B. Communication No. 196/1985, Ibrahima Gueye et al. v. France (Views adopted on 3 April 1989 at the thirty-fifth session)

Submitted by: Ibrahima Gueye et al.

Alleged victims: The authors

State party concerned: France

Date of communication: 12 October 1985 (date of initial letter)

Date of decision on admissibility: 5 November 1987

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

Meeting on 3 April 1989,

Having concluded its consideration of communication No. 196/1985, submitted to the Committee by Ibrahima Gueye and 742 other retired Senegalese members of the French Army under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

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

1.1 The authors of the communication (initial letter of 12 October 1985 and subsequent letters of 22 December 1986, 6 June 1987 and 21 July 1988) are Ibrahima Gueye and 742 other retired Senegalese members of the French Army, residing in Senegal. They are represented by counsel.

1.2 The authors claim to be victims of a violation of article 26 of the Covenant by France because of alleged racial discrimination in French legislation, which provides for different treatment in the determination of pensions of retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960 and who receive pensions that are inferior to those enjoyed by retired French soldiers of French nationality.

1.3 It is stated that, pursuant to Law No. 51-561 of 18 May 1951 and Decree No. 51-590 of 23 May 1951, retired members of the French Army, whether French or Senegalese, were treated equally. The acquired rights of Senegalese retired

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* Pursuant to rule 84, paragraph 1 (b), of the Committee's provisional rules of procedure, Ms. Christine Chanet did not participate in the adoption of the views of the Committee. Mr. Birame Ndiaye did not participate in the adoption of the views pursuant to rule 85.

soldiers were respected after independence in 1960 until the Finance Act No. 74.1129 of December 1974 provided for different treatment of the Senegalese. Article 63 of this Law stipulates that the pensions of Senegalese soldiers would no longer be subject to the general provisions of the Code of Military Pensions of 1951. Subsequent French legislation froze the level of pensions for the Senegalese as at 1 January 1975.

1.4 The authors state that the laws in question have been challenged before the Administrative Tribunal of Poitiers, France, which rendered a decision on 22 December 1980 in favour of Dia Abdourahmane, a retired Senegalese soldier, ordering the case to be sent to the French Minister of Finance for purposes of full indemnification since 2 January 1975. The authors enclose a similar decision of the Conseil d'Etat of 22 June 1982 in the case of another Senegalese soldier. However, these decisions, it is alleged, were not implemented, in view of a new French Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, which is said to frustrate any further recourse before the French judicial or administrative tribunals.

1.5 As to the merits of the case, the authors reject the arguments of the French authorities that allegedly justify the different treatment of retired African (not only Senegalese) soldiers on the grounds of: (a) their loss of French nationality upon independence; (b) the difficulties for French authorities to establish the identity and the family situation of retired soldiers in African countries; and (c) the differences in the economic, financial and social conditions prevailing in France and in its former colonies.

1.6 The authors state that they have not submitted the same matter to any other procedure of international investigation or settlement.

2. By its decision of 26 March 1986, the Human Rights Committee transmitted the communication under rule 91 of the Committee's provisional rules of procedure to the State party requesting information and observations relevant to the question of the admissibility of the communication.

3.1 In its initial submission under rule 91, dated 5 November 1986, the State party describes the factual situation in detail and argues that the communication is "inadmissable as being incompatible with the provisions of the Covenant (art. 3 of the Optional Protocol), additionally, unfounded", because it basically deals with rights that fall outside the scope of the Covenant (i.e. pension rights) and, at any rate, because the contested legislation does not contain any discriminatory provisions within the meaning of article 26 of the Covenant.

3.2 In a further submission under rule 91, dated 8 April 1987, the State party invokes the declaration made by the French Government upon ratification of the Optional Protocol on 17 February 1984 and contends that the communication is inadmissible ratione temporis:

> "France interprets article 1 [of the Optional Protocol] as giving the Committee the competence to receive communications alleging a violation of a right set forth in the Covenant 'which results either from acts, omissions, developments or events occurring after the date on which the Protocol entered into force for the Republic, or from a decision relating to acts, omissions, developments or events after that date'.

"It is clear from this interpretative declaration that communications directed against France are admissible only if they are based on alleged violations which derive from acts or events occurring after 17 May 1984, the date on which the Protocol entered into force with respect to France under article 9, paragraph 2, of the said Protocol.

"However, the statement of the facts contained both in the communication itself and in the initial observations by the French Government indicates that the violation alleged by the authors of the communication derives from Law No. 79.1102 of 21 December 1979, which extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as 'crystallization' of military pensions that had already applied since 1 January 1961 to the nationals of the other States concerned.

"Since this act occurred before ratification by France of the Optional Protocol, it cannot therefore provide grounds for a communication based on its alleged incompatibility with the Covenant unless such communication ignores the effect ratione temporis which France conferred on its recognition of the right of individual communication."

4.1 In their comments of 22 December 1986, the authors argue that the communication should not be declared inadmissible pursuant to article 3 of the Optional Protocol as incompatible with the provisions of the Covenant, since a broad interpretation of article 26 of the Covenant would permit the Committee to review questions of pension rights if there is discrimination, as claimed in this case.

4.2 In their further comments of 6 June 1987, the authors mention that although the relevant French legislation pre-dates the entry into force of the Optional Protocol for France, the authors had continued negotiations subsequent to 17 May 1984 and that the final word was spoken by the Minister for Economics, Finance and Budget in a letter addressed to the authors on 12 November 1984.

5.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with rule 87 of its provisional rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

5.2 With regard to the State party's contention that the communication was inadmissible under article 3 of the Optional Protocol as incompatible with the Covenant, the Committee recalled that it had already decided with respect to prior communications (Nos. 172/1984, 180/1984 and 182/1984) that the scope of article 26 of the Covenant permitted the examination of allegations of discrimination even with respect to pension rights.

5.3 The Committee took note of the State party's argument that, as the alleged violations derived from a law enacted in 1979, the communication should be declared inadmissible on the grounds that the interpretative declaration made by France upon ratification of the Optional Protocol precluded the Committee from considering alleged violations that derived from acts or events occurring prior to 17 May 1984, the date on which the Optional Protocol entered into force with respect to France. The Committee observed in this connection that in a number of earlier cases (Nos. 6/1977 and 24/1977), it had declared that it could not consider an alleged violation of human rights said to have taken place prior to the entry into force of the Covenant for a State party, unless it is a violation that continues after that

date or has effects which themselves constitute a violation of the Covenant after that date. The interpretative declaration of France further purported to limit the Committee's competence ratione temporis to violations of a right set forth in the Covenant, which result from "acts, omissions, developments or events occurring after the date on which the Protocol entered into force" with respect to France. The Committee took the view that it had no competence to examine the question whether the authors were victims of discrimination at any time prior to 17 May 1984; however, it remained to be determined whether there had been violations of the Covenant subsequent to the said date, as a consequence of acts or omissions related to the continued application of laws and decisions concerning the rights of the applicants.

6. On 5 November 1987, the Human Rights Committee therefore decided that the communication was admissible.

7.1 In its submission under article 4, paragraph 2, of the Optional Protocol, dated 4 June 1988, the State party recalls its submission under rule 91; a/ it adds that Senegalese nationals who acquired French nationality and kept it following Senegal's independence are entitled to the same pension scheme as all other French former members of the armed forces. Articles 97, paragraph 2, to 97, paragraph 6, of the Nationality Code offer any foreigner who at one point in time possessed French nationality the possibility of recovering it. The State party argues that this possibility is not merely theoretical, since, in the past, approximately 2,000 individuals have recovered French nationality each year.

7.2 The State party further explains that a Senegalese former member of the armed forces who lost his French nationality following Senegal's independence and then recovered his French nationality would ipso facto recover the rights to which French nationals are entitled under the Pension Code, article L 58 of which provides that "the right to obtain and enjoy the pension and life disability annuity is suspended: (...) by circumstances which cause a person to lose the status of French national for as long as that loss of nationality shall last". This implies that once nationality is recovered, the right to a pension is re-established. The State party concludes that nationality remains the sole criterion on which the difference in treatment referred to by the authors is based.

8.1 In their comments on the State party's submission, the authors, in a letter dated 21 July 1988, submit that the State party has exceeded the deadline for submission of its submission under article 4, paragraph 2, of the Optional Protocol by 12 days, and that for this reason it should be ruled inadmissible. b/ In this connection, they suspect that "(b) by stalling and making full use, even beyond the deadlines set under the Committee's rules of procedure, of procedural tactics so as to delay a final decision, the State party hopes that the authors will die off one by one and that the amounts it will have to pay will drop considerably". Alternatively, the authors argue that the Committee should not further examine the State party's observations as they repeat arguments discussed at length in earlier submissions and thus should be considered to be of a dilatory nature.

8.2 With respect to the merits of their case, the authors maintain that the State party's argument concerning the question of nationality is a fallacious one. They claim that the State party is only using the nationality argument as a pretext, so as to deprive the Senegalese of their acquired rights. They further refer to article 71 of the 1951 Code of Military Pensions, which stipulates:

"Serving or former military personnel of foreign nationality possess the same rights as serving or former military personnel of French nationality, except in the case where they have taken part in a hostile act against France."

In their view, they enjoy "inalienable and irreducible pension rights" under this legislation. Since none of them has ever been accused of having participated in a hostile act against France, they submit that the issue of nationality must be "completely and definitely" ruled out.

8.3 The authors argue that they have been the victims of racial discrimination based on the colour of their skin, on the purported grounds that:

(a) In Senegal, registry office records are not well kept and fraud is rife;

(b) As those to whom pensions are owed, i.e. the authors, are blacks who live in an underdeveloped country, they do not need as much money as pensioners who live in a developed country such as France.

The authors express consternation at the fact that the State party is capable of arguing that, since the creditor is not rich and lives in a poor country, the debtor may reduce his debt in proportion to the degree of need and poverty of his creditor, an argument they consider to be contrary not only to fundamental principles of law but also to moral standards and to equity.

9.1 The Human Rights Committee, having considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol, bases its views on the following facts, which appear uncontested.

9.2 The authors are retired soldiers of Senegalese nationality who served in the French Army prior to the independence of Senegal in 1960. Pursuant to the Code of Military Pensions of 1951, retired members of the French Army, whether French or Senegalese, were treated equally. Pension rights of Senegalese soldiers were the same as those of French soldiers until a new law, enacted in December 1974, provided for different treatment of the Senegalese. Law No. 79/1102 of 21 December 1979 further extended to the nationals of four States formerly belonging to the French Union, including Senegal, the régime referred to as "crystallization" of military pensions that had already applied since 1 January 1961 to the nationals of other States concerned. Other retired Senegalese soldiers have sought to challenge the laws in question, but French Finance Law No. 81.1179 of 31 December 1981, applied with retroactive effect to 1 January 1975, has rendered further recourse before French tribunals futile.

9.3 The main question before the Committee is whether the authors are victims of discrimination within the meaning of article 26 of the Covenant or whether the differences in pension treatment of former members of the French Army, based on whether they are French nationals or not, should be deemed compatible with the Covenant. In determining this question, the Committee has taken into account the following considerations.

9.4 The Committee has noted the authors' claim that they have been discriminated against on racial grounds, that is, one of the grounds specifically enumerated in article 26. It finds that there is no evidence to support the allegation that the State party has engaged in racially discriminatory practices vis-à-vis the

authors. It remains, however, to be determined whether the situation encountered by the authors falls within the purview of article 26. The Committee recalls that the authors are not generally subject to French jurisdiction, except that they rely on French legislation in relation to the amount of their pension rights. It notes that nationality as such does not figure among the prohibited grounds of discrimination listed in article 26, and that the Covenant does not protect the right to a pension, as such. Under article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. There has been a differentiation by reference to nationality acquired upon independence. In the Committee's opinion, this falls within the reference to "other status" in the second sentence of article 26. The Committee takes into account, as it did in communication No. 182/1984, that "the right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26".

9.5 In determining whether the treatment of the authors is based on reasonable and objective criteria, the Committee notes that it was not the question of nationality which determined the granting of pensions to the authors but the services rendered by them in the past. They had served in the French Armed Forces under the same conditions as French citizens; for 14 years subsequent to the independence of Senegal they were treated in the same way as their French counterparts for the purpose of pension rights, although their nationality was not French but Senegalese. A subsequent change in nationality cannot by itself be considered as a sufficient justification for different treatment, since the basis for the grant of the pension was the same service which both they and the soldiers who remained French had provided. Nor can differences in the economic, financial and social conditions as between France and Senegal be invoked as a legitimate justification. If one compared the case of retired soldiers of Senegalese nationality living in Senegal with that of retired soldiers of French nationality in Senegal, it would appear that they enjoy the same economic and social conditions. Yet, their treatment for the purpose of pension entitlements would differ. Finally, the fact that the State party claims that it can no longer carry out checks of identity and family situation, so as to prevent abuses in the administration of pension schemes cannot justify a difference in treatment. In the Committee's opinion, mere administrative inconvenience or the possibility of some abuse of pension rights cannot be invoked to justify unequal treatment. The Committee concludes that the difference in treatment of the authors is not based on reasonable and objective criteria and constitutes discrimination prohibited by the Covenant.

10. 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 events in this case, in so far as they produced effects after 17 May 1984 (the date of entry into force of the Optional Protocol for France), disclose a violation of article 26 of the Covenant.

11. The Committee, accordingly, is of the view that the State party is under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims.

Notes

a/ Submission dated 5 November 1986, paragraph 3.1 above.

b/ The deadline for the State party's submission under article 4, paragraph 2, expired on 4 June 1988. Although the submission is dated 4 June 1980, it was transmitted under cover of a note dated 16 June 1988.