the above, the Committee is not persuaded that on the whole the facts as submitted are sufficient to conclude that the complainant would face a foreseeable, real and personal risk of being subjected to torture if returned to the Democratic Republic of the Congo in the meaning of article 3 of the Convention.

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 complainant's removal to the Democratic Republic of the Congo would not constitute a breach by the State party of article 3 of the Convention.

[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.]

¹⁰ See the Committee's general comment No. 1, *supra*, para. 9. See also, inter alia, the Committee's decision in *T.D. v. Switzerland* (communication No. 375/2009), of 26 May 2011, para. 7.8.

¹¹ The font and character size used for the article in question, entitled "*Mme E.L. recherché [sic] traquée par la police politique*" (Ms. E.L. wanted and hounded by the political police), which is included in the file, differ in objective terms from those used for the rest of the page. The article appears on the "Economy and Society" page of *La Manchette* newspaper (28 January 2005). The Committee also noted that the title of the letter confirming the authenticity of the article contains a gross spelling error ("*La Machette*" instead of "*La Manchette*").