HUMAN RIGHTS COMMITTEE

Hopu and Bessert v. France

Communication No. 549/1993

30 October 1995

CCPR/C/55/D/549/1993*

ADMISSIBILITY

Submitted by: Francis Hopu and Tepoaitu Bessert [represented by counsel]

Alleged victims: The authors

State party: France

Date of communication: 4 June 1993 (initial submission)

Documentation references: Prior decisions - Special Rapporteur's rule 91 decision, transmitted to the State party on 11 June 1993 (not issued in document form) - CCPR/C/51/D/549/1993 (Decision on admissibility, dated 30 June 1994)

Date of present decision: 30 October 1995

On 30 October 1995, the Human Rights Committee adopted the following decision to amend its decision on admissibility on 30 June 1994 in respect of communication No. 549/1993.

Decision to amend decision on admissibility

1. The authors of the communication are Francis Hopu and Tepoaitu Bessert, both inhabitants of Tahiti, French Polynesia. They claim to be the victims of violations by France of articles 2, paragraphs 1 and 3 (a), 14, 17, paragraph 1, and 23, paragraph 1 and 27 of the International Covenant on Civil and Political Rights. They are represented by counsel, who has provided a duly signed power of attorney.

The facts as submitted by the authors:

2.1 The authors are the descendants of the owners of a land tract (approximately 4.5 hectares) called Tetaitapu, in Nuuroa, on the island of Tahiti. They argue that their ancestors were unjustly

dispossessed of their property by jugement de licitation of the Tribunal Civil d'Instance of Papeete on 6 October 1961. Under the terms of the judgment, ownership of the land was awarded to the Société Hôtelière du Pacifique Sud (SHPS). Since the year 1988, the Territory of Polynesia is the sole shareholder of this company.

2.2 In 1990, the SHPS leased the land to the Société Hôtelière d'Etude et de Promotion Hôtelière, which in turn subleased it to the Société Hôtelière RIVNAC. RIVNAC seeks to begin construction work on a luxury hotel complex on the site, which borders a lagoon, as soon as possible. Some preliminary work - such as the felling of some trees, cleaning the site of shrubs, fencing off the ground - has been carried out.

2.3 The authors and other descendants of the owners of the land peacefully occupied the site in July 1992, in protest against the planned construction of the hotel complex. They contend that the land and the lagoon bordering it represent an important place in the history, the culture and the life of Polynesians. They add that the land encompasses the site of the pre-European burial ground and that the lagoon remains a traditional fishing ground for Polynesians and provides the means of subsistence for some thirty families living next to the lagoon.

2.4 On 30 July 1992, RIVNAC seized the Tribunal de Première Instance of Papeete with a request for an interim injunction; this request was granted on the same day, when the authors and occupants of the site were ordered to leave the ground immediately and to pay 30, 000 FPC (Francs Pacifique) to RIVNAC. On 29 April 1993, the Court of Appeal of Papeete confirmed the injunction and reiterated that the occupants had to leave the site immediately. The authors were notified of the possibility to appeal to the Court of Cassation within one month of the notification of the order. Apparently, they have not done so.

2.5 The authors contend that the pursuit of the construction work would destroy their traditional burial grounds and ruinously affect their fishing activities. They add that their expulsion from the land is now imminent, and that the High Commissioner of the Republic, who represents France in Polynesia, will soon resort to police force to evacuate the land and to make the start of the construction work possible. In this context, the authors note that the local press reported that up to 350 police officers (including CRS - Corps Républicain de Sécurité) have been flown into Tahiti for that purpose. The authors therefore ask the Committee to request interim measures of protection, pursuant to rule 86 of the Committee's rules of procedure.

The complaint:

3.1 The authors allege a violation of article 2, paragraph 3(a), juncto 14, paragraph 1, on the ground that they have not been able to petition lawfully established courts for an effective remedy. In this connection, they note that land claims and disputes in Tahiti were traditionally settled by indigenous tribunals ("tribunaux indigènes"), and that the jurisdiction of these tribunals were recognized by France when Tahiti came under French sovereignty in 1880. However, it is submitted that since 1936, when the so-called High Court of Tahiti ceased to function, the State party has failed to take appropriate measures to keep these indigenous tribunals in operation; as a result, the authors submit, land claims have been haphazardly and unlawfully adjudicated by civil and administrative tribunals.

3.2 The authors further claim a violation of articles 17, paragraph 1, and 23, paragraph 1, on the ground that their forceful removal from the disputed site and the realization of the hotel complex would entail the destruction of the burial ground, where members of their family are said to be buried, and because such removal would interfere with their private and family lives.

3.3 The authors claim to be victims of a violation of article 2, paragraph 1. They contend that Polynesians are not protected by laws and regulations (such as articles R 361 (1) and 361 (2) of the Cemetery Act, as well as legislation concerning natural sites and archaeological excavations) which have been issued for the territoire métropolitain and which are said to govern the protection of burial grounds. They thus claim to be victims of discrimination.

3.4 Finally, the authors claim a violation of article 27 of the Covenant, since they are defined the right to enjoy their own culture.

The Committee's admissibility decision:

4.1 During its 51st session, the Committee examined the admissibility of the communication. It noted with regret that the State party had failed to put forth observations in respect of the admissibility of the case, in spite of three reminders addressed to it between October 1993 and May 1994.

4.2 The Committee began by noting that the authors could have appealed the injunction of the Court of Appeal of 29 April 1993 to the Court of Cassation. However, had this appeal been lodged, it would have related to the obligation to vacate the land the authors held occupied, and the possibility to oppose construction of the planned hotel complex; but not to the issue of ownership of the land. In the latter context, the Committee noted that so-called "indigenous tribunals" would be competent to adjudicate land disputes in Tahiti, pursuant to the decrees of 29 June 1880 ratified by the French Parliament on 30 December 1880. There is no indication that the jurisdiction of these courts was ever formally repudiated by the State party; rather, their operation appears to have fallen into disuse, and the authors' claim to this effect had not been contradicted by the State party. Nor had the authors' contention that land claims in Tahiti are adjudicated "haphazardly" by civil or administrative tribunals been contradicted. In the circumstances, the Committee found that there were no effective domestic remedies for the authors to exhaust.

4.3 In respect of the claim under article 27 of the Covenant, the Committee recalled that France, upon acceding to the Covenant, had declared that "in the light of article 2 of the Constitution of the French Republic, ... article 27 is not applicable as far as the Republic is concerned". It confirmed its previous jurisprudence that the French "declaration" on article 27 operated as a reservation and; accordingly, concluded that it was not competent to consider complaints directed against France under article 27 of the Covenant.[1]

4.4 The Committee considered the claims made under the other provisions of the Covenant to have been substantiated, for purposes of admissibility, and on 30 June 1994, declared the communication admissible
in so far as it appeared to raise issues under articles 14, paragraph 1, 17, paragraph 1, and 23, paragraph 1, of the Covenant.

The State party's request for review of admissibility and information on the merits:

5.1 In two submissions under article 4, paragraph 2, of the Optional Protocol dated 7 October 1994 and 3 April 1995, the State party contends that the communication is inadmissible and requests the Committee to review its decision on admissibility, pursuant to rule 93, paragraph 4, of the rules of procedure. It acknowledges that its submission is belated in as much as admissibility considerations are concerned but attributes the delay to the shortness of the deadline imparted initially and the time it took to obtain information from French Polynesia.

5.2 The State party contends that the authors failed to exhaust domestic remedies considered by the State party to be effective. Thus, concerning the authors' argument that they were illegally dispossessed of the land subleased to RIVNAC and that only indigenous tribunals are competent to hear their complaint, it notes that no French tribunal has at any moment been seized of any of the claims formulated by Messrs. Hope and Bessert. Thus, they could have, at the time of the sale of the contested grounds and of the proceedings leading to the judgment of the Tribunal of Papeete of 6 October 1961, challenged the legality of the procedure initiated or else the competence of the tribunal. Any decision made on such a challenge would have been susceptible of appeal. However, the judgment of 6 October 1961 was never challenged, and therefore has become final.

5.3 Furthermore, at the time of the occupation of the grounds in 1992-1993, it was fully open to the authors, according to the State party, to intervene in the proceedings between RIVNAC and the Association "IA ORA O NU'UROA". This procedure, known as "tierce opposition", enables every individual to oppose a judgment which affects/infringes his or her rights, even if he/she is not a party to the proceedings. The procedure of "tierce opposition" is governed by articles 218 et seq. of the Code of Civil Procedure of French Polynesia. The State party notes that the authors could have intervened ("... auraient pu former tierce opposition") both against the decision of the Tribunal of First Instance of Papeete and the judgment of the Court of Appeal of Papeete, by challenging the title of RIVNAC to the contested grounds and by refuting the competence of these courts.

5.4 The State party emphasizes that the competence of a tribunal can always be challenged by a complainant. Article 65 of the Code of Civil Procedure of French Polynesia stipulates that a complainant challenging the jurisdiction of the court must indicate the jurisdiction he considers to be competent ("s'il est prétendu que la juridiction saisie est incompétente..., la partie qui soulève cette exception doit faire connaître en même temps et à peine d'irrecevabilité devant quelle juridiction elle demande question l'affaire soit portée").

5.5 According to the State party, the authors could equally, in the context of "tierce opposition", have argued that the expulsion from the grounds claimed by RIVNAC constituted a violation of their right to privacy and their right to a family life. The State party recalls that the provisions of the Covenant are directly applicable before French tribunals, articles 17 and 23 could well have been invoked in the present case. In respect of the claims under articles 17 and 23, paragraph 1, therefore, the State party also argues that domestic remedies have not been exhausted.

5.6 Finally, the State party argues that judicial decisions made in the context of "tierce opposition" proceedings can be appealed in the same way as judgments of the same court ("... les jugements rendus sur tierce opposition sont susceptibles des mêmes recours question les décisions de la

juridiction dont ils émanent"). If the authors had challenged the judgment of the Court of Appeal of Papeete of 29 April 1993 on the basis of "tierce opposition", any decision adopted in respect of their challenge could have been appealed to the Court of Cassation. In this context, the State party notes that pursuant to article 55 of the French Constitution of 4 June 1958, the Covenant provisions are incorporated into the French legal order and are given priority over simple laws. Before the Court of Cassation, the authors could have raised the same issues they argue before the Human Rights Committee.

5.7 In the State party's opinion, the authors do not qualify as "victims" within the meaning of article 1 of the Protocol. Thus, in respect of their claim under article 14, they have failed to adduce the slightest element of proof of title to the grounds, or of a right to occupancy of the grounds. As a result, their expulsion from the grounds cannot be said to have violated any of their rights. According to the State party, similar considerations apply to the claims under articles 17 and 23 (1). Thus, the authors failed to show that the human remains excavated on the disputed grounds in January 1993 or before were in any way the remains of members of their family or of their ancestors. Rather, forensic tests undertaken by the Polynesian Centre for Human Sciences have revealed that the skeletons are ver old and pre-date the arrival of Europeans in Polynesia.

5.8 Finally, the State party contends that the communication is inadmissible ratione materiae and ratione temporis. It considers that the authors' complaint relates in reality to a dispute over property. The right to property not being protected by the Covenant, the case is considered inadmissible under article 3 of the Optional Protocol. Furthermore, the State party observes that the sale of the grounds occupied by the authors was procedurally correct, as decided by the Tribunal of First Instance of Papeete on 6 October 1991. The case thus is based on facts which preceded the entry into force both of the Covenant and of the Optional Protocol for France, and therefore considered to be inadmissible ratione temporis.

5.9 Subsidiarily, the State party offers the following comments on the merits of the authors' allegations: on the claim under article 14, the State party recalls that King Pomare V who, on 29 June 1880, had issued a proclamation concerning the maintenance of indigenous tribunals for land disputes, himself co-signed declarations on 29 December 1887 relating to the abolition of these tribunals. The declarations on 29 December 1887 were in turn ratified by article 1 of the Law of 10 March 1891. Since then, the State party argues, the ordinary tribunals are competent to adjudicate land disputes. Contrary to the authors' allegations, land disputes are given specialized attention by the Tribunal of First Instance of Papeete, where two judges specialized in the adjudication of land disputes each preside over two court sessions reserved for such disputes each month. Furthermore, it is argued that the right of access to a tribunal does not imply a right of unlimited choice of the appropriate judicial forum for the complainant - rather, the right to access to a tribunal must be understood as a right to access to the tribunal competent to adjudicate a given dispute.

5.10 As to the claims under articles 17 and 23, paragraph 1, the State party recalls that not even the authors claim that the skeletons discovered on the disputed grounds belong to their respective families or their relatives, but rater to their "ancestors" in the broadest sense of the term. To subsume the remains from a grave, however old and unidentifiable they are, under the notion of "family", would be an abusively extensive and unpracticable interpretation of the term.

The authors' comments on the State party's submission under article 4, paragraph 2:

6.1 In their comments, the authors refute the State party's argument that effective domestic remedies remain available to them. They request that the Committee dismiss the State party's challenge to the admissibility of the communication as belated.

6.2 The authors reiterate that they are not invoking a right to property but the right to access to a tribunal and their right to a private and family life. They therefore reject the State party's argument related to inadmissibility ratione materiae and add that their rights were violated at the time of submission of their communication, i.e. in June 1993 and after the entry into force of the Covenant and the Optional Protocol for France.

6.3 The authors submit that they must be regarded as "victims" within the meaning of article 1 of the Optional Protocol, since they consider that they have the right to be heard before the indigenous tribunal competent for land disputes in French Polynesia, a right denied to them by the State party. They contend that the State party is estopped from criticizing them for not having invoked their right to property or a right to occupancy of the disputed grounds when precisely their access to the indigenous tribunal competent for adjudication of such disputes was impossible. Similarly, they consider themselves to be "victims" in respect of claims under article 17 and 23 (1), arguing that it would have been for the courts and not the French Government to prove the existence or absence of family or ancestral links between the human remains discovered on the disputed site and the authors respectively their families.

6.4 On the requirement of exhaustion of domestic remedies, the authors recall that they were not parties to the procedure between the Société Hôtelière RIVNAC and the Association IA ORA O NU'UROA; not being parties of the proceedings, they were not in the position to raise the question of the tribunal's competence. They reiterate that they are faced with a situation in which their claims are not justiciable, given that the French Government has abolished the indigenous tribunals which it had agreed to maintain in the Treaty of 1881. The same argument is said to apply to the possibility of cassation: as the authors were not parties to the procedure before the Court of Appeal of Papeete of 29 April 1993, they could not apply for cassation to the Court of Cassation. Even assuming that they would have had the possibility of appealing to the Court of Cassation, they argue, this would not have been an effective remedy, since that court could only have concluded that the tribunals seized of the land dispute had no competence in the matter.

6.5 the authors reconfirm that only the indigenous tribunals remain competent to adjudicate land disputes in French Polynesia. Rather than refuting this conclusion, the declarations of 29 December 1887 are said to confirm it, since they stipulate that the indigenous tribunals were to be abolished once the disputes for which they had been established had been settled ("Les Tribunaux indiqènes, dont le maintien avait été stipulé à l'acte d;annexion de Tahiti à la France, seront supprimés dès que les opérations relatives à la délimitation de la propriété auxquelles elles donnent lieu auront été vidées"). The authors question the validity of the declarations of 29 December 1887 and add that as land disputes continue to exist in Tahiti, a fact conceded by the State party itself (paragraph 5.9 above), it must be assumed that the indigenous tribunals remain competent to adjudicate them. Only thus can it be explained that the Haute Cour de Tahiti continued to hand down judgments in these disputes until 1934.

Post-admissibility considerations:

7.1 The Human Rights Committee has considered the communication in the light of all the information provided by the parties, as required to do under article 5, paragraph 1, of the Optional Protocol. It has noted the State party's request that the decision of admissibility be reviewed pursuant to rule 93, paragraph 4, of the Committee's rules of procedure, as well as the authors' arguments in this respect.

7.2 The Committee has taken note of the State party's submission of 7 October 1994 that it did not submit its admissibility observations in time because of the complexity of the case and the short deadlines imparted to it. It notes, however, that the State party did not react to three reminders addressed to it on 1 October and 15 December 1993 and 3 May 1994, that it took the State party 16 months, instead of two, to comment on the admissibility of the authors' claims and that the State party's first submission in the case was made three months after the adoption of the decision on admissibility. Pursuant to article 5, paragraph 1, of the Optional Protocol, the Committee considers a communication in the light of all the information made available to it by the parties. This applies also at the time when the Committee determines whether the requirements of admissibility have been met. In the absence of any comments from the State party at that time, the Committee must reply on the information provided by the author and silence on the part of the State party militates in favour of concluding that the State party agrees that the admissibility requirements have been satisfied. In the circumstances, the Committee finds that it is not precluded from considering the authors' claims on the merits.

7.3 The Committee has, however, on the basis of the State party's request, taken the opportunity to reconsider its admissibility decision of 30 June 1994. It notes the authors' claim that they are discriminated against because French Polynesians are not protected by laws and regulations which were issued for the territoire métropolitain, especially in so far as protection of burial grounds is concerned. This claim, which may raise issues under article 26, was not specifically covered by the decision of 30 June 1994; the Committee considers however that it should be declared admissible and examined on its merits. The State party is, accordingly, invited to submit to the Committee information and observations in respect of the authors' claim of discrimination. If the State party seeks to challenge the admissibility of the claim, it is invited to join its observations in this respect to those on the substance of the claim, and the Committee will address them when considering the merits of the present communication.

8. Under article 4, paragraph 2, of the Optional Protocol, the State party is invited to submit to the Committee the information and observations requested in paragraph 7.3 above within six months of the date of this decision.

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

1/ Jurisprudence.

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