



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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 962/2019*, **

<i>Communication submitted by:</i>	R.K. and L.B.M. (represented by counsel, Alfred Ngoyi Wa Mwanza)
<i>Alleged victims:</i>	The complainants
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	4 August 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 114 of the Committee's rules of procedure, transmitted to the State party on 21 October 2019 (not issued in document form)
<i>Date of adoption of decision:</i>	11 November 2022
<i>Subject matter:</i>	Expulsion to the Democratic Republic of the Congo
<i>Procedural issues:</i>	None
<i>Substantive issue:</i>	Risk of torture or cruel, inhuman or degrading treatment if expelled to country of origin
<i>Article of the Convention:</i>	3

1.1 The complainants are R.K., born on 25 November 1952, and his wife, L.B.M., born on 21 March 1962, both nationals of the Democratic Republic of the Congo. Their application for asylum in Switzerland was rejected, and they are now facing expulsion to the Democratic Republic of the Congo. They claim that their removal would constitute a violation by the State party of their rights under article 3 of the Convention.

1.2 On 21 October 2019, the Committee, acting through its Rapporteur on new complaints and interim measures, decided not to accede to the complainants' request for interim measures.

Facts as submitted by the complainants

2.1 In November 2015, R.K., the first complainant, learned that his nephew had been arrested in Brazzaville by agents of the National Intelligence Agency following a dispute with his tenant, who allegedly denounced him to the intelligence services as an opponent of

* Adopted by the Committee at its seventy-fifth session (31 October–25 November 2022).

** The following members of the Committee participated in the examination of the communication: Todd Buchwald, Claude Heller, Erdogan Iscan, Liu Huawen, Maeda Naoko, Ilvija Pūce, Ana Racu, Abderrazak Rouwane, Sébastien Touzé and Bakhtiyar Tuzmukhamedov.



the regime. The first complainant asked a friend, a colonel in the army of the Democratic Republic of the Congo, to help find his nephew. Through him, he learned that his nephew was reportedly being held in a cell by the Detection of Unpatriotic Activities Police, accused of colluding with outside forces to destabilize the regime of the Democratic Republic of the Congo. Given the seriousness of the case, and with his friend unable to help him further, the first complainant took various steps with the assistance of a lawyer and of the non-governmental organization *La voix des sans voix pour les droits de l'homme* (Voice of the Voiceless for Human Rights), but without success. Finally, in December 2015, he approached the Human Rights Watch country manager for the Democratic Republic of the Congo.

2.2 The first complainant's nephew was released without charge in late December 2015. From March to May 2016, the complainants travelled to South Africa. On their return, they were warned by their colonel friend that the security services of the Democratic Republic of the Congo had opened a file on the first complainant for having taken his nephew's case to Human Rights Watch and that the complainant's name had been included in a report of that organization in July 2016. Furthermore, the person from Human Rights Watch whom the complainant had approached had been expelled from the country.

2.3 After returning from a trip to Europe in July 2016, the complainants were informed by neighbours that unknown persons had come to the first complainant's home to look for him. The complainant reportedly consulted his colonel friend, who advised him not to return home, and so he went to live with friends.

2.4 On 10 May 2016, the first complainant received a summons instructing him to report to the National Intelligence Agency for reasons that would be communicated to him on his arrival. In early September 2016, he travelled to Rutshuru fearing for his safety and his life. As he had not responded to the summons, the Congolese authorities issued a warrant for his arrest. The second complainant initially remained in Kinshasa before going to Kasai owing to the death of her father. She joined her husband in December 2016.

2.5 On the night of 23 December 2016, armed soldiers went to the complainants' home and accused them of possession of weapons and espionage against the State for the benefit of militias. The first complainant was driven away and beaten to the point of unconsciousness. He regained consciousness in the countryside, where he was rescued by villagers and members of the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, who took him to a hospital in Rutshuru where he spent several weeks. In late January 2017, the first complainant arrived at the Bondeko refugee centre in Uganda, thanks to a priest whom he had met at the hospital. In Uganda, he was informed by his colonel friend that, on 30 January 2017, the National Intelligence Agency had declared him wanted for high treason and endangering State security.

2.6 Fearing for his life and safety in Uganda owing to the country's proximity to the Democratic Republic of the Congo and the relations between the two countries, the complainant travelled to Switzerland via Istanbul on 15 May 2017 on a borrowed passport, with the help of a smuggler. He applied for asylum immediately on his arrival in Switzerland, where one of his daughters lives.

2.7 The second complainant, who was not with her husband at the time he was assaulted, was also abandoned in the countryside by her abductors. She was taken in by nuns before travelling, on 22 May 2017, to the Bondeko refugee centre in Uganda, thanks again to the priest who had assisted her husband. She arrived in Switzerland on 3 July 2017 by the same route as her husband, helped by a smuggler.

2.8 The first complainant based his claim for asylum on his fear of being persecuted by the security services of the Democratic Republic of the Congo on account of his nephew's detention and his actions vis-à-vis the authorities. In a decision dated 10 April 2018, the State Secretariat for Migration rejected the complainants' asylum application. The complainants challenged the decision before the Swiss Federal Administrative Court. The Court rejected the appeal on 20 June 2019, pointing out that the release of the complainant's nephew without charge after a few weeks did not appear to be consistent with the accusation of endangering State security. It was therefore unlikely that the complainant would encounter difficulties with the State for having enquired about his nephew. The Federal Administrative Court also deemed it implausible that the complainant should have been mentioned by name in the

Human Rights Watch report. The Court stated that there was no conclusive evidence that the complainant was wanted by the Congolese authorities and cast doubt on the authenticity of the documents provided by the complainants. In particular, the certificates from the Bondeko and Masaja refugee facilities contained a new, different version of events that had never been mentioned by the complainants. The fact that they were issued on the same dates and that the certificates from the Bondeko refugee centre were written in French rather than in English, the official language of Uganda, also suggested that they had been drawn up at the request of the complainants.

2.9 Following the decision of the Federal Administrative Court, the complainants were given until 5 August 2019 to leave Switzerland. The complainants, however, remain in Switzerland. They could be detained and returned to the Democratic Republic of the Congo at any time.

2.10 The complainants claim to have exhausted all domestic remedies.

The complaint

3.1 The complainants maintain that their removal to the Democratic Republic of the Congo would constitute a violation of article 3 of the Convention because the complainant would be exposed to a specific, personal and serious risk of torture and ill-treatment should he return to the country.

3.2 The complainants emphasize that, owing to the wanted notice issued against the first complainant, he would be arrested as soon as he entered the territory of the Democratic Republic of the Congo and detained for an indefinite period. Given the political nature of the offences of endangering State security and treason with which he is allegedly charged and the systematic violations of human rights in the Democratic Republic of the Congo, particularly in relation to fair trials and conditions of detention, and given the practices of the National Intelligence Agency, there is an imminent risk of the first complainant's suffering irreparable, real and personal harm as a result of torture or inhuman or degrading treatment. The first complainant submits that, despite the election of a new president in December 2018, the security services have remained the same and there are no fair trials for political crimes. The complainants also argue that the documents they have submitted demonstrate that they face a real, present and personal risk of being subjected to torture and inhuman and degrading treatment within the meaning of article 3 of the Convention.

3.3 Accordingly, the complainants request the Committee to adopt interim measures on their behalf, namely, to ask the State party not to return them to the Democratic Republic of the Congo pending the outcome of the case before the Committee.

State party's observations on the merits

4.1 On 7 April 2020, the State party submitted its observations on the merits of the complaint, arguing that the complainants had not provided any concrete evidence to support their assertion that they would face a foreseeable, personal and real risk of torture or ill-treatment if they were returned to the Democratic Republic of the Congo. The State party therefore requests the Committee to find that the removal of the complainants to the Democratic Republic of the Congo would not constitute a violation of the international obligations of Switzerland under article 3 of the Convention.

4.2 The State party refers to the Committee's general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22, in which it is stated that the author of a communication must show that he or she faces a foreseeable, present, personal and real risk of being subjected to torture in the event of deportation to his or her country of origin, that there must be substantial grounds for believing there is such a risk and that the allegations must be based on credible evidence. The State party also refers to the information that the Committee should take into account to conclude that there is such a risk, as set out in paragraph 49 of general comment No. 4 (2017).

4.3 With regard to the evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned, the State party submits that, in accordance with the Committee's jurisprudence, it is necessary to determine whether the complainants are at

personal risk of torture, as the existence of a pattern of violations is not sufficient grounds for concluding that a person would be at risk of torture on returning to his or her country. In the present case, the State party argues that, despite sporadic local clashes and tensions, particularly in the east of the country, there is no war, civil war or widespread violence prevailing in the Democratic Republic of the Congo as a whole. In that respect, the State party submits that the complainants have not adduced evidence that they would face a foreseeable, real and personal risk of being subjected to torture if they were returned to the Democratic Republic of the Congo.

4.4 The State party argues that past torture or ill-treatment is a factor to be considered when assessing a person's risk of being subjected to torture or ill-treatment again if returned to his or her country. In the present case, the State party argues that the complainants have never specified the ill-treatment to which they claim to have been exposed, nor have they provided evidence from independent sources to support their allegations.

4.5 Regarding the complainants' political activities within or outside the Democratic Republic of the Congo as an element to be taken into account when assessing the risk that they face of being subjected to torture in the event of their return, the State party is of the view that the evidence does not suggest that the complainants were engaged in political activities.

4.6 Lastly, concerning the evidence to support the allegations' credibility, the State party notes that both the State Secretariat for Migration and the Federal Administrative Court rejected the grounds for asylum put forward by the complainants, considering that they had presented an implausible, artificial and fabricated account. In particular, the State party argues that the complainants did not convincingly substantiate the claim that the first complainant was wanted for giving information to Human Rights Watch or the accusation that the Congolese authorities were responsible for their alleged abduction by an armed gang in December 2016. As for the complainants' submissions, the State party observes that the copy of the National Intelligence Agency summons submitted to the Committee is dated 10 May 2016, while the copy provided to the Swiss authorities is dated 29 August 2016. According to the State party, the version submitted to the Committee makes it less likely that the complainants were able to travel to France and subsequently return to the Democratic Republic of the Congo in July 2016 without encountering any problems, although the complainants state that they received the summons two or three weeks after their return. The State party also highlights the doubts raised by the Federal Administrative Court as to the authenticity of the summons issued by the national authorities. With regard to the wanted notice, the State party agrees with the conclusions of the Federal Administrative Court and considers it to be without evidentiary value; it also points out that the document contains a number of striking spelling errors. The State party argues that the two documents confirming the complainants' stays at the Bondeko refugee centre cannot be considered indicative of a risk of persecution in the Democratic Republic of the Congo. The State party is surprised that the documents are not written in English and that they refer to an attack on the first complainant in Kampala that he has never mentioned. Furthermore, the document suggests that the first complainant travelled abroad on 29 April 2017, while the record of his hearing before the State Secretariat for Migration states that he left Uganda on 15 May 2017. The State party adds that the document concerning the second complainant, which was drawn up on 24 July 2017, states her intention to leave the next day, even though she had already arrived in Switzerland on 27 June 2017. The State party also points to the inconsistency of the letters attesting to the complainants' stays at the Masaja refugee facility, signed on 28 April 2017, which state that the first complainant had left Uganda on 29 April 2019.

4.7 The State party argues that the copies of the emails allegedly sent by the first complainant to a Human Rights Watch staff member do not demonstrate that the organization mentioned him in a subsequent report. The State party notes that mentioning the name of an informant in a report would be totally incompatible with the practice of Human Rights Watch and that the first complainant has never submitted the report in question. Lastly, the State party notes that the complainants have never submitted, either to the national authorities or the Committee, proof of a warrant for their arrest. The State party also highlights that the complainants have not provided any details as to the date on which that warrant was issued, its content or the circumstances in which they became aware of it. The State party considers

that the first complainant's claim that he is wanted in the Democratic Republic of the Congo for endangering State security and high treason is not corroborated by the facts.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (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.

5.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. This rule does not apply where it has been established that the application of said remedies has been unreasonably prolonged or it is unlikely to bring effective relief.¹

5.3 In accordance with article 22 (5) (b) of the Convention, the Committee must ascertain whether the complainants have exhausted available domestic remedies, although this rule does not apply where remedy procedures exceed a reasonable length of time² or are unlikely to bring effective relief to the alleged victim. The Committee notes that the State party has not commented on the admissibility of the complaint. The Committee has, however, ascertained that the complainants have exhausted all available domestic remedies. It therefore finds the communication admissible under article 22 of the Convention and proceeds with its consideration of the merits, as the complainants' claims under article 3 of the Convention are sufficiently substantiated for the purpose of admissibility.

5.4 As the Committee finds no further obstacles to admissibility, it declares the complaint admissible under article 3 of the Convention and proceeds to its consideration of the merits.

Consideration of the merits

6.1 In accordance with article 22 (4) of the Convention, the Committee has considered the present communication in the light of all the information made available to it by the parties.

6.2 In the present case, the issue before the Committee is whether the removal of the complainants 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 to return ("refouler") a person to another State where there are grounds for believing that he or she would be in danger of being subjected to torture or other cruel, inhuman or degrading treatment or punishment. The Committee recalls that the prohibition of torture is absolute and non-derogable and that no exceptional circumstances whatsoever may be invoked by a State party to justify acts of torture.³

6.3 The Committee must evaluate whether there are substantial grounds for believing that the complainants would be personally in danger of being subjected to torture on their return to the Democratic Republic of the Congo. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the possible existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim is to establish whether the complainants would be personally at a foreseeable and real 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

¹ See, for example, *E.Y. v. Canada* (CAT/C/43/D/307/2006/Rev.1), para. 9.2. See also the Committee against Torture's general comment No. 4 (2017), para. 34.

² *Asfari v. Morocco* (CAT/C/59/D/606/2014), paras. 8.1, 8.2 and 12.2.

³ Committee against Torture's general comment No. 2 (2007), para. 5.

concerned would be personally at risk.⁴ 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.⁵

6.4 The Committee also recalls that the burden of proof is on the complainant, who must present an arguable case – that is, must submit circumstantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real.⁶ However, when the complainant is in a situation where he or she cannot elaborate on his or her case, for instance when the complainant has demonstrated that he or she has no possibility of obtaining documentation relating to his or her allegation of torture or is deprived of his or her liberty, the burden of proof is reversed and it is up to the State party concerned to investigate the allegations and verify the information on which the complaint is based.⁷ The Committee further recalls that it gives considerable weight to findings of fact made by organs of the State party concerned; however, it is not bound by such findings and will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.⁸

6.5 In the present case, the Committee notes the complainants' argument that their removal to the Democratic Republic of the Congo would constitute a violation by Switzerland of their rights under article 3 of the Convention. The Committee notes that the complainants claim to fear arrest and indefinite detention upon entry into the Democratic Republic of the Congo in view of the wanted notice issued against the first complainant. It takes note of the claims made by the complainants, who consider that, given the systematic violations of human rights in the Democratic Republic of the Congo, in relation to fair trials and conditions of detention, and given the practices of the National Intelligence Agency, there is an imminent risk of the first complainant's suffering irreparable, real and personal harm as a result of torture or inhuman or degrading treatment.

6.6 The Committee recalls that it must ascertain whether the complainants would currently run the risk of being subjected to torture if they were returned to the Democratic Republic of the Congo. It notes that the complainants had the opportunity to provide supporting evidence and additional details about their claims at the national level, first to the Federal Office for Migration, then to the State Secretariat for Migration and the Federal Administrative Court, but that the evidence provided did not lead the national authorities to conclude that they would be at risk of being subjected to torture or cruel, inhuman or degrading treatment on their return to the Democratic Republic of the Congo. The Committee notes that, according to the State party, there is no war, civil war or widespread violence prevailing in the territory of the Democratic Republic of the Congo as a whole, despite occasional local unrest in the east of the country. It notes that the State party asserts that the complainants have never specified or provided evidence to support their allegations of having suffered ill-treatment. The Committee also notes that the State party argues that the account presented by the complainants before both the national authorities and the Committee concerning their grounds for asylum was implausible, artificial and fabricated and contained contradictions on crucial points. In this regard, it also notes the State party's observation that the complainants claimed that they left the Democratic Republic of the Congo in July 2016 and were able to return without encountering problems with the authorities, despite having received a summons from the National Intelligence Agency dated 10 May 2016. The Committee notes that the majority of human rights abuses and intercommunal tensions and conflicts contributing to an alarming security situation are concentrated in the east of the country, in areas of armed conflict, particularly in the Provinces of Ituri, North Kivu and South Kivu.⁹ It also notes that the complainants were based in Kinshasa and did not claim,

⁴ *Alhaj Ali v. Morocco* (CAT/C/58/D/682/2015), para. 8.3; *R.A.Y. v. Morocco* (CAT/C/52/D/525/2012), para. 7.2; *L.M. v. Canada* (CAT/C/63/D/488/2012), para. 11.3; and *K.M. v. Switzerland* (CAT/C/71/D/865/2018), para. 7.3.

⁵ *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), para. 15.3; and *K.M. v. Switzerland*, para. 7.3.

⁶ See, inter alia, *A.R. v. the Netherlands* (CAT/C/31/D/203/2002).

⁷ General comment No. 4 (2017), para. 38.

⁸ *Ibid.*, para. 50.

⁹ See the report of the United Nations High Commissioner for Human Rights on the human rights situation and the activities of the United Nations Joint Human Rights Office in the Democratic

either before the national authorities of the State party or in the complaint addressed to the Committee, to have taken part in political activities. The Committee observes that, after having taken steps to secure the release of the first complainant's nephew, the complainants were able to travel to South Africa and return to the Democratic Republic of the Congo without encountering problems with the authorities on their return. In this regard, the Committee also notes that the complainants attached to their complaint a summons from the National Intelligence Agency dated 10 May 2016 and were aware at that time that the security services had opened a file on them, but that they were nevertheless able to travel to France in July 2016 and return to the Democratic Republic of the Congo without being arrested.

6.7 While the Committee is concerned at the numerous reports of human rights violations, including the use of torture and ill-treatment, in the Democratic Republic of the Congo, it recalls that, for the purposes of article 3 of the Convention, complainants must face a foreseeable, real and personal risk of torture in the country to which they are returned. In the light of the above, the Committee believes that such a risk has not been established. The Committee considers that the documents and information submitted by the complainants do not dispel the doubts expressed by the State party's authorities as to their reliability and are not sufficient to establish that the complainants would run a foreseeable, real and personal risk of being subjected to torture if they were returned to the Democratic Republic of the Congo.

7. The Committee, acting under article 22 (7) of the Convention, concludes that the return of the complainants to the Democratic Republic of the Congo would not constitute a violation of article 3 of the Convention by the State party.

Republic of the Congo ([A/HRC/48/47](#)), para. 18; and the report of the team of international experts on the Democratic Republic of the Congo ([A/HRC/51/60](#)), para. 22.