

ANNEX */

Views of the Committee against Torture under article 22, paragraph 7,
of the Convention against Torture and Other Cruel,
Inhuman or Degrading Treatment
- Sixteenth session -

concerning

Communication No. 36/1995

Submitted by: X
Alleged victim: The author
State party: The Netherlands
Date of communication: 17 November 1995

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

Meeting on 8 May 1996,

Having concluded its consideration of communication No. 36/1995, submitted to the Committee against Torture 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 author of the communication, his counsel and the State party,

Adopts the following:

Views under article 22, paragraph 7, of the Convention

1. The author of the communication is X, a Zairian citizen, at the time of submission of the communication awaiting his deportation from the Netherlands. He claims that his return to Zaire would be in violation of article 3 of the Convention against Torture. He is represented by counsel.

Facts as submitted by the author

2.1 The author states that he is a sympathizer of the political movement Union pour la Démocratie et le Progrès Social (UDPS). In 1992 he was arrested

*/ Made public by decision of the Committee against Torture.

with many others during a mass demonstration and kept in detention for several days. The author states that he was beaten with a rope with wire in it. In 1993, the author was again arrested and kept in detention for a few days. After his release, he left the country.

2.2 The author's request for political asylum in the Netherlands was rejected by the State Secretary of Justice. The Secretary accepted that the author had been detained twice, but considered that nothing indicated that he was perceived as an important political opponent by the Zairian authorities. In this connection, the Secretary noted that the author had not been harassed by the authorities in the period between his first and second arrest.

2.3 The author subsequently requested a review of this decision and requested the President of the Court in The Hague to grant provisional measures to defer his expulsion until a decision on his request for review had been taken. The author's request was rejected. The President considered that the situation in Zaire was not such as to justify a general prohibition of returning persons to the country. He found that the author had failed to show that he personally was at risk of being detained and tortured upon return. In this connection, the President considered that the author's activities in support of the UDPS had only been marginal and that he was not known as a political opponent.

The complaint

3.1 The author claims that his forced return to Zaire would lead to him being killed because of his political activities. Counsel adds that he fears to be detained and tortured upon return.

3.2 The author asks the Committee to request the Netherlands to take interim measures of protection and not to expel him while his communication is under consideration by the Committee.

The State party's observations on the admissibility and on the merits of the communication

4.1 In its submission, dated 22 January 1996, the State party acknowledges that X has exhausted domestic remedies, and does not raise any objections to the admissibility of the communication. In accordance with the request of the Committee against Torture, the author will not be expelled while his communication is under consideration by the Committee.

4.2 As to the merits, the State party begins by explaining the refugee determination process in the Netherlands. Asylum applications in the Netherlands are dealt with by the Immigration and Naturalization Service (INS) under the responsibility of the State Secretary for Justice. In addition to the information supplied by the individual, the INS, when assessing individual applications for asylum, also takes into consideration the findings of the Netherlands Ministry of Foreign Affairs concerning the asylum seeker's country of origin which are laid down in Ministry reports (ambtsberichten) as well as information supplied by the United Nations High Commissioner for Refugees and organizations such as Amnesty International.

4.3 The State party states that decisions on asylum applications can be contested before five District Courts (rechtbanken). In addition a Legal Uniformity Division (rechtseenheidskamer; REK) has been set up which has the task of promoting legal uniformity in the judgments and which has given a normative judgment in the case of Zaire, on 3 November 1994.

4.4 The State party states that if medical factors play a role in an asylum case, or if the asylum seeker concerned claims to have been ill-treated or tortured, the INS may request the Medical Inspector of the Ministry of Justice to give an opinion. The Medical Inspector himself may examine the individual or apply for information from a medical practitioner who has treated the individual. The State party adds that the individual himself can always request a further medical examination, or independently consult a medical practitioner.

4.5 The State party submits that the current conditions in Zaire give rise to concern but are not such as to justify the adoption of a general principle that asylum seekers whose applications have been rejected should not be repatriated. In support of its statement, the State party refers to the Committee's Views in communication No. 13/1993¹, where the Committee held: "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 determination that a person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist that indicate that the individual concerned would be personally at risk". The State party therefore considers it incumbent upon asylum seekers from Zaire to demonstrate that specific facts and circumstances apply in their particular case to justify that risk.

4.6 The State party states that in assessing the circumstances of the individual asylum seeker from Zaire, the guiding principle is the REK's consideration in the above-mentioned judgment of 3 November 1994, that a Zairian national who has previously been detained and who is therefore known to the authorities, is at greater risk to be apprehended upon return and to be detained again. The Court considered that asylum seekers who can demonstrate sufficiently convincingly that they belong to this group should therefore be granted a residence permit for compelling reasons of a humanitarian nature. In this context, the State party explains that detention should be understood as "registered detention", that is a detention which has lasted for a substantial period of time. If it is found that a registered detention has occurred, the asylum seeker is granted a residence permit for compelling reasons of a humanitarian nature.

4.7 As to the author's claim, the State party states that his asylum application was examined in the light of the Geneva Convention on the Status of Refugees and article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

¹ Mutombo v. Switzerland, Views adopted on 27 April 1994, paragraph 9.3.

4.8 The State party states that the author's membership of the UDPS in itself is not sufficient to assume that he has a well-founded fear of persecution. The Court has ruled that as the UDPS is a recognized political opposition party in Zaire, and the author's activities for this party have been only marginal, it is not likely that the Zairian authorities have taken a negative interest in him. Furthermore, the State party asserts that on his first arrest, the author agreed that he was apprehended together with a large number of other people, clearly at random. The second arrest was likewise not an action directed against the author personally.

4.9 The State party states that when the author was first questioned by an INS official, he claimed that he had been subjected to ill-treatment and showed his scars. The scars were however not such as to prompt the official to request a detailed medical examination. Furthermore, the State party states that neither the individual nor his authorized representative requested such an examination at any time during the proceedings. Equally, the author did not decide to have himself examined by another medical practitioner in order to produce a medical certificate. Nor did the Court consider a medical examination to be necessary.

4.10 The State party endorses the position adopted by the Dutch courts that it cannot be anticipated on the basis of the facts that X is so well-known to the Zairian authorities that he will be arrested if he returns to Zaire. Furthermore, according to the State party, the swift release after his second arrest suggests that the Zairian authorities do not regard him as the perpetrator of activities that pose a threat to the State, unlike the case of Mr. Mutombo² who was sentenced by a military court to a long term of imprisonment.

Counsel's comments

5.1 In her comments on the State party's submission, dated 5 March 1995, counsel states that the Dutch Alien Act allows for the possibility that a single judge in chambers decides on the question whether expulsion would contradict article 33 of the Geneva Convention. If the judge decides that the request for political asylum is manifestly unfounded, the procedure ends with that decision. In such a case, like the author's, there is no possibility of full judicial review or appeal. Although the REK sets out rules to be observed, a decision by a single judge can lead to judicial error in individual cases. Counsel refers to several decisions, where individuals in similar circumstances as the author's, were given the right to stay in the Netherlands.

5.2 Furthermore, counsel states that the (confidential) sources of the Ministry of Foreign Affairs are unreliable and that in several cases of Zairian asylum seekers, in which the Ministry reported that they had not been registered while detained, these reports were unfounded.

² Mutombo v. Switzerland, communication No. 13/1993, Views adopted on 27 April 1994.

5.3 Furthermore, the author does not agree that his name has not been registered by the Zairian secret service, and that he will not be detained by the secret service upon return. To support his position, counsel states that it is known that members and sympathizers of the UDPS are at risk when sent back to Zaire. The formal opinion of the Netherlands Government that it is able to predict which asylum seekers were registered by the authorities while detained, has in specific cases been found to be untrue.

5.4 Finally, counsel submits a note by the author's medical doctor, who states that he found scars on the back of the author which could very well be caused by beating. Counsel emphasizes that the State party has never questioned the fact that the author was beaten during detention. It is submitted that, if the author fell into the hands of the security forces at the airport (which is likely because of the lack of a valid travel document) his scars alone would give him away as a member of the opposition.

Decision on admissibility and examination of the merits

6. Before considering any claims contained in a communication, the Committee against Torture must decide whether or not 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. The Committee notes that the State party has not raised any objections to the admissibility of the communication and that it has requested the Committee to proceed to an examination of the merits. The Committee finds therefore that no obstacles to the admissibility of the communication exist and proceeds with the consideration of the merits of the communication.

7.1 The issue before the Committee is whether the forced return of the author to Zaire would violate the obligation of the Netherlands under article 3 of the Convention not to expel or to return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

7.2 Article 3 reads:

"1. No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

"2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights."

The Committee must decide, pursuant to paragraph 1 of article 3, whether there are substantial grounds for believing that the author would be in danger or being subject to torture. In reaching this conclusion, the Committee must take into account all relevant considerations, pursuant to paragraph 2 of article 3, including the existence of a consistent pattern of gross, flagrant or mass violations of human rights. The aim of the determination, however, is to establish whether the individual concerned would be personally at risk of being subjected to torture in the country to which he would return. 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 person would be in danger of being subjected to torture upon his return to that country; additional grounds must exist to indicate that the individual concerned would be personally at risk.

8. The Committee notes that the author has claimed that, during his first detention, he was beaten with a rope with wire in it. Although not explicitly corroborated by the medical note submitted by the author, the Committee is prepared to find that X was maltreated during his first detention in Zaire. The Committee also notes that the author has not claimed that he was tortured during his second detention. Finally, the Committee notes that the periods of the author's detention have been short, that the author has not claimed that he was an active political opponent and that there is no indication that the author is being sought by the authorities in his country. Therefore, the Committee considers that the author has not substantiated his claim that he will be personally at risk of being subjected to torture if he is returned to Zaire.

9. The Committee against Torture, acting under article 22, paragraph 7, of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, is of the view that the facts as found by the Committee do not reveal a breach of article 3 of the Convention.

[Done in English, French, Russian and Spanish, the English text being the original version.]