United Nations

CAT/C/76/D/1017/2020

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

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Committee against Torture

Decision adopted by the Committee under article 22 of the Optional Protocol, concerning communication No. 1017/2020*, **, ***

Communication submitted by:	S.A. (represented by counsel, Tarig Hassan)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	11 May 2020 (initial submission)
Document references:	Decision taken pursuant to rules 114 and 115 of the Committee's rules of procedure, transmitted to the State party on 24 July 2020 (not issued in document form)
Date of adoption of decision:	5 May 2023
Subject matter:	Deportation to Eritrea
Procedural issue:	None
Substantive issue:	Risk of torture or other cruel, inhuman or degrading treatment if deported to country of origin
Articles of the Convention:	1 and 3

1.1 The complainant, S.A.,[1] is a national of Eritrea of Tigrinya heritage who was born in 1987 in Degra. He is facing deportation to Eritrea and is of the view that being deported would be a violation by the State party of articles 1 and 3 of the Convention. The State party made the declaration under article 22 (1) on 2 December 1986. The complainant is represented by counsel.

1.2 On 24 July 2020, the Committee, acting through its Rapporteur on new complaints and interim measures, decided, as requested by the complainant, to make a request for interim measures.

1.3 On 30 July 2020, the State party informed the Committee that, in accordance with its established procedure, the State Secretariat for Migration had requested the competent authority to refrain from taking any steps to deport the complainant, who would therefore be

* Adopted by the Committee at its seventy-sixth session (17 April–12 May 2023).

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

*** An individual opinion of Committee member Todd Buchwald (dissenting) is annexed to the present decision.

[1] The complainant has requested anonymity.

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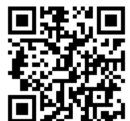

able to remain Switzerland pending the consideration of his complaint by the Committee or a decision to put an end to the suspensive effect.

Facts as submitted by the complainant

2.1 The complainant was born and raised in the Eritrean village of Degra, where he was a shepherd. He began attending school at the age of 15 and had to drop out four years later. As he had not completed his schooling, the complainant was not recruited for compulsory national military service. He spent most of his time outside the cities for fear of being stopped by the authorities and singled out for military service. In March 2013, despite his precautions, the complainant, who was tending his flock, was arrested for his refusal to register for compulsory national service. He was taken to a prison in Mai Serwa where he was handed over to the military training authorities.[2] The complainant, together with 25 other people, was held in a basement on the training base. A week after he was arrested, the authorities informed him that he would be released on bail to ensure that he would not avoid military training. After having posted bail,[3] the complainant was released and began his military training. During this period, he was beaten on several occasions and not allowed to see his wife and children. He was also required to work in his commander's vegetable fields.

2.2 In November 2013, the complainant finished his training and was assigned to a military unit. He was also assigned to a sentry post, where he guarded the prisoners in the Mai Serwa camp. In April 2014, after having worked there for more than a year, the complainant asked his commander for permission to visit his family.[4] He was arrested two months later and kept in custody until 17 August 2014. The authorities informed him that after his request for leave, other conscripts had made similar requests. The authorities then concluded that the complainant was the leader who had prompted these numerous requests. A week after his release, he was arrested again and detained for another two months. He was accused of being the leader of a mutiny by the conscripts.

2.3 In October 2014, the complainant was released and resumed his military service. Two months later, he was again given leave to visit his family. In January 2015, while on his way to see his family, the complainant decided to go into hiding to avoid his service obligations. His wife and children were arrested by the authorities in the wake of his desertion. The complainant was informed of the situation by his father, who was bringing him food in secret. The complainant was apprehended and handed over to the authorities. He was once again detained for two months in difficult conditions.

2.4 On 28 April 2015, the complainant was released from prison and resumed his military service. As he was at the end of his rope, however, and no longer wished to be detained, he sought an opportunity to escape. One night, pretending that he was going to the bathroom, he managed to flee. He went back to his village, where he lived with his family. He then went back to working in the bush for fear of being caught by the authorities.

2.5 On 5 July 2015, the complainant fled Degra for Ethiopia in an irregular manner. He flew to the Sudan and stayed there for seven months. He then went to Libya and Italy before reaching Switzerland on 18 June 2016. On the same day, the complainant applied for asylum. On 1 July 2016, the State Secretariat for Migration interviewed the complainant for the first time. On 22 December 2017, a second interview was held to consider the merits of his application for asylum. On 8 October 2018, the State Secretariat for Migration rejected his application. The Swiss authorities found that the complainant's statement concerning his departure did not meet the credibility requirements of Swiss law. In particular, they were of the view that the complainant's account of his flight was not sufficiently consistent to grant him asylum. The decision of the State Secretariat for Migration was confirmed by the Federal

[2] See A/HRC/41/53, which states that conscription is one of the main reasons that young people drop out of school early and do not complete their studies in Eritrea. It is also one of the main drivers of emigration from Eritrea. Military service has these effects in part because it is often indefinite and unpaid.

[3] Bail was set at 100,000 nakfa (about $6,670). The complainant's father asked a friend who had a store near their hometown to put collateral up for him.

[4] The complainant married in January 2010, and he and his wife have three children.

Administrative Court on 20 March 2020. On 30 March 2020, the State Secretariat served the complainant with notice that he had to leave Switzerland by 27 April 2020.

2.6 The complainant claims that he has exhausted all available domestic remedies and that his complaint has not been submitted for examination by any other procedure of international investigation or settlement.

Complaint

3.1 The complainant submits that there are numerous reports on the general human rights situation in Eritrea, which is characterized by systematic violations, including extrajudicial killings, cases of enforced disappearance, torture, inhumane conditions of detention and compulsory national service with no clear end date. He states that, according to several reports, the Eritrean Government is responsible for the widespread torture of Eritreans.[5] The complainant also maintains that compulsory military service is tantamount to slavery and forced labour and that those who leave Eritrea irregularly are considered deserters. He states that, according to a report of the European Asylum Support Office, deserters face harsh punishment, including torture, ill-treatment and incommunicado detention with no guarantee of due process.[6] Referring to the case *A.N. v. Switzerland*,[7] the complainant submits that the Committee has already noted that a complainant who was accused of helping a soccer team leave the country without permission was detained for two months, subjected to torture during interrogation and sentenced to 7 years in prison.

3.2 The complainant believes that the authorities have not given sufficient consideration to his application for asylum. He argues that the State party's authorities should have taken into account in their analysis the circumstances in which he made the statements that were considered inconsistent by the State Secretariat for Migration, in particular as he is poorly educated and was exhausted after months of travel on his arrival in Switzerland. He submits that, despite the discrepancies the Swiss migration authorities identified in his account of his flight, it was, in the main, consistent. He claims that deporting him to Eritrea would expose him to a risk of treatment contrary to article 1 of the Convention. He also claims that there are substantial grounds for believing that he would be at risk of torture and other ill-treatment if he were returned to Eritrea. He contends that, by deporting him to Eritrea, the State party would be breaching its obligations under article 3 (1) of the Convention.

State party's observations on the merits

4.1 The State party submitted its observations on the merits of the complaint in a note verbale dated 24 July 2020. The State party first reviews the facts and proceedings brought before the Swiss authorities and courts.

4.2 The State party notes that article 3 of the Convention states that no State party may expel, return (refouler) or extradite 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. For the purpose of determining whether there are such grounds, the competent authorities are to 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.

4.3 The State party notes that the Committee has reified the provisions of article 3 in its jurisprudence and issued specific guidelines on the implementation of this article in its general comment No. 4 (2017), paragraph 38 of which states that a complainant must show that the danger of being subjected to torture in the event of an expulsion to his or her country of origin is foreseeable, present, personal and real. The existence of such a danger must also be substantial, as when the relevant claims are based on credible facts. The factors that must be taken into account in order to conclude that such a danger exists include: evidence of a consistent pattern of gross, flagrant or mass violations of human rights in the State concerned;

[5] See European Asylum Support Office, *EASO Country of Origin Information Report: Eritrea Country Focus*, Luxembourg, 2015; and A/HRC/26/45, para. 9.

[6] European Asylum Support Office, *EASO Country of Origin Information Report: Eritrea – National Service and Illegal Exit*, November 2016.

[7] CAT/C/64/D/742/2016.

acts of torture or ill-treatment committed by a public official in the recent past; the existence of evidence from independent sources to support the allegations of torture or ill-treatment and the possibility of access to that evidence; allegations that a complainant or his or her entourage may be subjected to torture or ill-treatment as a result of the procedure before the Committee, the complainant's political activities in the State of origin or elsewhere; evidence of the complainant's credibility; and the general veracity of his or her claims, despite possible inconsistencies in the presentation of the facts or lapses of memory.

4.4 The State party notes that the Committee must, in accordance with article 3 (2) of the Convention, take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. It must thus be determined whether the complainant faces a "personal" danger of being subjected to torture in the country to which he would be returned.[8] It follows that the existence of a pattern of violations of human rights in a country is not sufficient to conclude that a particular person would be in danger of being subjected to torture on being returned to the country. There must therefore be additional reasons to conclude that the danger of being subjected to torture is "foreseeable, present, personal and real".[9]

4.5 The State party refers to the complainant's critique of Swiss practice in connection with Eritrean asylum-seekers. It is of the view that the reports mentioned by the complainant, which deal in general terms with the human rights situation in Eritrea, do not show that he would be personally at risk of torture if he were returned to Eritrea.

4.6 The State party stresses that, for the State Secretariat for Migration, a troubling human rights situation is not sufficient to prohibit deportation in general. It maintains that the person concerned must show that there is a real risk to him or her, a real threat. It specifies that such a risk exists if the person concerned is very likely to be subjected to treatment or punishment contrary to article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) on being deported to Eritrea. The State party adds that, in the present case, the complainant's submissions do not make it possible to conclude that there is a real risk, since his claims concerning national service and his desertion are not sufficiently credible to conclude that articles 1 and 3 of the Convention were violated.

4.7 The State party notes that the torture or ill-treatment to which a complainant claims to have been subjected in the past is a factor to be considered when assessing the person's risk of being subjected to torture or ill-treatment again in the event of his or her return to his or her country.[10] The State party points out that, regardless of the credibility of the allegations concerning detention and military training, the account of the ill-treatment that he endured that the complainant gave both to the Committee and in his interviews with the State Secretariat for Migration is vague.

4.8 The State party submits that, apart from his claim that his failure to support the Eritrean President[11] or the system, including the military system, made it necessary for him to flee, the complainant does not claim to have been involved in political activities. Accordingly, the State party is of the view that the complainant has not shown that he has a personal background likely to cause the Eritrean authorities to train their sights on him.

4.9 The State party emphasizes that the complainant's statements are inconsistent in several respects. It notes that the State Secretariat for Migration and the Federal Administrative Court concluded that the main factual claims made by the complainant – that he was arrested during a sweep in March 2013, that he was taken into custody several times during his stay in Mai Serwa, that his wife and children were arrested and that he deserted his unit in Mai Serwa – were not credible.

4.10 The State party also stresses that the State Secretariat and the Court found that the complainant's statements contained contradictory information about the time of the arrest of

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8 *M.D.T. v. Switzerland* (CAT/C/48/D/382/2009), para. 7.2.

9 See also, inter alia, *N.S. v. Switzerland* (CAT/C/44/D/356/2008), para. 7.2, and *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.3.

10 Committee against Torture, general comment No. 4 (2017), para. 49 (b)–(d).

11 This statement by the complainant is not included in his submissions to the Committee.

his wife. In his first interview with the State Secretariat, for example, the complainant stated that his wife had informed him that she had been arrested in May 2015, whereas in the second interview, he stated that his wife had been arrested in February 2015. The State party also notes inconsistencies in the information provided by the complainant regarding his national service. On 1 July 2016, at his first interview, the complainant stated that in January 2015 he had obtained leave and had left to visit to his family; at his second interview with the State Secretariat, however, he stated that his request for leave had not been granted and that he had fled.

4.11 With regard to the events of 2014, the State party notes that, in the first interview, the complainant stated that, after his release on 17 August 2014, he had stayed with his unit for another two months and then gone back to be with his family without leave and that, after his stay with his family, the authorities had come for him in December 2014 and apprehended him. The State party also notes that, in the second interview, the complainant stated that he had been detained for two months and that a week after his release he had been detained until October 2014 – that is, for another two months. The complainant reportedly remained with his unit for two more months and went home in January 2015.

4.12 The State party notes that the State Secretariat for Migration and the Federal Administrative Court noted that the complainant’s statements about his desertion were brief, superficial, conventional and lacking in substance. The State party doubts that the complainant, who had already attracted the attention of the authorities for his previous conduct and who, by his own admission, had already fled, could have fled two days after his release.

4.13 The State party observes that there are serious doubts about the complainant’s claim that he performed national service, as the statements he made in the two interviews about his knowledge of the use of firearms were contradictory. The State party also observes that the complainant could only name his military unit and was unable to explain how it fit in the military system in detail or give precise explanations of his experience in the army. In addition, the State party points out that the complainant’s accounts of the chronology of events before he began serving in the military are hard to understand. The State party finds it unlikely that soldiers were always looking for the complainant and that he could return to his village only at night and only for a short time if, on 31 January 2010, he was able to marry officially in a public church. The State party also questions the letters attesting to the complainant’s desertion from the army that were submitted in support of his application for asylum.

4.14 The State party rejects the complainant’s assertion that the inconsistencies in his statements are the result of fatigue following his months-long flight through Ethiopia, the Sudan, Libya and Italy. It is of the view that these inconsistencies concern central events of no particular complexity. The State party notes that the complainant tried both before the Federal Administrative Court and before the Committee to explain his inconsistent statements by claiming that there had been a comprehension problem during the first interview. The State party considers this argument unpersuasive, as the verbatim record was retranslated for the complainant, and the complainant signed it, confirming its accuracy. It notes that in the event of a misunderstanding, the complainant had the opportunity to make later corrections or clarifications.

4.15 The State party, commenting on the complainant’s illegal departure, refers to recent decisions of the Federal Administrative Court in landmark rulings on the absence of a serious and personal risk of arrest and ill-treatment in the event of a voluntary return to Eritrea by a person who left the country illegally.[12] It contends that these precedents draw on numerous sources of information.[13] The State party points out that other, more recent sources confirm the information on which the Court based its assessment. These sources make it clear that Eritrean nationals who have been abroad for three years or more may settle their diaspora status with the Eritrean authorities by paying the diaspora tax and, for those who have failed

[12] Federal Administrative Court, reference judgment D-7898/2015, 30 January 2017 (referred to in judgments D-2311/2016 of 17 August 2017, preambular para. 6.3, and E-5022/2017 of 10 July 2018, preambular para. 6.1.8).

[13] Federal Administrative Court, reference judgment D-7898/2015, preambular paras. 4.7 and 4.11.

to honour their obligations to perform national service, by signing a letter of repentance. These persons can then return to Eritrea and stay there temporarily under this status at no risk of being punished solely for their illegal departure from Eritrea. The State party emphasizes, too, that there is almost no up-to-date, specific and evidence-based information on the treatment by the Eritrean authorities of persons returning to Eritrea after an illegal departure. The State party adds that sources do not always distinguish explicitly between voluntary returns and deportation.

4.16 Lastly, the State party argues that in view of the recent jurisprudence of the Federal Administrative Court,[14] in the event of a voluntary return to Eritrea, an illegal departure is not, on its own, likely to entail personal and serious risk of arrest and ill-treatment,[15] that the complainant has not reported being involved in any political activities and that his statements about his military service, the periods he spent in detention and his desertion are not credible. In these circumstances, and in the absence of other risk factors, the State party is of the view that the complainant's alleged unlawful departure is unlikely to mean that he will face a foreseeable, present, personal and real risk of being arrested and subjected to torture in the event of his voluntary return to Eritrea. Since there is no readmission agreement between Eritrea and Switzerland, the Federal Administrative Court did not consider the admissibility of deportation.[16]

4.17 The State party therefore submits that nothing shows that there are substantial grounds for believing that the complainant would be exposed to a foreseeable, present, personal and real risk of torture and ill-treatment in the event of his or her return to Eritrea and requests the Committee to find that the removal of the complainant would not constitute a violation of articles 1 and 3 of the Convention.

Complainant's comments on the State party's observations

5.1 On 31 March 2022, the complainant submitted his comments on the State party's observations on the merits. He points out that the State party, in its observations, notes that refusal to serve and desertion are punished harshly in Eritrea. The complainant notes that the punishment is generally accompanied by imprisonment in inhumane conditions and often by torture, as desertion is considered an act of protest against the regime. He nonetheless states that such punishment is justified only if the person in question has already been in actual contact with the military or other authorities, insofar as such contact is a sign of forthcoming recruitment. The complainant notes that he has already been in contact with the military authorities and that he has already been imprisoned on several occasions for his conduct and desertion.

5.2 The complainant stresses that, in its landmark ruling D-7898/2015 of 30 January 2017 and in its ruling E-1218/2019 of 16 April 2019, the Federal Administrative Court noted the extent to which Eritreans who left their country illegally must fear persecution if they return. He also stresses that, despite this finding, the Court concluded that the practice whereby illegal egress from Eritrea justified, on its own, the recognition of refugee status could not be maintained and that only the presence of additional unfavourable factors (such as a major risk of punishment or serious harm, having been part of a group opposing the regime, having held a prominent position before fleeing or having avoided military service) could make someone a persona non grata in the eyes of the Eritrean authorities.

5.3 The complainant contests the analysis of the State party's migration authorities, who were of the view that Eritrea was not in a state of war, civil or otherwise, or experiencing widespread violence that would make it possible to presume from the outset that all the country's nationals are in actual danger and that the risk of being drafted into the national service could not in itself be considered an obstacle to removal within the meaning of article 83 (4) of the Foreign Nationals and Integration Act. In support of his argument, the complainant notes the decision adopted by the Committee on 12 November 2021 in the case

[14] Ibid (referred to in judgments D-2311/2016, preambular para. 6.3, and E-5022/2017, preambular para. 6.1.8).

[15] Federal Administrative Court, reference judgment E-5902/2019, 20 March 2020, preambular paras. 6.7 and 8.4.3.

[16] Ibid., preambular para. 8.5.

Y v. Switzerland,[17] which concerned a young Eritrean who had refused to perform military service and left the country illegally. The complainant states that, in the context of this communication, the Committee found that there was little reliable information on the danger of being subjected to torture faced by a person who left Eritrea illegally; as a consequence, the Committee could not conclude that the complainant would not face a foreseeable, real and personal risk of being subjected to torture in the event of his return to Eritrea.[18]

5.4 The complainant, commenting on the State party's view that his statements regarding his desertion in May 2015 were brief, superficial, conventional and lacking in substance, explains that he described the route he took, passing through the villages of Adi Hadid and Digsa before reaching his village, during his flight in April 2015. He adds that he also described the place where he slept before his escape. If, as the State party claims, there were inconsistencies in his accounts of the period during which the complainant had left to be with his family in 2015 and possible inaccuracies in the date of his wife's imprisonment in 2015, the misunderstanding, according to the complainant, was probably caused by the way he expressed himself, fatigue from his long flight and his lack of education.

5.5 The complainant also notes that, despite his rudimentary education, his statements during the two interviews were, on the whole, identical in several respects. He states that in both interviews he specified the date of his arrest and transfer to Mai Serwa in March 2013 and noted that he had served in the KS 55 military unit and had requested leave for the first time in April 2014 – that is, after more than a year away from home. The complainant also states that he consistently maintained in both interviews that he had been imprisoned three times, each time for two months, and that his wife had also been arrested once because of his desertion.

5.6 The complainant contests the State party's argument that the inconsistencies in his statements cast doubt on their plausibility. He points out that the events took place several years before the second interview and that the second interview took place in December 2017, whereas he had left Eritrea in July 2015. He also notes that there was a period of about a year and a half between the two interviews. The complainant argues that he had considerable trouble putting events in the correct chronological order and understanding the importance of a detailed description of the facts for the State party's migration authorities. He stresses that particular consideration should be given to this fact in evaluating the interview of 1 July 2016, in which no questions were asked of him.

5.7 The complainant submits that he was probably not in a position to correctly assess the significance of his first interview, especially since he was wholly unfamiliar with the local administrative conditions. He also believes it understandable that he has mixed up parts of the events he has experienced. The complainant adds that in view of his limited schooling and his limited contact with other people – having spent much of his adult life as a shepherd, far from cities – it was difficult for him to memorize and accurately reproduce the details of a complex story. He nonetheless believes that his story was largely consistent. He also argues that, by failing to take into account his individual circumstances and the considerable evidence in his favour, the State party failed to properly assess his application for asylum. The complainant argues that, in view of the many similarities on essential matters, these inconsistencies are not such as to make his statements wholly implausible. He submits that the State party's migration authorities did not give due weight to the considerable evidence corroborating his account.

5.8 The complainant reiterates that he faces an imminent and real danger of being subjected to torture or other cruel and degrading treatment if he is forced to return to Eritrea, as he fled the country illegally and is perceived as an enemy of the Eritrean regime. Lastly, the complainant states that if he is returned, the Eritrean authorities will apprehend him at the airport, question him and take him into custody, since his illegal departure from the country is considered by the Eritrean authorities to be an act of political dissent. He also submits that he will be harshly punished and tortured.

[17] CAT/C/72/D/916/2019.

[18] Ibid., para. 8.8.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 The Committee stresses that, in accordance with article 22 (5) (b) of the Convention, it will not consider any communication from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, as the complainant's appeal was rejected, the rejection of his application for asylum became final and that the State party has not contested the admissibility of the complaint. The Committee therefore finds that it is not precluded by article 22 (5) (b) of the Convention from considering the communication.

6.3 As the Committee finds no further obstacles to admissibility, it declares the communication admissible and proceeds to consider it on the merits.

Consideration of the merits

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

7.2 In the present case, the issue before the Committee is whether the return of the complainant to Eritrea would constitute a violation of the State party's obligation under articles 1 and 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 or other cruel, inhuman or degrading treatment or punishment.

7.3 The Committee must consider whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon his return to Eritrea. In assessing that risk, it must, pursuant to article 3 (2) of the Convention, take into account all relevant considerations, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights.[19] However, the Committee recalls that the aim of this 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 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 to conclude 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.[20]

7.4 The Committee recalls its general comment No. 4 (2017), which states, first, that the non-refoulement obligation exists whenever there are "substantial grounds" for believing that the person concerned would be in danger of being subjected to torture in the State to which he or she is facing deportation, either as an individual or as a member of a group which may be at risk of being tortured in the State of destination and, second, that the Committee's practice has been to determine that "substantial grounds" exist whenever the risk is "foreseeable, personal, present and real".[21] It also recalls that the burden of proof is borne by the complainant, who must present an arguable case – that is, submit substantiated arguments showing that the danger of being subjected to torture is foreseeable, personal, present and real. However, when the complainant is in a situation where he or she cannot elaborate on his or her case, the burden of proof is reversed and the State party concerned must investigate

[19] Committee against Torture, general comment No. 4 (2017), para. 43.

[20] *Kalinichenko v. Morocco* (CAT/C/47/D/428/2010), para. 15.3.

[21] Committee against Torture, general comment No. 4 (2017), para. 11.

the allegations and verify the information on which the communication is based.[22] The Committee gives considerable weight to findings of fact made by organs of the State party concerned; however, it is not bound by such findings, as it can make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all the circumstances relevant to each case.[23]

7.5 The Committee takes note of the complainant's argument that deporting him to Eritrea would expose him to treatment contrary to articles 1 and 3 of the Convention, as well as to compulsory military service, which amounts to slavery and forced labour.[24] It also takes note of the complainant's argument that the general human rights situation in Eritrea, which is characterized by extrajudicial killings, illegal detention, torture and other rights violations, is not conducive to the return of deserters to the country. In addition, the Committee notes the State party's argument that, according to recent precedents set by the Federal Administrative Court,[25] the return of Eritrean nationals who have evaded national service no longer entails a personal and serious risk of arrest and ill-treatment for the persons concerned.[26] The Committee observes that, according to the State party, the general human rights situation in a country is not in itself sufficient to prevent removal to that country and that the person concerned must show that there is a real risk to him or her, a real threat. The Committee nonetheless notes that the State party acknowledges that there is no up-to-date, specific and evidence-based information on the treatment by the Eritrean authorities of persons returning to Eritrea after an illegal departure. The Committee observes that allegations of torture and ill-treatment of persons who have fled military service in Eritrea are acknowledged not only by the State party but also by several United Nations agencies and mechanisms, including the Special Rapporteur on the situation of human rights in Eritrea.[27]

7.6 The Committee nonetheless recalls that the existence of human rights violations in a complainant's country of origin is not, in itself, sufficient for it to conclude that he or she runs a personal risk of being tortured.[28] Therefore, the mere fact that human rights violations occur in Eritrea is not in itself sufficient to conclude that the complainant's removal to that country would constitute a violation of article 3 of the Convention.[29] The Committee notes the complainant's argument that, because of his status as a deserter, he is considered an opponent of the regime. It also notes the State party's argument that, in the present case, the complainant does not claim to have been involved in political activities or demonstrated that he has a personal background of a sort likely to cause the Eritrean authorities to train their sights on him. The Committee also emphasizes that, according to the State party, the submissions made by the complainant do not make it possible to conclude that there is a real risk of a violation of articles 1 and 3 of the Convention. The Committee notes that the complainant has not proved that his political activities are significant enough to make him a person of interest to the authorities of his country of origin[30] and concludes that the information provided does not show that he would be personally at risk of torture or inhuman or degrading treatment if he were to return to Eritrea.

7.7 The Committee notes that the torture or ill-treatment to which a complainant claims to have been subjected in the past is a factor to be considered when assessing the risk of being

[22] Ibid., para. 38.

[23] Ibid., para. 50.

[24] See the 2015 report of the Commission of Inquiry into Human Rights in Eritrea, available on the Commission's webpage (www.ohchr.org/en/hr-bodies/hrc/co-i-eritrea/commissioninquiryonhrin-eritrea), paras. 1097 and 1098. See also the Commission's 2016 report, para. 188.

[25] Federal Administrative Court, reference judgment D-7898/2015 (referred to in judgments D-2311/2016, preambular para. 6.3, and E-5022/2017, preambular para. 6.1.8).

[26] Federal Administrative Court, judgment E-5902/2019, preambular paras. 6.7 and 8.4.3.

[27] See Human Rights Council, "Human Rights Council holds separate interactive dialogues on the human rights situations in Eritrea and in Sri Lanka", press release, 4 March 2022.

[28] *A.M. v. Switzerland* (CAT/C/65/D/841/2017), para. 7.7.

[29] See the following decisions on the expulsion of persons to Ethiopia: *H.K. v. Switzerland* (CAT/C/49/D/432/2010), para. 7.5, *R.D. v. Switzerland* (CAT/C/51/D/426/2010), para. 9.7, *X. v. Denmark* (CAT/C/53/D/458/2011), para. 9.6, *E.E.E. v. Switzerland* (CAT/C/54/D/491/2012), para. 7.7, *M.F. v. Switzerland* (CAT/C/59/D/658/2015), para. 7.7, *T.Z. v. Switzerland* (CAT/C/62/D/688/2015), para. 8.7, and *X. v. Switzerland* (CAT/C/65/D/765/2016), para. 7.8.

[30] *Z v. Switzerland* (CAT/C/64/D/738/2016 and CAT/C/64/D/738/2016/Corr.1), para. 7.6.

subjected again to torture or ill-treatment that he or she will face in the event of a return to his or her country.[31] In the present case, the Committee notes the complainant's claim that he was beaten during his military training. It also notes the State party's argument that the account of the ill-treatment he endured that the complainant gave both to the Committee and in his interviews with the State Secretariat for Migration is vague. The Committee observes that the complainant has not demonstrated that he has been tortured or subjected to ill-treatment in the recent past and has not produced any evidence that might cast doubt on the conclusions drawn by the Swiss authorities in their rejection of his application for asylum.[32]

7.8 The Committee takes note of the State party's comment that it has identified factual inconsistencies in the statements made by the complainant in his interviews conducted by the State Secretariat for Migration on 1 July 2016 and 22 December 2017. It also takes note of the complainant's arguments that the inconsistencies in the account of his experiences he gave to the Swiss migration authorities are the result of his limited schooling, the long period of time between the two interviews and the fatigue caused by his long flight through several countries. The Committee nonetheless notes that the complainant had ample opportunity to provide supporting evidence for and more information about his claims at the national level to the State Secretariat for Migration and the Federal Administrative Court but that the evidence he provided did not lead the national authorities to conclude that he would be in danger of being subjected to torture or cruel, inhuman or degrading treatment upon his return to Eritrea.

8. The Committee is therefore of the view that the information submitted by the complainant is insufficient to substantiate his claim that he would be at a foreseeable, real and personal risk of torture if he were deported to Eritrea.

9. The Committee, acting under article 22 (7) of the Convention, concludes that the deportation of the complainant to Eritrea, if it takes place, would not constitute a violation by the State party of article 3 of the Convention.

[31] Committee against Torture, general comment No. 4 (2017), para. 49 (b)–(d).
[32] Ibid., para. 49 (b).

Annex

Original: English

Individual opinion of Committee member Todd Buchwald (dissenting)

1. I respectfully dissent from this decision.

2. It is uncontested that the Government of Eritrea tightly controls departures from the country. Under its law, no one can leave Eritrea without permission, and violators face up to five years in prison.[1] The campaign to prevent departures is part of a dismal human rights situation that has continued to push thousands of Eritreans to flee the country.[2] As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment – together with other special procedure mandate holders – has noted, individuals leaving without exit visas are regarded as serious offenders and traitors. Returnees are often arrested, questioned and detained in extremely punitive conditions. Deported refugees have been subjected to torture during interrogation, incommunicado detention and enforced disappearance, while others have been made to undertake forced labour.[3]

3. Credible civil society organizations echo these concerns, and note that returned asylum-seekers often face torture and other abuse for suspected criticism of the Government to foreigners in the course of their asylum claims.[4] Indeed, the commission of inquiry on human rights in Eritrea described government efforts to punish even family members of those who disobey the ban on departures, with at least some reprisals taking the form of arbitrary detention, enforced disappearance or murder, and concluded there are reasonable grounds to believe that such acts constitute crimes against humanity.[5] In the most recent interactive dialogue before the Human Rights Council, the Deputy High Commissioner for Human Rights noted that the human rights situation in Eritrea remained dire and showed no sign of improvement, with violations committed in the context of complete impunity.[6]

4. It is, of course, possible that such assessments are incorrect or that, even if correct, this particular asylum-seeker would, for some reason, slip through the cracks. But the test under article 3 of the Convention is different: whether there exist substantial grounds for believing that a person would be in danger of being subjected to torture. A finding that there are no such grounds for believing that this asylum-seeker would be in danger of being subjected to torture is, to me, implausible.

5. The five points set out below are advanced in opposition to this conclusion.

6. First, the State party argues that, while its overall human rights record may be "troubling", it does not make it possible to conclude that there is a real risk of torture to this complainant (para. 4.4). Putting aside whether the Government's human rights record should be characterized as "troubling" or something worse, the complainant's claim is not based just on the overall human rights record of Eritrea, but rather on the way that Eritrea treats a specific category of persons (persons who have left the country without permission), which clearly includes the complainant.

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[1] Proclamation No. 24/1992, sects. 11 and 29 (2).

[2] A/HRC/50/20, para. 51.

[3] See communication EGY 13/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26812. See also A/HRC/29/42, para. 46; A/HRC/47/21, para. 52; CCPR/C/ERI/CO/1, para. 25; and the statements by the Special Rapporteur on the situation of human rights in Eritrea, on 4 March 2022 and 20 June 2023, to the Human Rights Council at its forty-ninth and fifty-third sessions, respectively.

[4] See, for example, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2FCCPR%2FCSS%2FERI%2F33764&Lang=en.

[5] A/HRC/32/47, paras. 40, 83 and 84.

[6] See https://media.un.org/en/asset/k1w/k1wa56dtbh.

7. Second, the State party contends that the complainant has failed to substantiate that he was involved in political activities that would cause the Eritrean authorities to train their sights on him (para. 4.8). The Committee appears to embrace this reasoning, saying that the complainant has not proved that his political activities are significant enough to make him a person of interest to the authorities of his country of origin and concluding that the information provided does not show that he would be personally at risk of torture or inhuman or degrading treatment if he were to return to Eritrea (para. 7.6).

8. Even accepting, for the sake of argument, that the complainant engaged in no political activity that should concern the Eritrean authorities, the problem – to repeat the words cited above – is that those who have left the country without permission are regarded as serious offenders and traitors, are often arrested, questioned and detained in extremely punitive conditions, and have been subjected to torture during interrogation, incommunicado detention and enforced disappearance.[7]

9. Third, the Committee concludes that the complainant has not demonstrated that he has been tortured or subjected to ill-treatment in the recent past (para. 7.7). This line of argument is unpersuasive since, as the Committee has decided in a separate case involving removal to Eritrea, a person need not have suffered previous torture to fall into the category of persons at risk of torture because of their "unlawful" departure from Eritrea.[8]

10. Fourth, the State party argues that there are serious doubts about the complainant's claim that he performed national service, in the light of contradictory statements he made in the course of his interviews before domestic authorities (para. 4.13). If true that the complainant failed to perform national service, that would – under the State party's own theory of the case – make it more rather than less likely that he would face the risk of torture.

11. Fifth, the State party argues that, in cases of voluntary return to Eritrea, an illegal departure should no longer be considered, on its own, likely to entail personal and serious risk of arrest and ill-treatment (para. 4.16). This conclusion is said to draw on numerous sources of information. According to the State party, these sources make it clear that Eritrean nationals who have been abroad for three years or more may settle their diaspora status with the Eritrean authorities by paying the diaspora tax and, for those who have failed to honour their obligations to perform national service, by signing a letter of repentance. These persons can then return to Eritrea and stay there temporarily under this status at no risk of being punished solely for their illegal departure from Eritrea (para. 4.15).

12. With due respect, these sources do not, in fact, make this conclusion clear, particularly in the light of the numerous assessments to the contrary cited above. Indeed, although the State party says that its sources make it clear that a person can avoid the risk by paying the diaspora tax and signing a repentance letter, the State party itself concedes that there is almost no up-to-date, specific and evidence-based information on the treatment by the Eritrean authorities of persons returning to Eritrea after an illegal departure and that, in any case, the sources do not always distinguish explicitly between voluntary returns and deportations.[9] In the final analysis, the test under article 3 is whether there are substantial grounds for believing that the complainant would be in danger of being subject to torture. Certainty is not required. As the Committee itself said, in its decision in *Berhane v. Switzerland*, the Committee should not presume the absence of risk where the State party has itself said there is no current, accurate and factual information on the treatment by the Eritrean authorities of persons returning to Eritrea after illegal departure.[10] Stacked against the record of Eritrea of past abuse and the many findings to that effect within the United Nations system, the ambiguous sources

[7] See communication EGY 13/2021, available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=26812.

[8] See *Berhane v. Switzerland* (CAT/C/76/D/983/2020).

[9] It is also worth noting that the State party would not be removing the complainant to Eritrea for him to stay there temporarily, as would be the case for someone coming to visit family but who will return to the country of residence and remain a member of the diaspora, and so the principle being invoked would not apply to the complainant in the first place.

[10] *Berhane v. Switzerland* (CAT/C/76/D/983/2020).

upon which the State party relies are insufficient to dispel the conclusion that there are substantial grounds for believing that such a risk exists.

13. One other point warrants mention. Even if its assessment of the lack of risk were otherwise accepted, the State party concedes that its conclusion that the complainant would be at no risk of torture would depend on his willingness to pay the so-called diaspora tax and sign a statement of repentance. However, requiring the complainant to take either of these steps as a condition for avoiding torture would be highly problematic. First, with regard to the repentance, the complainant would be required to confess using the specific words that he regrets having committed an offence by not completing the national service and is ready to accept appropriate punishment in due course.[11] In the context of a regime with a record such as that of Eritrea, it would seem perilous to submit a formal written confession that he had illegally evaded national service. Indeed, it would be particularly ironic to require the complainant to confess that he had failed to complete national service when a premise of the State party's decision was that the complainant had failed to establish this very point. Second, with respect to the diaspora tax, the Security Council has taken a decision, binding under international law,[12] that prohibits Eritrea from using extortion, threats of violence or other illicit means to collect the tax, and that calls upon other States to take appropriate action to prevent collection of the tax.[13] In these circumstances, States, as well as the Committee, should not be encouraging outcomes that rely on the payment of such a tax. In the end, a person has a right not to make such a confession and a right not to pay such a tax, and protection from torture or other abuse should not be made dependent on relinquishing either of those rights.

14. For all these reasons, I respectfully dissent from the Committee's decision.

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[11] See annex VII of the conference room paper of the commission of inquiry on human rights in Eritrea, available on the web page of the twenty-ninth session of the Human Rights Council (https://www.ohchr.org/en/hr-bodies/hrc/regular-sessions/session29/list-reports).

[12] Charter of the United Nations, Art. 25.

[13] Security Council resolution 2023 (2011), para. 11.