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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 Convention, concerning communication No. 872/2018*, **

Communication submitted by:	Yacob Berhane (represented by counsel, Tarig Hassan)
Alleged victim:	The complainant
State party:	Switzerland
Date of complaint:	16 May 2018 (initial submission)
Date of present decision:	28 April 2022
Subject matter:	Deportation to Eritrea
Procedural issue:	None
Substantive issue:	Risk of torture or other cruel, inhuman or degrading treatment or punishment
Article of the Convention:	3

1.1 The complainant is an Eritrean citizen born in 1977. He applied for asylum in Switzerland, but his application was rejected on 13 November 2017. He is facing deportation to Eritrea and considers that his return would constitute a violation by Switzerland of article 3 of the Convention. He is represented by counsel, Tarig Hassan.

1.2 On 17 May 2018, the Committee, acting through its Rapporteur on new complaints and interim measures, requested the State party to refrain from deporting the complainant to Eritrea while his complaint was being considered by the Committee.

Facts as submitted by the complainant

2.1 The complainant is an Eritrean citizen of Tigrinya ethnicity from Asmara. After graduating from school in 1994, he was called up for military service. He underwent military training in Sawa, Eritrea, for six months, after which he was transferred to civilian service for one year to do construction work. In 1996, the complainant returned to Asmara, where he played football. In 1997, he was again called up for military service. He served as a soldier during the war between Eritrea and Ethiopia until 2000. Subsequently, he was assigned to the police football club Al Tahrir. He played football professionally as a civilian until his departure from Eritrea in 2013.

2.2 On 21 January 2013, Operation Forto, a protest action of about 200 soldiers against the Eritrean regime, took place. The soldiers surrounded the building where the Eritrean

* Adopted by the Committee at its seventy-third session (19 April–13 May 2022).

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

television station ERiTV is based and asked for the release of political prisoners. The complainant, who supported the operation, discussed this event with his football colleagues. Some of them were against the movement.

2.3 On 11 February 2013, when the complainant was on his way home after training, two armed individuals stopped him in the Campo-Bolo quarter of Asmara and forced him into a car. He was blindfolded and taken to a small house where he was held, interrogated and beaten for two days. The individuals accused him of being a "troublemaker" who would call people to rebellion. They wanted to know with whom he collaborated and who had hired him. After two days, the complainant was taken back to the place where he had been picked up. The individuals ordered him not to tell anyone about the incident. After this incident, the complainant decided to leave Eritrea.

2.4 In April 2013, the complainant was taken from Asmara to Tesseney in western Eritrea by two smugglers in a passenger car. There he was driven across the border to the Sudan. A month and a half later, he flew from Khartoum to Europe via Cairo with a forged Sudanese passport. On 14 July 2014, he applied for asylum in Switzerland. On 11 June 2016, the State Secretariat for Migration rejected his application. On 13 November 2017, the Federal Administrative Court upheld the decision. The Court found that the complainant had made several inconsistent statements in his asylum interviews, namely whether it was light or dark in the room where he was held during his detention. The complainant submits that his second asylum interview, conducted on 22 December 2014, was too brief and that he was therefore denied the opportunity to make a substantiated statement on the events that caused him to leave from Eritrea. He argues that during the interviews he credibly described his arrest and detention.

2.5 The Federal Administrative Court further found that it was likely that the complainant had been released from military duty. It concluded that he had not therefore evaded military service and had not deserted. Regarding national service in Eritrea and the situation for returnees, the Court concluded that upon return to Eritrea, asylum-seekers who have been released from military service are not generally reintegrated into national service. In that regard, the complainant argues that at the time when he left Eritrea he had been in military service for several years and had not yet been discharged; he was still serving as a football player in the police team. He was therefore still serving in the national service, albeit as a civilian and was still being paid by the army. He argues that the assertion by the Swiss asylum authorities that he had been discharged from national service is pure speculation and is not corroborated by any evidence. He further argues that there is insufficient evidence to conclude that persons released from military service in Eritrea and who have applied for asylum abroad would not be at risk of being punished upon return, subjected to torture or reintegrated into military service. The complainant notes that the Court itself points out the fact that there is very little information regarding the situation in Eritrea. He notes that, in their decisions, the domestic authorities also relied on a new Eritrean directive that allegedly stipulated that voluntary returnees are not punished; however this directive has not been published and is therefore inaccessible.

2.6 The complainant submits that the State Secretariat for Migration based its decision on interviews conducted with only 27 Eritreans who returned to Eritrea after they had illegally left. In addition to the fact that there is no consistent information emerging from these conversations, the interviews were organized by the Eritrean foreign ministry and were held in the presence of an employee of the foreign ministry who translated the conversations. Furthermore, the State Secretariat report is based on observations by representatives of the Eritrean Government and European embassy staff. The State Secretariat itself acknowledges that the assessment of the international observers relies almost exclusively on anecdotal knowledge obtained from conversations with Eritreans. Consequently, the sources referred to by the State Secretariat and the Federal Administrative Court do not satisfy the necessary requirements of independence, reliability and objectivity. The Court found that demobilization from military service usually takes place after 5–10 years of service. However, this assertion is incorrect, as the upper age limit for national service is approximately 50

years.[1] The complainant submits that in practice military service is indefinite.[2] He refers to an expert report of the German Institute for Global and Area Studies, which concludes that conscripts will never or only very rarely be released from military duty after 10 years.

2.7 The complainant notes that the assertion by the Swiss asylum authorities that he has already been discharged from national service is pure speculation, which is not corroborated by any evidence. He submits that the burden of proof shifts to the State party if the applicant presents an arguable case with verifiable information.[3] Therefore, it is for the State party asylum authorities to prove that he was released from national service when he fled the country.

Complaint

3.1 The complainant claims that he would be at risk of persecution if he returned to Eritrea as he left illegally. He further claims that the conclusions reached by the Federal Administrative Court and the State Secretariat for Migration are contrary to several country information reports. He refers to a report issued by Amnesty International according to which: "Eritrean asylum seekers must in principle expect immediate arrest and internment by police and military in the event of deportation to Eritrea."[4] He notes that persons who do not contact the Eritrean authorities after their flight and who do not pay the diaspora tax would most probably not be regarded as diaspora Eritreans but as deserters. In the event of a return they would face punitive measures such as transfer to a military penal camp for an indefinite period and subsequent reintegration to the national service.

3.2 The complainant refers to a judgment of the Upper Tribunal Immigration and Asylum Chamber of the United Kingdom of Great Britain and Northern Ireland, according to which, in Eritrea "a person whose asylum claim has not been found credible, but who is able to satisfy a decision-maker (i) that he or she left illegally, and (ii) that he or she is of or approaching draft age, is likely to be perceived on return as a draft evader or deserter from national service and as a result face a real risk of persecution or serious harm."[5]

3.3 The complainant also refers to the report of the commission of inquiry on human rights in Eritrea, concluding that: "Individuals forcefully repatriated are inevitably considered as having left the country unlawfully, and are consequently regarded as serious offenders, but also as 'traitors'. A common pattern of treatment of returnees is their arrest upon arrival in Eritrea. They are questioned about the circumstances of their escape, whether they received help to leave the country, how the flight was funded, whether they [had] contact with opposition groups based abroad, etc. Returnees are systematically ill-treated to the point of torture during the interrogation phase."[6]

3.4 The complainant further notes that according to country information provided by the Norwegian authorities, an application for asylum abroad is regarded as criticism of the regime and that Eritrean security officials were particularly interested in how asylum-seekers fled the country, who assisted them, and what they said against the Government of Eritrea during their asylum application process. Returnees have reported that under torture, or threat of torture, they were forced to state that they had committed treason by falsely claiming persecution in asylum applications.[7]

3.5 The complainant claims that his deportation from Switzerland to Eritrea would expose him to a real risk of treatment, contrary to article 3 of the Convention. He notes that there is a consistent pattern of gross and flagrant violations of human rights in Eritrea. He refers to

[1] The complainant refers to A/HRC/29/CRP.1, para. 1178.

[2] Ibid., para. 1251. See also Landinfo - Norwegian Country of Origin Information Centre, "Report Eritrea: national service" (May 2016), p. 10.

[3] Manfred Nowak and Elizabeth McArthur, *The United Nations Convention against Torture - a Commentary* (Oxford, Oxford University Press, 2008), ch. on art. 3.

[4] Amnesty International, "Stellungnahme zum Umgang mit Rückkehrern und Kriegsdienstverweigerern in Eritrea" (in German only).

[5] *MST and Others* (*national service - risk categories) Eritrea CG, [2016] (UKUT 00443 (IAC)*, United Kingdom Upper Tribunal (Immigration and Asylum Chamber).

[6] A/HRC/29/CRP.1, para. 431.

[7] LandInfo, "Eritrea: reaksjoner mot hjemvendte asylsøkere" (Apri l 2016) (in Norwegian only).

the report of the commission of inquiry on human rights in Eritrea, in which it is noted that: "Torture is widespread throughout Eritrea. It is inflicted on detainees – in police stations, civil and military prisons, and in secret and unofficial detention facilities – but also on national service conscripts during their military training and throughout their life in the army. … Information also points to the fact that the same torture and punishment methods are applied in military training camps and in detention facilities. … the recurrence and prevalence of certain torture methods constitute strong indications that torture is systemic and inflicted in a routine manner".[8]

3.6 The complainant claims that he was already known to the Eritrean authorities as a supporter of Operation Forto before he left Eritrea. He was detained, interrogated and tortured for two days because of that support. When he left the country, he had not been discharged or exempted from military service. For that reason, he will face a real risk of torture and other ill-treatment upon return to Eritrea. The Eritrean authorities would question him directly upon his return and return him to his unit, as he has no passport and no exit visa and is of military age. His unit would then punish him for his desertion and the punishment would be exclusively subject to the commander's discretion. Regarding the punishment of deserters, the complainant refers to the judgment of the European Court of Human Rights in *Said v. The Netherlands* in which the Court found that "the treatment meted out to deserters in Eritrea … which ranges from incommunicado detention to prolonged sun exposure at high temperatures and the tying of hands and feet in painful positions" constitutes inhuman treatment.[9]

State party's observations on the merits

4.1 On 8 November 2018, the State party submitted its observations on the merits of the complaint. The State party recalls the elements that must be taken into account to ascertain the existence of a personal, present and serious danger of being subjected to torture upon return to the country of origin: (a) evidence of a consistent pattern of gross, flagrant or mass human rights violations in the country of origin; (b) any claims of torture or ill-treatment in the recent past and independent evidence to support those claims; (c) the political activity of the complainant within or outside the country of origin; (d) any evidence as to the credibility of the author and any factual inconsistencies in the complainant's claims.[10]

4.2 The State party recalls that the existence of a consistent pattern of gross, flagrant or mass violations of human rights does not, in itself, constitute sufficient grounds for determining that a particular person would be subjected to torture upon return to his or her country of origin. The Committee must establish whether the complainant is "personally" at risk of being subjected to torture in the country to which he would be returned.[11] Additional grounds must be adduced in order for the risk of torture to qualify as foreseeable, real and personal for the purposes of article 3 (1) of the Convention.[12]

4.3 The State party then describes the practice of the Swiss authorities of processing asylum applications from Eritrean nationals under article 3 of the Convention. The State Secretariat for Migration regularly evaluates reports on Eritrea and exchanges information with experts and authorities from partner countries. On that basis, it gives an updated appraisal of the situation, which serves as the basis for Swiss asylum practice. In May 2015, the State Secretariat prepared a report entitled "Eritrea: country study", which brings together all this information. That report was reviewed by four partner asylum and migration authorities, an external expert and the European Asylum Support Office.[13] In February and

[8] A/HRC/29/CRP.1, para. 1006.

[9] European Court of Human Rights *Said v. Netherlands*, Judgment, 5 July 2005, Application No. 2345/02, para. 54.

[10] Committee against Torture, general comment No. 1 (1997), para. 8.

[11] *K.N. v. Switzerland* (CAT/C/20/D/94/1997), para. 10.2, and *M.D.T. v. Switzerland*, (CAT/C/48/D/382/2009), para. 7.2.

[12] *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. See also the Committee's general comment No. 4 (2017), paras. 11 and 38.

[13] See *EASO Country of Origin Information Report: Eritrea Country Focus* (May 2015), available from www.easo.europa.eu/sites/default/files/public/Eritrea-Report-Final.pdf.

March 2016, the State Secretariat conducted a mission to review, further develop and complement this information by including other sources that had become available in the meantime. On the basis of all that information, the State Secretariat published an update on 22 June 2016. The report concluded that persons who wished to return voluntarily to Eritrea must pay a diaspora tax (2 per cent) to an Eritrean diplomatic mission and those who had not completed their national service must sign a confession of guilt. The report also concluded that when deserters or people who have left Eritrea illegally return voluntarily, the severe penalties provided for by law are apparently not applied if they have first regularized their situation with the Eritrean State. A recent unpublished directive provides that these people can return without being sanctioned.

4.4 The State party submits that the State Secretariat for Migration assesses each asylum application in the light of all the information available. When the asylum-seeker demonstrates a situation of persecution within the meaning of article 3 of the law on asylum on the basis of events that occurred before his or her departure from Eritrea, he or she is recognized as a refugee and granted asylum. In June 2016, the State Secretariat clarified its practice to the effect that illegal departure abroad no longer entails a risk of persecution. Asylum-seekers who fail to demonstrate a well-founded fear of persecution upon return to Eritrea are not recognized as refugees.

4.5 Although various reports refer to the very concerning human rights situation in Eritrea, the European Court of Human Rights in its decision on *M.O. v. Switzerland*, decided that none of the reports concluded, however, that the current situation in Eritrea was such that any Eritrean national, if returned to the country, would be at risk of persecution; and the reports did not contain any information that could lead to such a conclusion.[14] The same applies for illegal departure from the country and for the existence of the obligation to perform national service.[15]

4.6 The State party considers that any past experience of torture is one of the factors to consider in assessing the risk of torture should the complainant be returned to his country. However, in the present case, the complainant's account of the ill-treatment he allegedly suffered while in detention in 2013, remained vague and superficial both before the Committee and during the hearings by the State Secretariat for Migration. The complainant has neither mentioned nor provided evidence supporting his allegations.

4.7 According to his own statements, the complainant supported Operation Forto and spoke about it with colleagues from his team. The State party argues that the complainant did not, however, take part in the 21 January 2013 protest and only spoke about his support clandestinely with selected colleagues from his football team. The complainant thus does not claim to have publicly carried out political activities inside or outside Eritrea.

4.8 The State party submits that the migration authorities raised several inconsistencies in the complainant's account. The complainant made it plausible when he appeared before the migration authorities, that he had received military training and served in the army from 1994 and again from 1997. However, the migration authorities concluded that the complainant was demobilized in 2000 and therefore the allegation of desertion was not credible. They came to the same conclusion with regard to the complainant's arrest in January 2013 and ruled out the idea that the complainant was at risk of ill-treatment owing to the allegedly illegal departure from his country of origin. The assessment by the Federal Administrative Court that the complainant had been demobilized and therefore could not be considered a deserter was based on the fact that he had not mentioned the desertion during the proceedings when he appeared before the State Secretariat for Migration. That omission mitigates against his having deserted, invoked a posteriori.[16]

[14] European Court of Human Rights, *M.O. v. Switzerland*, Judgment of 20 June 2017, Application No. 41282/16, para. 70.

[15] Federal Administrative Court, judgment of 17 August 2017, paras. 10.2, 12 and 13, available from https://caselaw.euaa.europa.eu/Lists/CaseLawDocLib/2b45ca15-bf94-479a-a248-fb9853caabb0/D-2311_2016.pdf (in German only).

[16] The State party refers to a judgment of the Federal Administrative Court dated 12 April 2018.

4.9 The State party submits that the Federal Administrative Court had also analysed the possibilities of demobilization in 2017 [17] by considering various international reports, including from the State Secretariat for Migration and the United Kingdom Home Office. The Court noted that people were regularly demobilized in Eritrea and that, in principle, demobilization after 5–10 years' military service could be assumed. Concerning the assertion of the complainant based on an expert report of the German Institute for Global and Area Studies, the State party argues that this report cannot on its own modify the assessment made by the migration authorities on the demobilization of the complainant. The State party notes that the complainant served in the army from 1994 and left his country of origin in April 2013, at the age of 35. If he had deserted when he left Eritrea, he would have served 19 years. In view of its findings in its reference judgment and the fact that the complainant had not claimed to have deserted when he appeared before the State Secretariat, the Court concluded that he had left his country of origin after fulfilling his obligation to perform military service. It was therefore unlikely that he would be imprisoned or made to re-enlist in national service if he returned to Eritrea. Both the story itself and the circumstances of the case make the risk of persecution against the complainant unlikely.

4.10 The Federal Administrative Court concluded that the reasons invoked by the complainant for leaving the country (in particular the detention he allegedly suffered) could not be considered as credible. [18] In particular, the Court found that the complainant's descriptions were stereotyped and inconsistent. In addition, the complainant's allegation that the hearing of 22 December 2014 had significant flaws is not substantiated. Concerning the short duration (two hours) of the hearing, the State party notes that the complainant did not make this claim when he appeared before the Court. In particular, it does not appear from the hearing that the complainant was interrupted in his story when he appeared before the State Secretariat for Migration. If the complainant was unwilling to take the opportunity offered to him to provide a more detailed account and was therefore only heard for two hours, it was certainly not due to the shortcomings of the hearing.

4.11 The State party submits that in a judgment dated 30 January 2017, based on numerous reports from governmental and non-governmental bodies, the Federal Administrative Court, concluded that in Eritrea illegal departure would not, in itself, lead to a risk of torture. Other aggravating elements, such as being considered a person of opposing views or a deserter, must be met. The Court concluded that the Eritrean authorities would no longer automatically consider people who left the country illegally as traitors. According to the Court, it appears from the reports consulted that in the event of voluntary return, it is possible to avoid the risk of sanction by paying a diaspora tax at an Eritrean diplomatic representation and signing a confession of guilt. In the present case, the complainant could not make a plausible case for the presence of aggravating elements. On the contrary, it is highly probable that he was officially demobilized so that he cannot be considered a deserter. He does not have elements that could make him a person of interest for the Eritrean authorities. The State party submits that the complainant's statements regarding the preparation of his flight, the route followed and the progress of his journey were insubstantial and contained significant contradictions (flight without his partner; absence of information of the amounts paid for the organization of the flight; seeking the assistance of senior army officials without knowing their ranks; divergent versions of the course of the transfer to the Sudan).[19] The State party concedes that there is little reliable information available about the attitude of the Eritrean authorities towards forcible returns, given that in recent years forcible returns to Eritrea have only taken place from the Sudan (and possibly from Egypt). Unlike people who return voluntarily, these people cannot regularize their situation vis-à-vis the Eritrean State. The few reports that exist show that the authorities act towards these people in the same way as towards those who are arrested inside the country or when they leave the country illegally.

4.12 The State party argues that the burden of proof cannot be put upon the migration authorities when it comes to demonstrating that the complainant left Eritrea lawfully, particularly where his account has not been considered credible.[20] Challenging the use by the

[17] Federal Administrative Court, judgment D-2311/2016.

[18] The State party refers to a judgment of the Federal Administrative Court dated 12 April 2018.

[19] The State party refers to a decision of the State Secretariat for Migration dated 14 March 2016.

[20] European Court of Human Rights, *M.O. v. Switzerland*, para. 79.

complainant of a decision by the United Kingdom High Court as evidence, the State party recalls that in the judgment on the case of *MST and Others* at the Upper Tribunal of the United Kingdom, a person whose claim for asylum has not been found to be credible cannot be considered to have left Eritrea illegally. The tribunal also held that regular acts of demobilization were probable. Being a failed asylum-seeker was not in itself sufficient to face a real risk of treatment contrary to article 3 of the Convention if returned to Eritrea.[21] The Upper Tribunal further noted that 9 out of 10 people were not engaged in national service and that a seven-year period of service would be accepted by the Eritrean authorities. In the present case, the complainant was 35 years old when he left his country. According to the statements he made before the migration authorities, he was demobilized in 2001 after serving since 1994. The State party therefore concludes that the complainant will no longer be called up for national service in the event of his return.

4.13 In conclusion, there is nothing to indicate the existence of substantial grounds for fearing that the complainant would face a specific and personal risk of being tortured upon his return to Eritrea. His allegations and the evidence provided do not warrant a finding that his return would expose him to a real, concrete and personal risk of being tortured.

Complainant's comments on the State party's observations

5.1 On 2 June 2020, the complainant submitted his comments on the State party's observations on the merits. With regard to the situation in Eritrea, the complainant argues that the widespread and systemic prevalence of torture in the country is confirmed by the 2019 report of the Special Rapporteur on the situation of human rights in Eritrea.[22] The Special Rapporteur holds that human rights violations in the country persist and that "the Eritrean authorities have not yet engaged in a process of domestic reforms and the human rights situation remains unchanged".[23] More importantly, she criticizes the recent changes in Swiss asylum policy, explicitly referring to the judgments of the Federal Administrative Court. The Special Rapporteur recognizes that returning asylum-seekers to Eritrea would expose them to arrest, harassment and violence.[24] In 2016, the commission of inquiry on human rights in Eritrea, denounced "a persistent, widespread and systematic attack against the civilian population"[25] and the African Commission on Human Rights expressed concern about torture and the right to life in Eritrea.[26] The complainants submits that European countries continue to rule in favour of Eritrean asylum-seekers, owing to the critical situation in Eritrea. In the first quarter of 2019, the recognition rates of refugee status for Eritreans in the European Union were as high as 79 per cent or 81 per cent, depending on the source, which makes Eritrea the country of origin with the second-highest recognition rate after the Syrian Arab Republic.[27]

5.2 Concerning the allegations of torture or ill-treatment in the recent past, the complainant reiterates that he was tortured because he disclosed information about Operation Forto. With regard to his political activities in Eritrea, the complainant argues that he was kidnapped and interrogated for two days by unknown people because he talked to his team members about Operation Forto and because he spoke openly about a certain form of protest against the Government and exercised his right to freedom of speech. He is seen as a political opponent. For this reason, the complainant asserts that he will face torture or ill-treatment if he returns to Eritrea.

5.3 Concerning the credibility of his allegations, the complainant provides additional information on (a) his desertion, (b) his arrest and his detention and (c) his illegal departure

[21] *MST and Others*, United Kingdom, Upper Tribunal (Immigration and Asylum Chamber), paras. 335 and 431 (5) and (6).

[22] A/HRC/41/53.

[23] Ibid., summary.

[24] Ibid., para. 74.

[25] A/HRC/32/47, para. 62.

[26] African Commission on Human and Peoples' Rights, concluding observations and recommendations on the initial and combined periodic report of the State of Eritrea on the implementation of the African Charter on Human and Peoples' Rights.

[27] See, for example, https://euaa.europa.eu/asylum-report-2020/45-decisions-rendered-applications-international-protection.

from Eritrea. The complainant argues it is nearly impossible to leave national service in Eritrea. He served 19 years in the military without being demobilized and was still part of national service when he escaped. Regarding the State party's arguments on the credibility of his arrest and detention in February 2013, the complainant submits that as he was blindfolded when he was kidnapped, it was impossible for him to describe whether or not the lights were on or off during his torture. Failing to do so does not mean that his account of his arrest and his detention is not credible, as stated by the State party. Slight discrepancies in his accounts are due to the trauma he suffered during his arrest and detention as described in the Istanbul Protocol[28] and the British Medical Journal.[29] He reiterates that his hearing lasted only two hours and took place several years after the events in question. The complainant challenges the State party's argument that illegally leaving the country does not in itself suffice to expose a deserter to torture. He argues that he was not dismissed from national service but just transferred. The complainant further submits that in Eritrea, there is not only national service to consider, but also the people's army, into which men and women between the ages of 18 and 70, or even 75, get recruited. In 2012, members of the people's army, allegedly under the command of the regular army, received guns and had to participate weekly in military training.[30] The risk that the complainant will have to join the people's army is high. In any case, the complainant will, again, have to serve either in national service or the people's army and will therefore, in some form or another, be made to serve.

5.4 Concerning individual and real risk of torture and/or inhuman or degrading treatment, the complainant submits that Eritrea has not, as the State party insinuates, changed its approach towards citizens leaving the country illegally. For example, the commission of inquiry referred to Eritreans returned to their country from the Sudan, who upon arrival, were arrested and detained.[31] Eritrean citizens forcibly returned to their country in the last years have been arrested and incarcerated immediately.[32] It remains unclear what has happened to them since. The Special Rapporteur on the situation of human rights in Eritrea stated in 2017 that the Eritrean authorities consider those who cannot obtain exit visas but still leave Eritrea as political opponents akin to traitors. Signing a regret letter – an act the Eritrean State demands in order to "regularize" their relationship "gives the authorities carte blanche to mete out arbitrary punishment".[33] The complainant submits that this account is confirmed by the Committee's decision in *A.N. v. Switzerland*, in which the Committee held that a removal to Eritrea violates articles 3, 14 and 16 of the Convention.[34] In that case, the complainant who left Eritrea illegally was arrested immediately after his return and then detained for two months in Agordat, tortured and punished with seven years in prison. The complainant also submits that in 2020 the independent digital magazine *Republik*, jointly with the Swiss research-collective Reflekt, confirmed that returnees who had received invitations from the authorities upon their arrival in Eritrea were tortured, detained, disappeared or fled the country again because they were persecuted by the authorities.[35] The complainant therefore reiterates that he is in grave and specific danger of being arrested, incarcerated and tortured because he left the country illegally and will be regarded as having deserted if he has to return to Eritrea.

[28] Istanbul Protocol, para. 253.

[29] Jane Herlihy, Peter Scragg and Stuart Turner, "Discrepancies in autobiographical memories - implications for the assessment of asylum seekers: repeated interviews study", *British Medical Journal* (2002).

[30] State Secretariat for Migration, "Focus Eritrea: Volksarmee ("Volksmiliz"), 17 December 2019, pp. 4 and 11, available from https://www.sem.admin.ch/dam/data/sem/internationales/herkunftslaender/afrika/eri/ERI-volksarmee-d.pdf (in German only).

[31] A/HRC/32/CRP.1, para. 98.

[32] See, for example, https://www.ecoi.net/en/document/1407585.html.

[33] A/HRC/35/39, para. 41.

[34] *A.N. v. Switzerland* (CAT/64/D/742/2016), para. 9.

[35] See https://reflekt.ch/eine-geschichte-die-es-nicht-geben-duerfte/.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any claims contained in a complaint, 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 recalls that, in accordance with article 22 (5) (b) of the Convention, it shall not consider any complaint from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. It notes that, in this case, the State party does not contest the exhaustion of all available domestic remedies by the complainant or the admissibility of the complaint.

6.3 The Committee considers that the complainant has sufficiently substantiated his claim that his return to Eritrea would expose him to a risk of being persecuted and tortured, as he would be perceived as a deserter and a supporter of Operation Forto. As the Committee finds no further obstacles to admissibility, it declares the complaint admissible under article 3 of the Convention and proceeds with its consideration of the merits.

Consideration of the merits

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

7.2 In the present case, the Committee must evaluate whether there are substantial grounds for believing that the complainant would be personally in danger of being subjected to torture upon his return to Eritrea. In assessing that risk, the Committee must take into account all relevant considerations, pursuant to article 3 (2) of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture on return to that country and 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.[36]

7.3 The Committee recalls its general comment No. 4 (2017), according to which 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 a State to which he or she is facing deportation, either as an individual or as a member of a group that may be at risk of being tortured in the State of destination. The Committee recalls that "substantial grounds" exist whenever the risk of torture is "foreseeable, personal, present and real" (para. 11). Indications of personal risk may include, but are not limited to: (a) ethnic background and religious affiliation; (b) previous torture; (c) incommunicado detention or other form of arbitrary and illegal detention in the country of origin; and (d) political affiliation or political activities of the complainant (para. 45).

7.4 The Committee also recalls that the burden of proof is on complainants, who must present an arguable case, that is, submit substantiated arguments showing that the danger that they will be subjected to torture is foreseeable, present, personal and real.[37] However, when complainants are unable to elaborate on their case, such as when they have demonstrated that they are unable to obtain documentation relating to their allegations of torture or have been deprived of their liberty, the burden of proof is reversed and the State party concerned must investigate the allegations and verify the information on which the complaint is based.[38] The Committee further recalls that it gives considerable weight to findings of fact made by organs

[36] See, for example, *E.K.W. v. Finland* (CAT/C/54/D/490/2012), para. 9.3.
[37] See, inter alia, *E.T. v. the Netherlands* (CAT/C/65/D/801/2017), para. 7.5.
[38] General comment No. 4 (2017), para. 38.

of the State party concerned; however it is not bound by such findings. It follows that the Committee will make a free assessment of the information available to it in accordance with article 22 (4) of the Convention, taking into account all of the circumstances relevant to each case.[39]

7.5 The Committee notes the complainant's claim that in Eritrea he could be persecuted or subjected to torture owing to his leaving the country illegally to avoid military service and following the torture he endured after revealing information to his football team colleagues concerning Operation Forto. The Committee also notes the State party's assertion that recent reports on Eritrea show that the situation in the country has evolved regarding returnees who left the country illegally that returnees must now only pay a diaspora tax to an Eritrean diplomatic mission and that those who have not completed their national service must sign a confession of guilt. The Committee further notes the State party's argument that if the complainant served in the army from 1994 and left Eritrea in April 2013, at the age of 35, he would have served 19 years after fulfilling his obligation to perform military service. Therefore, it is unlikely that he will be imprisoned or made to re-enlist in national service if he returns to Eritrea. At the same time, the Committee observes that the State party's assumption that the complainant would have been discharged from military duties has not been corroborated with any documentary evidence.

7.6 The Committee takes note of the report issued in 2021 by the Special Rapporteur on the situation of human rights in Eritrea. According to the report, asylum-seekers who are returned to Eritrea reportedly face severe punishment upon their return, including prolonged periods of incommunicado detention, torture and ill-treatment.[40] The Committee also notes that the previous Special Rapporteur expressed concern that the voluntary return of 56 individuals from Switzerland to Eritrea in 2019 "could be placing individuals at risk given that their conditions of return cannot be adequately monitored".[41] Furthermore, the Committee notes that in a statement to the Human Rights Council on 4 March 2022, the Special Rapporteur noted that recent developments in Eritrea continued to evidence a lack of progress in the human rights situation in the country.[42]

7.7 Accordingly, the Committee cannot conclude that in the present case, the complainant does not face a foreseeable, real, present and personal risk of being subjected to torture if he is returned to Eritrea. The Committee therefore considers that his forced return to Eritrea would constitute a violation of article 3 of the Convention.

8. In the light of the foregoing, the Committee, acting under article 22 (7) of the Convention, concludes that the return of the complainant to Eritrea would constitute a breach of article 3 of the Convention.

9. The Committee is of the view that, in accordance with article 3 of the Convention, the State party has an obligation to refrain from forcibly returning the complainant to Eritrea. Pursuant to rule 118 (5) of its rules of procedure, the Committee invites the State party to inform it, within 90 days from the date of the transmittal of the present decision, of the steps it has taken to respond to the above observations.

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[39] Ibid, para. 50.

[40] A/HRC/47/21, para. 52.

[41] A/HRC/44/23, para. 83.

[42] See https://www.ohchr.org/en/press-releases/2022/03/human-rights-council-holds-separate-interactive-dialogues-human-rights