RESERVATIONS AND DECLARATIONS

III. JURISPRUDENCE

ICCPR

· *Fanali v. Italy* (75/1980) (R.18/75), ICCPR, A/38/40 (31 March 1983) 160 at paras. 11.4-11.6, 11.8 and 12-14.

...
11.4 The State party upon ratification of the Covenant has made a reservation with regard to article 14 (5) which it has now invoked. The Committee, therefore, has to decide whether this reservation applies to the present case. The Italian reservation reads as follows:

> "Article 14, paragraph 5, shall be without prejudice to the application of existing Italian provisions which, in accordance with the Constitution of the Italian Republic, govern the conduct, at one level only, of proceedings instituted before the Constitutional Court in respect of charges brought against the President of the Republic and its Ministers."

11.5 The author contests the applicability of the reservation in his case. He objects to its validity and furthermore argues, *inter alia*, that he cannot be classified under either of the two categories referred to in the reservation.

11.6 In the Committee's view, there is no doubt about the international validity of the reservation, despite the alleged irregularity at the domestic level. On the other hand, its applicability to the present case depends on the wording of the reservation in its context, where regard must be had to its object and purpose. Since the two parties read it differently, it is for the Committee to decide this dispute.
...
11.8 ...[T]he Committee notes that the reservation only partly excludes article 14 (5) from the obligations undertaken by Italy. The question is whether it is applicable only to the two categories mentioned, and not to the "layman", Mr. Fanali. A close reading of the text shows that a narrow construction of the reservation would be contrary both to its wording and its purpose. The reservation refers not only to the relevant rules of the Constitution itself, but to "existing Italian provisions...in accordance with the Constitution", thus clearly extending its scope to the implementing laws enacted by the ordinary legislator. As shown by the Government in its submission, it was also the purpose of the reservation to exclude proceedings before the Constitutional Court instituted in connection with criminal charges against the President of the Republic and its Ministers from Italy's acceptance of article 14 (5). Even when proceedings are brought against "laymen", as they were in the present case,

they must therefore be described in the terms of the reservation as "proceedings before the Constitutional Court in respect of charges brought against...Ministers". This follows from the connection between the cases, the charges against the Ministers were the cause and the *conditio sine qua non* for the other charges and for instituting proceedings against all defendants. It must follow that all of the proceedings were in this sense brought "in respect of charges" against Ministers, because they related to the same matter, which under Italian law only, that Court was competent to consider. On the background of the applicable Italian law this is not only a possible reading, but in the Committee's view the correct reading of the reservation.

...

12. For these reasons the Human Rights Committee concludes that Italy's reservation regarding article 14 (5) of the Covenant is applicable in the specific circumstances of the case.

...

13. ...It is true that article 2(3) provides generally that persons whose rights and freedoms, as recognized in the Covenant, are violated "shall have an effective remedy." But this general right to a remedy is an accessory one, and cannot be invoked when the purported right to which it is linked is excluded by a reservation, as in the present case. Even had this not been so, the purported right, in the case of article 14 (5), consists itself of a remedy (appeal). Thus it is a form of *lex specialis* besides which it would have no meaning to apply the general right in article 2(3).

14. Accordingly, the Human Rights Committee...is of the view that the present case does not disclose any violation of the Covenant.

· *Gueye v. France* (196/1985), ICCPR, A/44/40 (3 April 1989) 189 at para. 5.3.

...

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.

See also:

- *Hopu v. France* (549/1993), ICCPR, A/52/40 vol. II (29 July 1997) 70 (CCPR/C/60/D/549/1993) at para. 4.3 and Individual Opinion by David Kretzmer, Thomas Buergenthal, Nisuke Ando and Lord Colville (dissenting), 81 at paras. 1-7.

- *T. K. v. France* (222/1987), ICCPR, A/45/40 vol. II (8 November 1989) 118 (CCPR/C/37/D/222/1987) at paras. 8.5, 8.6 and 9.

...
8.5 The author has also invoked article 27 of the Covenant claiming that he has been a victim of a breach of its provisions. Upon accession to the Covenant, the French Government declared that "in light of article 2 of the Constitution of the French Republic...article 27 [of the Covenant] is not applicable so far as the Republic is concerned". This declaration has not been objected to by other States parties, nor has it been withdrawn.
8.6 The Committee is therefore called upon to decide whether this *decleration* precludes it from examining a communication alleging a violation of article 27...The Convention does not make a distinction between reservations and declarations. The Covenant itself does not provide any guidance in determining whether a unilateral statement made by a State party upon accession to it should have a preclusionary effect regardless of whether it is termed a reservation or a declaration...If the statement displays a clear intent on the part of the State party to exclude or modify the legal effect of a specific provision of a treaty, it must be regarded as a binding reservation, even if the statement is phrased as a declaration...Accordingly the Committee considers that it is not competent to consider complaints directed against France concerning alleged violations of article 27 of the Covenant.

9. The Committee therefore decides:

(a) That the communication is inadmissible under articles 2 and 5, paragraph 2(b), of the Optional Protocol...

RESERVATIONS AND DECLARATIONS

For dissenting opinion in this context, see T. K. v. France (222/1987), ICCPR, A/45/40 vol. II (8 November 1989) 118 (CCPR/C/37/D/222/1987) at Individual Opinion by Mrs. Rosalyn Higgins, 125.

· *Maleki v. Italy* (699/1996), ICCPR, A/54/40 vol. II (15 July 1999) 180 at paras 2.1 and 9.2.

...
2.1 The author, a truck driver for over 40 years who transported consignments between Iran and Italy, was tried and sentenced, *in absentia,* on 21 November 1988 to 10 years imprisonment for having imported and sold narcotic drugs in Italy. His sentence was confirmed by the Court of Appeal on 16 October 1989.
...
9.2 The State party's argument is that its declaration concerning article 14, paragraph 3 (d) is a reservation that precludes the Committee examining the author's argument that his trial *in absentia* was not fair. However, that declaration deals only with article 14, paragraph 3 (d), and does not relate to the requirements of article 14, paragraph 1. The State party itself has argued that its legal provisions regarding trial *in absentia* are compatible with article 14, paragraph 1. Under this provision, basic requirements of a fair trial must be maintained, even when a trial *in absentia*, is not, *ipso facto*, a violation of a State party's undertakings. These requirements include summoning the accused in a timely manner and informing him of the proceedings against him.

· *Rawle Kennedy v. Trinidad and Tobago* (845/1999), ICCPR, A/55/40 vol. II (2 November 1999) 258 at paras. 1, 4.1, 4.2, 6.2, 6.4-6.8 and 7.

1. The author of the communication is Mr. Rawle Kennedy, a citizen of Trinidad and Tobago, awaiting execution in the State prison in Port of Spain...
...
4.1 In its submission of 8 April 1999, the State party makes reference to its instrument of accession to the Optional Protocol of 26 May 1998, which included the following reservation:

"... Trinidad and Tobago re-accedes to the Optional Protocol to the International Covenant on Civil and Political Rights with a Reservation to article 1 thereof to the effect that the Human Rights Committee shall not be competent to receive and consider communications relating to any prisoner who is under sentence of death in respect of any matter relating to his prosecution, his detention, his trial, his conviction, his sentence or the carrying out of the death sentence on him and any matter connected therewith."

RESERVATIONS AND DECLARATIONS

4.2 The State party submits that because of this reservation and the fact that the author is a prisoner under sentence of death, the Committee is not competent to consider the present communication. It is stated that in registering the communication and purporting to impose interim measures under rule 86 of the Committee's rules of procedure, the Committee has exceeded its jurisdiction, and the State party therefore considers the actions of the Committee in respect of this communication to be void and of no binding effect.

...

6.2 On 26 May 1998, the Government of Trinidad and Tobago denounced the first Optional Protocol to the International Covenant on Civil and Political Rights. On the same day, it reacceded, including in its instrument of reaccession the reservation set out in paragraph 4.1 above.

...

6.4 As opined in the Committee's General Comment No. 24, it is for the Committee, as the treaty body to the International Covenant on Civil and Political Rights and its Optional Protocols, to interpret and determine the validity of reservations made to these treaties. The Committee rejects the submission of the State party that it has exceeded its jurisdiction in registering the communication and in proceeding to request interim measures under rule 86 of the rules of procedure. In this regard, the Committee observes that it is axiomatic that the Committee necessarily has jurisdiction to register a communication so as to determine whether it is or is not admissible because of a reservation. As to the effect of the reservation, if valid, it appears on the face of it, and the author has not argued to the contrary, that this reservation will leave the Committee without jurisdiction to consider the present communication on the merits. The Committee must, however, determine whether or not such a reservation can validly be made.

6.5 At the outset, it should be noted that the Optional Protocol itself does not govern the permissibility of reservations to its provisions. In accordance with article 19 of the Vienna Convention on the Law of Treaties and principles of customary international law, reservations can therefore be made, as long as they are compatible with the object and purpose of the treaty in question. The issue at hand is therefore whether or not the reservation by the State party can be considered to be compatible with the object and purpose of the Optional Protocol.

6.6 In its General Comment No. 24, the Committee expressed the view that a reservation aimed at excluding the competence of the Committee under the Optional Protocol with regard to certain provisions of the Covenant could not be considered to meet this test:

"The function of the first Optional Protocol is to allow claims in respect of [the Covenant's] rights to be tested before the Committee. Accordingly, a reservation to an obligation of a State to respect and ensure a right contained in the Covenant, made under the first Optional Protocol when it has not previously been made in respect of the same

rights under the Covenant, does not affect the State's duty to comply with its substantive obligation. A reservation cannot be made to the Covenant through the vehicle of the Optional Protocol but such a reservation would operate to ensure that the State's compliance with that obligation may not be tested by the Committee under the first Optional Protocol. And because the object and purpose of the first Optional Protocol is to allow the rights obligatory for a State under the Covenant to be tested before the Committee, a reservation that seeks to preclude this would be contrary to object and purpose of the first Optional Protocol, even if not of the Covenant" 1/ (emphasis added).

6.7 The present reservation, which was entered after the publication of General Comment No. 24, does not purport to exclude the competence of the Committee under the Optional Protocol with regard to any specific provision of the Covenant, but rather to the entire Covenant for one particular group of complainants, namely prisoners under sentence of death. This does not, however, make it compatible with the object and purpose of the Optional Protocol. On the contrary, the Committee cannot accept a reservation which singles out a certain group of individuals for lesser procedural protection than that which is enjoyed by the rest of the population. In the view of the Committee, this constitutes a discrimination which runs counter to some of the basic principles embodied in the Covenant and its Protocols, and for this reason the reservation cannot be deemed compatible with the object and purpose of the Optional Protocol. The consequence is that the Committee is not precluded from considering the present communication under the Optional Protocol.

6.8 The Committee, noting that the State party has not challenged the admissibility of any of the author's claims on any other ground than its reservation, considers that the author's claims are sufficiently substantiated to be considered on the merits.

7. The Human Rights Committee therefore decides:

(a) that the communication is admissible...

Notes

1/ HRI/GEN/1/Rev.3, 15 August 1997, p. 46.

For dissenting opinion in this context, see Rawle Kennedy v. Trinidad and Tobago (845/1999), ICCPR, A/55/40 vol. II (2 November 1999) 258 at Individual Opinion by Nisuke Ando, P.N. Bhagwati, Eckart Klein and David Kretzmer, 268.

· *Karakurt v. Austria* (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at paras. 3.1, 3.2, 3.4 and 7.5.

...
3.1 The author possesses (solely) Turkish citizenship, while holding an open-ended residence permit in Austria. He is an employee of the 'Association for the Support of Foreigners' in Linz, which employs 10 persons in total. On 24 May 1994, there was an election for the Association's work-council ('Betriebsrat') which has statutory rights and responsibilities to promote staff interests and to supervise compliance with work conditions. The author, who fulfilled the formal legal requirements of being over 19 years old and having been employed for over six months, and another employee, Mr Vladimir Polak, were both elected to the two available spaces on the work-council.

3.2 On 1 July 1994, Mr Polak applied to the Linz Regional Court for the author to be stripped of his elected position on the grounds that he had no standing to be a candidate for the work-council. On 15 September 1994, the Court granted the application, on the basis that the relevant labour law, that is s. 53(1) Industrial Relations Act (Arbeitsverfassungsgesetz), limited the entitlement to stand for election to such work-councils to Austrian nationals or members of the European Economic Area (EEA). Accordingly, the author, satisfying neither criteria, was excluded from standing for the work-council.
...
3.4 On 21 December 1995, the Supreme Court discussed the author's appeal and denied the request for a constitutional reference. The Court considered that the work-council was not an 'association' within the meaning of Art. 11 ECHR. The work-council was not an association formed on a voluntary and private basis, but its organisation and functions were determined by law and was comparable to a chamber of trade. Nor were the staff as such an independent association, as they were not a group of persons associated on a voluntary basis. As to arguments of discrimination against foreigners, the Supreme Court, referring to the State party's obligations under the International Convention for the Elimination of All Forms of Racial Discrimination, considered the difference in treatment between Austrian nationals and foreigners to be justified both under the distinctions that the European economic treaties draw in labour matters between nationals and non-nationals, and also on account of the particular relationship between nationals and their home State. Moreover, as a foreigner's stay could be limited and subjected to administrative decision, the statutory period of membership in a work-council was potentially in conflict.
...

7.5 The Committee has taken note of the State party's reservation to article 26, according to which the State party understood this provision "to mean that it does not exclude different treatment of Austrian nationals and aliens, as is also permissible under article 1, paragraph 2, of the International Convention on the Elimination of All Forms of Racial Discrimination." The Committee considers itself precluded, as a consequence, from examining the communication insofar as it argues an unjustified distinction in the State party's law between Austrian nationals and the author. However, the Committee is not precluded from examining the claim relating to the further distinction made in the State party's law between aliens being EEA nationals and the author as another alien. In this respect the Committee finds the communication admissible and proceeds without delay to the examination of the merits.

For dissenting opinion in this context, see Karakurt v. Austria (965/2000), ICCPR, A/57/40 vol. II (4 April 2002) 304 (CCPR/C/74/D/965/2000) at Individual Opinion by Sir Nigel Rodley and Mr. Martin Scheinin (partly dissenting), 311.

- *Kollar v. Austria* (989/2001), ICCPR, A/58/40 vol. II (30 July 2003) 538 (CCPR/C/78/D/989/2001) at paras. 8.2-8.6.

...

8.2 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been “examined” by the “European Commission on Human Rights”. As to the author’s argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission’s tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.3 The Committee considers that a reformulation of the State party’s reservation, upon re-ratification of the Optional Protocol, as suggested by the author, only to spell out what is in fact a logical consequence of the reform of the European Convention mechanisms, would be a purely formalistic exercise. For reasons of continuity and in the light of its object and purpose, the Committee therefore interprets the State party’s reservation as applying also to complaints which have been examined by the European Court.

RESERVATIONS AND DECLARATIONS

8.4 With respect to the author's argument that the European Court has not "examined" the substance of his complaint when it declared the application inadmissible, the Committee recalls its jurisprudence that where the European Commission has based a declaration of inadmissibility not solely on procedural grounds10/, but on reasons that comprise a certain consideration of the merits of the case, then the same matter has been "examined" within the meaning of the respective reservations to article 5, paragraph 2 (a), of the Optional Protocol.11/ In the present case, the European Court went beyond an examination of purely procedural admissibility criteria, considering that the author's application was inadmissible, partly for incompatibility *ratione personae*, partly because it disclosed no appearance of a violation of the provisions of the Convention. The Committee therefore concludes that the State party's reservation cannot be denied simply on the assumption that the European Court did not issue a judgment on the merits of the author's application.

8.5 As regards the author's contention that the European Court has not examined his claims under article 6, paragraph 1, of the Convention regarding the proceedings before the disciplinary committee, and that it has not even formally decided on his complaint related to the limited review of the decision of the disciplinary committee by the Austrian courts, the Committee notes that the European Court considered "that the disciplinary proceedings complained of were not conducted by a body exercising public power, but were internal to the applicant's workplace for the purpose of establishing whether or not he should be dismissed". On this basis, the Court concluded that the author's right to an effective remedy (article 13 of the European Convention and article 2, paragraph 1, of Protocol No. 7) had not been violated.

8.6 The Committee further observes that, despite certain differences in the interpretation of article 6, paragraph 1, of the European Convention and article 14, paragraph 1, of the Covenant by the competent organs, both the content and scope of these provisions largely converge. In the light of the great similarities between the two provisions, and on the basis of the State party's reservation, the Committee considers itself precluded from reviewing a finding of the European Court on the applicability of article 6, paragraph 1, of the European Convention by substituting its jurisprudence under article 14, paragraph 1, of the Covenant. The Committee accordingly finds this part of the communication inadmissible under article 5, paragraph 2 (a), of the Optional Protocol, as the same matter has already been examined by the European Court of Human Rights.

Notes

...

10/ See, for example, Communication No. 716/1996, *Pauger v. Austria*, Views adopted on 25 March 1999, at para. 6.4.

11/ See, for example, Communication No. 121/1982, *A.M. v. Denmark*, decision on admissibility adopted on 23 July 1982, at para. 6; Communication No. 744/1997, *Linderholm v. Croatia*, decision on admissibility adopted on 23 July 1999, at para. 4.2.

· *Cabal and Pasini v. Australia* (1020/2002), ICCPR, A/58/40 vol. II (7 August 2003) 346 (CCPR/C/78/D/1020/2002) at paras. 7.3 and 7.4.

...

7.3 The Committee notes that the State party has invoked its reservation to article 10, paragraph 2 (a), of the Covenant which states that, "In relation to paragraph 2 (a) the principle of segregation is an objective to be achieved progressively". Also, the Committee notes the authors' argument that despite the reservation this part of the communication is admissible as the reservation was made twenty years ago and it would be reasonable to expect that the State party would have fulfilled its objective to comply fully with its obligations under this article at this stage. Further, the Committee notes that both parties have made reference to the Committee's general comment No. 24 on reservations.

7.4 The Committee observes that the State party's reservation in question is specific and transparent, and that its scope is clear. It refers to the *segregation* of convicted and unconvicted persons and does not extend, as argued by the authors and not contested by the State party, to cover the *separate treatment* element of article 10, paragraph 2 (a) as it refers to these two categories of persons. The Committee recognises that while 20 years have passed since the State party entered the reservation and that it intended to achieve its objective "progressively", and although it would be desirable for all States parties to withdraw reservations expeditiously, there is no rule under the Covenant on the timeframe for the withdrawal of reservations. In addition, the Committee notes the State party's efforts to date to achieve this objective with the construction of the Melbourne Remand Centre in 1989, specifically for the purpose of housing remand prisoners, and its plan to construct two new prisons in Melbourne, including a remand prison, by end 2004. Consequently, although it may be considered unfortunate that the State party has not achieved its objective to *segregate* convicted and unconvicted persons in full compliance with article 10, paragraph 2 (a), the Committee cannot find that the reservation is incompatible with the object and purpose of the Covenant. This part of the authors' claim is, therefore, inadmissible under article 3 of the Optional Protocol.

...

· *Althammer et al. v. Austria* (998/2001), ICCPR, A/58/40 vol. II (8 August 2003) 317 (CCPR/C/78/D/998/2001) at paras. 8.3 and 8.4.

RESERVATIONS AND DECLARATIONS

...
8.3 The Committee notes that the State party has invoked the reservation it made under article 5, paragraph 2 (a), of the Optional Protocol, which precludes the Committee from considering claims that have previously been "examined" by the "European Commission on Human Rights". As to the author's argument that the application which he submitted to the European Commission was, in fact, never examined by that organ but declared inadmissible by the European Court of Human Rights, the Committee observes that the European Court, as a result of treaty amendment by virtue of Protocol No. 11, has legally assumed the former European Commission's tasks of receiving, deciding on the admissibility of, and making a first assessment on the merits of applications submitted under the European Convention. The Committee observes, for purposes of ascertaining the existence of parallel or, as the case may be, successive proceedings before the Committee and the Strasbourg organs, that the new European Court of Human Rights has succeeded to the former European Commission by taking over its functions.

8.4 Having concluded that the State party's reservation applies, the Committee needs to consider whether the subject matter of the present communication is the same matter as the one which was presented under the European system. In this connection, the Committee recalls that the same matter concerns the same authors, the same facts and the same substantive rights. The Committee on earlier occasions has already decided that the independent right to equality and non-discrimination embedded in article 26 of the Covenant provides a greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention. The Committee has taken note of the decision taken by the European Court on 12 January 2001 rejecting the authors' application as inadmissible as well as of the letter from the Secretariat of the European Court explaining the possible grounds of inadmissibility. It notes that the authors' application was rejected because it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols as it did not raise issues under the right to property protected by article 1 of Protocol No. 1. As a consequence, in the absence of an independent claim under the Convention or its Protocols, the Court could not have examined whether the authors' accessory rights under article 14 of the Convention had been breached. In the circumstances of the present case, therefore, the Committee concludes that the question whether or not the authors' rights to equality before the law and non-discrimination have been violated under article 26 of the Covenant is not the same matter that was before the European Court.

For dissenting opinions in this context generally, see:

- *Aduayom, Diasso and Dobou v. Togo* (422-424/1990), ICCPR, A/51/40 vol. II (12 July 1996) 17 (CCPR/C/57/D/422/1990) at Individual Opinion by Fausto Pocar, 23.
- *Evans v. Trinidad and Tobago* (908/2000), ICCPR, A/58/40 vol. II (21 March 2003) 216

RESERVATIONS AND DECLARATIONS

(CCPR/C/77/D/998/2000) at Individual Opinion of Ms. Ruth Wedgwood, 223.