

Communication No. 760/1997, J.G.A. Diergaardt et al. v. Namibia
(Views adopted on 25 July 2000, sixty-ninth session)*

<u>Submitted by:</u>	Rehoboth Baster Community et al. (represented by Dr. Y. J. D. Peeters, their international legal counsel)
<u>Alleged victim:</u>	The authors
<u>State party:</u>	Namibia
<u>Date of communication:</u>	17 November 1996 (initial submission)
<u>Date of admissibility decision:</u>	7 July 1998

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

Meeting on 25 July 2000,

Having concluded its consideration of communication No. 760/1997 submitted to the Human Rights Committee by J.G.A. Diergaardt et al. 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 authors of the communication, and the State party,

Adopts the following:

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

1. The authors of the communication are J.G.A. Diergaardt, Captain of the Rehoboth Baster Community,¹ D.J. Izaaks, Captain a.i. of the Rehoboth Baster Community, Willem van Wijk and Jan Edward Stumpfe, members of the Legislative Council of the Rehoboth Baster Community, Andreas Jacobus Brendell, Speaker of the Rehoboth Baster Community, and J. Mouton and John Charles Alexander McNab, members of the Rehoboth Baster Community.

* The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Nisuke Ando, Mr. P.N. Bhagwati, Ms. Christine Chanut, Lord Colville, Ms. Elizabeth Evatt, Ms. Pilar Gaitan de Pombo, Mr. Louis Henkin, Mr. Eckart Klein, Mr. David Kretzmer, Mr. Rajsoomer Lallah, Ms. Cecilia Medina Quiroga, Mr. Martin Scheinin, Mr. Hipólito Solari Yrigoyen, Mr. Roman Wieruszewski, Mr. Maxwell Yalden, and Mr. Abdallah Zakhia. The text of seven individual opinions signed by eleven Committee members is appended to this document.

They present the communication on their own behalf and on behalf of the Rehoboth Baster Community and claim to be a victim of a violation by Namibia of articles 1, 14, 17, 25(a) & (c), 26 and 27 of the Covenant. They are represented by Dr. Y.J.D. Peeters, their international legal counsel.

The facts as submitted by the authors

2.1 The members of the Rehoboth Baster Community are descendants of indigenous Khoi and Afrikaans settlers who originally lived in the Cape, but moved to their present territory in 1872. They were governed by their 'paternal laws', which provided for the election of a Captain, and for rights and duties of citizens. At present, the community numbers some 35,000 people and the area they occupy (south of Windhoek) has a surface of 14,216 square kilometres. In this area the Basters developed their own society, culture, language and economy, with which they largely sustained their own institutions, such as schools and community centres.

2.2 Their independence continued throughout the German colonial reign of Namibia, and was recognized by South Africa when it became the mandatory for South West Africa. However, in 1924, because of disagreement among the Basters about an agreement concluded with South Africa concerning the administration of the district of Rehoboth, the South African government enacted proclamation No. 31 whereby all powers of the Captain, the courts and officials appointed by the Council, were transferred to the Magistrate and his Court, thereby suspending the agreement on self-government. In 1933, a gradual process of restoring some form of local government was introduced by the establishment of an Advisory Council, members of which were elected by the community.

2.3 By Act No. 56 of 1976, passed by the South African parliament, the Rehoboth people were granted "self-government in accordance with the Paternal Law of 1872". The law provided for the election of a Captain every five years, who appointed the Cabinet. Laws promulgated by the Cabinet had to be approved by a 'Volksraad' (Council of the people), consisting of nine members.

2.4 According to counsel, in 1989, the Rehoboth Basters accepted under extreme political pressure, the temporary transfer of their legislative and executive powers into the person of the Administrator-General of South West Africa, so as to comply with UN Security Council resolution nr.435 (1978). In the motion, adopted by the Council of Rehoboth on 30 June 1989, the Administrator General was requested to administer the territory as an agent of the Captain and not to make any law or regulation applicable to Rehoboth without consent of the Captain, the Cabinet and the Council; at the end of the mandate the Government of Rehoboth would resume authority. The proclamation by the Administrator-General on the transfer of powers of legislative authority and government of Rehoboth, of 30 August 1989, suspends the powers of the Legislative Council and the Captain's Council of Rehoboth "until the date immediately before the date upon which the territory becomes independent". It is therefore submitted that the effect of this transfer expired on the day before independence of Namibia, and that thus on 20 March 1990, the traditional legal order and Law 56 of 1976 were in force on the territory of Rehoboth. A resolution restoring the power of the Captain, his Council and the legislative Council was adopted by the Rehoboth People's Assembly on 20 March 1990. On 21 March 1990, Namibia became independent, and the Constitution came into force.

2.5 The authors submit that the Government of Namibia did not recognize their independence and the return to the status quo ante, but expropriated all communal land of the community through application of schedule 5 of the Constitution, which reads:

(1) All property of which the ownership or control immediately prior to the date of independence vested in the Government of the Territory of South West Africa, or in any Representative Authority constituted in terms of the Representative Authorities Proclamation, 1980 (Proclamation AG 8 of 1990) or in the Government of Rehoboth, or in any other body, statutory or otherwise, constituted by or for the benefit of any such Government or Authority immediately prior to the date of independence, or which was held in trust for or on behalf of the Government of an independent Namibia, shall vest in or be under the control of the Government of Namibia.

...”

According to the counsel, this has had the effect of annihilating the means of subsistence of the community, since communal land and property was denied.

2.6 On 22 June 1991, the Rehoboth people organized general elections for a Captain, Council and Assembly according to the Paternal Laws. The new bodies were entrusted with protecting the communal properties of the people at all cost. Subsequently, the Rehoboth Baster Community and its Captain initiated a case against the Government of Namibia before the High Court. On 22 October 1993 the Court recognized the community’s locus standi. Counsel argues that this implies the recognition by the Court of the Rehoboth Basters as a people in its own right. On 26 May 1995, the High Court however rejected the community’s claim to the communal property. On 14 May 1996, the Supreme Court rejected the Basters’ appeal. With this, it is submitted that all domestic remedies have been exhausted.

2.7 On 28 February 1995, the International Covenant on Civil and Political Rights and the Optional Protocol thereto entered into force for Namibia.

The complaint

3.1 Counsel submits that the Government continues to confiscate the assets of the Rehoboth Basters, and that the Captain and other leaders and organizations were evicted from and deprived of the Captain’s residence, the administrative offices, the community hall, the communal land and of the assets of the Rehoboth Development Corporation. Counsel submits that this policy endangers the traditional existence of the community as a collective of mainly cattle raising farmers. He explains that in times of drought (as at the time when the communication was submitted) the community needs communal land, on which pasture rights are given to members of the community on a rotating basis. The expropriation of the communal land and the consequential privatization of it, as well as the overuse of the land by inexperienced newcomers to the area, has led to bankruptcy for many community farmers, who have had to slaughter their animals. As a consequence, they cannot pay their interests on loans granted to them by the Development Corporation (which used to be communal property but has now been seized by the Government), their houses are then sold to the banks and they find themselves homeless.

Counsel emphasizes that the confiscation of all property collectively owned by the community robbed the community of the basis of its economic livelihood, which in turn was the basis of its cultural, social and ethnic identity. This is said to constitute a violation of article 27.

3.2 In this context, the authors claim to be victims of a violation by the Government of Namibia of article 1 of the Covenant. They point out that the Namibian High Court has recognised them as a distinct community with a legal basis. They claim that their right to self-determination inside the republic of Namibia (so-called internal self-determination) has been violated, since they are not allowed to pursue their economic social and cultural development, nor are they allowed to freely dispose of their community's national wealth and resources. By enactment of the law on regional government 1996, the 124 year long existence of Rehoboth as a continuously organised territory was brought to an end. The territory is now divided over two regions, thus preventing the Basters from effectively participating in public life on a regional basis, since they are a minority in both new districts. Counsel claims that this constitutes a violation of article 25 of the Covenant.

3.3 The authors further claim a violation of article 14 of the Covenant, since they were forced to use English throughout the court proceedings, a language they do not normally use and in which they are not fluent. Moreover, they had to provide sworn translations of all documents supporting their claims (which were in Afrikaans) at very high cost. They claim therefore that their right to equality before the Courts was violated, since the Court rules favour English speaking citizens.

3.4 In this context, counsel points out that article 3 of the Constitution declares English to be the only official language in Namibia. Paragraph 3 of this article allows for the use of other languages on the basis of legislation by Parliament. Counsel states that seven years after independence such a law has still not been passed, and claims that this constitutes discrimination against non-English speakers. According to counsel, attempts by the opposition to have such legislation enacted have been thwarted by the Government which has declared to have no intention to take any legislative action in this matter. In this connection, counsel refers to the 1991 census, according to which only 0.8 percent of the Namibian population uses English as mother tongue.

3.5 As a consequence the authors have been denied the use of their mother tongue in administration,² justice, education and public life. This is said to be a violation of their rights under articles 26 and 27 of the Covenant.

3.6 The authors further claim a violation of article 17 of the Covenant, since they and their cattle have been expelled from the lands which they held in collective property.

3.7 Counsel requests the Committee for interim measures of protection under rule 86 of the rules of procedure. He requests that the Committee demand that no expropriation, buying or selling of the community lands take place, that no rent be collected from tenants, and that no herds be prevented from grazing on the community lands while the communication is under consideration by the Committee.

The State party's observations and counsel's comments thereon

4. On 23 June 1997, the Committee, acting through its Special Rapporteur on New Communications, transmitted the communication to the State party, requesting information and observations, without however requesting interim measures of protection under rule 86.
5. By note of 6 November 1997, the State party confirmed that domestic remedies had been exhausted. The State party denied however, that it had violated international obligations. The State party submitted that it was prepared to supply any relevant information which the Committee might request, either orally or in writing.
6. In his comments on the State party's submission, counsel noted that the State party conceded that domestic remedies had been exhausted and that it did not adduce any other grounds on the basis of which the communication should be inadmissible. Counsel agreed that the matter should be considered on its merits.

The Committee's admissibility decision

7. At its 63rd session, the Committee considered the admissibility of the communication. It ascertained, as required under article 5, paragraph 2(a), of the Optional Protocol, that the same matter was not being examined under another procedure of international investigation or settlement. The Committee noted that the State party had confirmed that all domestic remedies had been exhausted.
8. Consequently, on 7 July 1998 the Committee found the communication admissible and decided that the question whether or not the State party has violated its obligations under the Covenant in the authors' case should be examined on the merits.

Further developments

- 9.1 On 3 August 1998, the Committee's decision on admissibility was transmitted to the State party, with the request that the State party provide written explanations or statements on the substance of the authors' claims. No information was received, despite two reminders sent to the State party.
- 9.2 On 28 January 1999, counsel for the authors informed the Committee that Mr. John Macnab had been elected Captain of the Rehoboth community. In a further letter, dated 25 April 1999, counsel informed the Committee that the community's water supply had been cut off. He reiterated his request for interim measures of protection.

Consideration of the merits

- 10.1 The Human Rights Committee has considered the present communication in the light of all the written information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

10.2 The Committee regrets that the State party has not provided any information with regard to the substance of the authors' claims. It recalls that it is implicit in the Optional Protocol that States parties make available to the Committee all information at its disposal. In the absence of a reply from the State party, due weight must be given to the authors' allegations to the extent that they are substantiated.

10.3 The authors have alleged that the termination of their self-government violates article 1 of the Covenant. The Committee recalls that while all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the community to which the authors belong is a "people" is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive.³ As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular articles 25, 26 and 27.

10.4 The authors have made available to the Committee the judgement which the Supreme Court gave on 14 May 1996 on appeal from the High Court which had pronounced on the claim of the Baster community to communal property. Those courts made a number of findings of fact in the light of the evidence which they assessed and gave certain interpretations of the applicable domestic law. The authors have alleged that the land of their community has been expropriated and that, as a consequence, their rights as a minority are being violated since their culture is bound up with the use of communal land exclusive to members of their community. This is said to constitute a violation of Article 27 of the Covenant.

10.5 The authors state that, although the land passed to the Rehoboth Government before 20 March 1976, that land reverted to the community by operation of law after that date. According to the judgement, initially the Basters acquired for and on behalf of the community land from the Wartbooi Tribe but there evolved a custom of issuing papers (papieren) to evidence the granting of land to private owners and much of the land passed into private ownership. However, the remainder of the land remained communal land until the passing of the Rehoboth Self-Government Act No. 56 of 1976 by virtue of which ownership or control of the land passed from the community and became vested in the Rehoboth Government. The Baster Community had asked for it. Self-Government was granted on the basis of proposals made by the Baster Advisory Council of Rehoboth. Elections were held under this Act and the Rehoboth area was governed in terms of the Act until 1989 when the powers granted under the Act were transferred by law to the Administrator General of Namibia in anticipation and in preparation for the independence of Namibia which followed on 21 March 1990. And in terms of the

Constitution of Namibia, all property or control over property by various public institutions, including the Government of South West Africa, became vested in, or came under the control, of the Government of Namibia. The Court further stated:

“In 1976 the Baster Community, through its leaders, made a decision opting for Self-Government. The community freely decided to transfer its communal land to the new Government. Clearly it saw advantage in doing so. Then in 1989, the community, through the political party to which its leaders were affiliated, subscribed to the Constitution of an independent Namibia. No doubt, once again, the Community saw advantage in doing so. It wished to be part of the new unified nation which the Constitution created. One aim of the Constitution was to unify a nation previously divided under the system of apartheid. Fragmented self-governments had no place in the new constitutional scheme. The years of divide and rule were over.”

10.6 To conclude on this aspect of the complaint, the Committee observes that it is for the domestic courts to find the facts in the context of, and in accordance with, the interpretation of domestic laws. On the facts found, if “expropriation” there was, it took place in 1976, or in any event before the entry into force of the Covenant and the Optional Protocol for Namibia on 28 February 1995. As to the related issue of the use of land, the authors have claimed a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the de facto exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community. As the earlier case law by the Committee illustrates, the right of members of a minority to enjoy their culture under article 27 includes protection to a particular way of life associated with the use of land resources through economic activities, such as hunting and fishing, especially in the case of indigenous peoples.⁴ However, in the present case the Committee is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee’s assessment of the relationship between the authors’ way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.

10.7 The Committee further considers that the authors have not substantiated any claim under article 17 that would raise separate issues from their claim under article 27 with regard to their exclusion from the lands that their community used to own.

10.8. The authors have also claimed that the termination of self-government for their community and the division of the land into two districts which were themselves amalgamated in larger regions have split up the Baster community and turned it into a minority with an adverse impact on the rights under Article 25(a) and (c) of the Covenant. The right under Article 25(a) is a right to take part in the conduct of public affairs directly or through freely chosen representatives and the right under Article 25(c) is a right to have equal access, on general terms of equality, to public service in one’s country. These are individual rights. Although it may vary

well be that the influence of the Baster community, as a community, on public life has been affected by the merger of their region with other regions when Namibia became sovereign, the claim that this has had an adverse effect on the enjoyment by individual members of the community of the right to take part in the conduct of public affairs or to have access, on general terms of equality with other citizens of their country, to public service has not been substantiated. The Committee finds therefore that the facts before it do not show that there has been a violation of article 25 in this regard.

10.9 The authors have claimed that they were forced to use English during the proceedings in court, although this is not their mother tongue. In the instant case, the Committee considers that the authors have not shown how the use of English during the court proceedings has affected their right to a fair hearing. The Committee is therefore of the opinion that the facts before it do not reveal a violation of article 14, paragraph 1.

10.10 The authors have also claimed that the lack of language legislation in Namibia has had as a consequence that they have been denied the use of their mother tongue in administration, justice, education and public life. The Committee notes that the authors have shown that the State party has instructed civil servants not to reply to the authors' written or oral communications with the authorities in the Afrikaans language, even when they are perfectly capable of doing so. These instructions barring the use of Afrikaans do not relate merely to the issuing of public documents but even to telephone conversations. In the absence of any response from the State party the Committee must give due weight to the allegation of the authors that the circular in question is intentionally targeted against the possibility to use Afrikaans when dealing with public authorities. Consequently, the Committee finds that the authors, as Afrikaans speakers, are victims of a violation of article 26 of the Covenant.

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 a violation of article 26 of the Covenant.

12. Under article 2, paragraph 3(a), of the Covenant, the State party is under the obligation to provide the authors and the other members of their community an effective remedy by allowing its officials to respond in other languages than the official one in a nondiscriminatory manner. The State party is under an obligation 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 ninety days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the English text being the original version.
Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Notes

APPENDIX

Individual opinion of Abdalfattah Amor (dissenting)

I cannot subscribe to the Committee's finding of a violation of article 26 of the Covenant, for the following reasons:

1. In article 3 of its Constitution, Namibia, which had declared its independence on 21 March 1991, made English the country's official language out of a legitimate concern to improve the chances of integration. It was thought that granting any privilege or particular status to one of the many other minority or tribal languages in the country would be likely to encourage discrimination and be an obstacle to the building of the nation. Since then, all languages other than English have been on an equal footing under the Constitution: no privileges, and no discrimination. It is the same for all languages, including Afrikaans, the introduction of which into Namibia was tied up with the history of colonization and which, in any case, ceased to be used as an official language on 21 March 1991.

2. Article 3 (3) of the Constitution of Namibia permits the use of other languages in accordance with legislation adopted by Parliament. No such legislation, which in any case could have no effect on the use of English as the official language, has yet been adopted. The guarantees it might have provided or the restrictions it might have introduced have not been decreed and as the situation is the same for everyone, no distinction could have been established legislatively in either a positive or a negative sense. Naturally this also applies to the Afrikaans language.

3. The use of minority languages as such has not been limited, far less questioned, at any level other than the official level. In their personal relationships, among themselves or with others, people speaking the same language are able to use that language without interference - which would be difficult to imagine anyway - from the authorities. In other words, there is nothing to limit the use of Afrikaans as the language of choice of the Basters in their relations between themselves or with others who know the language and agree to communicate with them in that language.

4. Whatever legislative weaknesses there may have been so far, the right to use one's mother tongue cannot take precedence, in relations with official institutions, over the official language of the country, which is, or which is intended to be, the language of all and the common denominator for all citizens. The State may impose the use of the common language on everyone; it is entitled to refuse to allow a few people to lay down the law. In other words, everyone is equal in relation to the official language and any linguistic privileges - unless they apply to all, in which case they would no longer be privileges - would be unjustifiable and discriminatory. The Basters complain that they are not able to use their mother tongue for administrative purposes or in the courts. However, they are not the only ones in this situation. The situation is exactly the same for everyone speaking the other minority languages. In support of their complaint, the Basters provide a copy of a circular issued by the Regional Commissioner of the Central Region of Rehoboth dated 4 March 1992, in which, according to their counsel, "the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded". This circular, although not very skilfully drafted, actually says something else and, in any case, certainly says more than that. It deserved closer attention from the Committee, in order to avoid the danger of not seeing the wood for the trees and to prevent the specific problem from hiding the general solution. In that connection, it is important to

remember the structure of this circular, which consists of a statement of fact, a reminder, a ban and a requirement:

- The statement of fact is that officials, in the course of their duties, continue to hold their official telephone conversations and to write official letters in Afrikaans;
- The reminder refers to the fact that on 21 March 1992 Afrikaans ceased to be the official language and that since then English has been the official language of Namibia. As a result, Afrikaans has the same official status as the other tribal languages, of which there are many;
- The ban is on the continuing use by State officials of Afrikaans in their replies, in the exercise of their official duties, to telephone calls and letters;
- The requirement is that all telephone calls and official correspondence should be carried out exclusively in English, the official language of Namibia.

In other words, State services must use English, and English only, and refrain from giving privileged status to any unofficial language. From this point of view, Afrikaans is neither more nor less important than the other tribal languages. This means that minority languages must be treated without discrimination. Consequently, there is no justification, unless one wishes to discriminate against the other minority languages and disregard article 3 of the Constitution of Namibia, for continuing to deal with the linguistic problem in a selective manner by favouring one particular language, Afrikaans, at the expense of the others. In that respect, the Regional Commissioner's circular does not reveal any violation of the principle of equality and certainly not of the provisions of article 26 of the Covenant.

5. All things considered, it is questionable whether there has been any violation of article 26 of the Covenant in the case in point, and the Committee has, in the belief that it was denouncing discrimination, given the impression that it has, rather, granted a privilege - that it has, in short, undermined the principle of equality as expressed in article 26 of the Covenant. That being the case, the reasons for giving this individual opinion will be apparent.

(Signed) A. Amor

[Done in English, French and Spanish, the French text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Nisuke Ando (dissenting)

I am unable to agree with the Committee's Views that the authors in this case are victims of a violation of article 26 of the Covenant because the State party has instructed its civil servants not to reply to their written or oral communications with the authorities in the Afrikaans language. Article 26 provides for everyone's right to equality before the law as well as to equal protection of the law without discrimination. It further provides that "the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language etc."

Certainly the instruction in question will put a great burden on speakers of Afrikaans in their official correspondence with the authorities. However, according to the circular by which the instruction is given, "All phone calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia" and Afrikaans which "was for a very long time the official language ... now officially enjoys the same status as other tribal languages." In other words, now that English has become the official language of the State party, civil servants shall "refrain from using Afrikaans when responding to phone calls and ... correspondence."

Nevertheless, it is undoubtedly clear that the instruction puts the Afrikaans language exactly on the same footing as any other native languages spoken in Namibia, thus guaranteeing Afrikaans equal treatment without discrimination. Of course English is treated differently from all native languages including Afrikaans, but considering that each sovereign State may choose its own official language and that the official language may be treated differently from non-official languages, I conclude that this differentiation constitutes objective and reasonable distinction which is permitted under article 26.

My concern with respect to this instruction is whether it might unduly restrict communication between Namibian population and its authorities by apparently prohibiting not only written but also oral correspondence in any tribal language. This may raise issues under article 19, although I prefer to reserve my position on the subject in this particular case.

(Signed) N. Ando

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of P.N. Bhagwati, Lord Colville,
and Maxwell Yalden (dissenting)

We find ourselves unable to agree with the view taken by some of our colleagues in regard to the applicability of article 19, paragraph 2, and article 26 of the Covenant, though we do agree with them so far as articles 17, 25 and 27 are concerned. Our reasons for taking a different view from that taken by our other colleagues are the following:

Re: article 19 paragraph 2

1. So far as the alleged violation of article 19, paragraph 2 is concerned, it may be pointed out that when the admissibility decision was given by the Committee on 7 July 1998, the Committee declared the communication admissible without specifying what were the articles of the Covenant which appeared to have been violated. The only question raised in the admissibility decision was whether or not the State party had violated its obligations under the Covenant. However, the Complaint in the communication which was sent to the State party related only to violation of articles 17, 25, 26 and 27 of the Covenant. The communication did not allege violation of article 19, paragraph 2, and the State party was therefore not called upon to meet the challenge of article 19, paragraph 2. We do not therefore think that it would be right for the Committee to make out a case of violation of article 19, paragraph 2, when that was not the case put forward by the authors in the communication. We can appreciate that if the authors had not claimed violation of any particular articles of the Covenant but had made a general complaint of violation by the State party of its obligations under the Covenant on the facts alleged in the communication, the Committee might have been justified in holding that on the facts as found by it, any particular article or articles of the Covenant were violated. But when specific articles of the Covenant were relied upon by the authors in the communication, especially when advised by counsel, we do not think that it would be right for the Committee to make out a new case for the authors.

2. Moreover, we find that the only allegation in the communication as set out in paragraphs 3(4) and 3(5) is that the authors were denied "the use of their mother tongue in administration, justice, education and public life." In our view this allegation does not make out a case of violation of article 19, paragraph 2. So far as the administration is concerned, English being the official language of the State party, it is obvious that no other language could be allowed to be used in the administration or in the Courts or in public life. The authors could not legitimately contend that they should be allowed to use their mother tongue in administration or in the Courts or in public life, and the insistence of the State party that only the official language shall be used cannot be regarded as violation of their right under article 19, paragraph 2. In regard to the use of Afrikaans, the mother tongue of the authors, in education there is nothing to show that the authors were not allowed to use Afrikaans in the schools or colleges run by them and this allegation of violation of article 19 paragraph 2 also therefore remains unsubstantiated.

3. Of course, the authors might have argued that their language rights under Article 27 were being denied, and this allegation could then have been examined by the Committee; however, this is hypothetical, as in fact their Article 27 submission related entirely to land use

(paragraphs 10.4 and 10.6), and not to language. In the circumstances, as has just been suggested in respect of Article 19, paragraph 2, it is not for the Committee to construct a case on this ground under Article 27, in the absence of a complaint from the authors.

4. The majority members of the Committee have relied on the circular of the Regional Commissioner but we do not think that the circular in any way supports the claim of violation of article 19 paragraph 2. The circular is in the following terms:

“It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.

While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.

All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.

All phone-calls and correspondence should be treated exclusively in English which is the official language of the Republic of Namibia.”

It is clear from the first paragraph of the circular that it is intended to apply only in relation to “official phone calls and correspondence” handled by Government officials. The circular points out that the handling of official phone calls and correspondence in Afrikaans was alright when Afrikaans was the official language of the territory of the State, but since English has now become the official language, Afrikaans is in the same position as other tribal languages and consequently official phone calls and correspondence should be responded to by Government employees only in English, which is the official language and not in Afrikaans.

5. We fail to see how the circular can be construed as imposing any restriction on the right to freedom of expression and to freedom to receive and impart information. When English is the official language of the State, it is legitimate for the State to insist that all official phone calls and correspondence should be responded to by Government officials in the official language, namely English, and not in Afrikaans. The advice given by the Government to its officials not to use Afrikaans, which has ceased to be the official language, but to use only English, which has now become the official language, is confined only to official phone calls and official correspondence and does not prevent any Government official from carrying on any conversation or correspondence which is private and not of an official character. If any other view were taken, namely that anyone in the territory of a State is entitled to carry on any official conversation or correspondence with a Government official in any language other than the official language of the State and that Government official is free to respond to such conversation or correspondence in that language, it would create a chaotic situation because there would, in that event, be multiplicity of languages in the official records of the State. The whole object of making a particular language as the official language of the State would be defeated. We are therefore of the view that the circular in question does not in any way violate article 19, paragraph 2 of the Covenant.

6. The suggestion implicit in the argument of the authors as set out in paragraphs 3(4) and 3(5) is that the State party should have languages as Afrikaans in administration, Courts, education and public life and that the absence of such legislation in the context of making English the official language was violative of the Covenant. But this suggestion overlooks the

fact that it is for a State party to decide what shall be its official language and it is not competent to the Committee to direct the State party to adopt any other language or languages as official language or languages of the State. Once a State party has adopted any particular language or languages as its official language or languages, it would be legitimate for the State party to prohibit the use of any other language for official purposes and if the State party does so, its action cannot be branded being in violation of article 19, paragraph 2.

Re. article 26

7. We are also of the view that the circular does not violate article 26. Article 26 is a free-standing guarantee of equality and strikes at discrimination. The only argument which seems to have been advanced by the authors in paragraphs 3(4) and 3(5) in support of its claim of violation of article 26 is that by reason of English being declared as the only official language of the State and the failure of the State to enact legislation allowing the use of other languages, the authors have been denied the use of their mother tongue in administration, justice, education and public life. This argument has already been rejected by us while dealing with article 19, paragraph 2, and the same reasoning must apply in relation to the challenge under article 26. It is significant to note that it is nowhere alleged in the communication that the action of the State in declaring English as the official language and not allowing the use of other languages was directed only against the use of Afrikaans while permitting the other languages to be used. The action of the State in declaring English as the official language and not allowing the use of other languages by enacting appropriate legislation was clearly not violative of article 26 because all languages other than English were treated on the same footing and were not allowed to be used for official purposes and there was no discrimination against Afrikaans vis-à-vis other languages.

8. The reliance on the circular referred to above would also not help the authors to substantiate their claim under article 26. The circular is clearly intended to provide that all official phone calls and correspondence should be treated exclusively in English, which is the official language of the State. That is the thrust, the basic object and purpose of the circular and it is in pursuance of this object and purpose that the circular directs that the Government officials should refrain from using Afrikaans when responding to official phone calls and correspondence. The circular refers specifically only to Afrikaans and seeks to prohibit its use by Government officials in official phone calls and correspondence, because the problem was only in regard to Afrikaans which was at one time, until replaced by English, the official language and which continued to be used by Government officials in official phone calls and correspondence, though it had been ceased to be the official language of the State. There was apparently no problem in regard to the tribal languages because they were at no time used in administration or for official business. But Afrikaans was being used earlier for official purposes and hence it became necessary for the State to issue the circular prohibiting the use of Afrikaans in official phone calls and correspondence. That is why the circular specifically referred only to Afrikaans and not to the other languages. This is also evident from the statement in the circular that Afrikaans

now enjoys the same status as other tribal languages. It is therefore not correct to say that the circular singled out Afrikaans for unfavourable treatment as against other languages in that there was hostile discrimination against Afrikaans. We consequently hold that there was no violation of the principle of equality and non-discrimination enshrined in article 26.

9. We therefore hold, contrary to the conclusion reached by some of our colleagues, that there was no violation of article 19 paragraph 2 or article 26 committed by the State party.

(Signed) P.N. Bhagwati

(Signed) Lord Colville

(Signed) M. Yalden

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Elizabeth Evatt, Eckart Klein, David Kretzmer and
Cecilia Medina Quiroga (concurring)

We agree with the Committee's Views in this matter. However, we consider that the instruction given by the State party to civil servants not to respond in the Afrikaans language, even if they have the personal capacity to do so, restricts the freedom of the authors to receive and impart information in that language (art. 19, para. 2 of the Covenant). In the absence of a justification for this restriction, which meets the criteria set out in paragraph 3 of article 19, we consider that there has been a violation of the authors' right to freedom of expression under article 19 of the Covenant.

(Signed) E. Evatt

(Signed) E. Klein

(Signed) D. Kretzmer

(Signed) C. Medina Quiroga

[Done in English, French and Spanish, the English text being the original version. Subsequently issued also in Arabic, Chinese and Russian as part of the present report.]

Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring)

It is clear on the facts and from the 1996 decision of the High Court that the ownership of the communal lands of the community had been acquired by the government of Namibia before the coming into force of the Covenant and the Optional Protocol and that the authors cannot substantiate a claim on the basis of any expropriation. However, the significant aspect of the authors' claim under article 27 is that they have, since that date, been deprived of the use of lands and certain offices and halls that had previously been held by their government for the exclusive use and benefit of members of the community. Privatization of the land and overuse by other people has, they submit, deprived them of the opportunity to pursue their traditional pastoral activities. The loss of this economic base to their activities has, they claim, denied them the right to enjoy their own culture in community with others. This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.

(Signed) E. Evatt

(Signed) C. Medina Quiroga

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Individual opinion of Rajsoomer Lallah (dissenting)

1. I am unable to agree with the finding of the Committee (paragraph 10.10) that there has been a violation of Article 26 the Covenant.
2. I agree that, since the State party has not provided any explanations on the merits of the complaint, the Committee must give due weight to the allegations of the authors. However, where inferences are to be drawn from the material provided by the authors, these inferences must clearly be legitimate and must be seen in the context of the complaints made.
3. The material allegations of the authors with regard to this particular complaint are set out in paragraph 3.4 and 3.5. The authors complain of a violation of Articles 26 and 27. They have also provided the Committee with a copy of the circular advising civil servants not to respond to official phone calls and correspondence in Afrikaans and to do so in the official language. It is perhaps useful to reproduce the circular so that it may be seen in its proper perspective. The circular reads as follows:

Office of the Regional Commissioner
Central Region

4 March 1992

CIRCULAR

1. It has come to the attention of the office of the Regional Commissioner that some Government officials handle (answer) official phone calls and correspondence in Afrikaans contrary, to the Constitutional provision that Afrikaans ceased to be the official language in this country after 21 March 1990.
2. While it is understood that Afrikaans was for a very long time the official language, it now officially enjoys the same status as other tribal languages.
3. All employees of the Government are thus advised to, in future, refrain from using Afrikaans when responding to phone calls and their correspondence.
4. All phone-calls and correspondence should be treated in English which is the official language of the Republic of Namibia.

Thank you for your cooperation.

N. Angermund
Regional Commissioner Central

4. It is to be noted that the date of the circular is 4 March 1992 whereas the Covenant and the Optional Protocol came into force for Namibia on 28 February 1995. I proceed on the assumption, in the absence of any explanation from the State party, that the circular is still operative.
5. It is to be observed that the authors claim a violation of Article 27, in addition to Article 26. The Committee presumably found no violation of Article 27 which, inter alia, deals with the right of linguistic minorities not to be denied the right, in community with the other

members of their group, to use their own language. Indeed, it would be stretching the language of Article 27 too far to suggest, as the Committee might in effect be perceived to have done, that public authorities must make it possible to use a non- official language (Afrikaans) in official business when the official language is different. In this regard it is to be observed that the Committee itself finds in paragraph 10.9 that the authors have not shown how the use of English during Court proceedings has affected their right to a fair hearing. And a fair hearing requires that a person understands what is happening in court so as to brief his or her legal representative appropriately in the conduct of his or her case.

6. But it may very well be said that the gravamen of the reasoning of the Committee lies in that part of the finding which is to the effect that the circular is “targeted” against the possibility of using Afrikaans in official business. I am unable to follow this reasoning.

7. First, “targeted” connotes aiming at one particular object from among other objects: in this case singling out at “Afrikaans” from other non-official languages for the purpose of affording it discriminatory treatment. It may very well be said that in assimilating Afrikaans to a “tribal” language, the circular was perhaps unintentionally derogatory of Afrikaans. However, a reasonable construction of the circular would suggest that a difference was being made essentially between the official language and all unofficial languages.

8. Secondly, of course, the circular specifically mentions Afrikaans. The reason is stated in the first paragraph of the circular. The important point, however, is that neither the complaint of the authors nor the terms of the circular suggest that a more favourable treatment was being given to other unofficial languages. Indeed, the terms of the circular suggest quite the contrary. In my view, therefore, there is no basis for a finding of discriminatory treatment in violation of Article 26.

9. The real complaint of the authors with regard to Article 26, when seen in the context of their other complaints, would suggest that they still hanker after the privileged and exclusive status they previously enjoyed in matters of occupation of land, self-government and use of language under a system of fragmented self-governments which apartheid permitted. Such a system no longer avails under the unified nation which the Constitution of their country has created.

(Signed) R. Lallah

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Individual opinion by Martin Scheinin (concurring)

I share the Committee's conclusions in relation to all aspects of the case. On one particular point, however, I find that the Committee's reasoning is not fully consistent with the general line of its argumentation. In paragraph 10.8, the Committee, in my opinion unnecessarily, emphasizes the individual nature of rights of participation under article 25. In my view there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. As is emphasized at the end of paragraph 10.3 of the Views, the right of self-determination under article 1 affects the interpretation of article 25. This obiter statement represents, in my opinion, proper recognition of the interdependence between the various rights protected by the Covenant, including article 1 which according to the Committee's jurisprudence cannot, on its own, serve as the basis for individual communications under the Optional Protocol.

Irrespective of what has been said above, I concur with the Committee's finding that there was no violation of article 25. In my opinion, the authors have failed to substantiate how the 1996 law on regional government has adversely affected their exercise of article 25 rights, in particular the operation and powers of local or traditional authorities. On the basis of the material they presented to the Committee, no violation of article 25 can be established.

(Signed) M. Scheinin

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¹ On 10 May 1998, the Committee was informed about the passing away of Captain Diergaardt, and that Mr. D. Izaaks had been appointed acting chief.

² Counsel provides a copy of a circular issued by the Regional Commissioner, Central Region, Rehoboth, dated 4 March 1992, in which the use of Afrikaans during telephone conversations with regional public authorities is explicitly excluded.

³ See the Committee's Views in case No. 167/1984 (Ominayak v. Canada), Views adopted on 26 March 1990.

⁴ See, Kitok v. Sweden (197/1985), Ominayak v. Canada (167/1984), I. Länsman et al. v. Finland (511/1992), J. Länsman et al. v. Finland (671/1995), as well as General Comment No. 23 [50], para. 7.