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Eighty-eighth session

16 October - 3 November 2006

ANNEX*

Decisions of the Human Rights Committee declaring communications inadmissible under the Optional Protocol to the International Covenant on Civil and Political Rights

- Eighty-eighth session -

Communication No. 1453/2006

Submitted by: André Brun (represented by counsel, François Roux)

Alleged victim: The author

State party: France

Date of communication: 15 November 2005 (initial submission)

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

Meeting on 18 October 2006,

Adopts the following:

Decision on admissibility

1.1 The author of the communication, dated 15 November 2005, is André Brun, a French citizen. The author claims to be the victim of violations by France of articles 2, paragraphs 3 (a) and (b), 6, 17 and 25 (a) of the International Covenant on Civil and Political Rights. He is represented by counsel, François Roux. The Covenant and its Optional Protocol entered into force for France on 4 February 1981 and 17 May 1984, respectively.

1.2 On 3 May 2006, the Special Rapporteur for new communications, on behalf of the Committee, determined that the admissibility of this case should be considered separately from the merits.

Factual background

2.1 On 28 April 2000, the Minister of Agriculture issued an order, after consultation with the study group on the dissemination of biomolecularly engineered products, authorizing the company Biogemma to conduct an open-field trial of genetically modified organisms (GMOs). Groups of which the author was a member had demanded that the Minister of Agriculture put a stop to Biogemma's dissemination of GMOs, under threat of destruction of the field trials.

2.2 On 26 August 2001, 200 persons, including the author, met in Cléon d'Andran (France) to demonstrate against the GMO crops. The aim of the demonstration was to destroy a plot of transgenic maize, to dump the uprooted crops in front of the Prefecture and to be received as a delegation by the Prefect. The demonstrators destroyed the plot of transgenic maize.

2.3 Following these events, Biogemma, the company responsible for the destroyed transgenic maize crops, had 10 of the persons who had participated in this action summoned before the Criminal Court of Valence for joint destruction of property

belonging to other persons.

2.4 On 8 February 2002, the Criminal Court of Valence imposed fines and prison sentences on the 10 persons. The author received a three months' suspended sentence and a fine of 2,000 euros. On 14 March 2003, the Grenoble Appeal Court upheld the judgement of the court of first instance with regard to the author's conviction, but revised the sentence to a two months' suspended prison sentence and a fine of 300 euros. In a judgement of 28 April 2004, the Court of Cassation rejected the author's appeal.

The complaint

3.1 The author claims that he is the victim of a violation by France of articles 2, paragraphs 3 (a) and (b), 17 and 25 (a) of the Covenant. With regard to article 17, the author maintains that, in the context of the uncertainty surrounding GMO open-field trials, the domestic courts should have recognized the legitimacy of the act of destroying the transgenic maize crops and that they had acted out of necessity to protect the environment and health. He argues that the State party has not taken the necessary measures to prevent the violation of article 17 in the broader sense. The author explains in detail the jurisprudence of the European Court of Human Rights relating to pollution cases. He considers that "the Committee should proceed by analogy, referring to the jurisprudence developed by the European Court of Human Rights, and prepare an extensive interpretation of article 17", under which the concept of private and family life encompasses the right to live in a healthy environment. If the Committee interprets the provision in this way, the author argues that the Committee will find a violation of article 17.

3.2 The author invokes the "precautionary principle" and considers that the medium- and long-term risks of GMOs on health and the environment should be taken into account. He argues that, at present, in the current state of knowledge on the use of GMOs, there has been no precise and coherent response concerning the long-term health and environmental risks. Consequently, the precautionary principle should be applied. In the absence of State intervention, the author considers that, by destroying the field of transgenic maize, the persons convicted at the national level, including the author, acted to prevent risks to public health and the environment associated with experiments which are not subject to any a priori controls.

3.3 The author considers that the planting of transgenic crops in open fields inevitably results in the contamination of conventional crops by genetically modified crops. He argues that the current minimum distances between GMO trial fields and non-GMO fields are ineffective. Thus, the destruction of the transgenic maize crops is necessary to safeguard the assets of conventional and organic farmers.

3.4 The author argues that there is no system of compensation for conventional and organic farmers should their production be found to contain GMOs which they

themselves did not introduce. In addition, it is difficult to identify who is responsible, because of the complexity of the legal strategies used by companies to conduct open-field GMO trials.

3.5 The author believes that he acted out of necessity to protect his environment. He recalls that, under French law, the state of necessity arises when a person is in a situation such that, in order to protect an overriding interest, he or she has no other option but to commit an illegal act.

3.6 With regard to article 25, the author considers that in 2001, the year when the act in which he participated was committed, there had been no public debate to allow ordinary citizens to take an active part in the decisions of the public authorities concerning the environment. For this reason, acts of destruction were carried out by groups of farmers and citizens to trigger a debate with the State and the establishment of commissions to consider the question of the use of genetically modified crops and their health and environmental risks. The author claims that a majority of French people (farmers and consumers) is opposed to GMOs, but the State has a very restrictive position in that it continues to allow field trials of GMOs without prior public consultation. He therefore believes that the State party has not respected the provisions of article 25 (a) and has exceeded its authority in terms of environmental policy.

3.7 Concerning article 2, paragraphs 3 (a) and (b), the author considers that citizens have no legally recognized means of being heard and influencing the decisions of the public authorities concerning GMOs. He argues that the French legislative machinery does not allow him to have effective access to justice prior to the commencement of GMO field trials and that he is therefore unable to challenge the decisions which directly affect him in his private and family life.

3.8 Concerning the exhaustion of domestic remedies, the author argues that he invoked the substance of article 8 of the European Convention on Human Rights, which guarantees respect for private and family life in the same way as article 17 of the Covenant. The author therefore considers domestic remedies to have been exhausted.

3.9 The author notes that he has not submitted the same case to the European Court of Human Rights. It has, however, been submitted by other complainants who were among those also convicted by the Criminal Court of Valence.

State party's observations on admissibility

4.1 In a note verbale of 20 April 2006, the State party disputes the admissibility of the communication. First, the State party considers the communication inadmissible on the grounds that the author is not a victim. It recalls that complainants must have a personal interest in making a claim and that the Optional Protocol cannot be used to initiate a class action or to review domestic legislation **(1)** *in abstracto*. In order for the author to be considered a victim, he must establish that the disputed text has been applied to his

disadvantage, thereby causing him definite direct personal harm. In the present case, the author claims to have been the victim of a violation of his right to privacy, as guaranteed by article 17 of the Covenant, through his criminal conviction. The State party stresses that the author was convicted by the criminal courts for acts of deliberate destruction or damaging of property belonging to other persons committed jointly with others, the penalties for which are set out in article 322-1 ff. of the Criminal Code. This conviction has no direct or indirect connection to the regulations concerning GMOs. The State party also notes that the author is not claiming any personal impact on his health or his environment. Consequently, it concludes that the invocation of a mere risk that has not been defined with certainty cannot be considered a determining factor for qualifying the author as a victim under the provisions of the Covenant.

4.2 Second, the State party considers the communication inadmissible on the grounds of incompatibility *ratione materiae* in respect of its claims under both articles 17 and 25. It argues that the right to healthy food and environment does not stem from either the text of article 17 of the Covenant or its interpretation by the Committee in general comment No. 16 on this issue. Rather, the concept of private and family life is to be defined in contrast to the public domain. The State party therefore considers the communication incompatible *ratione materiae* with article 17. With regard to article 25, the author argues that "the citizens who participated in the acts of 26 August 2001 acted because they did not have the effective legal means to enable civil society to have an input into the laws adopted". The State party considers that such an interpretation of the right to participate directly in public affairs does not follow from article 25 or from the Committee's general comment No. 25. The communication is therefore incompatible *ratione materiae* with article 25.

4.3 Third, the State party considers the communication inadmissible on the ground that domestic remedies have not been exhausted. It recalls that the event at the root of the complaint submitted by the author was the order of the Minister of Agriculture of 28 April 2000, which authorized the company Biogemma deliberately to release GMOs. It also recalls that, under French law, it is possible to request the annulment of a ministerial order by lodging an appeal to the Council of State alleging an abuse of authority. Such an appeal, if the judge confirms the illegality of the act, serves to cancel the ministerial order retroactively. In the case in question, rather than following this appeal procedure which is open to all persons aggrieved by an administrative decision, the author chose to demand that the Minister of Agriculture put a stop to the dissemination of GMOs and to destroy the property of a third party. He did not, therefore, use the remedies available to him.

4.4 Finally, the State party considers the communication inadmissible on the grounds that it constitutes an abuse of rights. In this case, the objective of the communication submitted by the author is to provoke a public debate on GMO crops in France. Consequently, it constitutes both an abuse of procedure and an abuse of rights.

Author's comments on the observations of the State party

5.1 In his comments of 5 July 2006 the author maintains that he regards himself as personally targeted as a victim. He recalls that his conviction for the offence in question was directly linked to the lack of legislation on GMOs, for his original argument in this case was that there existed a state of necessity requiring the prevention of an imminent danger arising from the open-field sowing of transgenic maize. He considers therefore that he was a direct victim of a specific case of the application of legislation impairing his exercise of the rights guaranteed by the Covenant. He cites the jurisprudence of the European Court of Human Rights, which has made theoretical checks on the compliance of legislation with the European Convention in some of its decisions. He makes a distinction between the situation of the authors of the communication *Bordes and Temeharo v. France* and his own situation, for he believes himself to have been a potential direct victim of the threats resulting from the dissemination of GMOs in the environment in the course of the field trials, which constitute a real and imminent danger to his enjoyment of privacy and family life and to his quality of life. **(2)**

5.2 On the Committee's competence *ratione materiae* in respect of article 17, the author stresses that there is a link between the protection of the environment and the effective protection of certain rights and fundamental freedoms set out in articles 17 and 6 of the Covenant. He cites several relevant international instruments and recalls that the Committee's general comment No. 16, which states that interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant. The right to respect for the privacy of personal and family life and of the home obliges the State to take all necessary measures to protect individuals against any interference by the public authorities or private persons in the exercise of the guaranteed right. According to the author the interference must be justified and proportionate in the light of the provisions, aims and objectives of the Covenant. In this case the interference by the authorities consisted in their failure to take the necessary measures to prevent the threats to the author's health and environment associated with the dissemination of GMOs in the open field. The State party even violated the author's rights a second time by prosecuting him for having tried to terminate the violation of which he was a victim and by securing his conviction.

5.3 On the Committee's competence *ratione materiae* in respect of article 25, the author stresses that citizens did not have an effective and efficient remedy to prevent the threats posed by the GMO open-field trials to the environment and public health. He asserts that article 25 (a) contains a procedural obligation inherent in the guaranteed right to ensure participation in the decision-making process, and that this procedural obligation implies the rights to information, to participation and to appropriate remedies. He points out that at the time of the events in question he did not have the means of obtaining useful and relevant information to enable him to participate in the decision-making process conducted by the public authorities with a view to authorizing the open-field sowing of GMO crops. It is in this sense that article 25 was violated, for the public authorities did not allow the author to participate in the environmental decision-making process. The author maintains that the public authorities did not produce the required prior assessments and did not inform the public of the possible

dangers of the dissemination of GMOs in the open field. The Council of State recently revoked a decision of the Ministry of Agriculture authorizing the deliberate sowing of transgenic maize on the ground that the technical file, which ought to have contained all relevant information for assessing the impact of the tests on public health and the environment, was not in order.**(3)** He believes therefore that he is fully justified in invoking article 25 (a) in conjunction with article 2, paragraphs 3 (a) and (b).

5.4 Concerning the exhaustion of remedies, the author considers that he has in fact exhausted all domestic remedies, for the Court of Cassation rejected his appeal on 28 April 2004. With regard to application to the administrative courts the author points out that article 5, paragraph 2 (a), of the Optional Protocol does not refer to the exhaustion of all the domestic remedies available under the Constitution or administrative, civil and criminal law. It is not mandatory to exhaust all conceivable remedies in order to render the application admissible. He recalls that he was unable to apply to the administrative courts since no administrative decision had been taken against him and accordingly no administrative remedy was immediately available to him. In any event, an administrative remedy is no longer available to the author at this stage of the proceedings. The author points out that, although the State party criticized the authors of several earlier communications for failing to avail themselves of administrative remedies, the Committee had nonetheless concluded that it could consider those communications. **(4)**

5.5 The author maintains that, in view of the danger posed by the contamination of traditional and biological crops by the genetically modified crops, he could not delay his action or await the judicial outcome of an application for cancellation of the permit to disseminate GMOs. In any event, a decision by the administrative court would not have been taken until after the sowing of the genetically modified crops and it would not have prevented their sowing or the contamination of other crops as a result of the GMO field tests. The author points out that in similar cases rulings on applications to the administrative jurisdictions seeking cancellation of permits for the dissemination of GMOs in the open field were not made until two years after the issuance of the permits, leaving plenty of time for the GMO field tests to contaminate traditional and biological crops growing nearby.

5.6 Lastly, the author adds that article 6 was also violated and asserts that the promotion of a healthy environment contributes to the protection of the right to life. He cites a decision of the Committee concerning radioactive wastes in which the Committee observed that the communication raised serious issues with regard to the obligation of States parties to protect human life under article 6, paragraph 1, without however finding that this provision had been infringed. **(5)**

Issues and proceedings before the Committee

6.1 Before examining a complaint submitted in a communication, the Human Rights Committee must determine, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

6.2 In accordance with article 5, paragraph 2 (a), of the Optional Protocol, the Committee ascertained that the same matter was not being examined under another procedure of international investigation or settlement.

6.3 Concerning the author's allegations relating to articles 6 and 17 of the Covenant, the Committee observes that no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant. **(6)** Any person claiming to be a victim of a violation of a right protected by the Covenant must demonstrate either that a State party has by an act or omission already impaired the exercise of his right or that such impairment is imminent, basing his argument for example on legislation in force or on a judicial or administrative decision or practice. **(7)** In the present case, the Committee notes that the author's arguments (see paragraphs 3.2 to 3.5) refer to the dangers allegedly stemming from the use of GMOs and observes that the facts of the case do not show that the position of the State party on the cultivation of transgenic plants in the open field represents, in respect of the author, an actual violation or an imminent threat of violation of his right to life and his right to privacy, family and home. After considering the arguments and material before it the Committee concludes therefore that the author cannot claim to be a "victim" of a violation of articles 6 and 17 of the Covenant within the meaning of article 1 of the Optional Protocol.

6.4 The Committee notes the author's complaint under article 25 (a) of the Covenant to the effect that the State party denied him the right and the opportunity to participate in the conduct of public affairs with regard to the cultivation of transgenic plants in the open field. The Committee points out that citizens also take part in the conduct of public affairs by bringing their influence to bear through the public debate and the dialogue with their elected representatives, as well as through their capacity to form associations. In the present case the author participated in the public debate in France on the issue of the cultivation of transgenic plants in the open field; he did this through his elected representatives and through the activities of an association. In these circumstances the Committee considers that the author has failed to substantiate, for purposes of admissibility, the allegation that his right to take part in the conduct of public affairs was violated. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol. **(8)**

6.5 The Committee points out that article 2 of the Covenant may be invoked by individuals only in relation to other provisions of the Covenant and observes that article 2, paragraph 3 (a), provides that each State party shall undertake "to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy". Article 2, paragraph 3 (b), guarantees protection to alleged victims if their complaints are sufficiently well-founded to be arguable under the Covenant. A State party cannot reasonably be required, on the basis of article 2, paragraph 3 (b), to make such procedures available in respect of complaints which are less well-founded. **(9)** Since the author of the present complaint has failed to substantiate his complaint for purposes of admissibility under article 25, his allegation of a violation of article 2 of the Covenant is also inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides:

(a) That the communication is inadmissible under articles 1 and 2 of the Optional Protocol; and

(b) That this decision shall be communicated to the State party and to the author.

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[Adopted in English, French 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.]

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Alfredo Castillero Hoyos, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Mr. Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

Pursuant to rule 90 of the Committee's rules of procedure, Committee member Ms. Christine Chanet did not participate in adoption of the Committee's decision.

The text of an individual opinion signed by Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Appendix

PARTIALLY DISSENTING OPINION BY COMMITTEE MEMBER

MR. HIPÓLITO SOLARI-YRIGOYEN

I partially disagree with the majority view. I agree with the ruling of inadmissibility, based, however, not only on article 2 of the Optional Protocol but also on article 3, since I agree with the view of the State party (para. 4.4) that the author committed an abuse of rights by submitting the communication without justification or evidence of his alleged victimization.

(*Signed*): Hipólito Solari-Yrigoyen

[Done in English, French and Spanish, the Spanish 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. See *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, communication No. 35/1978, decision adopted on 9 April 1981, para. 9.1.

2. See *Bordes and Temeharo v. France*, communication No. 645/1995, decision on inadmissibility of 22 July 1996, para. 5.5.

3. Council of State, *Fédération des syndicats agricoles MODEF v. Monsanto SAS*, decision of 28 April 2006.

4. See *Maillé v. France*, communication No. 689/1996, Views adopted on 10 July 2000, para. 6.3; and *Vernier and Nicolas v. France*, communications Nos. 690-691/1996, Views adopted on 10 July 2000, para. 6.2.

5. See *E.H.P. v. Canada*, communication No. 67/1980, decision on inadmissibility of 27 October 1982, para. 8.

6. See *E.P. and others v. Colombia*, communication No. 318/1988, decision on inadmissibility of 25 July 1990, para. 8.2; and *Aumeeruddy-Cziffra and 19 other Mauritian women v. Mauritius*, communication No. 35/1978, Views adopted on 9 April 1981, para. 9.2.

7. See *E.W. and others v. Netherlands*, communication No. 429/1990, decision on inadmissibility of 8 April 1993, para. 6.4; *Bordes and Temeharo v. France*, communication No. 645/1995, decision on inadmissibility of 22 July 1996, para. 5.5; *Beydon and 19 other members of the association "DIH Mouvement de protestation civique" v. France*, communication No. 1400/2005, decision on inadmissibility of 31 October 2005, para. 4.3; and *Aalbersberg and others v. Netherlands*, communication No. 1440/2005, decision on inadmissibility of 12 July 2006, para. 6.3.

8. See *Beydon and 19 other members of the association "DIH Mouvement de protestation civique" v. France*, communication No. 1400/2005, decision on inadmissibility of 31 October 2005, para. 4.5.

9. See *Kazantzis v. Cyprus*, communication No. 972/2001, decision on inadmissibility of 7 August 2003, para. 6.6; and *Faure v. Australia*, communication No. 1036/2001, Views adopted on 31 October 2005, para. 7.2.