United Nations CCPR/C/98/D/1754/2008

International Covenant on Civil and Political Rights

Distr.: Restricted*
21 May 2010

Original: English

Human Rights Committee
Ninety-eighth session
8 to 26 March 2010

Decision

Communication No. 1754/2008

Submitted by:	Ms. Edith Loth - and her heirs (represented by counsel, Mr. Thorsten Purps)
Alleged victim:	The author(s)
State party:	Germany
Date of communication:	29 May 2007 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 23 January 2008 (not issued in document form)
Date of adoption of decision:	23 March 2010

* Made public by decision of the Human Rights Committee.

Subject matter:	Obligation to surrender without compensation a plot of land to the local authorities, in the context of the German reunification.
Procedural issues:	Scope and validity of the reservation made by the State party under article 5, paragraph2 (a) of the Optional Protocol.
Substantive issues:	Discrimination against certain categories of persons on the ground of their property.
Articles of the Covenant:	26.
Articles of the Optional Protocol:	5, paragraph 2 (a)

[Annex]

ANNEX

Decision of the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights (ninety-eighth session)

concerning

Communication No. 1754/2008**

Submitted by:	Ms. Edith Loth - and her heirs (represented by counsel, Mr. Thorsten Purps)
Alleged victim:	The author(s)
State party:	Germany
Date of communication:	29 May 2007 (initial submission)

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

Meeting on 23 March 2010

Adopts the following:

Decision on admissibility

1. The original author of the communication was Edith Loth, a German national, who died on 16 March 2008. The author's heirs, who are her three children, Ms. Suzanne Loth, Ms. Ingrid Loth and Mr. Andreas Loth, decided to pursue the communication before the Committee, since the alleged violation directly affects them. The authors claim to be victims of a violation by Germany[1] of article 26 of the International Covenant on Civil and Political Rights. They are represented by counsel.

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Mahjoub El Haiba, Mr. Ahmad Amin Fathalla, Mr. Yuji Iwasawa, Ms. Helen Keller, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Mr. Michael O'Flaherty, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Fabian Omar Salvioli, Mr. Krister Thelin and Ms. Ruth Wedgwood.

An individual opinion co-signed by Committee members Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli is appended to the present decision.

[1] The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 17 March 1974 and 25 November 1993, respectively. Upon ratification of the Optional Protocol, the State Party entered the following reservation: "The Federal Republic of Germany formulates a reservation concerning article 5 paragraph 2 lit. (a) to the effect that the competence of the Committee shall not apply to communications (a) which have already been considered under another procedure of international investigation or settlement, or (b) by means of which a violation of rights is reprimanded having its origin in events occurring prior to the entry into force of the Optional Protocol for the Federal Republic of Germany, or (c) by means of which a violation of article 26 of the [said

Facts as presented by the author

2.1 In 1946, the deceased's uncle received a plot of land under the land reform scheme initiated by the former German Democratic Republic (GDR). According to the 1945 Land Reform Decrees, the disposal of land acquired under this scheme could only be passed on to the new owner's heirs if they continued to use the land for agricultural purposes. Otherwise, the land was to be allocated to third parties or returned to the pool of State-owned land by the GDR authorities. On 29 March 1986, the deceased inherited the plot of land. During the period of the GDR and afterwards, the deceased's land has not been used for agricultural purposes but as a recreational facility by a community of interests with whom the deceased had signed a contract.

2.2 On 6 March 1990, the GDR Parliament passed a law on the rights of owners of land redistributed under the land reform scheme, which entered into force on 16 March 1990. The law removed all restrictions on the disposal of land acquired pursuant to the 1945 land reform. On 3 October 1990, upon German reunification, the Law of 6 March 1990 became an integral part of the law of the Federal Republic of Germany (FRG). On the same date, a new article 233, section 2, paragraph 1, of the Introductory Act to the Civil Code came into effect, confirming the status of ownership of land under the land reform scheme at that time.

2.3 On 14 July 1992, the FRG Parliament enacted a further amendment to the same Act. New article 233, section 12, paragraph 3, provides that the only persons who may inherit land acquired under the land reform scheme are those who on 15 March 1990 carried on agricultural activities, or worked in the forestry or food-industry sectors of the GDR, or had carried on an activity in one of the above sectors during the previous ten years. If this was not the case, title to the land in question was to revert without compensation to the tax authorities of the German region ("Lander") in which the land was situated. The idea of the FRG authorities was to "reestablish" the situation as "it should have been" if the GDR authorities had not failed to implement their own law prior to 15 March 1990.

2.4 On the basis of the amended Introductory Act to the Civil Code, on 28 July 1995, referring to the fact that the deceased had not used the land for agricultural purposes, the authorities requested the deceased to transfer the property without compensation. On 16 July 1997, the District Court of Frankfurt/Oder ordered the deceased to reassign her property. On 10 June 1998, the Brandenburg Court of Appeal dismissed the deceased's appeal against the decision of 16 July 1997. On 15 July 1999, the Federal Supreme Court dismissed her appeal against the decision of 10 June 1998. Finally, on 25 October 2000, the Federal Constitutional Court dismissed the deceased's appeal on the ground that there had been no breach of her fundamental rights.

2.5 The deceased brought the case to the European Court of Human Rights, claiming that the obligation to reassign her land to the tax authorities without compensation infringed her rights to the peaceful enjoyment of her possessions, guaranteed by article 1, of Protocol No.1, of the European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention), as well as her rights not to be discriminated against, under article 14 of the European Convention, taken in conjunction with article 1, of the Protocol No. 1.

2.6 The deceased argued, in particular, that she had been discriminated against in comparison with three categories of persons: owners of land acquired under the land reform who had acquired their property as new farmers and were still alive on 15 March 1990;

Covenant] is reprimanded, if and insofar as the reprimanded violation refers to rights other than those guaranteed under the aforementioned Covenant."

owners of land who had acquired it *inter vivos* before 15 March 1990; and, lastly, persons who had inherited the land between 16 March 1990 and 2 October 1990.

2.7 On 22 January 2004, the European Court delivered a judgment in which it held unanimously that there had been a violation of article 1 of Protocol No. 1 and that it was not necessary to examine the applicants' complaint under article 14 of the Convention taken in conjunction with article 1 of the Protocol No.1.[2]

2.8 On 14 June 2004, following the request by the German Government and in accordance with article 43 of the Convention and rule 73 of the Court, the case was referred to the Grand Chamber. On 30 June 2005, the Grand Chamber held that there had not been a breach of article 1 of Protocol No. 1, or of article 14 of the Convention taken in conjunction with article 1 of Protocol No.1. The Court concluded that in the unique context of German reunification, having taken into account both the uncertainty of the legal position of heirs in the Law of 6 March 1990, and the grounds of social justice relied on by the German authorities, the lack of any compensation did not upset the "fair balance", which had to be struck between the protection of property and the requirements of the general interest.

The complaint

3.1 The authors allege a violation of the deceased's rights under article 26 of the Covenant, because along with 70,000 other persons, the so-called "new settlers' inheritors", her property was confiscated without any compensation by the State party. They claim that the deceased, as one of these "new settlers' inheritors", was discriminated against in comparison to persons belonging to a similar group, the so-called "Modrow purchasers".[3] They argue that while the deceased was forced to surrender her property without compensation, the "Modrow purchasers'" right to their property was comprehensively protected by the various laws enacted during the same period of time. They base the comparability of the two groups of persons, the "new settlers inheritors" and the "Modrow purchasers" on the fact that the laws affecting these two groups regarding their property rights were passed within one day of the other i.e. 6 and 7 March 1990, respectively.

3.2 The authors claim that the German reservation to article 5 paragraph 2 (a) of the Optional Protocol does not apply in the present case, as the European Court of Human Rights, in its decision of 30 June 2005, did not examine the "same matter" within the meaning of the State party's reservation. They argue that the main focus of the case brought to the European Court was the violation of the deceased's right to property, in accordance with article 1, of Protocol No.1. In addition, the deceased claimed to have been discriminated against, under article 14 of the Convention, in conjunction with article 1, of Protocol No.1, compared with three categories of new settlers inheritors mentioned in the Section 233 (12) of the Introductory Act to the Civil Code. However, in the present complaint to the Committee, the authors stress that they are not asserting a violation of the deceased's property rights but a breach of her right under article 26 of the Covenant. Unlike article 14 of the European Convention, article 26 is a free-standing provision, which can be invoked independently of the other Covenant rights and offers a broader scope of protection

[2] European Court of Human Rights, *Case of Jahn and others v. Germany*, (Applications No. 46720/99, 72203/01 and 72552/01).

[3] On 7 March 1990, the GDR parliament adopted the Law on the Sale of State-owned Buildings, which entered into force on 19 March 1990. The law allowed private persons, the "Modrow purchasers", to purchase both state-owned buildings and parcels of land at very low prices. The deceased was not such a purchaser. On 21 September 1994, the FRG Parliament adopted the Split Property Settlement Act, which allowed the "Modrow purchasers", to repurchase plots of land for half of their current market value, in the event that they had to retransfer them to the previous owners for various reasons.

than article 14 of the European Convention. The authors argue that the European Court only examined the deceased's alleged discriminatory treatment against other "new settlers inheritors", and not the claim of discrimination compared with the "Modrow purchasers".

3.3 The authors also claim that the reservation made by Germany under article 5, paragraph 2 (a), regarding the Committee's competence *ratione temporis* is irrelevant, as the pertinent events occurred after 25 November 1993, date of the entry into force of the Optional Protocol for the State party. These events are the legal provisions contained in the Split Property Settlement Act of 21 September 1994 and the Law Preserving the Modernisation of Living Spaces of 23 June 1997, which are the basis of the preferential treatment granted to the "Modrow purchasers".

3.4 The authors further claim that the German reservation regarding article 26 of the Covenant, is invalid as it is particularly extensive and limits the scope of the Committee to a disproportionate extent. This reservation is incompatible with the object and purpose of the Optional Protocol, if not the Covenant itself, as it seeks to limit the State party's obligations under article 26 in a manner inconsistent with the Committee's interpretation of that provision as a free-standing right. They argue that no reservation can be made to a substantive obligation under the Covenant through the vehicle of the Optional Protocol[4]. They recall that the Committee had expressed regrets about the State party's reservation in its concluding observations on the fourth periodic report of Germany. Further, they state that the State party has no legitimate interest in upholding its reservation, after having signed Protocol No. 12 to the European Convention, [5] which contains a general prohibition of discrimination. The authors conclude that the reservation being invalid, the Committee is not precluded from examining their claim under article 26.

State party's observations on admissibility

4.1 On 27 March 2008, the State party submitted its observations on the admissibility of the communication, arguing that, on the basis of the German reservation, it is inadmissible *ratione materiae* because of the prior consideration of the "same matter" by the European Court of Human Rights.

4.2 The State party notes that the European Court has considered the "same matter", as it concerned the same claim based on similar facts. As in the present communication, the deceased requested the European Court to find that she had been a victim of discrimination because the group of persons to which she belongs was dispossessed of their property without compensation and for no objective reasons, unlike other groups of owners. It notes that the deceased's claim was thoroughly and comprehensively examined by the European Court. It recalls the Court's conclusion that no discrimination occurred as the provisions of the law in question were in fact properly and reasonably based. The State party argued that the examination by the Committee under article 26 of the Covenant would lead to the same conclusion as on the basis of the German reservation, the extent of protection of article 26 goes no further than the protection under article 14 of the European Convention. In this regard, the State party referring to the inadmissibility decision in *Rogl* v. *Germany*,[6]

[4] They refer to the Committee's General Comment 24, CCPR, 52nd session (1994), General Comment 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant, at para. 13, as well as its jurisprudence in *Kennedy* v. *Trinidad and Tobago*, Communication No. 845/1998, at para. 6, and articles 2, paragraph 1 (d), and 19 of the Vienna Convention on the Law of Treaties.

[5] Germany has signed Protocol No. 12 to the European Convention on 4 November 2000 but has not ratified it to date. See the Council of Europe's Treaty Office at: http://conventions.coe.int (consulted on 22 December 2003).

[6] Communication No. 808/1998.

observes that the authors failed to substantiate their claim on the difference of the scope of protection between article 26 of the Covenant and article 14 of the Convention.

4.3 The State party submits that the German reservation aims to prevent duplication of international control procedures, conflicting decisions under such procedures and "forum shopping" by complainants.

4.4 It observes that the new comparison group of the "Modrow purchasers" referred to by the authors in the present claim has never been mentioned before. As the authors failed to litigate this argument at the national level, the State party considers that the submission is thus also inadmissible on the ground of non-exhaustion of domestic remedies. .

4.5 The State party submits that the claim is inadmissible *ratione temporis* in accordance with its reservation under article 5, para. 2 (a) of the Optional protocol. The origin of the alleged violation is the Law of 14 July 1992, which introduced the new article 233, section 12, paragraph 3, to the Introductory Act to Civil Code of 1992. It argues that the authors' claim that discrimination resulted from the laws of 1994 and 1997 is ill founded and only serves the purpose of circumventing the reservation.

4.6 Lastly, the State party observes that its reservation regarding article 26 is valid and must be observed under international law, and the Human Rights Committee recognized it as such.[7] Thus, the Committee is precluded from considering this claim, as it is based solely on article 26.

Comments by the author

5.1 On 14 May 2008, the authors reiterate their previous claims.

5.2 On the issue of the "same matter" having been examined by the European Court, the authors argue that the scope of protection between article 14 of the European Convention and article 26 of the Covenant are different, as is their jurisprudence. They emphasize that their free-standing claim of discrimination has not been, and could not have been, considered by the European Court, in accordance with the established case law of the Committee.[8] Therefore, the Committee is not precluded from examining these claims on the basis of the State party's reservation.

5.3 The authors argue that the issue of discrimination was brought before the domestic legal authorities, and thus remedies have been exhausted. The deceased's constitutional complaint included the allegation of a violation of article 14 (protection of property) and of article 3 (basic right to equality/non discrimination) of the Constitution of the State party, including with regard to the comparison group of the "Modrow purchasers".

5.4 Regarding the State party's argument that the origin of the alleged violation is the 1992 law, the authors argue that infringements of rights do not come into being until the general legal basis is substantiated and individualized for a person by an administrative or judicial legal act. They argue that it was only with the 1995 claim against the deceased, the subsequent court decisions and other legal acts forming the basis of the discriminatory treatment (1994 and 1997 laws) that their rights were infringed.

[7] Final notes of 2004 to the 5th Governmental Report of the Federal Republic of Germany.
[8] The author refers to Communication No. 965/2000, *Karakurt* v. *Austria*, at para. 7.4.

Issues and proceedings before the Committee

6.1 Before considering any claim contained in a communication, the Human Rights Committee must, in accordance with rule 93 of its rules of procedure, decide whether or not the communication is admissible under the Optional Protocol to the Covenant.

6.2 The Committee notes that the State party has invoked its reservation to article 5, paragraph 2 (a) of the Optional Protocol, precluding the Committee from examining communications, "which have already been considered under another procedure of international investigation or settlement." The Committee has to assess whether the "same matter" has indeed been considered during the proceedings before the European Court.

6.3 The Committee recalls its jurisprudence that the "same matter" within the meaning of article 5, paragraph 2 (a), must be understood as relating to the same author, the same facts and the same substantive rights.[9] It observes that Application no. 72552/01 was submitted to the European Court by the same author, was based on the same facts and related to the right of non-discrimination on the same grounds.

6.4 The Committee also recalls that the independent right to equality and non-discrimination in article 26 of the Covenant provides greater protection than the accessory right to non-discrimination contained in article 14 of the European Convention,[10] which has to be claimed in conjunction with another right protected under the Convention or its relevant Protocols. However the Committee notes that the authors are claiming to have been broadly discriminated against on the basis of the deceased's property title. It also notes that the European Court has examined whether the deceased was discriminated against in connection with the enjoyment of her property. To do so, the Court examined and assessed the treatment made by the legislator with respect to her property title and compared it with treatment of other categories of "new settlers' inheritors". The fact that the Court did not consider whether the deceased was discriminated against in comparison to an entirely separate category of property owners, "the Modrow purchasers", who bore no relationship to the deceased, does not detract from the fact that the same substantive issue was considered by the Court. Consequently, the Committee concludes that the "same matter" has been considered by the European Court, within the meaning of the State party's reservation. It follows that the Committee is precluded by the State party's reservation to article 5, paragraph 2 (a), of the Optional Protocol from examining the present communication.

6.5 Under these circumstances the Committee does not need to address the permissibility and applicability of the other dispositions contained in the State party's reservation to the Optional Protocol.

7. The Human Rights Committee therefore decides:

(a) That the communication is inadmissible under article 5, paragraph 2 (a) of the Optional Protocol;

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

[Adopted in English, French and Spanish, the English text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

[9] See Communication 998/2001, *Althammer* v. *Austria*, at para. 8.4.
[10] See Communication 998/2001, *Althammer* v. *Austria*, at para. 8.4.

Appendix

Individual opinion of Committee members, Mr. Rafael Rivas Posada and Mr. Fabián Omar Salvioli (dissenting)

Having examined the communication *Loth v. Germany*, the Committee decided that it was inadmissible under article 5, paragraph 2 (a), of the Optional Protocol. It justified this decision by what we deem to be a misinterpretation of this provision, insofar as it recalled its jurisprudence that grounds for declaring a communication inadmissible exist when another international body has examined the same matter and found the same complaint to be inadmissible. In the instant case, in order to seek the application of its reservation to article 5, paragraph 2 (a), of the Optional Protocol, to the effect that the Committee shall not be competent when the same matter has been considered by another international body, the State party argued that the European Court of Human Rights had examined the same case and had concluded as to its inadmissibility.

We are of the opinion that the letter and spirit of the above-mentioned paragraph clearly establishes that these grounds of inadmissibility exist solely when the matter is being examined by another international body at the time when the Committee embarks on its consideration thereof. This means that the matter is currently under examination by the international body other than the Committee and not that it has been decided in the past. The wording of the English and French versions of article 5, paragraph 2 (a), of the Optional Protocol is sufficiently clear as to leave no room for any doubt. The English text lays down as grounds for admissibility that "the same matter is not being examined under another procedure of international investigation or settlement" (our underlining) and the French text states in this respect that "*[l]a même question n'est pas déjà en cours d'examen devant une autre instance internationale d'enquête ou de règlement*" (our underlining). An error of translation certainly occurred in the Spanish version, since it speaks of admissibility when "*[e]l mismo asunto no ha sido sometido ya a otro procedimiento ... internacional*" (when the same matter has not been subject to another international procedure) thus opening up the possibility, of which some States have availed themselves, of interpreting grounds of inadmissibility as solely referring to the submission in the past of the same matter to another international body and not, as is correct, to its contemporaneous consideration by that body. In view of this error of translation, the Committee has repeatedly decided that the English and French versions must take precedence over the erroneous Spanish text, but in requiring [as grounds for inadmissibility] examination of the matter by the other international body, it has accepted that this examination may have taken place in the past, in contradiction of the unequivocal text of article 5, paragraph 2 (a), of the Optional Protocol.

For the above reasons, we are of the opinion that the Committee should have declared the communication *Loth v. Germany* to be admissible, without prejudice to a decision on the alleged violation of article 26 of the Covenant by the State party.

(*Signed*): Rafael Rivas Posada

(*Signed*): Fabián Omar Salvioli

[Done in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]