

Distr.
RESTRICTED*

CAT/C/12/D/13/1993
27 April 1994

Original: ENGLISH

COMMITTEE AGAINST TORTURE
Twelfth session

VIEWS

Communication No. 13/1993

Submitted by: Mr. Balabou Mutombo [represented by counsel]
Alleged victim: The author
State party concerned: Switzerland
Date of communication: 18 November 1993

[See Annex]

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

ANNEX

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

concerning

Communication No. 13/1993

Submitted by: Mr. Balabou Mutombo [represented by counsel]

Alleged victim: The author

State party concerned: Switzerland

Date of communication: 18 November 1993

Date of decision: 27 April 1994

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

Meeting on 27 April 1994,

Having concluded its consideration of communication No. 13/1993, submitted to the Committee against Torture on behalf of Mr. Balabou Mutombo 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, and by the State party,

Adopts its Views under article 22, paragraph 7, of the Convention.

1. The author of the communication (dated 18 October 1993) is Balabou Mutombo, a Zairian citizen, born on 24 November 1961, at present living in Switzerland and seeking recognition as a refugee. He claims to be a victim of a violation by Switzerland 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 has been a member of the Zairian Armed Forces since 1982. In 1988, he clandestinely became a member of the political movement Union pour la démocratie et le progrès social (UDPS), as he felt discriminated against because of his ethnic background (Luba). His father had been a member of the movement since its launch in 1982 and was allegedly

forced to retire as a magistrate at the Kinshasa Magistrate's Court (Tribunal de Grande Instance) because of that affiliation. The author participated in several manifestations and attended illegal meetings.

2.2 On 20 June 1989, the author was arrested by three members of the Division Spéciale Présidentielle, when he was about to deliver a letter from his father to Mr. Etienne Tshisekedi, a founding member and leader of the UDPS. He was detained in the military camp of Tshatsi, where he was locked up in a cell of one square metre. During the four days that followed, he was tortured by his interrogators, whom he mentions by name. He was subjected to electric shocks, beaten with a rifle, and his testicles were bruised until he lost consciousness. On 24 June 1989, he was brought before a military tribunal, found guilty of conspiracy against the State and sentenced to 15 years' imprisonment. He was transferred to the military prison of Ndolo, where he was detained for seven months. Although the author had lost part of his eye-sight and suffered a head-injury caused by the torture, he was not given any medical treatment. On 20 January 1990, he was released under the condition that he present himself twice a week at the Auditorat militaire of Mantete. In February 1990, he sought medical treatment for his eye-injury at the General Hospital Mama Yemo.

2.3 Subsequently, the author's father and brothers suggested that he leave Kinshasa, to avoid that the police would find other members of the movement by following him. They also feared for the author's security. On 30 March 1990, the author left Zaire, leaving behind his family, including his two children who live with his father; after 15 days he arrived in Luanda, Angola, where he stayed with friends for three months. A friend provided him with a visa for Italy, where he arrived on 29 July 1990, using the passport of his friend. On 7 August 1990, he illegally crossed the border to enter Switzerland; on 8 August 1990, he applied for recognition in Switzerland as a refugee. In the course of that month he learned that his father had been detained after his departure.

2.4 The author was heard by the Cantonal Office for Asylum Seekers in Lausanne on 10 October 1990. He submitted a medical report written by a medical doctor in Switzerland indicating that the scars on his body corresponded with the alleged torture. A report by an ophthalmologist indicated that the author had an eye-injury, caused by a trauma, which according to the author was caused by a blow to his head during the interrogation in June 1989. On 31 January 1992, the Federal Refugee Office (Office fédéral des réfugiés) rejected his application and ordered his removal from Switzerland. It considered that, even if the author had been detained in the military prison of Ndolo, it was unlikely that he had been imprisoned for political reasons, since the International Committee of the Red Cross, which had visited the prison in November 1989, had stated that it did not visit him, since he apparently did not belong to the category of prisoners which fell under the mandate of the ICRC. The Refugee Office further doubted the authenticity of the provisional release order, which the author had submitted as evidence of his detention. With regard to the author's return to Zaire, the Refugee Office considered that there were no indications that he would be exposed to punishment or treatment prohibited by article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

2.5 On 6 March 1992, the author appealed the decision. On 10 August 1992, the decision to expel him was stayed, but on 2 June 1993, the Commission of Appeal in Refugee Matters (Commission suisse de recours en matière d'asile) dismissed the author's appeal. On 24 June 1993, the author was informed that he had to leave Switzerland before 15 September 1993, failing which he would be subject to expulsion. The author's request for a review of the decision, on the ground that the authorities had not sufficiently taken into account essential documents, such as a report of Amnesty International and medical reports, was dismissed on 13 September 1993. On 17 September 1993, the author received permission to stay in Switzerland until 17 October 1993.

The complaint

3.1 The author claims that a real risk exists that he would be subjected to torture or that his security would be endangered, if he were to be returned to his country. It is submitted that evidence exists that there is a consistent pattern of gross and massive violations of human rights in Zaire, which, according to article 3, paragraph 2, of the Convention against Torture, are circumstances which a State party should take into account when deciding on expulsion. The author contends that on this basis alone the Swiss authorities should refrain from expelling him.

3.2 In a letter to counsel, dated 3 November 1993, Amnesty International supports the author's arguments that he would be exposed to a risk of torture upon return to Zaire. It considers the author's story credible and emphasizes that the general situation in Zaire is one of violence and repression. AI submits in particular that hundreds of soldiers, suspected of sympathizing with the opposition to the rule of President Mobuto, have been arrested and many of them are detained in secret places. In AI's opinion, members of the opposition are subject to repression and the simple fact of seeking recognition as a refugee is seen as a subversive act.

3.3 Since the author could be expelled any moment, he asked the Committee to request Switzerland to take interim measures of protection and not to expel him while his communication is under consideration by the Committee.

Issues and proceedings before the Committee

4. During its eleventh session, on 18 November 1993, the Committee decided to solicit from the State party clarifications or observations as to the admissibility of the communication, and, in the specific circumstances of the case, to request the State party, under rule 108, paragraph 9, not to expel the author while his communication was under consideration by the Committee. The State party was also invited to submit explanations or statements as to the merits of the communication, in case it had no objections to its admissibility.

5. On 18 February 1994, the State party informed the Committee that it would comply with the Committee's request not to expel the author and that it would not contest the admissibility of the communication, since the author had exhausted all available domestic remedies.

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

6.1 By submission of 7 March 1994, the State party recalls that the Federal Refugee Office has, on 31 January 1992, rejected the author's application to be recognized as a refugee, on the basis that there were several contradictions in his testimony, that the principal document, the provisional release order, had no legal value, that the medical certificates were not persuasive and that in general the author's allegations were not reliable. The Federal Refugee Office was of the opinion that the situation in Zaire was not one of systematic violence.

6.2 As to the author's specific claim that his expulsion would be in violation of article 3 of the Convention, the State party notes that the author has not raised this objection before any of the national authorities, but has only invoked article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The State party refers to the author's argument that the existence in a State of a consistent pattern of human rights violations would by itself be sufficient reason not to return anyone to that State. The State party considers the issue raised by the author of great importance for the interpretation and application of article 3 of the Convention; it points out that, if the general situation in a country alone would suffice to conclude that substantial grounds exist for believing that someone, if returned, would be subjected to torture, the requirement of article 3, paragraph 1, that the belief concerns the individual personally, would no longer have a separate meaning. The State party concludes therefore that the interpretation as suggested by the author is incompatible with article 3 and with a systematic and teleological interpretation thereof. It submits that article 3, paragraph 1, stipulates the conditions in which a State party is precluded from expelling an individual from its territory, whereas paragraph 2 prescribes how to appreciate the evidence when determining the existence of such conditions.

6.3 The State party submits that, even if a consistent pattern of gross, flagrant or mass violations of human rights exists in a country, this should only be taken as an indication when examining all the circumstances to determine whether the person to be returned would be in concrete danger of being tortured. The existence of the "substantial grounds" of paragraph 1 has to be determined in the light of all the circumstances in a particular case. The State party argues that only in exceptional circumstances a reference to a situation of gross violations of human rights would suffice to prove the existence of substantial grounds to believe that a person would be in danger of being subjected to torture, for instance if the violations are directed against a particular group of persons in a confined territory and the individual to be returned belongs to that group. The State party submits that this is not the case with the author of the present communication.

6.4 In support of its interpretation of article 3 of the Convention, the State party refers to the jurisprudence of the European Commission of Human Rights, establishing that a decision to expel an asylum seeker may give rise to an issue under article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms where substantial grounds have been shown for believing that he faces a real risk of being subjected to torture. In the Commission's opinion, a reference to the general situation in a

country is not sufficient to preclude the return of an individual, as it must be shown that the individual himself is at risk. The State party further refers to the decision of the European Court of Human Rights in *Vilvarajah e.a. v. The United Kingdom*, where it was held that a mere possibility of ill-treatment because of the general situation in a country was not in itself sufficient to give rise to a violation of article 3. The State party argues that article 3 of the Convention against Torture does not provide a wider protection than article 3 of the European Convention. It adds that the author himself is apparently of the same opinion, since he did not deem it necessary to invoke article 3 of the Convention against Torture while exhausting his domestic remedies, but only invoked article 3 of the European Convention.

6.5 The State party submits that the author of the present communication does not have substantial grounds to believe that he himself would be in danger of being subjected to torture in case of his return to Zaire. Even taking into account the general situation in Zaire, the State party claims that the evidence adduced by the author does not support his allegations. In this context, the State party submits that it has, on several occasions, contacted its embassy in Kinshasa before taking its decision not to grant the author asylum. The embassy contacted an informant from the human rights movement in Zaire, who advised the embassy that the author's story was highly unlikely. He affirmed that the provisional release order was a document without any legal value and that all released prisoners were provided with a "fiche de libération", which the author did not possess. Moreover, the signature on the order produced by the author does not correspond with the signature of the director of the military prison in which the author allegedly was detained. The State party further submits that the author's name does not figure in the Ndolo prison registers for 1989 and 1990 and that the author's father has declared that his son has never been detained in a military prison. It is also submitted that the drawing made by the author of the prison lacks important elements such as the desk of the prison's director and the division of the prison in two parts, one for ordinary soldiers and one for officers.

6.6 As regards the author's father, it was found that he had retired, not for political reasons, but pursuant to the applicable rules for civil servants. The leaders of the UDPS subsection, to which the author's father geographically belongs, have stated that he was not a UDPS member.

6.7 Moreover, the State party argues that, even if the author's story is true, it still does not indicate that a real risk exists that he will be subjected to torture upon his return. The State party argues that the fact that the author was provisionally released after seven months, while having been sentenced to 15 years' imprisonment, shows that such a risk is minimal, even if he has been subjected to torture after his arrest in 1989. The State party recalls that the author has admitted having received a new military uniform upon his release. The State party further refers to the author's communication to the Committee, and concludes that he left Zaire mainly because he did not want to endanger his family and friends, not because he was personally at risk.

6.8 As regards the general situation in Zaire, the State party acknowledges that the country suffers from internal political unrest and from incidental outbursts of violence. However, it submits that this cannot lead to the conclusion that a personal risk exists for the author that he will be tortured after his return. In this context, the State party refers to a recent letter from the Office of the High Commissioner for Refugees, in which it expressed concern for the situation in Zaire and recommended great prudence in the return of persons to Zaire, but did not recommend a suspension of expulsions to Zaire altogether.

7.1 In his comments (dated 20 April 1994) on the State party's submission, counsel argues that, even if Mr. Mutombo did not invoke the Convention against Torture but only the European Convention for the Protection of Human Rights and Fundamental Freedoms before the national authorities, the Swiss authorities were according to the Swiss legal system nevertheless under an obligation to apply the Convention against Torture. Counsel further contests the State party's argument that article 3 of the Convention against Torture does not provide a wider protection than article 3 of the European Convention. He argues that the articles of the Convention against Torture must be interpreted in such a way as to give the most effective protection against torture. In this context, counsel notes that article 3 of the European Convention prohibits torture but does not directly deal with the issue of expulsion or "refoulement". Its application to situations of expulsion has been developed only in the jurisprudence by the European Commission and the European Court on Human Rights, which have been reluctant to interpret it broadly. Since article 3 of the Convention against Torture contains an explicit protection against forced return to a country where an individual would be at risk of being subjected to torture, counsel argues that this necessarily has to lead to a different, wider interpretation.

7.2 Counsel further argues that the criteria to establish the existence of a risk that an individual, if returned, would be subjected to torture, are not the same under the two conventions. The jurisprudence on the basis of article 3 of the European Convention has established that a risk must be concrete and serious to engage the applicability of article 3. Under article 3 of the Convention against Torture the existence of substantial grounds for believing that such risk exists are sufficient to prohibit the individual's return; among these grounds is the existence in the country concerned of a consistent pattern of gross, flagrant or mass violations of human rights. Counsel contests the State party's interpretation of the second paragraph of article 3, and argues that the existence of systematic human rights violations in a country sufficiently shows the existence of substantial grounds for believing that a person would be in danger of being subjected to torture, on the basis of which the person's return to that country is prohibited.

7.3 Counsel further argues that article 3 of the Convention against Torture lays the burden of proof on the State party, thereby reinforcing the protection of the individual. In this connection, counsel notes that it is difficult for an individual to prove the existence of the danger of being subjected to torture. As regards the State party's contention that Mr. Mutombo's story is not credible, and its investigation to adduce evidence to that effect, counsel notes that the secretive nature of the investigation

and the use of an anonymous informant makes it impossible for him to verify the credibility and the objectivity of the information furnished. Counsel furthermore doubts that the informant would have had access to the register of the Ndolo prison, which normally would not be open to anyone from the outside. He therefore requests that the State party disclose the name of the informant and the name of the human rights movement of which he is a member, failing which the information provided by the State party should not be taken into account by the Committee. To substantiate the credibility of the author's story, counsel refers to the initial communication and the position taken by Amnesty International in support of it.

7.4 Counsel further argues that the fact that the author was conditionally released from detention does not diminish the risk of being subjected to torture upon return to the country. In this connection, counsel points out that the situation in Zaire has considerably deteriorated since 1990 and that it is the present danger facing the author upon his return to Zaire which is at issue. To support his argument, counsel refers to several reports written by non-governmental organizations and to the report concerning Zaire prepared by the Secretary-General for the United Nations Commission on Human Rights, which indicate that torture and ill-treatment of detainees are common practice in Zaire and are perpetrated with impunity. Counsel argues that the State party's reference to the failure of the High Commissioner for Refugees to recommend the suspension of all expulsions to Zaire is irrelevant, because this was related to another case and had nothing to do with the author's situation. Counsel further states that the language used in the letter from the High Commissioner is strongly dissuasive of all expulsions to Zaire.

7.5 Finally, counsel refers to the medical report submitted by the author and written by a Swiss medical specialist, indicating that the author's injuries correspond with the alleged torture. He notes that the State party has rejected this report as not persuasive without even conducting a re-examination.

Decision on admissibility and examination of the merits

8. 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 25, 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 confirmed that the author has exhausted all available domestic remedies. The Committee therefore finds that no obstacles to the admissibility of the present communication exist and proceeds with the consideration of the merits of the communication.

9.1 The Committee observes that it is not called upon to determine whether the author's rights under the Convention have been violated by Zaire, which is not a State party to the Convention. The issue before the Committee is whether the expulsion or return of the author of the communication to Zaire

would violate the obligation of Switzerland under article 3 of the Convention not to expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

9.2 The Committee is aware of the concerns of the State party that the implementation of article 3 of the Convention might be abused by asylum seekers. The Committee considers that, even if there are doubts about the facts adduced by the author, it must ensure that his security is not endangered.

9.3 The relevant provisions are contained in article 3:

"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 to article 3, whether there are substantial grounds for believing that Mr. Mutombo would be in danger of 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 that indicate that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person cannot be considered to be in danger of being subjected to torture in his specific circumstances.

9.4 The Committee considers that in the present case substantial grounds exist for believing that the author would be in danger of being subjected to torture. The Committee has noted the author's ethnic background, alleged political affiliation and detention history as well as the fact, which has not been disputed by the State party, that he appears to have deserted from the army and to have left Zaire in a clandestine manner and, when formulating an application for asylum, to have adduced arguments which may be considered defamatory towards Zaire. The Committee considers that, in the present circumstances, his return to Zaire would have the foreseeable and necessary consequence of exposing him to a real risk of being detained and tortured. Moreover, the belief that "substantial grounds" exist within the meaning of article 3, paragraph 1, is strengthened by "the existence in the State

concerned of a consistent pattern of gross, flagrant or mass violations of human rights", within the meaning of article 3, paragraph 2.

9.5 The Committee is aware of the serious human rights situation in Zaire, as reported, inter alia, to the United Nations Commission on Human Rights by the Secretary-General and by the Commission's Special Rapporteur on extrajudicial, summary or arbitrary executions, the Special Rapporteur on torture and the Working Group on Enforced or Involuntary Disappearances. The Committee notes the serious concern expressed by the Commission in this regard, in particular in respect of the persistent practices of arbitrary arrest and detention, torture and inhuman treatment in detention centres, disappearances and summary and arbitrary executions, which prompted the Commission to decide, in March 1994, to appoint a special rapporteur specifically to examine and to report on the human rights situation in Zaire. The Committee cannot but conclude that a consistent pattern of gross, flagrant or mass violations does exist in Zaire and that the situation may be deteriorating.

9.6 Moreover, the Committee considers that, in view of the fact that Zaire is not a party to the Convention, the author would be in danger, in the event of expulsion to Zaire, not only of being subjected to torture but of no longer having the legal possibility of applying to the Committee for protection.

9.7 The Committee therefore concludes that the expulsion or return of the author to Zaire in the prevailing circumstances would constitute a violation of article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

10. In the light of the above, the Committee is of the view that, in the prevailing circumstances, the State party has an obligation to refrain from expelling Balabou Mutombo to Zaire, or to any other country where he runs a real risk of being expelled or returned to Zaire or of being subjected to torture.
