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PRACTICE ADVISORY

The First Circuit's *H.H. v. Garland*, 52 F.4th 8 (1st Cir.)
on the Convention Against Torture
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In *H.H. v. Garland*, 52 F.4th 8 (1st Cir.), the United States Court of Appeals for the First Circuit held the following: (1) the acquiescence under the Convention Against Torture is a two-step analysis (awareness and breach of legal responsibilities); (2) the awareness prong of acquiescence can be established through willful blindness; (3) the breach of legal responsibilities does not mean that any evidence of minimal efforts taken by the foreign government to prevent torture would preclude the agency from denying the CAT relief; and (4) a non-government actor may be construed under color of law under the Fourteenth Amendment color of law analysis. All of these holdings are highly relevant when the actors inflicting torture on asylum seekers are not officials of foreign governments such as gangs, militia, and cartels.

This practice advisory discusses how practitioners can apply *H.H.*'s analyses in other Convention Against Torture cases. To request technical assistance on these issues, please contact SangYeob Kim, a Staff Attorney at the ACLU of New Hampshire, at sangyeob@aclu-nh.org.[1]

The general legal landscape of the Convention Against Torture

Under the United Nations Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), as implemented by 8 C.F.R. §§ 1208.16-1208.18, an applicant is eligible for withholding/deferral of removal if he or she establishes that it is "more likely than not" that he or she would be tortured in the proposed country of removal "by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1).[2]

An applicant who establishes that he or she is entitled to protection under the CAT shall be granted withholding of removal unless he or she is subject to mandatory denial of that relief, in which case he or she shall be granted deferral of removal. 8 C.F.R. §§ 1208.16(c)(4), 1208.17(a). For the deferral of removal under the CAT, an applicant's criminal convictions, no matter how serious, are not a bar to the relief. 8 C.F.R. § 1208.17(a); *Matter of G-A-*, 23 I&N Dec. 366, 368 (BIA 2002).

[1] This advisory is not a substitute for independent legal advice by a lawyer who is familiar with an individual's case.
[2] Although the Trump administration proposed to amend 8 C.F.R. § 1208.18 in December 2020, this proposed amendment to 8 C.F.R. § 1208.18(a)(1) and (a)(7) was enjoined in January 2021 by *Pangea Legal Servs v. U.S. Dep't of Homeland Sec.*, 512 F. Supp. 3d 966, 977 (N.D. Cal. 2021). *See H.H.*, 52 F.4th at 18 n.9.

The meaning of "acquiescence" of a public official

In *H.H.*, the First Circuit addressed the "acquiescence" language in 8 C.F.R. § 1208.18(a)(7). Again, the acquiescence of a public official must be established if torture is inflicted by non-government actors. Under 8 C.F.R. § 1208.18(a)(7), "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." As reflected in the regulatory language, the First Circuit held that the acquiescence test has two prongs: awareness and breach of legal responsibility to intervene to prevent torture. *H.H.*, 52 F.4th at 19-21.

The awareness prong (of acquiescence) under *H.H.*

For the awareness prong, the First Circuit held that either a public official's "actual knowledge" of torture or "willful blindness" to the possibility of torture is sufficient to establish this *mens rea* element. For example, a police officer has actual knowledge when he or she knows that the applicant betrayed MS-13 gangs; thus, retribution by MS-13 is inevitable. Evidence to support the "actual knowledge" theory can be the applicant's testimony and country conditions reports showing how obvious it is for MS-13 gangs to harm individuals who betrayed MS-13 gangs.

The First Circuit explained that the awareness prong could be satisfied through willful blindness, even if a public official has no actual knowledge of torture. *See H.H.*, 52 F.4th at 20-21. Willful blindness, which is a concept derived from criminal law, is defined as "a conscious course of deliberate ignorance" of the possibility of torture. *Id*. at 20 n.15. In other words, willful blindness means a public official is turning a blind eye to the possibility of torture. For example, a police officer's conduct constitutes willful blindness when he or she intentionally refuses to find out when the applicant states that he or she will be harmed by MS-13 gangs because of his or her betrayal of MS-13.

Tip: practitioners are not required to prove that the foreign officials are turning a blind eye to the possibility of torture if they can establish that the foreign officials have actual knowledge of torture.

The breach of legal responsibilities prong (of acquiescence) under *H.H.*

For the breach of legal responsibilities prong, the First Circuit did not reach this prong. Nonetheless, the Court noted that Immigration Judges and the Board of Immigration Appeals should not find that no breach of legal responsibilities by the foreign officials occurs with "any record evidence of efforts taken by the foreign government to prevent torture, no matter how minimal . . . ." *H.H.*, 52 F.4th at 21 (emphasis in original).

Tip: the concept of willful blindness may satisfy both awareness and breach of legal responsibilities. *See H.H.*, 52 F.4th at 21 n.16 ("We recognize that there may be cases where some of the same facts supporting a finding of willful blindness also support a finding of breach of responsibility, such as evidence of actions that government actors have taken to avoid learning about torture.").

The due diligence standard for the breach of legal responsibilities prong under international law

Because the First Circuit did not address the breach of legal responsibilities, what constitutes a public official's breach of legal responsibilities is an open question.

Practitioners should argue before Immigration Judges and the Board of Immigration Appeals that the proper inquiry of the "breach of legal responsibilities" prong is whether the foreign government/officials exercise due diligence to prevent, investigate, prosecute, and punish acts of torture by non-government actors.

The United Nations Committee against Torture, which consists of a panel of ten independent experts charged with monitoring implementation and countries' compliance with the CAT, has adopted the "due diligence" standard for the meaning of the "breach of legal responsibility" prong of acquiescence. Under this standard, a public official's failure "to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture" constitutes acquiescence. *See* Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2, at ¶18 (Jan. 24, 2008); *Njamba and Balikosa v. Sweden*, Comm. No. 322-2007, U.N. Doc. CAT/C/44/D/322/2007, ¶9.5 (2007).

This standard is not only favorable to CAT applicants but also consistent with *H.H.*, in which the First Circuit expressed "skepticism that any record evidence of efforts taken by the foreign government to prevent torture, no matter how minimal, will necessarily be sufficient to preclude the agency from finding that a breach of the duty to intervene is likely to occur." *H.H.*, 52 F.4th at 21.

The meaning of "other person acting in an official capacity"

In *H.H.*, the First Circuit also addressed the meaning of "other person acting in an official capacity" language in 8 C.F.R. § 1208.18(a)(1). The regulation provides that "other person acting in an official capacity" is sufficient to satisfy the CAT in addition to "a public official" for inflicting torture on applicants. Put another way, if practitioners establish that non-public officials such as gangs, militia, and cartels constitute "other person acting in an official capacity," acquiescence by a public official is not needed to be proved.

In reaching its decision that non-government actors can be construed "other person acting in an official capacity," the First Circuit first endorsed the former Attorney General William Barr's *Matter of O-F-A-S-*, 28 I&N Dec. 35, 37 (A.G. 2020) that the Fourteenth Amendment's color of law inquiry is the standard for determining whether a public official is acting in an official capacity. *See H.H.*, 52 F.4th at 22. Second, the First Circuit expanded this color of law inquiry to non-public/government officials because the Fourth Amendment also permits this approach. *See id*. at 22-23.

Under the Fourteenth Amendment color of law standard, "[a] private [actor] can be treated as a state actor in rare circumstances falling into three categories: (1) if the private [actor] assumes a traditional assumes a traditional public function when performing the challenged conduct, (2) if

the private party's conduct is coerced or significantly encouraged by the state, and (3) if the private party and the state have become so intertwined that they were effectively joint participants in the challenged conduct." *H.H.*, 52 F.4th at 23 (citing and quoting *Jarvis v. Vill. Gun Shop, Inc.*, 805 F.3d 1, 8 (1st Cir. 2015) (internal quotation marks and alterations omitted).

Traditional public function

Under the traditional public function test, covered functions include "the administration of elections, the operation of a company town, eminent domain, peremptory challenges in jury selection, and in at least limited circumstances, the operation of a municipal park." *Santiago v. Puerto Rico*, 655 F.3d 61, 71 (1st Cir. 2011). The private police forces "may become state actors in certain circumstances." *Klunder v. Trs. Fellows of the Coll. or Univ. in the English Colony*, No. 10-410 ML, 2011 U.S. Dist. LEXIS 76673, at *15-16 (D.R.I. July 13, 2011) (collecting cases). Thus, for example, practitioners may argue that MS-13 has assumed state functions (levying taxes and providing sole securities) in territories under their control by filling gaps in governance where the formal government is nonexistent.

Joint/nexus

Under the joint/nexus test, factors for consideration include the "state's sharing of profits generated from the private [actor's] rights-depriving conduct." *Santiago v. Puerto Rico*, 655 F.3d 61, 71 (1st Cir. 2011). Thus, for example, practitioners may argue that it is very difficult to pull the state and MS-13 apart in the territories they hold sway, because one couldn't operate without the other in these spaces by showing the evidence of police patrols serving as an arm of surveillance for MS-13 in lieu of cutting profits from the illicit business.

(Sample Legal Background for Briefing)

I. Legal Background

Under the Convention Against Torture (CAT), a respondent is eligible for the relief if he establishes that it is "more likely than not" that he would be tortured in the proposed country of removal "by, or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity." 8 C.F.R. § 1208.18(a)(1).

Under 8 C.F.R. § 1208.18(a)(7), "[a]cquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity." The awareness prong is satisfied either by showing that a public official has actual knowledge of torture or turns a blind eye to the possibility of torture. *See H.H. v. Garland*, 52 F.4th 8, 19-21 (1st Cir. 2022).

For the breach of legal responsibility prong, this Court should adopt the due diligence standard of the United Nations Committee against Torture. The United Nations Committee against Torture, which consists of a panel of ten independent experts charged with monitoring implementation and countries' compliance with the CAT, has adopted the "due diligence" standard for the meaning of the "breach of legal responsibility" prong of acquiescence. Under this standard, a public official's failure "to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture" constitutes acquiescence. *See* Comm. Against Torture, General Comment No. 2, Implementation of Article 2 by States Parties, U.N. Doc. CAT/C/GC/2, at ¶18 (Jan. 24, 2008); *Njamba and Balikosa v. Sweden*, Comm. No. 322-2007, U.N. Doc. CAT/C/44/D/322/2007, ¶9.5 (2007). Adopting this standard is consistent with the First Circuit's holding in *H.H. See H.H.*, 52 F.4th at 21 (expressing "skepticism that any record evidence of efforts taken by the foreign government to prevent torture, no matter how minimal, will necessarily be sufficient to preclude the agency from finding that a breach of the duty to intervene is likely to occur" (emphasis in original)). Moreover, adopting the Committee's interpretation is in line with Congressional intent that the domestic provisions of the CAT should be given the same meaning as their counterparts in the Convention itself. *See* Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), Pub. L. No. 105-277, div. G., tit. XXII, § 2242(f)(2), 112 stat. 2681-822 (codified at 8 U.S.C. § 1231 note(f)(2)) ("Same terms as in the convention.-Except as otherwise provided, the terms used in this section have the meanings given those terms in the Convention, subject to any reservations, understandings, declarations, and provisos contained in the United States Senate resolution of ratification of the Convention").

In addition, non-public officials can act in an official capacity under 8 C.F.R. § 1208.18(a)(1). *See H.H.*, 52 F.4th at 22-23; *Matter of O-F-A-S-*, 28 I&N Dec. 35, 40 (A.G. 2020). A private party can be treated as a state actor in rare circumstances falling into three categories: (1) "if the private party assumes a traditional public function when performing the challenged conduct," (2) "if the private party's conduct is coerced or significantly encouraged by the state," and (3) "if the private party and the state have become so intertwined that they were effectively joint participants in the challenged conduct." *H.H.*, 52 F.4th at 23 (internal quotation marks and alterations omitted).

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COMMITTEE AGAINST TORTURE

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

GENERAL COMMENT No. 2

Implementation of article 2 by States parties

1. This general comment addresses the three parts of article 2, each of which identifies distinct interrelated and essential principles that undergird the Convention's absolute prohibition against torture. Since the adoption of the Convention against Torture, the absolute and non-derogable character of this prohibition has become accepted as a matter of customary international law. The provisions of article 2 reinforce this peremptory *jus cogens* norm against torture and constitute the foundation of the Committee's authority to implement effective means of prevention, including but not limited to those measures contained in the subsequent articles 3 to 16, in response to evolving threats, issues, and practices.

2. Article 2, paragraph 1, obliges each State party to take actions that will reinforce the prohibition against torture through legislative, administrative, judicial, or other actions that must, in the end, be effective in preventing it. To ensure that measures are in fact taken that are known to prevent or punish any acts of torture, the Convention outlines in subsequent articles obligations for the State party to take measures specified therein.

3. The obligation to prevent torture in article 2 is wide-ranging. The obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment (hereinafter "ill-treatment") under article 16, paragraph 1, are indivisible, interdependent and interrelated. The obligation to prevent ill-treatment in practice overlaps with and is largely congruent with the obligation to prevent torture. Article 16, identifying the means of prevention of ill-treatment, emphasizes *"in particular"* the measures outlined in articles 10 to 13, but does not limit effective prevention to these articles, as the Committee has explained, for example, with respect to compensation in article 14. In practice, the definitional threshold between ill-treatment and torture is often not clear. Experience demonstrates that the conditions that give rise to ill-treatment frequently facilitate torture and

therefore the measures required to prevent torture must be applied to prevent ill-treatment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention and its prevention to be an effective and non-derogable measure.

4. States parties are obligated to eliminate any legal or other obstacles that impede the eradication of torture and ill-treatment; and to take positive effective measures to ensure that such conduct and any recurrences thereof are effectively prevented. States parties also have the obligation continually to keep under review and improve their national laws and performance under the Convention in accordance with the Committee's concluding observations and views adopted on individual communications. If the measures adopted by the State party fail to accomplish the purpose of eradicating acts of torture, the Convention requires that they be revised and/or that new, more effective measures be adopted. Likewise, the Committee's understanding of and recommendations in respect of effective measures are in a process of continual evolution, as, unfortunately, are the methods of torture and ill-treatment.

II. Absolute prohibition

5. Article 2, paragraph 2, provides that the prohibition against torture is absolute and non-derogable. It emphasizes that *no exceptional circumstances whatsoever* may be invoked by a State Party to justify acts of torture in any territory under its jurisdiction. The Convention identifies as among such circumstances a state of war or threat thereof, internal political instability or any other public emergency. This includes any threat of terrorist acts or violent crime as well as armed conflict, international or non-international. The Committee is deeply concerned at and rejects absolutely any efforts by States to justify torture and ill-treatment as a means to protect public safety or avert emergencies in these and all other situations. Similarly, it rejects any religious or traditional justification that would violate this absolute prohibition. The Committee considers that amnesties or other impediments which preclude or indicate unwillingness to provide prompt and fair prosecution and punishment of perpetrators of torture or ill-treatment violate the principle of non-derogability.

6. The Committee reminds all States parties to the Convention of the non-derogable nature of the obligations undertaken by them in ratifying the Convention. In the aftermath of the attacks of 11 September 2001, the Committee specified that the obligations in articles 2 (whereby "no exceptional circumstances whatsoever…may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions that "must be observed in all circumstances"[1]. The Committee considers that articles 3 to 15 are likewise obligatory as applied to both torture and ill-treatment. The Committee recognizes that States parties may choose the measures through which they fulfill these obligations, so long as they are effective and consistent with the object and purpose of the Convention.

7. The Committee also understands that the concept of "any territory under its jurisdiction," linked as it is with the principle of non-derogability, includes any territory or facilities and must be applied to protect any person, citizen or non-citizen without discrimination subject to the de jure or

[1] On 22 November 2001, the Committee adopted a statement in connection with the events of 11 September which was sent to each State party to the Convention (A/57/44, paras. 17-18).

de facto control of a State party. The Committee emphasizes that the State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State party. It is a matter of urgency that each State party should closely monitor its officials and those acting on its behalf and should identify and report to the Committee any incidents of torture or ill-treatment as a consequence of anti-terrorism measures, among others, and the measures taken to investigate, punish, and prevent further torture or ill-treatment in the future, with particular attention to the legal responsibility of both the direct perpetrators and officials in the chain of command, whether by acts of instigation, consent or acquiescence.

III. Content of the obligation to take effective measures to prevent torture

8. States parties must make the offence of torture punishable as an offence under its criminal law, in accordance, at a minimum, with the elements of torture as defined in article 1 of the Convention, and the requirements of article 4.

9. Serious discrepancies between the Convention's definition and that incorporated into domestic law create actual or potential loopholes for impunity. In some cases, although similar language may be used, its meaning may be qualified by domestic law or by judicial interpretation and thus the Committee calls upon each State party to ensure that all parts of its Government adhere to the definition set forth in the Convention for the purpose of defining the obligations of the State. At the same time, the Committee recognizes that broader domestic definitions also advance the object and purpose of this Convention so long as they contain and are applied in accordance with the standards of the Convention, at a minimum. In particular, the Committee emphasizes that elements of intent and purpose in article 1 do not involve a subjective inquiry into the motivations of the perpetrators, but rather must be objective determinations under the circumstances. It is essential to investigate and establish the responsibility of persons in the chain of command as well as that of the direct perpetrator(s).

10. The Committee recognizes that most States parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be a violation of the Convention to prosecute conduct solely as ill-treatment where the elements of torture are also present.

11. By defining the offence of torture as distinct from common assault or other crimes, the Committee considers that States parties will directly advance the Convention's overarching aim of preventing torture and ill-treatment. Naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture. Codifying this crime will also (a) emphasize the need for appropriate punishment that takes into account the gravity of the offence, (b) strengthen the deterrent effect of the prohibition itself, (c) enhance the ability of responsible officials to track the specific crime of torture and (d) enable and empower the public to monitor and, when required, to challenge State action as well as State inaction that violates the Convention.

12. Through review of successive reports from States parties, the examination of individual communications, and monitoring of developments, the Committee has, in its concluding observations, articulated its understanding of what constitute effective measures, highlights of which we set forth here. In terms of both the principles of general application of article 2 and developments that build upon specific articles of the Convention, the Committee has recommended specific actions designed to enhance each State party's ability swiftly and effectively to implement measures necessary and appropriate to prevent acts of torture and ill-treatment and thereby assist States parties in bringing their law and practice into full compliance with the Convention.

13. Certain basic guarantees apply to all persons deprived of their liberty. Some of these are specified in the Convention, and the Committee consistently calls upon States parties to use them. The Committee's recommendations concerning effective measures aim to clarify the current baseline and are not exhaustive. Such guarantees include, inter alia, maintaining an official register of detainees, the right of detainees to be informed of their rights, the right promptly to receive independent legal assistance, independent medical assistance, and to contact relatives, the need to establish impartial mechanisms for inspecting and visiting places of detention and confinement, and the availability to detainees and persons at risk of torture and ill-treatment of judicial and other remedies that will allow them to have their complaints promptly and impartially examined, to defend their rights, and to challenge the legality of their detention or treatment.

14. Experience since the Convention came into force has enhanced the Committee's understanding of the scope and nature of the prohibition against torture, of the methodologies of torture, of the contexts and consequences in which it occurs, as well as of evolving effective measures to prevent it in different contexts. For example, the Committee has emphasized the importance of having same sex guards when privacy is involved. As new methods of prevention (e.g. videotaping all interrogations, utilizing investigative procedures such as the Istanbul Protocol of 1999[2], or new approaches to public education or the protection of minors) are discovered, tested and found effective, article 2 provides authority to build upon the remaining articles and to expand the scope of measures required to prevent torture.

IV. Scope of State obligations and responsibility

15. The Convention imposes obligations on States parties and not on individuals. States bear international responsibility for the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under colour of law. Accordingly, each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm. The Convention does not, however, limit the international responsibility

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[2] *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.*

that States or individuals can incur for perpetrating torture and ill-treatment under international customary law and other treaties.

16. Article 2, paragraph 1, requires that each State party shall take effective measures to prevent acts of torture not only in its sovereign territory but also "in any territory under its jurisdiction." The Committee has recognized that "any territory" includes all areas where the State party exercises, directly or indirectly, in whole or in part, de jure or de facto effective control, in accordance with international law. The reference to "any territory" in article 2, like that in articles 5, 11, 12, 13 and 16, refers to prohibited acts committed not only on board a ship or aircraft registered by a State party, but also during military occupation or peacekeeping operations and in such places as embassies, military bases, detention facilities, or other areas over which a State exercises factual or effective control. The Committee notes that this interpretation reinforces article 5, paragraph 1 (b), which requires that a State party must take measures to exercise jurisdiction "when the alleged offender is a national of the State." The Committee considers that the scope of "territory" under article 2 must also include situations where a State party exercises, directly or indirectly, de facto or de jure control over persons in detention.

17. The Committee observes that States parties are obligated to adopt effective measures to prevent public authorities and other persons acting in an official capacity from directly committing, instigating, inciting, encouraging, acquiescing in or otherwise participating or being complicit in acts of torture as defined in the Convention. Thus, States parties should adopt effective measures to prevent such authorities or others acting in an official capacity or under colour of law, from consenting to or acquiescing in any acts of torture. The Committee has concluded that States parties are in violation of the Convention when they fail to fulfil these obligations. For example, where detention centres are privately owned or run, the Committee considers that personnel are acting in an official capacity on account of their responsibility for carrying out the State function without derogation of the obligation of State officials to monitor and take all effective measures to prevent torture and ill-treatment.

18. The Committee has made clear that where State authorities or others acting in official capacity or under colour of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with the Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission. The Committee has applied this principle to States parties' failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation, and trafficking.

19. Additionally, if a person is to be transferred or sent to the custody or control of an individual or institution known to have engaged in torture or ill-treatment, or has not implemented adequate safeguards, the State is responsible, and its officials subject to punishment for ordering, permitting

or participating in this transfer contrary to the State's obligation to take effective measures to prevent torture in accordance with article 2, paragraph 1. The Committee has expressed its concern when States parties send persons to such places without due process of law as required by articles 2 and 3.

V. Protection for individuals and groups made vulnerable by discrimination or marginalization

20. The principle of non-discrimination is a basic and general principle in the protection of human rights and fundamental to the interpretation and application of the Convention. Non-discrimination is included within the definition of torture itself in article 1, paragraph 1, of the Convention, which explicitly prohibits specified acts when carried out for "*any reason based on discrimination of any kind*…". The Committee emphasizes that the discriminatory use of mental or physical violence or abuse is an important factor in determining whether an act constitutes torture.

21. The protection of certain minority or marginalized individuals or populations especially at risk of torture is a part of the obligation to prevent torture or ill-treatment. States parties must ensure that, insofar as the obligations arising under the Convention are concerned, their laws are in practice applied to all persons, regardless of race, colour, ethnicity, age, religious belief or affiliation, political or other opinion, national or social origin, gender, sexual orientation, transgender identity, mental or other disability, health status, economic or indigenous status, reason for which the person is detained, including persons accused of political offences or terrorist acts, asylum-seekers, refugees or others under international protection, or any other status or adverse distinction. States parties should, therefore, ensure the protection of members of groups especially at risk of being tortured, by fully prosecuting and punishing all acts of violence and abuse against these individuals and ensuring implementation of other positive measures of prevention and protection, including but not limited to those outlined above.

22. State reports frequently lack specific and sufficient information on the implementation of the Convention with respect to women. The Committee emphasizes that gender is a key factor. Being female intersects with other identifying characteristics or status of the person such as race, nationality, religion, sexual orientation, age, immigrant status etc. to determine the ways that women and girls are subject to or at risk of torture or ill-treatment and the consequences thereof. The contexts in which females are at risk include deprivation of liberty, medical treatment, particularly involving reproductive decisions, and violence by private actors in communities and homes. Men are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles. States parties are requested to identify these situations and the measures taken to punish and prevent them in their reports.

23. Continual evaluation is therefore a crucial component of effective measures. The Committee has consistently recommended that States parties provide data disaggregated by age, gender and other key factors in their reports to enable the Committee to adequately evaluate the implementation of the Convention. Disaggregated data permits the States parties and the Committee to identify,

compare and take steps to remedy discriminatory treatment that may otherwise go unnoticed and unaddressed. States parties are requested to describe, as far as possible, factors affecting the incidence and prevention of torture or ill-treatment, as well as the difficulties experienced in preventing torture or ill-treatment against specific relevant sectors of the population, such as minorities, victims of torture, children and women, taking into account the general and particular forms that such torture and ill-treatment may take.

24. Eliminating employment discrimination and conducting ongoing sensitization training in contexts where torture or ill-treatment is likely to be committed is also key to preventing such violations and building a culture of respect for women and minorities. States are encouraged to promote the hiring of persons belonging to minority groups and women, particularly in the medical, educational, prison/detention, law enforcement, judicial and legal fields, within State institutions as well as the private sector. States parties should include in their reports information on their progress in these matters, disaggregated by gender, race, national origin, and other relevant status.

VI. Other preventive measures required by the Convention

25. Articles 3 to 15 of the Convention constitute specific preventive measures that the States parties deemed essential to prevent torture and ill-treatment, particularly in custody or detention. The Committee emphasizes that the obligation to take effective preventive measures transcends the items enumerated specifically in the Convention or the demands of this general comment. For example, it is important that the general population be educated on the history, scope, and necessity of the non-derogable prohibition of torture and ill-treatment, as well as that law enforcement and other personnel receive education on recognizing and preventing torture and ill-treatment. Similarly, in light of its long experience in reviewing and assessing State reports on officially inflicted or sanctioned torture or ill-treatment, the Committee acknowledges the importance of adapting the concept of monitoring conditions to prevent torture and ill-treatment to situations where violence is inflicted privately. States parties should specifically include in their reports to the Committee detailed information on their implementation of preventive measures, disaggregated by relevant status.

VII. Superior orders

26. The non-derogability of the prohibition of torture is underscored by the long-standing principle embodied in article 2, paragraph 3, that an order of a superior or public authority can never be invoked as a justification of torture Thus, subordinates may not seek refuge in superior authority and should be held to account individually. At the same time, those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures. The Committee considers it essential that the responsibility of any superior officials, whether for direct instigation or encouragement of torture or ill-treatment or for consent or acquiescence therein, be fully investigated through competent, independent and impartial prosecutorial and judicial authorities. Persons who resist what they view as unlawful orders or who cooperate in the investigation of torture or ill-treatment, including by superior officials, should be protected against retaliation of any kind.

27. The Committee reiterates that this general comment has to be considered without prejudice to any higher degree of protection contained in any international instrument or national law, as long as they contain, as a minimum, the standards of the Convention.

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26 April – 14 May 2010

Decision

Communication No. 322/2007

Submitted by:	Eveline Njamba and her daughter Kathy Balikosa (represented by counsel, Mr. Manuel Boti Flid)
Alleged victim:	The complainants
State party:	Sweden
Date of the complaint:	11 June 2007 (initial submission)
Admissibility decision:	CAT/C/41/D/322/2007
Date of present decision:	14 May 2010
Subject matter:	Deportation of the complainants from Sweden to Democratic Republic of the Congo
Procedural issues:	None
Substantive issues:	Deportation of persons to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture.
Article of the Convention:	3 and 16

[Annex]

* 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-fourth session)

concerning

Communication No. 322/2007

Submitted by:	Eveline Njamba and her daughter Kathy Balikosa (represented by counsel, Manuel Boti Flid)
Alleged victim:	The complainants
State party:	Sweden
Date of the complaint:	11 June 2007 (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 14 May 2010,

Having concluded its consideration of complaint No. 322/2007, submitted to the Committee against Torture by Eveline Njamba and her daughter Kathy Balikosa 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.

Decision

1.1 The complainants are Eveline Njamba and her daughter Kathy Balikosa, nationals of the Democratic Republic of the Congo (DRC) and born on 10 April 1975 and 4 March 2001 respectively. They are the subject of an order for deportation from Sweden to the DRC. While they do not invoke any particular provision of the Convention, their complaint appears to raise issues under article 3 and possibly article 16. They are represented by counsel, Mr. Manuel Boti Flid.

1.2 In accordance with article 22, paragraph 3, of the Convention, the Committee brought the complaint to the State party's attention on 14 June 2007. At the same time, the Committee, pursuant to rule 108, paragraph 1, of its rules of procedure, requested the State party not to deport the complainants to the DRC while their complaint is being considered. On the same day, the State party acceded to the request.

The facts as presented by the complainants

2.1 The complainants are from Gemena in the province of Equateur. In 2004, they moved to Goma where Ms. Njamba's husband had started a small business. At that time, her husband's brother was a commander in the Congolese military. In Goma, Ms. Njamba discovered that the small business served as a cover for her husband's real activities which involved providing support for the rebels in the Equateur province and Goma. Her husband had been implicated in acts of treason and espionage on behalf of rebels since 1998, including purchasing of arms for rebels in Equateur. For this reason, many families wanted her husband dead and had threatened him. Ms. Njamba knew about her husband's and her brother-in-law's activities and was thus considered by many to have been their accomplice and involved herself in pro-rebel activities. The police would not protect her. On the contrary, they had helped expose her husband's activities to the families seeking revenge against him.

2.2 In December 2004, while the complainants were in church, fighting broke out. When they returned home after hiding for a few days in other people's homes, Ms. Njamba's husband and three of her children had disappeared. Ms. Njamba suspects that they were killed by Congolese militia. She believes that she and her daughter survived only because they were hiding in a different place. During the fighting, the complainants witnessed executions, rapes and other acts of torture. Ms. Njamba's brother-in-law was killed for suspected treason.

2.3 Following this incident, the complainants fled the DRC and arrived in Sweden on 29 March 2005. They applied for asylum on the same day. On 21 March 2006, their application was rejected by the Migration Board which concluded that the circumstances referred to by the complainants were not sufficient to entitle them to refugee status. The Board considered that there was no personal threat to the complainants' lives. Moreover, it considered that the complainants were from the province of Equateur where they could return. The complainants appealed against this decision submitting that Ms Njamba was HIV positive and that no medical treatment was available in the DRC.

2.4 On 1 September 2006, the complainants' appeal was rejected by the Migration Court. It shared the conclusions of the Migration Board that the circumstances invoked by the complainants were not sufficient to show that they were in need of protection. With regard to Ms Njamba's health condition, the Court stated that it was not considered to be of such a character as to amount to the exceptionally distressing circumstances that are required to apply Chapter 5, Section 6, of the 2005 Aliens Act. On 10 October 2006, the complainants lodged a further appeal before the Migration Court of Appeal, but leave to appeal was denied on 8 January 2007.

2.5 In a request to the Migration Board on 21 March 2007, the complainants called for a new examination of their application under Chapter 12, Section 19, of the 2005 Aliens Act. They added to their request that they would be in danger if they were to be sent back to the DRC because people who were returned from Europe were automatically arrested and interrogated upon arrival. On 30 May 2007, the Migration Board decided not to stay the execution of the expulsion order. On 7 June 2007, it also decided not to re-examine the complainants' application.

The complaint

3.1 The complainants claim that they would be victims of a violation of the Convention if they were deported to the DRC where they fear they will be subjected to torture. Ms Njamba believes that, if returned, she would be tortured and/or killed by the security services, or in revenge by the families who felt betrayed by her, her husband, and her brother-in-law. The complainants also allege that, in practice, the secret police detain and interrogate everyone returned to the country and often tortures, arbitrarily imprisons, and/or kills them. In addition, they allege that the security situation in the DRC is precarious and that the Government is thus unable to guarantee protection of their human rights.

3.2 Ms Njamba has been confirmed as HIV-positive by doctors in Sweden.[1] She claims that, given the lack or rarity of treatment in the DRC, returning her there would result in her death from AIDS. Upon return to the DRC, she would face a "painful death" from the disease and suffering due to the knowledge that her young daughter would grow up an orphan.

3.3 The complainants claim to have exhausted domestic remedies, as all of their appeals have been rejected.

State party's observations on admissibility and merits

4.1 On 11 December 2007, the State party filed observations on the admissibility and the merits of the complaint. It acknowledges that all available domestic remedies have been exhausted. Nevertheless, it maintains that the communication should be considered inadmissible in accordance with article 22, paragraph 2, of the Convention. It recalls that article 3 is only applicable if the complainant is in danger of being subjected to torture as defined in article 1. Accordingly, since any possible deterioration of Ms. Njamba's health after deportation cannot be considered to constitute torture as defined by article 1, the State party contends that the issue of whether the execution of the expulsion order would constitute a violation of the Convention in view of Ms. Njamba having been diagnosed as HIV-positive falls outside the scope of article 3. Moreover, the State party maintains that the complainants' claim that they will be subjected to treatment in breach of article 3 fails to rise to the basic level of substantiation required for purposes of admissibility. It submits that the complaint is manifestly unfounded.[2]

[1] An affidavit addressed to the Committee is attached from a Swedish nurse specializing in HIV treatment, who worked 11 years in the DRC as a missionary. She notes that she personally knows of several persons returned to the DRC, who were detained without process upon arrival by DRC security forces and were forced to bribe their way out of prison. She predicts that Ms Njamba's health would deteriorate rapidly upon arrival although she does not currently require HIV medication; this prediction she ascribes to conditions in the DRC as well as Ms Njamba's precarious conditions were she to be returned without money or contacts and having to resort to her ominous job as a sex worker She notes that, "it is a known fact that the time span between HIV virus infection to fully blown Aids is significantly shorter in Africa than in Sweden," and that she would not receive retroviral medication in the DRC.

[2] See for instance Communication No. 216/2002, *H.I.A. v. Sweden*, Views adopted on 2 May 2003, para.6.2.

4.2 The State party concedes that the complaint may raise issues under article 16 of the Convention.[3] However, it recalls the Committee's prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16.[4] It maintains that no such factors have been revealed by the complainants in their case. Accordingly, the complaint, as far as it relates to article 16, should be declared inadmissible *ratione materiae*. If the Committee were to find that article 16 applies to the issue of the implementation of the complainants' expulsion, the State party maintains that their complaint fails to rise to the basic level of substantiation required for purposes of admissibility. The complaint is considered manifestly unfounded in this respect too.

4.3 On the merits, the State party notes that there have been positive developments towards democracy and stability in the DRC. In particular, the first democratic election in 46 years was held in 2006. The DRC has ratified most major international human rights instruments. 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. The State party thus maintains that the current situation in the DRC does not appear to be such that a general need to protect asylum seekers from that country exists.

4.4 As for the personal risk of the complainants of being subjected to torture in the DRC, the State party 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 estimate the credibility of his or her claims. In the present case, the asylum interview lasted two hours and the Migration Board thus had sufficient information, which, taken together with the facts and documentation in the case file, ensured that it had a solid basis for its assessment of the complainants' need for protection in Sweden. The State party relies on the decisions of the Migration Board and the Migration Court and on the reasoning set out in their respective decisions.

4.5 Considering the complainants' claim that their expulsion would constitute a violation of the Convention because of the hostilities in the DRC, the State party disputes that this claim has been substantiated. While the complainants submit that they witnessed terrible human rights abuses, they have not been assaulted or abused themselves. Accordingly, their statements about risks of torture are general in nature and based only on the general country situation. Nothing in these statements demonstrates that there is any foreseeable, real and personal risk of the complainants being subjected to torture. Furthermore, the State party notes that the complainants will not be returned to the eastern parts of the DRC, but to the province of Equateur in the western parts of the country where the security and human rights situation are far better. It recalls that the complainants were born in that province and were registered as living there when leaving the country. While the complainants had moved to Goma before leaving the country, this was only for a short period of time. The complainants can avoid any alleged risk of torture due to possible hostilities in the eastern part of the DRC by moving back to the Equateur province.

[3] See for instance Communication No. 220/2002, *R.D. v. Sweden*, Views adopted on 2 May 2005; and Communication No. 221/2002, *M.M.K. v. Sweden*, Views adopted on 3 May 2005.

[4] See for instance Communication No. 49/1996, *S.V. v. Canada*, Views adopted on 15 May 2001, para.9.9; Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.5; Communication No. 220/2002, *R.D. v. Sweden*, Views adopted on 2 May 2005, para.7.2; and Communication No. 221/2002, *M.M.K. v. Sweden*, Views adopted on 3 May 2005, para.7.3.

4.6. Considering the complainants' claim that their forced return to the DRC would put them at risk of being arrested, interrogated, imprisoned and possibly being subjected to torture and then killed by the security services, the State party submits that this claim is equally general and that the complainants have not presented any circumstances which would explain why they face a personal risk. While the complainants submit that persons forcibly returned to the DRC are subjected to abuses, the State party does not find support for this contention in the generally available information on the country. Examples of interrogations upon return to the DRC exist, but no further abuses are reported to have been committed by the authorities in these cases. Moreover, the State party notes that the complainants came to mention these specific circumstances for the first time in their new application to the Migration Board, as late as 21 March 2007.

4.7 With regard to a possible claim under article 16, the State party invokes the Committee's prior jurisprudence and noted that no violation of this provision was ever found in cases regarding expulsion. Invoking the case law of the European Court of Human Rights, the State party notes that the Court has only found a violation of article 3 of the European Convention of Human Rights in very exceptional circumstances when the person to be expelled had reached the advanced stages of AIDS and would face a lack of treatment as well as a lack of social and moral support in the receiving country.[5] In the present case, the State party submits that no such exceptional circumstances exist. Indeed, anti-retroviral medicines are available, in principle free of charge. Considering Ms. Njamba's health condition, the State party notes that she has not reached the stage of AIDS, nor does she suffer from any HIV-related illnesses. Her medical certificate shows that she will be in no need of medication within the next few years.

Complainants' comments on the State party's observations

5.1 On 20 February 2008, the complainants submitted that they did not have any comments on the State party's observations.

5.2 On 24 June 2008, the complainants reiterated that the whereabouts of Ms. Njamba's husband are still unknown and that they believe him to be dead. They explain that they did not want to mention his political activities in the asylum procedure because they were traumatised by the events they had witnessed. Moreover, Ms. Njamba did not want to put her husband in danger by revealing details of his political activities to the asylum authorities.

Additional comments by the State party

6.1 On 8 October 2008, the State party points out that the new circumstances concerning the disappearance of the complainants' family members had never been presented to the domestic migration authorities, but were introduced for the first time in their complaint to the Committee, i.e. more than two years after their initial asylum application. The complainants did not invoke these circumstances before the Migration Court in an appeal against the Migration Board's decision. The State party recalls that in cases where the asylum seeker wishes to invoke new circumstances as ground for their asylum application, there is a domestic remedy available to them under Chapter 12, Sections 18 and 19 in the 2005 Aliens Act. It notes that the complainants did not appeal against the Migration Board's decision not to grant them a residence permit. In their appeal, they could have invoked the new circumstances they invoked before the Committee. Since they have not

[5] See European Court of Human Rights, *D. v. United Kingdom*, judgment of 2 May 1997, Reports of Judgments and Decisions, 1997-III, p.794, para.54.

done so, the State party considers that the communication should be declared inadmissible for failure to exhaust domestic remedies.

6.2 In any event, the State party argues that the complainants' assertion that they are at risk of being treated in a manner that would amount to a breach of the Convention on account of their husband/father's activities in Goma fails to rise to the level of substantiation required for purposes of admissibility. It thus submits that the communication is manifestly unfounded.[6] In particular, it considers that there are strong reasons to question the veracity of the new allegations and that presenting before the Committee a whole new account of the events in the DRC, which has not been presented before the domestic authorities, calls for close scrutiny of that account. This new account of events has to be substantiated by more facts and details. In any case, the account of facts presented by the complainants is contradictory and confusing even in its lack of details. Moreover, the State party finds it remarkable that the complainants mentioned none of these new circumstances in their original complaint to the Committee. At the time of submission of their complaint, the complainants did not even try to explain why these new circumstances had not previously been submitted. It was only in June 2008 that they provided some explanations as to why they had not previously presented these circumstances (see para.5.2 above). With regard to these explanations, the State party wishes to point out that at the initial stages of the domestic proceedings before the Migration Board, Ms. Njamba was informed of the consequences of deliberately stating incorrect information and of excluding information in the case. She was also informed that the officials of the Migration Board as well as the interpreter and the legal counsel were under an obligation of secrecy. Furthermore, the reasons put forward by the complainants still do not explain why the new circumstances were not invoked before the domestic authorities, e.g. in an appeal of the Migration Board's decision of 7 July 2007.

6.3 The State recalls that article 3 of the Convention is only applicable if the person is in danger of being subjected to torture as defined in article 1 of the Convention.7 It also recalls that the Committee has emphasised in its jurisprudence that the issue of whether a State party is under an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent of acquiescence of the Government, falls outside the scope of article 3 of the Convention.8 As the recent claim by the complainants seems to be that they risk being killed by private individuals as revenge for the activities allegedly carried out by their husband/father, this issue in any event falls outside the scope of article 3 of the Convention.

6.4 Concerning the alleged disappearance of the complainants' family members, the State party reiterates that before the national migration authorities, Ms. Njamba neither claimed that her husband was working undercover for the rebels nor that he would be killed for that reason. The reasons the complainants submitted in their asylum claim were the general conflict in the DRC and Ms. Njamba's HIV positive status. For the examination of these issues, the alleged disappearance of the rest of the family members was not relevant. Furthermore, the issue of availability of family support upon return was not relevant for the determination of whether Ms. Njamba could return to the DRC despite the fact that she had been diagnosed as HIV positive. It was not relevant because her health was considered to be good and there is adequate HIV treatment in the DRC. Even so, the Migration Court of Appeal examined the issue of the alleged disappearance of the family members. In its judgment, it held that Ms. Njamba's husband and other children were still somewhere in the

[6] See for instance Communication No. 216/2002, *H.I.A. v. Sweden*, Views adopted on 2 May 2003, para.6.2.
[7] See for instance Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.5.
[8] *Ibid.*

DRC. The State party adds that when applying for asylum, Ms. Njamba stated a name and address of a maternal uncle in the Equateur province. In the domestic proceedings, she also mentioned that her husband's brother was alive and has been known to help them in the past. It is thus surprising that she now claims before the Committee that he has been killed due to suspicions of treason. The State party notes that the International Committee of the Red Cross offers assistance to trace family members dispersed by the conflict in the DRC, but that the complainants do not seem to have used this service, although it is available from Sweden. The State party therefore maintains that it still cannot be excluded that Ms. Njamba's husband and other children are still alive in the DRC today.

6.5 Concerning Ms. Njamba's HIV diagnosis, the State party recalls that anti-retroviral (ARV) medicines are available, in principle free of charge, in all eleven of the provincial capitals of the DRC, which have all joined the national HIV programme. Ms. Njamba would therefore have access to ARV therapy upon return to the Equateur province from where she and her daughter originate. The State party provides details about the availability of health care in general in the DRC. It notes that, according to UNAIDS, ARV therapy coverage over the world, including in Africa, has undergone remarkable improvements in the last few years. With regard to HIV treatment in the DRC specifically, the State party provides details about the availability of such treatment in the various regions of the DRC. In particular, it notes that Médecins sans Frontières (MSF) runs HIV/AIDS projects in, inter alia, Kinshasa, Goma in North-Kivu and Bukavu in South-Kivu. In addition, the German aid organisation GTZ has treatment centres in Kinshasa, Lubumbashi, Bukavu, Kisangani and Mbuji Mayi. Moreover, inter alia, the World Bank contributes towards covering the Government's costs for distributing free ARV drugs in the DRC.

6.6 Bearing in mind the lack of jurisprudence from the Committee on the issue of whether the expulsion of an alien diagnosed as HIV-positive or suffering from AIDS would constitute a violation of the Convention, the State party invokes a recent Grand Chamber judgment from the European Court of Human Rights.9 In that case, the applicant was a Ugandan national who suffered from AIDS. She claimed that returning her to Uganda would cause her suffering and lead to her early death. Although the Court accepted that her quality of life and life expectancy would be affected if she were returned to Uganda, it found that her removal to Uganda would not give rise to a violation of article 3 of the European Convention on Human Rights. In the present case, the State party points out that Ms Njamba has still not presented any evidence in support of her statement that her health is deteriorating. In view of the available evidence before the Committee, there is nothing to suggest otherwise than that her health condition is good since the HIV infection has not yet affected her immune system and that she is still in no need of medication.

Decision on admissibility

7.1 On 14 November 2008 during the 41st session, the Committee considered the admissibility of the communication. It ascertained, as it is required to do under article 22, paragraph 5 (a), of the Convention, that the same matter had not been and was not being examined under another procedure of international investigation or settlement.

7.2 With regard to the requirement, under article 22, paragraph 5 (b), of the Convention, that all available domestic remedies be exhausted, the Committee noted that the complainants had applied for asylum on 29 March 2005. Their application had been examined by the Migration Board on 21 March 2006 and their appeal against this decision was rejected by the Migration Court of Stockholm on 1 September 2006. The complainants had lodged a further appeal before the Migration Court of Appeal, but leave to appeal was

[9] See *N. v. the United Kingdom*, application no.26565/05, judgment of 27 May 2008.

denied on 8 January 2007. They had requested a re-examination of their asylum application, which was denied by the Migration Board on 7 June 2007. In these circumstances, the Committee considered that the complainants had exhausted domestic remedies.

7.3 Concerning the claim relating to Ms Njamba's expulsion in light of her condition as HIV-positive, the Committee recalled its prior jurisprudence that the aggravation of the condition of an individual's physical or mental health by virtue of a deportation is generally insufficient, in the absence of additional factors, to amount to degrading treatment in violation of article 16.10 The Committee noted the medical evidence presented by Ms. Njamba, stating that she was HIV-positive and that AIDS treatment was not readily available in the DRC. It also noted that the same medical evidence mentioned that Ms. Njamba did not require HIV treatment. In any case, the Committee took note of the detailed information provided by the State party on the availability of HIV treatment in the DRC (see para.6.5 above). In the circumstances, the Committee considered that the aggravation of Ms. Njamba's health which might occur following her return to the DRC is in itself insufficient to substantiate this claim, which is accordingly considered inadmissible.

7.4 With respect to the complainants' claim under article 3, paragraph 1, of the Convention, the Committee found that no further obstacles to the admissibility of the complaint existed and that this case should be considered on the merits. While noting that the State party and the complainants had already provided submissions on the merits of this case, prior to making a decision on the merits, the Committee wished to receive further information on how the current developments in the Democratic Republic of the Congo bear upon the decision to deport the complainants from the State party.

State party's submission on the merits

8.1 On 19 May 2009, the State party provided further comments on the merits in response to the questions posed by the Committee in its admissibility decision. With respect to the general situation in the DRC, the State party submits that it continues to be affected by violence and insecurity, especially in the east. In January 2008, a peace conference took place in Goma and a peace accord was signed, however violent clashes continued and in August 2008 there was renewed fighting between the government and rebel groups. General Nkunda called a ceasefire at the end of October 2008, but reports of fighting continued. However, the fighting was mainly concentrated in the North Kivu and South Kivu provinces, and the Ituru district in the Orientale province; all in the east of DRC11. In January 2009, the DRC and Rwanda launched a joint military operation against the Rwanda Hutu rebels of the Forces Démocratiques pour la Libération du Rwanda (FDLR) in North Kivu. Moreover, General Nkunda – leader for the Congrés National pour la Défense du Peuple (CNDP) – was arrested. Furthermore, in March 2009, a peace agreement between the DRC government and the CNDP was reached.

8.2 The State party reiterates that numerous human rights abuses are still being committed by different armed groups in the country, including government soldiers. Torture, abductions and sexual abuse by militia groups and government forces continue to be reported. However, the security and human rights situation is still most precarious in the areas of the DRC which are not controlled by the government.

8.3 The State party submits that under the Aliens Act, an alien who is considered to be a refugee or otherwise in need of protection is, with certain exceptions, entitled to a residence

[10] See Communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para.6.7; Communication No. 183/2001, *B.S.S. v Canada*, Views adopted on 12 May 2004, para.10.2; and Communication No. 245/2004, *S.S.S. v Canada*, Views adopted on 16 November 2005, para.7.3.

[11] US Department of State, « 2008 Human Rights Report : Democratic Republic of the Congo ».

permit in Sweden. The term "an alien otherwise in need of protection" has been exemplified previously, but it might be added that it also includes a person who needs protection because of external or internal armed conflict or, because of other severe conflicts in the country of origin, feels a well-founded fear of being subjected to serious abuse.

8.4 In November 2008, the Swedish Migration Board adopted a guidance note regarding the situation in the DRC and how it affected the examination of asylum claims of DRC nationals. The note confirmed that there is internal conflict in the eastern part of the DRC, held that internal relocation is possible to the stable parts of the DRC but that such a possibility should be considered on an individual basis. Especially regarding single woman, the note prescribed that the existence of a social network and a connection to other parts of the DRC had to be taken into account when assessing whether internal relocation was a possibility. In fact, in November 2008, the Migration Board also granted a permanent residence permit to a single woman from the North Kivu province for whom it found internal relocation was not an option, as she had no connection to and no social network in another part of the DRC.

8.5 As to the present case, the State party reiterates that the complainants originate from and have a strong connection to the Equateur province where, apart from a few months prior to their flight from the DRC, they have always lived. Thus, for the complainants the question of internal relocation does not arise, as they do not come from an area in conflict and would be returning to their home province. The State party reiterates that it still cannot be excluded that Ms. Njamba's husband and three other children are still alive and could be found in the DRC. Even if they have no close relatives left in their village, given that they have lived there all their lives it is reasonable to expect that there are people there who would be willing to assist them. In any event, the complainants may request a re-examination of their application by the Migration Board if they claim that the current situation has significantly changed since the filing of their initial application and there are impediments to the enforcement of the expulsion decisions.

8.6 The State party reiterates that since the initial submission to the Committee the reasons upon which the complainants submit they need asylum have changed. In addition, their account of events completely changed upon submission of their case to the Committee. It submits that according to article 3, it is for the complainants to present an arguable case. In any event, in the State party's view, the claim that they are likely to be subjected to torture on account of their husband's/father's activities in Goma are neither credible nor consistent and lack veracity. It also refers to the fact that the complainants have not responded to these arguments made by the State party in its last submission. The State party highlights that the complainants will not be returned to Goma where they claim they will risk being killed in revenge for the activities allegedly carried out by their husband/father.

State party's supplementary submission on the merits

9.1 On 19 March 2010, the State party provided information in response to questions posed by the Secretariat on behalf of the Committee, in particular with respect to how five United Nations reports[12] would bear upon the decision to deport the complainants from

[12] Combined report of seven thematic special procedures on technical assistance to the Government of the Democratic Republic of the Congo and urgent examination of the situation in the east of the country, A/HRC/10/59, 5 March 2009; Report of the independent expert on the situation of human rights in the Democratic Republic of the Congo, Mr. Titinga Frédéric Pacéré, A/HRC/7/25, 29 February 2008; Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk, A/HRC/7/6/Add.4, 28 February 2008; and Report of the

Sweden. Given that the Government has no power to influence decisions on expulsion cases, as this lies exclusively with the migration authorities, the Migration Board was asked to respond to the Committee's request. The Board maintains its view that there is currently no foreseeable risk that the complainants would be subjected to violence upon return to the DRC. It submits that the complainants have not sufficiently substantiated that they risk torture in Gemena, Equateur, which is not in a conflict area. They would have access to a social network, as it is the town where Ms. Njamba grew up. It is a large town safe enough to live there without ending up in a camp for Internally Displaced Persons. Several humanitarian organisations are stationed there because of the stable security situation. Living in a large town also reduces the risk of abuse compared with rural areas. The Migration Board reiterates that it adopted a guidance note (para. 8.4) in November 2008, regarding the situation in the DRC and how it affected the examination of asylum claims there. It suggests that if the complainant's had been from such a conflict zone, they may have been entitled to a residence permit upon re-examination of their application if internal relocation would not have been possible. Indeed, it submits that if the complainants believe that they meet the criteria in this guidance note or that the situation in the DRC, especially in their home province, has changed significantly so that there are impediments to the enforcement of their decisions on expulsion, it remains open to them to request a re-examination of their application by the Board under chapter 12, section 19 of the Aliens Act.

9.2 As to whether, given the information in the reports in question, enforced deportation would constitute a violation of article 3, the State party reiterates earlier arguments and supports the views expressed by the Migration Board. It emphasizes that the complainants would not be returned to Goma, where they claim that they will risk being killed in revenge for the activities allegedly carried out by their husband/father, but to the Equateur province. The reports in question largely relate to the eastern parts of the DRC and are thus irrelevant. They confirm that there has been no armed conflict in Equateur for many years. Although the State party acknowledges that there is information in these reports that sexual violence occurs in Equateur too, especially in the form of abuse by the police and the military as a form of revenge against rebellious villages, it is clear that women in rural areas and small villages are more exposed to violence that women in towns. Women who are IDPs are also more exposed to violence than women with a permanent abode. In this context, the State party refers to a decision of the European Court of Human Rights, in *S.M. v. Sweden*[13], which indicates that even though the reports of violence against women are alarming, an individual assessment must be made of each case and the complainants' personal situation must determine his or her risk of being subjected to violence or torture on return. In the State party's view, the information in the reports is not sufficient to establish that the complainants upon return to the DRC would face a forseeable, real and personal risk of abuse – sexual or otherwise. In addition, the State party reiterates that there are strong reasons to question the veracity of the new allegations presented by the complainants,

United Nations High Commissioner on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo, A/HRC/10/58, 2 April 2009; Twenty-ninth report of the Secretary-General on the United Nations Organization Mission in the Democratic Republic of the Congo, S/2009/472, 18 September 2009; Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009.

[13] Application no. 47683/08, 10 February 2009. "As concerns the general situation in the DRC, the Court is aware of the occurrence of reports of continuous, serious human rights violations, in particular, against women, in that country. However, it has to establish whether the applicant's personal situation was such that her return contravened Article 3 of the Convention."

which were presented for the first time in their submissions of 11-12 June 2007, as well as the complainants' failure to response to the State party's observations of 8 October 2008 and 19 May 2009.

9.3 Finally, the State party makes a procedural request. It submits that according to chapter 12, section 22, of the 2005 Aliens Act, an expulsion order which has not been issued by a general court expires four years after the order becomes final and non-appealable. This is applicable with respect to expulsion orders not issued on account of a criminal offence, as in the present case. The decision on expulsion regarding the complainants became final and non-appealable on 20 December 2006, when the Aliens Appeals Board rejected their appeal against the Migration Boards decision. The expulsion decision will thus become statue-barred on 20 December 2010. In light of this, and given that this case has already been before the Committee, the State party specifically requests the Committee to decide upon this complaint at its upcoming 44th session in April-May 2010. It also points out that despite being represented by counsel, the complainants have only responded briefly to the State party's observations, in contrast to its own lengthy submissions.

Consideration of the merits

9.1 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.

9.2 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 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.

9.3 In assessing whether there are substantial grounds for believing that the complainants 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 complainants run a personal risk of being subjected to torture in the country to which they 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.

9.4 The Committee recalls its General Comment No.1 on article 3, 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. In this regard, in previous decisions, the Committee has determined that the risk of torture must be foreseeable, real and personal. 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.

9.5 The Committee finds that while some factual issues of this case are disputed, including the claims relating to the complainants' husband's political activities, the Committee observes that the most relevant issues raised in this communication relate to the legal effect that should be given to undisputed facts, such as the risk of danger to the complainants' security upon return. The Committee notes that the State party itself acknowledges that sexual violence occurs in Equateur Province, to a larger extent in rural villages (para. 9.2). It notes that since the State party's last response of 19 March 2010, relating to the general human rights situation in the Democratic Republic of the Congo, a second joint report from seven United Nations experts on the situation in the Democratic Republic of the Congo was published, which refers to alarming levels of violence against women across the country and concludes that, "Violence against women, in particular rape and gang rape committed by men with guns and civilians, remains a serious concern, including in areas not affected by armed conflict."[14] In addition, a second report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her Office in the Democratic Republic of the Congo as well as other UN reports, also refers to the alarming number of cases of sexual violence throughout the country, confirming that these cases are not limited to areas of armed conflict but are happening throughout the country".[15] In reviewing this information, the Committee is reminded of its General Comment no. 2 on article 2, in which it recalled that the failure, "to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity…". Thus, in light of all of the abovementioned information, the Committee considers that the conflict situation in the Democratic Republic of the Congo, as attested to in all recent United Nation reports, makes it impossible for the Committee to identify particular areas of the country which could be considered safe for the complainants in their current and evolving situation.

9.6 Accordingly, the Committee finds that, on a balance of all of the factors in this particular case and assessing the legal consequences aligned to these factors, substantial grounds exist for believing that the complainants are in danger of being subjected to torture if returned to the Democratic Republic of the Congo.

10. 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 deportation of the complainants to the Democratic Republic of the Congo would amount to a breach of article 3 of the Convention.

11. The Committee urges the State party, in accordance with rule 112, paragraph 5, of its rules of procedure, to inform it, within 90 days from the date of the transmittal of this decision, of the steps taken in response to the decision expressed above.

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

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[14] A/HRC/13/63, 8 March 2010.

[15] A/HRC/13/64, 28 January 2010.