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PALAIS DES NATIONS • 1211 GENEVA 10, SWITZERLAND

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PG/AT/ak 413/2010

The Secretariat of the United Nations (Office of the High Commissioner for Human Rights) presents its compliments to the Permanent Mission of Sweden to the United Nations office in Geneva and has the honour to transmit herewith the decision, adopted by the Committee against Torture on 23 May 2012, concerning communication No. 413/2010, which was presented to the Committee for consideration under article 22 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, on behalf of Ms.

In accordance with the Committee's established practice, this decision will be made public.

GP

23 July 2012



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

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Committee against Torture

Communication No. 413/2010

**Decision adopted by the Committee at its forty-eighth session, 7 May to
1 June 2012**

<i>Submitted by:</i>	(represented by counsel, E.P.)
<i>Alleged victim:</i>	The complainant
<i>State party:</i>	Sweden
<i>Date of complaint:</i>	19 February 2010 (initial submission)
<i>Date of present decision:</i>	23 May 2012
<i>Subject matter:</i>	Expulsion of the complainant to Burundi
<i>Substantive issue:</i>	Risk of torture upon return to the country of origin
<i>Procedural issue:</i>	-
<i>Article of the Convention:</i>	3

Annex

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

concerning

Communication No. 413/2010

Submitted by: _____ (represented by counsel, E.P.)

Alleged victim: _____ The complainant

State party: _____ Sweden

Date of complaint: _____ 19 February 2010 (initial submission)

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

Meeting on 23 May 2012,

Having concluded its consideration of complaint No. 413/2010, submitted to the Committee against Torture by E.P. on behalf of _____ under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

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

Adopts the following:

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

1.1 The complainant is _____, a national of Burundi born on 3 December 1982 in the village of _____ in Muramvya province, Burundi; she currently resides in Sweden. She claims that an enforcement of her expulsion order to Burundi¹ would violate article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the Convention). The complainant is represented by counsel, E.P.

1.2 Under rule 114 (former rule 108), of its rules of procedure (CAT/C/3/Rev.5), the Committee requested the State party, on 2 March 2010, to refrain from expelling the complainant to Burundi while her communication is under consideration by the Committee.

Factual background

2.1 The complainant comes from a family belonging to the Tutsi ethnicity. Her parents, _____, were killed in 1993 by Hutu militia in the village of _____. Thereafter, her

¹ Burundi acceded to the Convention on 18 February 1993 and accepted the Committee's competence to receive and consider individual communications in accordance with article 22 of the Convention on 10 June 2003.

only sibling, an older brother, , became active in the Tutsi militia known as the . He was engaged in looting and gunfights against Hutus. Due to the fact that the complainant's brother had a high position in the and was well-known, he received death threats. On 3 September 2006, the complainant's brother was killed in his home by Hutu soldiers from the national army. At that specific moment, she was outside of the house and could hear her brother being ill-treated inside the house and the soldiers asking him about her whereabouts, which she understood as a death threat.

2.2 The complainant ran from the house to a friend who lived 10 minutes away. The following day the complainant's friend went back to the house and found the brother brutally tortured and executed. A few days later, the complainant met her former maid, who told her that the Hutu militia was searching for her. The complainant stayed at her friend's house for two months. According to her, the authorities are unable to offer her protection and she cannot receive protection in another part of the country. She does not have any family members in Burundi, nor does she have a social network there. Thus, she fled Burundi on 28 November 2006, helped by smugglers and a friend, who arranged the travel.

2.3 The complainant arrived in Sweden on 29 November 2006 and applied for asylum the next day. Upon application, she presented a Burundian identity card to the Migration Board. On 23 November 2007, the Migration Board held an interview with the complainant, in the presence of her legal aid counsel. The complainant stated, *inter alia*, that she had never had a passport or been abroad. She also stated that she had never belonged to a party or organization, and that she had never been subjected to threats or harassments, apart from the events that happened when her brother was killed.

2.4 In February 2008, the Migration Board learned that an application for a visa had been presented in 2006 to the Swedish embassy in Algiers, by an individual with almost identical personal data as the complainant. The Migration Board requested all documentation for the application from the Swedish embassy in Algiers. The application had been made and signed by a person named born on 3 December 1982 in Bujumbura, Burundi. The application was signed on 16 July 2006 in Algiers and the applicant's purpose for going to Sweden was to visit a friend and to explore the possibility of conducting further studies. Both the applicant and the friend, who was also the reference person in the application, stated that they had gotten to know each other in Niger in 2002–2003 when the applicant was working there. The friend also stated that the applicant planned to go to Niger after the visit to Sweden. The applicant further stated that she was a student at the university in Algiers, which was confirmed by her friend, and listed a home address in Algiers. She also stated that she had valid Algerian travel insurance and health travel insurance for the journey. The applicant supported herself through study allowances and economic support from her family.

2.5 Under the section of personal particulars of parents and brothers/sisters in the application, the applicant stated that her father's name was , her mother's name was and that they lived together in , Bujumbura. The applicant further stated that she had two sisters and a younger brother. Furthermore, the applicant stated that she had a national passport and had had three previous stays in France between July 2003 and October 2005. The information contained in the application form was corroborated by the attached copies of the Burundian passport, which had been renewed at the Burundian embassy in Paris on 20 August 2004. The application for a visa was refused by the Migration Board on 7 August 2006.

2.6 After the required documentation relating to the application for a visa arrived at the Migration Board in Sweden, which was at that time examining the complainant's application for asylum, the Board investigated whether the person in the photo attached to the application for a visa was the same as the person having claimed asylum in Sweden, i.e. the complainant. The report, issued and signed on 3 March 2008 by an expert within the

department for identity, stated that the result of the comparison of the photos strongly suggested that they represented the same person.

2.7 On 6 June 2008, an additional interview with the complainant was held at the Migration Board, based on the information in the application for a visa that had come to light. During the interview, the complainant stated that she had never left Burundi. She had given her passport to a friend from the Congo, who studied in Algeria and whom she had met in Burundi. Somehow the passport had been used by this friend and the application for a visa had been submitted without her being involved or aware of it. The complainant did not know who had applied for the visa to Sweden. She confirmed that her correct name was [redacted] and that the only real name in her passport was her first name. Being asked by the Board whether that meant that the passport was false, the complainant stated it was not but that someone else, [redacted], had helped her to apply for the passport. Her motive for applying for the passport was to help her friend from the Congo. Asked by the Migration Board whether she could explain why her photo was on the application for a visa to Sweden, the complainant stated that it was the same photo as in her passport. When the Migration Board asserted that it was not the case, the complainant then stated that her friend might have used another photo but that she did not know.

2.8 On 23 August 2008, the Migration Board rejected the complainant's asylum application, declaring that based on the written information in the file and the expert report from the Board's department for identity, she was the same person who applied for a Swedish visa in Algiers. The Board further stated that the complainant had not been able to present a trustworthy and coherent explanation as to why an application for a visa together with her passport containing a photo of her, her date of birth and her first name, had been presented in Algeria. The Board also noted that even if the complainant had been in Algeria in July 2006 presenting the application for a visa, that did not rule out that she could have been in Burundi at the time of the murder of the brother. The Board considered that in the event of this alternative, there was no reasonable explanation presented by the complainant as to why she had not informed the Board that she had applied for a Swedish visa and that she had been abroad previously. Therefore, the Board questioned the claims presented by the complainant. The Board concluded that the complainant had not proved her identity, country of origin and citizenship, but decided to try the matter and her asylum application against Burundi. Apart from the lack of credibility in the details presented by the complainant, the Board considered that her claims were not such that she had substantiated that she risked being subjected to persecution, ill-treatment or punishment, as she had not been subjected to such acts while in Burundi. She had indirectly heard that she had been asked for by the militia but remained in the country for a relatively long time after her brother was killed without being subjected to threats or other harassments.

2.9 On 13 October and 14 November 2008, the complainant appealed against the decision by the Migration Board to the Migration Court, claiming that the latter should grant her a residence permit, refugee status and a travel document. She added that she had given a coherent and credible explanation as to why an application for a visa had been presented in Algeria. The complainant's legal aid counsel pointed out that this issue should not overshadow his client's grounds for requesting asylum. Since the Migration Board did not question the fact that her brother had been executed, the threats directed at the complainant herself should be taken seriously. Legal aid counsel argued that his client was vulnerable to abuse and persecution due to her brother's high position within the [redacted]

The threats directed at him also included the complainant.

2.10 The Migration Board was given a possibility to present observations on the complainant's appeal. The Board stated that the complainant's explanations in relation to her departure from Burundi were not trustworthy. Moreover, the Board considered that the lack of credibility in her information regarding the application for a Swedish visa reduced

the credibility of the other statements presented by her. Therefore, the complainant's statements could not be considered sufficiently substantiated for granting her protection.

2.11 On 19 May 2009, the Migration Court rejected the complainant's appeal. The Migration Court stated that the author had neither proven her identity nor established as probable that she was from Burundi. Even assuming that she was from Burundi, the Court stated that the general situation in that country did not constitute grounds for asylum or protection. It considered her explanation as to how an application for a visa in her name had been presented in Algeria acceptable. Nevertheless, the Migration Court found that the complainant had not substantiated her claim that she risked being subjected to persecution, ill-treatment or punishment if she returned to Burundi. In its examination, the Migration Court noted particularly that she had not been involved in the Tutsi militia in which her brother had been engaged and that she had not been party to her brother's activities. The Migration Court further noted that the event which the complainant claimed was the direct cause for her to flee Burundi occurred nearly three years ago, a period that was considered to be relatively long.

2.12 On 8 June 2009, the complainant appealed the Migration Court's judgement and, on 27 July 2009, the Migration Court of Appeal refused leave to appeal against the Migration Court's judgement. The decision to expel the complainant thus gained legal force.

2.13 On 7 September 2009, a letter from the complainant was registered with the Migration Board. In the letter, she claimed that in June 2009 she had forwarded documents to her legal aid counsel, stating, *inter alia*, that she had been sentenced in Burundi to 20 years' imprisonment. The complainant attached copies of the summons from the police in Burundi dated 8 October 2007,² an arrest warrant in her name dated 19 November 2007³ and a judgement of 20 years' imprisonment dated 16 December 2008.⁴

2.14 In the light of the information presented in the complainant's letter and the attached copies, the Migration Board decided, on 24 September 2009, not to grant her a residence permit under chapter 12, section 18 of the 2005 Swedish Aliens Act, or to re-examine the matter under chapter 12, section 19.⁵ The Migration Board noted, *inter alia*, that the attached documents were copies and that consequently their value as evidence was low.

2.15 The Migration Board's decision was appealed by the complainant to the Migration Court. After the Migration Court had asked her questions in relation to the documents presented, the complainant stated in writing that in March or April 2009 she had learned from an acquaintance working in Burundi as a secretary in a court that she had been notified, searched for and sentenced for having helped her brother to kill people and plunder their belongings. The complainant was shocked to hear this but assumed that if she told her legal aid counsel or the Swedish authorities about it, they would ask her to prove it. Therefore, she asked the acquaintance in Burundi to send her the documents from the court file in Burundi. In the beginning of June 2009, the documents arrived and the complainant immediately handed over copies of them to her legal aid counsel, who, however, did not submit them to the Migration Board or the courts.

² The request addressed to the complainant to appear for questioning about her involvement in theft is signed by the criminal police in Bujumbura, Burundi.

³ An inquiry in relation to the suspicion about the complainant's involvement in murder and theft, as well as her failure to appear for questioning, is signed by a criminal police officer in Bujumbura, Burundi.

⁴ The complainant was found guilty of aiding murder and theft.

⁵ Rules regarding lasting impediments to enforcement of refusal-of-entry and expulsion orders that have become final and non-appealable are laid down in chapter 12, sections 18 and 19, read together with chapter 12, sections 1-3, of the Act.

2.16 On 16 November 2009, the Migration Court rejected the complainant's appeal. It held that the information that the complainant had been sentenced to imprisonment and searched for by the police were new circumstances according to the Aliens Act and, therefore, had not been examined before. However, the complainant's statement that she had received this information from an acquaintance in Burundi could not, in the absence of any further corroboration, be considered sufficiently substantiated to conclude that the new circumstances constituted lasting impediments to the enforcement of her expulsion order under chapter 12, section 19, of the Aliens Act. The documents, which were presented in original to the Migration Court, were of questionable quality and consequently had a low value as evidence. Regardless of this, the Migration Court concluded that the complainant was aware of the documents that were going to be sent to her already by the end of April or early May 2009, i.e. before the Migration Court's judgement of 19 May 2009 in relation to her application for a residence permit. Before that time, she had been aware of the information that she had been sentenced and searched for by the police in Burundi. Consequently, she had had a possibility to present this information during the proceedings on her initial asylum application but decided not to do it. The reason given by the complainant, i.e. that she would have been asked to submit proof, was not considered by the Migration Court as a valid excuse under chapter 12, section 19, of the Aliens Act for not presenting the new circumstances at an earlier stage.

2.17 On 9 December 2009, the Migration Court of Appeal refused leave to appeal against the Migration Court's judgement. This decision is not subject to appeal.

The complaint

3.1 The complainant claims that there exists a consistent pattern of gross, flagrant or mass violations of human rights in Burundi. She refers to the sixth report of the Secretary-General on the United Nations Integrated Office in Burundi (S/2009/611), and to a 2009 report by Amnesty International USA regarding the poor human rights record in Burundi, including the use of torture against detainees in prison, unlawful killings by the security forces, widespread rape and sexual violence, and impunity. In the light of the above, the complainant submits that due to her association with the deceased brother's activities and the expected imprisonment for aiding murder and theft, her expulsion from Sweden to Burundi would expose her to harsh and life-threatening prison conditions, torture and other forms of abuse, such as rape and sexual violence. She claims, therefore, that her forcible return to Burundi would constitute a breach by Sweden of her rights under article 3 of the Convention.

3.2 The complainant submits that she is at personal risk of being tortured upon her return to her country of origin. She argues that a close family member has already been killed and she fears that in case of her expulsion to Burundi she may face the same fate, and there is an obvious risk that she will be subjected to ill-treatment, torture and rape while imprisoned. In this connection, the complainant states that she is innocent and has not committed the acts for which she was convicted. The background for her conviction is ethnic contradictions in Burundi and her brother's involvement with the *Sans Échec*.

State party's observations on the admissibility and the merits

4.1 By note verbale of 2 September 2010, the State party submitted its observations on the admissibility and the merits. As to the admissibility, it states that it is not aware of the same matter having been or being subject to another procedure of international investigation or settlement. With reference to article 22, paragraph 5 (b), of the Convention, the State party acknowledges that all available domestic remedies have been exhausted in the present communication.

4.2 Irrespective of the outcome of the Committee's examination of the issues relating to article 22, paragraphs 5 (a) and (b), of the Convention, the State party maintains that the complainant's assertion that she is at risk of being treated in a manner that would amount to a breach of the Convention fails to attain the basic level of substantiation required for the purposes of admissibility. It submits that the communication is manifestly unfounded and, thus, inadmissible under article 22, paragraph 2, of the Convention and rule 113, subparagraph (b) (former rule 107, subparagraph (b)), of the Committee's rules of procedure.

4.3 The State party submits that, should the Committee conclude that the communication is admissible, the issue before the Committee on the merits is whether the expulsion of the complainant would violate the obligation of Sweden under article 3 of the Convention, not to expel or return a person to another state where there are *substantial grounds*⁶ for believing that he or she would be in danger of being subjected to torture. In this respect, the State party refers to the Committee's jurisprudence,⁷ according to which the aim of the determination of whether the forced return of a person to another country would constitute a violation of article 3 of the Convention is to establish whether the individual concerned would be *personally at risk*⁸ of being subjected to torture in the country to which he or she would be returned. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country. Furthermore, the State party submits that its obligation to refrain from forcibly returning a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture is directly linked to the definition of torture as set out in article 1 of the Convention. It follows from the Committee's jurisprudence⁹ that the issue of whether a State party has an obligation to refrain from expelling a person who might risk pain or suffering inflicted by a non-governmental entity, without the consent or acquiescence of the Government, falls outside the scope of article 3 of the Convention.

4.4 As far as the general human rights situation in Burundi is concerned, the State party submits that it can still be described as very unstable after the long civil war between the Tutsi-dominated Government and its army and the Hutu-dominated rebel groups. As a result of the war, many civilians have lost their lives and both parties to the conflict are responsible for severe violations of the human rights of the civilian population. The human rights record of the Government of Burundi remains poor. Members of the army (Force de Défense Nationale, FDN), the police and the National Intelligence Service (Service National de Renseignement, SNR) have been responsible for killings, torture and beatings of civilians and detainees, including suspected supporters of the National Forces of Liberation (Forces Nationales de Libération, FNL)¹⁰. Security forces have continued to harass members of the opposition. Despite the ceasefire agreed in May 2008, abuses by the FNL against civilians have continued and occurred primarily in the traditional FNL strongholds, including Bujumbura Rural. While civilian authorities have generally maintained effective control of security forces, there have been instances where elements of the security forces have acted independently. Although government security forces,

⁶ Emphasis added by the State party.

⁷ Communications No. 150/1999, *S.L. v. Sweden*, Views adopted on 11 May 2001, para. 6.3; and No. 213/2002, *E.J.V.M. v. Sweden*, decision adopted on 14 November 2003, para. 8.3.

⁸ Emphasis added by the State party.

⁹ Reference is made to communication No. 83/1997, *G.R.B. v. Sweden*, Views adopted on 15 May 1998, para. 6.5.

¹⁰ Formerly Party for the Liberation of the Hutu People.

especially the FDN, have taken some steps to prosecute the perpetrators of human rights abuses, most individuals have acted with impunity.¹¹

4.5 The State party adds that since 2005 a new Constitution has been in force, establishing terms by which the two ethnic groups will share power and recognizing fundamental human rights for all Burundians. The Constitution guarantees a multiparty system and freedom of speech and the press. Also in 2005 general elections were held and the National Council for the Defence of Democracy – Forces for the Defence of Democracy (Conseil National pour la Défense de la Démocratie – Forces pour la Défense de la Démocratie, CNDD-FDD) became the ruling party. In April 2009, the FNL was formally transformed to a political party. With the disarmament of the FNL movement and its accreditation as a political party, any acts of violence by them are now treated as crimes and the number of abuses attributed to them has declined.¹² Impunity remains prevalent and justice, which is not granted in the courts, “tends to be claimed in the streets”.¹³ The State party submits that the said assessment is the essence of how the situation in Burundi is described in the reports referred to by the complainant before the Committee (see para. 3.1 above).

4.6 The State party states that while it does not wish to underestimate the concerns that may legitimately be expressed with respect to the current human rights situation in Burundi, there can be no doubt that the circumstances referred to in the above-mentioned reports do not in themselves suffice to establish that the complainant’s forced return to Burundi would entail a violation of article 3 of the Convention. The Committee, therefore, should determine the complainant’s personal risk of being subjected to torture, as defined in article 1 of the Convention, following her removal to Burundi.

4.7 The State party submits that the Swedish migration authorities and courts apply the same test in assessing the risk of being subjected to torture when considering an asylum application under the Aliens Act as the Committee would apply when examining a subsequent communication under the Convention.¹⁴ The State party adds that it must be appreciated that the national authorities are in a very good position to assess the information submitted by an asylum seeker and to appraise his or her statements and claims in view of the fact that they have the benefit of direct contact with the asylum seeker concerned. In light of the above, the State party contends that great weight must be attached to the assessment made by the Swedish migration authorities.

4.8 Concerning the assessments of the credibility of the complainant’s statements, the State party relies mainly on the reasoning contained in the decision of the Migration Board, which has had two interviews and face-to-face contact with the complainant. In addition, the State party considers it pertinent to emphasize that there exist extensive credibility gaps in the details that the complainant has presented to the migration authorities and the Committee. The Migration Board has maintained throughout the proceedings in the present case that the complainant is the same person as the one who presented the application for a visa to the Swedish embassy in Algiers in 2006, and this is expressed both in its decision to reject the complainant’s asylum application and in its observations to the Migration Court

¹¹ Reference is made to the 2008 “Human rights report: Burundi” by the United States Department of State and section 1 of the 2007 “Country report on human rights practices in Burundi” presented by the Swedish Ministry for Foreign Affairs.

¹² Reference is made to the report of the United Nations High Commissioner for Human Rights on the situation of human rights and the activities of her office in Burundi (A/HRC/12/43), para. 22.

¹³ Ibid., para. 68.

¹⁴ Reference is made to chapter 4, sections 1 and 2, of the Act and the Committee’s general comment No. 1 (1996) on the implementation of article 3 of the Convention (*Official Records of the General Assembly, Fifty-third Session, Supplement No. 44 (A/53/44 and Corr.1), annex IX*).

after the complainant appealed the Board's decision. The State party concurs fully with this conclusion. It argues that the complainant's explanation as to how an application for a Swedish visa was made in her name in Algiers in 2006 is not trustworthy, as it is vague and incoherent.

4.9 The State party submits that a photo that is attached to a visa application must not be older than six months. The visa application must be filled in and signed personally by the applicant and the documents that should be attached to the application must be in the original. These facts, in the State party's view, raise further doubts in relation to the complainant's explanation that she did not take part in presenting the application to the Swedish embassy in Algiers. Moreover, until she was confronted with the details of the visa application, she had stated that she had never had a passport. During the interview, when she was confronted with the visa application, the complainant stated however that she was the holder of a passport and that it was not false. The State party contends that the complainant's statement that the only real name in the passport is her first name is not trustworthy, nor is her explanation that someone else, a man called [redacted] helped her to apply for the passport or that she applied for it to help her friend. In addition to the consideration that the complainant's explanations regarding the application for a visa and her passport are not credible, one of the experts on identity within the Migration Board certified that a comparison of the complainant's photo taken when she applied for asylum and the photo attached to the application for a Swedish visa in Algiers shows that they represent the same person.

4.10 As the State party, like the Migration Board, considers it evident that the complainant is the same person who applied for a Swedish visa in Algiers, it follows that the visa application had been filled in by the complainant and, therefore, has to be considered while examining her claim for asylum. In this regard, the State party contends that the statements made by the complainant in her application for a Swedish visa and her application for protection are contradictory for the following reasons:

(a) According to the application for a Swedish visa, the complainant's parents are living together in [redacted] Bujumbura and she has two sisters and one brother. The brother is said to have been born in 1990. In the application for asylum, the complainant stated that her parents were killed in 1996. Further, according to the application for asylum, the complainant stated that her brother was born in 1975 and, therefore, would have been 31 years old when he was killed. Also, the application for asylum contains no information stating that the complainant has sisters; and

(b) Information in the application for a Swedish visa shows that the complainant was working in Niger in 2002–2003. The information also shows that she left Algeria, entered France and returned to Algeria three times between July 2003 and October 2005. During the visit to France in July 2004, the complainant renewed her passport at the Burundian embassy in Paris.

4.11 The State party argues that although the details regarding exits and entries to Algeria and France do not in themselves prove that the complainant was living in Algeria during 2003, 2004 and 2005, they show that she was at least travelling between Algeria and France during this time. Furthermore, she had not hesitated to contact the Burundian embassy in Paris. Moreover, this information, together with the details that she worked in Niger in 2002–2003, and consequently lived there, also shows that she had no problems with leaving Burundi during this time. As the complainant stated in the visa application that she was a student at a university in Algiers, listing a home address in the town, it must be assumed that she was living in Algiers at least during parts of 2006. In the light of these circumstances, the State party concludes that it is evident that the complainant had been abroad several times before arriving in Sweden in late 2006 to ask for protection, contrary to what she has stated in her asylum application.

4.12 The State party also contends that details in the complainant's statements in her asylum application are in themselves contradictory. The complainant's information that she was close enough to hear the Hutu militia asking her brother about her, at the time she claims he was killed, without being discovered by the soldiers lacks credibility. The State party also considers the complainant's information as to how she managed to run away from the house on that occasion and stay with a friend, only a short distance away, for two months without being searched for or discovered there, as lacking in credibility. It is also clear, in the State party's view, that the complainant has lied about the fact that she was the holder of a passport, as she revealed this when she was confronted with the information about the visa application.

4.13 In the light of the above and the weakness in the complainant's description of the preparations and departure from Burundi, the State party concludes that the credibility of the complainant's statements and claims regarding her asylum case before the Swedish migration authorities and before the Committee is very weak. Accordingly, the State party submits that she cannot be given "the benefit of the doubt" in the present communication. The State party further concludes that, given the low credibility of the complainant's claim for asylum, there is no information or evidence in support of her statement that she risks being subjected to ill-treatment and rape by Hutu militia in Burundi, because of her brother's alleged previous activities in the

4.14 The State party further argues that, correspondingly, her statement that she was sentenced to imprisonment, notified and searched for in Burundi, is not credible. It adds that the complainant's explanation as to how she obtained the documents stating that she was notified, searched for and sentenced in Burundi is very incoherent and difficult to grasp, despite the fact that it was presented by her in writing to the Migration Court. Furthermore, the State party concurs with the conclusion that the Migration Board drew after having examined the documents of the sentence, the notification and the search warrant, that they are of questionable quality and, consequently, have a low value as evidence. As to the complainant's statement that her legal aid counsel neglected to forward the documents in question to the migration authorities, the State party submits that a statement of that kind should be substantiated and preferably be confirmed or refuted, or at least communicated to the counsel. It notes that no such information has been presented by the complainant. Given that there are several statements made by the complainant that the State party considers to be untrustworthy, that consideration applies to her general credibility. Consequently, the State party does not consider the complainant's statement regarding her counsel credible.

4.15 The State party argues that no other statements or information presented by the complainant shows that she would be at risk of being subjected to ill-treatment or rape if returned to Burundi. Her statement in the asylum application that she lacks a social network in Burundi contradicts her own statements regarding her family in the application for a Swedish visa. According to the latter, her parents, her older sister and her younger sister and brother live in Burundi. Furthermore, according to what the complainant has alleged in relation to her whereabouts in Burundi just before she left the country, it is apparent that she has a social network. The State party concludes that the circumstances invoked by the complainant do not suffice to show that the alleged risk of torture fulfils the requirements of being foreseeable, real and personal. Therefore, the complainant has not shown substantial grounds for believing that she would run a real and personal risk of being subjected to treatment contrary to article 3 of the Convention if deported to Burundi.

4.16 Finally, the State party submits that under chapter 12, section 22, of the Aliens Act, an expulsion order expires four years after the order becomes final and not subject to appeal. In the present communication, the decision on the complainant's expulsion became final and not subject to appeal on 27 July 2009, when the Migration Court of Appeal

refused leave to appeal. Accordingly, the expulsion order in question will become statute-barred on 27 July 2013.

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

5.1 On 15 December 2010, the complainant reiterated her initial statements in relation to her identity, country of origin and events that led to her departure from Burundi. As to the entanglements with the alleged passport and visa application, she submits that she fell in love with a man, whom she met in Burundi. When he asked her to give him her passport and photos, she did so. The complainant has never applied for a visa nor has she been in Algeria or France or anywhere else as claimed by the Migration Board and others. She was not subjected to persecution, ill-treatment or punishment while she remained in Burundi after her brother's killing, because she was in hiding. She left Burundi with the help of smugglers and for this reason she has no information about the passport on which she travelled to Sweden. The only thing she cared about was leaving her country of origin and getting to a safe place.

5.2 As to the merits, the complainant submits that since she has provided a high level of details and information to substantiate her claims, the burden of proof should shift from her to the State party.¹⁵ The complainant argues that she would be imprisoned upon her return to Burundi and imprisonment would lead to her being subjected to torture within the meaning of this term, as set out in article 1 of the Convention. She reiterates that, based on the current situation in Burundi, combined with her reasons for asylum and protection as presented to the Swedish migration authorities and in the communication to the Committee, her expulsion to Burundi would constitute a violation of article 3 of the Convention.

5.3 The complainant contests the State party's assertion that it applies the same test when considering an asylum application under the Aliens Act as the Committee will apply when examining a subsequent communication under the Convention. She submits that the Swedish migration authorities, when considering an asylum application under the Act, must start out by examining whether the applicant is a refugee (under the Convention relating to the Status of Refugees (Refugee Convention)), thereafter the authorities examine whether the applicant might be in need of protection due to other circumstances or if there are grounds of exceptionally distressing circumstances and the applicant should be granted a residence permit on one of those grounds. The complainant argues, therefore, that the authorities' assessment is characterized by the refugee status determination in accordance with the Refugee Convention and not the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

5.4 The complainant submits that the Refugee Convention is both broader and narrower than article 3 of the Convention against Torture. It is broader, as a "refugee", a person with a right to non-refoulement under article 33 of that Convention, is a person who faces a "well founded fear of persecution" on particular grounds in a receiving State. "Persecution" may fall short of "torture", so the Refugee Convention applies in circumstances where one fears a lesser form of ill-treatment in a receiving State. On the other hand, the reasons why one might face torture are irrelevant for the purposes of assessment under article 3 of the Convention against Torture, whereas reasons why one might face persecution are relevant under the Refugee Convention. Furthermore, the rights under article 3 of the Convention against Torture are absolute, whereas refugee rights can be denied. In this regard, the complainant states that the assessments of the Swedish migration authorities and the State party in relation to whether or not the complainant's expulsion would violate article 3 of the

¹⁵ Reference is made to communication No. 149/1999, *A.S. v. Sweden*, Views adopted on 24 November 2000, para. 8.6.

Convention against Torture are most likely made on the basis of the same assessment as when determining refugee status under the Refugee Convention.

State party's further observations

6.1 By note verbale of 13 April 2011, the State party submitted further observations. It states that contrary to what is claimed by the complainant, the application to her case of chapter 4, section 2, in conjunction with chapter 5, section 1, of the Aliens Act provided the same protection against refoulement as the Convention against Torture. To be entitled to protection against refoulement, the reasons why the alien would risk being subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment were not relevant and it was not necessary that the alien be considered a refugee within the meaning of the Refugee Convention. Furthermore, chapter 12, section 1, of the Act provides an absolute prohibition against enforcement of a decision on expulsion where there is a fair reason to assume that enforcement of the expulsion order would put the alien in danger of being sentenced to death or subjected to corporal punishment, torture or other inhuman or degrading treatment or punishment in the intended country of return, or where there is fair reason to assume that the alien is not protected from being sent on to a third country in which he or she would be in such danger. The State party also submits that chapter 12, section 1, of the Act was adopted to ensure compliance with article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which provides a stronger protection against refoulement than article 3 of the Convention against Torture. The State party adds that it is evident from the initial observations of 2 September 2010 that its consideration of the present communication is based on article 3 of the Convention against Torture.

6.2 As to the burden of proof, the State party reiterates its earlier argument that it is for the complainant to show that there are substantial grounds for believing that she faces a foreseeable, real and personal risk of being tortured in Burundi. It is only after evidence has been presented which shows that there is such a risk that the burden of proof shifts to the State party. It contests that the complainant has managed to present evidence sufficient to shift the burden of proof and submits that no actual judgement has been submitted by the complainant showing that she was sentenced to 20 years' imprisonment, only a document titled "proof of service of a judgment". Further, the State party argues that the documents submitted in support of her claims are of very limited value as evidence, since they are very simple documents which are easy to produce. Additionally, the "arrest warrant" and the "notice" both lack any kind of case number or other identification.

6.3 The State party further states that the documents submitted by the complainant are claimed to be in the original. It notes in this regard that the documents consist of printed forms which have all been filled out by hand with blue ink pen and have blue stamps. The State party finds it peculiar that the complainant would have received the originals of the forms and not – as is customary – certified copies. Furthermore, the story presented by the complainant as to how she obtained the documents is highly improbable and fails to explain why there is no copy of the actual judgement if the person helping her was asked to send copies of all the documents in the court file. The State party concludes that the documents cannot be considered to substantiate the complainant's claims.

6.4 The State party strongly contests the complainant's assertion that she has provided a high level of detail and information to substantiate her claims and argues that, on the contrary, she has submitted a story which lacks detail and is improbable. It has been established that the complainant has knowingly submitted untruthful information to the migration authorities, which affects her general credibility. Furthermore, the information submitted by the complainant in the asylum application is contradictory, which further diminishes her credibility and the reliability of the account submitted by her. The State party maintains that the circumstances summarized in paragraphs 2.4 – 2.8 and 4.8 – 4.10

strongly speak in favour of the conclusion that the complainant submitted the visa application in Algiers herself. Moreover, the facts submitted in the said application lead to the conclusion that the complainant's story regarding her brother's involvement in

and his subsequent killing cannot be true. In the light of the lack of reliable written evidence in support of the claims, as well as the strong reasons for questioning the complainant's credibility and the veracity of her claims, the State party maintains that the complainant has not fulfilled her burden of proof to show that she faces a foreseeable, real and personal risk of being tortured in Burundi. Consequently, the burden of proof has not shifted to the State party. It adds that there is no basis for maintaining the interim measure requested under rule 114 of the Committee's rules of procedure, since the enforcement of the expulsion order would not cause the complainant any irreparable damage.

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

7. On 17 July 2011, the complainant reiterated her initial claims that there are substantial grounds for believing that she will be tortured in Burundi if she has to return. She submits that these claims have been corroborated by, inter alia, documents and that she has explained how she managed to obtain them. The complainant adds that she cannot give a better explanation as to why there is a visa application in "her" name and why her passport has been used by someone else, since she does not know what happened. She is "just telling the truth".

Issues and proceedings before the Committee

Consideration of admissibility

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

8.2 The Committee recalls that, in accordance with article 22, paragraph 5 (b) of the Convention, it shall not consider any communications from an individual unless it has ascertained that the individual has exhausted all available domestic remedies. The Committee notes that, in the instant case, the State party has recognized that the complainant has exhausted all available domestic remedies.

8.3 The State party submits that the communication is inadmissible as manifestly unfounded. The Committee considers, however, that the arguments put forward by the complainant raise substantive issues, which should be dealt with on the merits. Accordingly, the Committee finds no further obstacles to the admissibility and declares the communication admissible. Since both the State party and the complainant have provided observations on the merits of the communication, the Committee proceeds immediately with the consideration of the merits.

Consideration of the merits

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

9.2 The issue before the Committee is whether the expulsion of the complainant to Burundi would constitute a violation of the State party's obligation under article 3 of the Convention not to expel or to return (*refouler*) a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The Committee notes that the issue of whether a State party has an obligation to

refrain from expelling a person who might risk torture or ill-treatment inflicted by a non-governmental entity falls within the scope of article 3 of the Convention in cases in which there is consent or acquiescence of the State's authorities in the country of return to such conduct.¹⁶ However, while the complainant alleges that she initially fled Burundi because of her fear of harm by Hutu militias, she has not provided any evidence to support a claim that she would face a risk of harm by such militias if returned at the present time.

9.3 With regard to the complainant's claims that she risks imprisonment in Burundi and that imprisonment is inevitably followed by ill-treatment, torture and rape, the Committee must evaluate whether there are substantial grounds for believing that she would be personally in danger of being subjected to torture upon return to her country of origin. In assessing this risk, the Committee must take into account all relevant considerations, pursuant to article 3, paragraph 2, of the Convention, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. However, the Committee recalls that the aim of such determination is to establish whether the individual concerned would be personally at a foreseeable and real risk of being subjected to torture in the country to which he or she would 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 the implementation of article 3, according to which the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. While the risk does not have to meet the test of being "highly probable",¹⁷ the Committee recalls that the burden of proof generally falls on the complainant, who must present an arguable case that he or she faces a "foreseeable, real and personal" risk.¹⁸ The Committee further recalls that in accordance with its general comment No. 1, it gives considerable weight to findings of fact that are made by organs of the State party concerned,¹⁹ while at the same time it is not bound by such findings and instead has the power, provided by article 22, paragraph 4, of the Convention, of free assessment of the facts based upon the full set of circumstances in every case.

9.5 In the present case, the Committee notes that the State party has acknowledged and taken into account the fact that the human rights record of Burundi remained poor²⁰ and that the general human rights situation in Burundi was still very unstable after the long civil war between the Tutsi-dominated Government and the Hutu-dominated rebel groups. However, while not underestimating the concerns that may legitimately be expressed with respect to

¹⁶ In this respect, the Committee recalls its jurisprudence, as reflected in its general comment No. 2 (2007) on the implementation of article 2 of the Convention by States parties (*Official Documents of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44)*, annex VI, para. 18), that States parties bear responsibility for acts of torture or ill-treatment committed by private actors on the basis of having consented or acquiesced to such torture where the authorities know or have reasonable grounds to believe that such acts are being committed and fail to exercise due diligence to prevent, investigate, prosecute and punish the perpetrators.

¹⁷ General comment No. 1, para. 6.

¹⁸ See, for example, communication No. 203/2002, *A.R. v. The Netherlands*, decision adopted on 14 November 2003, para. 7.3.

¹⁹ See, inter alia, communication No. 356/2008, *N.S. v. Switzerland*, decision adopted on 6 May 2010, para. 7.3.

²⁰ Conclusions and recommendations of the Committee against Torture: Burundi (CAT/C/BDI/CO/1).

the current human rights situation in Burundi, the State party's migration authorities and the courts established that the prevailing circumstances in that country did not in themselves suffice to establish that the complainant's forced return to Burundi would entail a violation of article 3 of the Convention.

9.6 The Committee also notes that the State party has drawn attention to numerous inconsistencies and serious contradictions in the complainant's account of the facts and submissions which call into question her general credibility and the veracity of her claims. The Committee also takes note of the information furnished by the complainant on these points.

9.7 In relation to the complainant's assertion that she was sentenced to 20 years' imprisonment for aiding murder and theft, acts she claims she did not commit, the Committee notes the State party's argument that no actual judgement has been submitted by the complainant, only a document titled "proof of service of a judgment". Further, the State party stated that the documents submitted in support of her claims were of very limited value as evidence, since they were very simple documents which were easy to produce and lacked any kind of case number or other identification. Furthermore, the State party raised questions as to why the complainant would have received the originals of the documents in the court file and not – as is customary – certified copies. The complainant has not refuted these observations, nor has she submitted any evidence to the contrary or additional arguments, even though she was given the opportunity to do so.

9.8 In the light of the foregoing, the Committee finds that the complainant has not established that in case of her expulsion to the country of origin she would face a foreseeable, real and personal risk of being tortured within the meaning of article 3 of the Convention.

10. Accordingly, 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 complainant's removal to Burundi by the State party would not constitute a breach of article 3 of the Convention.

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

