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Sixtieth session
14 July - 1 August 1997

VIEWS

Communication No. 549/1993

Submitted by:	Francis Hopu and Tepoaitu Bessert [represented by Messrs. James Lau, Alain Lestourneaud and François Roux, lawyers in France]
Victims:	The authors
State party:	France
Date of communication:	4 June 1993 (initial submission)
Date of adoption of Views:	29 July 1997

On 29 July 1997, the Human Rights Committee adopted its Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 549/1993. The text of the Views is appended to the present document.

[ANNEX]

*Made public by decision of the Human Rights Committee.

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
- Sixtieth session -

concerning

Communication No. 549/1993***

Submitted by:	Francis Hopu and Tepoaitu Bessert [represented by Messrs. James Lau, Alain Lestourneaud and François Roux, lawyers in France]
Victims:	The authors
State party:	France
Date of communication:	4 June 1993 (initial submission)
Date of decision on admissibility:	30 June 1994
Date of decision to amend decision on admissibility:	30 October 1995

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

Meeting on 29 July 1997,

Having concluded its consideration of communication No. 549/1993 submitted to the Human Rights Committee on behalf of Messrs. Francis Hopu and Tepoaitu Bessert under the Optional Protocol to the International Covenant on Civil and Political Rights,

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*The following members of the Committee participated in the examination of the present communication: Mr. Nisuke Ando, Mr. Prafullachandra N. Bhagwati, Mr. Thomas Buergenthal, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Eckart Klein, Mr. David Kretzmer, Ms. Cecilia Medina Quiroga, Mr. Fausto Pocar, Mr. Julio Prado Vallejo, Mr. Martin Scheinin, Mr. Danilo Türk and Mr. Maxwell Yalden.

**Pursuant to rule 85 of the Committee's rules of procedure, Ms. Christine Chanet did not participate in the examination of the case.

***The texts of two individual opinions signed by nine Committee members are appended to the present document.

Having taken into account all written information made available to it by the authors of the communication, their counsels and the State party,

Adopts the following:

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

1. The authors of the communication are Francis Hopu and Tepoaitu Bessert, both ethnic Polynesians and inhabitants of Tahiti, French Polynesia. They claim to be victims of violations by France of articles 2, paragraphs 1 and 3(a), 14, 17, paragraph 1, 23, paragraph 1, and 27 of the International Covenant on Civil and Political Rights. They are represented by Messrs. James Lau, Alain Lestourneaud and François Roux, who have 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 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 d'étude 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 of 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 their history, their culture and their life. They add that the land encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground 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 ground 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 was 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 their 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 Code des Communes, concerning cemetaries, 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 denied 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 was no indication that the jurisdiction of these courts had been formally repudiated by the State party; rather, their operation appeared 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.

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.

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. Hopu 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 que 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 que 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 very 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 1961. The case thus is based on facts which precede 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 of 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 to 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 rather 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 articles 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 to 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 September 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 indigènes, 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 During its 55th session, the Committee further examined the communication, and took note of the State party's request that the decision on admissibility be reviewed pursuant to rule 93, paragraph 4, of the rules of procedure. It took note of the State party's argument that the Government had not filed its admissibility observations in time because of the complexity of the case and the short deadlines imparted to the State party; it observed, however, that the Government had not reacted to three reminders and that it had taken the State party 16 months, instead of two, to reply to the admissibility of the authors' claims, and that the State party's first submission had been made three months after the adoption of the decision on admissibility. The Committee considered that as there had been no submissions from the State party by the time of the adoption of the decision on admissibility, it had to rely on the authors' information; furthermore, silence on the part of the State party militated in favour of concluding that the State party agreed that all admissibility requirements had been fulfilled. In the circumstances, the Committee was not precluded from considering the authors' claims on their merits.

7.2 On the basis of the State party's observations the Committee took, however, the opportunity to reconsider its admissibility decision. It noted in particular the authors' claim that they are discriminated against because French Polynesians are not protected by laws and regulations which apply to the territoire métropolitain, especially as far as protection of burial grounds is concerned. This claim could raise issues under article 26 of the Covenant but was not covered by the terms of the admissibility decision of 30 June 1994; the Committee was of the opinion, however, that it should be declared admissible and considered on its merits. The State party was invited to submit to the Committee information in respect of the authors' claim of discrimination. If the State party intended to challenge the admissibility of the claim, it was invited to join its observations in this respect to those on the substance of the claim, and the Committee would address them when examining the merits of the complaint.

7.3 On 30 October 1995, therefore, the Committee decided to amend its decision on admissibility of 30 June 1994.

8.1 By submission of 27 February 1996, counsel informs the Committee that on 16 January 1996, the High Commissioner of the French Republic for French Polynesia called in the forces of order to evacuate the (archaeological) site of Nuuroa, so as to enable the immediate start of construction of the hotel complex. At 5:30 a.m., a large number of police, later joined by a military detachment, occupied the grounds and put up a fence around the site. On 19 January, approximately 100 residents of the area protested on the beach of the site to express their opposition to the hotel complex, as well as the violation of the supposedly sacred nature of the site, on which human remains pointing to the existence of an ancient burial ground had been found in 1993. According to the association "Paruru Ia Tetaitapu Eo Nuuroa", poles for the fence were placed directly onto the old grave sites.

8.2 The authors forward a copy of an affidavit sworn on 22 January 1996 by a lawyer acting upon instructions of Mr. G. Bennett, the president of the association "Paruru Ia Tetaitapu Eo Nuuroa". The affidavit states, inter alia, that along parts of the beach of the grounds on which the hotel is to be built, human remains have been discovered. To demonstrate the presence of human bones, Mr. Bennett dug into the sand of a little sandy elevation, upon which extremities of several human bones appeared. Mr. Bennett then covered them again with sand. No more than one meter from this sandy elevation, fence poles had been planted. Mr. Bennett expressed his fear that during the construction of the fence, human remains might inadvertently have been exposed.

8.3 The authors reaffirm that they are victims of discrimination within the meaning of article 26, since French legislation governing the protection of burial sites is not applicable to French Polynesia.

9.1 In a submission dated 6 June 1996, the State party once again challenges the admissibility of the authors' claim in as much as it relates to article 26 on the ground that they cannot pretend to be "victims" of a violation of this provision[1]. It submits that the authors have failed to show that the human remains discovered on the disputed grounds in January 1993 are in fact those of their ancestors, or that the burial ground was that in which their ancestors had been buried. The State party reiterates that according to forensic tests carried out by the Polynesian Centre of Human Sciences, the skeletons discovered predate the arrival of Europeans in Polynesia. Accordingly, the authors have no personal, direct and current interest in invoking the application of legislation governing the protection of burial grounds, as they fail to establish a kinship link between the remains discovered and themselves.

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[1]Reference is made to the Committee's jurisprudence in this respect, especially to the inadmissibility decision in case No. 187/1985 (J.H. v. Canada), adopted 12 April 1985.

9.2 In this context, the State party points out that respect for the deceased does not necessarily extend to individuals buried long ago and whose memory has been lost for centuries. E contrario, it would be necessary to conclude that each time human remains are found on a site cleared for construction, this site becomes inconstructible because the remains are hypothetically those of the ancestors of a family which still exists. Accordingly, the State party concludes that French legislation governing the existence of burial grounds is not applicable to the authors, and that their claim under article 26 should be deemed inadmissible under article 1 of the Optional Protocol.

9.3 Subsidiarily, the State party contends that there can be no question of a violation of article 26 in the present case. In effect, the relevant provisions of the French Criminal Code[2] are also applicable to French Polynesia since Ordinance No. 96267 of 28 March 1996, relative to the entry into force of the new Criminal Code in the French overseas territories and in Mayotte. Therefore, the authors are ill advised to complain about discriminatory application of criminal legislation governing protection of burial sites. The State party adds that the authors had never, up to mid-1996, filed any action complaining about a violation of burial grounds.

9.4 In additional observations, the State party argues that the existence of different legislative texts in metropolitan France and overseas territories does not necessarily imply a violation of the non-discrimination principle enshrined in article 26. It explains that pursuant to article 74 of the French Constitution and implementing legislation, legislative texts adopted for metropolitan France is not automatically and fully applicable to overseas territories, given the geographic, social and economic particularities of these territories. Thus, legislative texts applicable to French Polynesia are either adopted by State organs, or by the competent authorities of French Polynesia.

9.5 Recalling the Committee's jurisprudence, the State party notes that article 26 does not prohibit all difference in treatment, if such difference in treatment is based on reasonable and objective criteria. It submits that the legislative and regulatory differences between metropolitan France and overseas territories is based on such objective and reasonable criteria, as stipulated in article 74 of the Constitution, which explicitly refers to the "specific interests" of the overseas territories. The notion of "specific interests" is designed to protect the particularities of overseas territories and justifies the attribution of particular competencies to the authorities of French Polynesia. This said, the regulations governing the protection of burial sites are very similar in metropolitan France and in French Polynesia.

9.6 In the latter context, the State party observes that article L.131 al.2 of the Code des Communes actually applies both in metropolitan France and in

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[2]Articles 225-17 and 225-18 of the French Criminal Code.

Polynesia. The implementation regulations based on this provision may not be based on the same texts in metropolitan France and in French Polynesia, but in practice the differences are insignificant. Thus, the prohibition to exhume the body of a deceased person without prior authorization is contained both in article 28 of Decision (Arrêté) No. 583 S of 9 April 1953, which is applicable in French Polynesia, and in article R. 361-15 of the Code des Communes.

9.7 The State party further observes that in 1989, French Polynesia adopted legislation governing the urbanization of its territory (Code d'aménagement du territoire). Chapter Five of this legislation governs the protection of historical sites, monuments, as well as archaeological activities. The provisions of this legislation are largely inspired by the laws of 2 May 1930 and of 27 September 1941 (the latter governing archaeological excavations), and which apply in metropolitan France[3]. Reference is made by the State party to article D. 151-2, paragraph 1, of the Code de l'aménagement de la Polynésie française, which provides, inter alia, that sites and monuments the preservation of which is of historical, artistic, scientific or other interest may be placed under partial or complete protection ("... peuvent faire l'objet d'un classement en totalité ou en partie"). This provision, it is argued, would apply to the protection of sites presenting a particular interest. Article D. 151-8 of the same Code stipulates that the objects and sites or monuments which are placed under protection cannot be destroyed or displaced, or be restored, without prior authorization of the chief administrative officer of French Polynesia[4]. Finally, article D. 154-8 of the same Code specifically covers the accidental discovery of burial sites: under this provision, the discovery of burial sites must be notified immediately to the competent administrative authority.

9.8 The State party contends that the above provisions fully protect the authors' interests and may provide a remedy to their concerns. Contrary to the authors' affirmation, there does exist in French Polynesia legislation which provides for the protection of historical sites and burial grounds and of archaeological sites presenting a particular interest.

9.9 By submission of 26 August 1996, counsel informs the Committee of the death of Mr. Hopu, and indicates that his heirs have signalled their wish to pursue the examination of the communication.

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[3]The State party provides copies of the texts of these laws.

[4]"... les biens, les sites et les monuments naturels classés et les parcelles de ceux-ci ne peuvent être détruits et déplacés ni être l'objet d'un travail de restoration ... sans l'autorisation du chef de territoire suivant les conditions qu'il aura fixées..." (this provision is similar to article 12 of the Law of 2 May 1930 applying in metropolitan France).

Examination of the merits

10.1 The Human Rights Committee has examined the present communication in the light of all the information presented to it by the parties, as required under article 5, paragraph 1, of the Optional Protocol.

10.2 The authors claim that they were denied access to an independent and impartial tribunal, in violation of article 14, paragraph 1. In this context, they claim that the only tribunals that could have had competence to adjudicate land disputes in French Polynesia are indigenous tribunals and that these tribunals ought to have been made available to them. The Committee observes that the authors could have brought their case before a French tribunal, but that they deliberately chose not to do so, claiming that French authorities should have kept indigenous tribunals in operation. The Committee observes that the dispute over ownership of the land was disposed of by the Tribunal of Papeete in 1961 and that the decision was not appealed by the previous owners. No further step was made by the authors to challenge the ownership of the land, nor its use, except by peaceful occupation. In these circumstances, the Committee concludes that the facts before it do not disclose a violation of article 14, paragraph 1.

10.3 The authors claim that the construction of the hotel complex on the contested site would destroy their ancestral burial grounds, which represent an important place in their history, culture and life, and would arbitrarily interfere with their privacy and their family lives, in violation of articles 17 and 23. They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term "family" be given a broad interpretation so as to include all those comprising the family as understood in the society in question. It follows that cultural traditions should be taken into account when defining the term "family" in a specific situation. It transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life. This has not been challenged by the State party; nor has the State party contested the argument that the burial grounds in question play an important role in the authors' history, culture and life. The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti. The Committee therefore concludes that the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel

complex. The Committee concludes that there has been an arbitrary interference with the authors' right to family and privacy, in violation of articles 17, paragraph 1, and 23, paragraph 1.

10.4 As set out in paragraph 7.3 of the decision of 30 October 1995, the Committee has further considered the authors' claim of discrimination, in violation of article 26 of the Covenant, on account of the alleged absence of specific legal protection of burial grounds in French Polynesia. The Committee has noted the State party's challenge to the admissibility of this claim, as well as the subsidiary detailed arguments relating to its merits.

10.5 On the basis of the information placed before it by the State party and the authors, the Committee is not in a position to determine whether or not there has been an independent violation of article 26 in the circumstances of the instant communication.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights is of the view that the facts before it disclose violations of articles 17, paragraph 1, and 23, paragraph 1, of the Covenant.

12. The Human Rights Committee is of the view that the authors are entitled, under article 2, paragraph 3(a), of the Covenant, to an appropriate remedy. The State party is under an obligation to protect the authors' rights effectively and to ensure that similar violations do not occur in the future.

13. Bearing in mind that, by becoming a State party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and 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 90 days, information about the measures taken to give effect to the Committee's Views.

[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.]

A. Individual opinion by Committee members Elizabeth Evatt, Cecilia Medina Quiroga, Fausto Pocar, Martin Scheinin and Maxwell Yalden *(partly dissenting)*

We do not share the Committee's decision of 30 June 1994 to declare the authors' complaint inadmissible in relation to article 27 of the Covenant. Whatever the legal relevance of the declaration made by France in relation to the applicability of article 27 may be in relation to the territory of metropolitan France, we do not consider the justification given in said declaration to be of relevance in relation to overseas territories under French sovereignty. The text of said declaration makes reference to article 2 of the French Constitution of 1958, understood to exclude distinctions between French citizens before the law. Article 74 of the same Constitution, however, includes a special clause for overseas territories, under which they shall have a special organization which takes into account their own interests within the general interests of the Republic. That special organization may entail, as France has pointed out in its submissions in the present communication, a different legislation given the geographic, social and economic particularities of these territories. Thus, it is the Declaration itself, as justified by France, which makes article 27 of the Covenant applicable in so far as overseas territories are concerned.

In our opinion, the communication raises important issues under article 27 of the Covenant which should have been addressed on their merits, notwithstanding the declaration made by France under article 27.

After the Committee decided not to reopen the issue of admissibility of the authors' claim under article 27, we are able to associate ourselves with the Committee's Views on the remaining aspects of the communication.

Elizabeth Evatt [signed]
Cecilia Medina Quiroga [signed]
Fausto Pocar [signed]
Martin Scheinin [signed]
Maxwell Yalden [signed]

[Original: English]

B. Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville *(dissenting)*

1. Unfortunately we are unable to join the Committee's view that violations of article 17 and 23 of the Covenant have been substantiated in the present communication.

2. This Committee has held in the past (communication Nos. 220/1987 and 222/1987, declared inadmissible on 8 November 1989) that the French declaration upon ratification of the Covenant regarding article 27, must be read as a reservation, according to which France is not bound by this article. Relying on this decision, the Committee held in its decision an admissibility of 30 June 1994, that the authors' communication was not admissible as regards an alleged violation of article 27. This decision, which was phrased in general terms, precludes us from examining whether the French declaration applies not only in Metropolitan France, but also in Overseas Territories, in which the State party itself concedes that special conditions may apply.

3. The authors' claim is that the State party has failed to protect an ancestral burial ground, which plays on important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion. However, for the reasons set out above, the Committee was precluded from examining this issue. Instead the Committee holds that allowing the building on the burial ground constitutes arbitrary interference with the authors' family and privacy. We cannot accept these propositions.

4. In reaching the conclusion that the facts in the instant case do not give rise to an interference with the authors' family and privacy, we do not reject the view, expressed in the Committee's General Comment 16 on article 17 of the Covenant, that the term "family" should "be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned." Thus, the term "family", when applied to the local population in French Polynesia, might well include relatives, who would not be included in a family, as this term is understood in other societies, including metropolitan France. However, even when the term "family" is extended, it does have a discrete meaning. It does not include all members of one's ethnic or cultural group. Nor does it necessarily include all one's ancestors, going back to time immemorial. The claim that a certain site is an ancestral burial ground of an ethnic or cultural group, does not, as such, imply that it is the burial ground of members of the authors' family. The authors have provided no evidence that the burial ground is one that is connected to their family, rather than to the whole of the indigenous population of the area. The general claim that members of their families are buried there, without specifying in any way the nature of the relationship between themselves and the persons buried there, is insufficient to support their claim, even on the assumption that the notion of family is different from notions that prevail in other societies. We therefore

cannot accept the Committee's view that the authors have substantiated their claim that allowing building on the burial ground amounted to interference with their family.

5. The Committee mentions the authors' claim "that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life." Relying on the fact that the State party has challenged neither this claim nor the authors' argument that the burial grounds play an important part in their history, culture and life, the Committee concludes that the construction of the hotel complex on the burial grounds interferes with the authors' right to family and privacy. The reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee. We regret that the Committee is prevented from applying article 27 in the instant case.

6. Contrary to the Committee, we cannot accept that the authors' claim of an interference with their right to privacy has been substantiated. The only reasoning provided to support the Committee's conclusion in this matter is the authors' claim that their connection with their ancestors plays an important role in their identity. The notion of privacy revolves around protection of those aspects of a person's life, or relationships with others, which one chooses to keep from the public eye, or from outside intrusion. It does not include access to public property, whatever the nature of that property, or the purpose of the access. Furthermore, the mere fact that visits to a certain site play an important role in one's identity, does not transform such visits into part of one's right to privacy. One can think of many activities, such as participation in public worship or in cultural activities, that play important roles in persons' identities in different societies. While interference with such activities may involve violations of articles 18 or 27, it does not constitute interference with one's privacy.

7. We reach the conclusion that there has been no violation of the authors' rights under the Covenant in the present communication with some reluctance. Like the Committee we too are concerned with the failure of the State party to respect a site that has obvious importance in the cultural heritage of the indigenous population of French Polynesia. We believe, however, that this concern does not justify distorting the meaning of the terms family and privacy beyond their ordinary and generally accepted meaning.

Thomas Buergenthal [signed]
David Kretzmer [signed]
Nisuke Ando [signed]
Lord Colville [signed]

[Original: English]
