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

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English
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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 704/2015*, **, ***

Communication submitted by:	X (represented by counsel)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	24 September 2015
Date of present decision:	17 May 2018
Subject matter:	Expulsion to the Democratic Republic of the Congo
Procedural issues:	Exhaustion of domestic remedies
Substantive issues:	Non-refoulement
Articles of the Convention:	3 and 22

1.1 The complainant is X, a national of the Democratic Republic of the Congo born in 1989. She applied for asylum in Switzerland but her application was denied. She submitted a complaint on 24 September 2015 in which she argued that her expulsion by Switzerland to the Democratic Republic of the Congo would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. She is represented by counsel.

1.2 Pursuant to rule 114 of its rules of procedure, on 15 October 2015, the Committee requested the State party not to expel the complainant while her complaint was being considered. On 16 October 2015, the State party informed the Committee that, in accordance with its established procedure, the Federal Office for Migration had requested the competent authority to refrain from taking any steps to deport the complainant. She was thus assured that she could stay in Switzerland while her communication was being considered by the Committee and that its suspensive effect would not be discontinued.

The facts as submitted by the complainant

2.1 In December 2008, the complainant met Y, a Belgian national and real-estate agent, in Kinshasa. On 22 February 2009, they entered into a customary marriage. On 26

* Adopted by the Committee at its sixty-third session (23 April–18 May 2018).

** The following members of the Committee participated in the examination of the present communication: Essadia Belmir, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Ana Racu, Diego Rodríguez-Pinzón, Sébastien Touzé, Bakhtiyar Tuzmukhamedov and Honghong Zhang.

*** The text of an individual (dissenting) opinion by Mr. Diego Rodríguez-Pinzón is attached to this decision.

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September 2009, the complainant's husband left the family home and did not return or contact her. A few days later, the complainant learned that her husband had been arrested on suspicion of attempting to organize an insurgent movement. Following the arrest, soldiers, accompanied by an intelligence officer, came to the family home on more than one occasion and searched the house. The officials threatened to rape the complainant. They also threatened her with the same fate as her husband and demanded that she divulge the location of her husband's weapons cache.

2.2 On 26 October 2009, no longer able to withstand the situation, the complainant left Kinshasa for Lukolela, a small town in the province of Equateur, where she lived until she left the Democratic Republic of the Congo on 5 September 2012. During her stay in Lukolela, she learned that she was sought by the authorities.

2.3 On 6 September 2012, the complainant arrived in Switzerland and applied for asylum that same day. The application was denied by the State Secretariat for Migration on 6 February 2015 on the grounds that the complainant's claims were unsubstantiated. The State Secretariat based its decision on inconsistencies in the complainant's statements and on other available information.

2.4 On 12 March 2015, the complainant challenged the decision before the Federal Administrative Court. In support of her challenge, the complainant produced an acknowledgement of the conjugal relationship, signed by her husband and dated 3 March 2015, as well as a press release issued by the foundation Paix sur Terre that said that the complainant had been persecuted. The challenge was dismissed on 18 June 2015 and the complainant was required to leave Switzerland before 22 July 2015.

2.5 On 28 July 2015, the complainant filed a request for review of the decision of 18 June 2015 with the Federal Administrative Court. In support of this request, she submitted new evidence, namely, a summons from the provincial police station in Kinshasa, dated 28 February 2015, summoning her to the offices of the Mobile Intervention Group; a certificate of customary monogamous marriage dated 10 July 2015; and a letter from her husband's lawyer, addressed to the Court, in which he said that her husband was still in prison and attested to the legal validity of customary marriage in the Democratic Republic of the Congo. In an interim ruling of 11 August 2015, the Court gave the complainant until 25 August 2015 to pay the fee required for the review procedure, denied her request for interim measures and did not give her authorization to remain in Switzerland until the end of the review. According to the complainant, the Court also found the new evidence to be inadmissible.

2.6 In addition to the aforementioned items, the complainant attached the following supporting documents to her complaint to the Committee: a second summons from the national police, dated 1 February 2014, summoning her to the offices of the Mobile Intervention Group, the record of her asylum hearings before the Swiss authorities and copies of the decisions of the federal authorities.

The complaint

3.1 The complainant argues that her expulsion to the Democratic Republic of the Congo would constitute a violation by the State party of article 3 of the Convention. She notes that her husband remains in the central prison of Makala and has been found guilty of attempting to organize an insurgent movement. She also underlines that it has been demonstrated that relatives of persons charged with national security offences are persecuted. She contends that, were she to be deported to the Democratic Republic of the Congo, she would run the risk of being subjected to torture or inhuman and degrading treatment.

3.2 The complainant is of the view that the situation in the Democratic Republic of the Congo meets the criterion set out in paragraph 8 of the Committee's general comment No. 1 (A/53/44, Annex IX, and A/53/44/Corr.1), in other words, the existence of a consistent pattern of gross, flagrant or mass violations of human rights.

State party's observations on admissibility

4.1 On 3 December 2015, the State party transmitted its observations on the admissibility of the complaint. It considers the complaint inadmissible on the grounds of the non-exhaustion of domestic remedies.

4.2 The State party notes that the complainant submitted new documents with her request for review of 28 July 2015 before the Federal Administrative Court. On 11 August 2015, the Court ruled that the two new pieces of evidence (a written statement from the lawyer of the complainant's husband and a certificate of customary monogamous marriage), which were dated after the decision of 18 June 2015, were inadmissible as part of the review procedure. Owing to the complainant's failure to pay the review application fee on time, the Court declared the request for review inadmissible in a decision dated 1 September 2015.

4.3 The State party notes that the decision of inadmissibility regarding the new pieces of evidence applies only to the review procedure because, in accordance with the Federal Administrative Court's jurisprudence, in a request for review, the Court is not required to consider or assess evidence which is dated after the end of the ordinary procedure but pertains to prior events, or to transmit requests for review based on such evidence to the State Secretariat for Migration for reconsideration. However, the complainant could have had this new evidence assessed by the State Secretariat for Migration by submitting a request for reconsideration.

4.4 The State party stresses that the interim ruling of 11 August 2015 does not deal with the merits of the complainant's case and that there was nothing in the file to indicate that she did not have the means to pay the fee required for the submission of a case to the Federal Administrative Court.

4.5 Thus, according to the State party, the complainant has not met the requirement regarding the exhaustion of domestic remedies inasmuch as she could either initiate an extraordinary legal action to have the new evidence assessed by submitting a request for reconsideration to the State Secretariat for Migration — whose decision can be appealed before the Federal Administrative Court — or submit a new asylum application. A new asylum application gives the applicant the right to remain in Switzerland until the end of the asylum procedure and, in the event of an extraordinary procedure, the relevant authority can decide to suspend deportation after the application has been considered.

4.6 The State party indicates that the complainant claims to have annexed the two police summonses that she submitted to the Committee to her request for review, but notes that only the summons dated 1 February 2014 was submitted to the Federal Administrative Court. Therefore, the Court did not have the opportunity to assess this new evidence.

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

5.1 On 8 January 2016, the complainant submitted her comments on the State party's observations on admissibility.

5.2 The complainant alleges that, under the applicable law, she ran the risk of being deported to the Democratic Republic of the Congo during the extraordinary reconsideration or review procedures. She recalls that, in its interim ruling of 11 August 2015, the Federal Administrative Court refused to authorize her to remain in Switzerland until the review procedure had been concluded. Even had she paid the procedural fees, she would have risked deportation.

5.3 The complainant points out that the evidence submitted to the Federal Administrative Court does not open the way for a new asylum application because it does not relate to new events having occurred after she fled but, rather, to events she had already adduced during the ordinary procedure. The police summons of 1 February 2014 would not be enough to entitle her to submit a new asylum application since it is dated prior to the Court's decision. Therefore, it can only be used in a request for review.

5.4 The complainant concludes that she did not, therefore, have any opportunity to file a new asylum application and, consequently, was not entitled to the legal safeguard that

would have allowed her to remain in Switzerland until the end of the review procedure. She claims to have exhausted all domestic remedies.

State party's observations on the merits

6.1 On 17 March 2016, the State party submitted its observations on the merits of the communication.

6.2 The State party recalls that, in its general comment No. 1, the Committee enumerates the elements to be taken into account in order to determine whether there is a risk of torture within the meaning of article 3 of the Convention. The State party groups these elements into the following categories: (a) evidence of the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned; (b) allegations of recent torture or ill-treatment and corroborating evidence from independent sources; (c) the complainant's political activities within or outside of the country of origin; (d) evidence as to the credibility of the complainant; and (e) factual inconsistencies in the complainant's claims.

6.3 The State party recalls that evidence of a consistent pattern of human rights violations in a State does not constitute sufficient grounds to conclude that a person runs the risk of becoming a victim of torture upon his or her return and that there must, therefore, be additional grounds for that conclusion in order for the risk of torture to be found to meet the criteria set out in article 3 of the Convention. The State party is of the view that, while the human rights situation in the Democratic Republic of the Congo remains a concern, it does not, in itself, constitute sufficient grounds to conclude that the complainant risks being tortured if returned there.

6.4 The State party also notes that the complainant did not submit any claims or evidence from independent sources that she had been subjected to torture or ill-treatment or that she had engaged in any political activities.

6.5 Concerning factual inconsistencies in the complainant's claims and her credibility, the State party points out that the State Secretariat for Migration and the Federal Administrative Court described her allegations as being irrelevant. The State party notes that, at her hearings, the complainant gave contradictory information about the address of her marital home and the exact date on which she had left the home.[1] It was also remarked that the complainant was not aware of events that took place in Lukolela village at the time when she claimed to have taken shelter there.[2]

6.6 The State party asserts that the documents submitted to confirm the complainant's marriage have no evidentiary value. The State party further deems it inexplicable that the complainant should have been able to have an acknowledgement of her marriage drawn up and signed on 3 March 2015 by a person who, as indicated on the certificate, is serving a 10-year prison sentence for political reasons and who is requesting the authorities of a third country to grant political asylum to the complainant. In the State party's opinion, the Makala prison authorities would not have allowed the document to be dispatched. As to the certificate of customary monogamous marriage, it includes information that contradicts the complainant's statements: Y is listed as being a national of the Democratic Republic of the Congo, whereas the complainant has stated that he acquired Belgian nationality through his daughter in 2001, and the Democratic Republic of the Congo does not authorize its citizens to hold dual citizenship. Furthermore, the complainant claimed to belong to an ethnic group from the village of Lukolela in the province of Equateur, whereas the marriage certificate states that she is from the area of Gombe-Matadi in the province of Kongo Central. The marriage certificate also contains some errors: the fourth paragraph is incomplete, and a

[1] At her hearings, the complainant claimed to have lived at No. 1 Rue Trèfle in Ma Campagne in the Joli Parc neighbourhood, whereas the available information indicates that Y lived at No. 81 Avenue Trèfle in the Joli Parc neighbourhood. At her first hearing, the complainant said that she remained in the marital home until her husband's arrest but, at her second hearing, she stated that she stayed there for a month after his arrest.

[2] The available information indicates that armed men from the Congo allegedly fired into the air at around 10 p.m. on 7 October 2011.

reference to Ordinance-Law No. 21/164 is contrary to the practice of the authorities of the Democratic Republic of the Congo, which usually refer to Ordinance No. 21/164 (without the word "law"). In addition, the State party notes that the complainant did not produce the certificate until after the State Secretariat for Migration had remarked upon its absence. Moreover, the letter from Y's lawyer is not co-signed and contains an error in his client's name. The State party is of the view that the letter is suspect.

6.7 The State party believes that the documents submitted in support of the claim that the complainant was persecuted in the Democratic Republic of the Congo are of dubious authenticity. In that connection, it emphasizes the contradictions between the press release issued by the Paix sur Terre foundation and the complainant's statements: according to the press release, Y had had no news of his wife for more than three months (i.e., April 2012); however, the complainant reportedly said that she hid in Lukolela from 26 October 2009 to 5 September 2012 and had had no news of Y since his arrest on 26 September 2009. In addition, the State party notes that the two police summonses submitted to the Committee have poor-quality mastheads that may have been photocopied several times, do not refer to the same address as the one indicated by the complainant as being her home (No. 81 rather than No. 1 Rue Trèfle) and do not use the same name for the issuing authority. In addition, one of the summonses contains a spelling error, and the summonses were issued on a Saturday and ordered the complainant to report to the authorities on the following day, a Sunday, which is not a working day in the Democratic Republic of the Congo. In the State party's estimation, the above factors cast a great deal of doubt on the authenticity of the documents.

6.8 Concerning the complainant's story, the State party believes that it is not credible that the authorities of the Democratic Republic of the Congo, despite actively looking for the complainant, failed to find her in Lukolela or that they sought her out at her former marital home prior to her departure from the country, in other words three years after she had left that home. Moreover, it is illogical for the complainant, knowing that she was threatened and accused of being an accomplice in her husband's case, to decide to remain in the marital home for a month, thereby risking arrest and detention. What is more, a wanted person would not have taken the risk of leaving the Democratic Republic of the Congo via Kinshasa airport, the country's most closely monitored exit point.

6.9 Accordingly, the State party argues that there is nothing to indicate that there are serious grounds to fear that the complainant will be at real or personal risk of torture if returned to the Democratic Republic of the Congo.

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

7.1 On 30 May 2016, the complainant submitted her comments on the State party's observations on the merits.

7.2 The complainant contends that the State party's observations do not include any points that cast doubt upon the fact that she would face a tangible, real, present and personal risk of being subjected to torture or inhuman or degrading treatment if returned to the Democratic Republic of the Congo. In her opinion, the State party has relied solely on the assessments made by its own agencies in their consideration of her asylum application.

7.3 The complainant claims that there is no question that Y was convicted in the Democratic Republic of the Congo of undermining national security and has been in prison since 2009. She notes that there is a consistent pattern of human rights violations in the Democratic Republic of the Congo and that, when the authorities are going after a person, his or her relatives are subjected to threats, violence, blackmail, arrest and humiliating and degrading treatment within the meaning of article 1 of the Convention.[3]

7.4 The complainant argues that the inconsistencies remarked upon by the State party do not call into question the authenticity of the documents in the case file and that her relationship with Y should no longer be in doubt.

[3] The complainant appends a press release that mentions the risk of persecution experienced by the family of one of Y's partners, who was also convicted.

7.5 The complainant attaches a message from Y which was conveyed by the Red Cross of the Democratic Republic of the Congo. The Committee has also received an email signed by Y in which he affirms that the complainant is his wife, requests the Committee to conclude that her deportation would constitute a violation of the Convention and claims that he has been subjected to torture while in prison.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any complaint submitted in a communication, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention.

8.2 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.

8.3 The Committee notes that the State party has contested the admissibility of the complaint on the grounds of a failure to exhaust domestic remedies. The Committee takes note of the State party's argument that the complainant had the possibility of submitting a new asylum application. The Committee also notes the complainant's claim that the evidence presented to the Federal Administrative Court does not open the way for a new asylum application because it does not relate to new events that occurred since she fled the country but, rather, to events she had already recounted during the ordinary asylum procedure. In addition, the State party points out that, had the complainant paid the required procedural fees, the judge could have ruled on her request for review; however, in the absence of that payment, the only possible outcome was the dismissal of the request. Nevertheless, the complainant had the possibility of initiating extraordinary legal action to have the new evidence assessed by submitting a request for reconsideration by the State Secretariat for Migration. The Committee takes note of the complainant's argument that she would have risked deportation to the Democratic Republic of the Congo during the extraordinary reconsideration or review procedure given that, in its interim ruling of 11 August 2015, the Federal Administrative Court had denied her authorization to remain in Switzerland until the completion of the procedure. The Committee notes that the complainant, having failed to pay the review application fees, showed a lack of due diligence in her efforts to see the extraordinary review process through to its conclusion. The Committee also notes that the complainant has never claimed to be unable to afford the required fees and finds that she has not provided a satisfactory explanation as to why she did not pay them. The Committee recalls that a new asylum request gives the applicant the right to remain in Switzerland until the end of the procedure. The Committee is therefore of the view that domestic remedies have not been exhausted in accordance with article 22 (5) (b) of the Convention.

9. The Committee against Torture therefore decides:

(a) That the communication is inadmissible;

(b) That the present decision shall be transmitted to the State party and to the complainant.

Annex

[Original: English]

Individual opinion of Committee member Diego Rodríguez-Pinzón (dissenting)

1. In the present case, I respectfully disagree with the Committee's views regarding the nature of the judicial remedies available to the author of the communication to protect her from being expelled or returned to the Democratic Republic of the Congo. The complainant is not required to exhaust domestic remedies that are not effective in protecting her from deportation, where she faces a risk of torture or cruel, inhuman or degrading treatment. Pursuant to articles 3 and 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, available remedies must allow for the suspension of deportation while a final decision is still pending in the domestic proceedings. Therefore, once such proceedings cease to allow for the suspension of expulsion or deportation (as indicated in the interim ruling of 11 August 2015 of the Federal Administrative Court denying the complainant the authorization to remain in Switzerland until the completion of the procedure), they are no longer effective for the purposes of the protection required under article 3 of the Convention, and the complainant is not required to exhaust them. In addition, while the Committee considers that a new application for asylum would provide for another opportunity to seek such protection, I believe that it is clear from the record that lodging a new asylum application would only be possible if new facts were presented to the authorities, which is not the case in the current complaint.

2. The Committee itself has indicated in its case law that domestic legal remedies to challenge deportation orders must have suspensive effect if the deportee is at risk of torture or ill-treatment. The legal remedies can otherwise not be considered effective within the meaning of international human rights law. The Committee has considered in the past that a complaint was admissible even though the authors of the communications had not exhausted all domestic remedies, stating that such remedies were ineffective because they did not have suspensive effect to halt the deportation procedures.[1] This is confirmed in paragraphs 34 and 35 of the Committee's general comment No. 4 (2017) on the implementation of article 3 of the Convention in the context of article 22.

3. The standards of the European human rights system are especially relevant in the present case, as required under article 16, paragraph 2, of the Convention, owing to the fact that Switzerland is also party to the Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention on Human Rights). The European Court of Human Rights has ruled in numerous cases that individuals must have access to a remedy with suspensive effect in cases of deportation that carry a risk of torture or ill-treatment. For example, in the *Čonka v. Belgium* case, the Court held that the notion of an effective remedy under article 13 of the European Convention on Human Rights required that the remedy could prevent the execution of measures that were contrary to the Convention and whose effects were potentially irreversible. Consequently, the Court considered that it was inconsistent with article 13 for such measures to be executed before the national authorities had examined whether they were compatible with the Convention.[2] Referring to *Čonka v. Belgium*, the Court specified in *Gebremedhin [Gaberamadhien] v. France* that a foreigner facing deportation must have access to a remedy with suspensive effect where there were substantial grounds for believing that he or she faced a risk of torture or ill-treatment[3] contrary to article 3 of the European Convention on Human Rights. The Court confirmed the ruling of *Čonka v. Belgium* in later cases, such as *M.S.S. v.*

[1] See *Josu Arkauz Arana v. France* (CAT/C/23/D/63/1997), para. 6.1; and *I.S.D. v. France* (CAT/C/34/D/194/2001), para. 6.1.

[2] See European Court of Human Rights, *Čonka v. Belgium* (application No. 51564/99), judgment of 5 February 2002, para. 79.

[3] See European Court of Human Rights, *Gebremedhin [Gaberamadhien] v. France* (application No. 25389/05), judgment of 26 April 2007, para. 66 (see also para. 58).

Belgium and Greece and *Hirsi Jamaa and Others v. Italy*.[4] Furthermore, in the *Olaechea Cahuas v. Spain* case, the Court considered that the legal remedy available to the applicant to obtain a stay of the deportation order was ineffective because it did not have suspensive effect. Thus, it dismissed the argument of the Government of Spain that the case was inadmissible because of the applicant's failure to exhaust domestic remedies.[5] Moreover, in the *de Souza Ribeiro v. France* case, the Court rejected the Government's objection of non-exhaustion of domestic remedies, stating that the legal remedies were ineffective as they had no suspensive effect to halt the removal of the applicant.[6]

4. I must also note that the Court of Justice of the European Union adopted the approach of the European Court of Human Rights in its ruling on the *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida* case when it stated that domestic legal remedies must have suspensive effect in respect of a return decision whose enforcement might expose the third-country national concerned to a serious risk of grave and irreversible deterioration in his state of health,[7] which would amount to inhuman or degrading treatment. The Court of Justice of the European Union referred to the European Court of Human Rights cases of *Gebremedhin [Gaberamadhien] v. France* and *Hirsi Jamaa and Others v. Italy*.[8]

5. Overall, the suspensive effect in domestic proceedings seeking to remove, expel or deport a person to another country where that person is in danger of being subjected to torture or cruel, inhuman or degrading treatment is a crucial safeguard underlying article 3 of the Convention. It is very important for the Committee to uphold such central guarantee and preserve the international standards recognized by the Committee and other international human rights bodies.

[4] See European Court of Human Rights, *M.S.S. v. Belgium and Greece* (application No. 30696/09), judgment of 21 January 2011, para. 293; and *Hirsi Jamaa and Others v. Italy* (application No. 27765/09), judgment of 23 February 2012, para. 205.

[5] See European Court of Human Rights, *Olaechea Cahuas v. Spain* (application No. 24668/03), judgment of 10 August 2006, paras. 32–36.

[6] See European Court of Human Rights, *de Souza Ribeiro v. France* (application No. 22689/07), judgment of 13 December 2012, para. 100.

[7] See Court of Justice of the European Union, *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida* (case C-562/13), judgment of 18 December 2014, para. 53.

[8] See *Centre public d'action sociale d'Ottignies-Louvain-la-Neuve v. Moussa Abdida*, para. 52.