



**International covenant
on civil and political
rights**

Distr.
RESTRICTED*

CCPR/C/90/D/1419/2005
30 August 2007

Original: ENGLISH

HUMAN RIGHTS COMMITTEE
Ninetieth session
9 – 27 July 2007

DECISION

Communication No. 1419/2005

<u>Submitted by:</u>	Francesco De Lorenzo (represented by counsel, Andrea Saccucci)
<u>Alleged victim:</u>	The author
<u>State Party:</u>	Italy
<u>Date of communication:</u>	1 February 2005 (initial submission)
<u>Document references:</u>	Special Rapporteur's rule 97 decision, transmitted to the State party on 17 August 2005 (not issued in document form)
<u>Date of decision:</u>	24 July 2007

* Made public by decision of the Human Rights Committee.

Subject matter: trial of former Cabinet Minister on corruption charges

Procedural issues: previous examination of the case by the European Court of Human Rights

Substantive issues: trial by an independent and impartial tribunal

Articles of the Covenant: 2, paragraph 1; articles 14, paragraph 1; 14, paragraph 3(d); 14, paragraph 5; and 26

Article of the Optional Protocol: article 5, paragraph 2(a)

[ANNEX]

ANNEX

Decision of the Human Rights Committee under article 5, paragraph 4, of
the Optional Protocol to the International Covenant on Civil and Political rights

Ninetieth session

concerning

Communication No. 1419/2005**

<u>Submitted by:</u>	Francesco de Lorenzo (represented by counsel, Andrea Saccucci)
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The Human Rights Committee, established under article 28 of the International Covenant
on Civil and Political Rights,

Meeting on 24 July 2007,

Adopts the following:

DECISION ON ADMISSIBILITY

1. The author of the communication, dated 1 February 2005, is Francesco de Lorenzo. The author claims violations of articles 2, paragraph 1; 14, paragraph 1; 14, paragraph 3(d); 14, paragraph 5; and 26 of the Covenant by Italy. The Optional Protocol entered into force for Italy on 15 December 1978. He is represented by counsel, Andrea Saccucci.

Factual background

2.1 The author was Minister of Health of Italy between 1989 and 1992. In 1993, the Offices of the Prosecutor in Naples and Milan opened an investigation into the unlawful financing of political parties. As a result of the investigation, several charges were brought against the author. On 12 May 1994, the judge of the preliminary investigation of Naples ordered that the author be

** The following members of the Committee participated in the examination of the present communication: Mr. Abdelfattah Amor, Mr. Prafullachandra Natwarlal Bhagwati, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley and Mr. Ivan Shearer.

remanded in custody. The author challenged the order before the Court of Cassation and requested the transfer of his case to the Panel for Ministerial Offences (hereinafter the Panel), since the charges brought against him concerned certain activities allegedly carried out in the exercise of his official ministerial functions. On 20 July 1994, the Court of Cassation granted his request and referred the case to the Panel established within the Naples Tribunal. On 6 August 1994, the Panel remanded the author in custody. The author challenged his detention alleging the lack of impartiality and independence of the Panel. On 5 September 1994, the Panel rejected the appeal, maintaining that it was an independent judicial body.

2.2 On 29 October 1994, the Panel separated the procedure concerning the author from that concerning the other co-accused. The author was committed to stand trial before the Tribunal of Naples on ninety-seven charges, including corruption, breach of the law regarding financing of political parties and membership of a criminal association, aggravated by the participation of more than ten persons.

2.3 The author's trial lasted from November 1994 to March 1997. On 16 December 1994, the author challenged the constitutionality of Law No. 219 of 1989 alleging a violation of the right to an independent and impartial tribunal guaranteed by the Italian Constitution because the Panel was empowered to act as prosecutor and as judge of the preliminary hearing. The author also argued that the order of 29 October 1994 committing him for trial was null and void because the Panel lacked competence to adopt it, and requested the re-joinder of his procedure with that concerning his co-accused. On 27 December 1994, the Tribunal of Naples rejected all the challenges and requests. On 12 January 1995, the author was released from detention due to his poor health. On 11 October 1995, he submitted a request for suspension of the trial because of cancer treatment. The Tribunal rejected this request.

2.4 During the trial, eighty-six of the author's co-accused who had been summoned to testify as witnesses chose to remain silent. Pursuant to article 513 of the Italian Code of Criminal Procedure, the Tribunal of Naples authorised the reading of the incriminating statements made by these witnesses to the prosecutor during the preliminary investigation.

2.5 On 8 March 1997, the Tribunal of Naples found the author guilty on many counts of corruption and violations of the law on the financing of political parties. He was found guilty of having established a criminal association and sentenced to eight years and four months of imprisonment and a fine.

2.6 Both the author and the prosecutor appealed to the Naples Court of Appeal. The author requested, *inter alia*, that the procedure before the Tribunal of Naples be declared null and void because the decision to commit him to stand trial was adopted by the Panel which, according to him, lacked independence and impartiality, and because the decision to separate the proceedings was made by an incompetent body.

2.7 In response, the Court of Appeal re-opened the case and summoned most of the co-accused to appear in court. The majority of them again availed themselves of their right to remain silent. As a result, statements made during the preliminary investigation were used again. On 7 July 2000, the Court of Appeal found the author guilty of several counts of corruption and violations of the law on the financing of political parties. It upheld the appeal of the prosecutor, finding that the applicant did participate in a criminal association with at least ten other persons. It rejected

the author's arguments regarding the incompetence of the Panel to commit him for trial and to separate the proceedings. The author's sentence was reduced to seven years, five months and twenty days of imprisonment. The author challenged the decision of the Court of Appeal before the Court of Cassation.

2.8 On 14 June 2001, the Court of Cassation acquitted the author on some of the charges and reduced his sentence to four years, ten months and ten days of imprisonment. It did not refer the case back to the Court of Appeal. Nonetheless, it ruled out the applicability of aggravating circumstances in relation to the charges of criminal association.

2.9 On 14 February 2002, the author filed a request for rectification of errors before the Court of Cassation alleging that the Court should have referred the case back to the Court of Appeal in relation to the charge of membership of a criminal association. On 27 March 2002, the Court of Cassation rejected the request.

2.10 Back on 21 July 2000, the Tribunal of Naples had already acquitted some of the author's co-accused. On 7 May 2004, the author's request for re-opening the trial based on the existence of a conflict between his conviction and the acquittal of his co-accused in separate proceedings was rejected by the Naples Court of Appeal.

2.11 Within the context of another criminal procedure pending against the author, the Panel had requested on 24 May 2001 an opinion from the Constitutional Court on the constitutionality of the Law No. 219 of 1989 allowing it to simultaneously exercise the functions of prosecutor and judge of the preliminary investigation. By judgment No.134 of 11 April 2002, the Constitutional Court held that the Panel should refer the file to the public prosecutor who should then request that the accused be committed to stand trial before the ordinary competent judge. It accepted that the separation of investigative and judicial functions was required by Law No. 81 of 1987, as well as by article 6 of the European Convention on Human Rights.

2.12 On 7 April 2003, the then Minister of Justice affirmed that the interpretation adopted by the Constitutional Court was the only one compatible with the constitutional principles of equality, presumption of innocence and fair trial. However, he also noted that the judgment could not be applied retroactively to proceedings already concluded, including those concerning the author.

2.13 On 31 January 2001, the author submitted an application to the European Court of Human Rights alleging that:

- his conviction on the basis of statements of witnesses that he had no opportunity to examine violated articles 6(1) and 3(d) of the European Convention on Human Rights;¹

¹ Article 6(1) provides that "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in

- that the refusal to adjourn the trial while the author was undergoing cancer treatment violated articles 6(1) and 6(3)(c) of the Convention;²
- that the reading by the public prosecutor before the Tribunal of Naples of several statements made by the co-accused during the preliminary investigation violated article 6(1) of the Convention;
- that the unspecified nature of the accusations and the modification during the trial of the legal qualification of one of them violated articles 6(1) and 6(3)(a) and (b) of the Convention;³
- that the lack of impartiality and independence of the “Panel for Ministerial Offences” violated article 6(1) of the Convention;
- that the difference in treatment between the author and his co-accused, especially regarding the application of new rules concerning the admissibility of evidence collected during the investigation, violated article 14, read in conjunction with article 6, of the Convention;⁴
- that the fact that the author was compelled to appear at his own trial despite poor health violated articles 3 and 8 of the Convention;⁵

the opinion of the court in special circumstances where publicity would prejudice the interests of justice.” Article 6(3)(d) provides that everyone charged with a criminal offence has the right “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

² Article 6(3)(c) provides that everyone charged with a criminal offence has the right “to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require”.

³ Article 6(3)(a) and (b) provides that everyone charged with a criminal offence has the right “to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him” and “to have adequate time and facilities for the preparation of his defence”.

⁴ Article 14 provides that “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

⁵ Article 3 provides that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” Article 8 provides that

“1 Everyone has the right to respect for his private and family life, his home and his correspondence.

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

- and that the fact that his conviction of having set up a criminal association was not substantially reviewed by a higher tribunal violated article 2 of Protocol No. 7 to the Convention.⁶

2.14 On 12 February 2004, the European Court declared the majority of these claims manifestly unfounded. The claim regarding the impartiality of the Panel was declared incompatible *ratione materiae* with article 6 of Convention because the guarantees provided for therein apply only to tribunals called upon to determine criminal charges.⁷ Accordingly, the similar claim made under article 14, read together with article 6, was also declared inadmissible as incompatible *ratione materiae* with the Convention.

The complaint

3.1 The author alleges a violation of article 14, paragraph 1, because of the lack of impartiality of the Panel, and a violation article 2, paragraph 1, and article 26 because of the discriminatory nature of the special procedure concerning ministerial offences.

3.2 The author alleges a violation of article 14, paragraph 1, because of the reading by the prosecutor into the file during the opening hearing of statements made during the preliminary investigation.

3.3 The author alleges a violation of article 14, paragraph 3(d), because the refusal of the Tribunal to adjourn the trial deprived him of his right to actively and effectively participate in the trial.

3.4 The author alleges a violation of article 14, paragraph 5, because he was denied the right to a review of his conviction and sentence concerning the charge of membership in a criminal association since the Court of Cassation did not refer the case back to the trial court to have the conviction reviewed.

3.5 The author alleges a violation of article 2, paragraph 1, article 26 and article 14, paragraphs 1 and 3, because of the discriminatory application of the new rules of evidence adopted after his trial ended. He argues that the discrepancy in the application of the new rules of evidence resulted in a different treatment of the author and the other co-accused and violated the principle of equality before the law.

3.6 The author submits that he exhausted domestic remedies and that the same matter is not being examined under another procedure of international investigation or settlement. Regarding

⁶ Article 2 of Protocol No.7 provides that

“1 Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.

2 This right may be subject to exceptions in regard to offences of a minor character, as prescribed by law, or in cases in which the person concerned was tried in the first instance by the highest tribunal or was convicted following an appeal against acquittal.

⁷ See European Court of Human Rights, judgment of 12 February 2004, application No.69264/01.

the State party's reservation to article 5, paragraph 2(a), of the Optional Protocol, he argues that his application to the European Court of Human Rights was "not examined" by the Court, since in relation to some complaints, his application was declared incompatible *ratione materiae* with the provisions of the European Convention on Human Rights. Other claims were declared manifestly ill-founded and thus inadmissible. Although the facts complained of under the Covenant are the same which were previously submitted to the European Court, the author submits that the rights violated and the legal arguments are substantially different from those relied upon in the proceedings before the European Court or have not been "examined" by the latter.

State party's submissions on admissibility

4.1 By note verbale of 18 July 2006, the State party challenged the admissibility of the communication on the ground that it entered a reservation to article 5, paragraph 2(a), of the Optional Protocol. It notes that the author's claims under the Covenant and those previously submitted under the European Convention of Human Rights largely converge and that the same substantive rights are at stake. The "same matter" was thus clearly submitted to the European Court of Human Rights which carefully "examined" it.

4.2 The State party notes that the author himself concedes that the same matter has already been examined by the European Court of Human Rights. Nonetheless, the author claims that his legal arguments are "substantially different from those relied upon in the proceedings before the European Court". The State party recalls that, according to the Committee's consistent jurisprudence, a matter is deemed to have already been investigated when the parties, the complaints advanced and the fact adduced in support are the same: the Committee has never identified "same legal arguments" as one of the elements constituting "the same matter".⁸ In any case, it is difficult to identify any genuine new legal argument, since the claims and legal reasoning of the author, as well as the facts adduced to support them, perfectly coincide with those contained in his application before the European Court. Moreover, the State party notes that the same substantive rights are invoked before the Committee.

4.3 With regard to the two claims which were declared inadmissible as incompatible *ratione materiae* with the Convention, the State party notes that the Court in fact examined these claims in detail, reaching the conclusion that the author has used arguments referring not to the direct behaviour of the judicial court, but of the public prosecutor or the Panel evaluating the admissibility to trial of the former Minister, to imply lack of independence and impartiality of national tribunals. As result of this detailed examination, the two claims cannot be newly examined by the Committee. In any event, the State party submits that they are equally incompatible *ratione materiae* with the Covenant under article 3 of the Optional Protocol. Indeed, the Covenant only envisages situations where the determination of rights and obligations in a suit at law is at stake and the abstract evaluation of the independence and impartiality of an organ as the Panel would not be covered by the Covenant. This Panel only judged the issue of whether the author could stand trial, while the ordinary trial was conducted by regular tribunals whose behaviour has been examined by the European Court.

⁸ See Communication No.168/1984, *V.O. v. Norway*, inadmissibility decision adopted on 17 July 1985, para.4.4.

4.4 Finally, the State party argues that the author has not exhausted all available domestic remedies, as he did not oppose the constitution of the Panel.

Author's comments

5.1 By letter dated 30 December 2006, the author reiterates that the “matter” under consideration by the Committee is not “the same” which has already been “examined” by the Court. He insists that the Court has not “examined” claims that it declared incompatible *ratione materiae* with the Convention. In any event, he recalls that some of his claims refer to rights and freedoms which are not explicitly enshrined in the Convention or are protected in a clearly restrictive manner if compared with the corresponding rights and freedoms of the Covenant.

5.2 With regard to the alleged failure to exhaust domestic remedies, the author reaffirms that he has pursued all available and effective remedies.

Issues and proceedings before the Committee

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

6.2 In accordance with article 5, paragraph 2(a), of the Optional Protocol, the Committee has ascertained that a similar complaint filed by the author was declared inadmissible by the European Court of Human Rights on 12 February 2004 (application No.69264/01). Most claims were declared inadmissible because they were manifestly ill-founded, others were declared inadmissible because they were incompatible *ratione materiae* with the European Convention of Human Rights. The Committee also recalls that when the State party adhered to the Optional Protocol, it entered a reservation to article 5, paragraph 2(a), specifying that the Committee “shall not have competence to consider a communication from an individual if the same matter is being examined or has already been considered under another procedure of international investigation or settlement”.

6.3 In the instant case, the Committee is seized of the “same matter” as the European Court. As to whether the Court “examined” the same matter, the Committee observes that most of the author's claims were declared inadmissible as manifestly ill-founded by the Court (see para.2.14 above), a conclusion for which it gave extensive justification. In that respect, the Committee concludes that the Court indeed “examined” most of the author's allegations and that the State party's reservation to article 5, paragraph 2(a), of the Optional Protocol, applies.⁹ In respect of the author's remaining claim regarding the Panel, which was declared inadmissible as incompatible *ratione materiae* by the European Court, the Committee considers that the Court did not *examine* this claim within the meaning of article 5, paragraph 2(a).¹⁰

⁹ See Communication No.121/1982, *A.M. v. Denmark*, Inadmissibility decision adopted on 23 July 1982, para.4; and Communication No.584/1994, *Valentijn v. France*, Inadmissibility decision adopted on 22 July 1996, para.5.2.

¹⁰ See Communication No.441/1990, *Casanovas v. France*, Views adopted on 19 July 1994, para. 5.1.

6.4 The Committee notes the State party's argument that the author did not exhaust domestic remedies. It does however consider that the author exhausted domestic remedies since he raised the issue of the independence and impartiality of the Panel before the Panel itself, the Naples Court of Appeal and the Constitutional Court. Nonetheless, the Committee notes that the European Court of Human Rights considered that the main purpose of article 6, paragraph 1, of the European Convention of Human Rights, as far as criminal matters are concerned, is to ensure a fair trial by a tribunal competent to "determine" any criminal charge and that the guarantees of independence and impartiality for a fair trial concern only jurisdictions called upon to determine the innocence or guilt of the accused.¹¹ Similarly, the Committee considers that article 14, paragraph 1, mainly applies to "courts and tribunals" that deliver judgment in a criminal case. In the present case, the Panel for Ministerial Offences could only determine whether the author should be committed to stand trial, not whether he was guilty as charged. It was a *sui generis* jurisdiction which exercised the functions of prosecutor and judge of the preliminary investigation and the author himself requested that his case be transferred to this Panel. In such circumstances, the Committee considers that this part of the communication is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

6.5 With regard to the author's related claim under article 26 concerning the discriminatory nature of the special procedure concerning ministerial offences, the Committee notes that it was the author himself who requested that his case be transferred to the Panel (see again para.2.1 above). The author is supposed to have made this request in full knowledge of the competences granted to the Panel by Law No. 219 of 1989. The Committee considers that the author has failed to demonstrate how the transfer of his case to the Panel amounts to discrimination. It therefore considers that the author has failed adequately to substantiate a violation of article 26 for purposes of admissibility. This part of the communication is therefore inadmissible under article 2 of the Optional Protocol.

7. Accordingly, the Committee decides:

- (a) that the communication is inadmissible under article 2; article 3; and article 5, paragraph 2(a) of the Optional Protocol;
- (b) that this decision be transmitted 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 also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]

¹¹ See European Court of Human Rights, decision of 12 February 2004, application no.69264/01, p.26.