

HUMAN RIGHTS COMMITTEE

Diergaardt et al. v. Namibia

Communication No. 760/1997

7 July 1998

CCPR/C/63/D/760/1997 */

ADMISSIBILITY

Submitted by: Members of the Rehoboth Baster Community (Represented by Dr. Y. J. D. Peeters)

Alleged victim: The authors

State party: Namibia

Date of communication: 17 November 1996

Date of present decision: 7 July 1998

The Human Rights Committee, acting through its Working Group pursuant to rule 87, paragraph 2, of the Committee's rules of procedure, adopts the following decision on admissibility.

Decision on admissibility

1. The authors of the communication, are J.G.A. Diergaardt, Captain of the Rehoboth Baster Community, 1/ D.J. Izaaks, Captain a.i. of the Rehoboth Baster Community, Willem van Wijk and Jan Edward Stumpfe, members of the Legislative Council of the Rehoboth Baster Community, Andreas Jacobus Brendell, Speaker of the Rehoboth Baster Community, and J. Mouton and John Charles Alexander McNab, members of the Rehoboth Baster Community. They present the communication on their own behalf and on behalf of the Rehoboth Baster Community and claim to be a victim of a violation by Namibia of articles 1, 14, 17, 25(a) & (c), 26 and 27 of the Covenant. They are represented by Dr. Y.J.D. Peeters, their international legal counsel.

The facts as submitted by the authors

2.1 The members of the Rehoboth Baster Community are descendants of Khoi and Afrikaans settlers, who originally lived in the Cape, but moved to their present territory in 1872. They were

governed by their 'paternal laws', which provided for the election of a Captain, and for rights and duties of citizens. At present, the community numbers some 35,000 people and the area they occupy (south of Windhoek) has a surface of 14,216 square kilometres. In this area the Basters developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centres.

2.2 Their independence continued throughout the German colonial reign of Namibia, and was recognized by South Africa when it became the mandatory for South West Africa. However, in 1924, because of disagreement among the Basters about an agreement concluded with South Africa concerning the administration of the district of Rehoboth, proclamation No. 31 was enacted whereby all powers of the Captain, the courts and officials appointed by the Council, were transferred to the Magistrate and his Court, thereby suspending the agreement on self-government. After the peace was restored, a gradual process of restoring some form of local government was introduced by the establishment of an Advisory Council members of which were elected by the community.

2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, under the United Nations Transitional Administration, the Rehoboth Baster accepted under duress and extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN General Assembly resolution nr. 435. In the motion, adopted by the Council of Rehoboth on 30 June 1989, the Administrator General was requested to administer the territory as an agent of the Captain and not to make any law or regulation applicable to Rehoboth without consent of the Captain, the Cabinet and the Council; at the end of the mandate the Government of Rehoboth would resume authority. The proclamation by the Administrator-General on the transfer of powers of legislative authority and government of Rehoboth, of 30 August 1989, suspends the powers of the Legislative Council and the Captain's Council of Rehoboth "until the date immediately before the date upon which the territory becomes independent". It is therefore submitted that the effect of this transfer expired on the day before independence of Namibia, and that thus de jure on 20 March 1990, the traditional legal order and Law 56 of 1976 were in force on the territory of Rehoboth. A resolution restoring the power of the Captain, his Council and the legislative Council was adopted by the Rehoboth People's Assembly on 20 March 1990.

2.5 The authors submit that the Government of Namibia did not recognize their independence and the return to the status quo ante, but expropriated all communal land of the community through application of schedule 5 of the Constitution, which reads:

"(1) All property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1990) or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent

Namibia, shall vest in or be under the control of the Government of Namibia.
...”

According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community's locus standi. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community's claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters' appeal. With this, it is submitted that all domestic remedies have been exhausted.

The complaint

3.1 Counsel submits that the Government continues to confiscate the assets of the Rehoboth Basters, and that the Captain and other leaders and organizations were evicted from and deprived of the captain's residence, the administrative offices, the community hall, the communal land and of the assets of the Rehoboth Development Corporation. Counsel submits that this policy endangers the traditional existence of the community as a collective of mainly cattle raising farmers. He explains that in times of draught (as at present) the community needs communal land, on which pasture rights are given to members of the community on a rotating basis. The expropriation of the communal land and the consequential privatization of it, as well as the overuse of the land by inexperienced newcomers to the area, has led to bankruptcy for many community farmers, who have had to slaughter their animals. As a consequence, they cannot pay their interests on loans granted to them by the Development Corporation (which used to be communal property but has now been seized by the Government), their houses are then sold to the banks and they find themselves homeless. Counsel emphasizes that the confiscation of all property collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity. This is said to constitute a violation of article 27.

3.2 In this context, the authors claim to be victims of a violation by the Government of Namibia of article 1 of the Covenant. They point out that the Namibian High Court has recognized them as a distinct community with a legal basis. They claim that their right to self-determination inside the republic of Namibia (so-called internal self-determination) has been violated, since they are not allowed to pursue their economic social and cultural development, nor are they allowed to freely dispose of their community's national wealth and resources. By enactment of the law on regional government 1996, the 124 year long existence of Rehoboth as a continuously organized territory was brought to an end. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. Counsel claims that this constitutes a violation of article 25 of the Covenant.

3.3 The authors further claim a violation of article 14 of the Covenant, since they were forced to

use English throughout the court proceedings, a language they do not normally use and in which they are not fluent. Moreover, they had to provide sworn translation of all documents supporting their claims (which were in Afrikaans) at very high cost. They claim therefore that their right to equality before the Courts was violated, since the Court rules advantage English speaking citizens.

3.4 In this context, counsel points out that article 3 of the Constitution declares English to be the only official language in Namibia. Paragraph 3 of this article allows for the use of other languages on the basis of legislation by Parliament. Counsel states that seven years after independence such a law has still not been passed, and claims that this constitutes discrimination against non-English speakers. According to counsel, attempts by the opposition to have such legislation enacted have been thwarted by the Government which has declared to have no intention to take any legislative action in this matter. In this connection, counsel refers to the 1991 census, according to which only 0.8 percent of the Namibian population uses English as mother tongue.

3.5 As a consequence the authors have been denied the use of their mother tongue in administration, 2/ justice, education and public life. This is said to be a violation of their rights under articles 26 and 27 of the Covenant.

3.6 The authors further claim a violation of article 17 of the Covenant, since they and their cattle have been expelled from the lands which they held in collective property.

3.7 Counsel requests the Committee for interim measures of protection under rule 86 of the rules of procedure. He requests that the Committee demand that no expropriation, buying or selling of the community lands take place, that no rent be collected from tenants, and that no herds be prevented from grazing on the community lands while the communication is under consideration by the Committee.

The State party's observations and counsel's comments thereon

4. By note of 6 November 1997, the State party confirms that domestic remedies have been exhausted. The State party denies however, that it has violated international obligations. The State party submits that it is prepared to supply any relevant information which the Committee may request, either orally or in writing.

5. In his comments on the State party's submission, counsel notes that the State party concedes that domestic remedies have been exhausted and that it does not adduce any other grounds on the basis of which the communication should be inadmissible. Counsel agrees that the matter should be considered on its merits.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

6.2 The Committee has ascertained, as required under article 5, paragraph 2(a), of the Optional

protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

6.3 The Committee notes that the State party has agreed that all domestic remedies have been exhausted. The Committee finds the communication admissible and considers that the question whether or not the State party has violated its obligations under the Covenant in the authors' case should be examined on the merits.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible;

(b) that, in accordance with article 4, paragraph 2, of the Optional Protocol, the State party shall be requested to submit to the Committee, within six months of the date of transmittal to it of this decision, written explanations or statements clarifying the matter and the measures, if any, that may have been taken by it;

(c) that any explanations or statements received from the State party shall be communicated by the Secretary-General under rule 93, paragraph 3, of the rules of procedure to the authors' counsel, with the request that any comments which he may wish to make should reach the Human Rights Committee, in care of the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, within six weeks of the date of the transmittal;

(d) that this decision shall be communicated to the State party and to the authors' counsel.

[Adopted in English, French and Spanish, the English text being the Original version.]

*/ All persons handling this document are requested to respect and observe its confidential nature.

1/ On 10 May 1998, the Committee was informed about the passing away of Captain Diergaardt, and that Mr. D. Iszaaks had been appointed acting chief.

2/ Counsel provides a copy of a circular issued by the Regional Commissioner, Central Region, Rehoboth, dated 4 March 1992, in which the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded.