

Katombe L. Tshishimbi v. Zaire, Communication No. 542/1993, U.N. Doc. CCPR/C/53/D/542/1993(1996).

ANNEX

Views of the Human Rights Committee under article 5, paragraph 4,

of the Optional Protocol to the International Covenant

on Civil and Political Rights

- Fifty-sixth session -

concerning

Communication No. 542/1993

Submitted by: Mrs. Agnès N'Goya [represented by counsel]

Victim: Her husband, Katombe L. Tshishimbi

State party: Zaire

Date of communication: 21 April 1993 (initial submission)

Date of decision on admissibility: 16 March 1995

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 25 March 1996,

Having concluded its consideration of communication No. 542/1993, submitted to the Committee by Mrs. Agnès N'Goya, on behalf of her husband, Katombe L. Tshishimbi, under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication, her counsel and by the State party,

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication is Agnès N'Goya, a Zairian citizen born in 1946 and currently domiciled in Brussels, Belgium. She submits the communication on behalf of her husband, Katombe L. Tshishimbi, a Zairian citizen born in 1936 in Likasi, Province of Shaba, Zaire. Mr. Tshishimbi was abducted on 28 March 1993, and his whereabouts cannot be ascertained. The author is represented by counsel, who alleged violations by Zaire of articles 2, 3, 5, 7, 9, 12, paragraphs 1, 17, 18, 19, 20, paragraphs 2, and 25 of the International Covenant on Civil and Political Rights.

Facts as presented by counsel

2.1 Katombe Tshishimbi is a career military officer. In 1973, he was stripped of all his functions and sentenced by a military tribunal to 10 years' imprisonment for his refusal to obey orders. The court's sentence was later reduced to four years, of which he spent two years in detention. On an unspecified subsequent date, he allegedly participated in a failed coup attempt against President Mobutu Sese Seko.

2.2 From the late 1970s onwards, Mr. Tshishimbi sympathized with the principal movement of the political opposition to President Mobutu, the Union for Democracy and Social Progress (Union pour la Démocratie et le Progrès Social - UDPS). After UDPS leader Etienne Tshisekedi had been nominated Prime Minister by the National Sovereign Conference (Conférence Nationale Souveraine - CNS) in 1992, he appointed Mr. Tshishimbi as his military adviser. It appears that Mr. Tshishimbi was used primarily as one of Mr. Tshisekedi's bodyguards.

2.3 Counsel recalls that after the Government of E. Tshisekedi took office, the Prime Minister, his Cabinet and his special advisers were subjected to constant surveillance, and at times harassment and bullying, from the military and especially members of the special presidential division (Division Spéciale Présidentielle - DSP), which generally remains loyal to President Mobutu. Detachments of DSP and paramilitary groups generally known as "owls" (Hiboux) circulating in unmarked vehicles have arbitrarily arrested opponents of the President, kidnapped them, extorted money, ransacked their homes, etc. It is submitted that anyone who openly supports the process of democratic reform in Zaire lives in constant insecurity, especially in Kinshasa.

2.4 It was in this context that Mr. Tshishimbi was abducted during the night of 28 March 1993; Belgian press reports of 6 April 1993 mention that he had been arrested ("aurait été arrêté"). The exact circumstances of his abduction, which occurred after he had left the residence of Mr. Tshisekedi for his home, remain unknown. After his abduction, his family, relatives and colleagues have remained without news from him. It was believed - as reported in Belgian newspaper reports of 21 April 1993 - that he is/was detained at the headquarters of the National Intelligence Service (SNIP), where ill-treatment of detainees is said to be common.

2.5 Counsel does not indicate whether any steps have been taken in Kinshasa to pursue domestic remedies in respect of the abduction of Mr. Tshishimbi. It is apparent, however, that counsel and Mrs. N'Goya consider the resort to such remedies to be futile, given in particular the absence of reliable information about the whereabouts of Mr. Tshishimbi.

The complaint

3.1 It is submitted that the facts as described reveal violations by Zaire of articles 2, 3, 5, 7, 9, 12, paragraphs 1, 17, 18, 19, 20, paragraphs 2, and 25 of the Covenant.

3.2 As the whereabouts of Mr. Tshishimbi remain unknown, counsel requests the application of interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

Admissibility considerations

4.1 On 21 May 1993, the communication was transmitted to the State party under rule 91 of the Committee's rules of procedure. The State party was requested to clarify the circumstances of Mr. Tshishimbi's abduction, to investigate the author's allegations and to provide information about Mr. Tshishimbi's whereabouts and state of health. Under rule 86 of the rules of procedure, the State party was further requested to avoid any action which might cause irreparable harm to the alleged victim.

4.2 The State party did not submit any information on the case within the imparted deadlines. On 11 November 1993, the file was retransmitted to the Zairian authorities, after a representative of the UDPS who had contacted the Committee's secretariat had expressed doubts about the reliability of postal communications between Switzerland and Zaire. No reply to the second transmittal of the file was received from the State party.

4.3 During its fifty-third session, the Committee considered the admissibility of the communication. It expressed concern at the absence of cooperation on the part of the State party; this was a matter of concern especially in the light of the request under rule 86 of the rules of procedure which had been issued by the Committee's Special Rapporteur for New Communications. In the circumstances, due weight had to be given to the author's allegations, to the extent that they were sufficiently substantiated.

4.4 It was uncontested that Mr. Tshishimbi had been apprehended and brought to an unknown location during the night of 28 March 1993. It had also transpired that no domestic remedies had been pursued in Zaire to secure his release. On the other hand, the State party had been requested to provide specific information about effective remedies available to the author in the circumstances of the case. In the absence of State party cooperation on the issue, and given Mr. Tshishimbi's situation, including the impossibility for his family to have access to him or to obtain reliable information about his whereabouts and state of health, the Committee was satisfied that it was not precluded by article 5, paragraph 2 (b), of the Optional Protocol from examining the communication.

4.5 Concerning the author's allegations under articles 3, 5, 12, paragraphs 1, 17, 18, 19, 20, paragraphs 2, and 25 of the Covenant, the Committee observed that they were general and unsubstantiated. Nothing in the file indicated that Mr. Tshishimbi had been subjected to arbitrary interference with his privacy (article 17), denied his freedom of conscience and religion (article 18), his right to freedom of expression (article 19) or his right to political participation (article 25). In this respect, therefore, no claim under the Optional Protocol had been advanced.

4.6 The Committee considered that the author's allegations under articles 7 and 9 could not, given the circumstances of Mr. Tshishimbi's abduction, be further substantiated at that stage, and that they should be considered on their merits.

4.7 On 16 March 1995, therefore, the Committee declared the communication admissible in so far as it appeared to raise issues under articles 7 and 9 of the Covenant. It reiterated its request to the State party to provide detailed information on the whereabouts of Mr. Tshishimbi and to indicate whether he was covered by the terms of the amnesty announced by the State party's new Government in the summer of 1994.

Examination of the merits

5.1 The deadline for the State party's information and observations under article 4, paragraph 2, of the Optional Protocol expired on 9 November 1995. No information has been received from the State party, in spite of a reminder addressed to it on 27 November 1995.

5.2 The Committee must therefore consider the present communication in the light of the material made available to it by the author. It notes with serious concern the total absence of cooperation on the part of the State party. It is implicit in article 4, paragraph 2, of the Optional Protocol that a State party make available to the Committee, in good faith and within the imparted deadlines, all the information at its disposal. This the State party has failed to do, in spite of reminders addressed to it. It has further failed to react to the request for interim measures of protection formulated by the Committee's Special Rapporteur for New Communications in May 1993. As of 1 March 1996, no information on the fate of Mr. Tshishimbi had been forwarded to the Committee.

5.3 The author has alleged a violation of article 9 of the Covenant. While there is no evidence that Mr. Tshishimbi was actually arrested or detained during the night of 28 March 1993, the Committee recalls that the State party was requested, in the decision on admissibility, to clarify this issue; it has not done so.

5.4 The first sentence of article 9, paragraph 1, guarantees to everyone the right to liberty and security of person. In its prior jurisprudence, the Committee has held that this right may be invoked not only in the context of arrest and detention, and that an interpretation which would allow States parties to tolerate, condone or ignore threats made by persons in authority to the personal liberty and security of non-detained individuals within the State party's jurisdiction would render ineffective the guarantees of the Covenant. 1In the circumstances of this case, the Committee concludes that the State party has failed to ensure Mr. Tshishimbi's right to liberty and security of person, in violation of article 9, paragraph 1, of the Covenant.

5.5 With regard to the claim under article 7, the Committee recalls that Mr. Tshishimbi was abducted under circumstances that have not been clarified and has had no contact with his family or, on the basis of the information available to the Committee, with the outside world since. Furthermore the State party has consistently ignored the Committee's requests for information regarding Mr. Tshishimbi's abduction and whereabouts. In the circumstances, the Committee concludes that the removal of the victim and the prevention of contact with his family and with

the outside world constitute cruel and inhuman treatment, in violation of article 7 of the Covenant.

6. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before the Committee reveal violations by Zaire of articles 7 and 9, paragraph 1, of the Covenant.

7. Under article 2, paragraph 3 (a), of the Covenant, the State party is under a duty to provide the author and the victim with an appropriate remedy. The Committee urges the State party: (a) to investigate thoroughly the circumstances of Mr. Tshishimbi's abduction and unlawful detention, (b) to bring to justice those responsible for his abduction and unlawful detention and (c) to grant adequate compensation to him and to his family for the violations of his rights suffered. The State party is under an obligation to ensure that similar violations do not occur in the future.

8. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 90 days of the transmittal to it of this decision, information about the measures taken to give effect to its Views.

[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.]

footnotes

*/ Made public by decision of the Human Rights Committee.

1.) See for example the Committee's Views on communication No. 468/1991 (Oló Bahamonde v. Equatorial Guinea), adopted 20 October 1993, para. 9.2; Views on communication No. 449/1991 (Mójica v. Dominican Republic), adopted 15 July 1994, para. 5.4.