

HUMAN RIGHTS COMMITTEE

Mbenge v. Zaire

Communication No. 16/1977

25 March 1983

VIEWS

Submitted by: Daniel Monguya Mbenge

Alleged victims: The author of the communication, members of his family and persons in their employ

State party concerned: Zaire

Date of registered communication: 8 September 1977 (date of first letter)

Date of decision on admissibility: 24 April 1979

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

Meeting on 25 March 1983,

Having concluded its consideration of communication No. 16/1977, submitted to the Committee by Daniel Monguya Mbenge under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all the written information made available to It by the author of the communication and by the State party concerned,

Adopts the following:

Views under article 5(4) of the Optional Protocol

1.1 The author of this communication, Daniel Monguya Mbenge, is a Zairian citizen now residing in Belgium as a political refugee. He has submitted the communication on his own behalf and on behalf of the following relatives and business connections: Ibale Simon Biyanga, his brothers Abraham Oyabi, his younger brother; Emmanuel Ngombe, his father-

in-law; the family driver, whose name is not given; and a pharmacist named Mozola.

1.2 The author has approached the Committee to complain of what he considers to be systematic persecution of his family by the Government of Zaire. He alleges that this persecution has continued against his family since the time of his sentence to death in September 1977 for supposedly having participated in the invasion of the province of Shaba. In March 1978, he was again sentenced to death as the alleged instigator of a plot against the regime. A petition for clemency filed on behalf of the author and other co-defendants was rejected by the President of Zaire the same month. The movable and immovable property of the author has been transferred to the State.

2.1 Until 1972, Daniel Monguya Mbenge was Governor of the Shaba region (formerly Katanga). In 1972, he was sentenced to a year's imprisonment for offences against a foreign head of State. Subsequent to this sentence he was stripped of his functions as Governor. In February 1974, he left Zaire for what he called reasons of health. Later, he established residence in Brussels, where the Belgian authorities in due course granted him the status of political refugee.

2.2 With reference to the two death sentences passed against him, the author claims that he learned of them through the press, and that the judicial authorities of his country neither summoned him to appear nor allowed him to defend himself or have a lawyer to defend him. Furthermore, he says he was not notified of the sentences. He therefore claims that he has been the victim of convictions and sentences at variance with the provisions of the Covenant. In support of his complaint he cites article 6, paragraphs 1, 2 and 4; article 12, paragraph 2; article 14, paragraph 2 and paragraph 3 (a), (b), (d), (e) and (g), and article 19, paragraphs 1 and 2 of the Covenant, which he considers have been violated by the Government of his country.

2.3 He claims that the President of Zaire sought in vain to have him extradited from Belgium and practically took hostage several members of his family by arresting them and imprisoning them one after the other.

3. Asked by the Committee why he was acting on behalf of the above-mentioned persons, he said that they were relatives or persons with whom he had business contacts and that they had been persecuted as follows:

(a) Simon Ibale Biyanga, the author's brother and a former Deputy Chief of Division in the Department of the Interior, was arrested arbitrarily by the security services of Zaire and held without charge for 21 days. He apparently left Zaire secretly and is now in Belgium;

(b) Abraham Oyabi, the author's younger brother, was allegedly arrested on 1 September 1977 and held hostage during the course of a search for his older brother, Simon. According to the latest reports he was freed early in 1979 or late in 1978 (25 December 1978). He was sent to Miadembelo, his parents' home village, although he himself was born at Kinshasa and had never lived in that village. It should be noted that there is no documentary evidence of any sentence having been passed against this person;

(c) Emmanuel Ngombe, the author's father-in-law, was arrested on 1 September 1977 and freed in July 1978 as the result of the amnesty declared by the President of Zaire;

(d) The pharmacist Mozola and the family driver were arrested on 1 September 1977 and freed as the result of an amnesty in July 1978. No conviction appears to have been given against them.

4. On 24 January 1978, the Human Rights Committee decided to transmit the communication to the State party concerned under rule 91 of the provisional rules of procedure and to request it to submit information and observations on the question of the admissibility of the communication. No reply has been received from the State party.

5. On 24 April 1979, on the basis of the information before it, the Human Rights Committee concluded:

(a) That, in addition to himself, the author was justified in acting on behalf of his brothers and his father-in-law by reason of close family connections

(b) That the facts of the claim, as presented by the author, merited that the communication be declared admissible, in so far as it related to himself and his younger brother, Abraham Oyabi, with regard to the events alleged to have occurred on or after 1 February 1977;

(c) That further information was needed with regard to the situation of the author's brother, Simon Biyanga, and his father-in-law, before the Committee could decide on the admissibility of the communication in so far as it related to them;

(d) That the author had not established any grounds justifying his authority to act on behalf of the pharmacist, Mozola, and the unnamed family driver.

The Committee therefore decided:

(i) That, in addition to himself, the author was justified by reason of close family connection in acting on behalf of his brothers, Simon Biyanga and Abraham Oyabi, and his father-in-law, Emmanuel Ngombe;

(ii) That the communication was admissible, in so far as it related to events alleged to have occurred on or after 1 February 1977, in respect of the author and his brother, Abraham Oyabi;

(iii) That the author be requested to furnish, within six weeks of the transmittal of the decision to him, detailed information on the facts of the claim in so far as it related to his brother, Simon Biyanga, and his father-in-law, Emmanuel Ngombe, including precise information on their present situation and whereabouts, and why they could not act for themselves;

(iv) that the communication was inadmissible in so far as it related to the other alleged

victims, the pharmacist, Mozola, and the family drivers

(v) That any reply received from the author pursuant to paragraph 3 of the decision should be transmitted to the State party to enable it to comment thereon within four weeks of the date of the transmittal;

(vi) That, in accordance with article 4 (2) of the Optional Protocol, the State party should be requested to submit to the Committee, within six months of the date of the transmittal to it of the decision, written explanations or statements clarifying the matter in so far as the communication related to Daniel Mbenge and Abraham Oyabi, and the remedy, if any, that might have been taken by it;

(vii) That the State party should be informed that the written explanations or statements submitted by it under article 4 (2) of the Optional Protocol must primarily relate to the substance of the matter under consideration, and in particular the specific violations alleged to have occurred. The State party was requested, in this connection, to enclose copies of any court orders or decisions of relevance to the matter under consideration.

6. In reply to its request for further information concerning the alleged victims Simon Biyanga and Emmanuel Ngombe, the author informed the Committee by letter dated 7 June 1979 that his brother, Simon Biyanga, and his brother's family had left Zaire and that they were then living in Belgium, and that his father-in-law, Emmanuel Ngombe, had been released and has rejoined his family. The author further informed the Committee that his brother, Abraham Oyabi, had been released from detention towards the end of 1978 or early in 1979.

7. In the light of this information, the Committee decided, on 21 July 1980, to discontinue consideration of the communication in so far as it related to Simon Biyanga and Emmanuel Ngombe, since it appeared that these alleged victims would now be in a position to act on their own behalf, if they so wished.

8. In its explanations of 3 June 1980, communicated pursuant to article 4 (2) of the Optional Protocol, the State party declared that Daniel M. Mbenge and Abraham Oyabi had benefitted from the amnesty laws in Zaire and were therefore free to return to the country; adding, with regard to Daniel M. Mbenge, that although he "is a former criminal sentenced for embezzlement" he had been granted a presidential pardon.

9. On 15 June 1980, the author submitted his comments in response to the explanations furnished by the State party, describing the latter as false and defamatory. He asserted that, contrary to the provisions of the amnesty laws and the favourable effect they were meant to produce, his possessions, which had been seized by the State when he was sentenced, were still being sold by auction in Kinshasa. In particular, he rejected the assertion by the State party that he had been convicted for embezzlement. He reiterated that he had been sentenced for political reasons. He added that, despite the fact that the amnesty measure of 1978 had also applied to his brother Oyabi, the latter had had to take refuge in the Congo in November 1979 to avoid arbitrary arrest by the security forces of Zaire for a second time. He therefore

concluded that to return to Zaire as required under the amnesty laws would not be without risk for him.

10. By its decision of 21 July 1980, the Committee invited the Government of Zaire to provide it with further particulars of the legal effects of the amnesty laws, in so far as they related to the persons and property of M. Mbenge and A. Oyabi and, in particular, to confirm in this connection the Committee's interpretation; namely, that the convictions and two sentences delivered against Daniel M. Mbenge, as well as all the consequences of these convictions in criminal and civil law, were expunged by the amnesty.

11. In its reply the State party, under cover of its note of 6 October 1980, forwarded to the Committee the texts of the amnesty laws and of the judicial decisions by which D. M. Mbenge was sentenced in 1972, 1977 and 1978. The State party added that "if a Zairian citizen decided to return to the country, even after the expiry of the time-limit (for the amnesty), the President of the Republic was quite ready to grant him a new amnesty which might affect his person and his property." The Government of Zaire has not provided other details in response to the Committee's request.

12. The Human Rights Committee, considering the present communication in the light of all information made available to it by the parties as provided for in article 5 (1) of the Optional Protocol, decides to base its views on the undisputed submissions of the author of the communication and on the documents transmitted by the State party, in particular the judgements of 17 August 1977 and 16 March 1978.

13. Daniel Monguya Mbenge, a Zairian citizen and former Governor of the province of Shaba, who had left Zaire in 1974 and is at present living in Brussels, was twice sentenced to capital punishment by Zairian tribunals. The first death sentence was pronounced against him by judgement of 17 August 1977, in particular for his alleged involvement in the invasion of the province of Shaba by the so-called Katangan gendarmes in March 1977. The second judgement is dated 16 March 1978. It pronounces the death sentence for "treason" and "conspiracy" without providing facts to establish these charges. Daniel Monguya Mbenge, learned about the trials through the press. He had not been duly summoned at his residence in Belgium to appear before the tribunals. An amnesty decree of 28 June 1978 (Act 78-023 of 29 December 1978) covering offences "against the external or -internal security of the State or any other offence against the laws and regulations of the Republic of Zaire", committed by Zairians having sought refuge abroad, was restricted to persons returning to Zaire before 30 June 1979.

14.1 In the first place, the Human Rights Committee has to examine whether the proceedings on the basis of which the author of the communication has been twice sentenced to death disclose any breach of rights protected under the International Covenant on Civil and Political Rights. According to article 14 (3) of the Covenant, everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for

instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14 (3) (a)). Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).

14.2 The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. The State party has not challenged the author's contention that he had known of the trials only through press reports after they had taken place. It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.

15. With reference to the claim that the death sentences were pronounced for political reasons on trumped-up charges, the Committee observes that it does not come within its general mandate to review judicial decisions of national courts of States parties and that it may not reject as false the facts mentioned therein unless there is clear evidence that the trial in question was affected by serious irregularities in violation of the Covenant. Due, in particular to a lack of information from the Government of Zaire, there may be some reason to question the correctness of the charges brought against D. Monguya Mbenge, especially with regard to the judgement of 16 March 1978. While the earlier judgement of 17 August 1977 contains a rather elaborate statement of facts and expressly refers to witnesses having testified under oath, the judgement of 16 March 1978 does not even specify the charges brought forward against the accused and thus leaves open the question why the author of the communication was convicted of treason and conspiracy. Nevertheless, the Committee considers that it does not have sufficient information in order to arrive at the conclusion that Daniel Monguya Mbenge has been the victim of purely politically motivated and substantially unfounded charges.

16. In view of the findings of violations of article 14 (3) of the Covenant, the Committee does not consider it necessary in the circumstances of the present case to examine further the

question whether article 14 (2) was also violated.

17. Daniel Monguya Mbenge also alleges a breach of article 6 of the Covenant. Paragraph 2 of that article provides that sentence of death may be imposed only "in accordance with the law [of the State party] in force at the time of the commission of the crime and not contrary to the provisions of the Covenant". This requires that both the substantive and the procedural law in the application of which the death penalty was imposed was not contrary to the provisions of the Covenant and also that the death penalty was imposed in accordance with that law and therefore in accordance with the provisions of the Covenant. Consequently, the failure of the State party to respect the relevant requirements of article 14 (3) leads to the conclusion that the death sentences pronounced against the author of the communication were imposed contrary to the provisions of the Covenant, and therefore in violation of article 6 (2).

18. The Committee has next to examine whether any measure taken by the State party subsequent to the pronouncement of the death penalties and, in particular, the amnesty to which the Committee's attention has been drawn, provided Daniel Monguya Mbenge with an effective remedy for the violation of his rights, in accordance with article 2 (3) of the Covenant. The adverse effects of the two Judgements cannot be deemed to have ceased by reason of the amnesty put into force by Act No. 78-012 of 28 June 1978 and extended until 30 June 1979 by Act No. 78-023 of 29 December 1978. It appears that the author of the communication could have enjoyed this amnesty only if he had returned to Zaire before the expiration date. It is, however, understandable that he hesitated to take advantage of the amnesty decree, since the second trial in which he had again been sentenced to death took place only about three months before the coming into force of the amnesty. In fact he submits that, notwithstanding the amnesty measure, his brother Oyabi had been persecuted in November 1979. The submission of the State party to the effect that the President of the Republic would be entirely prepared to grant a new amnesty to citizens re-entering Zaire even after the expiration of the amnesty decree does not offer a secure legal basis upon which the author could firmly have relied. The Committee notes further that no valid reasons have been put forward by the State party which would explain why a person, in order to benefit from the amnesty, should have been required to return to the territory of Zaire.

19. In his communication, the author also referred to articles 12 (2) and 19 (1) and (2) of the Covenant as being relevant in his case. As regards article 12 (2), the Committee recalls that the author had already left his country before 1 February 1977, the date of entry into force of the Optional Protocol in respect of Zaire, and has not returned there since. As regards article 19 (1) and (2), the author, who has been living outside Zaire since 1974, has not furnished the Committee with any relevant facts as to the measures taken against him by the Government of Zaire on or after 1 February 1977. The events predating 1 February 1977, which are described by the author at some length, cannot be taken into account by the Committee.

20. Concerning Abraham Oyabi, the Human Rights Committee bases its assessment on the undisputed fact that he was arrested on 1 September 1977 in order to force him to disclose the whereabouts of Simon Biyanga and that he was not released from detention until late in

1978 or early in 1979. The State party has not claimed that there was any criminal charge against him. In the view of the Committee, therefore, he was subject to arbitrary arrest and detention contrary to article 9 of the Covenant.

21. The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts set out in paragraphs 13 to 20 above, in so far as they have occurred on or after 1 February 1977, disclose violations of the International Covenant on Civil and Political Rights, in particular:

(a) With respect to Daniel Monguya Mbenge:

of article 6 (2), because Daniel Monguya Mbenge was twice sentenced to death in circumstances contrary to the provisions of the Covenants

of article 14 (3) (a), (b), (d) and (e), because he was charged, tried and convicted in circumstances in which he could not effectively enjoy the safeguards of due process, enshrined in these provisions;

(b) With respect to Abraham Oyabi:

of article 9, because he was subjected to arbitrary arrest and detention.

22. The Committee, accordingly, is of the view that the State party is under an obligation to provide the victims with effective remedies, including compensation for the violations they have suffered, and to take steps to ensure that similar violations do not occur in the future.