



# International Covenant on Civil and Political Rights

Distr.: General  
24 December 2015  
English  
Original: French

## Human Rights Committee

### Communication No. 2214/2012

#### Views adopted by the Committee at its 115th session (19 October-6 November 2015)

<i>Submitted by:</i>	John-Jacques Lumbala Tshidika (represented by the World Organization Against Torture and Association africaine de défense des droits de l'homme)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Democratic Republic of the Congo
<i>Date of communication:</i>	13 August 2012 (initial submission)
<i>Document references:</i>	Special Rapporteur's decision under rules 92 and 97, transmitted to the State party on 27 November 2012 (issued in document form)
<i>Date of adoption of Views:</i>	5 November 2015
<i>Procedural issues:</i>	None
<i>Subject matter:</i>	Torture and arbitrary detention
<i>Substantive issues:</i>	Right to liberty; right not to be subjected to torture; equality of arms and fair hearing; arbitrary interference with family life
<i>Articles of the Covenant:</i>	2 (paras. 2 and 3), 7, 9, 10 (para. 1), 16, 17, 19 and 23
<i>Article of the Optional Protocol:</i>	None



## 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 (115th session)**

concerning

#### **Communication No. 2214/2012\***

*Submitted by:* John-Jacques Lumbala Tshidika (represented by the World Organization Against Torture and Association africaine de défense des droits de l'homme)

*Alleged victim:* The author

*State party:* Democratic Republic of the Congo

*Date of communication:* 13 August 2012 (initial submission)

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

*Meeting on 5 November 2015,*

*Having concluded* its consideration of communication No. 2214/2012, submitted by John-Jacques Lumbala Tshidika 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 and the State party,

*Adopts* the following:

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

1.1 The author of the communication dated 13 August 2012 is Mr. Lumbala Tshidika, born on 2 May 1969 in the Democratic Republic of the Congo. He claims to be a victim of violations by the Democratic Republic of the Congo of articles 7 and 9, read alone and in conjunction with articles 2 (paras. 2 and 3), 10, 16, 17, 19 and 23, of the Covenant. He is represented by the World Organization Against Torture and Association africaine de défense des droits de l'homme. The Optional Protocol entered into force for the State party on 1 February 1977.

1.2 On 27 November 2012, the Committee, acting through its Special Rapporteur on new communications and interim measures, requested the State party to implement

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\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Lazhari Bouzid, Sarah Cleveland, Olivier de Frouville, Yuji Iwasawa, Ivana Jelić, Duncan Laki Muhumuza, Photini Pazartzis, Mauro Politi, Sir Nigel Rodley, Victor Manuel Rodríguez-Rescia, Fabián Omar Salvioli, Dheerajlall Seetulsingh, Anja Seibert-Fohr, Yuval Shany, Konstantine Vardzelashvili and Margo Waterval.

The text of an individual opinion (partly dissenting) of Committee members Olivier de Frouville, Yadh Ben Achour and Mauro Politi is appended to the present Views.

measures to protect the members of the author's family from any form of reprisal and to take all necessary and appropriate steps to ensure their protection during the entire time that the communication was under review by the Committee.

### **The facts as presented by the author**

2.1 In January 2008, the author was recruited as the Director of Human Resources at Banque Congolaise in the Democratic Republic of the Congo. In March 2008, having assumed his new functions, he was appointed to the Good Governance Committee in his capacity as secretary of the bank. The Committee, which comprises representatives of the bank and outside individuals who serve by appointment, is responsible for auditing the bank's accounts and management. The author's main duty consisted of preparing a report on the internal operations of the bank for submission to Union Congolaise des Banques after clearance by the President of Banque Congolaise, Mr. R.Y.

2.2 Shortly after assuming his duties, the author detected a number of financial irregularities at the bank. In June 2008, he submitted for approval by Mr. R.Y. a report detailing the unsound practices detected. The report was signed off on by the majority of the members of the Good Governance Committee. The President of the bank, however, refused to transmit the report to Union Congolaise des Banques and, as the author refused to remove the critical text, confiscated the report. In early August 2008, the President presented a new version of the report that did not mention the fraudulent acts that had been detected. The author refused to sign off on the amended report and tendered his resignation, which was not accepted by the President. During that same period, the author noticed that an anonymous deposit of US\$ 50,000 had been made into his bank account. He sought an explanation from the President of the bank, whom he suspected of having made the deposit, but was unsuccessful in his attempt. In view of the author's determination, the President eventually agreed to take back the funds that had been deposited in the author's account and desisted from seeking the author's signature on the report for Union Congolaise des Banques. The author at that point withdrew his letter of resignation.

2.3 After that, however, the author saw his authority and prerogatives being gradually reduced, which he interpreted as a form of intimidation. When he again detected financial mishandling at the bank, particularly in relation to a consultancy contract between the United States company Custom and Tax Consultancy and the Congolese Customs and Excise Office, the author informed the President and the board of directors of his findings. As the President had become increasingly threatening towards him, the author resigned on 30 October 2008. On 5 December 2008, the author was hired by Access Bank. In the interim, around 10 November 2008, the author refused an offer made by Banque Congolaise concerning compensation.

2.4 On 12 November 2008, the car in which the author was travelling with his daughters was pursued by armed men dressed in civilian clothing. The author was able to lose them. Later the same day, at 11 p.m., some armed men in military uniform came to his home and tried to enter. The author's security guard refused to let them in; they said they had a warrant but did not present it. The following day, the author filed a complaint against persons unknown in connection with the act of aggression from which he had escaped by car. He filed his complaint at the police station located on Avenue Kabambare in Kinshasa. He never received a copy of the official version of his complaint and was never able to follow up on it.

2.5 On 8 December 2008, the author received a call on his mobile phone from a colleague of the President of Banque Congolaise. She said that the purpose of the call was to inform the author that the President of Banque Congolaise had met with the Prime Minister and the Minister of the Budget and that, during the meeting, they had

discussed the author. They accused him of having divulged to opposition members of the parliament and to political opponents living abroad information about the bank's management that was deemed confidential. He was asked to telephone the President to assure the latter of his intentions, but did not comply. The call he received was made at a time when the aforementioned consultancy contract was under heated public attack and the case had been submitted to parliament.<sup>1</sup>

2.6 On 11 December 2008, at around 6.30 a.m., three agents from the National Intelligence Agency (ANR) arrived at the author's home dressed in civilian clothing. They informed him that he was under arrest. They were acting on orders from Mr. K.M., Senior Director of the ANR Department for Internal Security. When the author asked them to present an arrest warrant, the agents pointed their guns at him and handcuffed him in the presence of one of his daughters. They gave him no indication as to the reasons for his arrest, despite his requests. He was taken outside and forced into one of the two jeeps, which were dark-coloured, had tinted glass and no licence plates. Inside the vehicle, one of the agents took from the author 300 dollars that he had on his person.

2.7 The author was taken to a small house that had been requisitioned by ANR; there, he underwent preliminary questioning to confirm his identity. The agents asked him for his full name, whether he had worked previously at Banque Congolaise and whether he had a clear conscience. Still in handcuffs, and while the agents waited for their supervisor to arrive (according to what they told him), he was locked in a small room measuring 3 metres by 4 that was used as a cell, with a tiny window that allowed very little light in. There was a nauseating stench in the room, which had a heavy metal mesh door through which the agents could observe him. The author was subsequently transferred to an ANR detention centre not far from the Prime Minister's office in Kinshasa. His clothes were taken away, leaving him in his underwear, and he was placed in an isolation cell, which he shared with a young woman. The two were kept in the same cells throughout the author's detention (see below). The author had no contact with any other prisoners aside from this woman, except for one evening when a Sudanese prisoner was put in their cell for three hours.

2.8 The cell measured barely 3 square metres. It had no windows and no furniture. The author and the other prisoner slept on the concrete floor. A bucket was left in the room for them to use as a toilet. The author was deprived of food and water during the first two days of his detention. During the days that followed, the young woman shared her meals with him. The room was permeated by a sickening stench. On two occasions, the author and the other prisoner were moved temporarily to other cells that were even smaller and dirtier than the first and had no light at all.

2.9 During the seven days he was detained, the author had no access at any time to a lawyer and was not brought before a judge. He received no medical care and was not allowed to be seen by a doctor, nor was he allowed to receive visits from his family or to have any contact whatsoever with them. He left the cell solely for questioning. During his detention, he was taken almost every day to a separate room where he underwent questioning, during which he was subjected to torture and other ill-treatment.

2.10 Each morning, the author was forced to submerge his head in a bucket full of prisoners' urine. During each interrogation, he was beaten severely, including being kicked and struck with a revolver in the groin and upper thighs. He was also subjected to having metal clamps attached to his testicles and tongue on a regular basis, to choking and to blows to the lower abdomen. During one of the interrogations, a guard

<sup>1</sup> In early January 2011, Banque Congolaise was closed in unexplained circumstances following a forced liquidation.

lifted the author by the throat and then attached a clamp to his tongue. The author was also raped in his cell by three guards. The interrogations were conducted by two unidentified ANR agents in the presence of Mr. K.M., Senior Director of Internal Security, and other agents. A young guard took a photograph of the author, saying it was standard practice.<sup>2</sup>

2.11 On 15 December 2008, the author was taken to a room located on the floor set aside for administrative offices for three and a half hours of questioning; it was during the questioning that an ANR legal officer finally informed him of the accusations made against him. The following day, he was questioned in his cell for four hours in the presence of the other prisoner. This interrogation was extremely violent, as the seven agents present were especially angry because of the public outcry over his detention.

2.12 On the evening of 17 December 2008, three agents entered his cell and told the other prisoner to get undressed. When the author objected, they threatened to tear out his tongue with a pair of pliers. After raping the young woman, they pushed the author to the ground and raped him. This was clearly intended to humiliate and break the author so that he would finally give in and tell them the information he had. Following the rape, the pain in his abdomen worsened seriously and left him writhing in pain on the ground. On 18 December, the pain in his abdomen worsened further and the author heard an agent say to another that it would be better to seek some care for him since they still had not obtained the information they were looking for. The author was taken to the medical centre in Bandal. During the night, the author was able to contact a friend and, thanks to help from the medical staff, who were themselves later subjected to threats, he was able to escape. He headed to the border with the Republic of the Congo, and from there reached Brazzaville on 19 December 2008. ANR then issued a public statement claiming that the author had been set free.

2.13 In early 2009, the author was targeted by a media smear campaign launched by Banque Congolaise. The campaign has tarnished his reputation by spreading a series of lies about the author's activities while at the bank.

2.14 The author travelled to the United Kingdom of Great Britain and Northern Ireland, for which he held a visa, and was granted refugee status there on 2 October 2009. His wife and three daughters were issued visas on 22 September 2010 and arrived in the United Kingdom on 5 October 2010.

2.15 After the author's escape, his family and friends were placed under close surveillance and subjected to acts of intimidation. As a result, the author and his family have very limited contact with their friends in the Democratic Republic of the Congo out of fear that the latter will be targeted by reprisals.

2.16 With regard to exhausting all domestic remedies, on 17 December 2008, the author's brother filed a complaint with the Attorney General of the Republic against ANR for abduction and arbitrary detention. The complaint stated that the author had been arrested by ANR agents, that he had not been brought before a judge after his arrest and that, as he was not allowed to receive any visits from his family, his family was worried about his health and how he was being treated by ANR. The complaint made reference to provisions of the Criminal Code and to relevant international conventions.<sup>3</sup> On 23 December 2008, the author's brother withdrew the complaint in

<sup>2</sup> The photograph was published by *Congo Indépendant* in an article entitled "*L'Ofida sous la coupe d'une mafia euro-congolo-libanaise*" [Congo Customs and Excise Office under thumb of European-Congolese-Lebanese mafia], 18 June 2009 [a copy of the article is included in the author's file].

<sup>3</sup> The date stamp showing receipt of the complaint is 18 December 2008 (a copy of the complaint is included in the author's file).

the wake of acts of intimidation committed against him that endangered his personal safety (anonymous telephone calls and being followed by unidentified individuals). On 23 January 2009, the author's brother decided to reinstate the complaint by way of a letter addressed to the Attorney General in which he stressed the urgent nature of the request. The letter was received by the competent service on 2 February 2009. This complaint clearly indicated the intention to bring action against the General Director of ANR for abduction, arbitrary detention and torture of the author.<sup>4</sup>

2.17 In parallel, the World Organization Against Torture and Association africaine de défense des droits de l'homme publicly denounced what had happened and called on the authorities to take action to desist from further violations of the author's rights and to investigate the parties responsible for those activities.<sup>5</sup>

2.18 On 11 March 2009, a lawyer retained by the author's brother sent a communication to the Attorney General to enquire about the status of his client's complaint.<sup>6</sup> On 17 June 2009, a second lawyer — representing the Association — wrote to the Attorney General pointing out that the complaint filed by the author's brother had not yet been investigated despite counsel having resubmitted the complaint. He requested that an inquiry should be launched immediately into the events in question.

2.19 On 4 April 2011, the lawyer retained by the author's brother wrote again to the Attorney General to follow up on the earlier complaint; receipt of the letter was registered by the Attorney General's office on 7 April 2011. On 24 June 2011, another lawyer for the author sent a request to the Minister of Justice and Human Rights requesting that he enjoin the Attorney General to launch the investigation into the complaint.<sup>7</sup>

2.20 The remedies pursued have exceeded a reasonable time period and, more importantly, have proved to be ineffective.

### **The complaint**

3.1 The author claims that the State party has violated his rights under article 7 in view of the treatment he was subjected to during his detention, which constitutes torture. The author alleges, first, that he was subjected to acute pain and suffering during interrogations that were conducted every day but one. During each interrogation, he was beaten severely, including being kicked and struck with a revolver in the groin and upper thighs. He was also subjected to having metal clamps attached to his testicles and tongue on a regular basis, to choking and to blows to the lower abdomen. During one of the interrogations, a guard lifted the author by the throat and then attached a clamp to his tongue. The author was also raped by the guards. Each morning, he was forced to submerge his head in a bucket of urine. These acts continued until the author had to be hospitalized. These acts were committed by ANR authorities for the purpose of inflicting acute pain in order to extort political information. Evidence of torture was recorded in a 25 August 2009 forensic medical report prepared as part of the procedure that led to the granting of refugee status in the United Kingdom.<sup>8</sup>

<sup>4</sup> A copy of the complaint is included in the author's file.

<sup>5</sup> Copies of the Association's press release of 15 December 2008 and of the urgent appeals from the World Organization Against Torture dated 15 and 23 December 2008 are included in the author's file.

<sup>6</sup> A copy of the letter is included in the author's file.

<sup>7</sup> A copy of the letter is included in the author's file.

<sup>8</sup> The report, a copy of which is included in the author's file, establishes a causal link between the symptoms and marks observed on his body and his allegations of torture.

3.2 The author maintains that the State party has failed to respect article 9 of the Covenant in that: (a) he was subjected to arbitrary detention inasmuch as the arrest was effected without a warrant; (b) he was not informed of the reasons for his arrest; (c) he was not brought before a judge during the time he was detained; (d) he was not able to bring proceedings before a court to decide on the lawfulness of the detention; and (e) he has not received any reparation as the State party's refusal to conduct a criminal inquiry has deprived him of his right to compensation under article 9, paragraph 5, of the Covenant.

3.3 The author also maintains that there was a violation of articles 7 and 9, read in conjunction with article 2, paragraph 2, since the State party did not take the necessary steps to prevent the acts from occurring. Specifically, it could have taken steps to educate civilian and military personnel, to monitor compliance with interrogation methods and rules, and to improve conditions of detention.

3.4 The author also considers that articles 7 and 9, read in conjunction with article 2, paragraph 3, were violated because of the lack of an effective remedy against those violations. Three years went by between the occurrence of the events and the submission of the communication to the Committee without any form of prompt and rapid inquiry being conducted.

3.5 The author further maintains that the conditions of his detention constitute a separate violation of article 10, paragraph 1, of the Covenant. He was held in the ANR detention centre in conditions that were deplorable: the first cell measured no more than 3 metres by 4, was permeated by a nauseating stench and had a tiny window that barely let in any light; agents were able to observe him through a mesh door. He was subsequently taken to a cell measuring 3 square metres, which also had an unbearable smell and had no windows at all. The author and another prisoner slept on a concrete floor and were given a bucket to use as a toilet. Twice they were placed in cells that were even smaller. The author was given no food or water during the first two days of his detention. He was allowed no access to medical care despite the torture he had been subjected to, except on the last day of his detention when the pain was so intense that one of the agents suggested that he should be given some treatment.

3.6 The author was held in incommunicado detention by ANR agents between 11 and 18 December 2008. He was thereby prevented from exercising the rights set out in the Covenant and in the Congolese Constitution, namely the right to be brought promptly before a judge, the right to seek remedy before a court to decide on the lawfulness of his detention and the right to communicate with his family and with legal counsel. The foregoing was a direct consequence of the State's conduct, which should be interpreted as a denial of recognition of the author as a person before the law, in violation of article 16 of the Covenant.

3.7 The author maintains that the State party has not met its obligations under article 17 in that it arbitrarily and unlawfully interfered with the author's privacy, family and home, and that agents of the State are responsible for the attacks on his honour and reputation. The author was arrested at his home without a warrant and was subjected to acts of violence in the presence of one of his daughters. After the author escaped from the State party's territory, his home remained under close surveillance and his wife was subjected to acts of intimidation. On several occasions, ANR agents went to the home to try to find out from her the whereabouts of her husband. This was reported to the United Nations Organization Mission in the Democratic Republic of the Congo, which gave the author's wife a hotline number that she could call in case of serious danger. She was prohibited by ANR from leaving the country to attend a funeral in Brazzaville. In addition, the author considers that the photograph taken of him by a guard during his detention and that was subsequently circulated in the media

as part of a series of untrue accusations made against him, has tarnished his reputation, in violation of article 17 of the Covenant.

3.8 The author was the victim of arbitrary detention, torture and cruel, inhuman and degrading treatment because of opinions he held that were contrary to the interests of senior officials at Banque Congolaise and in the Government of the State party. The Committee has made known its position on the only conditions in which the freedom of expression may be restricted, namely those restrictions that are provided by law and that may be imposed only for one of the purposes set out in paragraphs 3 (a) and (b) of article 19. In the case at hand, the author was detained because of his ideas, but not for reasons allowed by the law, and the impediment to the author's freedom of expression under article 19 was not motivated by the need to guarantee respect for the rights or reputations of others, or for reasons of public order, but rather it was politically motivated by the incidents relating to the mismanagement at Banque Congolaise and involving the responsibility of senior officials at the bank and in the Government.

3.9 The author alleges that the violations of his fundamental rights constitute a violation of article 23, paragraph 1, insofar as the family dynamic has been severely affected over the long term. The principal harm suffered by the author's family is as follows: separation of the family; trauma inflicted upon the author that has had an impact on his family life; acts of intimidation and threats against him and his family; the State party's smear campaign within its territory against the author and his family; and the uncertainty of the author's situation owing to his status as a refugee in the United Kingdom.

3.10 The author fears reprisals against his family for a number of reasons: (a) his family has already been the target of threats and intimidation in the Democratic Republic of the Congo<sup>9</sup> and (b) ANR agents enjoy general impunity throughout the country. The author therefore requests that the Committee request the State party to implement measures to protect members of the author's family in the Democratic Republic of the Congo against any form of reprisal; and that it take all necessary and appropriate measures to ensure the protection of members of the author's family in the Democratic Republic of the Congo during the entire time that the Committee has the author's communication under review.

#### **Lack of cooperation by the State party**

4. By notes verbales dated 27 November 2012, 19 August 2013, 2 December 2013 and 4 February 2014, the State party was requested to submit to the Committee its observations on the admissibility and merits of the communication. The Committee notes that this information has not been received and finds it regrettable that the State party has failed to provide any information with regard to admissibility or the substance of the author's claims. The Committee recalls that article 4, paragraph 2, of the Optional Protocol obliges States parties to examine in good faith all allegations brought against them and to make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are substantiated.<sup>10</sup>

<sup>9</sup> The author refers in particular to his brother, who filed a complaint on his behalf, and to his father, who received visits at his home after the author had escaped. The author further maintains that his sister and brother-in-law have received threats and have since also left the Democratic Republic of the Congo to become refugees in a European country.

<sup>10</sup> Communication No. 2087/2011, *Guneththige v. Sri Lanka*, Views adopted on 30 March 2015, para. 4.



## Issues and proceedings before the Committee

### *Consideration of admissibility*

5.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

5.3 With regard to the obligation to exhaust all domestic remedies, the Committee notes that the State party has not contested the admissibility of any of the claims made. It takes note, in addition, of the information and attachments furnished by the author in connection with the complaints that he filed, through his brother, with the Attorney General of the Republic, none of which appears to have led to an inquiry. It also notes that the author was forced to escape the country and was granted refugee status in the United Kingdom of Great Britain and Northern Ireland, and thus could not be expected to pursue judicial remedies in the Democratic Republic of the Congo. The Committee therefore finds that the provisions of article 5, paragraph 2 (b), of the Optional Protocol do not prevent it from examining the communication.

5.4 With regard to the author's allegations under article 19 and to the fact that he was detained arbitrarily and tortured because of opinions he held that were contrary to the interests of senior officials at Banque Congolaise and in the Government of the State party, the Committee considers that those allegations and their connection with article 19 were not substantiated for purposes of admissibility. The Committee thus considers this part of the communication inadmissible under article 2 of the Optional Protocol.

5.5 With regard to the author's allegation that the State party has not met its obligations under articles 7 and 9, read in conjunction with article 2, paragraph 2, of the Covenant inasmuch as it has not enacted legislation or taken measures to give effect to the rights acknowledged in those provisions, the Committee recalls its jurisprudence, which indicates that the provisions of article 2, which lay down general obligations for States parties, cannot, in and of themselves, give rise to a claim in a communication under the Optional Protocol.<sup>11</sup> The Committee also considers that the provisions of article 2 cannot be invoked jointly with other provisions of the Covenant in a communication under the Optional Protocol, except when the failure by the State party to observe its obligations under article 2 is the proximate cause of a distinct violation of the Covenant directly affecting the individual who claims to be a victim.<sup>12</sup> In the case at hand, the Committee considers that the author has not sufficiently substantiated the claim that examination of the question of whether the State party also violated its general obligations under article 2, paragraph 2, read in conjunction with articles 7 and 9, would be distinct from examining a violation of the author's rights under articles 7 and 9, read alone and in conjunction with article 2, paragraph 3, of the Covenant. Therefore, the Committee considers that the author's claims in this regard are incompatible with article 2 of the Covenant and are thus inadmissible under article 3 of the Optional Protocol.

<sup>11</sup> See communication No. 2202/2012, *Castañeda v. Mexico*, Views adopted on 18 July 2013, para. 6.8; communication No. 1834/2008, *A.P. v. Ukraine*, decision of inadmissibility adopted on 23 July 2012, para. 8.5; and communication No. 1887/2009, *Peirano Basso v. Uruguay*, Views adopted on 19 October 2010, para. 9.4.

<sup>12</sup> See, in particular, communication No. 2030/2011, *Poliakov v. Belarus*, Views adopted on 17 July 2014, para. 7.4; and communication No. 1982/2010, *Mikhalchenko v. Belarus*, Views adopted on 22 July 2015, para. 7.5.

5.6 Having found no other impediment to the admissibility of the communication, the Committee declares the rest of the communication admissible in that it raises questions under articles 7, 9, 10 (para. 1), 16, 17 and 23, as well as under article 2 (para. 3), read in conjunction with articles 7 and 9 of the Covenant, and proceeds to its examination on the merits.

*Consideration of the merits*

6.1 The Committee has considered the communication in the light of all the information made available to it, as required under article 5, paragraph 1, of the Optional Protocol. It recalls that, in the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that they are sufficiently substantiated.

6.2 The Committee takes note of the author's claim under article 7 of the Covenant that the treatment to which he was subjected during his detention from 11 to 18 December 2008 constituted torture. It notes the allegations that, during the interrogations that were carried out over a seven-day period, he was beaten severely, including being kicked and struck with a revolver in the groin and upper thighs; that he was subjected to having metal clamps attached to his testicles and tongue on a regular basis, to choking and to blows to the lower abdomen; that, during one of the interrogations, a guard lifted the author by the throat and then attached a clamp to his tongue; that he was forced to witness the rape of the prisoner who was sharing his cell and that he himself was then raped by the guards; and that, each morning, he was forced to submerge his head in a bucket of urine. The Committee notes as well that these acts reportedly continued to the point that the author had to be hospitalized and that they were committed by ANR authorities. Lastly, the Committee notes that the evidence of torture and the symptoms developed by the author as described in a forensic medical report prepared in the United Kingdom and dated 25 August 2009 corroborate these allegations. In the absence of any information from the State party in that regard, the Committee finds a violation of article 7 of the Covenant with respect to the author.

6.3 With regard to article 9, the Committee takes note of the author's allegations that, on 11 December 2008, he was arrested at his home by ANR agents without being served a warrant and without knowing the reasons for his arrest, that he was held in detention for seven days without being brought before a judge or allowed access to a lawyer and that he was thus unable to bring proceedings before a court to decide on the lawfulness of his detention. In the absence of any information from the State party refuting these allegations, the Committee concludes that the rights guaranteed to the author under article 9 of the Covenant have been violated.

6.4 The Committee notes the author's allegation that articles 7 and 9 of the Covenant, read in conjunction with article 2, paragraph 3, were violated given the lack of an effective remedy against these violations. In the case at hand, three years went by between the occurrence of the events and the submission of the communication to the Committee without any prompt, rapid inquiry having been conducted. The Committee notes that the author, by way of a letter dated 17 December 2008, filed a complaint against the ANR agents for arbitrary detention; that the complaint was filed again, with an additional claim of torture, on 23 January 2009; that letters following up on those complaints were sent on 11 March and 17 June 2009 and on 4 April 2011 to the Attorney General but received no reply; and that, on 24 June 2011, counsel for the author sent a follow-up letter to the Ministry of Justice and Human Rights. The Committee notes that the State party has not provided any explanation for the lack of measures to remedy the alleged violations. The Committee concludes that the State

party has violated the author's rights under articles 7 and 9, read in conjunction with article 2, paragraph 3, of the Covenant.

6.5 The Committee notes as well the author's allegations under article 10, paragraph 1, to the effect that he was held in an ANR detention centre in deplorable conditions, spending seven days in different cells, with the one on the first day measuring 12 square metres, the next one measuring 3 square metres and then two others that were even smaller; and that all the cells were permeated by a nauseating stench. The Committee notes that the author had no access to food or water during the first two days of his detention; that he had a shared bucket to use as his only toilet; that he had no access to daylight; and that he had no access to medical care except on the last day of his detention, despite the acts of torture to which he had been subjected. It also notes the alleged failure of the State party to separate male and female prisoners and to protect their privacy and dignity. In view of the gravity of the allegations concerning the deplorable conditions of detention described by the author in his communication, and in the absence of any information from the State party to refute them, the Committee concludes that there was a separate violation of article 10, paragraph 1, of the Covenant.

6.6 Having reached the above conclusions, the Committee will not examine the claims of a violation of article 16 of the Covenant.

6.7 The Committee notes that the author's arrest at his home took place without a warrant and was accompanied by acts of violence in the presence of one of his daughters; that, after the author had escaped from the State party's territory, his home remained under close surveillance and his wife was subjected to acts of intimidation; that, on various occasions, ANR agents went to the home to try to find out from her the whereabouts of her husband; and that these facts were reported to the United Nations Organization Mission in the Democratic Republic of the Congo. The Committee also notes that the author was forced to flee and to seek refugee status for him and his family in the United Kingdom, resulting in a three-year separation of the family after the author's departure from the Democratic Republic of the Congo. In the absence of observations from the State party and taking into consideration all circumstances of the present case, the Committee considers that these facts constitute arbitrary and unlawful interference with the author's privacy, home and family. Accordingly, the Committee concludes that the State party violated the author's rights under article 17, read alone and in conjunction with article 23, of the Covenant.

7. The Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the information before it discloses a violation of articles 7 and 9 of the Covenant, read alone and in conjunction with article 2, paragraph 3; article 10, paragraph 1; and article 17, read alone and in conjunction with article 23, of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy. The State party is therefore required to provide full reparation to individuals whose Covenant rights have been violated. In the present case, the State party is under an obligation to, *inter alia*, carry out an effective and complete investigation of the facts, prosecute and punish the perpetrators, and provide full reparation and appropriate measures of satisfaction. The State party is also under an obligation to take steps to prevent similar violations in the future.

9. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant 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 180 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Views and to have them translated into the official language of the State party and widely disseminated.

## Appendix

### Individual opinion of Olivier de Frouville, Yadh Ben Achour and Mauro Politi (partly dissenting)

1. We disagree with the Committee's decision not to consider separately the author's complaint under article 16 of the Covenant, according to which "Everyone shall have the right to recognition everywhere as a person before the law". We believe that the treatment suffered by the author clearly justified a finding of a violation of article 16 by the Committee, in addition to the findings of violations on the basis of articles 7, 9 and 10. In the case at hand, the author was subject not only to arbitrary detention in the usual sense, but to secret detention.<sup>a</sup> Such detention is characterized not by the restrictions on information to third parties or on the right of the person deprived of liberty to communicate with counsel of his or her choice or to inform his or her family. All those restrictions are reprehensible and may lead to a finding of a violation of article 9; however, they do not necessarily lead to the removal of the person from the framework of the law. Some countries have legal regimes of *incommunicado* detention, based on such restrictions. But, as objectionable as they may be, those regimes remain established by law and are generally associated with certain guarantees, however minimal.<sup>b</sup> Thus, a person subjected to such a restrictive regime continues to enjoy recognition as a person before the law. Incommunicado detention as practised in the present case, however, lies outside any legal framework. This type of practice means that the person is plunged into a legal vacuum, not only because the deprivation of liberty itself has no legal basis, but because it is organized so that the person does not have access to any remedy, cannot assert any right and is thus completely at the mercy of the persecutor. If a police officer tortures a detainee in a police station, the victim is treated "as an object" at the hands of the torturer, but the idea of the law is still present as a third party in that relationship, because the victim can hold on to the hope of escape and of complaining about the treatment suffered to a superior officer, a judge or to his or her lawyer. In secret detention, however, this possibility is completely absent, leaving nothing but a cruel and intimate exchange between the persecutor and the victim, which reduces the latter to the status of an object: the very idea of the law offering mediation and protection is removed. It is for that reason that the International Convention for the Protection of All Persons from Enforced Disappearance makes the right not to be subjected to secret detention an absolute right,<sup>c</sup> as is the right to recognition as a person before the law in article 16 of the Covenant (see article 4 of the Covenant). It would seem quite preposterous to assert that such treatment could be justified in the circumstances covered by article 4.

2. The question here is not whether the treatment in question may or may not be described as enforced disappearance within the meaning of the International Convention for the Protection of All Persons from Enforced Disappearance, which has not been invoked by the author of the communication. The problem is to decide

<sup>a</sup> See, for example, article 17, paragraph 1, of the International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>b</sup> See, for example, the Committee's concluding observations concerning the sixth periodic report of Spain, on the regime of *incommunicado* detention (CCPR/C/ESP/CO/6, para. 17); and communication No. 1945/2010, *Maria Cruz Achabal Puertas v. Spain*, Views adopted on 27 March 2013, in which the Committee recalls, under the remedies that the State party should adopt, the recommendation made during the consideration of its fifth periodic report that "it should take the necessary measures, including legislative ones, to definitively put an end to the practice of *incommunicado* detention and to guarantee that all detainees have the right to freely choose a lawyer who can be consulted in complete confidentiality and who can be present at interrogations".

<sup>c</sup> International Convention for the Protection of All Persons from Enforced Disappearance, art. 17, para. 1: "No one shall be held in secret detention."

whether the secret detention to which the author was clearly subjected violated his right to recognition as a person before the law, within the meaning of article 16 of the Covenant.

3. In the case in question, the victim was placed in an unofficial place of detention (a requisitioned dwelling house, then a cell located in the administrative offices of the national intelligence agency, ANR). There, he was tortured and placed in a situation of total vulnerability: he understood that there was no recourse and that nobody could know of his whereabouts. For their part, the ANR officers placed him there specifically to ensure such isolation. They made sure not only that their victim had no rights at all, but, and especially, that he could no longer even *claim* to have any rights. The author of the communication might thus have remained there for years without anyone knowing and without ever being able to avail himself of the guarantees which the legal system normally recognizes to any human being. Fortunately for him, he was able to escape from the hospital to which he had been transferred and thus reclaim his dignity.

4. The victim's family did not remain idle: on 17 December 2008, six days after the arrest, the author's brother filed a complaint with the Attorney General against ANR for abduction and arbitrary detention. But, on 23 December 2008, the author's brother was forced to withdraw his complaint following acts of intimidation against him. However, he again filed a complaint on 23 January 2009, that is, after the victim had escaped. That complaint too remained unaddressed. Thus, in this case, the authorities refused to acknowledge the detention of the victim or to provide information on his fate; they also concealed his place of detention, which was an unofficial place of detention. Such non-recognition of the arrest and detention, coupled with the subjective situation of the prisoner, who was aware that he was a "non-person" plunged into an organized legal vacuum, constitutes a violation of article 16 of the Covenant.

5. It should be noted that the practices of ANR in the Democratic Republic of the Congo are well known and have been documented many times by non-governmental organizations and the international human rights bodies. Specifically, the following conclusions were drawn in a report by the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo, written a year and a half before the event in question:

Serious violations of the rights of persons have occurred on the premises and in the cells of the intelligence services [...] and in the cells of military camps [...]. The services concerned are very frequently acting outside their mandate. They most often deny the existence of these places of detention, which are not subject to any control and can also be the starting point for enforced disappearances.<sup>d</sup>

6. Basing its assessment on recent developments that have taken place in its jurisprudence, the Committee should have recognized a violation of article 16 in the case of Mr. Lumbala Tshidika.

<sup>d</sup> United Nations Organization Stabilization Mission in the Democratic Republic of the Congo/Human Rights Division and Child Protection Section, *Arrestations et détentions dans les prisons et cachots de la RDC. Partie I. La légalité des arrestations et des détentions* (Arrests and detentions in the prisons and cells of DRC. Part I. The legality of arrests and detentions), March 2006. For a recent case, see, on the website of Human Rights Watch, article of 27 January 2015 on the arrest and the secret detention of Mr. Ngoyi: five days after Mr. Ngoyi's arrest, a senior official of ANR admitted that Mr. Ngoyi was being detained by its services, but "the authorities have not revealed where he is being detained or allowed him access to his family or a lawyer". Human Rights Watch pointed out that "Enforced disappearances are defined [...] as the arrest or detention of a person by government officials or their agents followed by a refusal to acknowledge the deprivation of liberty, or to reveal the person's fate or whereabouts."

7. It should be recalled that the Committee initially developed its jurisprudence in respect of article 16 in cases of enforced disappearances by referring to the definition of enforced disappearance in article 7, paragraph 2 (i) of the Rome Statute of the International Criminal Court.<sup>e</sup> However, that definition has been criticized with regard to the way it addresses the element of “removing [the persons] from the protection of the law for a prolonged period of time”.<sup>f</sup> Firstly, the definition in the Rome Statute transforms this circumstantial element into special intent; secondly, it adds the element of an unspecified time factor that is difficult to grasp; hence it must be possible to determine that the perpetrator(s) had the “intention of removing [the persons] from the protection of the law for a prolonged period of time”. In any case, the definition in the Rome Statute establishes the elements of an international crime and is intended to engage individual criminal responsibility; while the Covenant, particularly its article 16, concerns the responsibility of the State under international law. In its Views of 10 July 2007 on the cases of *Kimouche v. Algeria* and *Grioua v. Algeria*, the Committee appears to use this definition, although it does transform it when, for the first time, it addresses the question of a violation of article 16 in the context of an enforced disappearance. It “points out that *intentionally* removing a person from the protection of the law *for a prolonged period of time* may constitute a refusal to recognize that person before the law if the victim was in the hands of the State authorities when last seen and, at the same time, if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3), have been systematically impeded.”<sup>g</sup>

8. In the following paragraph, however, the Committee adopts a different standard, more in line with the reality of the violation found:

[The Committee] is of the view that, if a person is arrested by the authorities and there is subsequently no news of that person’s fate, the failure by the authorities to conduct an investigation effectively places the disappeared person outside the protection of the law.<sup>h</sup>

<sup>e</sup> For an internal critical appraisal of this approach, see the individual opinion (dissenting) of Christine Chanut, Rajsoomer Lallah, Michael O’Flaherty, Elisabeth Palm and Hipólito Solari-Yrigoyen attached to the decision on the *Yurich v. Chile* case, communication No. 1078/2002, inadmissibility decision adopted on 2 November 2005, p. 10.

<sup>f</sup> See particularly in the literature: Federico Andreu-Guzmán, “The Draft International Convention on the Protection of All Persons from Forced Disappearance”, *ICJ Review. Impunity, crimes against humanity and forced disappearance*, No. 62-63, Geneva, September 2001; Tullio Scovazzi and Gabriella Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Martinus Nijhoff Publishers, 2007, pp. 273 et seq.; Gabriella Citroni, “When is it enough? Enforced Disappearance and the ‘Temporal Element’”, *Droits fondamentaux*, No. 9, January 2011-December 2012. See also the report submitted by Manfred Nowak, independent expert for the Commission on Human Rights (E/CN.4/2002/71), para. 69; and the general comment of the Working Group on Enforced or Involuntary Disappearances on the definition of enforced disappearance (A/HRC/7/2), paragraph 5. On the *travaux préparatoires* for the International Convention for the Protection of All Persons from Enforced Disappearances and the rejection of the element of intent in the definition of enforced disappearance: Marthe Lot Vermeulen, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, *Intersentia*, 2012, p. 56 et seq.; Olivier de Frouville, “*La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: Les enjeux juridiques d’une négociation exemplaire*” (The International Convention for the Protection of All Persons from Enforced Disappearance: the legal stakes in model negotiations), *Droits fondamentaux*, No. 6, January-December 2006, pp. 16 and 17.

<sup>g</sup> See communication No. 1328/2004, *Messaouda Kimouche née Cheraitia and Mokhtar Kimouche v. Algeria*, Views adopted on 10 July 2007, para 7.8; and communication No. 1327/2004, *Grioua v. Algeria*, Views adopted on 10 July 2007, para. 7.8. See also communication No. 1495/2006, *Zohra Madaoui v. Algeria*, Views adopted on 28 October 2008. (Emphasis added.)

<sup>h</sup> Views in the cases of *Kimouche v. Algeria* and *Grioua v. Algeria*, cited in the previous note, para. 7.9.

9. In its Views adopted on 26 July 2010 in the case of *Benaziza v. Algeria*, the Committee replaces the reference to the Rome Statute with a reference to the International Convention for the Protection of All Persons from Enforced Disappearance, which had just been adopted by the General Assembly. Although the definition from the Convention mentions neither the element of special intent, nor a time factor, the Committee still does not relinquish either of these. In fact, in paragraph 9.8 of the Views, it refers to both the standards mentioned above, which are largely contradictory.<sup>i</sup>

10. However, from October 2010 onward, the Committee “simplifies” the drafting of its views: firstly, it deletes any reference to texts other than the Covenant — whether the Rome Statute or the International Convention for the Protection of All Persons from Enforced Disappearance; it also removes the latter from the paragraph devoted to article 16 and retains only the restrictive standard based on the definition in the Rome Statute, namely the *intention* to remove the person from the protection of the law for a *prolonged period of time*, to which, as noted, it adds a further condition, namely that the efforts of the relatives of the disappeared person to gain access to potentially useful remedies, including before the courts (Covenant, art. 2, para. 3), must have been systematically hampered.<sup>j</sup>

11. If that standard is taken as a reference, it could indeed seem doubtful that Mr. Lumbala Tshidika was the victim of a violation of article 16. Firstly, it is very difficult to demonstrate the intention of ANR to remove him from the protection of the law for a prolonged period of time, and in any case, since the author did manage to escape, any such demonstration is — fortunately — rendered impossible.<sup>k</sup> Secondly, it is difficult to assert that the efforts of his relatives were “systematically hampered”: in this case, the judicial authorities quite simply did not respond to the complaints filed by the author’s brother, while any direct application to ANR was clearly not an option for fear of reprisals.

12. It should however be noted that the Committee’s jurisprudence has evolved recently and, in our opinion, that should have led the Committee to find a violation of article 16.

13. In its Views on the case of *Tharu et al. v. Nepal*, adopted on 3 July 2015, the Committee decided to drop the time factor derived from the definition in the Rome

<sup>i</sup> See communication No. 1588/2007, *Benaziza v. Algeria*, Views adopted on 26 July 2010; and communication No. 1640/2007, *Abdelhakim Wanis El Abani (El Ouerfeli) v. Libyan Arab Jamahiriya*, Views adopted on 26 July 2010.

<sup>j</sup> See, for example, communication No. 1751/2008, *Adam Hassan Aboussedra v. Libyan Arab Jamahiriya*, Views adopted on 25 October 2010, para. 7.9; and communication No. 1811/2008, *Taous Djebbar and Saadi Chihoub v. Algeria*, Views adopted on 31 October 2011, para. 8.9. Application of the time factor has led to heated debate within the Committee, as evidenced in opinions attached to the Views in the case of *Tahar Mohamed Aboufaied v. Libya*, communication No. 1782/2008, Views adopted on 21 March 2012, individual opinion (concurring) of Sir Nigel Rodley; individual opinion (partly dissenting) of Walter Kaelin; individual opinion (partly dissenting) of Fabián Salvioli.

<sup>k</sup> On this point, see the opinion of Fabián Salvioli on the case of *Aboufaied v. Libya* cited in the previous note, on the element of time in the Rome Statute definition: “it should be noted that there is no reference to the duration of detention; it merely has to be proved that the perpetrator intended to remove the person from the protection of the law for a certain length of time. Thus, for example, if a person is detained or abducted by or with the acquiescence of agents of the State, no information is provided on the place of detention and a few days later the person concerned is found dead, or even if he succeeds in escaping from captivity and is reunited with his family, it is difficult to maintain that he was not the victim of enforced disappearance, as has happened in numerous cases in many countries of the world, particularly in South America during the military dictatorships.”



Statute, although it did retain the element of intention and the idea that efforts by relatives to exercise remedies must be “systematically hampered”.<sup>1</sup>

14. But, in its Views adopted on 9 July 2015 in the case of *Rosa María Serna et al. v. Colombia*, the Committee downplayed the importance of the latter condition, considering it as one factor among others in establishing refusal to recognize the victim as a person before the law.<sup>m</sup>

15. It follows from these two developments that:

- Neither the duration of the period during which a person is removed from the protection of the law nor even the intention to remove a person from the protection of the law *for a prolonged period of time* is a criterion for a violation of article 16;
- It is, rather, the removal of the person from the protection of the law which *in itself* constitutes a refusal to recognize that person as a person before the law, and the fact that the removal from the protection of the law is made evident — especially for the relatives — by the authorities’ behaviour, which may take the form of either action (a “systematic” hampering of efforts to obtain access to remedies, an explicit refusal, etc.) or omission (lack of response to complaints or any other discretionary or judicial remedies).

16. In the light of these elements, we consider that the Committee should, in this case, have ruled on a violation of article 16 and found a violation.

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<sup>1</sup> See communication No. 2038/2011, *Chhedulal Tharu et al. v. Nepal*, Views adopted on 3 July 2015, para. 10.9: “With regard to the alleged violation of article 16, the Committee considers that the intentional removal of a person from the protection of the law constitutes a denial of the right to recognition everywhere as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (see art. 2 (3) of the Covenant), have been systematically impeded.” See also the individual opinion (concurring) of Olivier de Frouville and the individual opinion of Anja Seibert-Fohr.

<sup>m</sup> Communication No. 2134/2012, *Rosa María Serna et al. v. Colombia*, Views adopted on 9 July 2015, para. 9.5: “The Committee is of the view that the intentional removal of a person from the protection of the law constitutes a refusal to recognize that person as a person before the law, *in particular* if the efforts of his or her relatives to obtain access to effective remedies have been systematically impeded.” (Emphasis added.)