
Distr.: Restricted

20 May 2008

Original: English

**Committee on the Elimination of Discrimination
against Women**
Forty-first session
30 June-18 July 2008

**Working paper on reservations in the context of
individual communications**

1. At its fortieth session, the Committee on the Elimination of All Forms of Discrimination against Women requested information on the practice of other human rights treaty bodies in relation to communications concerning any provisions of their relevant treaties which are subject to reservations. The present report is in response to that request.

2. The Human Rights Committee, the Committee against Torture and the Committee on the Elimination of Racial Discrimination have the competence to receive and consider individual communications from individuals or groups of individuals alleging violations of the respective treaties by States parties which have accepted that competence.

3. To date, only the Human Rights Committee had to pronounce itself on the legal effect of reservations in the context of individual communications.¹ In the landmark case of *Kennedy v. Trinidad and Tobago*,² the Committee was required to examine the effect of a reservation where the author of the communication was a death row prisoner. Trinidad and Tobago had entered a reservation to the Optional Protocol to the International Covenant on Civil and Political Rights which precluded the Committee considering individual communications involving death row prisoners. The Committee concluded that “the reservation could not be deemed compatible with the object and purpose of the Optional Protocol and that accordingly the Committee was not precluded from considering the communication under the Optional Protocol”. It did not explain why the reservation was considered to be contrary to the object and purpose of the treaty. Four Committee members dissented. In their joint individual opinion, they stated that they saw “no reason to

¹ In *Hagan v. Australia* (Case 26/2002), decided by the Committee on the Elimination of Racial Discrimination, in paragraph 4.7, the State party had invoked its reservation to article 4 of the Convention, but the Committee made no reference to this issue in its merits decision.

² Case 845/1999.

consider the State party's reservation incompatible with the object and purpose of the Optional Protocol" and considered the communication to be inadmissible.

4. This has so far been the only case in which the Committee has set aside a reservation. On 27 March 2000, Trinidad and Tobago notified the Secretary-General that it had decided to denounce the Optional Protocol with effect from 27 June 2000.

5. The Human Rights Committee has only had to examine the effect of reservations made to the Covenant on rare occasions. In some cases, it has accepted the reservation made by the State party concerned, since the reservation was not incompatible with the object and purpose of the Covenant.³ In other cases, while the Committee accepted the reservation invoked by the State party, it decided to assess the complaint from the perspective of other provisions of the Covenant. For instance, in *Hopu and Bessert v. France*, the Committee decided not to examine the complaint under article 27 since France had a "reservation" to that provision. Nonetheless, it went on to find violations of the other provisions which were also invoked by the authors.⁴ In *Maleki v. Italy* involving a trial *in absentia*, the authors had not invoked any specific provisions of the Covenant. In its admissibility decision, the Committee decided to examine the complaint under article 14 (3), to which Italy had made a declaration, and under article 14 (1).⁵ Both parties were requested to make submissions on the effect of the declaration on the admissibility of the author's claim under article 14 before a decision on the merits could be made. The Committee eventually found a violation of article 14 (1).

6. In 1994, the Human Rights Committee adopted General Comment No. 24 on reservations. In that text, the Committee stated that it was its role to determine whether a specific reservation is compatible with the object and purpose of the Covenant, since this was an inappropriate task for States parties in relation to human rights treaties. It declared that the object and purpose of the Covenant is "to create legally binding standards for human rights by defining certain civil and political rights and placing them in a framework of obligations which are legally binding for those States which ratify; and to provide an efficacious supervisory machinery for the obligations undertaken". It went on to declare that reservations to provisions of the Covenant which reflect customary international law are not compatible with the object and purpose of the Covenant. Nevertheless, it noted that "while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be". While reservations to non-derogable provisions are not automatically contrary to the object and purpose of the Covenant, the Committee insisted that a State has a heavy onus to justify such a reservation. General Comment No. 24 has elicited strong and negative reactions from some States parties such as France,⁶ the United Kingdom of Great Britain and Northern Ireland and the United States of America.⁷

³ See the series of cases involving members of the Breton linguistic minority and the French reservation to article 27 in *T.K. v. France* (Case 220/1987), *M.K. v. France* (222/1987), *S.G. v. France* (347/1988), *G.B. v. France* (348/1989), *R.L.M. v. France* (Case 363/1989), *C.L.D. v. France* (439/1990). See also *Cabal and Pasini v. Australia* (Case 1020/2001).

⁴ Case 549/1993.

⁵ Case 699/1996.

⁶ See A/51/40, para. 367, and annex VI.

⁷ See A/50/40, para. 481, and annex VI.

7. In its 1997 preliminary conclusions on reservations to normative multilateral treaties including human rights treaties, the International Law Commission stated that “where these treaties are silent on the subject, the monitoring bodies established thereby are competent to comment upon and express recommendations with regard, inter alia, to the admissibility of reservations by States, in order to carry out the functions assigned to them”.⁸ This was seen as an important concession from the International Law Commission, which had previously considered that only States parties to a treaty could express opinions as to whether a reservation was valid or not. Nonetheless, the International Law Commission still considered that it was not for human rights treaty bodies to decide on the consequences of an invalid reservation and that it was the reserving State that has the responsibility to take action.

8. In July 2003, members of the International Law Commission met with members of the Human Rights Committee to discuss General Comment No. 24 and the 1997 Preliminary Conclusions. The position of the International Law Commission seems to have evolved since then. Indeed, the Special Rapporteur of the International Law Commission on the topic of “Reservations to treaties”, Alain Pellet, has proposed draft guideline 3.2.1 which states that “where a treaty establishes a body to monitor application of the treaty, that body shall be competent, for the purpose of discharging the functions entrusted to it, to assess the validity of reservations formulated by a State”.⁹ This text has not yet been adopted by the International Law Commission. All treaty bodies handling complaints have held detailed discussions with the International Law Commission on the issue of reservations. At its thirty-seventh session, the Committee on the Elimination of Discrimination against Women held an exchange of views with the Special Rapporteur of the International Law Commission on the topic of “Reservations to treaties”.

9. In the broader context of the examination of the reports of States parties, the Committee on the Elimination of Discrimination against Women has expressed its views and concerns regarding the number and extent of reservations to the Convention in its General Recommendations Nos. 4, 20 and 21. In its General Recommendation No. 21, the Committee addressed reservations to article 16 of the Convention. It noted with alarm the number of States parties that made reservations to the whole or, to part of article 16, and required States parties to “... progress to the stage where reservations, particularly to article 16, will be withdrawn”.¹⁰ In 1998, the Committee also issued a statement on the adverse impact that reservations to the Convention on the Elimination of All Forms of Discrimination against Women may have on the achievement by women of full and substantive equality with men. This statement was published as part of the Committee’s report on its nineteenth session (see A/53/38/Rev.1). The Committee held that article 2 and 16 are considered as core provisions of the Convention. In particular, it expressed the opinion that “... reservations to article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and therefore impermissible and should be reviewed and modified or withdrawn”.¹¹ The Committee also referred to article 28, paragraph 2, of the Convention which adopted

⁸ See A/52/10, para. 157.

⁹ See A/CN.4/558/Add.2, annex.

¹⁰ General Recommendation No. 21: Equality in marriage and family relations, paras. 41-47.

¹¹ See A/53/38/Rev.1, part two, para. 17.

the impermissibility principle contained in the Vienna Convention on the Law of Treaties. It added that such reservations prevent the Committee from assessing the progress of State party implementation of Convention provisions, limit its mandate and potentially affect the entire human rights regime.

10. At its twenty-fourth session, in decision 24/III, the Committee requested its secretariat to prepare an analysis of the approaches of other human rights treaties in consideration of States parties' reports and communications, for its consideration at its twenty-fifth session. The practices of human rights treaty bodies on reservations were included in the ways and means report of the Secretariat (see CEDAW/C/2001/II/4).

11. The Committee on the Elimination of Discrimination against Women has not yet had the opportunity to pronounce itself on the legal effect of reservations in the context of individual communications.¹² The question of whether the Committee considers that the determination of the permissibility of a reservation falls within its functions in the examination of an individual communication thus remains open.

¹² In *Salgado v. United Kingdom* (case 11/2006), the State party argued that the communication was manifestly ill-founded because its subject matter fell within the reservation in relation to article 9 entered upon ratification. The Committee decided that the communication was inadmissible *ratione temporis* as well as for non-exhaustion of domestic remedies and did not pronounce itself on the reservation.