

HUMAN RIGHTS COMMITTEE

Bordes and Temeharo v. France

Communication No. 645/1995**

22 July 1996

CCPR/C/57/D/645/1995*

ADMISSIBILITY

Submitted by: Mrs. Vaihere Bordes and Mr. John Temeharo [represented by counsel]

Victims: The authors

State party: France

Date of communication: 26 July 1995 (initial submission)

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

Meeting on 22 July 1996,

Adopts the following:

Decision on admissibility

1. The authors of the communication are Vaihere Bordes, Noël Narii Tauira and John Temeharo, all French citizens residing in Papeete, Tahiti, French Polynesia. All claim to be victims of violations by France of articles 6 and 17 of the International Covenant on Civil and Political Rights. The authors are represented by counsel.

Facts and claim:

2.1 On 13 June 1995, French President Jacques Chirac announced that France intended to conduct a series of underground nuclear tests on the atolls of Mururoa and Fangataufa in the South Pacific. The authors challenge the decision of President Chirac, which they claim is in clear violation of international law. They contend that the tests represent a threat to their right to life and their right not to be subjected to arbitrary interference with their privacy and

their family life. After the submission of the communication, six underground nuclear tests were carried out between 5 September 1995 and the beginning of 1996. According to the State party, these underground tests would be the last to be carried out by France, as President Chirac has announced France's intention to accede to the Comprehensive Nuclear Test Ban Treaty, which is scheduled to be adopted in Geneva in late 1996.

2.2 The authors recall the General Comments of the Human Rights Committee on the right to life, in particular General Comment 14[23] on nuclear weapons, and add that numerous studies show the danger to life caused by nuclear tests, on account of the direct effects of the radiation on the health of individuals living in the test area, which manifests itself in an increased number of cancer and leukaemia cases, as well as genetical risks. Indirectly, human life is said to be threatened through the contamination of the food chain.

2.3 According to the authors, the French authorities have failed to take sufficient measures to protect their life and security. They claim that the authorities have not been able to show that the underground nuclear tests do not constitute a danger to the health of the inhabitants of the South Pacific and to the environment. They therefore request the Committee to ask France, under rule 86 of the rules of procedure, not to carry out any nuclear tests until an independent international commission has found that the tests are indeed without risks and do not violate any of the rights protected under the Covenant. Both during the 54th and 55th sessions, the Committee decided not to grant interim protection under rule 86.

2.4 With regard to the requirement of exhaustion of domestic remedies, the authors contend that because of the urgent nature of their cases, they cannot be expected to await the outcome of judicial procedures before the French tribunals. It is further argued that domestic remedies are ineffective in practice, and would fail to offer the authors any protection or any remedy.

State party's submission on the admissibility of the complaint:

3.1 In its submission under rule 91 of the rules of procedure, dated 22 January 1996, the State party challenges the admissibility of the communication on several grounds.

3.2 The State party argues that, in the first instance, the authors do not qualify as "victims" within the meaning of articles 1 and 2 of the Optional Protocol. In this context, it refers to the arguments developed in its submission to the European Commission of Human Rights in a case (No. 28024/95) virtually identical to that before the Committee introduced before that body. The State party provides a detailed description of the geology of the atoll of Mururoa, where most of the underground tests are carried out, and of the techniques developed for the conduct of the tests. These techniques, the State party notes, are designed to provide a maximum of security and to minimize the risks of radioactive contamination of the environment and atmosphere. It dismisses the authors' argument that earlier underground tests in the 1970s and incidents said to have occurred during those tests have led to fissures in the atoll's geology and, thereby, increases the risk of radiation escaping from the underground shafts where the nuclear devices are tested, through a process known as "venting".

3.3 The State party further rejects the argument that the tests expose the population of the islands surrounding the testing area to an increased risk of radiation. It recalls that the level of radioactivity at Mururoa is identical to that measured over and at other islands and atolls in the South Pacific and is, for example, less than that measured in metropolitan France: thus, the level of Caesium 137 measured in French Polynesia in 1994 was one third of the level measured in France and in the northern hemisphere at the same date where, it is noted, the emissions resulting from the nuclear accident which occurred at Tchernobyl (Ukraine) in 1985 are still clearly measurable.

3.4 Similar considerations apply to the alleged and expected contamination of the food chain through the nuclear tests. The State party refutes the authors' argument that they run a risk of contamination through consumption of agricultural products produced and fish caught in proximity of the testing area. It points out that all serious scientific studies on the environmental effects of underground nuclear tests have concluded that whatever radioactive elements reach the surface of the lagoon at Mururoa or Fangataufa, are subsequently diluted by the ocean to levels which are perfectly innocuous for the marine fauna and flora and, a fortiori, for human beings. In the same vein, the State party rejects as unfounded and unsubstantiated the authors' contention that the incidence of cases of cancer has risen in French Polynesia as a result of French nuclear tests in the area.

3.5 The State party notes that it has granted access to the testing area to several independent commissions of inquiry in the past, including, in 1982, a mission led by the internationally recognized vulcanologist Haroun Tazieff, in 1983, a mission of experts from New Zealand, Australia and Papua New Guinea, one by J. Y. Cousteau in 1987, etc. That the monitoring of the environmental effects of the tests carried out by the French authorities has been serious and of high quality has, inter alia, been confirmed by the Lawrence Livermore Laboratory (California) and the International Laboratory of Marine Radioactivity in Monaco.

3.6 In the light of the above, the State party affirms that the authors have failed to discharge the burden of proof that they are "victims" within the meaning of article 1 of the Optional Protocol. It notes that the authors cannot argue that the risk to which they might be exposed through the nuclear tests would be such as to render imminent a violation of their rights under articles 6 and 17 of the Covenant. Purely theoretical and hypothetical violations, however, do not suffice to make them "victims" within the meaning of the Optional Protocol.

3.7 Subsidiarily, the State party contends that the communication is inadmissible under article 5, paragraph 2(a), of the Optional Protocol, since two of the authors, Ms. Bordes and Mr. Tauira, are co-authors of the complaint which was placed before the European Commission of Human Rights and registered by that body in August 1995 (case No. 28204/95). The State party recalls its reservation to article 5, paragraph 2(a), pursuant to which the Committee "shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement". As the case which was examined by the European Commission and declared inadmissible on 4 December 1995 in fact concerned the alleged unlawfulness of the French nuclear tests and thus the "same matter", the Committee's competence in respect of the present case is said to be excluded.

3.8 Equally subsidiarily, the State party submits that the complaint is inadmissible on the basis of non-exhaustion of domestic remedies. It refers to its arguments developed before the European Commission of Human Rights on this point: thus, the authors could have filed a complaint before the Conseil d'État and argued that President Chirac's decision to resume nuclear tests constituted an abuse of (executive) power (... recours pour excès de pouvoir). Contrary to what the authors affirm, such a recourse could not a priori be deemed futile or ineffective. Furthermore, the State party notes that as the authors essentially invoke the potential risks which the tests entail for their health and the environment, they should have requested compensation from the competent authorities, which they failed to do. If their request had been rejected, they could have filed a complaint before the administrative tribunals, invoking the State's no fault responsibility (responsabilité sans faute).

3.9 Finally, the State submits that the authors' claim is incompatible ratione materiae with articles 6 and 17 of the Covenant. For the State party, article 6 only applies in the event of a real and immediate threat to the right to life, which presents itself with some degree of certainty; such is not the case in the authors' situation. Similar considerations apply to article 17, where the prohibited unlawful interference with private or family life is a real and effective interference, and not the risk of a purely hypothetical interference.

4.1 In her comments, dated 8 April 1996, counsel for the authors contends that the risk of adverse effects of the nuclear tests already carried out on the authors' life, health and environment is real and serious. She deplores the absence of an independent international investigation into the impacts of the programmed and concluded tests. She criticizes the lack of transparency of the French authorities, which are said to even misrepresent the true number of underground nuclear tests carried out on Mururoa and Fangataufa since the 1970s. She further points out that even the reports invoked by the State party itself (see paragraph 3.5 above) contain passages which caution that the danger of escape of radioactive particles (Caesium 134, Iodine 131) from the underground shafts and consequently contamination of the atmosphere is real; however, the State party has chosen to invoke only those conclusions favourable to its position.

4.2 Counsel argues that the tests do have adverse impacts on the marine environment in the testing area, and from there have repercussions on the whole region's ecosystem, by propagation of radiation through the food chain (especially fish). She notes that a July 1995 report prepared by Médecins Sans Frontières rightly criticizes the absence of medical supervision of the population of French Polynesia in the aftermath of the nuclear tests.

4.3 It is submitted that the nuclear tests carried out will, with some degree of probability, increase the incidence of cases of cancer among inhabitants of French Polynesia. Counsel concedes that it is too early to gauge the extent of the contamination of the ecosystem, the marine environment and the food chain by radiation, as cancers may take 10 to 30 years to develop and manifest themselves; the same is true for genetical malformations. She notes that some reports have revealed the presence of Iodine 131 in significant quantities in the lagoon of Mururoa after the tests, and surmises that the discovery of Caesium 134 in the lagoon's waters is an indicator of the leaky nature of the underground shafts, from which more radioactivity is likely to escape in the future. Finally, negative effects are expected

from the poisoning of fish in the South Pacific by a toxic substance found on algae growing on dead coral reefs, and which trigger a disease known as ciguatera; there is said to be a correlation between the conduct of nuclear tests in the South Pacific and the increase in poisoning of fish and of human beings by ciguatera.

4.4 On the basis of the above, counsel argues that the authors do qualify as victims within the meaning of article 1 of the Optional Protocol. The risks to the health of Mr. Temeharo and Ms. Bordes are said to be significant, clearly exceeding the threshold of purely hypothetical threats. The evaluation of the threats to the authors' rights under articles 6 and 17 can only be, according to counsel, made during evaluation of the merits of the authors' claims. For purposes of admissibility, the burden of proof is said to have been discharged, as the authors have made prima facie substantiated allegations.

4.5 Counsel denies that the communication is inadmissible under article 5, paragraph 2(a), of the Optional Protocol. She notes that Ms. Bordes withdrew her complaint from the European Commission of Human Rights by letter of 17 August 1995; conversely, Mr. Taurira withdrew his complaint from consideration by the Human Rights Committee by letter of 18 August 1995. Counsel further contends that the French reservation to article 5, paragraph 2(a), of the Optional Protocol, is inapplicable in the present case: in this context, she affirms that the reservation only applies if the "same matter" has been the subject of a decision on the merits by another instance of international investigation or settlement. In the instant case, the European Commission of Human Rights declared the case presented to it inadmissible, without entering into a debate on the merits of the authors' claims.

4.6 Counsel submits that the authors should be deemed to have complied with the requirement of exhaustion of domestic remedies, since available judicial remedies are clearly ineffective. In this context, she notes that President Chirac's decision to resume nuclear tests in the South Pacific is not susceptible of judicial control: this is said to be confirmed by the jurisprudence of the French Conseil d'État, the highest administrative tribunal. Thus, in a judgment handed down in 1975¹, the Conseil d'État had already held that the establishment of a security zone around the nuclear testing areas in the South Pacific were governmental decisions ("acte de gouvernement") which could not be dissociated from France's international relations and were not susceptible of control by national tribunals. The same considerations are applicable to the present case. Counsel further notes that the French section of Greenpeace challenged the resumption of nuclear tests before the Conseil d'État: by judgment of 29 September 1995, the Conseil d'État dismissed the complaint, on the basis of the "act of government" theory².

4.7 Counsel reiterates that the authors' complaints are compatible ratione materiae with articles 6 and 17 of the Covenant. As far as article 6 is concerned, she recalls that the Human Rights Committee has consistently, including in General Comment 6[16] on article 6, argued that the right to life must not be interpreted restrictively, and that States should adopt positive measures to protect this right. In the context of examination of periodic State reports, for example, the Committee has frequently enquired into States parties' policies relating to measures to reduce infant mortality or improve life expectancy and policies relating to the protection of the environment or of public health. Counsel emphasizes that

the Committee itself has stated, in its General Comment 14[21] of 2 November 1984, that the development, testing, possession and deployment of nuclear weapons constitutes one of the most serious threats to the right to life.

4.8 As far as the authors' claim under article 17 is concerned, counsel notes that the risks to the authors' family life are real: thus, the danger that they lose a member of their family through cancer, leukaemia, ciguatera, etc., increases as long as measures are not taken to prevent the escape of radioactive material set free by the underground tests into the atmosphere and environment. This is said to constitute an unlawful interference with the authors' right to their family life.

Issues and proceedings before the Committee:

5.1 Before considering any claims 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.

5.2 The Committee notes that Mr. Tauira withdrew his communication from consideration by the Committee by letter dated 18 August 1995, so as to enable him to present his case to the European Commission of Human Rights. In his respect, therefore, the Committee discontinues consideration of his complaint. Conversely, Ms. Bordes withdrew her application to the European Commission by telefax of 17 August 1995, before any decision was adopted by the European Commission of Human Rights. Given, therefore, that the authors of the case which was before the European Commission and of the present case are not identical, the Committee need not examine whether the French reservation to article 5, paragraph 2(a), of the Optional Protocol, applies in the present case.

5.3 In the initial communication, the authors challenge President Chirac's decision to resume nuclear underground tests on Mururoa and Fangataufa as a violation of their rights under articles 6 and 17 of the Covenant. In subsequent letters, they reformulate their claim in that the actual conduct of tests has increased the risks to their lives and for their families.

5.4 The Committee has noted the State party's contention that the authors do not qualify as "victims" within the meaning of article 1 of the Optional Protocol. It recalls that for a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or omission of a State party has already adversely affected his or her enjoyment of such right, or that there is a real threat of such result³.

5.5 The issue in the present case therefore is whether the announcement and subsequent conduct of underground nuclear tests by France on Mururoa and Fangataufa resulted in a violation of their right to life and their right to their family life, specific to Ms. Bordes and Mr. Temeharo, or presented an imminent threat to their enjoyment of such rights. The Committee observes that, on the basis of the information presented by the parties, the authors have not substantiated their claim that the conduct of nuclear tests between September 1995 and the beginning of 1996 did not place them in a position in which they could justifiably claim to be victims whose right to life and to family life was then violated or was under a

real threat of violation.

5.6 Finally, as to the authors' contention that the nuclear tests will further deteriorate the geological structure of the atolls on which the tests are carried out, further fissurate the limestone caps of the atolls, etc., and thereby increase the likelihood of an accident of catastrophic proportions, the Committee notes that this contention is highly controversial even in concerned scientific circles; it is not possible for the Committee to ascertain its validity or correctness.

5.7 On the basis of the above considerations and after careful examination of the arguments and materials before it, the Committee is not satisfied that the authors can claim to be victims within the meaning of article 1 of the Optional Protocol.

5.8 In the light of the above, the Committee need not address the other inadmissibility grounds that have been adduced by the State party.

5.9 Although the authors have not shown that they are "victims" within the meaning of article 1 of the Optional Protocol, the Committee wishes to reiterate, as it observed in its General Comment 14[23], that "it is evident that the designing, testing, manufacture, possession and deployment of nuclear weapons are among the greatest threats to the right to life which confront mankind today"⁴.

6. The Human Rights Committee therefore decides:

(a) that the communication is inadmissible under article 1 of the Optional Protocol;

(b) that this decision shall be communicated to the State party, to the authors and to their counsel.

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

Footnotes

*/ Made public by decision of the Human Rights Committee.

**/ Pursuant to rule 85 of the rules of procedure, Committee member Christine Chanet did not participate in the examination of the present communication.

1/ Judgment in the case of Sieur Paris de Bollardière, 11 July 1975.

2/ Association Greenpeace France, judgment of 29 September 1995.

3/ See, e.g., decision on communication No. 429/1990 (E.W. et al. v. the Netherlands),

adopted on 8 April 1993, paragraph 6.2.

4/ General Comment 14[23], adopted on 2 November 1984.