HUMAN RIGHTS COMMITTEE

Vakoumé v. France

Communication No 822/1998

31 October 2000

CCPR/C/70/D/822/1998

ADMISSIBILITY

Submitted by: Mr. Mathieu Vakoumé and 28 other persons (represented by Mr. Gustave Téhio, a barrister in Nouméa, and the law firm of Roux, Lang, Cheymol and Canizares, located in Montpellier)

Alleged victim: The authors

State party: France

Date of communication: 11 March 1998

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

Meeting on 31 October 2000,

Adopts the following:

Decision on admissibility

1.1 The authors of the communication are Mr. Vakoumé and 28 other persons who claim to be landowners or enjoy customary rights on the Isle of Pines in New Caledonia. They assert that they are victims of violations of articles 17 (1), 18 and 23 (1) of the International Covenant on Civil and Political Rights, by reason of interference with their privacy and family life and with their freedom to manifest their religion or beliefs in worship. The authors are represented by joint counsel - Mr. Téhio, a barrister in Nouméa, and the law firm of Roux, Cheymol and Canizares, located in Montpellier.

Facts and proceedings as they emerge from statements by the authors and from the evidence

submitted

2.1 The authors are members of the Touété tribe based in Baie d'Oro on the Isle of Pines in southern New Caledonia, on a reservation established in 1887 where customary rights are exercised. Baie d'Oro is divided into properties held by clans. According to tradition, the representative of each clan must seek the opinion, and obtain the agreement, of every clan member in decisions concerning the use of the land.

2.2 The authors claim to possess customary rights to plots of land on which the company Magénine S. A. had begun construction of a hotel complex. This complex was inaugurated and has been in operation since November 1998.

2.3 The representatives of the Touété tribe, with the exception of the authors, participated in the project for the creation of the hotel complex through the company Magénine S. A., which was established in 1994 especially for that purpose. It was agreed between the representatives of the Touété tribe and the South Province of New Caledonia that the latter would advance the funds needed, so as to provide the tribe with the capital for a 66 per cent holding in the company owning the prospective complex, with the rest of the capital belonging to the Société des hôtels de Nouméa. The representatives of the tribe also provided the company with the usufruct, for a period of 25 years, of the land needed for the construction, the surface area of which is 5 hectares and 37 ares. The authors, who did not take part in this agreement, claim to have rights to the plots of land in question.

2.4 Work began immediately upon receipt of a building permit issued by the South Province Assembly to Magénine S.A. on 30 August 1996. As of December 1996, several petitions from local residents were lodged with the Nouméa Administrative Tribunal seeking to have the building permit revoked. In a decision dated 1 April 1997 the Tribunal revoked the building permit on the grounds that, under article 8 of Provincial Assembly deliberation No. 24 of 8 November 1989, any project for the development of land or buildings, whether or not for residential purposes, must be the subject of an application for authorization in the conditions established by the provincial assemblies, rather than a building permit. The Tribunal also ordered the company to pay the petitioners the sum of CFP francs 100,000.

2.5 On 16 April 1997 Magénine S.A. filed an appeal against that ruling with the Court of Appeal of Nouméa. On 24 April 1997 the authors lodged a request for a default fine with the interim relief judge. On 21 May the judge dismissed the request. The authors appealed against the decision of the interim relief judge on 4 June 1977.

2.6 By decision of 16 October 1997, the Nouméa Court of Appeal quashed the ruling of the interim relief judge of 21 May 1997 and ordered that the decision of the Nouméa Administrative Tribunal of 1 April 1997 should be carried out, and accompanied by a default fine. On 17 October 1997 the South Province Assembly issued an authorization allowing Magénine S.A. to construct a group of buildings. On 22 December 1997 Mr. Vakoumé and a number of other persons requested the Nouméa Administrative Tribunal to order the suspended execution and annulment of the decision of 17 October 1997. On 16 February 1998 the Nouméa Administrative Tribunal revoked the decision authorizing construction, on the grounds that several local authorities had not been consulted prior

to the issue of the building authorization. On 3 April 1998 the South Province appealed to the Paris Administrative Appeal Court against the Nouméa Administrative Tribunal's ruling of 16 February 1998.

2.7 On 26 February 1998 the South Province issued Magénine S.A. with a new building authorization. On 23 March1998 the authors requested the Nouméa Administrative Tribunal to annul and suspend application of the new authorization of 26 February 1998. The authors claimed, inter alia, that the construction of the hotel would undermine their right to privacy (International Covenant on Civil and Political Rights, art. 17) and to protection of family life (Covenant, art. 23). On 4 June 1998 the Nouméa Administrative Tribunal dismissed the authors' appeal of 23 March1998, and authorized the building work to continue. The Tribunal found that the construction did not violate the authors' rights as set forth in the International Covenant on Civil and Political Rights, because it had not been proved that the hotel was to be placed on a site where ancestral tombs were located and because the representatives of the tribe had given their consent for the construction. On 4 August 1998 the authors applied to the Paris Administrative Appeal Court to have the judgement of 4 June 1998 quashed.

The complaint

3.1 The authors claim that they are victims of violations of articles 17 (1), 23 (1) and 18 of the International Covenant on Civil and Political Rights.

3.2 They first invoked rule 86 of the rules of procedure of the Human Rights Committee with a view to obtaining implementation of interim protection measures to avoid irreparable damage to them, (1) claiming that the site on which the complex was built was one of special significance for their history, culture and life.

3.3 The authors draw a distinction between two aspects of the violations of rights as set forth in the International Covenant on Civil and Political Rights.

3.4 In the first place, they consider themselves to be victims of violations of articles 17 (1) and 23 of the Covenant. To that effect, they declare that the Baie d'Oro is an important part of their natural, historic and cultural heritage. Ancestral burial grounds are to be found on the site, which is also the source of legends forming part of the heritage and collective memory of the Isle of Pines.

3.5 The authors draw attention to the Human Rights Committee's decision of 29 July 1997 in case No. 549/1993, Hopu and Bessert vs. France, (2) concerning the construction of a hotel complex on the site of ancestral burial grounds, which the Committee deemed to be interference with the authors' privacy and family life, constituting a violation of articles 17(1) and 23 of the International Covenant on Civil and Political Rights. The authors recall that that case, too, concerned the construction of a hotel complex by the same group.

3.6 Regarding the violation of article 18 (1) of the Covenant, the authors consider that building on the ancestral burial grounds constitutes a violation of their right to freedom of thought, conscience and religion. In that connection, it is claimed that the authors, like all Melanesians, live in a natural environment founded on a network of ties to their parents, their families and their dead. Veneration

of the dead is a manifestation of religion and tradition inherent in their lifestyle, beliefs and culture.

3.7 That being the case, the authors consider that destruction of the sacred site violates their right to freedom to manifest their religion or beliefs in worship and the observance of rites.

The State party's comments on admissibility

4.1 The State party submitted its comments with regard to communication No. 822/1998 on 4 December 1998. It considers the communication to be inadmissible on the grounds of non-exhaustion of domestic remedies. The State party draws attention to the proceedings brought by the authors after the communication was introduced before the Committee on 11 March 1998. On 23 March 1998 the authors appealed against the South Provinces authorization of 26 February 1998. In addition, on 4 August 1998 the authors filed an appeal with the Paris Administrative Appeal Court against the Nouméa Administrative Tribunal's decision of 4 June 1998 and this appeal is still awaiting judgement.

4.2 The State party also maintains that the proceedings cannot be considered to have been unreasonably prolonged. In less than two years, the case has given rise to an interim relief decision by the Nouméa court of first instance, a ruling by the Nouméa Court of Appeal and three judgements by the Nouméa Administrative Tribunal.

4.3 Finally, the State party contests the admissibility of the communication on the grounds that at no time did the authors submit to the French courts their claim of alleged violation of articles 17 (1), 18 (2) and 23 (1) of the International Covenant on Civil and Political Rights; in its view, this is contrary to article 5 (2) (b) of the Optional Protocol to the International Covenant on Civil and Political Rights.

The authors' response to the State party's comments

5.1 In response to the State party's comments, counsel for the authors submitted a memorandum dated 8 April 1999, pointing out that the hotel complex had already been built and inaugurated and that the injury to the victims was thus fully established. All remedies invoked to end the problem had proved ineffective and futile and there could be no remaining doubt that the said articles had been violated.

5.2 In answer to the State party's contention that all available domestic remedies had not been exhausted, the authors maintain that those remedies had been ineffective and futile to end the problem. No sooner had a decision to stop the work been taken than the company had promptly obtained a new permit from the Provincial Assembly and continued to build. As a result, the authors were unable to have the illegal construction halted.

5.3 In the authors' view, the fact that a judicial decision, accompanied by a default fine, ordering the cessation of the work was never respected and the fact that the company continued its illegal construction, with the approval of the President of the Provincial Assembly, constitutes a gross violation of the right of every individual to an effective remedy. The repetition of those illegal acts and their toleration by the State authorities constitute practices which render legal remedies

ineffective and futile.

5.4 With regard to the Government's allegations that the authors did not invoke violations of their fundamental rights and freedoms, the authors cannot but deplore the bad faith of the State party. Counsel had repeatedly invoked violations of the Covenant and other international instruments.

Issues and proceedings before the Committee

6.1 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.

6.2 The Committee notes from the documents presented that the State party's allegations to the effect that the authors did not claim before the judicial or administrative courts that the construction constituted a violation of their privacy, freedom of conscience and religion, and family life cannot be upheld. In fact, it has been established that counsel for the authors put forward such claims, in particular in the appeal against the building authorization of 26 February 1998, and that the Nouméa Tribunal's decision of 4 June 1998 took them into account.

6.3 The Committee notes that the State party contests the admissibility of the communication on the grounds of non-exhaustion of domestic remedies given that the authors did not await the outcome of their appeal.

6.4 With regard to the authors' statements that the domestic remedies were ineffective because the hotel complex had already been built and because the authorities had not respected the court decisions in favour of the authors, the Committee notes that after the decision of the Nouméa Court of Appeal of 16 October 1997 ordering a halt to the construction and payment of a default fine because of the lack of valid administrative authorization, the authorities then granted such authorization, thus making the continuation of the construction legal. It appears, therefore, that the court decisions in favour of the authors were largely based on construction regulation requirements and that there is nothing to indicate that the authorities did not respect the court decisions.

6.5 With regard to the State party's assertion that domestic remedies were not exhausted given that the authors did not await the outcome of their appeal and the authors' counter-argument that recourse to the Paris Administrative Appeal Court and, if necessary, the Council of State, would be ineffective, the Committee cannot accept counsel's contention that given that the construction has already been completed, the courts would no longer be able to guarantee an appropriate remedy. Accordingly, the Committee is of the view that the communication is inadmissible under article 5 (2)(b) of the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5 (2) (b) of the Optional Protocol;

(b) That this decision will be transmitted to the State party and to the representative of the

authors of the communication;

(c) That this decision may be reviewed under rule 92 (2) of the Committee's rules of procedure upon receipt of a written request by or on behalf of the authors containing information to the effect that the reasons for inadmissibility no longer apply.

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* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Ms. Elizabeth Evatt, Ms. Pilar Gaitán de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden and Mr. Abdallah Zakhia. Under rule 85 Ms. Chanet did not participate in the examination of the present communication.

[Adopted in French, English and Spanish, the French 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.]

Notes

1. The Committee, acting through its Special Rapporteur on New Communications, did not grant this petition.

2. CCPR/C/60/D/549/1993/Rev.1, Views adopted by the Committee on 29 July 1997.