



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

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Committee against Torture

Communication No. 406/2009

**Decision adopted by the Committee at its forty-ninth session,
29 October to 23 November 2012**

<i>Submitted by:</i>	S.M. (represented by counsel, T.H.)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Switzerland
<i>Date of complaint:</i>	10 November 2009 (initial submission)
<i>Date of decision:</i>	23 November 2012
<i>Subject matter:</i>	Deportation of the complainant to Ethiopia
<i>Substantive issue:</i>	Risk of torture upon return to the country of origin
<i>Procedural issue:</i>	-
<i>Article of the Convention:</i>	3

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-ninth session)

concerning

Communication No. 406/2009

Submitted by: S.M. (represented by counsel, T.H.)
Alleged victim: The complainant
State party: Switzerland
Date of complaint: 10 November 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 23 November 2012,

Having concluded its consideration of complaint No. 406/2009, submitted to the Committee against Torture by S.M. 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, her counsel and the State party,

Adopts the following:

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

1.1 The complainant is S.M., a national of Ethiopia born on 2 June 1979 in a refugee camp in Kassala, Sudan.¹ The complainant is an asylum seeker whose application for asylum was rejected; at the time of submission of the complaint, she was awaiting deportation to Ethiopia. She claims that her deportation to Ethiopia would constitute a violation by Switzerland of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The complainant is represented by counsel, T.H.

1.2 On 10 and 25 November 2009, the complainant asked the Committee to request the State party not to deport her to Ethiopia while her complaint is under consideration by the Committee. On 25 November 2009, the Committee, through its Rapporteur on new complaints and interim measures, transmitted the complaint to the State party, without

¹ The complainant appears under four different spellings of her first and last names, two different dates of birth and two different countries of nationality, Ethiopia and Somalia, in the transcript of the interview held by the Federal Office for Migration on 29 March 2007, the decision of the Federal Office for Migration of 22 June 2007 and the judgement of the Federal Administrative Court of 23 October 2009.

requesting interim measures of protection under former rule 108, paragraph 1, of the Committee's rules of procedure.² Further to the complainant's repeated request of 21 April 2011 to suspend her deportation to Ethiopia, the Rapporteur on new complaints and interim measures again decided not to issue a request for interim measures of protection.

The facts as presented by the complainant

2.1 The complainant was born in a refugee camp in Kassala, Sudan. As a teenager she returned to Gondar and Dire-Daws, Ethiopia, with her mother. She submits that in Ethiopia, being a Christian she was harassed by persons of Islamic faith. In 2001, she left for Kenya. One year later, she flew from Nairobi to Zurich, where she applied for asylum on 7 March 2002.

2.2 On 7 October 2002, the Federal Office for Refugees, later replaced by the Federal Office for Migration, rejected the complainant's asylum request and ordered her to leave Switzerland. The Swiss Asylum Appeals Commission, replaced by the Federal Administrative Court as of 1 January 2007, did not consider her appeal for formal reasons (see also para. 4.1 below).

2.3 On 22 December 2006, the complainant submitted a second asylum request, this time on the basis of her political activities in Switzerland. She states that she is a founding member of the support group for the Coalition for Unity and Democracy (CUD; outside of Ethiopia often referred to as KINIJIT or CUPD) in Switzerland, which aims to strengthen the rule of law in Ethiopia by changing the regime. She is allegedly one of the most prominent members in Switzerland and she has taken an active part in dozens of demonstrations and public events, often figuring as a speaker. The complainant is a spokesperson for the cantonal section of the group in Basel. In April of 2006, she participated in the founding meeting of KINIJIT at the University of Geneva and took active part in discussions and attended subsequent KINIJIT events, often being accompanied by prominent opposition leaders.

2.4 The Federal Office for Migration interviewed the complainant on 29 March 2007 and rejected her second asylum request on 22 June 2007. Her appeal against this decision was rejected by the Federal Administrative Court on 23 October 2009. Following the latter judgement, the complainant was requested to leave Switzerland by 25 November 2009. The complainant submits that if she fails to leave voluntarily, she will be forcibly returned to Ethiopia.

2.5 The complainant submits that the Federal Administrative Court has acknowledged that she was a founding member of the KINIJIT movement and that she participated in various demonstrations and other political activities. It, however, pointed out that according to the Court's jurisprudence, political activities in exile would only lead to the recognition of a refugee status if political persecution in the country of origin was a highly probable result. While accepting the complainant's claim that members of the Ethiopian opposition in exile were closely monitored by the Ethiopian authorities, the Federal Administrative Court concluded that there were no indications that the complainant might have attracted their attention due to her political activities. In addition, it found that the complainant neither held a prominent position within the Swiss KINIJIT organization that was part of the international KINIJIT movement, nor was she one of its five executive leaders. The Federal Administrative Court established that her main task was to disseminate information. It also stated that the complainant's identity had not been established, as she

² Rule 114, paragraph 1, of the current rules of procedure (CAT/C/3/Rev.5).

has not submitted any documents, and that she has not been able to establish that she would face a real risk of torture in case of her return to Ethiopia.

2.6 The complainant submits that her speech at the founding meeting of KINIJIT was recorded on a DVD, which also features many prominent opposition leaders. She does not doubt that the Ethiopian embassy has knowledge of the content of this video recording. She also claims that the decision of the Federal Administrative Court is inconsistent with its prior jurisprudence, since another Ethiopian national has been found to fulfil the refugee criteria in similar circumstances.³ The complainant adds that she was one of the most active KINIJIT members from the very beginning. She spoke out on numerous occasions and attended demonstrations in front of the United Nations as early as in 2005. She was present at the time of filing a petition with the United Nations at Geneva in October of 2007 and had been photographed together with Ato Mistre Haile Selassie, the leader of KINIJIT in Switzerland, on that occasion. Other photographs show her with a megaphone as a demonstration leader, speaking to the crowd assembled in front of the United Nations Office at Geneva. On yet another occasion, she was photographed together with Obang Metho, the Director of International Advocacy for the Anuak Justice Council. The complainant argues that her involvement in the activities of KINIJIT has been consistent over time and that she is one of its leading figures. She adds that the Ethiopian authorities who closely monitor the activities of dissidents abroad must have noticed her outstanding commitment to the KINIJIT movement in Switzerland.

2.7 According to the complainant, the Federal Administrative Court held that it must have been noticed by the Ethiopian authorities that political activities of its nationals abroad intensified after a negative decision on the asylum requests. She infers from this finding that, firstly, the Ethiopian authorities know about the result and status of its nationals' asylum procedures in Switzerland. This, in turn, presupposes a degree of observation which would involve every single Ethiopian asylum seeker, making it extremely hard for them not to be identified. Secondly, the moment of establishment of the KINIJIT in Switzerland had nothing to do with her asylum requests, since she is genuinely committed to the movement's political objectives and has dedicated a large part of her private life to voicing her concerns. The complainant argues, therefore, that the allegation made by the Federal Administrative Court that the Ethiopian authorities distinguished between "real" and "fake" opponents is completely unjustified. She also refers in this context to the anti-terrorism law passed by the Ethiopian House of Peoples' Representatives on 7 July 2009, which contains a broad definition of "terrorist acts".⁴ The complainant adds that, pursuant to this law, any kind of public political dissent can lead to a lengthy conviction, since the Ethiopian authorities fail to make a distinction between political criticism and terrorism.

2.8 As to her identity,⁵ the complainant submits that she has never given a false name to the asylum authorities in Switzerland. She applied for asylum under her original (Muslim) name S.M. During the asylum interview, she once mentioned that she also had a Christian name, A.A., which she adopted after returning from Sudan to Ethiopia with her family. The complainant adds that the fact that she was unable to present any identity papers should not be used against her, considering that she lived in Ethiopia only for four years.

³ Reference is made to the judgement of the Federal Administrative Court No. D-5398/2006, dated 24 June 2009, in relation to the asylum application of "A." against the Federal Office for Migration.

⁴ Reference is made to Human Rights Watch, "Analysis of Ethiopia's draft anti-terrorism law", 30 June 2009; Christian Ehret, "Ethiopia lawmakers pass controversial new anti-terrorism law", *Jurist*, 9 July 2009.

⁵ See footnote 1 above.

2.9 The complainant submits that police torture is still widespread in Ethiopia and refers to a report by the Human Rights Watch,⁶ which documents the use of torture by police and military officials in both official and secret detention facilities across Ethiopia.

The complaint

3. The complainant claims that her forcible deportation to Ethiopia would amount to a violation by Switzerland of her rights under article 3 of the Convention, since she risks being arrested, interrogated and subjected to torture or other inhumane and degrading treatment by the Ethiopian authorities as a result of her political activities in Switzerland.

State party's observations on the merits

4.1 On 25 May 2010, the State party submitted its observations on the merits. As to the facts, it adds that, on 5 November 2002, the complainant appealed to the Asylum Appeals Commission against the decision of the Federal Office for Refugees on her first asylum request. In its interlocutory decision of 14 November 2002, the Commission found that the complainant's appeal did not provide for sufficient reasons, gave her extra time to supplement the appeal and asked her to make an advance payment of the fees by 29 November 2002. On 9 December 2002, the Commission decided not to examine the complainant's appeal, since she neither supplemented it nor made the requested advance payment.

4.2 The State party submits that the complainant argues before the Committee that she would run a personal, real and serious risk of being subjected to torture if returned to her country of origin, because of her political activities in Switzerland. She does not present any new elements that would call into question the judgement of the Federal Administrative Court of 23 October 2009, which was made following a detailed examination of the case, but rather disputes the assessment of the facts and evidence by the Court. The State party submits that it will demonstrate the validity of the Court's decision, in the light of article 3 of the Convention and the jurisprudence of the Committee and its general comments, and maintains that the deportation of the complainant to Ethiopia would not constitute a violation of the Convention by Switzerland.

4.3 The State party submits that according to article 3 of the Convention, the States parties are prohibited from expelling, returning or extraditing a person to another State where there exist substantial grounds for believing that he or she would be subjected to torture. To determine the existence of such grounds, the competent authorities 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.⁷ The existence of gross, flagrant or mass violations of human rights is not in itself a sufficient basis for concluding that an individual might be subjected to torture upon his or her return to his or her country, and additional grounds must exist for the risk of torture to qualify under the meaning of article 3 as "foreseeable, real and personal".

⁶ Reference is made to Human Rights Watch, "UK: Ethiopian 'assurances' no guarantee against torture", 17 September 2009.

⁷ The State party refers to the Committee's general comment No. 1 (1997) on the implementation of article 3 of the Convention in the context of article 22 (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1), annex IX*), paras. 6 and 8, and the Committee's jurisprudence in communications No. 94/1997, *K.N. v. Switzerland*, Views adopted on 19 May 1998, para. 10.2, and No. 100/1997, *J.U.A. v. Switzerland*, Views adopted on 10 November 1998, paras. 6.3 and 6.5.

4.4 Regarding the general human rights situation in Ethiopia, the State party submits that the elections in Ethiopia in May 2005 and August 2005 have strengthened the representation of opposition parties in the Parliament. It recognizes that, although the Ethiopian Constitution explicitly recognizes human rights, there are many instances of arbitrary arrests and detentions, particularly of members of opposition parties. In addition, there is a lack of an independent judiciary. However, being a member or supporter of an opposition political party does not, in principle, lead to a risk of persecution. It is different for persons who hold a prominent position in an opposition political party.⁸ In the light of the above information, the competent Swiss asylum authorities have adopted differentiated practices to determine the risk of persecution. Individuals who are suspected by the Ethiopian authorities to be members of the Oromo Liberation Front or the Ogaden National Liberation Front are considered at risk of persecution. With regard to persons belonging to other opposition groups, such as CUD, the risk of persecution is assessed on case-by-case basis, in accordance with the above criteria. With regard to monitoring political activities in exile, the State party submits that according to the information available to it, the Ethiopian diplomatic or consular missions lack the personnel and structural resources to systematically monitor the political activities of opposition members in Switzerland. However, active and/or important members of the opposition, as well as activists of organizations who are campaigning for the use of violence, run the risk of being identified and registered and, therefore, of being persecuted if returned.

4.5 The State party notes that the complainant does not claim to have suffered torture or to have been arrested or detained by Ethiopian authorities and submits that it is, therefore, not surprising that her second asylum request of 22 December 2006 was based exclusively on her political activities in Switzerland. It further argues, with reference to the Committee's general comment No. 1 (para. 8 (e)), that another element to be taken into account when assessing the complainant's risk of being subjected to torture if returned to her country of origin is whether she has engaged in political activities in Ethiopia. The State party notes in this regard that the complainant does not claim to have been politically active in her home country.

4.6 As to the complainant's political activities in Switzerland, the State party notes that she made her respective claims before the asylum authorities approximately three years after submitting the first asylum request and two years after the end of the first asylum procedure. Furthermore, the complainant appeared under multiple identities and nationalities from the beginning of the first asylum procedure and her true identity has not been established to this day.

4.7 The State party notes that the complainant claims to have been one of the most active KINIJIT members from the moment the organization was established. She refers, inter alia, to her speech at the founding meeting of KINIJIT, her participation in several demonstrations and her presence at the time of filing a petition with the United Nations at Geneva. The State party maintains that numerous political demonstrations attended by the complainant's compatriots take place in Switzerland, that photographs or video recordings showing sometimes hundreds of people are made publicly available by the relevant media and that it is unlikely that the Ethiopian authorities are able to identify each person, or that they even have knowledge of the affiliation of the complainant with the above organization.

4.8 The State party submits that the complainant's claims were the subject of an extensive analysis by the Federal Administrative Court and that the latter noted in particular that she did not claim to be a member of the steering committee of KINIJIT Switzerland,

⁸ The State party refers to the operational guidance note on Ethiopia published by the Home Office of the United Kingdom of Great Britain and Northern Ireland in March 2009, para. 3.7.9.

composed of five members. To the contrary, in the complainant's own words, her role is to disseminate information about demonstrations and meetings of KINIJJIT, but she is not involved, for example, in their organization. In addition, she has participated in several demonstrations, made an oral statement at a meeting of KINIJJIT on 29 April 2006 and appears in the photographs showing a group of people upon the filing of a petition to the United Nations at Geneva on 22 May 2008.

4.9 In this regard, the State party submits that the Ethiopian authorities are focusing all their attention on individuals whose activities go beyond "the usual behaviour", or who exercise a particular function or activity that could pose a threat to the Ethiopian regime. However, the complainant presented no political profile when she arrived in Switzerland and the State party deems it reasonable to exclude that she has subsequently developed such a profile. The State party maintains that the documents produced by the complainant do not show activity in Switzerland able to attract the attention of the Ethiopian authorities. The fact that the complainant is identified in photographs and video recordings is not sufficient to demonstrate a risk of persecution if returned. It is difficult, for obvious practical reasons, to identify the participants of a large demonstration if they are not previously known to the Ethiopian authorities.

4.10 The State party submits that there is no evidence that the Ethiopian authorities have opened criminal proceedings against the complainant or that they have adopted other measures against her.

4.11 As to the complainant's claim that she is a victim of the conflicting jurisprudence by the Federal Administrative Court, the State party submits that there are considerable differences between the complainant's case and the other case mentioned in her communication to the Committee.⁹ The latter case involved an individual who had held important positions within the Ethiopian army, had knowledge of sensitive data and was in close contact with the opposition before her flight. Hence she fell within the category of persons exposed to a high risk of monitoring by the Ethiopian authorities abroad. In the complainant's case, however, the Federal Office for Migration and the Federal Administrative Court did not deem convincing the complainant's claim that she has a function within the Ethiopian diaspora in Switzerland able to attract the attention of the Ethiopian authorities.¹⁰ In other words, the complainant has not established that if returned to Ethiopia she would run a risk of ill-treatment because of her political activities in Switzerland.

4.12 The State party submits that, in the light of the above, there is no indication that there are substantial grounds for fearing that the complainant's return to Ethiopia would expose her to a foreseeable, real and personal risk of torture, and invites the Committee to find that the return of the complainant to Ethiopia would not constitute a violation of the international obligations of Switzerland under article 3 of the Convention.

The complainant's comments on the State party's observations

5.1 On 21 April 2011, the complainant commented on the State party's observations. She notes that recent reports¹¹ suggest that the Ethiopian authorities are closely monitoring

⁹ See footnote 3 above. A copy of the judgement was provided by the State party and is available on file.

¹⁰ Reference is also made, inter alia, to communications No. 375/2009, *T.D. v. Switzerland*, decision adopted on 26 May 2011; No. 393/2009, *E.T. v. Switzerland*, decision adopted on 23 May 2012; and No. 414/2010, *N.T.W. v. Switzerland*, decision adopted on 16 May 2012.

¹¹ Reference is made to the United States Department of State, 2010 Country Reports on Human Rights Practices: Ethiopia, 8 April 2011; Human Rights Watch, *World Report 2011* (New York, 2011),

opposition movement and frequently arresting not only its leaders but also followers and supporters. She adds that only the increased interest in the *whole*¹² of the opposition movement of the Ethiopian authorities – and not only its leaders – can explain the extent of monitoring and surveillance currently implemented by the Zenawi regime. The complainant reiterates her initial claim that she is not a mere KINIJT supporter but a cantonal representative, who often appears as a speaker on the occasion of political events. She further notes that she maintains personal contacts with leading personalities of the Ethiopian opposition worldwide and that she has been photographed with them on many occasions. Therefore, the complainant argues that it must be assumed that she has indeed been identified by the Ethiopian authorities.

5.2 The complainant further submits that incidents of torture or other prohibited treatment are frequently reported in Ethiopia. Thus, even a mere arrest that is not followed by a conviction may entail mistreatments, in particular in cases of female detainees.¹³ The complainant argues that there is a real and imminent risk that she would face torture or other inhuman and degrading treatment in detention if she were forcibly returned to Ethiopia, and reiterates her request for interim measures of protection.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering a claim contained in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22, 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.

6.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b), of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that in the instant case the State party has recognized that the complainant has exhausted all available domestic remedies. As the Committee finds no further obstacles to admissibility, it declares the communication admissible.

Consideration of the merits

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

7.2 The issue before the Committee is whether the removal of the complainant to Ethiopia would violate the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon return to Ethiopia. In assessing this risk, the Committee must take into account all relevant

pp. 121-126; Freedom House, *Freedom on the Net 2011*, pp. 132-140; The Economist Intelligence Unit Limited, "Country report: Ethiopia", April 2011, p. 9.

¹² Emphasis added by the complainant.

¹³ Reference is made to the United States Department of State, 2010 Country Reports (note 11 above); and Human Rights Watch, submission to the Committee against Torture on Ethiopia, September 2010.

considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would return.

7.3 The Committee recalls its general comment No. 1, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being “highly probable” (para. 6), the Committee notes that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a “foreseeable, real and personal” risk.¹⁴ The Committee further recalls that in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,¹⁵ while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

7.4 The Committee notes that the State party has drawn its attention to the fact that the complainant appeared under multiple identities and nationalities from the beginning of the first asylum procedure and that her true identity has not been established to this day. The Committee also takes note of the information furnished by the complainant on this point. It considers, however, that the inconsistencies in the complainant’s account do not constitute an obstacle for the Committee’s assessment of the risk of torture in case of her deportation to Ethiopia.

7.5 The Committee has noted the complainant’s submissions about her involvement in the activities of KINIJIIT in Switzerland. It also notes that she claims to be one of the most active KINIJIIT members and that she has been from the moment this organization was established, and that she, inter alia, gave a speech at the founding meeting of KINIJIIT, participated in several demonstrations and was present at the time of filing a petition with the United Nations at Geneva. The Committee further notes that the complainant has not claimed to have been arrested or ill-treated by the Ethiopian authorities, nor has she claimed that any charges have been brought against her under the anti-terrorism law or any other domestic law. The Committee further notes the complainant’s claim that the Ethiopian authorities use sophisticated technological means to monitor Ethiopian dissidents abroad, but observes that she has not elaborated on this claim or presented any evidence to support it. The Committee also notes that the State party has disputed this claim, as well as the complainant’s reference to the inconsistencies in the jurisprudence of the Federal Administrative Court in relation to the evaluation of the risk faced by the nationals of Ethiopia in case of their return to the country of origin (see paras. 2.6 and 4.11 above). In the Committee’s view, the complainant has failed to adduce sufficient evidence about the conduct of any political activity of such significance that would attract the interest of the Ethiopian authorities, nor has she submitted any other tangible evidence to demonstrate that the authorities in her home country are looking for her or that she would face a personal risk of being tortured if returned to Ethiopia.

7.6 The Committee finds accordingly that the information submitted by the complainant, including the absence of any political activities in Ethiopia prior to her departure from the country and the low-level nature of her political activities Switzerland,

¹⁴ See, inter alia, communications No. 203/2002, *A.R. v. Netherlands*, decision adopted on 14 November 2003; and No. 258/2004, *Dadar v. Canada*, decision adopted on 23 November 2005.

¹⁵ See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

is insufficient to establish her claim that she would personally be exposed to a substantial risk of being subjected to torture if returned to Ethiopia. The Committee is concerned at the many reports of human rights violations, including the use of torture in Ethiopia,¹⁶ but recalls that for the purposes of article 3 of the Convention the individual concerned must face a foreseeable, real and personal risk of being tortured in the country to which he or she is returned. In the light of the foregoing, the Committee deems that such a risk has not been established.

8. In the light of the above, the Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concludes that the decision of the State party to return the complainant to Ethiopia would not constitute a violation of article 3 of the Convention.

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

¹⁶ The Committee notes that Ethiopia is also a State party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and recalls its 2011 concluding observations (CAT/C/ETH/CO/1), paras. 10-14.