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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. 916/2019*, **

Communication submitted by:	Y (represented by counsel, Rêzan Zehrê)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	21 February 2019 (initial submission)
Document references:	Decision taken pursuant to rule 115 of the Committee's rules of procedure, transmitted to the State party on 6 March 2019 (not issued in document form)
Date of adoption of decision:	12 November 2021
Subject matter:	Deportation to Eritrea
Procedural issue:	Admissibility – exhaustion of domestic remedies
Substantive issue:	Risk to life and of torture or ill-treatment in the event of deportation to country of origin
Articles of the Convention:	3 and 16

1.1 The complainant is Y, a national of Eritrea born on 5 November 1998. His application for asylum in Switzerland was rejected, and he is now facing expulsion to Eritrea. He claims that his expulsion would constitute a violation by the State party of articles 3 and 16 of the Convention. The State party made the declaration provided for in article 22 (1) of the Convention on 2 December 1986. The complainant is represented by counsel, Rêzan Zehrê.

1.2 On 16 June 2021, pursuant to rule 114 of its rules of procedure, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from deporting the complainant to Eritrea while his complaint was being considered. On 23 June 2021, the State party informed the Committee that it had suspended the complainant's expulsion to Eritrea.

The facts as submitted by the complainant

2.1 The complainant is of Tigrinya ethnicity and Catholic faith and was born in Hadish Adi, Eritrea. His brother has been granted asylum in Switzerland, where he resides. The complainant has another brother who has also applied for asylum in Switzerland. These two brothers have deserted the Eritrean armed forces.

* Adopted by the Committee at its seventy-second session (8 November–3 December 2021).

** The following members of the Committee participated in the examination of the communication: Claude Heller, Erdoğan İşcan, Ilvija Pūce, Ana Racu, Diego Rodríguez-Pinzón, Bakhtiyar Tuzmukhamedov and Peter Vedel Kessing.

2.2 In January or February 2014, the complainant attended a class on HIV given by a physician. The physician, a Pentecostal, took the opportunity to preach the word of God to some 15 students who had stayed behind at the end of class. Seven soldiers then arrested them and had them board a truck. The complainant and the other students were placed in detention. The complainant spent two and a half months on a former military base near Ela Beridi. During his detention, the complainant was forced to work in an army-owned market garden during the day and, at night, he was locked up in a container and slept on the floor, alongside 24 other detainees.

2.3 In March 2014, the complainant was questioned by guards. He stated that he was a Catholic and had not known that the physician was not one. As a result of these claims and repeated appeals by his uncle, the authorities eventually acknowledged that they had wrongly suspected him of being a follower of Pentecostalism, a religious movement not recognized by the State.

2.4 The complainant was released at the end of March 2014. He subsequently contacted the principal of his school to be reinstated, but the principal rejected his request, stating that he could not be reinstated because of his unjustified absence. As he was unable to continue his schooling, in March 2014, the complainant started helping his uncle with farm work.

2.5 In August 2014, the complainant's mother informed him of a discussion she had had with the village administrator: according to the administrator, the complainant would have to start military training since he was no longer in school.

2.6 The complainant objected to the regime's policies, including the requirement to serve in the army for an indefinite period. In October 2014, for fear of being rounded up during a police raid and detained again, the complainant left Eritrea illegally. His trip was financed by the proceeds of the sale of cattle belonging to his parents and by savings from his brother, who was staying in Juba.

2.7 The complainant travelled from his village to Awgaro by vehicle. He was carrying a student card, which served as a safe conduct. He then crossed the border into the Sudan on foot with three other people. He spent five months in a refugee camp run by the Office of the United Nations High Commissioner for Refugees (UNHCR) in Khartoum, where he was registered as a refugee. He threw away his student card before entering the camp, because someone had told him that, if he had it on him, he would not be taken in as a refugee by a UNHCR camp.

2.8 Due to the harsh living conditions of refugees in the Sudan, the complainant left the Sudan by crossing the desert into Libya, where he stayed for three months. Then he took a boat to Italy, where he stayed for a week.

2.9 On 26 May 2015, the complainant, then an unaccompanied minor, was stopped at the Sihlbrugg railway station in Switzerland while on a train from Milan. His asylum application was registered on 28 May 2015. On 8 June 2015, the complainant was given a personal background interview, during which he was not assisted by either his own legal counsel or a court-appointed legal representative.

2.10 On 17 June 2015, the State Secretariat for Migration interviewed the complainant, again without legal representation, and asked him questions about his identity and age. His status as a minor was subsequently recognized by the Swiss asylum authorities, and his case was referred to the Canton of Fribourg, where his brother's asylum application was being examined. A guardian was appointed to be the complainant's legal representative until he reached the age of majority.

2.11 On 14 July 2016, the complainant was interviewed regarding his grounds for asylum in the presence of his guardian. On 6 March 2017, the State Secretariat for Migration rejected his asylum application, on the basis that the complainant, now of age, had not had any trouble from the Eritrean authorities between his release in March 2014 and his departure from Eritrea six to seven months later. His statements concerning the discussion between his mother and the village administrator were not decisive, since the discussion had not been followed by an official summons. Furthermore, the fact that he had been told by his mother that the authorities might be looking for him was insufficient to establish an objectively founded fear of persecution. His illegal departure from Eritrea was irrelevant, as there was

no evidence that the complainant was persona non grata with the military authorities. Nor was the possibility of future military service relevant, since it was a civil duty imposed on every Eritrean citizen without discrimination. The State Secretariat for Migration considered the complainant's statements to be irrelevant and dispensed with an "in-depth" examination of their plausibility. Furthermore, the State Secretariat for Migration found that there was no impediment to removal, which it declared lawful, required and practicable.

2.12 On 7 April 2017, the complainant lodged an appeal with the Federal Administrative Court against the decision of the State Secretariat for Migration. The complainant argued, inter alia, that, by leaving Eritrea illegally, he had evaded the recruitment of which the local authorities had informed his mother, following his exclusion from school. Consequently, he would be considered a draft evader if he returned to Eritrea. In addition, two of his brothers were deserters. There are therefore a number of factors, in addition to his illegal departure, that would make him appear as persona non grata with the Eritrean authorities. He also argued that, owing to his illegal departure, he would face treatment prohibited, inter alia, under article 3 of the Convention upon his return. Moreover, the national service, which is of indefinite duration, is tantamount to enslavement or forced labour.

2.13 On 22 May 2017, the complainant sent the Federal Administrative Court a copy and his translation of a summons from the Hadish Adi population department, dated 5 January 2015, inviting him to present himself at the department's offices three days later. The summons, which was delivered to the complainant's family after his departure, had been found by the complainant's sister in the belongings of their mother, who is illiterate.

2.14 By letter dated 18 August 2017, the complainant also produced the originals of his baptismal certificate and of the summons dated 5 January 2015, together with the envelope it had been mailed in. He also invoked the principle of equal treatment in relation to similar cases, in which two young Eritreans whom the State Secretariat for Migration considered "unknown to the Eritrean authorities" had been recognized as refugees by the State Secretariat, upon reconsideration, because they had reached the age for enlistment.

2.15 On 22 November 2018, the Federal Administrative Court dismissed the complainant's appeal on the grounds that (a) arbitrary detention was not the cause of the complainant's flight from Eritrea in September or October 2014, a fact which the complainant had not contested; (b) it was appropriate for the State Secretariat for Migration to have found the complainant's illegal departure from Eritrea, in itself, irrelevant, based on a new practice introduced in June 2016 and confirmed by the Court in Reference Judgment D-7898/2015 of 30 January 2017; (c) the summons dated 5 January 2015 was not sufficient to establish that the complainant would be conscripted, given that he had not yet reached the age for enlistment; (d) it could not be inferred, given that the summons did not come from the military authorities, but from the population department of his place of residence, that the complainant would be regarded as a draft evader in breach of his military obligations; (e) the conversation of the complainant's mother with a local administrator in August 2014 was not sufficient to establish the existence of concrete contact with the Eritrean military authorities prior to the complainant's departure from Eritrea with a view to his conscription; (f) there were no factors that would make the complainant appear to be persona non grata with the Eritrean authorities and therefore that would expose him, in the event of his return, to a significant risk of punishment on account of his illegal departure; (g) there was no evidence in the file to suggest that the first instance authority had been wrong to find that enforcement of the removal order was lawful, reasonable and practicable; (h) since the complainant had not yet reached the age for enlistment when he had left Eritrea, there was no real risk that he would be imprisoned for breach of military duty upon his return; and (i) in the absence of circumstances specific to the case in question, the enforced removal of an Eritrean national who was required to perform national service could not be deemed unlawful.

2.16 On 28 November 2018, the State Secretariat for Migration directed the complainant to leave Switzerland on 27 December 2018 at latest. The complainant declares that he has exhausted all available domestic remedies and that he has not submitted his complaint for examination under another procedure of international investigation or settlement.

The complaint

3.1 The complainant argues that the State party would be in breach of its obligations under articles 3 and 16 of the Convention if it deported him to Eritrea. Having left Eritrea illegally and having since reached the age for enlistment, he would be punished and would face a real and imminent risk of being subjected to inhuman and degrading treatment that would in turn place his physical and psychological integrity in serious danger. If deported, he would be at risk of being reimprisoned in inhumane conditions and subjected to torture and ill-treatment and then forced to enlist in the army.

3.2 According to the complainant, the decisions of the Swiss authorities involve procedural errors. In particular, the State Secretariat for Migration and the Federal Administrative Court wrongly held that, in view of the lack of relevance of the complainant's grounds for asylum, they were not obliged to consider their plausibility. However, the State party is obliged to examine thoroughly the complainant's asylum application, as concluded by the Committee in *M.G. v. Switzerland*.[1] In addition, the Swiss authorities refused to take into account the information on illegal departures from Eritrea, as well as the relevant facts of the case.

3.3 Furthermore, neither the State Secretariat for Migration nor the Federal Administrative Court have challenged any of the following elements: (a) the nationality of the complainant; (b) the fact that he has reached the age for enlistment in Eritrea; (c) the plausibility of his reasons for fleeing and for seeking refugee protection; (d) his statements regarding his illegal departure from Eritrea; or (e) his statements regarding his imprisonment in Eritrea. It appears from his interviews that his account was coherent, detailed and without major contradictions. Since the complainant disappeared, leaving the country without authorization, and has been absent for more than four years, he would be stopped and questioned by the Eritrean authorities if he returned to Eritrea. It is clear that the summons addressed to the complainant was related to his enlistment in the army, the official recruitment age being 18.

3.4 As to the plausibility of his illegal departure, for many years, permission to leave Eritrea has, in practice, been given only to a very small number of people considered to be loyal to the regime, in exchange for a large sum of money. A valid passport, an exit visa and an international health certificate are required to leave Eritrea legally. Owing to the restrictions on the issuance of exit visas, it is generally very difficult for ordinary Eritrean citizens to leave the country legally. For these reasons, deserters and draft evaders like the complainant, who has never had a passport and did not qualify for an exit visa, tend to leave the country illegally via the Sudan or Ethiopia.

3.5 In its decision in *M.G. v. Switzerland*, the Committee cites the 2018 report of the Special Rapporteur on the situation of human rights in Eritrea,[2] noting, inter alia, that torture and other inhumane acts continued to be committed in Eritrea, especially in connection with the national service. The Committee concluded that the complainant's deportation to Eritrea would constitute a violation of article 3 of the Convention.

3.6 There is no basis for the assertion made by the Federal Administrative Court that a significant risk of punishment in the event of deportation is plausible only if there are "additional factors" involved in the complainant's illegal departure from the country of origin. According to the complainant, he would be punished for having left Eritrea without the express permission of the authorities. Moreover, he is already known to the local authorities who summoned him. He did not respond to the summons, which raises doubts about his subordination or makes him a suspected draft evader. The complainant has reached the age for enlistment and would, given his unauthorized departure from Eritrea, be considered a "draft evader" by the Eritrean Government and therefore an enemy of the country.

3.7 Furthermore, the complainant contests the conclusions of Reference Judgment D-7898/2015 of the Federal Administrative Court, which served as a basis for the same Court's Judgment E-2076/2017 of 22 November 2018, upholding the complainant's removal to his

[1] CAT/C/65/D/811/2017.
[2] A/HRC/38/50.

country of origin. Up until that reference judgment, the Court approached the question of an illegal exit from Eritrea in the same way as the European Court of Human Rights had in *M.O. v. Switzerland*,[3] considering that a person who was close to or had already reached the age for enlistment and who had exited the country illegally would be subjected to political persecution in the event of return.

3.8 However, in its recent case law, the Federal Administrative Court has changed its stance regarding the question of the punishment of an Eritrean national who is close to reaching or who has already reached enlistment age after leaving Eritrea illegally, and it now gives more credence to unclear, unreliable and unobjective sources of information than to those of established international organizations. Thus, the Swiss authorities did not observe the standards of quality established by the European Court of Human Rights, which are crucial in the decision-making process, and did not consult other sources besides the information available to the asylum authority, in particular those from non-governmental organizations (NGOs) or United Nations organizations.[4] The State party merely examined information provided by sources whose authority and reputation it had not reviewed and relied on this information without checking whether it was consistent with the other information available. The illegal exit of a national who is close to reaching or who has already reached the age for enlistment is still considered a crime against the nation and is unduly punished by the Eritrean regime.[5]

3.9 Furthermore, the complainant may be forced to perform military service for an indefinite period which amounts to forced labour contrary to his fundamental rights. National service is of unlimited duration since 2002, and torture is a widespread practice during Eritrean national service.

3.10 The Federal Administrative Court, relying on its Reference Judgment E-5022/2017 of 10 July 2018, holds that the enforcement of removal is unlawful only if there is a real risk of a gross violation of article 4 (2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Forced labour is in itself ill-treatment, whether or not it was flagrantly applied, and Eritrean military service should even be considered a form of enslavement.[6]

State party's observations on the merits

4.1 In its observations of 28 August 2019, the State party provides detailed information on asylum procedures and the processing of asylum applications submitted by Eritrean nationals in Switzerland. The State party asserts that the complaint ought to be rejected on the merits. In May 2015, the State Secretariat for Migration prepared a report entitled "Eritrea – Country Focus", which brings together information on the situation in Eritrea. This report was approved by four partner authorities, a scientific expert and the European Asylum Support Office. In February and March 2016, the State Secretariat for Migration undertook a mission to Eritrea in order to review, develop and supplement this information, in the light of other sources that had become available in the meantime. The State Secretariat published an update, based on all the information gathered, on 10 August 2016.[7] In reports published between December 2015 and August 2016, several national authorities – such as those of Sweden and Norway, and the Home Office of the United Kingdom – reached similar conclusions.

[3] European Court of Human Rights, *M.O. v. Switzerland*, case No. 41282/16, judgment, 20 June 2017.

[4] European Court of Human Rights, *N.A. v. The United Kingdom*, case No. 25904/07, judgment, 17 July 2008, paras. 119–121.

[5] See, inter alia, Upper Tribunal of the United Kingdom, *MST and Others (national service – risk categories) Eritrea CG*, [2016] UKUT 00443 (IAC), judgment, 7 October 2016, para. 344.

[6] A/HRC/38/50, para. 108 (b), where it is stated that the Eritrean national service constitutes no less than the enslavement of a whole population.

[7] State Secretariat for Migration, "Focus Eritrea: Update Nationaldienst und illegale Ausreise", 10 August 2016.

4.2 The Federal Administrative Court has handed down three reference judgments concerning Eritrea,[8] in which it discusses specific limitations relating to the availability of information on the situation in Eritrea. In Judgment E-5022/2017, the Court also devoted two and a half pages to discussing the shortcomings of some important categories of sources regarding Eritrea and stated that it had some methodological reservations about all the available sources. In that judgment, the Court took into account the available information on Eritrea, in accordance with the standards of quality and scientific methods approved by the European Union authorities and member State authorities that are responsible for migration-related issues, especially asylum and removal. Keeping in mind the challenges faced by those seeking information on Eritrea, the Court took into consideration not only the facts reported, quite a while ago in some cases, by international human rights organizations, but also the facts reported more recently by foreign journalists and specialists from European authorities in the context of information-gathering missions to the country. The Court therefore examined the situation in Eritrea in great detail, over tens of pages, drawing on a large number of sources. It evaluated the information, reports and arguments contained in those sources very carefully. In its judgments on recent cases concerning Eritrea, the Court confirmed its earlier findings. That is why the State party considers those judgments to be relevant to the present case.

4.3 According to the Swiss migration authorities, if the examination of an individual case reveals that the person concerned would not only be punished in order to ensure his or her compliance with military obligations but would also be considered a political opponent and subjected to disproportionate punishment and inhuman treatment, the person is considered to be at risk of persecution under refugee law.

4.4 The Federal Administrative Court has noted that refusal to serve and desertion are severely punished in Eritrea. The penalty that is imposed is generally accompanied by imprisonment in inhumane conditions, and often by torture, since desertion and refusal to serve are considered acts of protest against the regime. As such, this penalty constitutes a form of persecution, and a well-founded fear of being subjected to it results in the granting of refugee status. However, a fear of this kind is well founded only if the person concerned has already actually been in contact with the military authority or another authority, provided this contact suggested that the person would soon be recruited (for example, the receipt of a summons from the army). It is not enough for there to be merely a possibility that the person may receive a summons at some point in the future. Moreover, the fact that the person may have to do military service is not, in itself, decisive.

4.5 The question of whether the potential enlistment of the complainant in the national service upon his return to Eritrea would constitute treatment that is prohibited by international law relates to the question of whether the removal is lawful and enforceable. The execution of a removal order is unlawful in cases where Switzerland, under public international law, cannot force a foreign national to travel to a given country and where no other State has declared that it is willing to receive the person, in accordance with the principle of non-refoulement. Under domestic law, a removal order is unenforceable if the removal or expulsion of the foreign national to his or her country of origin would actually put him or her in danger, for example if there is a war, a civil war or widespread violence or if the person needs medical treatment.

4.6 Since June 2016, the State Secretariat for Migration has taken the position that the mere fact that a person left Eritrea illegally does not expose that person to certain persecution upon return to the country. Consequently, Eritrean nationals who have not yet been summoned for national military service, who are exempt from service or who have been released from service are no longer recognized as refugees on that basis alone. Nevertheless, the State Secretariat for Migration still examines every asylum application carefully. The Federal Administrative Court confirmed and explained this practice in the reference judgments mentioned above.

[8] Judgements D-7898/2015 of 30 January 2017, D-2311/2016 of 17 August 2017 and E-5022/2017 of 10 July 2018.

4.7 In Reference Judgment D-7898/2015 of 30 January 2017, the Federal Administrative Court considered the likelihood that Eritreans who had left their country illegally would be persecuted on those grounds if they returned. The Court summarized its findings in Judgment E-1218/2019 of 16 April 2019. After a thorough analysis of the available information, it reached the conclusion that the practice of granting refugee status solely on the grounds of illegal departure from Eritrea could no longer be followed. This assessment is based primarily on the observation that members of the Eritrean diaspora, some of whom left the country illegally, are able to return to Eritrea for short stays without coming to any harm. Consequently, individuals who left Eritrea without authorization can no longer be considered, as a general rule, to be at risk of severe punishment and thus eligible for asylum.

4.8 In the current case, the expulsion of the complainant is not unenforceable. Eritrea is not in a situation of war, civil war or widespread violence that would automatically make it possible to assume – regardless of the circumstances of the case – that anyone from that country faces real danger. Moreover, the living conditions there have improved, despite ongoing economic problems; the situation has stabilized as regards the state of medical resources, access to water and food, and training conditions. In addition, a large proportion of the population receives substantial remittances from the diaspora. The peace agreement that was signed with Ethiopia on 9 July 2018 put an end to the conflict between the two countries. In this context, removal orders are enforceable unless, owing to specific personal circumstances, the person's life would be in danger if he or she were to be returned to Eritrea; the execution of such orders no longer requires the existence of particularly favourable individual circumstances, as stipulated in earlier case law. The risk of enlistment in the national service can no longer be considered, in itself, an obstacle to the enforcement of a removal order.

4.9 Furthermore, the expulsion of the complainant is not unlawful. According to the case law of the Federal Administrative Court, complainants who state that they left their country for fear of being summoned for national service must also demonstrate that it is highly likely that they would be subjected personally – and not simply by an unfortunate coincidence – to measures that are incompatible with international law. In its Reference Judgment E-5022/2017, the Court examines the lawfulness of enforced removal to Eritrea, in the event of voluntary return, where there is a risk of conscription into the national military or civilian service. In doing so, it considers the objectives of the service, the recruitment system, the duration of the obligation to serve, the group of people concerned and the conditions of service. The Court acknowledges that the numerous sources of information consulted indicate that all Eritrean nationals, male and female, are required to perform national service. According to the information available to it, recruitment for the national service is usually done through the school system. In the twelfth grade, all students are assigned to the national military training centre in Sawa, where they receive military training, complete their studies and take their final examination. Those turning 18 years old who are no longer in school may be instructed directly to report to duty by the local administrative authorities. The basic training to be completed under this scheme may last up to six months before the persons concerned are drafted into military or civilian service for a period of 5 to 10 years. The Court also acknowledges that living conditions are harsh both during basic training and during national service, and that the sources consulted mentioned ill-treatment and sexual abuse. The Court notes that, during their military training, soldiers are subjected to arbitrary decisions by their superiors, who severely punish undisciplined behaviour, dissenting opinions and attempts to flee. Arbitrariness also prevails during military service; the same abuses can be observed, although they cannot necessarily be considered widespread. As for the civilian service, it is very poorly paid; those who serve in it can barely cover their needs with the pay they receive.

4.10 That being said, the Federal Administrative Court did not find that ill-treatment and abuse of conscripts were so widespread that all members faced a real and serious risk of being subjected to such abuse. It therefore cannot be said that the complainant would be at serious risk of being subjected to forced or compulsory labour if he were to perform national service; the same applies to the risk of being subjected to inhuman or degrading treatment. Moreover, there are considerable differences between military service performed in the army and military service performed for a civilian employer or administration: (a) the conditions for joining one or the other, as well as for release from service, differ in that the least qualified

and most recalcitrant tend to be assigned to strictly military service, from the start; (b) the chances of being assigned to a civilian sector are significantly higher, as the vast majority of people perform their national service within the framework of the planned State economy; and (c) penalties for evading service are generally less coercive and less harsh in the civilian sector. It is therefore impossible to make generalizations, especially as there are gaps in the information available on national service practices and statistics.

4.11 The complainant is critical of the fact that, according to the Federal Administrative Court, national service in Eritrea should be considered forced labour rather than enslavement. In Reference Judgment E-5022/2017, the Court held, on the basis of the information available, that there were no grounds for presuming that national service was a permanent condition of servitude within the meaning of international law. On the other hand, insofar as national service in Eritrea is poorly remunerated, has no predetermined duration and can last from 5 to 10 years, it cannot be described as a normal civic obligation; it is a disproportionate burden and could be considered to constitute forced labour. This approach is in line with that of the Human Rights Council which, in its resolution 38/15 of 6 July 2018, does not mention enslavement when referring to the report of the Special Rapporteur on the situation of human rights in Eritrea. Furthermore, the Human Rights Committee has not referred to enslavement in the context of national service.[9]

4.12 In addition, the complainant has not provided any new information that relates to him specifically and that suggests he would be at risk of prohibited treatment if he were to perform military service. In reality, he seeks to have the situation in Eritrea reassessed to his advantage, without presenting conclusive arguments linked to his personal situation. Lastly, as noted above, the complainant cannot be considered a draft evader.

4.13 It is apparent from the decisions of the domestic authorities that the complainant's asylum application was thoroughly assessed. However, the complainant does not demonstrate in any way how his right to an effective remedy against the decision to enforce his removal was infringed.

4.14 The complainant repeatedly alleges that he is at risk of being forcibly returned to Eritrea. However, Switzerland has not forcibly returned Eritrean nationals to Eritrea since the country's independence, for the simple reason that Eritrea does not accept such measures in respect of its own nationals residing de facto in Switzerland. Since it is not possible to forcibly return the complainant, the examination of the case focuses solely on the risks faced by the complainant if he voluntarily complies with his obligation to return.

4.15 The so-called "voluntary" return of the complainant requires the complainant to present himself at an Eritrean consular office abroad in order to be issued a passport or safe conduct. He has stated that he has no national travel documents and he cannot board a plane from Switzerland to Eritrea without one, nor can he enter a country that shares a land border with Switzerland without a visa, since Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation), which also applies to Switzerland, would apply to him. By applying to an Eritrean consular office, the complainant would have the means, if not to obtain assurances regarding his return to Eritrea, at least the possibility of negotiating them and then, in the event of failure, of deciding against voluntary return.

4.16 According to the conclusions reached by the Federal Administrative Court after a detailed analysis of the Eritrean national service, the possibility that the complainant might be required to perform national military service upon his return to Eritrea contravenes neither article 3 nor article 16 of the Convention.

4.17 The State party does not contest the illegality of the complainant's departure from Eritrea. However, it is the profile of the person concerned rather than the circumstances of that person's departure from Eritrea that interests the Eritrean authorities. With regard to Eritrean minors who left their country before reaching the standard age for enlistment, the

[9] CCPR/C/ERI/CO/1, paras. 37–38.

sources are incomplete and even contradictory. It might be the case, indeed it is even probable, that minors who subsequently return to the country will be exempted from sanctions for illegal departure from the country, especially if they return voluntarily.[10] The complainant's personal profile is not likely to attract the negative attention of the Eritrean authorities, given that (a) he is Catholic, which is an authorized religion in Eritrea; (b) all charges against him were dismissed at the end of March 2014, at which time the authorities admitted their misunderstanding of his religious beliefs; and (c) he has not plausibly established that he violated his military obligations prior to his illegal departure. Furthermore, available sources indicate that Eritreans who have been abroad for three years have the opportunity to settle their diaspora status with the Eritrean authorities by paying a "diaspora tax" and, for those who have violated their national service obligations, by signing a letter of regret. These persons can then return to Eritrea and stay there temporarily under this status, and do not risk being exposed to sanctions solely on account of their illegal departure from Eritrea. As a general rule, after an uninterrupted stay in Eritrea of one to three years maximum, these persons lose their diaspora status and are again subject to national service obligations, as well as those relating to leaving the country.

4.18 There is little up-to-date, specific and evidence-based information on the treatment by the Eritrean authorities of persons returning to Eritrea after an illegal departure. Furthermore, the sources do not always distinguish explicitly between voluntary return and forced removal. In addition, the situation in Eritrea has evolved since the signing of a peace declaration and a peace agreement between Ethiopia and Eritrea in 2018. This agreement led to the opening of three land borders in September 2018 and a fourth on 7 January 2019. A journalist reported in October 2018 that the situation at the border had changed and that tens of thousands of Eritrean nationals had left the country without passports or exit permits.[11] As there is no information on this matter, it appears that the Eritrean authorities have not prevented persons who ordinarily require an exit permit from crossing the border into Ethiopia. Although efforts are being made to establish more effective border control and to reintroduce an exit visa requirement, it seems that crossing without an exit visa is still tolerated at the Omhajer-Humera border crossing.

4.19 The summons dated 5 January 2015 was not sufficient to establish that the complainant would be conscripted, regardless of the document's authenticity. The complainant does not explain how it is obvious that this summons from the administrative authorities of Hadish Adi – and not from the army – was related to his enlistment in the army, given that it did not even mention the purpose of its issuance. Furthermore, at the time the summons was delivered, the complainant was 16 years old, even assuming he was born in May 1998. He was therefore not of age to serve or even close enough to being of age to serve. The excerpt from the report of the European Asylum Support Office cited by the complainant mentions that young people who had to stop school before their twelfth year can be directly conscripted by the local administration when they reach the age of 18. The summons was also delivered to the complainant's family more than three months after the alleged date of his illegal departure. In addition, the complainant stated before the State Secretariat for Migration that he had not been called up for military service and that he was afraid of being forcibly recruited in the context of a police round-up ("*giffa*"). Moreover, there are no reliable or consistent sources of information that would make it possible to assume that, at the time in question, it was the practice of the local Eritrean administrative authorities to summon to their offices minors who had dropped out of school, who were actively involved in farm work with their families and who could plausibly establish their year of birth, in order to force them into military service, despite the fact that they were minors. There is thus no real reason to believe that, in the event of his voluntary return to Eritrea, the complainant would be considered to have violated his military obligations prior to his illegal departure and that he would be punished for this.

4.20 The complainant does not claim to have been tortured or ill-treated in his country of origin. Furthermore, his detention was not the reason he fled Eritrea. The complainant does

[10] United States Department of State, "Eritrea 2018 Human Rights Report", p. 15.

[11] Tom Gardner, "'I was euphoric': Eritrea's joy becomes Ethiopia's burden amid huge exodus", *The Guardian*, 12 October 2018.

not claim to have engaged in political activity within or outside Eritrea. He has never engaged in any activity in opposition to the Eritrean regime. In addition, the complainant submitted the summons of 5 January 2015 only in the course of appeal proceedings, that is to say, two years after it had been issued, without ever having mentioned its existence before that.

Complainant's comments on the State party's observations on the merits

5.1 In his comments dated 30 January 2020, the complainant reiterates and develops his arguments and challenges some of the State party's assessments. He maintains that there is no guarantee that persons who have left Eritrea illegally can return safely to their country. Little reliable information is available on the attitude of the Eritrean authorities towards Eritreans who are forcibly returned to the country. In its report, the State Secretariat for Migration itself admits that there is no legal certainty in this context. However, based on this same report, the State Secretariat changed its practice in June 2016 when dealing with persons who had illegally left Eritrea, finding that illegal departure alone no longer entailed a risk of persecution. In the case at hand, the State Secretariat gave far more weight in its decision-making process to information received from the Eritrean authorities and international diplomatic sources than to information received from NGOs and international organizations. Moreover, the information about the sources as provided by the Eritrean regime and international diplomatic sources is vague. The sources on which the State Secretariat and the Federal Administrative Court based their change of practice are extremely weak and often quoted out of context. In view of the above, the information used by the State Secretariat cannot be considered sufficiently well founded to justify a change in practice.

5.2 The issue of the complainant's voluntary return is irrelevant. The complainant categorically refuses to submit to the obligation to serve in the Eritrean army, a refusal that will result in his imprisonment and ill-treatment. The impossibility of refusing to serve on grounds of conscience is the basis for the need for international protection when the person concerned would be subjected to inhuman conditions while performing military service. The complainant is also opposed to signing a letter of regret and paying a 2 per cent tax in order to benefit from the privileged status granted to "members of the diaspora". The idea that the Swiss authorities would force him to sign a letter of repentance in which he would acknowledge having committed an offence in fleeing Eritrea is very problematic. By doing so, he would, in effect, be agreeing to any sanction imposed on him. Moreover, the signing of a letter of regret is not sufficient to ensure that the complainant would be spared a conviction; such a signature would be tantamount to an admission of guilt. No independent source has confirmed that Eritreans who paid the required diaspora tax were no longer in danger if they returned to Eritrea.

5.3 In three other cases, the State Secretariat for Migration granted refugee status to Eritrean nationals who had left the country illegally and were all of age to serve in the Eritrean army. The complainant cites several reports in support of his claim that the human rights situation in Eritrea has not improved. The positive developments noted by the Federal Administrative Court are based solely on data from the Eritrean regime.

5.4 Although the Swiss authorities claim not to be forcibly returning Eritreans, they are nevertheless putting them in catastrophic life situations that clearly qualify as ill-treatment within the meaning of articles 3 and 16 of the Convention. The complainant is entitled only to emergency aid of 10 Swiss francs per day in the Canton of Fribourg. His foreign national identity card, which was valid for six months and renewable, and by which he could prove his identity during police checks, was taken away from him. He is therefore deprived of a document that legitimizes his stay, and is restricted in his freedom of movement. The complainant is in a situation of extreme personal distress.

5.5 The complainant submitted the original version of the summons issued by the Eritrean administrative authorities. It is the responsibility of the State party to verify the authenticity of the document with the Eritrean authorities if it questions its authenticity. The State party does not explain on what basis it considers the summons to have so little probative value. The State party itself admits that there are no reliable and convergent sources of information regarding the recruitment practices of local government authorities in Eritrea.

5.6 According to Eritrean law, every Eritrean citizen, irrespective of sex, is obliged to serve in the army between the ages of 18 and 50. Therefore, if returned to Eritrea, the complainant will be obliged to serve in the army for an indefinite period of time, at least until the age of 50. It is therefore highly likely that, if returned, the complainant will be punished and then forced to perform military service, which is tantamount to slavery and forced labour, for an indefinite period of time; this constitutes a violation of his fundamental rights. Such duties imposed on a population go far beyond mere "ordinary civic obligations"; they are clearly repressive constraints aimed at controlling the population so that it ultimately is forced to perform work that benefits a minority in power in the country – for example, foreign operating companies or senior members of the military apparatus.

5.7 The complainant would be persecuted if he returned to Eritrea, since his two brothers in Switzerland deserted the Eritrean army. It is in fact highly likely that his family is under close surveillance by the Eritrean authorities. In the event of deportation, the complainant would certainly be put under pressure because of the desertion of his two brothers.

5.8 The complainant states that he is not politically active at the moment. However, he has participated in several demonstrations in Switzerland against the Eritrean Government.

State party's additional observations on admissibility and the merits

6.1 In its additional observations of 19 March 2020, the State party maintains its position. The most recent reports do not justify a change in practice as regards asylum and removal to Eritrea. These include the report of the European Asylum Support Office of September 2019;[12] the report of the Danish Immigration Service of January 2020;[13] and the report of the Federal Department of Justice and Police of November 2019[14] in response to a letter from the Office of the United Nations High Commissioner for Human Rights of 19 June 2019.

6.2 While the complainant alleges that his return to Eritrea would be involuntary, the relevant question, as far as the State party is concerned, is whether or not "removal with coercion" is possible. In that respect, the responsibility for the safety of an aircraft lies solely with the captain, who can refuse transport to anyone who expresses his or her objection to being returned to his or her country and have that person disembark without having to justify it. Therefore, no removal order – whether or not the person concerned has volunteered to return to his or her country of origin while preparations were being made for departure – can be executed if, at the last moment, the person concerned refuses to go to the airport or refuses to board or remain on the plane. Nor are removals with coercive measures (police escort) possible in the absence of a readmission agreement between Switzerland and Eritrea. Consequently, if the complainant refuses to take the necessary steps with Eritrean diplomatic or consular representation with a view to returning to Eritrea, the Swiss authorities can only take note. They have no way of controlling these actions, which must be taken by the complainant.

6.3 The State party challenges the admissibility of some of the complainant's claims. The complainant has so far never alleged that his living conditions and treatment in Switzerland constitute a violation of articles 3 and 16 of the Convention. People who are forced to leave Switzerland are provided with everything that is materially necessary for a human being to live a dignified existence. Moreover, the complainant did not mention any deliberate persecution in his appeal before the Federal Administrative Court or in his comments to the Committee. He claimed before the Court that he would be considered persona non grata in Eritrea due to the fact that his two brothers were deserters, and that there was no guarantee that he would receive support from his family. Accordingly, the complainant's allegations regarding treatment in Switzerland and deliberate persecution are inadmissible for failure to exhaust remedies and for being manifestly unfounded.

[12] European Asylum Support Office, *Eritrea: National service, exit, and return − Country of Origin Information Report*, September 2019.

[13] Denmark, Danish Immigration Service, *Eritrea: National service, exit and entry*, January 2020.

[14] Switzerland, Federal Department of Justice and Police, "Situation des requérants d'asile érythréens en Suisse : pratique en matière d'asile et de renvoi, levée des admissions provisoires, retour et principe de l'aide d'urgence", 30 November 2019.

Issues and proceedings before the Committee

Consideration of admissibility

7.1 Before considering any claims contained in a communication, the Committee 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 (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.

7.2 The Committee recalls that, in accordance with article 22 (5) (b) of the Convention, it does not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. It notes that the complainant has not claimed before the Swiss authorities that his living conditions and treatment in Switzerland constitute a violation of articles 3 and 16 of the Convention. The Committee thus concludes that this aspect of the communication should be declared inadmissible under article 22 (5) (b) of the Convention.

7.3 The Committee notes that, according to the State party, the complainant also did not mention before the Swiss authorities any risk of deliberate persecution in the event he was returned to Eritrea and that he claimed, before the Federal Administrative Court, that he would be considered persona non grata in Eritrea owing to the fact that his two brothers had deserted the army and that his parents would not be able to support him. The Committee notes that, during his interview with the State Secretariat for Migration on 8 June 2015, when the migration authorities asked him to state the grounds for his asylum application, the complainant said that he had been arrested and imprisoned in 2014, that he had been denied the opportunity to continue his schooling and that he had been afraid of being rounded up by the police. At his interview on 14 July 2016, the complainant indicated that he had left Eritrea because he had been expelled from school; that he did not wish to become a soldier and remain one for the rest of his life; that there were often police round-ups, during which he hid; that he was never free and had left Eritrea because he did not want to be rounded up by the police; and that if he returned to Eritrea, he would be imprisoned. The Committee observes that, as part of his appeal, the complainant provided the Federal Administrative Court with the summons of 5 January 2015 that was allegedly served on his family by the Eritrean authorities after his departure. In the light of these factors, the Committee finds that the complainant has exhausted domestic remedies with regard to his claim that he would be at risk of torture owing to the possibility that he would be forcibly recruited into military service in Eritrea or owing to his illegal departure from Eritrea. Accordingly, the Committee concludes that it is not precluded by article 22 (5) (b) of the Convention from considering the communication on this ground.

7.4 The Committee considers the complainant's other claims under articles 3 and 16 of the Convention to be sufficiently substantiated for the purpose of admissibility and thus declares them admissible, and proceeds to their examination on the merits.

Consideration of the merits

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

8.2 In the present case, the Committee must first determine whether the removal of the complainant to Eritrea would constitute a violation of the State party's obligation under article 3 of the Convention. The Committee recalls its general comment No. 4 (2017), according to which (a) the non-refoulement obligation exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in a State to which the person is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination; and (b) the Committee's practice has been to determine that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real".[15] It also recalls that the burden

[15] General comment No. 4 (2017), para. 11.

of proof is upon the author of the communication, who must present an arguable case, that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, present, personal and real. However, when complainants are in a situation where they cannot elaborate on their case, the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the communication is based.[16] The Committee 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.[17]

8.3 The Committee notes the complainant's statement that he was detained by the military for two and a half months in 2014 on suspicion of being a follower of Pentecostalism, despite being a Catholic, and that he left Eritrea illegally. The Committee also notes that the village administrator allegedly informed the complainant's mother that he would have to start his military training as he was no longer in school, and that he had been officially summoned to the population department after leaving Eritrea. The Committee notes that, according to the State party, there appears to be no substantial grounds for fearing that he would face a specific and personal risk of being subjected to torture upon his return to Eritrea.

8.4 The Committee notes the complainant's argument that the Swiss asylum authorities have not thoroughly examined his claims, the relevant facts and the information currently available on the human rights situation in Eritrea. It recalls that the right to an effective remedy contained in article 3 of the Convention requires, in this context, an opportunity for an effective, independent and impartial review of the decision to expel or return, once that decision is made, when there is a plausible allegation that article 3 issues arise.[18] The Committee notes that the complainant contests the findings of fact made by the Swiss authorities. However, having considered the detailed explanation of the grounds on which asylum decisions are taken, the Committee finds that it is unable to conclude from the available information that the conduct of the asylum proceedings constituted a violation of the State party's obligation to undertake an effective, independent and impartial review, under article 3 of the Convention.

8.5 In order to determine whether the complainant would face a risk of being subjected to torture if he returned to Eritrea, the Committee referred to recent reports on the human rights situation in Eritrea, while noting that the reports cited below were published after the Swiss authorities issued their decisions on the complainant's asylum application. According to a 2019 report of the Special Rapporteur on the situation of human rights in Eritrea, despite the peace agreement signed by Eritrea and Ethiopia in 2018, the human rights situation in Eritrea remained a concern given that, among other things, the duration of military and national service was of unlimited duration; conscripts were sometimes subjected to ill-treatment and abuse; evading military conscription could lead to arrest and detention; and the requirement to obtain an exit visa to travel abroad had been reinstated.[19] According to this same report, the Government of Eritrea indicated in March 2019 that reforms to the military service would begin when it had the resources to create job opportunities for conscripts.[20] A 2019 report by the NGO Human Rights Watch, as well as a 2020 report of the Special Rapporteur on the situation of human rights in Eritrea, indicate that these reforms have not yet taken place.[21]

8.6 The Committee also takes note of the findings in the report drafted by the State Secretariat for Migration and published by the European Asylum Support Office in September 2019. According to this report, the national service in Eritrea has a military

[16] Ibid., para. 38.

[17] Ibid., para. 50.

[18] *M.G. v. Switzerland*, para. 7.4.

[19] A/HRC/41/53, paras. 8, 13 and 26–30. See also A/HRC/38/50, para. 108 (b), (c) and (h); and CCPR/C/ERI/CO/1, para. 37.

[20] A/HRC/41/53, para. 31.

[21] Human Rights Watch, *"They Are Making Us into Slaves, Not Educating Us" – How Indefinite Conscription Restricts Young People's Rights, Access to Education in Eritrea*, August 2019; and A/HRC/44/23, paras. 32–39.

component and a civilian component.[22] All conscripts first undergo military training and are then assigned either to the military component, under the Ministry of Defence, or to the civilian component, under the responsibility of one of the other ministries. The punishment for desertion, draft evasion and illegal exit from the territory continues to be applied arbitrarily and inconsistently by military commanders and other representatives of the security forces.[23] Anecdotal information suggests that deserters and draft evaders are likely to be arrested during round-ups or even after they return from abroad and are then sent to prison for a term that generally ranges from 1 to 12 months. During their imprisonment, they may be subjected to torture. Those who left the country without obtaining prior permission may be imprisoned for longer periods, up to 3 years. Returnees who paid a tax and signed a letter of regret may be arrested and forcibly recruited into national service after a grace period. No official information on the treatment of deserters, draft evaders and persons who left Eritrea illegally is available. As of August 2019, there were no indications that the signing of the peace agreement with Ethiopia in 2018 had led to more leniency towards these groups.

8.7 The Committee recalls its recent jurisprudence in the case of *X. v. Switzerland*[24] and finds that, in view of the lack of information on the methods used for the conscription of young people in Eritrea, the Federal Administrative Court did not support its conclusion that the summons received by the complainant's family had not been prepared by the Hadish Adi population department for the purpose of conscripting the complainant, who was then 16 years old. The Committee notes that, according to the complainant, police round-ups often took place in his village for the purpose of conscription and that he hid during such round-ups. The Committee finds that the complainant's claims regarding round-ups are consistent with the information that is available on the general situation in Eritrea, as described by the State Secretariat for Migration in the report published by the European Asylum Support Office in September 2019.[25] The Committee notes that, according to a report by Human Rights Watch, military recruitment in Eritrea sometimes targets young people under the age of 18.[26] The Committee further notes that the complainant is now over 20 years old and is therefore over the official military recruitment age in Eritrea, which is 18 years old.[27]

8.8 Given the complainant's claims that police round-ups often took place in his village for the purpose of conscription, and that it was those police round-ups that had driven him to leave his country illegally; the recent reports concerning the widespread conscription of young people, particularly boys, in Eritrea and the possibility that draft evaders and those who left the country illegally may be subjected to torture after their return; and the shortage of reliable information regarding the level of risk involved in such cases, the Committee cannot conclude in the present case that the complainant does not face a foreseeable, real and personal risk of being subjected to torture if he is returned to Eritrea. His return would therefore constitute a violation by the State party of article 3 of the Convention.

9. In the light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the return of the complainant to Eritrea would constitute a violation by the State party of article 3 of the Convention. Having reached that conclusion, the Committee does not consider it necessary to examine the claim made under article 16 of the Convention.

10. The Committee is of the view that, in accordance with article 3 of the Convention, the State party has an obligation to refrain from forcibly returning the complainant to Eritrea.

[22] European Asylum Support Office, *Eritrea: National service, exit, and return − Country of Origin Information Report*, September 2019, p. 24.

[23] Ibid., pp. 9–10.

[24] CAT/C/71/D/900/2018.

[25] European Asylum Support Office, *Eritrea: National service, exit, and return − Country of Origin Information Report*, September 2019.

[26] See Human Rights Watch, *"They Are Making Us into Slaves, Not Educating Us" − How Indefinite Conscription Restricts Young People's Rights, Access to Education in Eritrea*, August 2019.

[27] See, inter alia, ibid.

11. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to the above observations.