



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

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**Committee against Torture**  
**Forty-sixth session**  
9 May–3 June 2011

**Decision**

**Communication No. 379/2009**

<i>Submitted by:</i>	Sylvie Bakatu-Bia (represented by counsel, Emma Persson)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	26 March 2009 (initial submission)
<i>Date of decision:</i>	3 June 2011
<i>Subject matter:</i>	Deportation of the complainant to Democratic Republic of the Congo
<i>Procedural issues:</i>	Insufficient substantiation
<i>Substantive issues:</i>	Prohibition of refoulement
<i>Articles of the Convention:</i>	3

[Annex]

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

## Annex

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

concerning

#### **Communication No. 379/2009**

<i>Submitted by:</i>	Sylvie Bakatu-Bia (represented by counsel, Emma Persson)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	26 March 2009 (initial submission)

*The Committee against Torture*, established under article 17 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Meeting on* 3 June 2011,

*Having concluded* its consideration of complaint No. 379/2009, submitted to the Committee against Torture by Sylvie Bakatu-Bia under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

*Having taken into account* all information made available to it by the complainant, his counsel and the State party,

*Adopts* the following:

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

1.1 The complainant is Ms. Sylvie Bakatu-Bia, born on 22 May 1984 in the Democratic Republic of the Congo (hereinafter DRC). She is currently in Sweden, awaiting deportation to DRC. She claims that her return to DRC would constitute a violation by Sweden of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee requested the State party under the rule 114 (former rule 108), paragraph 1, of the Committee's rules of procedure, not to expel the complainant to DRC while her complaint was under consideration by the Committee. The State party acceded to this request, and on 27 March 2009 decided to stay the enforcement of the expulsion order.

#### **The facts as presented by the complainant**

2.1 The complainant was born and raised in the village of Tshilenge in Mbuji-Mayi in DRC. She has two daughters. The last years before she left DRC and fled to Sweden, she had lived and worked in Lubumbashi in the southern part of the DRC. She has worked as a

secretary in the parish of Nouvelle Cité de David, a Christian protestant radical parish. Her partner was supposed to be the next pastor. The pastor was a strong opponent of the regime, and openly criticized the authorities in several sermons. The complainant, who was his secretary, shared his political views. Due to the tense situation in the region, the parish was particularly observed by the military forces, who wanted the pastor to help them spread their political message. As the pastor refused to do this, he was arrested several times. The pastor's second and third arrests happened on 3 August 2004 and on 23 or 24 December 2004, respectively. During his last one-day detention he was allegedly severely tortured and, as a consequence of the torture endured, he died shortly after his release. After the death of the pastor, the surveillance of the parish increased. The security forces were aware of the complainant's activity as secretary to the pastor and also that she shared his opinions and political beliefs. She feared for her life and security but, due to her strong faith and commitment to the parish, she decided to stay in Lubumbashi.

2.2 On 30 September 2005, the complainant and her partner were arrested by the security forces. No grounds for the arrest were given. They were taken to different prisons, and this was the last time she saw her partner. Meanwhile, their two children and the complainant's sister were left in the house. Some members of the security forces remained in their house as well and the complainant believes they looted her house and took, *inter alia*, her identity documents.

2.3 The complainant does not know the name of the prison where she was imprisoned. During her detention, which lasted from 30 September 2005 until 22 February 2006, she was tortured, beaten on her legs and her back and repeatedly raped, sometimes several times a day. The torture suffered has permanently marked her and as a result, she is now in constant distress.

2.4 On 22 February 2006, the complainant managed to escape from prison with the help of friends from the parish who bribed the prison personnel. Immediately after her escape, she fled to Kinshasa where she met a nun who helped her leave the country<sup>1</sup>. Therefore, she could not return home to look for her two children who had been left behind when she was arrested. According to the complainant, their whereabouts remain unknown.

2.5 The complainant allegedly<sup>2</sup> arrived in Sweden on 27 February 2006 and applied for asylum the same day. Her request for asylum<sup>3</sup> was rejected by the Migration Board on 11 July 2007. The Board stated that the complainant had failed to prove her Congolese identity, although it acknowledged that she speaks the language of the region from which she claims to originate. The Board held that the general situation in DRC does not constitute grounds for asylum. As for the individual circumstances of the complainant, the Board questioned her trustworthiness, indicating that she failed to adduce any documents proving her identity. It referred to the fact that the complainant, unlike the pastor, held no leading position within the parish, and also found improbable the allegations in relation to her detention and her account of how she travelled to Sweden.

2.6 The complainant appealed to the Migration Court. On that occasion, the author supplemented her initial asylum application with two documents: the medical report

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<sup>1</sup> The complainant did not pay for the trip and does not specifically mention who paid for it. She travelled to Sweden on fake documents and claims that it was the nun who carried all travel documents.

<sup>2</sup> The complainant claims to have arrived to Sweden on 27 February 2006.

<sup>3</sup> In order to substantiate her claim regarding the physical and mental health problems she experiences, the complainant submitted to the Migration Board a report issued by a district medical officer from Sweden documenting, according to the complainant, her back troubles and the pain in her legs.

submitted previously to the Migration Board (*see* note 3 above); and a document produced by a parish in Kiruna (northern part of Sweden) confirming the complainant's strong religious and political convictions. On 25 March 2008, the complainant submitted a medical report issued by a psychotherapist working at the Swedish Red Cross treatment center in Luleå, who concluded that, according to the complainant, she showed signs of depression due to the trauma she experienced in her home country. On 20 May 2008, she submitted another medical report from the same psychotherapist who referred, according to the complainant, both to her fear of returning to DRC and to the fact that she suffers from sleeping problems, is still being affected by the rapes to which she was exposed, and consumes large quantities of alcohol to allay her anxiety. On 23 May 2008, the appeal was rejected by the Migration Court. The complainant then appealed to the Migration Court of Appeal, which rejected the appeal on 10 July 2008. On 25 February 2009, the complainant filed an application to the Migration Board claiming that her relationship to a Swedish citizen is another impediment to the enforcement of the expulsion order. On 27 February 2009, the Migration Board decided not to grant the complainant a residence permit under Chapter 12, Section 18, of the 2005 Aliens Act<sup>4</sup>. This decision is non-appealable.

### **The complaint**

3. The complainant claims that her forcible deportation to DRC would amount to a violation by Sweden of article 3 of the Convention. She maintains that she would be arrested and tortured upon return to DRC due to her religious and political beliefs and because she has criticized the regime and is connected to the now well-known deceased pastor Albert Lukusa. The complainant submits that she faces a personal risk of torture if she were to return to DRC, and that her claim is sufficiently substantiated by the information she provided on her arrest and subsequent detention, torture and ill-treatment, as well as by evidence on the existence of a consistent pattern of gross, flagrant, and mass violations of human rights in DRC<sup>5</sup>.

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

4.1 On 25 September 2009, the State party provided its observations on the admissibility and the merits of the complaint. It submits that the complainant applied for asylum on 27 February 2006, the same day she allegedly arrived in Sweden. She carried neither a travel nor an identity document. The Swedish Migration Board held the first interview with the complainant on 1 March 2006. During the interview, the complainant stated that she was

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<sup>4</sup> Chapter 12 ("Impediments to the enforcement of refusal of entry and expulsion"), Section 18 states: "If, in a case concerning the enforcement of a refusal-of-entry or expulsion order that has become final and non-appealable, new circumstances come to light that mean that (1) there is an impediment to enforcement under Section 1, 2 or 3, (2) there is reason to assume that the intended country of return will not be willing to accept the alien or (3) there are medical or other special grounds why the order should not be enforced, the Swedish Migration Board may grant a permanent residence permit if the impediment is of a lasting nature. If there is only a temporary impediment to enforcement, the Board may grant a temporary residence permit. The Swedish Migration Board may also order a stay of enforcement".

<sup>5</sup> The complainant refers to international sources that report the existence of a consistent pattern of gross, flagrant or mass violations of human rights in DRC: Human Rights Report 2008. Democratic Republic of the Congo (U.S. Department of State, 25 February 2009); Special Report on Sexual Violence in the Democratic Republic of the Congo (The Institute for War and Peace Reporting, October 2008); Human Rights Watch Report "We Will Crush You" (25 November 2008); World Report 2009 (Human Rights Watch, 2009).

born in Tshilenge in the province of Mbuji-Mayi. She is not married, but lived together with a man with whom she has two children, born in 2002 and 2004. She was active in a protestant church in DRC. She and her partner were arrested as a result of critical remarks against the regime made by the pastor, Albert Lusaka. During the detention, she was tortured, beaten on her legs and back and raped a number of times. Persons from the parish bribed the prison staff and organized her escape in February 2006. She was not able to return home to look for her children who were left behind when she was arrested. She travelled by train to Kinshasa, where she received a plane ticket and travel documents from a person within the parish who had visited her during her imprisonment. She claimed that she was unaware of the whereabouts of her partner and her children. She stated that she was neither in possession of any identity documents nor in a position to obtain such documents, since her house had been destroyed. She had no one in DRC who could help her obtain new identification documents. Asked about her health, the complainant stated that she experienced a lot of stress, back and stomach pain, sleeping difficulties, and nightmares.

4.2 On 7 March 2006, during the second interview, the complainant explained that she had never received a passport, and she could not submit any identity documents as the only document she had was kept in her house in DRC which was looted by the security forces. She added that no one could verify her identity, either in Sweden or in DRC<sup>6</sup>. She claimed that the nun with whom she traveled to Sweden was carrying all the necessary documents. They lacked a common language and thus the possibility to communicate. She also submitted that she was the assistant of the pastor of the parish and her partner was supposed to take the parish over from the pastor. She had not been politically active and she had had no problems with the authorities, except for her arrest. She claimed that she was wanted in DRC and, because of her escape from prison, she would be imprisoned and subjected to ill-treatment upon return. According to the language analysis conducted by the migration authorities, it was highly probable that the complainant had her language background in DRC, more specifically in the regions Kasai Oriental and Kasai Occidental. Furthermore, it was likely that she had been socialized in Kinshasa.

4.3 The State party further submits that on 22 September 2006, the complainant's counsel provided additional information and corrections to what had been stated by the complainant during the interviews. The complainant doubted that her identity documents were still in her house, since it was looted after her arrest and maintained that she would have to return to the DRC in order to apply for new identity documents. She was not able to get in touch with anyone who could prove her identity, since the whereabouts of her family were unknown. With regard to her home address, the complainant indicated that she resided in Tshilenge, but that during the last three years she had lived in Lubumbashi together with her family, including one of her sisters. Her parents and the rest of her siblings live in the village of Mushenge. She left Tshilenge because she was offered a position as assistant of a well-known pastor in Lubumbashi. She reiterated the information about the pastor's activity, his detention and alleged torture, as well as his subsequent death shortly after his release. Counsel further reiterated the information regarding the complainant's abduction, her detention and ill-treatment in custody, including battery, torture and rape, and reconfirmed the circumstances of the complainant's escape from prison.

4.4 On 31 October 2006, during the third interview, the complainant stated that, due to health problems, she was unable to attend a meeting with the Red Cross concerning the whereabouts of her family. In response to the question about her being socialized in Kinshasa, the complainant maintained that she had not resided there but had only been there

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<sup>6</sup> However, the complainant gave the following information about her family to the Migration Board: her father and mother were still alive, and she has three brothers and one sister with whom she previously lived in Tshilenge. She has no relatives in Sweden.

in connection with her journey to Sweden. She further claimed that she would be at risk even if she were to relocate to Kinshasa or to another part of the DRC. She maintained that she was wanted by authorities and would be detained upon return. The State party submits that, according to medical reports provided by the complainant, she was in good health, apart from complaints of back pain.

4.5 In a submission dated 17 November 2006, counsel informed the Migration Board that the complainant had worked with people from Kinshasa and had moved around DRC, this having an impact on her pronunciation. She worked closely with the pastor and therefore became the next target after his death. Counsel also stated that the general situation of women in DRC makes it impossible for the complainant to relocate internally, and maintained that medical reports corroborate the complainant's allegations of ill-treatment in detention.

4.6 The Migration Board rejected the complainant's asylum request on 11 July 2007 on grounds that she had not provided any information to prove her identity or her activity in the parish. It also recalled that, according to her statements, the complainant had not been persecuted or convicted of any crime. The Migration Board had therefore found that she failed to substantiate her allegation that she ran the risk of persecution due to her religious and political beliefs. The complainant's story about travel documents and travel itinerary was not deemed credible. The Board concluded that the circumstances of the complainant's case were not exceptionally distressing so as to justify the granting of a residence permit.

4.7 The complainant appealed against the decision of the Migration Board, claiming that her identity could be verified through the language analysis conducted by the migration authorities. She also recalled that arbitrary arrests, rapes and torture are common in DRC. The complainant further held that, according to the country information that the Migration Board had obtained from the Swedish embassy in DRC, it is possible to bribe guards at the airport of Kinshasa in order to leave the country. The Migration Board requested the Migration Court of Stockholm to dismiss the complainant's appeal, arguing that the complainant had not been politically active in DRC and held no prominent position within the parish, which made it improbable that she would be of interest to the authorities upon her return.

4.8 On 3 October 2007, the complainant supplemented her appeal with two documents: a medical report in support of her claim that she suffered from health problems as a consequence of the abuse allegedly suffered by her in DRC, and a letter from a Swedish parish which testified to her religious conviction. On 26 February 2008, the Migration Court rejected the complainant's request for an oral hearing.

4.9 On 25 March 2008, the complainant submitted a report issued by a psychotherapist working for the Red Cross, dated 14 March 2008, indicating that she suffered from sleeping problems caused by her possible return to DRC and that she was still affected by the violations to which she was subjected in her home country. In a submission to the Migration Court, the Migration Board contested the relevance of the medical report and maintained that the complainant failed to substantiate the claim that she ran the risk of persecution due to her alleged connection with the parish. She had not proved her membership in the parish or that she had been politically active, or that the members of the parish were particularly exposed to the risk of being subjected to ill-treatment.

4.10 The complainant's appeal was rejected by the Migration Court on 23 May 2008. The Court concluded that the complainant failed to provide sufficient documentary evidence in support of her claims. The Court also found her story about the escape from prison and travel to Sweden vague and improbable. The complainant failed to substantiate her claim of being a refugee or a person otherwise in need of protection pursuant to Chapter 4, Sections 1 and 2, of the Aliens Act. Furthermore, after having considered the complainant's state of

health and the length of her stay in Sweden, the Court concluded that the circumstances were not of such nature as to amount to exceptionally distressing circumstances which would require the granting of a residence permit under Chapter 5, Section 6, of the Aliens Act. On 2 June 2008, the complainant appealed against the judgment of the Migration Court. The Migration Court of Appeal denied leave to appeal on 25 July 2008.

4.11 With regard to the admissibility of the complaint, the State party acknowledges that all available domestic remedies have been exhausted. Nevertheless, it maintains that the complainant's allegation that she will be subjected to treatment contrary to the Convention fails to substantiate the claim for purposes of admissibility. The complaint is manifestly unfounded and is therefore inadmissible under article 22, paragraph 2, of the Convention and rule 113 (b) (former rule 107 (b)) of the Committee's rules of procedure.

4.12 On the merits, the State party submits that, should the communication be declared admissible, when considering whether the forced return of the complainant to DRC would violate the obligation of Sweden under article 3 of the Convention, the Committee must take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights, however the existence of such a pattern does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his return to that country. For a violation of article 3 to exist, additional grounds must be shown in that the individual concerned would be personally at risk. The State party further submits that the obligation of non-refoulement is directly linked with the definition of torture as laid down in article 1 of the Convention, and recalls the Committee's jurisprudence to the effect that the obligation to refrain from expelling a person who might risk pain or suffering inflicted by non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

4.13 With respect to the human rights situation in DRC, the State party notes that DRC has ratified several major human rights instruments, including the Convention against Torture, and has also recognized the competence of the Human Rights Committee to receive and consider individual complaints. Despite this, DRC is not able to fulfill many of its obligations under the human rights instruments. The State party points out, by reference to the "Country of Origin Information Report-The Democratic Republic of the Congo"<sup>7</sup>, that numerous human rights abuses are being committed in the country. Serious violations, including arbitrary executions, rape, torture, are committed mostly by the army, police and intelligence services. It also notes the difficult situation of women who are subjected to systematic rape, sexual slavery and other forms of sexual violence with full impunity. While the State party concedes that human rights abuses are still commonly reported in the country, they happen mostly in areas not controlled by the Government, primarily in the eastern parts of the country, including North and South Kivu provinces, the Iruru District of Orientale Province and northern Katanga Province. It further submits that the circumstances referred to above do not in themselves suffice to establish that the forced return of the complainant would entail a violation of article 3 of the Convention. The complainant does not come from any of the areas where the Migration Court has held that there is an ongoing internal armed conflict or severe conflict and would not be forced to return to any of those areas. Furthermore, the language analysis indicated that the complainant has some kind of connection to Kinshasa. Therefore, the State party considers that a forced deportation of the

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<sup>7</sup> UK Home Office, Border and Immigration Agency, Country of Origin Information Report - The Democratic Republic of the Congo, published 30 June 2009, available at <http://rds.homeoffice.gov.uk/rds/pdfs09/drcongo-010709.doc>

complainant would only violate article 3 if she could show that she would be personally at risk of being subjected to treatment contrary to the said provision.

4.14 The State party submits, with reference to the Committee's jurisprudence, that for the purposes of article 3, the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is to be returned. It also recalls that, according to the General Comment No. 1, it is for the complainant to present an arguable case, i.e. to collect and present evidence in support of his or her account of events. The State party further states that the Swedish migration authorities apply the same kind of test when considering an application for asylum under the Aliens Act as the Committee will apply when examining a complaint under the Convention. It notes that the national authority conducting the asylum interview is in a very good position to assess the information submitted by an asylum seeker and to evaluate the credibility of his or her claims. In the present case, it is noteworthy that the Migration Board made its decision after having held three interviews with the complainant and gathered sufficient information, which ensured that it had a solid basis for its assessment of the complainant's need for protection in Sweden. Therefore, as concerns the merits of the complaint, the State party relies on the decisions of the Migration Board and the Migration Court and on the reasoning set out therein.

4.15 The State party maintains that the complainant's statement as to the reasons why she left DRC and applied for asylum in Sweden is not credible, accordingly her claim under article 3 is not substantiated. It contends that no documents have been adduced to prove the complainant's identity. She stated during one of the interviews that no one in Sweden or DRC can verify her identity, her argument being in contradiction with the information provided by the complainant's counsel on 22 September 2006, namely that the complainant's parents and siblings still reside in DRC in the village of Mushenge, in the Kasai Occidental province. If that were the case, it would be possible for the complainant to obtain new identification documents with the assistance of her relatives or, at least, contact them in order to verify her identity, but she has made no such attempts. The State party holds that the fact that the complainant has not exhausted all possibilities to prove or at least to try to verify her identity weakens the general credibility of her submission. She also has not submitted any document to prove her membership in the parish, and it seems very unlikely that she would be unable to obtain such documentation, considering her claim that she was active in the parish and the members of it arranged her escape from prison and paid for her travel to Sweden.

4.16 With reference to the email correspondence between the complainant's counsel and the Swedish embassy in Kinshasa, the State party submits that the embassy confirmed that a man named Albert Lukusa used to be the pastor of the parish of Nouvelle Cité de David in Lubumbashi, before passing away in 2004. However, it recalls that the complainant informed the Migration Board that the pastor's name was Albert Lusaka (and not Lukusa). This is also the name that the complainant's counsel referred to during the third interview and in the submission of 7 September 2007 to the Migration Court. Thus, the State party finds it unlikely that a person who has worked closely with the pastor would be mistaken about his name. Furthermore, the complainant's statements that she grew up in Mbuji-Mayi in the central part of the DRC, and lived in Lubumbashi in the southern part of the country before coming to Sweden contradict the conclusion of the language analysis, according to which she has been socialized in Kinshasa, i.e. in the eastern part of DRC. In respect to the medical reports adduced by the complainant, indicating that she suffers from back pain, shows signs of depression and sought medical aid due to traumatic experiences in her home country, the State party submits that her allegations that these health problems are a consequence of the ill-treatment she endured in her country are based solely on her own word. The fact that the medical reports only contain a very general description of her symptoms makes them inconclusive when it comes to determining the cause of her health



problems, thus providing insufficient information in order to conclude that the complainant's symptoms are due to physical abuse or any other treatment contrary to article 3 of the Convention.

4.17 As to the complainant's allegations that she worked for a pastor who was a strong opponent of the regime in DRC, the State party submits that she failed to provide an adequate explanation as to why the authorities directed their attention towards her after the alleged persecution of the pastor. This allegation does not seem probable in the light of the complainant's statement that she was not politically active. Moreover, the State party considers it unlikely that a mere affiliation to a parish with a politically active pastor would lead to the consequences described by the complainant, especially since she stated that she had never held a prominent position within the parish.

4.18 The State party also contends that the complainant initially omitted certain important circumstances about her escape from prison. During the interviews of 1 and 7 March 2006, she stated that members of her parish had helped her to escape by bribing prison guards. It was not until the written submission by her counsel that the allegation that she had received help from an acquaintance who did not belong to the parish came to light. The fact that the complainant failed to provide such essential information during the initial interviews weakens the credibility of her allegations. The State party further submits that the complainant's description of her escape is vague and improbable. She has not provided any information that would explain her acquaintance's incentives for helping her escape or how he had learned that she was imprisoned and at which facility. Neither had she provided any information as to the identity of the other man who was waiting in the car used to drive her from the prison. The State party also finds unlikely the fact that the complainant did not know the name of the prison where she was allegedly imprisoned for several months.

4.19 The State party disputes the author's account of the manner in which she left DRC, considering it improbable in view of the control measures implemented at Kinshasa airport. It also finds unlikely that the complainant was assisted by a nun whose identity is unknown and with whom she lacked a common language, as well as that this nun carried all the necessary travel documents.

4.20 With regard to the complainant's allegation that she was unaware of the whereabouts of her family, the State party submits that she made limited efforts to locate them. The complainant's counsel indicated that the author has been in contact with the Red Cross, but she was unable to attend a scheduled meeting due to health problems. However, the State party maintains that the medical report submitted by the complainant does not suggest that her state of health prevented her from travelling or attending meetings. The fact that a group within the Red Cross was helping the complainant to locate her family was confirmed in a letter from a psychotherapist of the Red Cross, this being the only indication that the complainant attempted to find her family, although she had been living in Sweden for more than two years. In addition, her claim that her house had been looted is based only on her speculation. That is why it may not be excluded that her partner and her children can be found in DRC today. There is no information that the DRC authorities have tried to locate the complainant at her parents' place in Mushenge. The complainant has not substantiated her claim that she lacks a social network in DRC. Even if in fact she is unable to locate her partner and children, she still has the possibility to return to DRC and relocate to Mushenge.

4.21 The State party further points out that, although incidents in the past should be taken into account when making the assessment pursuant to article 3 of the Convention, the deciding factor is whether there are substantial grounds for believing that the complainant would be subjected to any treatment contrary to the Convention upon return to her home country. In this respect, the State party recalls that, according to her own submissions, the complainant has not been convicted of any crime in DRC. This makes it improbable that

she would still be of interest to the authorities upon her return to DRC, in view of the fact that she left the country in 2006.

4.22 In conclusion, the State party submits that the evidence and circumstances invoked by the complainant do not suffice to show that the alleged risk of torture fulfills the requirements of being foreseeable, real and personal, and thus her return would not constitute a violation of article 3 of the Convention. The complainant has failed to substantiate her allegations and the complaint should be declared inadmissible as being manifestly unfounded. Should the Committee consider that the complaint is admissible, the State party contends that it reveals no violation of the Convention.

#### **Complainant's comments on the State party's observations**

5.1 By letter of 15 February 2010, the complainant submitted her comments on the State party's observations. She contends that the existence of the parish of Nouvelle Cité de David, as well as of a pastor named Albert Lukusa, now deceased, was attested to by the Swedish embassy in Kinshasa. The embassy also confirmed that in DRC a person cannot obtain identity documents without personal appearance. As to the State party's contention that the complaint should be declared inadmissible for lack of substantiation, the author maintains that she adduced written evidence in support of her allegations, including two medical reports issued by a psychotherapist who concluded that she shows signs of depression due to the abuses endured in her home country, suffers from sleeping difficulties and is still affected by the continued rape she endured during her imprisonment. The psychotherapist also indicated that the complainant fears for her life if she were to return to DRC, and started to consume large quantities of alcohol in order to allay her anxiety. The complainant maintains that her claim is supported by written evidence and the general information on the human rights situation in DRC, and recalls the information submitted by the State party on the human rights abuses that are being committed in DRC. She claims that there is a risk of torture upon return to DRC that goes beyond mere theory or suspicion. The risk must be considered highly probable, taking into account that she was already imprisoned and exposed to torture and other forms of ill-treatment. She further submits that the burden of proof for establishing a breach of article 3 of the Convention is initially on the complainant, but recalls that, if the author has provided a certain level of detail and information, the burden of proof may then shift to the State party. She was exposed to torture by persons acting in an official capacity due to her religious/political beliefs and because the pastor with whom she worked openly criticized the authorities and the regime.

5.2 The complainant questions the State party's statement that the migration authorities apply the same kind of test as the Committee when considering an application for asylum under the Aliens Act, claiming that the authorities' assessment is characterized by the refugee status determination in accordance with the Refugee Convention, not the Convention against Torture.

5.3 With respect to the State party's questioning of her credibility and the fact that no documents were provided to prove her identity, the complainant submits that, according to article 196 of the UNHCR Handbook on Procedures and Criteria for determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees<sup>8</sup>

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<sup>8</sup> Article 196: "It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is

(hereinafter UNHCR Handbook), the cases when an asylum seeker can provide evidence for all his/her statements will be the exception rather than the rule. In most cases when a person is fleeing from persecution, she very frequently arrives in another country without any personal documents, i.e. identity card. The author submits that she had never had a passport, but the identity card she had was most likely taken by the security forces at the time of her arrest. She refers to the conclusion of the language analysis, according to which her mother tongue is Tchilouba and she has a level of French typical of the less educated in DRC. Therefore it is likely that she originates from the region from which she claims to be. She also recalls that a person who is not in DRC cannot obtain identity documents without personal appearance, as confirmed by the Swedish embassy in Kinshasa. The author affirms that she has not been able to make contact with her family, although she tried to locate them with the assistance of the Red Cross, without success.

5.4 As to the error in spelling the name of the pastor, the complainant affirms that it is attributable to the counsel and the interpreter. She also explains that her medical reports were issued by a psychotherapist who treated her for more than half a year and they support her allegations of having been imprisoned and subjected to torture and ill-treatment. The author further claims that, although she does not consider herself to have been politically active *per se*, she feels a well-founded fear of persecution due to her religious/political beliefs and the fact that the pastor had criticized the regime. As to the details surrounding her escape, the author maintains that she was helped by people from the parish, i.e. by Douglas M. whom she knew through the parish and her friends there.

5.5 The complainant claims that, although she did not commit any criminal act, she criticized the regime and was therefore imprisoned and subjected to torture. Upon return to DRC, she will be punished and again imprisoned for her religious/political beliefs and for having escaped from prison. She maintains that her return to DRC would amount to a violation by Sweden of article 3 of the Convention.

#### **Additional observations by the State party**

6.1 In its submission of 23 April 2010, the State party refutes the author's argument that the migration authorities' assessment of whether an expulsion would violate article 3 of the Convention is made on the basis of the same assessment as when determining refugee status, and points out that the examination under the Aliens Act is the same as the one made under article 3 of the Convention and actually goes further as the alien is also protected from being sent to a country where he or she would risk the death penalty or inhuman treatment or punishment, which is not covered by the prohibition of non-refoulement in article 3 of the Convention.

6.2 As regards the complainant's claim that she has adduced written evidence in support of her claims, the State party recalls that the complainant has not submitted any documents to substantiate her alleged membership of the parish. Furthermore, the medical

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shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt". See the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1.

evidence does not prove the alleged cause of her health problems, i.e. that these are due to the ill-treatment suffered in DRC. Therefore, no conclusion as to the causes of her health problems can be drawn from these medical reports.

6.3 The complainant's argument that she is unable to provide a document proving her identity since her identity card was confiscated by the security forces of DRC appears speculative insofar as it is based solely on her own assumption. She has not taken any initiative to prove her identity and made limited efforts to contact her family. She failed to provide any evidence in support of her claim that the contacts with the Red Cross led to no results. All these facts weaken the credibility of her submission.

6.4 The State party recalls that the complainant had made changes regarding the spelling of the pastor's name several times. Initially, the complainant indicated his name as being 'Albert Lusaka'. In a later submission, the counsel referred to him as 'Albert Lukusa'. However, during the third interview, counsel informed the Board that the spelling in the written submission was inaccurate and the pastor's name was in fact Albert Lusaka, as indicated initially by the complainant herself. The Swedish embassy in Kinshasa clarified that the pastor's surname was Lukusa, while counsel in her email to the embassy referred to the pastor as 'Lusaka'. In view of these inconsistencies, the State party considers that it is justified to question the veracity of the complainant's allegation that she has worked with the pastor. The State party concludes that the complainant's return to DRC would not constitute a violation of article 3 of the Convention.

#### **Additional comments by the complainant**

7.1 In a submission dated 9 June 2010, the author insists on her claim that the assessment made by the migration authorities is different from the assessment of the Committee under article 3 of the Convention. She further submits that she has done everything in her power to get in touch with her family, albeit unsuccessfully.

7.2 As to the State party's argument that she failed to provide any evidence from her home country, the complainant, with reference to article 196 of the UNHCR Handbook<sup>9</sup>, recalls that she was imprisoned and after her escape she left DRC illegally and in haste. She arrived in Sweden with only the barest necessities and without personal documents.

7.3 With regard to the error in the spelling of the pastor's name, the complainant reaffirms her explanation that this is a simple mistake made by counsel and the interpreter. She reiterates her claim that her return to DRC would amount to a violation of article 3 of the Convention.

#### **Further comments by the parties**

8.1 By letter of 17 August 2010, the State party refutes the complainant's argument that she has done everything in her power to contact her family in DRC. It points out that any attempts to locate persons through the Red Cross are recorded, even if the efforts lead to the conclusion that the whereabouts of the relatives cannot be clarified. However, the complainant has not provided any evidence to demonstrate the result of her alleged efforts to get in touch with, or locate, her family. There is nothing – excepting her vague allegation in the latest submission – to suggest that she has done something else to locate her family except turning to the Red Cross. Therefore, the State party maintains that she has not substantiated her claims that her relatives are missing and she lacks a social network in DRC or that it would not be possible for her to relocate to Mushenge, where her parents live, upon her return to DRC. It reiterates its position that the evidence and circumstances

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<sup>9</sup> See note 8 *supra*.

invoked by the complainant do not suffice to show that the alleged risk of torture fulfills the requirement of being foreseeable, real and personal, and, therefore, her return to DRC would not constitute a violation of article 3 of the Convention.

8.2 In her submission of 2 September 2010, the complainant maintains that her efforts to locate her family brought no results. She submits that she has substantiated her claim with written evidence, the risk of torture being foreseeable, real and personal. On 16 September 2010, she submitted two reports produced by the UN which give credible information about the extremely difficult human rights situation in the DRC, and a copy of the Committee's decision in respect of the communication no. 322/2007<sup>10</sup>. On 4 October 2010, the complainant provided information about the fate of other persons that have the same background or have been in the same situation as the complainant herself. She submits that in 2002 a catholic priest was arrested because he criticized the regime, and was released only after the Cardinal Etshou had threatened the regime with a mass demonstration. The Cardinal died a few weeks later in Brussels, most likely he was poisoned. Another pastor from Katanga, Theodore Ngoy, was forced to flee and is now a refugee in Canada. Kotino Fernando, a pastor previously working in Kinshasa, has been sentenced to death and subsequently his sentence was commuted to 20 years' imprisonment. Therefore, she maintains that she would be arrested upon return and exposed to persecution and torture due to her previous political and religious activities in DRC.

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

#### *Consideration of admissibility*

9.1 Before considering any claims contained in a complaint, the Committee against Torture must decide whether or not it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

9.2 In accordance with article 22, paragraph 5 (b), of the Convention, the Committee does not consider any communication unless it has ascertained that the complainant has exhausted all available domestic remedies. The Committee notes the State party's acknowledgment that domestic remedies have been exhausted and therefore finds that the complainant has complied with article 22, paragraph 5 (b), of the Convention.

9.3 The State party submits that the communication is inadmissible under article 22, paragraph 2, of the Convention, on the basis that it fails to rise to the basic level of substantiation required for purposes of admissibility. The Committee is of the opinion that the arguments before it raise substantive issues which should be dealt with on the merits and not on admissibility considerations alone.

9.4 Accordingly, the Committee finds the communication admissible and proceeds to its consideration on the merits.

#### *Consideration of the merits*

<sup>10</sup> The complainant submitted the following documents: the copy of the Committee's decision in communication no. 322/2007, *Njamba v. Sweden*; Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo, 8 March 2010, UN. Doc. A/HRC/13/63; Report of the United Nations High Commissioner for Human Rights and the activities of her Office in the Democratic Republic of the Congo, 28 January 2010, UN. Doc. A/HRC/13/64.

10.1 The Committee has considered the communication in the light of all information made available to it by the parties concerned, in accordance with article 22, paragraph 4, of the Convention.

10.2 The issue before the Committee is whether the complainants' removal to the Democratic Republic of the Congo would constitute a violation of the State party's obligation, under article 3 of the Convention, not to expel or return (*refouler*) a person to a State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture.

10.3 In assessing whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture upon return, the Committee must take account of all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights in the Democratic Republic of the Congo. The aim of such an analysis is to determine whether the complainant runs a real personal risk of being subjected to torture in the country to which she would be returned. It follows that the existence of a pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute sufficient reason for determining that a particular person would be in danger of being subjected to torture on return to that country; additional grounds must be adduced to show that the individual concerned would be personally at risk. Conversely, the absence of a consistent pattern of flagrant violations of human rights does not mean that a person might not be subjected to torture in his or her specific circumstances<sup>11</sup>.

10.4 The Committee recalls its General Comment No.1 on article 3<sup>12</sup>, which states that the Committee is obliged to assess whether there are substantial grounds for believing that the complainant would be in danger of being subjected to torture were he/she to be expelled, returned or extradited, the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable. The risk need not be highly probable, but it must be foreseeable, real and personal, and present, as confirmed by the Committee in its previous decisions<sup>13</sup>. The Committee recalls that, while it gives considerable weight to the findings of fact of the State party's bodies, it is entitled to freely assess the facts of each case, taking into account the circumstances.

10.5 The Committee notes that the State party has questioned the complainant's credibility, including the claims related to her involvement in political activity within the parish, and considered her account of facts as not plausible. It further notes the author's claim that she has been imprisoned and subjected to torture and rape in the past, and that her allegations are corroborated by the medical reports provided.

10.6 The Committee observes that, according to the Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo (2010)<sup>14</sup> and the

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<sup>11</sup> Communication No.150/1999, *S.L. v. Sweden*, decision adopted on 11 May 2001, para.6.3.

<sup>12</sup> General Comment No. 1: Implementation of article 3 of the Convention in the context of article 22, U.N. Doc. A/53/44 (21 November 1997), Annex IX.

<sup>13</sup> See, inter alia, Communication No.103/1998, *S.M.R. and M.M.R. v. Sweden*, decision adopted on 5 May 1999, para. 9.7; Communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 21 November 2003, paragraph 7.3; Communication No. 256/2004, *M.Z. v. Sweden*, decision adopted on 12 May 2006, para. 9.3; Communication No. 322/2007, *Njamba v. Sweden*, decision adopted on 14 May 2010, para. 9.4.

<sup>14</sup> Second joint report of seven United Nations experts on the situation in the Democratic Republic of the Congo, 8 March 2010, UN. Doc. A/HRC/13/63;

Report of the United Nations High Commissioner for Human Rights and the activities of her Office in the Democratic Republic of the Congo (2010)<sup>15</sup> on the general human rights situation in the Democratic Republic of the Congo, serious human rights violations, including violence against women, rape and gang rape by armed forces, rebel groups and civilians, continued to take place throughout the country and not only in areas affected by armed conflict. Furthermore, in a recent report, the High Commissioner for Human Rights stressed that sexual violence in DRC remains a matter of serious concern, particularly in conflict-torn areas, and despite efforts by authorities to combat it, this phenomenon is still widespread and particularly affects thousands of women and children<sup>16</sup>. The Committee also notes that the Secretary-General in his report of 17 January 2011, while acknowledging a number of positive developments in DRC, expressed his concern about the high levels of insecurity, violence and human rights abuses faced by the population<sup>17</sup>.

10.7 Thus, in the light of the foregoing information, the Committee considers that the precarious human rights situation in the Democratic Republic of the Congo, as documented in recent United Nations reports, makes it impossible for the Committee to identify particular areas of the country which could be considered safe for the complainant in her current and evolving situation<sup>18</sup>.

10.8 Accordingly, the Committee, after having taken into account all the factors relevant for its assessment under article 3 of the Convention, and considering that the complainant's account of events is consistent with the Committee's knowledge about the present human rights situation in the Democratic Republic of the Congo, is of the view that, in the prevailing circumstances, substantial grounds exist for believing that the complainant is at risk of being subjected to torture if returned to the Democratic Republic of the Congo<sup>19</sup>.

11. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, considers that the complainant's removal to the Democratic Republic of the Congo would constitute a violation of article 3 of the Convention.

12. In conformity with rule 118 (former rule 112), paragraph 5, of its rules of procedure, the Committee wishes to be informed, within 90 days, on the steps taken by the State party to respond to this decision.

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

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<sup>15</sup> Report of the United Nations High Commissioner for Human Rights and the activities of her Office in the Democratic Republic of the Congo, 28 January 2010, UN. Doc. A/HRC/13/64;

<sup>16</sup> See Rapport de la Haut Commissaire des Nations Unies sur la situation des droits de l'homme et les activités du Haut-commissariat en République démocratique du Congo, 10 janvier 2011, UN. Doc. A/HRC/16/27.

<sup>17</sup> Report of the Secretary-General on the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, 17 January 2011, UN. Doc. S/2011/20.

<sup>18</sup> Communication No. 322/2007, *Njamba v. Sweden*, decision adopted on 14 May 2010, para. 9.5.

<sup>19</sup> *Ibid.*, para. 9.6.