Compilation of Decisions on Women's Rights of International Treaty Bodies

[Committee on Elimination of All Forms of Discrimination against Women, Human Rights Committee and European Human Rights Committee]

Forum for Women, Law and Development (FWLD)

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Aiming to contribute to the enrichment of legal jurisprudence and ensure, respect, fulfillment, protection and realization of women's rights in Nepal, the Forum for Woman, Law and Development (FWLD) has taken the initiative to publish this compilation of decisions by various treaty bodies. The publication consists of the decisions of the Committee on the Convention on Elimination of all Forms of Discrimination against Women (CEDAW) which have been collected from http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm. Also included are: KL v. Peru, decided by the Human Rights Committee constituted under ICCPR, and Tysiac v. Poland, decided by European Human Rights Committee collected from the Center for Reproductive Rights (CRR), U.S.A.

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Excerpt from A/59/38

Decision of the Committee on the Elimination of Discrimination against Women, declaring a communication inadmissible under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No.: 1/2003, Ms. B.-J. v. Germany* (Decision adopted on 14 July 2004, thirty-first session)

Submitted by	:	Ms. B.-J.
Alleged victim	:	The author
State party	:	Germany
Date of communication	:	20 August 2002 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women.

Meeting on: 14 July 2004

***Adopts the following*:**

Decision on admissibility

1. The author of the communication dated 20 August 2002, with supplementary information dated 10 April 2003, is Ms. B.-J, a German citizen of about 57 years of age in April 2004, currently

* Pursuant to rule 60 of the Committee's rules of procedure, Ms. Hanna Beate Schopp–Schilling did not participate in the examination of this communication. The text of an individual opinion signed by two Committee members, Ms. Krisztina Morvai and Ms. Meriem Belmihoub-Zerdani, is appended.

residing in Norten-Hardenberg, Germany. She claims to be a victim of violations by Germany of articles 1, 2 (a-f), 3, 5 (a and b), 15 (2) and 16 (1.c, d, g and h) of the Convention on the Elimination of All Forms of Discrimination against Women. The author is representing herself. The Convention and its Optional Protocol entered into force for the State party on 9 August 1985 and 15 April 2002, respectively.

The facts as presented

2.1 In 1969, the author got married. Although she was a nurse by training, the author and her husband agreed that she would take on the role of homemaker during the marriage and not further her education so as to allow her husband to pursue his career. The author has three grown children, born in 1969, 1970, and 1981.

2.2 The author wanted to continue her education in 1984, but her husband requested her not to do so, and to support him in a period of professional difficulty. By 1998, the author's husband's difficulties were resolved and she again wished to continue her education, but in May 1999 the author's husband applied for a divorce.

2.3 In September 1999, in connection with her separation, the author and her husband agreed in a settlement before a family court in Northeim that he would pay her DM 973 per month in separation maintenance, DM 629 per month in child support for their youngest child and DM 720 per month to cover the mortgage on the house in which the author continued to live.

2.4 The divorce became final on 28 July 2000. While the issue of the equalization of pensions was resolved as part of the divorce, no decisions have been reached regarding the equalization of accrued gains and maintenance after termination of the marriage.

2.5 On 10 July 2000, the author submitted a complaint to the Federal Constitutional Court, claiming that statutory regulations regarding the law on the legal consequences of divorce violated her constitutional right to equality protected under articles 3.2 and 3.3 of the Constitution.

2.6 On 30 August 2000, the Federal Constitutional Court decided not to accept the complaint for decision.

2.7 In April 2004, the Court of Gottingen awarded the author a maintenance payment of € 280 per month with retroactive effect to August 2002, the date that the author's husband had stopped payment of separation maintenance. The author has appealed against the decision.

2.8 The author has also written without success to the Federal Ministry of Justice and the Ministry of Justice and of Women's issues of the Land Niedersachsen on 28 July 2001, 6 February 2002, and 2 March 2002, and on 15 January 2003, 22 February 2003, claiming disregard for marriage and family as well as gender-specific discrimination by the courts of Niedersachsen.

2.9 Proceedings concerning maintenance after divorce, as well as equalization of accrued gains continue.

The complaint

3.1 The author alleges that she was subjected to gender-based discrimination under the statutory regulations regarding the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage) and that she has since continued to be affected by those regulations. In her view, the regulations systematically discriminate against older women with children who are divorced after long marriages.

3.2 With respect to the issue of accrued gains, the author suggests that, although the law provides that the spouse with the lesser accrued gains receives half the excess of the higher-earning spouse, the law does not take into account the improved or devalued "human capital" of marriage partners. She maintains that this constitutes discrimination, as it results in providing a husband with his wife's unremunerated labour. The author claims that the law relating to reallocation of pension entitlements is similarly discriminatory and that vague, unclear and discriminatory provisions govern the question of maintenance.

3.3 The author furthermore claims more generally that women are

subjected to procedural discrimination because the risks and stress of court proceedings to resolve the consequences of divorce are carried unilaterally by women, who are also prevented from enjoying equality of arms. She also claims that all divorced women in situations similar to hers are victims of systematic discrimination, disadvantage and humiliation.

3.4 The author claims that she exhausted all domestic remedies when the Constitutional Court decided not to accept for review her complaint of omission on the part of the legislator to fulfil the Constitution's equal treatment provisions (art. 3.2 and 3.3 of the Constitution) in respect of the statutory regulations regarding the law on the legal consequences of divorce.

The State partys observations on admissibility

4.1 By its submission of 26 September 2003, the State party objected to the admissibility of the communication.

4.2 The State party notes that the divorce decree, which the author did not submit with her initial submissions, only contained a decision on pension equalization. No final decision has yet been reached in separate proceedings regarding maintenance after termination of the marriage and equalization of accrued gains. The State party further notes that the author filed a constitutional complaint against the divorce decree and against the law on the legal consequences of divorce, in general, which the Federal Constitutional Court did not accept for adjudication. In the ensuing period, the author repeatedly turned to Federal and State Ministries to achieve an amendment of the statutory regulations.

4.3 As regards relevant legal provisions governing the effects of marriage and of the rights and duties of spouses, as well as those concerning divorce and the legal consequences of divorce, the State party explained that in event of divorce, "acrued gains" are to be equalized, if the spouses live in the statutory marital regime of community of gains. The value of the assets of the spouses at the time of marriage (original assets) and at the time of termination (final assets) is first determined. The "accrued gains" are the amount by which the final assets of a spouse

exceed his or her original assets. The spouse with the lower accrued gains is entitled to an equalization claim amounting to one half of the difference in value compared to the accrued gains of the other spouse (Section 1378 BGB). Regulations concerning maintenance after termination of marriage are initially based on self-responsibility of (former) spouses. Following the divorce, the spouses are in principle required to be responsible for their own livelihood. Consequently, maintenance is really only envisaged for certain categories of cases. However, since these prerequisites are regularly met in a large number of divorce cases, the existence of a claim to maintenance tends to be more the rule. The reason for this is the opinion of the legislature that, owing to his or her personal and financial situation, the financially weaker, needy spouse should be able to rely on the post-marital solidarity of the financially stronger, capable spouse. The law also provides under certain circumstances for a maintenance claim for a period of training or education for a spouse who may have omitted to acquire or interrupted formal education or vocational training in the expectation of, or during marriage. Furthermore, the law on equalization of pensions creates the duty of the spouse who acquired greater overall pension entitlements than the other spouse during marriage to equalize by one half of the difference in value.

4.4 According to the State party, the communication is inadmissible for lack of grievance under article 2 of the Optional Protocol as only *victims*, who have to illustrate that they, themselves are directly affected by a violation of the law, can submit claims. An abstract review of constitutionality by means of an individual complaint is inadmissible. The situation could be different if the author were already directly adversely affected by the legal position created by existing legal provisions. However, this is not the case as the law on the legal consequences of divorce still has to be implemented by the courts in regard to the author. The State party submits that the author of a complaint cannot achieve a general and fundamental review of German law on the legal consequences of divorce with her complaint.

4.5 Based on this argument, the State party submits that the author's basis for complaint is her own divorce proceedings; only in this framework can the applied legal provisions relating to the law

on the legal consequences of divorce be (directly) reviewed.

4.6 The State party also argues inadmissibility for lack of sufficient substantiation. The lack of concrete information from the author regarding the financial settlements made in the divorce proceedings, the legal basis on which they were reached and whether and to what extent they put her at a financial disadvantage compared to her divorced husband, make it impossible to examine whether and which rights set forth in the Convention were violated in the author's case.

4.7 The State party notes, in particular, non-disclosure of the contents, or submission of the divorce decree, lack of information as to whether, and which legal provisions may have been applied in the author's case and with what financial consequences, lack of information about equalization of pensions and accrued gains, and about the amount of maintenance the author receives after termination of marriage. The State party concludes that the author's claim of being financially disadvantaged by German law on the legal consequences of divorce compared to her divorced husband remain unsubstantiated and that a global reference to studies on the alleged financial disadvantages of divorced women is insufficient in this respect.

4.8 The State party further submits, only by way of precaution and notwithstanding inadmissibility for lack of grievance, lack of exhaustion of domestic remedies, which, in this case, would be the filing, in admissible fashion, of a constitutional complaint. While the author filed a constitutional complaint against the law on the legal consequences of divorce in general, according to the Supreme Federal Constitutional Court Act (section 93, para. 3), a complaint directly against a law can only be filed within one year of the law entering into force, making the author's constitutional complaint against the law in general inadmissible for this reason alone.

4.9 The State party also submits that only the issue of equalization of pensions has been settled so far in conjunction with the divorce. The author restricted her appeal against the divorce decree solely to the pronouncement of the divorce itself, omitting to also make the equalization of pensions the subject of the review by the appellate court (Oberlandesgericht Braunschweig). This would

have been admissible and could have been reasonably expected of the author. Failure to lodge a required and reasonable appeal must result in inadmissibility of a complaint pursuant to article 4.1 of the Optional Protocol.

4.10 As regards inadmissibility *ratione temporis*, the State party submits that the facts that are the subject of the complaint occurred prior to the entry into force of the Optional Protocol for the Federal Republic of Germany. In this regard, the State party submits that since the divorce proceedings alone are the subject of the complaint and a final and conclusive decision has so far only been reached on the equalization of pensions in conjunction with the divorce, the decisive point for inadmissibility *ratione temporis* is the time at which this decision became final, i.e. on 28 July 2000. The Optional Protocol entered into force for Germany on 15 April 2002.

The authors comments on the State partys observations on admissibility

5.1 The author submits that the State party's explanation of relevant legal provisions governing the effects of marriage and of the rights and duties of spouses, as well as those concerning divorce and the legal consequences of divorce, fail to describe the continuous discrimination and disadvantage of persons who are entitled to equalization in divorce proceedings, who, as a rule, are women. She notes that, in Germany, social structures ensure that men, as a rule, advance professionally during marriage, while women have to interrupt their careers and professional advancement because of their continuing main responsibility for the family and the raising of children, thus putting them at a striking disadvantage, especially after separation or divorce. These fundamental societal, familial and marital realities, as well as their differential consequences after divorce are however, not sufficiently, or not at all, accounted for in the law on the legal consequences of divorce, to the disadvantage of women. This is particularly the case for divorced older women who have deferred their own career plans during marriage.

5.2 The author also submits that enforcement of claims upon divorce is rendered extremely difficult because courts commonly ignore

marital agreements and family situations to the detriment of women, and equalization provisions are made dependent upon women's proper behaviour during marriage and after divorce, subjecting women to rigid social control by the divorced husband and the courts. Inappropriate behaviour by a husband, on the other hand, is not subject to any kind of sanction. The author argues that such discrimination and disadvantage of divorced women is only possible because of insufficient and vague legislation.

5.3 The author rejects the State party's argument with respect to inadmissibility for lack of grievance by noting that since her divorce, she continues to be personally and directly affected by the law on the legal consequences of divorce. She maintains that she is affected not only by the decisions of the family court, but by the discrimination in the court proceedings resulting especially from an omission by the legislator to regulate the consequences of divorce in accordance with article 3.2 of the Constitution, in a manner in which no discrimination or disadvantage occurs. In this regard, her constitutional complaint was directed specifically against an "omission on the part of the legislator".

5.4 On the issue of lack of sufficient substantiation, the author submits that, while she had quoted statistics and expert opinions in her constitutional complaint and also in her submissions to ministries, the insufficient legislative provisions and court practice and the resulting discrimination against women were borne out by her personal situation as a divorced woman. The author maintains that she has given a concrete account of her fundamental material disadvantage. Had she not deferred to family responsibilities and her husband&' needs, she would have been able to achieve her own income in the amount of euro 5,000 per month, with a commensurate old age pension.

5.5 The author states that the concrete *equalization* of pension payments reached in a divorce is irrelevant as the discriminatory disadvantages only start, and continue, after divorce. In her concrete case, since her husband's filing for divorce in May 1999, the 500 euro/months for her old age pension had stopped. Had she not deferred to her husband's family's needs, between 47,000 (had she remained married) and 94,000 euro (in case

of her own income) would have been made towards her old age pension.

5.6 With respect to exhaustion of domestic remedies, the author maintains that her constitutional complaint was directed against the legal consequences of divorce because articles 3.2 and 3.3 of the Constitution had been infringed in her very personal case, and was not solely directed *in general* against the legal consequences of divorce. Her complaint had not been directed "in general" against a law, but rather against the discrimination contained therein and the omission of the legislator to eliminate such discrimination and the disadvantage experienced by divorced women, and from which she was directly affected.

5.7 She notes that the constitutional complaint was admissible and thus, she exhausted domestic remedies. Her complaint concerning the legal consequences of divorce had not been rejected as "inadmissible" or "unfounded" but rather had not been acepted for decision., The author further submits that article 93 of the Federal Constitutional Court Act does not establish a statute of limitations in regard to omissions by the State. In support of her argument, the author refers to a decision of the Federal Constitutional Court (BverfGE 56, 54, 70) that constitutional complaints concerning continuing omission on the part of the legislator do not necessarily require prior use of legal remedies and do not require adherence to the statute of limitations provided for in article 93.2 of the Federal Constitutional Court Act. In addition, she submits that her Constitutional complaint against the law on the legal consequences of divorce was admissible also without prior exhaustion of legal remedies in accordance with article 90.2, second sentence, of the Federal Constitutional Court Act, because of the general importance and the fundamental constitutional questions posed.

5.8 The author further submits that her requests for financial assistance to cover legal proceedings had been denied to her in several instances, because of a lack of prospects to prevail in such proceedings, and the courts had not taken into consideration family and marital facts. Without such assistance she was prevented from using domestic remedies because of financial constraints. Lastly, while divorce proceedings are dealt with very

expeditiously by courts, proceedings on the legal consequences of divorce take forever when women claim equalization payments. This was also true in her case where she had tried to obtain, since September 2001, the relevant information from her divorced husband to calculate maintenance after termination of marriage, leading to her filing a suit in August 2002 to obtain such information. These proceedings had not yet resulted in obtaining the required information.

5.9 The author reiterates that by August 2003, there was no Court decision concerning maintenance after termination of marriage. While she had received monthly maintenance payments of 497 euro 497, these were no longer paid as of August 2002, after a lengthy and difficult court procedure that went against her. The author submits that, while she has appealed against this decision, she has no hope that the courts would be considering her concerns. She estimates that, had she completed her studies and focused on her career instead of supporting her husband and caring for the family, she would today be able to earn as much income as her husband, i.e., 5,000 euro per month.

5.10 As regards the State party arguments concerning inadmissibility *ratione temporis*, the author notes that, while the divorce decree became final in July 2000, she continues to be directly affected by the discriminatory provisions of the law on the legal consequences of divorce. The steps she took $ constitutional complaint and interventions with ministries $ did not lead to results. Likewise, she continues to experience discrimination, disadvantage and humiliations by the courts.

Additional comments of the State party on admissibility pursuant to a request of the Working Group

6.1 According to the State party, the author's general constitutional complaint against the law on the consequences of divorce of 10 July 2000 had been inadmissible on the whole for several reasons.

6.2 The State party submits that, according to Section 93, para. 3, of the Federal Constitutional Court Act a constitutional complaint immediately directed against an Act may only be lodged within one year following its entry into force. This preclusive time limit

serves the purpose of legal security. Failure to observe the deadline, as in the case of the constitutional complaint (file no. 1 BvR 1320/00) generally filed by the author against the "law on the consequences of divorce" on 10 July 2000, will render the constitutional complaint inadmissible. The Federal Constitutional Court will not accept an inadmissible constitutional complaint for adjudication.

6.3 The State party disagrees with the author's argument that the deadline of Section 93, para. 3, of the Federal Constitutional Court Act is not applicable because her constitutional complaint is aiming at an omission by the legislator. An omission does not already exist when certain demands are not met or are not met to the desired extent. Rather, the decisive factor is the legislator's consideration of these demands. In the law on the consequences of divorce the legislator has stipulated numerous legal provisions which, from his point of view are sufficient, adequate and appropriate. Regulations exist for the respective situations of life. It is not relevant that the author considers these regulations to be an infringement of Article 3, paras. 2 and 3, of the Basic Law for the Federal Republic of Germany because of, in her view, insufficient consideration of matrimonial and family work, and thus does not constitute a case of omission.

6.4 The State party furthermore argues that her constitutional complaint generally directed against the "law on the consequences of divorce" of 10 July 2000 had already been inadmissible for other reasons. As a prerequisite for an examination of whether the deadline of Section 93, para. 3, of the Federal Constitutional Court Act has been met, an applicant has to state first against which actual provision, i.e. against which paragraph and which subparagraph his or her complaint is directed. This is not the case in the author&' constitutional complaint of 10 July 2000 which does not refer to particular sections, paragraphs or subparagraphs of the Civil Code as infringements of the Constitution, nor does it indicate the number of provisions complained about, thus making her constitutional complaint inadmissible.

6.5 In addition, the State party asserts that the prerequisites of Section 90 of the Federal Constitutional Court Act had also not been fulfilled. Pursuant to Section 90, para. 1, of the Federal

Constitutional Court Act anyone may lodge a constitutional complaint on the assertion that he or she has been violated in his or her fundamental rights or in one of the rights granted by Article 20, para. 4, Articles 33, 38, 101, 103 and 104 of the Basic Law for the Federal Republic of Germany by the public authority. Section 90, para. 2, of the Federal Constitutional Court Act furthermore states that the constitutional complaint may only be filed when recourse to the courts has been taken – as far as this is admissible in case of an infringement of rights. If recourse to the courts can be taken, these legal remedies have to be exhausted, i.e. recourse must be had to all instances. This requirement of exhaustion of legal remedies and thus the principle of subsidiarity applies particularly to constitutional complaints against legal provisions. A constitutional complaint is not a general action. It cannot be lodged by anybody but only by someone who asserts that his or her rights protected by Section 90 of the Federal Constitutional Court Act have been violated by the public authority.

6.6 The State party consequently notes that, exceptionally, a legal provision can only be directly contested with a constitutional complaint if the applicant himself or herself is currently and immediately – and not by means of an act of enforcement – affected by this provision. In order to determine whether and to what extent an Act and/or a concrete provision affects the individual citizen, the concrete case first has to be subsumed under a specific legal provision for decision by a court. This also applies to the author in regard to the law on the consequences of divorce which she complains is not consistent with fundamental rights. For this reason as well, and irrespective of whether the deadline of Section 93, para. 3, of the Federal Constitutional Court Act had been observed, the author could not lodge a general constitutional complaint against the law on the consequences of divorce. She would first have had to take action to obtain a decision by the competent specialist courts concerning the different consequences of divorce such as post-marital spousal support, pension sharing and equalization of accrued gains. Only subsequently is it admissible to lodge a constitutional complaint based on the assertion that the concrete provisions of the law on the consequences of divorce applied by the courts are infringing Article 3, paras. 2 and 3, of the Basic Law. In the latter

case, a deadline of one month following the service, pronouncement or communication of the decision at last instance applies pursuant to Section 93, para. 1, of the Federal Constitutional Court Act.

6.7 The State party submits that a final decision has still not been reached in the legal proceedings before the family court initiated by the author for post-marital spousal support (Local Court of Göttingen file no. 44 F 316/02). In the main proceedings for post-marital spousal support, the author has been granted legal aid and is represented by attorney. The court is still to reach a decision on the amount of support to be paid to the author. The author may file an appeal against this decision. Only then can it be considered to bring the matter to the Federal Constitutional Court.

6.8 The State party submits that the proceedings concerning the equalization of accrued gains are at the stage of consideration of the author's application of 8 September 2003 for legal aid and assignment of an attorney-at-law for the litigation. This application remains pending due to subsequent motions of the author seeking disqualification of the judge on grounds of conflict of interest in the proceedings for spousal support. The author has also remonstrated against the decision of the Higher Regional Court of Braunschweig of 11 February 2004, on which the latter still has to decide.

6.9 The State party concludes that domestic legal remedies had not yet been exhausted when the author lodged a general constitutional complaint against the law on the consequences of divorce on 10 July 2000. Also for this reason the constitutional complaint had been inadmissible.

6.10 The State party lastly argues that it is not sufficient merely to quote scientific publications to justify a constitutional complaint, and to maintain in general, as the author did, that the equalization of accrued gains as such or the pension sharing and/or the law on spousal support as such would be contrary to the Constitution.

6.11 The State party emphasized that the author's constitutional complaint against the law on the consequences of divorce of 10 July 2000 was inadmissible in general for the above-stated

reasons. Since only a complaint of unconstitutionality lodged in a lawful manner fulfils the prerequisites for exhaustion of legal remedies, the author&' communication is inadmissible pursuant to article 4, para. 1, of the Optional Protocol.

6.12 The State party lastly recalls the other reasons set forth in its original submission to declare the communication inadmissible.

Additional comments of the author on admissibility

7.1 In regard to the divorce proceedings in first instance in 1999 (Amtsgericht Northeim), the author recalls that the divorce judgement of 10 November 1999 also included the equalization of pensions, a legal requirement in accordance with article 1587 of the Civil Code, on the basis of a formula described in her earlier submission. The author reiterates that this presumably "just equalization" is deeply unjust, unbalanced and discriminatory as it does not take into account the post-marital consequences of the division of labour and of understandings reached during marriage. In her concrete case, her divorced husband will reach a pension that will be significantly above the amount determined by the equalization of pensions. On the other hand, there were serious doubts whether, when and to what degree she will be able to obtain the determined amount.

7.2 The author further submits that notwithstanding her repeated urgings, the questions of post-marital support and of equalization of accrued gains were dealt with neither in the divorce judgement nor in her appeal against the divorce, which the appellate court (Oberlandesgericht Braunschweig) denied on 23 May 2000. This was the case as certain private commitments and marital agreements concerning her material, social and old-age security had been handed over by the Family Court to the Civil Court for decision. The author asserts that the justifications of the Family Court of first instance as well as of the appellate court in her divorce show that the organs of Justice simply and solely take into consideration, and favour, the views and interest of the male spouse who files for divorce.

7.3 The author, in regard to her constitutional complaint with decision of 30 August 2000, refers to her extensive earlier submissions

and confirms that the discriminatory nature of the legal consequences of divorce continues to exist.

7.4 In regard to the exhaustion of remedies, the author asserts that contrary to the State's view, it was not necessary to file a distinct separate appeal against the equalization of pensions as such equalization is part of the divorce judgement. Contrary to the State party's assertion, such a separate appeal was, according to the established jurisprudence of the Constitutional Court, neither necessary nor expected, as the statutory equalization of pensions is, according to article 1587 of the Civil Code, an "unambiguous legislative provision", and a repeal of the divorce would automatically also have resulted in a repeal of the equalization of pensions. Thus, the author asserts that her constitutional complaint was admissible and justified also against the statutory equalization of pensions without prior exhaustion of remedies in the lower courts. The Constitutional Court's decision not to accept for decision her complaint also included part B of her complaint, i.e. the complaint against the statutory equalization of pensions. The author reiterates that her constitutional complaint was not directed generally against the legal consequences of divorce but rather against the omission of the legislator to eliminate those elements that were discriminatory and disadvantageous to divorced women. As a result, the author submits that her complaint is admissible also in relation to the statutory equalization of pensions in accordance with article 4.1 of the Optional Protocol as domestic remedies were exhausted with the admissible constitutional complaint, which was, however, not accepted for decision.

7.5 The author submits that, contrary to the State's assertions, in regard to her constitutional complaint of violation of articles 3.2 and 3 of the Constitution, exhaustion of remedies through the courts was not necessary for reasons that article 3.2 clarified the explicit instruction of the Constitution concerning the content and scope of the legislator's duty to legislate. Furthermore, prior exhaustion of remedies was also not necessary as her constitutional complaint raised issues of general relevance and fundamental constitutional issues, in accordance with article 90.2 of the BVerfGG. The author reiterates that her complaint is admissible under article 4.1 of the Optional Protocol as the

exhaustion of remedies through the courts was not necessary, and domestic remedies had been exhausted with the admissible constitutional complaint which had, however, not been accepted for decision.

Issues and proceedings before the Committee concerning admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

8.2 In accordance with rule 66 of its rule of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

8.3 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

8.4 The Committee considers that the facts that are the subject of the communication concern the consequences of divorce, i.e. in particular with regard to equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage. It notes that divorce proceedings were initiated by the author's husband in May 1999. It also notes that the divorce, itself, became final together with the matter of the equalization of pensions on 28 July 2000, that is, prior to the entry into force of the Optional Protocol in respect of the State party on 15 April 2002. Considering that the author has not made any convincing arguments that would indicate that the facts, insofar as they relate to the equalization of pensions, continued after this date, the Committee considers that, in accordance with article 4, paragraph 2 (e), of the Optional Protocol, it is precluded *ratione temporis* from considering the part of the communication that relates to the equalization of pensions.

8.5 Furthermore, with regard to the issue of the equalization of pensions, the Committee notes the State party's artugmnt that the author restricted her appeal against the divorce decree solely to the pronouncement of the divorce itself and did not make the equalization of pensions the subject of a review by an appellate

court. The Committee also notes the author's contention that a successful appeal of the divorce decree would automatically have repealed the equalization of pensions as this element is a mandatory part of the divorce decree. The Committee considers that notwithstanding the mandatory resolution of the equalization of pensions in divorce decrees, the author could reasonably have been expected to include a specific appeal on the issue to the appellate court, as well as in her constitutional complaint. It concludes that the author has thereby not exhausted domestic remedies concerning the issue of the equalization of pensions. This part of the communication is therefore inadmissible also under article 4, paragraph 1, of the Optional Protocol.

8.6 The Committee further notes that the author's complaint was rejected by the Federal Constitutional Court and, in this connection, relies on the State party's explanation that the filing was carried out in an inadmissible manner for several reasons, including because the complaint was time-barred. The Committee is not persuaded by the author's argument that her constitutional complaint was filed in an admissible manner as a complaint of omission on the part of the legislator to eliminate discriminatory elements of the legislation by which she was personally affected – rather than a general complaint about the legal consequences of divorce. The Committee therefore concludes that the improperly filed constitutional complaint of 10 July 2000 cannot be considered an exhaustion of domestic remedies by the author.

8.7 The Committee notes that separate proceedings regarding both the equalization of accrued gains and maintenance after termination of marriage have not yet been settled definitively. In light of the fact that the author has not denied that this was the case nor argued persuasively for the purpose of admissibility that the proceedings have been unreasonably prolonged or are unlikely to bring relief, the Committee considers that these claims are inadmissible under article 4, paragraph 1, of the Optional Protocol.

8.8 **The Committee therefore decides:**

(a) That the communication is inadmissible under article 4, paragraph 1, for the author's failure to exhaust domestic

remedies, and paragraph 2 (e), because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State party and did not continue after that date;

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

Appendix

Individual opinion of Committee members Krisztina Morvai and Meriem Belmihoub-Zerdani (dissenting)

In our view, the author's communication is partly admissible. While I agree with the majority that the claim concerning the divorce and equalization of pensions decision of 28 July 2000 is inadmissible *ratione temporis* I believe that the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact do meet all admissibility criteria.

In the majority's view, the separate claims (regarding the alleged violations of the Convention in relation to substantive and procedural aspects of the equalization of accrued gains and of post-divorce maintenance) are inadmissible due to the lack of exhaustion of domestic remedies (Article 4.1).

In accordance with the Optional Protocol as a general rule all available domestic remedies have to be exhausted, !*unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief*".

In our view, the domestic proceedings must be evaluated on a case-by-case basis regarding their "unreasonably prolonged" character.

In the present case, proceedings concerning spousal maintenance and accrued gains have been ongoing for about five years. (According to para. 7.2 of the Committee's decision on admissibility the author submitted that "notwithstanding her repeated urgings, the questions of post-marital support and of equalization of accrued gains were dealt with neither in the divorce judgement nor in her appeal against the divorce, which the appellate court/Oberlandesgericht Braunschweig/ denied on 23 May 2000". According to the State party's observations on admissibility, summarized in paragraph 4.2 of the Committee's

decision, "No final decision has yet been reached in separate proceedings regarding maintenance after termination of the marriage and equalization of accrued gains".) Even though in April 2004, the Court of Göttingen awarded the author a maintenance payment of 280 euros per month, with retroactive effect to August 2002 (see para. 2.7 of the decision of the Committee), the decision regarding maintenance is still not final, due to the author's appeal. Similarly, no final decision has been reached in the equalization of accrued gains case. Two years of these ongoing proceedings period follow the ratification of the Optional Protocol by the State party.

Indeed, there might be cases and situations where the same length of time could not be considered "unreasonably prolonged". However, in the present situation the subject matter of the proceedings is basically *the determination and granting of the financial/material sources of the survival of the author*. Ms. B.-J. is now 57 years old, she was 52 when her husband divorced her after three decades of marriage. The author, as so many women in the world, devoted her whole adult life to unpaid work in the family, while her husband, on whom she was therefore financially dependent, had advanced his career and his income. According to the submissions of the author her financial situation is deeply uncertain, to say the least. There are times when she receives some maintenance, and there are times when she does not receive anything. (In the meantime, the former husband, who successfully capitalized the 30 years of unremunerated work of the author, apparently has an income of about 5,000 euros per month, a very good salary (see decision of the Committee, para. 5.9, final sentence)). The applicant, who has no work experience outside the home and the family and who is considered to be an "older woman", has very little chance to enter the labour market and to support herself financially. It is sad and shameful that following the upbringing of three children and a lifetime of work in the home she has to live without a regular, reliable income, even five years after the divorce that took place against her will. In these circumstances, the domestic courts should have determined and granted a decent maintenance for her a long time ago. A legal and judicial system that is able to finalize contested divorce proceedings following three decades of marriage in just one year would be able to finalize post-divorce maintenance (and accrued gains) proceedings with similar speed and efficiency. For an older woman who raised three children and worked for the benefit of her spouse for three decades living in such uncertainty five years after the divorce is

rightly considered to be unacceptable and a serious violation of her human rights in and of itself.

In our opinion it follows that under all the circumstances of the case the application of domestic remedies is *unreasonably prolonged*. Moreover, it follows that the general rule in article 4.1 concerning the need to exhaust all domestic remedies does not apply here, instead the "unreasonable prolongation" exception to the rule applies.

(*Signed*) Krisztina **Morvai**

(*Signed*) Meriem **Belmihoub-Zerdani**

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No.: 2/2003, M s. A. T. v. Hungary*
(Views adopted on 26 January 2005, thirty-second session)

Submitted by	:	Ms. A. T.
Alleged victim	:	The author
State party	:	Hungary
Date of communication	:	10 October 2003 (initial submission)

The Committee on the Elimination of Discrimination against Women , established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 26 January 2005,

Having concluded its consideration of communication No. 2/2003, submitted to the Committee on the Elimination of Discrimination against Women by Ms. A. T. under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the author of the communication and the State party,

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* The following members of the Committee participated in the examination of the communication: Magalys Arocha Dominguez, Meriem Belmihoub -Zerdani, Huguette Bokpe Gnacadja, Dorcas Coker-Appiah, Mar y Shanthi Dairiam, Cornelis Flinterman, Françoise Gaspard, Salma Khan, Tiziana Maiolo, Rosario Manalo, Silvia Pimentel, Victoria Popescu, Hanna Beate Schöpp -Schilling, Heisoo Shin, Glenda P. Simms, Dubravka Simonovic, Anamah Tan, Maria Regina Tavares da Silva and Zou Xiaoqiao. Pursuant to rule 60 of the Committee's rules of procedure, Krisztina Morvai did not participate in the examination of this communication.

Adopts the following :

Views under article 7, paragraph 3, of the Optional Protocol

1.1 The author of the communication dated 10 October 2003, with supplementary information dated 2 January 2004, is Ms. A. T., a Hungarian national born on 10 October 1968. She claims to be a victim of a violation by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is representing herself. The Convention and its Optional Protocol entered into force in the State party on 3 September 1981 and 22 March 2001, respectively.

1.2 The author urgently requested effective interim measures of protection in accordance with artic le 5, paragraph 1, of the Optional Protocol, at the same time that she submitted her communication, because she feared for her life.

The facts as presented

2.1 The author states that for the past four years she has been subjected to regular severe domestic violence and serious threats by her common law husband, L. F., father of her two children, one of whom is severely brain -damaged. Although L. F. allegedly possesses a firearm and has threatened to kill the author and rape the children, the author has not gone to a shelter, reportedly because no shelter in the country is equipped to take in a fully disabled child together with his mother and sister. The author also states that there are currently no protection orders or restraining orders available under Hungarian law.

2.2 In March 1999, L. F. moved out of the family apartment. His subsequent visits allegedly typically included battering and/or loud shouting, aggravated by his being in a drunken state. In March 2000, L. F. reportedly moved in with a new female partner and left the family home, taking most of the furniture and household items with him. The author claims that he did not pay child support for three years, which forced her to claim the support by going to the court and to the police, and that he has used this form of financial abuse as a violent tactic in addition to continuing to threaten her physically. Hoping to protect herself

and the children, the author states that she changed the lock on the door of the family's apartment on 11 March 200 0. On 14 and 26 March 2000, L. F. filled the lock with glue and on 28 March 2000, he kicked in a part of the door when the author refused to allow him to enter the apartment. The author further states that, on 27 July 2001, L. F. broke into the apartment using violence.

2.3 L. F. is said to have battered the author severely on several occasions, beginning in March 1998. Since then, 10 medical certificates have been issued in connection with separate incidents of severe physical violence, even after L. F. left the family residence, which, the author submits, constitute a continuum of violence. The most recent incident took place on 27 July 2001 when L. F. broke into the apartment and subjected the author to a severe beating, which necessitated her hospitalization.

2.4 The author states that there have been civil proceedings regarding L. F.'s access to the family's residence, a 2 and a half room apartment (of 54 by 56 square metres) jointly owned by L. F. and the author. Decisions by the court of the first instance, the Pest Central District Court (*Pesti Központi Kerületi Bíróság*), were rendered on 9 March 2001 and 13 September 2002 (supplementary decision). On 4 September 2003, the Budapest Regional Court (*Forvarosi Bíróság*) issued a final decision authorizing L. F. to return and use the apartment. The judges reportedly based their decision on the following grounds: (a) lack of substantiation of the claim that L. F. regularly battered the author; and (b) that L. F.'s right to the property, including possession, could not be restricted. Since that date, and on the basis of the earlier attacks and verbal threats by her former partner, the author claims that her physical integrity, physical and mental health and life have been at serious risk and that she lives in constant fear. The author reportedly submitted to the Supreme Court a petition for review of the 4 September 2003 decision, which was pending at the time of her submission of supplementary information to the Committee on 2 January 2004.

2.5 The author states that she also initiated civil proceedings regarding division of the property, which have been suspended.

She claims that L. F. refused her offer to be compensated for half of the value of the apartment and turn over ownership to her. In these proceedings the author reportedly submitted a motion for injunctive relief (for her exclusive right to use the apartment), which was rejected on 25 July 2000.

2.6 The author states that there have been two ongoing criminal procedures against L. F., one that began in 1999 at the Pest Central District Court (*Pesti Központi Kerületi Bíróság*) concerning two incidents of battery and assault causing her bodily harm and the second that began in July 2001 concerning an incident of battery and assault that resulted in her being hospitalized for a week with a serious kidney injury. In her submission of 2 January 2004, the author states that there would be a trial on 9 January 2004. Reportedly, the latter procedure was initiated by the hospital ex officio. The author further states that L. F. has not been detained at any time in this connection and that no action has been taken by the Hungarian authorities to protect the author from him. The author claims that, as a victim, she has not been privy to the court documents and, that, therefore, she cannot submit them to the Committee.

2.7 The author also submits that she has requested assistance in writing, in person and by phone, from the local child protection authorities, but that her requests have been to no avail since the authorities allegedly feel unable to do anything in such situations.

The Claim

3.1 The author alleges that she is a victim of violations by Hungary of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention on the Elimination of All Forms of Discrimination against Women for its failure to provide effective protection from her former common law husband. She claims that the State party passively neglected its "positive" obligations under the Convention and supported the continuation of a situation of domestic violence against her.

3.2 She claims that the irrationally lengthy criminal procedures against L. F., the lack of protection orders or restraining orders under current Hungarian law and the fact that L. F. has not spent any

time in custody constitute violations of her rights under the Convention as well as violations of general recommendation 19 of the Committee. She maintains that these criminal procedures can hardly be considered effective and/or immediate protection.

3.3 The author is seeking justice for herself and her children, including fair compensation, for suffering and for the violation of the letter and spirit of the Convention by the State party.

3.4 The author is also seeking the Committee's intervention into the intolerable situation, which affects many women from all segments of Hungarian society. In particular, she calls for the (a) introduction of effective and immediate protection for victims of domestic violence into the legal system, (b) provision of training programmes on gender-sensitivity, the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol, including for judges, prosecutors, police and practising lawyers, and (c) provision of free legal aid to victims of gender-based violence, including domestic violence.

3.5 As to the admissibility of the communication, the author maintains that she has exhausted all available domestic remedies. She refers, however, to a pending petition for review that she submitted to the Supreme Court in respect of the decision of 4 September 2003. The author describes this remedy as an extraordinary remedy and one which is only available in cases of a violation of the law by lower courts. Such cases report edly take some six months to be resolved. The author believes that it is very unlikely that the Supreme Court will find a violation of the law because Hungarian courts allegedly do not consider the Convention to be a law that is to be applied by them. She submits that this should not mean that she has failed to exhaust domestic remedies for the purposes of the Optional Protocol.

3.6 The author contends that, although most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force in Hungary, they constitute elements of a clear continuum of regular domestic violence and that her life continues to be in danger. She alleges that one serious violent act took place in July 2001, that is after the Optional Protocol came into force in the country. She also claims that Hungary has been bound by the Convention since becoming party to it

in 1982. The author further argues that Hungary has in effect assisted in the continuation of violence through lengthy proceedings, the failure to take protective measures, including timely conviction of the perpetrator and the issuance of a restraining order, and the court decision of 4 September 2003.

Request for interim measures of protection in accordance with article 5, paragraph 1, of the Optional Protocol

4.1 On 10 October 2003, with her initial submission, the author also urgently requested effective interim measures, as may be necessary, in accordance with article 5, paragraph 1, of the Optional Protocol in order to avoid possible irreparable damage to her person, that is to save her life, which she feels is threatened by her violent former partner.

4.2 On 20 October 2003 (with a corrigendum on 17 November 2003), a note verbale was sent to the State party for its urgent consideration, requesting the State party to provide immediate, appropriate and concrete preventive interim measures of protection to the author, as may be necessary, in order to avoid irreparable damage to her person. The State party was informed that, as laid down in article 5, paragraph 2, of the Optional Protocol, this request did not imply a determination on admissibility or on the merits of the communication. The Committee invited the State party to provide information no later than 20 December 2003 of the type of measures it had taken to give effect to the Committee's request under article 5, paragraph 1, of the Optional Protocol.

4.3 In her supplementary submission of 2 January 2004, the author states that, apart from being interrogated by the local polic e at the police station in her vicinity on the day before Christmas, she had not heard from any authority concerning the ways and means through which they would provide her with immediate and effective protection in accordance with the Committee's request.

4.4 By submission of 20 April 2004, the State party informed the Committee that the Governmental Office for Equal Opportunities (hereinafter "the Office") established contact with the author in

January 2004 in order to inquire about her situation. It turned out that at that time, the author had had no legal representative in the proceedings, and thus the Office retained a lawyer with professional experience and practice in cases of domestic violence for her.

4.5 The State party further informed the Commit tee that on 26 January 2004, the Office set up contact with the competent family and child -care service at the Ferencváros local government in order to halt the domestic violations against the author and her children. The State party stated that urgent measures were enforced for securing the safety and the personal development of the children.

4.6 On 9 February 2004, the Office sent a letter to the notary of Ferencváros local government containing a detailed description of the author's and her children's situation. The Office requested the notary to convene a so-called "case-conference" with the aim of determining the further necessary measures for promoting effective protection of the author and her children. As at 20 April 2004, the Office had not had a reply to that letter.

4.7 On 13 July 2004, on behalf of the Working Group on Communications, a note verbale with a follow-up to the Committee's request of 20 October and 17 November 2003 was sent to the State party, conveying the Working Group's regret that the State party had furnished little information on the interim measures taken to avoid irreparable damage to the author. The Working Group requested that A.T. be immediately offered a safe place for her and her children to live and that the State party ensure that the author receive adequate financial assistance, if needed. The State party was invited to inform the Working Group as soon as possible of any concrete action taken in response to the request.

4.8 By its note of 27 August 2004, the State party repeated that it had established contact with the author, retained a lawyer for her in the civil proceedings and established contact with the competent notary and child welfare services.

State party's submission on admissibility and merits

5.1 By its submission of 20 April 2004, the State party gave an explanation of the civil proceedings to which reference is made by the author, stating that in May 2000 L. F. instituted trespass proceedings against the author because she had changed the door-lock of their common flat and prevented him from gaining access to his possessions. The notary of Ferencváros local government ordered the author to cease interfering with L. F.'s property rights. She applied to the Pest Central District Court (*Pesti Központi Kerül eti Bíróság*) in order to set aside this decision and to establish her entitlement to use the flat. The District Court dismissed the author's claims on grounds that L. F. was entitled to the use of his property and that the author could have been expected to try to settle the dispute by lawful means, instead of the arbitrary conduct she had resorted to. In a supplementary judgement of 13 September 2002, the District Court established that the author was entitled to use the flat, but ruled that it was not competent to establish whether she was entitled to the exclusive use of the flat since she had not submitted a request to that effect. The judgement of 4 September 2003 of the Budapest Regional Court (*Forvarosi Bíróság*) confirmed the District Court's decision. The author submitted a petition for review by the Supreme Court on 8 December 2003 and these proceedings were still pending as at 20 April 2004, the date of the submission of the State party's observations.

5.2 On 2 May 2000, the author brought an action against L. F. before the Pest Central District Court requesting separation of their common property. On 25 July 2000, the District Court dismissed the author's request for interim measures on the use and possession of the common flat on grounds that the other set of proceedings concerning that issue (the "trespass" proceedings) were pending and that it was not competent to decide the question in the proceedings concerning the division of the property. The State party contends that the progress of the proceedings was considerably hindered by the author's lack of cooperation with her then counsel and failure to submit the requested documents. Furthermore, it turned out that the couple's ownership of the flat had not been registered and that civil proceedings had been suspended in this connection.

5.3 The State party states that several sets of criminal proceedings were instituted against L. F. on charges of assault and battery. On 3 October 2001 the Pest Central District Court convicted L. F. on one count of assault committed on 22 April 1999 and sentenced him to a fine of 60,000 Hungarian forints (HUF). The District Court acquitted L. F. on another count of assault allegedly committed on 19 January 2000 for lack of sufficient evidence. The public prosecutor's office appealed but the case file was lost on its way to the Budapest Regional Court. On 29 April 2003, the Budapest Regional Court ordered a new trial. The proceedings were resumed before the Pest Central District Court and were joined to another set of criminal proceedings pending against L. F. before the same court.

5.4 A proceeding was brought against L. F. on charges of an assault allegedly committed on 27 July 2001 causing bruises to the aut hor's kidneys. Though the investigations were twice discontinued by the police (on 6 December 2001 and 4 December 2002) they were resumed by order of the public prosecutor's office. Witnesses and experts were heard and a bill of indictment was brought against L. F. on 27 August 2003 before the Pest Central District Court.

5.5 The State party states that the two sets of criminal proceedings (that is the criminal proceedings regarding the separate incidents of assault allegedly committed on 19 January 2000 and 21 July 2001) have been joined. The Pest Central District Court has held hearings on 5 November 2003, 9 January and 13 February 2004. The next hearing is scheduled for 21 April 2004.

5.6 The State party maintains that although the author did not make effective use of the domestic remedies available to her, and although some domestic proceedings are still pending, the State party does not wish to raise any preliminary objections as to the admissibility of the communication. At the same time, the State party admits that these remedies were not capable of providing immediate protection to the author from ill-treatment by her former partner.

5.7 Having realized that the system of remedies against domestic violence is incomplete in Hungarian law and that the effectiveness of the existing procedures is not sufficient, the State party states

that it has instituted a comprehensive action programme against domestic violence in 2003. On 16 April 2003, the Hungarian Parliament adopted a resolution on the national strategy for the prevention and effective treatment of violence within the family, setting forth a number of legislative and other actions to be taken in the field by the State party. These actions include: introducing a restraining order into legislation; ensuring that proceedings before the Courts or other authorities in domestic violence cases are given priority; reinforcing existing witness protection rules and introducing new rules aimed at ensuring adequate legal protection for the personal security of victims of violence within the family; elaborating clear protocols for the police, childcare organs and social and medical institutions; extending and modernizing the network of shelters and setting up victim protection crisis centres; providing free legal aid in certain circumstances; working out a complex nationwide action programme to eliminate violence within the family that applies sanctions and protective measures; training of professionals; ensuring data collection on violence within the family; requesting the judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority; and launching a nationwide campaign to address indifference to violence within the family and the perception of domestic violence as a private matter and to raise awareness of State, municipal and social organs and journalists. In a resolution of 16 April 2003 by the Hungarian Parliament, a request with due regard to the separation of powers has been also put forward to the National Council of the Judiciary to organize training for judges and to find a way to ensure that cases relating to violence within the family are given priority. In the resolution, reference is made, inter alia, to the Convention on the Elimination of All Forms of Discrimination against Women, the concluding comments of the Committee on the combined fourth and fifth periodic report of Hungary adopted at its exceptional session in August 2002 and the Declaration on the Elimination of Violence against Women.

5.8 In a second resolution, the Parliament has also stated that prevention of violence within the family is a high priority in the national strategy of crime prevention and describes the tasks of various actors of the State and of the soc iety. These include:

prompt and effective intervention by the police and other investigating authorities; medical treatment of pathologically aggressive persons and application of protective measures for those who live in their environment; operation of 24-hour "SOS" lines; organization of rehabilitation programmes; organization of sport and leisure time activities for youth and children of violence -prone families; integration of non -violent conflict resolution techniques and family-life education into the public educational system; establishment and operation of crisis intervention houses as well as mother and child care centres and support for the accreditation of civil organizations by municipalities; and launching of a media campaign against violence wit hin the family.

5.9 The State party further states that it has implemented various measures to eliminate domestic violence. These measures include registration of criminal proceedings (Robotzsaru) in a manner that will facilitate the identification of trends in offences related to violence within the family, as well as the collection of data, the expanded operation of family protection services by 1 July 2005, including units for ill-treated women without children in Budapest, which is to be followed by the establishment of seven regional centres. The first shelter is planned to be set up in 2004. The Government has prepared a draft law, which will enter into force on 1 July 2005, that provides for a new protective remedy for victims of domestic violence, namely the issuance of a temporary restraining order by the police and a restraining order by the Courts, accompanied by fines if intentionally disregarded, and has decided to improve the support services available to such victims.

5.10 Additionally, the State party states that special emphasis has been put on the handling of cases of domestic violence by the police. The State party observes that the efforts made in this field have already brought about significant results which were summed up by the National Headquarters of the Police in a press communication in December 2003. Non-governmental organizations have also been involved in the elaboration of the governmental policy to combat domestic violence.

The author's comments on the State party's observations on admissibility and merits

6.1 By her submission of 23 June 2004, the author states that, in spite of promises, the only step that has been taken under the Decree/Decision of Parliament on the Prevention of, and Response to Domestic Violence is the entry into force of the new protocol of the police, who now respond to domestic violence cases. She states that the new protocol is still not in line with the Convention and that batterers are not taken into custody, as this would be considered a violation of their human rights. Instead, according to the media, the police mostly mediate on the spot.

6.2 The author further states that the parliamentary debate on the draft law on restraining orders has been postponed until the autumn. Resistance to change is said to be strong and decision-makers allegedly still do not fully understand why they should interfere in what they consider to be the private affairs of families. The author suggests that a timely decision in her case may help decision -makers understand that the effective prevention of, and response to domestic violence are not only demands of victims and "radical" non-governmental organizations but also of the international human rights community.

6.3 The author reports that her situation has not changed and she still lives in constant fear as regards her former partner. From time to time L. F. has harassed her and threatened to move back into the apartment.

6.4 The author submits that in the minutes of the official case conference of 9 May 2004 of the local child protection authority regarding her case, it is stated that it cannot put an end to her threatening situation using official measures. It recommends that she continue to ask for help from the police, medical documentation of injuries and help from her extended family as well as to keep the local authority informed. The child protection authority also reportedly states that it would summon L. F. and give him a warning in the event that the battering continues.

6.5 As at 23 June 2004, according to the author, the criminal proceedings against L. F. were still ongoing. A hearing scheduled for 21 April was postponed to 7 May and, as the judge was

reportedly too busy to hear the case, the criminal proceedings were again postponed until 25 June 2004. The author believes that, whatever the outcome, the criminal proceedings have been so lengthy and her safety so severely neglected that she has not received the timely and effective protection and the remedy to which she in entitled under the Convention and general recommendation 19 of the Committee.

6.6 The author refers to the civil proceedings, in particular to the petition for review by the Supreme Court, which she considers to be an extraordinary remedy but submitted nonetheless. She states that, in respo nse to the Committee's intervention, the State party covered the legal costs of supplementing her petition with additional arguments.

6.7 On 23 March 2004, the Supreme Court dismissed the petition, arguing, inter alia, that the jurisprudence is established with regard to the legal issue raised in the petition.

6.8 The author refutes the State party's argument that she did not submit a request for the exclusive use of the apartment. The court of the second instance, the Budapest Regional Court, ordered the court of the first instance, the Pest Central District Court, to retry the case, namely because it had failed to decide on the merits of the request. She believes that it is clear from the context and from her court documents, including the decisions, that she had requested sole possession of the apartment to avoid a continuation of the violence. However, she states that under the established law and jurisprudence in the State party, battered individuals have no right to the exclusive use of the jointly owned/ leased apartments on grounds of domestic violence.

6.9 The author requests that the Committee declare her communication admissible without delay and decide on the merits that the rights under the Convention have been violated by the State party. She re quests that the Committee recommend to the State party to urgently introduce effective laws and measures towards the prevention of and effective response to domestic violence, both in her specific case and in general. The author furthermore seeks compensat ion for long years of suffering that have been directly related to the severe and serious violations of the Convention. The author believes that the most

effective way would be to provide her with a safe home, where she could live in safety and peace with her children, without constant fear of her batterer's "lawful" return and/or substantial financial compensation.

6.10 By her submission of 30 June 2004, the author informs the Committee that the criminal proceedings against L. F have been postponed until 1 October 2004 in order to hear the testimony of a policeman because the judge thinks that there is a slight discrepancy between two police reports.

6.11 By her submission of 19 October 2004, the author informs the Committee that the Pest Central District Court convicted L. F. of two counts of causing grievous bodily harm to her and fined him for the equivalent of approximately $365 United States dollars.

Supplementary observations of the State party

7.1 By note dated 27 August 2004, the State party argues that, although all tasks that the Decree/Decision of Parliament on the Prevention of and Response to Domestic Violence prescribe have not yet been completely implemented, some positive steps, including new norms in the field of crime prevention and Act LXXX (2003) on the conditions under which legal assistance is given to those in need, have been taken. These documents are said to provide an opportunity to establish a national network of comprehensive legal and social support for future victims of domestic violence.

7.2 The State party confirms that consideration of the Draft Act on Restraining Orders that applies to cases of violence within the family has been postponed to the autumn session of Parliament.

7.3 The State party admits that the experience of the Office and the information it has shows that domestic violence cases as such do not enjoy high priority in court proceedings.

7.4 Based on the experience of the Office both in the present case and in general, it is conceded that the legal and institu tional system in Hungary is not ready yet to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

8.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

8.3 With regard to article 4, paragraph 1, of the Optional Protocol, the Committee observes that the State party does not wish to raise any preliminary objections as to the admissibility of the communication and furthermore concedes that the currently existing remedies in Hungary have not been capable of providing immediate protection to the author from ill-treatment from L. F. The Committee agrees with this assessment and considers that it is not precluded by article 4, paragraph 1, from considering the communication.

8.4 The Committee, nevertheless, wishes to make some observations as to the State party's comment in its submission of 20 April 2004 that some domestic proceedings are still pending. In the civil matter of L. F.'s access to the family's apartment, according to the author's submission of 23 June 2004, the petition for review by the Supreme Court was dismissed on 23 March 2004. The civil matter on the distribution of the common property, on the other hand, has been suspended over the issue of registration for an undisclosed period of time. The Committee considers, however, that the eventual outcome of this proceeding is not likely to bring effective relief vis -à-vis the current life-threatening violation of the Convention of which the author has complained. In add ition, the Committee notes that two sets of criminal proceedings against L. F. on charges of assault and battery allegedly committed on 19 January 2000 and 21 July 2001 were joined and, according to the author, were decided on 1 October 2004 by convicting L. F. and imposing a fine equivalent to approximately $365. The Committee has not been informed as to whether the conviction and/or sentence may or will be

appealed. Nonetheless, the Committee is of the view that such a delay of over three years from the dates of the incidents in question would amount to an unreasonably prolonged delay within the meaning of article 4, paragraph 1, of the Optional Protocol, particularly considering that the author has been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee takes account of the fact that she had no possibility of obtaining temporary protection while criminal proceedings were in progress and that the defendant had at no time been detained.

8.5 As to the facts that are the subject of the communication, the Committee observes that the author points out that most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force in Hungary. She argues, however, that the 10 in cidents of severe physical violence that are medically documented and which are part of an allegedly larger number constitute elements of a clear continuum of regular domestic violence and that her life was still in danger, as documented by the battering which took place 27 July 2001, that is after the Optional Protocol came into force in Hungary. The Committee is persuaded that it is competent ratione temporis to consider the communication in its entirety, because the facts that are the subject of the communication cover the alleged lack of protection/alleged culpable inaction on the part of the State party for the series of severe incidents of battering and threats of further violence that has uninterruptedly characterized the period beginning in 1998 to the present.

8.6 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication admissible.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

9.2 The Committee recalls its general recommendation No. 19 on violence against women, which states that "… [T]he definition of discrimination includes gender-based violence" and that "[G]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence". Furthermore, the general recommendat ion addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "… discrimination under the Convention is not restricted to action by or on behalf of Governments …" and "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". Against this backdrop, the immediate issue facing the Committee is whether the author of the communication is the victim of a violation of articles 2 (a), (b) and (e), 5 (a) and 16 of the Convention because, as she alleges, for the past four years the State party has failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health and her life from her former common law husband.

9.3 With regard to article 2 (a), (b), and (e), the Committee notes that the State party has admitted that the remedies pursued by the author were not capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State part y are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence. While appreciating the State party's efforts at instituting a comprehensive action programme against domestic violence and the legal and other measures envisioned, the Committee believes that these have yet to benefit the author and address her persistent situation of insecurity. The Committee further notes the State party's general assessment that domestic violence cases as such do not enjoy high priority in court proceedings. The Committee is of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincides with this general assessment.

Women's human rights to life and to physical and mental integrity cannot be superseded by other rights, including the right to property and the right to privacy. The Committee also takes note that the State party does not offer information as to the existence of alternative avenues that the author might have pursued that would have provided sufficient protection or security from the danger of continued violence. In this connection, the Committee recalls its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report, which state "… [T]he Committee is concerned about the prevalence of violence against women and girls, including domestic violence. It is particularly concerned that no specific legisla tion has been enacted to combat domestic violence and sexual harassment and that no protection or exclusion orders or shelters exist for the immediate protection of women victims of domestic violence". Bearing this in mind, the Committee concludes that the obligations of the State party set out in article 2 (a), (b) and (e) of the Convention extend to the prevention of and protection from violence against women, which obligations in the present case, remain unfulfilled and constitute a violation of the auth or's human rights and fundamental freedoms, particularly her right to security of person.

9.4 The Committee addressed articles 5 and 16 together in its general recommendation No. 19 in dealing with family violence. In its general recommendation No. 21, the Committee stressed that "the provisions of general recommendation 19 ... concerning violence against women have great significance for women's abilities to enjoy rights and freedoms on an equal basis with men". It has stated on many occasions that traditional attitudes by which women are regarded as subordinate to men contribute to violence against them. The Committee recognized those very attitudes when it considered the combined fourth and fifth periodic report of Hungary in 2002. At that time it was con cerned about the "persistence of entrenched traditional stereotypes regarding the role and responsibilities of women and men in the family …". In respect of the case now before the Committee, the facts of the communication reveal aspects of the relationships between the sexes and attitudes towards women that the Committee recognized vis -à-vis the country as a whole. For four years and continuing to the present day, the author

has felt threatened by her former common law husband, the father of her two children. The author has been battered by this same man, her former common law husband. She has been unsuccessful, either through civil or criminal proceedings, to temporarily or permanently bar L. F. from the apartment where she and her children have continued to reside. The author could not have asked for a restraining or protection order since neither option currently exists in the State party. She has been unable to flee to a shelter because none are equipped to accept her together with her children, one of whom is fully disabled. None of these facts have been disputed by the State party and, considered together, they indicate that the rights of the author under articles 5 (a) and 16 of the Convention have been violated.

9.5 The Committee also notes that the lack of effective legal and other measures prevented the State party from dealing in a satisfactory manner with the Committee's request for interim measures.

9.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee is of the view that the State party has failed to fulfil its obligations and has thereby violated the rights of the author under article 2 (a), (b) and (e) and article 5 (a) in conjunction with article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, and makes the following recommendations to the State party:

I. Concerning the author of the communication

(a) Take immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family;

(b) Ensure that A. T. is given a safe home in which to live with her children, receives appropriate child support and legal assistance as well as reparation proportionate to the physical and mental harm undergone and to the gravity of the violations of her rights;

II. General

(a) Respect, protect, promote and fulfil women's human rights, including their right to be free from all forms of domestic violence, including intimidation and threats of violence;

(b) Assure victims of domestic violence the maximum protection of the law by acting with due diligence to prevent and respond to such violence against women;

(c) Take all necessary measures to ensure that the national strategy for the prevention and effective treatment of violence within the family is promptly implemented and evaluated;

(d) Take all necessary measures to provide regular training on the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto to judges, lawyers and law enforcement officials;

(e) Implement expeditiously and without delay the Committee's concluding comments of August 2002 on the combined fourth and fifth periodic report of Hungary in respect of violence against women and girls, in particular the Committee's recommendation that a specific law be introduced prohibiting domestic violence against women, which would provide for protection and exclusion orders as well as support services, including shelters;

(f) Investigate promptly, thoroughly, impartially and seriously all allegations of domestic violence and bring the offenders to justice in accordance with international standards;

(g) Provide victims of domestic violence with safe and prompt access to justice, including free legal aid where necessary, in order to ensure them available, effective and sufficient remedies and rehabilitation;

(h) Provide offenders with rehabilitation programmes and programmes on non-violent conflict resolution methods.

9.7 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information

on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

Committee on the Elimination of Discrimination against Women

Thirty-fourth session

16 January-3 February 2006

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-fourth session)

concerning

Communication No. —8/2005

Submitted by	:	Rahime Kayhan
Alleged victim	:	The author (represented by counsel, Ms. Fatma Benli)
State party	:	Turkey
Date of communication	:	Dated 20 August 2004
Document references	:	Transmitted to the State party on 10 February 2005 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under art icle 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 27 January 2006

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 20 August 2004, is Ms. Rahime Kayhan, born on 3 March 1968 and a national of Turkey. She claims to be a victim of a violation by Turkey of article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Ms. Fatma Benli, Attorney at law. The Convention and its Optional Protocol entered into force for the State party on 19 January 1986 and 29 January 2003, respectively.

The facts as presented

2.1 The author, a teacher of religion and ethics, is married and the mother of three children between the ages of two and 10. She has worn a scarf covering her hair and neck (her face is exposed) since the age of 16, including while studying at a State university.

2.2 On 26 September 1991, the author was hired to work at Bursa Karacabey Imam Hatip High School, a State school under the Ministry of Education. She began to teach at Erzurum Imam Hatip High School on 12 September 1994 and taught at that institution for the next five years until her transfer to Mehmetcik Middle School. She wore a headscarf when she got her first appointment and when she was photographed for her identification cards (for example on her driver's licence, teacher ID, health insurance card, etc.).

2.3 On 16 July 1999, she received warnings and then a deduction was taken from her salary (1/30) for wearing a headscarf. The author appealed against this penalty and, during the proceedings Amnesty Law No. 4455 came into effect and the warnings and penalty were removed from her record.

2.4 On 13 January 2000, the author received a document stating that an investigation had begun into a claim that she did not obey regulations on appearance, that she entered the classroom with her hair covered and that she spoiled the peace, quiet, work and harmony of the institution with her id eological and political objectives. She was asked to submit a written statement.

2.5 On 8 February 2000, the author defended herself by pointing out that she had in no way acted in a manner that would spoil the peace and quiet of the institution. She had worked hard during the past eight years despite having two infants, she had never had political or ideological objectives, she had been praised so many times by the inspectors for her teaching successes and was a person who loved her country and was devoted to the republic and democracy and that she aimed to help raise Turkish youth to be devoted to their country and nation.

2.6 On 29 March 2000, the Ministry of Education informed the author that she had the right to study her file and defend herself orally or be defended by counsel.

2.7 The author responded by sending the sworn statements of 10 persons who claimed that the accusations and imputations against her were untrue. Her lawyer made written and oral statements to the Higher Disciplinary Council, stat ing that the allegations against the author were untrue and that there were no indications that she had "spoiled the harmony in the investigation report". If she were to be punished, it would amount to a violation of national and international principles o f law, including freedom to work, of religion, conscience, thought and freedom of choice. It would also be discrimination and a violation of the right to develop one's physical and spiritual being.

2.8 The author states that on 9 June 2000, she was arbitra rily dismissed from her position by the Higher Disciplinary Council. The Council's decision suggested that the author's wearing of a headscarf in the classroom was the equivalent of "spoiling the peace, quiet and work harmony" of the institution by politic al means in accordance with article 125E/a of the Public Servants Law No. 657. As a result, she permanently lost her status as a civil servant. The author lost, inter alia, her means of subsistence to a great extent, the deductions that would go towards he r pension entitlement, interest on her salary and income, her education grant and her health insurance. She would be unable to teach in a private school as well while wearing a headscarf allegedly because the private schools in Turkey depend on the Ministry of National Education. Nobody would want to employ a woman who had been given the gravest of disciplinary penalties.

2.9 On 23 October 2000, the author appealed to Erzurum Administrative Court demanding that the dismissal be cancelled because she had not violated article 125E/a of the States Officials Act by wearing a headscarf. At most she should have been reprimanded or condemned — not dismissed. She claims that the penalty lacked a legitimate purpose and was not a necessary intervention for a democratic society.

2.10 On 22 March 2001, Erzurum Administrative Court refused the appeal, finding that her punishment did not violate the law.

2.11 On 15 May 2001, the author appealed against the decision of Erzurum Administrative Court to the State Council, and claimed that in order to apply article 125E/a of the Public Servants Law No. 657, a concrete act to upset public order will have had to be committed. There was no evidence of the author committing such an act. She had covered her head and thus had violated the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments.

2.12 On 9 April 2003, the Chair of the 12th Department of the State Council rejected this appeal, upholding the judgement of the Erzurum Administrative Cou rt on grounds that it was justified in procedure and law. The author was notified of the final decision on 28 July 2003.

The complaint

3.1 The author complains that she is a victim of a violation by the State party of article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. By dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women, the State party is said to have violated the author's right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment. Allegedly she is one of more than 1,500 women civil servants who have been dismissed for wearing a headscarf.

3.2 The author also claims that her right to a personal identity includes her right to choose Islamic attire without discrimination. She considers that the wearing of a headscarf is covered by the

right to freedom of religion and thought. Had she not considered the headscarf so important and vital, she would not have jeopardized her family's income and future. The author considers that the act of forcing her to make a choice between working and uncovering her head violates her fundamental rights that are protected in international conventions. She believes it to have been unjust, legally unforeseeable, illegitimate and unacceptable in a democratic society.

3.3 The author complains that the action taken against her was arbitrary because it was not grounded in any law or a judicial decision. The only dress code is the so -called Regulation relevant to the Attire of the Personnel working in Public Office and Establishments of 25 October 1982, which specifies that "Heads should be uncovered at the work place" (art. 5). It is alleged that this regulation no longer applies in practice and that persons who have disobeyed it have not been warned or disciplined.

3.4 The author also claims that the punishment for violating article 125A/g of the Public Servants Law No. 657 on the issue of clothing is a warning (for the first infraction) and condemnation (for a repeated infraction). Instead of this, the author was allegedly punished for the crime of "breaking the peace, silence and working order of the institutions with ideological and political reasons" without evidence of her having committed the offence. She maintains thus that the decisions of the Erzurum Administrative Court and the State Council were based on the application of the wrong provision. They do not answer the question of why the acts of the defendant were considered political and ideological actions. She questions why the administration had permitted her to wear a headscarf for nine years if it had been an ideological action.

3.5 The punishment to which she was subjected restricted her right to work, violated equality among employees and fostered an intolerant work environment by categorizing persons according to the clothes that they wear. She claims that had she been a man with similar ideas, she would not have been so punished.

3.6 Having been unjustly expelled from the civil service and her teaching position, the author feels compelled to have recourse to the Committee and requests it to find that the State party has violated her rights and discriminated against her on the basis of

her sex. She further requests the Committee to recommend to the State party that it amend the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments, prevent the High Disciplinary Board s from meting out punishment for anything other than proven and concrete offences and lift the ban on wearing headscarves.

3.7 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted with her appeal to the State Council. She also states that she has not submitted the communication to any other international body.

The State party's submission on admissibility

4.1 By submission of 10 May 2005, the State party argues that domestic remedies have not been exhausted in that the author did not bring an action in accordance with the Regulation on the Complaints and Applications by Civil Servants, which was adopted by decree 8/5743 of the Council of Ministers on 28 November 1982 and published in the Official Gazette on 12 January 1983. Moreover, she did not bring an action before the Turkish Parliament (Grand National Assembly) under article 74 of the Constitution and she did not use the remedy provided under section 3 (Remedies against Decisions), article 54 of the Law on Administrative Judicial Procedures.

4.2 The State party contends that the same matter has been examined by another procedure of international investigation. In particular, the European Court of Human Rights examined a similar case in which the applicant, Leyla Sahin claimed that she was unable to complete her education because of wearing a headscarf and that this constituted a violation of the European Convention on Human Rights. The Court ruled unanimously that article 9 of that Convention (freedom of thought, conscience and religion) was not violated and that there was no need to further examine the claims that article 10 (freedom of expression), article 14 (prohibition of discrimination) and article 2 of Protocol No. 1 Additional to that Convention (education) were violated.

4.3 The State party argues that the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for Turkey in 2002. The author was dismissed

on 9 June 2000 and her co mmunication is therefore inadmissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol.

4.4 The State party also submits that the communication violates the spirit of the Convention because her claims are not relevant to the definitio n of discrimination against women as contained in article 1 of the Convention. The attire of civil servants is specified in the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments, which was prepared in conformity with the Constitution and the relevant laws. This regulation applies to male and female civil servants and both sexes face the same disciplinary and legal actions as the author faced and there is no element of the regulation — content or application — that constitutes discrimination against women. Rulings of the High Courts, such as the Constitutional Court of the Council of State, underline the obligation of civil servants and other public employees to abide by the dress code. When persons (male and female) join the public service, they take office being aware of the relevant provisions of the Constitution, other legislation and case law. It is an obligation for them to abide by the dress code. It is clear that Ms. Kayhan acted consistently against the relevant legislation, namely article 129 of the Constitution, articles 6/1 and 19 of Law No. 657 on Civil Servants, and article 5a of the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments. The relevant Court decided that Ms. Kayhan insisted on coming to work and to her lectures with her head covered despite warnings and penalties. She was therefore discharged from service in accordance with article 125/E-a of Law No. 657 on Civil Servants (spoiling the peace and ord er of the work place for political and ideological reasons). Her religious beliefs are only her own concern and she has the right to act and dress as she wishes in her private life. However, as a public employee, she must abide by principles and rules of the State. In accordance with the public nature of her work, she is obliged to follow the laws and regulation mentioned above. There has been no discrimination in the disciplinary actions taken against the author, nor is there any contradiction in the law. In the implementation of the relevant norms and the case law, no discrimination is made between men and women. The Constitutional Court has already

made rulings in this respect, which form the basis for the application of the laws and other norms in Turkey. In the light of these rulings, it should be noted that the ban on the headscarf in the workplace for female public employees does not constitute discrimination against them, but aims at achieving compliance with the laws and other regulations in force. The rules on attire for those in public service (women and men) are clearly defined by the provisions of the laws and regulations. Therefore, it is known that for those wishing to join public service, there are rules for attire.

4.5 For the stated reasons, the State party considers that the author's communication should be deemed inadmissible within the context of discrimination.

The author's comments on the State party's observations on admissibility

5.1 The author maintains that she applied to the administrative court when she was dismissed and lost her status as a civil servant and appealed to the State Council after the administrative court ruled against her. She argues that the State Council is the highest body to which she could appeal. She lost that appeal. She could not bring an action to have the dress code for civil servants rescinded because there is a 60-day deadline for such an action from the moment that a regulation is published in the Official Gazette or as soon as the treatment at issue has ended. The Regulation relevant to the Attire of the Personnel working in Public Office and Establishments was published in the Official Gazette on 12 January 1983 — when the author was 15-years old and not yet a civil servant. She considers that she need not exhaust this remedy as she has already gone the judicial route, claiming that the treatment to which she was subjected was unjust.

5.2 The author claims that an appeal to Parliament is not a remedy that she need exhaust vis -à-vis the discrimination th at she suffered because a remedy must offer exact and clear solutions — not only in theory but in practice. She maintains that the only remedies to which she is obligated to resort to are judicial remedies. The author also maintains that she need not resort to using the procedure governed by article 54 of the Administrative

procedural law. She considers this to be an extraordinary remedy because it entails a review of the decision in question by the same authority that has issued the decision. Therefore, it is not de facto possible to obtain an effective result by addressing the 12th Department of the State Council. By way of substantiation, the author claims that the claims of two other applicants, a laboratory assistant and a nurse, were dismissed because there was "no reason for correction of decisions" by the very same Department of the State Council. The author believes this procedure to be a waste of time and a pecuniary burden.

5.3 The author maintains that her complaint is not the same matter that has been examined under another procedure of international investigation or settlement. She has not applied to other international bodies. The applicant before the European Court of Human Rights, Leyla Sahin, is a different individual and the case has different characteristics. The purpose and characteristics of the Convention on the Elimination of All Forms of Discrimination against Women and the European Convention on Human Rights are completely different. Furthermore, the right to work is not covered under the latter instrument and thus, a petition before the European Court of Human Rights should not be considered the same matter as a communication brought to the attention of the Committee.

5.4 The author argues that her communication is not time -barred because the impact of the discrimination she suffered has continued after the Optional Protocol came into force for Turkey. The author was expelled from the civil service and will never again be able to take up her former duties. She cannot work as a teacher in a private school either and has been deprived of any social security and lost her health insurance.

5.5 The author argues that the violations of which she complains are protected rights under the Convention on the Elimination of All Forms of Discrimination against Women. She maintains that the discrimination to which she was subjected occurred because she wore a headscarf. A male or a female who violated another rule of the Regulation relevant to the Attire of the Personnel working in Public Office and Es tablishments would likely be able to continue to work. The author did not conduct herself in a manner that could justify her exclusion from public

service. The punishment meted out in her case for disobeying the dress code should have been a warning or a reproach, but she was dismissed. The author claims that the harsh punishment itself is indicative of the discrimination to which she has been subjected. She maintains that banning the veil denies women their capacity to decide, tarnishes their dignity and o ffends the notion of gender equality. The ban on wearing a headscarf generates inequality among women in work and education.

Additional comments of the State party on admissibility

6.1 The case of Leyla Sahin before the European Court of Human Rights and the author's communication are the same in essence, irregardless of one being a student and the other a teacher. Regardless of gender, individuals are free and equal to wear what they will. In the public sphere, they must abide by the rules.

6.2 The State party explains that under Turkish Administrative Law, administrative acts create a new state of law and have immediate legal consequences. Suits of law do not have the effect of suspending the decisions. Courts set aside such decisions. Ms. Kayhan was dismissed on 9 June 2000 by decision of the High Disciplinary Board of the Ministry of National Education. This decision stripped her of her status as a civil servant. Therefore, the relevant date to be taken into account in deciding whether article 4, paragraph 2 (e) of the Optional Protocol would bar the admissibility of the communication would be 9 June 2000 — that is prior to the entry into force of the Optional Protocol for Turkey.

6.3 The State party maintains that the communication is incompatible with the Convention in accordance with article 4, paragraph 2 (b) of the Optional Protocol. The State party considers baseless the claim made by the author that she would still be employed had she been a man or had she failed to comply with any other provision of the dress code for civil servants. The author was dismissed because it was discovered that her stance stemmed from her political and ideological opinions. The same sanctions would apply to male civil servants whose actions were undertaken for political and ideological reasons. Gender is not a consideration

and does not affect the sanction and therefore, there is no discrimination based on sex.

6.4 The State party argues that there is no discrimination against women concerning their participation in social life, education and involvement with work in the public sphere. Statistics on the number and percentage of women who work in schools and academic institutions clearly indicate this assertion. Many women hold high public posts, such as judges, governors, high -level administrators, deans and presidents of universities, including the President of the Constitutional Court and the President of the Turkish Institution for Scientific and Te chnical Research (TUBITAK).

6.5 The State party submits that regular remedies are those to which an applicant must resort within required time limits to appeal against a decision or take it on review ("revision of judgement"). Article 54 of the Administrat ive Trial Procedure Law (No. 2577) allows the parties to request a "revision of judgement" within a 25-day time limit. The grounds for the remedy's use include: if the allegations or objections that impact the merits are not dealt with; if there are contra dictory elements; if there is a mistake of law or a procedural irregularity; or for fraud or forgery that impact the merits. The Divisions of the Council of State, General Assemblies of Administrative Tax Trial Divisions and Regional Administrative Courts, which have issued the decisions that will be reviewed, receive the applications. Those judges who were involved in the decision -making cannot participate when the (same) decision is being reviewed.

6.6 While the author claims that her appeal to the Council of State was sufficient to satisfy the requirements of article 4, paragraph 1 of the Optional Protocol, because the "revision of judgement" remedy is an extraordinary remedy, the State party argues that "revision of judgement" is a regular remedy within Turkish administrative law that should be utilized after an appellate body has rendered a decision. That the author considers the remedy to be ineffective is immaterial to the issue of exhaustion of domestic remedies and reflects only the personal view of the author's lawyer. The State party maintains that there are exemplary rulings by the Council of State in favour of applicants for "revision of judgement" and that the communication should

be declared inadmissible for failure to exhaust domestic remedies.

6.7 The State party refers to the author's claim that she had no possibility of or right to complain in accordance with the Regulation on the Complaints and Applications by Civil Servants. The State party submits that the author's claim was based on an erroneous understanding of the procedure. The author appears to have understood the State party to have argued that she should challenge the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments with a view to obtaining its annulment. The State party explained that it had not intended to give this impression. The State party had argued that the author did not make use of an avenue of complaint provided by the Regulation on the Complaints and Applications by Civil Servants.

6.8 With regard to the remedy under article 74 of the Turkish Constitution, the State party explains that requests and complaints concerning individual authors or the [general] public or "the status of acts taken", shall be made in writing to the competent authorities and to the Turkish Grand National Assembly. The results are made known to the petitioners in writing as well. Law No. 3071 of 1 November 1984 sets out the procedure on the right to petition. Those petitions that concern matters that fall within the competence of the judiciary may not be considered under this procedure. Petitions before the Turkish Grand National Assembly should be reviewed and finalized within 60 days by the Commission for Petitions.

Issues and proceedings before the Committee concerning admissibility

7.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

7.2 In accordance with rule 66 of its rules of proce dure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

7.3 The Committee notes that the State party argues that the communication ought to be declared inadmissible under article

4, paragraph 2 (a) of the Optional Protocol because the European Court of Human Rights had examined a case that was similar. The author assures the Committee that she has not submitted her complaint to any other international body and points to the dissimilarities between the case of Leyla Sahin v. Turkey and her own complaint. In its early case law, the Human Rights Committee pointed out that the identity of the author was one of the elements that it considered when deciding whether a communication submitted under the Optio nal Protocol to the International Covenant on Civil and Political Rights, was the same matter that was being examined under another procedure of international investigation or settlement. In Fanali v. Italy (communication No. 075/1980) the Human Rights Committee held:

> "the concept of 'the same matter' within the meaning of article 5 (2) (a) of the Optional Protocol had to be understood as including the same claim concerning the same individual, submitted by him or someone else who has the standing to act on his behalf before the other international body".

The Committee on the Elimination of Discrimination against Women concludes that the present communication is not inadmissible under article 4, paragraph 2 (a) of the Optional Protocol to the Convention — already, because the author is a different individual than Leyla Sahin, the woman to whom the State party referred.

7.4 In accordance with article 4, paragraph 2 (e) of the Optional Protocol, the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the Protocol for the State party concerned unless those facts continued after that date. In considering this provision, the Committee notes the State party's argument that the crucial date was 9 June 2000, when the author was dismissed from her position as a teacher. This date preceded the entry into force of the Optional Protocol for Turkey on 29 January 2003. The Committee notes that as a consequence of her dismiss al, the author has lost her status as a civil servant in accordance with article 125E/a of the Public Servants Law No. 657. The effects

of the loss of her status are also at issue, namely her means of subsistence to a great extent, the deductions that would go towards her pension entitlement, interest on her salary and income, her education grant and her health insurance. The Committee therefore considers that the facts continue after the entry into force of Optional Protocol for the State party and justify admissibility of the communication *ratione temporis*.

7.5 Article 4, paragraph 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the domestic remedies rule) precludes the Committee from declaring a communication admissible unless it has ascertained that "all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief". The domestic remedies rule should guara ntee that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee considers the violation. This would be an empty rule if authors were to bring the substa nce of a complaint to the Committee that had not been brought before an appropriate local authority. The Human Rights Committee requires the same of authors of communications submitted under the Optional Protocol to the International Covenant on Civil and Political Rights.[1]

7.6 The Committee notes that the first time that the author refers to filing an appeal was in respect of a warning and a deduction in her salary for wearing a headscarf at the school where she taught in July of 1999. She stated that in her petition to the court she declared that the penalty for her infraction should have been a warning and not a "higher prosecution". On this occasion, the author did not raise the issue of discrimination based on sex. The author was pardoned under Amnesty Law No. 4455. The next opportunity to raise the subject of sex-based discrimination came in February 2000, when the author defended herself while she was under investigation for having allegedly entered a classroom with her hair covered and "with ideological and political objectives she spoilt the peace, quiet and work harmony of the

1 See for example, Antonio Parra Corral v. Spain (communication No. 1356/2005), para. 4.2.

institution". The author focused on political and ideological issues in her defence. She challenged the Ministry of Education to prove when and how she had spoilt the peace and quiet of the institution. Her lawyer defended her before the Higher Disciplinary Council by arguing over a mistake in law. Her lawyer also claimed that freedom of work, religion, conscience, thought and freedom of choice, the prohibition of discrimination and immunity of person, the right to develop one's physical and spiritual being and national and international principles of law will all be violated if the author were to be punished. When the author appealed against her dismissal from State service to Erzurum Administrative Court on 23 October 2000 she based her claims on nine grounds — none of which were discrimination based on her sex. On 15 May 2001, the author appealed to the Council of State against the decision of Erzurum Administrative Court. Again, she failed to raise sex-based discrimination. On 9 April 2003 the last decision was handed down against the author. The Committee notes that the author pursued no further domestic remedies.

7.7 In sharp contrast to the complaints made before local autho rities, the crux of the author's complaint made to the Committee is that she is a victim of a violation by the State party of article 11 of the Convention by the act of dismissing her and terminating her status as a civil servant for wearing a headscarf, a piece of clothing that is unique to women. By doing this, the State party allegedly violated the author's right to work, her right to the same employment opportunities as others, as well as her right to promotion, job security, pension rights and equal treatment. The Committee cannot but conclude that the author should have put forward arguments that raised the matter of discrimination based on sex in substance and in accordance with procedural requirements in Turkey before the administrative bodies that she addressed before submitting a communication to the Committee. For this reason, the Committee concludes that domestic remedies have not been exhausted for purposes of admissibility with regard to the author's allegations relating to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women.

7.8 The Committee notes that the State party drew attention to other remedies that would have been available of which the author did not make use — namely review ("revision of judgeme nt"), the complaints procedure under article 74 of the Turkish Constitution and a procedure under the Regulation on the Complaints and Applications by Civil Servants. However, the Committee considers that the information provided to it on the relief that might reasonably have been expected from the use of the remedies is insufficiently clear to decide on their efficacy in relation to article 4, paragraph 1 of the Optional Protocol. In any event the Committee considers it unnecessary to make this determination or whether the communication is inadmissible on any other grounds.

7.9 The Committee therefore decides:

(a) That the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol for failure to exhaust domestic remedies;

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

Committee on the Elimination of Discrimination against Women

Thirty-sixth session

7-25 August 2006

Views

Communication No. 3/2004

Submitted by	:	Ms. Dung Thi Thuy Nguyen
Alleged victim	:	The author
State party	:	The Netherlands
Date of communication	:	8 December 2003 (initial submission)

On 14 August 2006, the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's Views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 3/2004. The Views are appended to the present document.

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-sixth session)

Communication No.: 3/2004*

Submitted by	: Ms. Dung Thi Thuy Nguyen
Alleged victim	: The author
State party	: The Netherlands
Date of communication	: 8 December 2003 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 14 August 2006,

Having concluded its consideration of communication No. 3/2004, submitted to the Committee on the Elimination of Discrimination against Women by Ms. Dung Thi Thuy Nguyen under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the author of the communication and the State party,

***Adopts the following*:**

Views under article 7, paragraph 3, of the Optional Protocol

1.1 The author of the communication dated 8 December 2003, is Ms. Dung Thi Thuy Nguyen, born on 24 June 1967 and a

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* The following members of the Committee participated in the examination of the present communication: Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Huguette Bokpe Gnacadja, Ms. Dorcas Coker-Appiah, Ms. Mary Shanthi Dairiam, Ms. Naela Mohamed Gabr, Ms. Françoise Gaspard, Ms. Rosario Manalo, Ms. Krisztina Morvai, Ms. Pramila Patten, Ms. Fumiko Saiga, Ms. Hanna Beate Schöpp-Schilling, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Simonovic, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao. Pursuant to rule 60 (1) (c) of the Committee's rules of procedure, Mr. Cees Flinterman did not participate in the examination of this communication, as he is a national of the State party concerned.

resident of the Netherlands currently living in Breda, the Netherlands. She claims to be a victim of a violation by the Netherlands of article 11, paragraph 2 (b) of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsel, Mr. G. J. Knotter, and by Ms. E. Cremers, a self-employed researcher at Leiden, the Netherlands. The Convention and its Optional Protocol entered into force for the State party on 22 August 1991 and 22 August 2002, respectively.

The facts as presented by the author

2.1 The author worked as a part-time salaried employee (a temporary employment agency worker) as well as together with her husband as a co-working spouse in his enterprise. She gave birth to a child and took maternity leave as from 17 January 1999.

2.2 The author was insured under the Sickness Benefits Act (Ziektewet – "ZW") for her salaried employment and, in accordance with article 29a of this Act, received benefits to compensate for her loss of income from her salaried employment during her maternity leave over a period of 16 weeks.

2.3 The author was also insured under the Invalidity Insurance (Self-Employed Persons) Act (Wet arbeidsongeschiktheidsverzekering zelfstandigen "WAZ") for her work in her husband's enterprise. On 17 September 1998, prior to the start of her maternity leave, she submitted an application for maternity benefits under the WAZ. On 19 February 1999, the National Institute for Social Insurance (Landelijk instituut sociale verzekeringen – "LISV"), the benefits agency, decided that, despite her entitlement, the author would not receive benefits during maternity leave for her loss of income stemming from her work in her husband's enterprise. This was because section 59 (4) of the WAZ – the so-called "anti-accumulation clause" – allows (in cases of concurrent claims for maternity benefits) payment of benefits only insofar as they exceed benefits payable under the ZW. The author's benefits from her work with her spouse did not exceed those from her salaried employment.

2.4 The author lodged an objection to the decision, which was rejected on 18 May 1999. Thereafter, she applied for a review

with the Breda District Court (rechtbank). Reportedly, this application was dismissed on 19 May 2000. The author then appealed to the Central Appeals Tribunal (Centrale Raad van Beroep), reportedly, the highest administrative court in the Netherlands in social security cases.

2.5 On 25 April 2003, the Central Appeals Tribunal (Centrale Raad van Beroep) confirmed the contested judgment of the Breda District Court (rechtbank). The Tribunal found that section 59 (4) of the WAZ does not result in unfavourable treatment of women as compared to men. The Tribunal also referred to one of its earlier judgments in which it held that article 11 of the Convention lacks direct effect.

2.6 On 8 May 2002, the author began a second maternity leave (in connection with her second pregnancy) and again applied for benefits. On 4 June 2002 the benefits agency decided that the author's entitlement under the ZW would be supplemented by the difference between her claim under the WAZ and her entitlement under the ZW. Unlike during the previous period of maternity leave, her WAZ entitlement exceeded her ZW entitlement.

2.7 The author lodged an appeal against the decision of 4 June 2002, which she subsequently withdrew after the decision of the Central Appeals Tribunal (Centrale Raad van Beroep), which heard the appeal regarding benefits for her maternity leave in 1999, was rendered on 25 April 2003.

The complaint

3.1 The author complains that she is a victim of a violation by the State party of article 11, paragraph 2 (b) of the Convention on the Elimination of All Forms of Discrimination against Women. She contends that this provision entitles women to maternity leave with full compensation for loss of income from their work. The author claims that women whose income stems from both salaried and other forms of employment only receive partial compensation for their loss of income during their maternity leave. In this respect, the author submits that pregnancy has a negative effect on the income of this group of women. She alleges

that partial compensation for the loss of income does not fulfil the requirements of the article 11, paragraph 2 (b) of the Convention and amounts to direct discrimination of women as a result of their pregnancy.

3.2 The author asserts that article 11 of the Convention applies to any conceivable professional activity carried out for payment and refers to legal literature on the Travaux Préparatoires of the Convention to substantiate her assertion. She believes that this is important in assessing the compatibility of the provisions of the WAZ in relation to pregnancy and maternity with article 11 of the Convention. She also considers it important to establish that the prohibition of discrimination against women means, inter alia, that pregnancy and maternity may not result in a subordinated position of women as compared to men.

3.3 As a result of the above, the author requests the Committee to examine to what extent the so-called "anti-accumulation clause" - i.e. section 59 (4) of the WAZ – as a result of which she did not receive any compensation for her lost income as a co-working spouse in connection with her maternity leave - is a discriminatory provision and violates article 11, paragraph 2 (b) of the Convention.

3.4 The author requests the Committee to recommend to the State party, under article 7 (3) of the Optional Protocol to the Convention, to take appropriate measures to comply with the requirements of article 11, paragraph 2 (b) of the Convention so that co-working spouses or self-employed women on pregnancy and maternity leave are provided with full compensation for loss of income. She further requests the Committee to recommend that the State party award her compensation for loss of income during both periods of maternity leave.

3.5 The author further asserts that article 11, paragraph 2 (b) provides a right that is open to tangible judicial review and that, under article 2 of the Optional Protocol, the Committee has been authorized to decide whether the violation of a certain Convention right may be judicially reviewed in actual cases.

3.6 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted in

that she ultimately brought proceedings before the highest administrative court against the refusal to award benefits under the WAZ. She informs the Committee that she withdrew her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first pregnancy.

3.7 The author also states that she has not submitted the communication to any other international body and thus, the requirement for admissibility in article 4, paragraph 2 (a) has been fulfilled. The author points out that, on several occasions, in its comments on the report of the Netherlands to the Committee of Experts, the Netherlands Trade Union Confederation FNV has claimed that section 59 (4) of the WAZ is contrary to article 12 (2) of the European Social Charter. It has reportedly also brought the issue to the attention of the International Labour Organization (ILO) in its comments on the report of the Netherlands under ILO Convention 103 on Maternity Protection. Nonetheless, the author maintains that both procedures differ from the individual right of complaint and that neither the European Social Charter nor ILO Convention 103 contain provisions identical to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. She also refers to case law on admissibility in individual complaints procedures of other international investigation procedures, including the Optional Protocol to the International Covenant on Civil and Political Rights. For these reasons, the author argues that there is no impediment as regards article 4, paragraph 2 (a) of the Optional Protocol.

3.8 The author contends that the communication is admissible under the terms of article 4, paragraph 2 (e) of the Optional Protocol. Although the decision not to pay the author benefits under the WAZ were taken before the Netherlands ratified the Optional Protocol, the decision of the Central Appeals Tribunal (Centrale Raad van Beroep) was delivered some time after ratification. The author argues that the decision of the highest court determines whether the facts should be considered to have occurred after ratification, as the facts only became final on that date. She maintains that international case law supports this view. Furthermore, she points out that part of her communication directly concerns the decision of the Central Appeals Tribunal

(Centrale Raad van Beroep) itself. Additionally, the author argues that the so-called "anti-accumulation clause" has continued to be applied (now found in another piece of legislation) after the Optional Protocol's entry into force for the State party. Lastly, the author argues that her withdrawal of her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first pregnancy in April 2003 also indicates that the facts at issue continue (i.e. the application of the anti-accumulation clause).

The State party's submission on admissibility

4.1 By submission of 19 March 2004, the State party argues that the communication is inadmissible *ratione temporis* pursuant to article 4,paragraph 2 (e). It argues that the subject of the communication is the prohibition against receiving pregnancy and maternity benefits under both the WAZ and the ZW at the same time. This arose in the author's case at the point in time when the relevant implementing body took the decisions affecting her, namely on 19 February 1999 and 4 June 2002. Both dates were prior to the entry into force of the Protocol for the Netherlands on 22 August 2002.

4.2 The State party refers to the author's view that the deciding factor in determining whether the facts that are the subject of the communication occurred before the Protocol entered into force for the Netherlands is the date of the judgment given by the court of last resort, since it is only then that the facts are definitively established.

4.3 The State party is of the opinion that the author based her views on an incorrect interpretation of Report No. 73/01, Case No. 12.350, MZ v Bolivia of the Inter-American Commission on Human Rights. While the petitioner's complaint in the Bolivian case was declared admissible where it related to a judgment by a Bolivian court that dated from after the entry into force of the individual right of complaint in respect of Bolivia, it had nothing to do with that judgment definitively establishing facts that had occurred prior to that date. The case concerned the course of the proceedings and the conduct of the judges involved in the case.

The author's comments on the State party's observations on admissibility

5.1 The author reiterates her arguments as to why her communication should be declared admissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol to the Convention.

5.2 She explains that her interpretation of article 4, paragraph 2 (e) of the Optional Protocol cannot be directly inferred from the international case to which she referred in her initial submission. She wished merely to refer to judgments in which judicial bodies did not decide restrictively on the question of admissibility. The author, therefore, considers the comparison of the facts of her case to the facts in MZ v. Bolivia (IACHR Report No. 73/01, case No. 12.350 of 10 October 2001) irrelevant.

State party's further submission on admissibility and observations on merits

6.1 The State party states that under article 2 of the Optional Protocol, communications may be submitted by or on behalf of individuals claiming to be victims of a violation of any of the rights set forth in the Convention. It is the State party's opinion that an individual can only be regarded as a victim under the article at the moment at which there has been some failure to respect his or her rights. In the author's case, this would be the dates on which she was notified that all or part of the benefits was to be withheld. These decisions were taken before 22 August 2002, the date that the Optional Protocol entered into force for the State party. Ergo, the communication should be declared inadmissible *ratione temporis*. A different view would misconstrue the substance of the Optional Protocol by recognizing a general rather than an individual right of complaint.

6.2 The State party recalls that lodging an application for review in social security cases does not suspend legal proceedings in the Netherlands. Only the final judgment of a court can change (with retroactive effect) the earlier decisions of the bodies that implement social security legislation.

6.3 In addressing the author's contention that section 59 (4) of the WAZ is incompatible with article 11, paragraph 2 (b) of the

Convention, which, the author believes, imposes an obligation to ensure full compensation of loss of income ensuing from childbirth in all cases and constitutes direct sex discrimination, the State party observes that the word "pay" is used in general to refer to a salary and not to income from business profits. This gives rise to whether the word "pay" in article 11, paragraph 2 (b) of the Convention should include the frequently fluctuating income arising from self-employment. The State party views its composite system of maternity benefits as adequately fulfilling the terms of article 11, paragraph 2 (b) of the Convention.

6.4 Initially, maternity leave and maternity benefits were regulated exclusively in the ZW, an insurance scheme that provided compulsory coverage for both male and female employees. Self-employed women or women working in their husbands' businesses could voluntarily take out insurance under the scheme. In 1992, a study revealed that only a small proportion of these women took out insurance – either because they were unaware of the option or because of the cost involved. It also emerged that the women concerned only took maternity leave if there were medical complications.

6.5 Subsequently, a compulsory insurance scheme was set up under WAZ for self-employed women or women who worked in their husbands' businesses, which resembled the other scheme – but with contributions based on profits. It was recognized that situations might arise in which women might be simultaneously entitled to benefits from both schemes and, in order to guard against giving more entitlements to persons who were insured in respect of the same risk under two sets of regulations, section 59 (4) was included in the WAZ.

6.6 To ensure that those who were insured under both schemes would not be disadvantaged, the principle of equivalence was applied in relation to contributions. In order to determine contributions, the income from salaried employment was deducted from other income in certain circumstances. This meant that the higher the income from salaried employment the lower the contribution would be to the WAZ. Benefits granted within the framework of the employees' insurance were deducted from the other benefits.

6.7 The State party shares the views expressed by the Central Appeals Tribunal (Centrale Raad van Beroep) as to whether the so-called "anti-accumulation clause" constitutes sex discrimination. It maintains that entitlement to maternity benefits under section 22 of WAZ, is an advantage exclusively for women. Furthermore, within the WAZ system as a whole, the basic principle of anti-accumulation of benefit in respect of the same risk also applies in the event of concurrence between a WAZ benefit and some form of benefit other than a maternity benefit – without any distinction according to sex.

6.8 In responding to the author's contention that the Central Appeals Tribunal (Centrale Raad van Beroep) was wrong to conclude that article 11 of the Convention was not directly applicable, the State party states that the crucial point is whether further legislation has to be enacted to implement rights protected by the provision or whether without the enactment of further legislation citizens can derive entitlements which they can pursue before a national court, contrary to national law, if necessary. National constitutions determine the manner in which provisions of international law are incorporated into national systems of law. The State party, therefore, is of the opinion that the Committee cannot be asked to give its opinion on the matter. The State party considers it self-evident that statutory regulations that are incompatible with international law must be amended; in this type of situation the question is not so much whether but how these obligations must be fulfilled.

6.9 In the State party the courts decide on the basis of the nature, substance and tenor of a particular provision of international law, whether it is directly applicable. For a provision to be invoked directly by private individuals, it must be formulated so precisely that rights necessarily ensue from it unambiguously and without the need for any further action to be taken by the national authorities.

6.10 The State party would have it that the only possible conclusion is that article 11, paragraph 2 (b) of the Convention imposes on the legislature and Governments of States parties an obligation to pursue, rather than to achieve, a certain goal (inspanningsverplichting), with States parties being allowed

certain discretionary powers. In the Netherlands, these powers are exercised by the legislature. The State party therefore concurs with the Central Appeals Tribunal (Centrale Raad van Beroep) in its view that article 11, paragraph 2 (b) of the Convention is not directly applicable.

6.11 The State party requests the Committee to declare the communication inadmissible, or alternatively, should it be deemed admissible, to declare it ill-founded.

The author's comments on the State party's observations on admissibility and merits

7.1 As to admissibility *ratione temporis,* the author believes that article 4, paragraph 2 (e) of the Optional Protocol must be read in conjunction with the other requirements of the article. Paragraph 1 provides that local remedies must be exhausted before a communication can be submitted. Viewed together with article 4, paragraph 2 (e), this means that "facts" must be understood to mean the date of the court decision of the highest instance (i.e. 25 April 2003). The correctness of the facts cannot be assumed until such a final decision is reached.

7.2 Furthermore, the complaint concerns the period of the second maternity leave from 8 May to 28 August 2002, during which the author received benefits based on the decision of 4 June 2002 decision - that is to say that the "facts" (the period for which a benefit is received) continued after the entry into force of the Optional Protocol for the State party.

7.3 The author also points out that the State party does not challenge admissibility on grounds of non-exhaustion of remedies in respect of benefits covering the second maternity leave.

7.4 The author further states that "facts" should be understood to mean the facts to which the entitlement applies in accordance with the WAZ, including section 59 (4) and the Work and Care Act after 1 December 2001. She considers the facts to continue because the entitlement continues to exist and maintains that the right to complain is not limited to individual occurrences but generally concerns the right of victims of discrimination against women.

7.5 As to the issue of the definition of "pay" in article 11, paragraph 2 (b) of the Convention, the author maintains her position that all women who perform paid work should be covered – especially professional women or women in business. She disagrees with the argument that women who are insured under two insurance schemes would be unjustifiably accorded favoured treatment if they were to receive more benefits. Furthermore, referring to the State party's comments on contributions, the author sees no connection between the issue of entitlements to benefits and the payment of contributions – because entitlements exist irrespective of the contributions paid.

7.6 As to whether section 59 (4) of the WAZ is discriminatory, the author contends that only women are affected negatively by a loss of income that can never be experienced by men. That loss of income – an effect of the Act – constitutes discrimination.

7.7 The author clarifies that she has not requested the Committee to decide whether or not article 11 of the Convention has direct effect. The author has only indicated that as a result of the decision of the Central Appeals Tribunal (Centrale Raad van Beroep), she has been deprived of the right to have national legislation tested against the provisions of the Convention.

Supplementary observations of the State party

8.1 The State party refers to the author's claim that "the Government does not object to the statement that is not necessary for the admissibility of the complaint as regards the second period that the complainant should have exhausted the entire appeal proceedings once more". The State party points out that this claim was not made in the author's initial submission to the Committee. The only reference therein to the second period of pregnancy and maternity leave in 2002 was made to support the claim that the alleged violation continued after the Optional Protocol entered into force in the Netherlands. It should not be inferred from the fact that the State party did not explicitly address the question of whether the author had exhausted domestic remedies regarding the decision on the benefits payable to her for the period of her maternity leave in 2002 that the State party believes that this condition for admissibility has been

met regarding that period. Regarding article 4, paragraph 1 of the Optional Protocol, the State party believes that the Committee cannot take the communication into consideration, inasmuch as it must be assumed to apply to the benefit for the period of leave in 2002, on account of non-exhaustion of domestic remedies.

8.2 The State party reiterates that it considers the communication in any event to be inadmissible because the relevant facts took place before the date that the Optional Protocol entered into force for the Netherlands. It also wishes to emphasize that the Optional Protocol created an individual right of complaint that follows from article 2. In order to determine whether a person is a victim of a violation by a State, it is necessary to identify an act, legal or otherwise, by the State that can be defined as a violation, for instance a decision by the State on the application of a particular rule of law. In the State party's view, the right of complaint does not stretch to facts that a complainant considers to be discriminatory in general unless the complainant has been affected personally.

8.3 Concerning the merits of the author's claims, the State party wishes to clarify that it raised previously– but did not answer - the obvious question relating to the meaning of the word "pay" in article 11, paragraph 2 (b) of the Convention. The State party disagrees with the author's interpretation that the provision prescribes full compensation for loss of income resulting from pregnancy and childbirth. It views the provision as a general norm that imposes on States an obligation to make arrangements that enable women to provide for themselves in the period of pregnancy and childbirth and to resume work after childbirth without any adverse effects on their career. The way in which the obligation is fulfilled is left to States to determine. States may opt between arrangements based on continued payment of salary and arrangements creating a comparable social provision. That this must involve full compensation for loss of income cannot automatically be inferred.

8.4 The State party makes a comparison between paragraph 2 (b) of article 11 of the Convention and EC directive 92/85 of 19 October 1992 concerning the introduction of measures to encourage improvements in the safety and health at work of

pregnant workers and workers who have recently given birth or are breastfeeding, which provides for a payment to, and/or entitlement to an adequate allowance. While the State party finds it implausible that the European legislature envisaged a wholly different norm than the Convention's norm, it describes the EC directive as being more clearly formulated in that the term "adequate allowance" is defined.

8.5 The State party elaborates further about the reasoning behind section 59 (4) – the so-called "anti-accumulation clause" – of WAZ. Under this Act a self-employed woman would be entitled to a benefit of up to 100 per cent of the statutory minimum wage. Those who worked as a salaried employee as well would be entitled to a benefit under both this Act and the ZW. If the latter exceeded 100 per cent of the statutory minimum wage the WAZ benefit would not be paid and if the ZW entitlement was lower than 100 per cent of the statutory minimum wage, the WAZ benefit could be paid as long as the two together would not exceed 100 per cent of the minimum wage. At the same time, the higher a woman's income would be from salaried employment – the greater the likelihood that her WAZ benefit would not be paid and the lower her contribution payable to the WAZ scheme would be.

8.6 As for the author's contention that the so-called "anti-accumulation clause" constitutes direct discrimination, the State party reiterates that the entitlement is exclusively given to women and is specifically designed to give women an advantage in relation to men. It is, therefore, impossible to see how it can lead to more unfavourable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it

shall do so before considering the merits of the communication.

9.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

9.3 With respect to article 4, paragraph 1 of the Optional Protocol, the Committee notes that the State party has not disputed that the author has exhausted all available domestic remedies concerning benefits for her first maternity leave in 1999. The issue is not as straightforward regarding the author's 2002 maternity leave benefits. The Committee is informed by the author in her initial submission, that she withdrew her appeal in connection with her second maternity leave after she lost her final appeal in connection with her first maternity leave. She did not explain her reasons. In its latest observations, the State party objected to the admissibility of the author's claim relating to the latter maternity leave on grounds of her failure to exhaust all available domestic remedies without explaining why. The Committee notes that in earlier observations in which the State party challenged the admissibility *ratione temporis* (see below) of the communication and in doing so referred to the decisions taken denying benefits under the WAZ system vis-à-vis both periods of maternity leave, it did not mention the issue of exhaustion of remedies. In the absence of particulars from either the State party or the author on which to assess whether the author should have continued her appeal or whether these proceedings were unlikely to bring relief, the Committee considers that, on the face of it and in light of the unambiguous wording of the decision rendered on 25 April 2003 by the Central Appeals Tribunal (Centrale Raad van Beroep), the highest administrative court in social security cases, proceedings regarding the author's 2002 maternity leave benefits were unlikely to bring relief. The Committee therefore holds that it is not precluded by article 4, paragraph 1 of the Optional Protocol from considering the communication as regards claims relating to both periods of the author's maternity leave.

9.4 In accordance with article 4, paragraph 2 (*e*), the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned

unless those facts continued after that date. The Committee notes that the State party disputed the author's contention that article 4, paragraph 2 (e) posed no impediment to admissibility of the communication. The State party put forward that the pertinent dates for the Committee to consider in this regard were 19 February 1999 and 4 June 2002 - both dates being prior to the entry into force of the Protocol for the Netherlands. These dates were the dates on which decisions were taken to deny the author – the first time to fully deny her benefits under the WAZ in relation to her first maternity leave and the second time to partially deny her benefits under the WAZ in relation to her second maternity leave. The author, for her part, in her initial submission argued that 25 April 2003, i.e. after the Optional Protocol came into force for the Netherlands, is the pertinent date in relation to article 4, paragraph 2 of the Optional Protocol because on that date the Central Appeals Tribunal (Centrale Raad van Beroep), the highest administrative court in social security cases, took the final decision vis-à-vis her dispute with the WAZ authorities regarding her first maternity leave. The Committee is of the view that the central question to be answered is "when has the Dutch legislation at issue been applied to the alleged actual detriment of the author (i.e. what the facts of the case are)?

9.5 The Committee takes into account that the actual leave periods for which the author applied for benefits spanned two 16-week periods, the first was in 1999, which clearly predated the entry into force of the Optional Protocol for the State party. The second 16-week period, according to the author, was from 8 May to 28 August 2002. This period extended beyond the entry into force of the Optional Protocol for the State party on 22 August 2002 and justifies admissibility ratione temporis insofar as the communication relates to the author's maternity leave in 2002.

9.6 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication insofar as it concerns the author's later maternity leave in 2002 admissible.

Consideration of the merits

10.1 The Committee has considered the present communication in

light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002 constituted a violation of her rights under article 11, paragraph 2(b) of the Convention because it resulted in her receiving less benefits than she would have received had the provision not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

The aim of article 11, paragraph 2, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. The Committee considers that the author has not shown that the application of the 59 (4) of the WAZ was discriminatory towards her as a woman on the grounds laid down in article 11, paragraph 2 of the Convention, namely of marriage or maternity. The Committee is of the view that the grounds for the alleged differential treatment had to do with the fact that she was a salaried employee and worked as a co-working spouse in her husband's enterprise at the same time.

Article 11, paragraph 2 (b), obliges States parties in such cases to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances. The Committee notes that article 11, paragraph 2 (b), does not use the term "full" pay, nor does it use "full compensation for loss of income" resulting from pregnancy and childbirth. In other words, the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil Convention requirements. The Committee notes that the State party's legislation provides that self-employed women and co-working spouses as well as salaried women are entitled to paid maternity leave – albeit under different insurance schemes. Entitlements under both schemes may be claimed simultaneously and awarded as long as the two together do not exceed a specified maximum amount. In such cases, contributions to the scheme covering self-employed women and co-working

spouses are adjusted with income from their salaried employment. It is within the State party's margin of discretion to determine the appropriate maternity benefits within the meaning of article 11, paragraph 2 (b) of the Convention for all employed women, with separate rules for self-employed women that take into account fluctuating income and related contributions. It is also within the State party's margin of discretion to apply those rules in combination to women who are partly self-employed and partly salaried workers. In light of the foregoing, the Committee concludes that the application of section 59 (4) of the WAZ did not result in any discriminatory treatment of the author and does not constitute a violation of her rights under article 11, paragraph 2 (b), of the Convention.

10.3 Acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it do not reveal a violation of article 11, paragraph 2 (b) of the Convention.

Individual opinion of Committee members, Ms. Naela Mohamed Gabr, Ms. Hanna Beate Schöpp-Schilling and Ms. Heisoo Shin (dissenting)

Consideration of the merits

10.1 The Committee has considered the present communication in light of all of the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002 constituted a violation of her rights under article 11, paragraph 2 (b), of the Convention, because it resulted in her receiving less benefits than she would have received had the provisions not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

10.3 The aim of article 11, paragraph 2, in general, and article 11, paragraph 2 (b), in particular, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. Article 11, paragraph 2 (b), obliges States parties in such cases to introduce maternity leave with pay or with comparable social benefits without loss of former employment, seniority or social allowance. Article 11, paragraph 2 (b), does not use the term "full" pay. A certain margin of discretion is left to States parties to devise a system of maternity leave benefits which fulfils the requirements of the Convention. This interpretation is bolstered by the "travaux préparatoires" of the Convention and by State practice as presented to the Committee in reports submitted to it under article 18 of the Convention. It can be argued that the explicit wording of article 11, paragraph 2 (b), read in conjunction with the other subparagraphs of article 11, paragraph 2, aims primarily at women as salaried employees in the public or private labour market sectors. On the other hand, the provision can also be interpreted to mean that States parties are also obliged to provide for a maternity leave with pay for self-employed women. We have seen that the State party has made some provision for this category of women. The manner in which States parties do so is left to their discretion — subject to their obligations under the Convention to achieve results.

10.4 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we are of the following view: Based on the reasoning set forth above, we conclude that the law of the Netherlands which provides for a financially compensated maternity leave for women who are both salaried women and self-employed, albeit with the restriction of the so-called anti-accumulation clause in article 59WAZ, is compatible with the obligations of the State party under article 11, paragraph 2 (b), of the Convention in the sense that it does not reveal a violation of the author's rights under this article as concerns a *direct* form of discrimination based on sex.

10.5 At the same time, we are concerned at the fact that the so-called "equivalence" principle does not seem to take into account the potential situation of a women working in a situation of both

salaried part-time and self-employment, in which the number of her working hours in both categories of work equal or even may go beyond the hours of a full-time salaried female employee, who, in the Netherlands, to our knowledge, receives a maternity benefit which equals full pay for a certain period of time. In addition, the 1996 Equal Treatment (Full-time and Part-time Workers) (WOA) requires full-time and part-time employees to be treated equally. Therefore, we are of the view that the so-called anti-accumulation clause in article 59WAZ may constitute a form of *indirect* discrimination based on sex. This view is based on the assumption that an employment situation in which salaried part-time work and self-employment is combined, as described by the complainant, is one which mainly women experience in the Netherlands, since, in general, it is mainly women who work part-time as salaried workers in addition to working as family helpers in their husbands' enterprises. However, no information was requested by the Committee or given by the State party under this communication procedure to substantiate this assumption with facts, although in the State party's fourth report under the CEDAW Convention, which has been in general distribution since 10 February 2005 and which is to be discussed at the thirty-seventh session of the Committee, in 2007, the State party admits that part-time work is particularly common among women (see CEDAW/C/NLD/4). In addition, in the same report the State party refers to the fact that in 2001, under a new Invalidity Insurance Act (WAO) for self-employed persons, 55 per cent of the applicants were women.

10.6 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, we, therefore, made the following recommendation to the State party:

(a) Collect data on the number of women working in the combination of part-time salaried employment and as self-employed persons as compared to men in order to assess the percentage of women versus men in this situation; and, if this data shows a preponderance of women in such situations of employment;

(b) Review the "anti-accumulation clause" (section 59 (4) of the WAZ), in particular its principle of "equivalence", which

does not seem to take into account the overall amount of hours of work in such combined employment situations and constitutes a possible form of indirect discrimination for women in such employment situations when pregnant and giving birth;

(c) Accordingly amend the WAZ; or,

(d) Consider in the design of any new insurance scheme for self-employed persons, which includes maternity benefits and which covers those who combine self-employment with part-time salaried employment, as referred to in the State party's fourth report (CEDAW/C/NLD/4, p. 61), that the integration of provisions ensures full harmony of the law of the Netherlands with the Convention on the Elimination of All Forms of Discrimination against Women in the area of maternity leave benefits for all women working in various forms of employment in the Netherlands.

Committee on the Elimination of Discrimination against Women

Thirty-sixth session

7-25 August 2006

Views

Communication No. 4/2004

Submitted by	: Ms. A. S. (represented by the European Roma Rights Center and the Legal Defence Bureau for National and Ethnic Minorities)
Alleged victim	: The author
State party	: Hungary
Date of communication	: 12 February 2004 (initial submission)

On 14 August 2006, the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's Views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 4/2004. The Views are appended to the present document.

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-sixth session)

Communication No.: 4/2004*

Submitted by	: Ms. A. S. (represented by the European Roma Rights Center and the Legal Defence Bureau for National and Ethnic Minorities)
Alleged victim	: The author
State party	: Hungary
Date of communication	: 12 February 2004 (initial submission)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 14 August 2006

Having concluded its consideration of communication No. 4/2004, submitted to the Committee on the Elimination of Discrimination against Women by The European Roma Rights Center and the Legal Defence Bureau for National and Ethnic Minorities on behalf of Ms. A. S. under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the author of the communication and the State party,

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* The following members of the Committee participated in the examination of the present communication: Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Huguette Bokpe Gnacadja, Ms. Dorcas Coker-Appiah, Ms. Mary Shanthi Dairiam, Mr. Cees Flinte rman, Ms. Naela Mohamed Gabr, Ms. Françoise Gaspard, Ms. Rosario Manalo, Ms. Pramila Patten, Ms. Fumiko Saiga, Ms. Hanna Beate Schöpp-Schilling, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonoviæ, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao. Pursuant to rule 60 (1) (c) of the Committee's rules of procedures, Ms. Krisztina Morvai did not participate in the examination of this communication, as she is a national of the State party concerned.

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

1.1 The author of the communication dated 12 February 2004, is Ms. A. S., a Hungarian Roma woman, born on 5 September 1973. She claims to have been subjected to coerced sterilization by medical staff at a Hungarian hospital. The author is represented by the European Roma Rights Center, an organization in special consultative status with the Economic and Social Council, and the Legal Defence Bureau for National and Ethnic Minorities, an organization in Hungary. The Convention and its Optional Protocol entered into force for the State party on 3 September 1981 and 22 March 2001, respectively.

The facts as presented by the author

2.1 The author is the mother of three children. On 30 May 2000, she was examined by a doctor and found to be pregnant, the delivery date estimated to be 20 December 2000, during that time, she followed antenatal treatment and attended all the scheduled appointments with the district nurse and gynaecologist. On 20 December 2000, the author reported to the maternity ward of Fehérgyarmat Hospital. She was examined and found to be 36 to 37 weeks pregnant and was asked to return when she went into labour.

2.2 On 2 January 2001, the author went into labour pain and her amniotic fluid broke. This was accompanied by heavy bleeding. She was taken to Fehérgyarmat Hospital, one hour's drive by ambulance. While examining the author, the attending physician found that the foetus (the term "embryo" is used) had died in her womb and informed her that a caesarean section needed to be performed immediately in order to remove the dead foetus. While on the operating table, the author was asked to sign a form consenting to the caesarean section. She signed this as well as a barely legible note that had been hand-written by the doctor and added to the bottom of the form, which read:

> "Having knowledge of the death of the embryo inside my womb I firmly request my sterilization [a Latin term unknown to the author was used]. I do not

intend to give birth again; neither do I wish to become pregnant."

The attending physician and the midwife signed the same form. The author also signed statements of consent for a blood transfusion and for anaesthesia.

2.3 Hospital records show that within 17 minutes of the ambulance arriving at the hospital, the caesarean section was performed, the dead foetus and placenta were removed and the author's fallopian tubes were tied. Before leaving the hospital the author asked the doctor for information on her state of health and when she could try to have another baby. It was only then that she learned the meaning of the word "sterilization". The medical records also revealed the poor health condition of the author when she arrived at the hospital. She felt dizzy upon arrival, was bleeding more heavily than average and was in a state of shock.

2.4 The author states that the sterilization has had a profound impact on her life for which she and her partner have been treated medically for depression. She would never have agreed to the sterilization as she has strict Catholic religious beliefs that prohibit contraception of any kind, including sterilization. Furthermore, she and her partner live in accordance with traditional Roma customs — where having children is said to be a central element of the value system of Roma families.

2.5 On 15 October 2001, a lawyer with the Legal Defence Bureau for National and Ethnic Minorities, filed a civil claim on behalf of the author against Fehérgyarmat Hospital, inter alia, requesting that the Fehérgyarmat Town Court find the hospital in violation of the author's civil rights. She also claimed that the hospital had acted negligently by sterilizing the author without obtaining her full and informed consent. Pecuniary and non-pecuniary damages were sought.

2.6 On 22 November 2002, the Fehérgyarmat Town Court rejected the author's claim, despite a finding of some negligence on the part of the doctors, who had failed to comply with certain legal provisions, namely, the failure to inform the author's partner of the operation and its possible consequences as well as to obtain the birth certificates of the author's live children. The Court reasoned that the medical conditions for sterilization prevailed

in the author's case and that she had been informed about her sterilization and given all relevant information in a way in which she could understand it. The Court also found that the author had given her consent accordingly. The Court further viewed as a "partial extenuating circumstance towards the defendant's negligence the fact that, with the author's consent, the doctors performed the sterilization with special dispatch simultaneously with the Caesarean section".

2.7 On 5 December 2002, the lawyer filed an appeal on behalf of the author before the Szabolcs-Szatmár-Bereg County Court against the decision of the Fehérgyarmat Town Court.

2.8 On 12 May 2003, the author's appeal was rejected. The appellate court found that although article 187, paragraph 4 (a), of Hungary's Act on Health Care allowed for the exceptional performance of the sterilization, the operation was not of a life-saving character, and therefore, the sterilization procedure should have been subject to the informed consent of the author. The appellate court further found that the doctors acted negligently in failing to provide her with detailed information (about the method of the operation, of the risks of its performance and of the alternative procedures and methods, including other options of birth control) and that the written consent of the author could not in and of itself exclude the hospital's liability. The appellate court, however, turned down the appeal on the ground that the author had failed to prove a lasting handicap and its causal relationship with the conduct of the hospital. The appellate court reasoned that the performed sterilization was not a lasting and irreversible operation inasmuch as the tying of fallopian tubes can be terminated by plastic surgery on the tubes and the likelihood of her becoming pregnant by artificial insemination could not be excluded. Based on her failure to prove that she had lost her reproductive capacity permanently and its causal relationship to the conduct of the doctors, the appellate court dismissed the appeal.

The complaint

3.1 The author claims that Hungary has violated articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention.

3.2 She emphasizes that sterilization is never a life-saving intervention that needs to be performed on an emergency basis without the patient's full and informed consent. It is an operation that is generally intended to be irreversible and surgery to reverse sterilization is complex and has a low success rate. The author states that international and regional human rights organizations have repeatedly stressed that the practice of forced sterilization constitutes a serious violation of numerous human rights and she refers to general comment 28 of the Human Rights Committee on equality of rights between men and women by way of example. She also states that coercion presents itself in various forms — from physical force to pressure from and/or negligence on the part of medical personnel.

3.3 As to the alleged violation of article 10 (h) of the Convention, the author argues that she received no specific information about the sterilization, the effects of the operation on her ability to reproduce, or advice on family planning and contraceptive measures — either immediately before the operation or in the months/years before the operation was carried out. She claims that she was not given information about the nature of the operation, the risks and consequences, in a way that was comprehensible to her before she was asked to sign the consent form. The author quotes paragraph 22 of general recommendation No. 21 of the Committee on marriage and family relations in support of her argument.

3.4 In support of the alleged violation of article 12 of the Convention, the author refers to paragraphs 20 and 22 of general recommendation No. 24 of the Committee on women and health and submits that she was unable to make an informed choice before signing the consent form for the sterilization procedure. She argues that her inability to give informed consent on account of the incomplete information provided is a violation of the right to appropriate health-care services. She also argues that there is a clear causal link between the failure of the doctors to fully inform her about the sterilization and the injuries that it caused, both physical and emotional.

3.5 The author claims that article 16, paragraph 1 (e) of the Convention has been violated by virtue of the State party limiting her ability to reproduce and she refers to paragraph 22 of general

recommendation No. 21 of the Committee and paragraphs 22 and 24 of general recommendation No. 19 of the Committee on violence against women in this instance. She adds that the facts of the case show that she was denied access to information, education and the means to exercise her right to decide freely and responsibly on the number and spacing of her children.

3.6 The author requests the Committee to find a violation of articles 10 (h), 12 and 16, paragraph 1 (e) and to request the State party to provide just compensation.

3.7 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted because the decision of the appellate court specifically stated that no appeal against it was permitted. The author also maintains that the matter has not been and is not currently being examined under any other procedure of international investigation or settlement.

3.8 Furthermore, the author notes that, although the incident giving rise to the communication occurred on 2 January 2001, Hungary has been legally bound by the Convention's provisions since 3 September 1981. The author claims that, most importantly, the effects of the violations at issue are of an ongoing, continuing character. In particular, as a result of having been sterilized without giving full and informed consent, she can no longer give birth. In light of these considerations, the author submits that the communication is admissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol.

The State party's submission on admissibility and merits

4.1 By submission of 7 March 2005, the State party argues that the author failed to exhaust domestic remedies because she did not make use of judicial review (so-called "revision of judgement"), a special remedy under Hungarian law.

4.2 The State party contends that the communication is inadmissible *ratione temporis* pursuant to article 4, paragraph 2 (e). It is the opinion of the State party that the author has not sustained a permanent disability because the sterilization is not irreversible surgery and has not caused permanent infertility. The State party

therefore argues that there has been no permanent violation of the rights of the author.

4.3 The State party is of the view that article 10 (h) of the Convention has not been violated since, aside from the dead embryo, the author has three other living children, which means that she must have been familiar with the nature of pregnancy and childbirth without further education.

4.4 The State party submits that article 12, paragraph 1, of the Convention has not been violated because the author received free of charge the benefits and services that all Hungarian women receive during pregnancy and after childbirth. The author was given all information prior to the surgery in a way that was appropriate in the given circumstances. According to the court decision, the author had been in a condition in which she was able to understand the information.

4.5 The State party stresses that the Public Health Act allows a physician to perform sterilization surgery without following any special procedure when it seems to be appropriate in certain circumstances. These circumstances were present, namely that this was not the author's first caesarean section and her womb was in very bad condition. Further, the State party considers that the surgery had been safe because the risk of undergoing another abdominal operation was greater and appeared inevitable in the given circumstances.

The author's comments on the State party's observations on admissibility and merits

5.1 By her submission of 6 May 2005, the author reiterates several of her arguments regarding the admissibility and merits of her claims.

5.2 Concerning article 4, paragraph 1, of the Optional Protocol, the author claims that the State party failed to show that the judicial review (so-called "revision") by the Supreme Court constitutes an effective remedy that is available to the author. She argues that the Constitutional Court of Hungary has held that the Constitution guarantees a one-tier appeal system only. Under this system an appeal of a judgement of an appellate

court is an extraordinary remedy. The author argues that this extraordinary relief was not accessible to her as it could neither be legally substantiated that her case concerned a point of law of general importance that had to be reviewed for the development of the uniform interpretation of the law nor that the final judgement differed from a previous binding decision of the Supreme Court. Between 1 January 2002 and 9 November 2004, the relevant judicial review criteria were, essentially, that the judgement to be reviewed infringed the law and that this affected the merits of the case and (a) the decision differed from the binding decisions of the Supreme Court on the uniform interpretation of the law or (b) review by the Supreme Court would be necessary to develop a point of law of conceptual importance. The author also argues that the second alternative conditions of (a) and (b) were declared unconstitutional by the Constitutional Court of Hungary on 9 November 2004 because they could not be applied predictably as they were not straightforward. As such, she was really without effective access to judicial review.

5.3 With regard to article 4, paragraph 2 (e) of the Optional Protocol, the author states that her reproductive capacity has been taken away by State actors — the doctors at the public hospital. She reiterates that sterilization, in law and in medical practice, is regarded as irreversible surgery and that it has had a profound impact on her.

5.4 The author claims that her fundamental rights to health and human dignity and freedom as elaborated in several international outcome documents, notably the Programme of Action of the International Conference on Population and Development (Cairo, 1994) and the Beijing Declaration and Platform for Action (Beijing, 1995) and the outcome documents of their respective five-year reviews have been violated.

5.5 The author also argues that in the instant case, the Hungarian health service did not at any time provide any form of information on family planning, the sterilization surgery, or the effects on her reproductive capacity. The State party appears to believe that the author should have been self-taught on the use of contraception and family planning. The appellate court agreed that the Hungarian health service failed to fulfil its obligation to

provide appropriate information. According to the author, failure to provide her with specific information on contraception and family planning before coercing her into signing the consent to sterilization constitutes a breach of article 10 (h) of the Convention.

5.6 The author maintains that the question of payment for health care is irrelevant. She also maintains that she did not consent to the sterilization in that she did not receive clear and suitably worded information and was not in a condition to understand the form that she was asked to sign.

5.7 The author points out that the appellate court stressed in its decision that because the sterilization was not a life-saving measure, informed consent was required and that it had not been established that the conditions had been met for performing the surgery pursuant to article 15, paragraph 3 of the Health Care Act.

5.8 The author argues that informed consent is based on a patient's ability to make an informed choice and its validity does not depend on the form in which it is given. Written consent merely can serve as evidence.

The State party's further submission on admissibility and merits

6.1 By its submission of 22 June 2006, the State party maintains its position that judicial review by the High Court of Justice is an extraordinary remedy to which the author should have resorted.

6.2 The State party maintains that the method used to sterilize the author was not irreversible. Therefore there is no continuous violation of her rights. The State party cites the Judicial Committee of the Medical Research Council for the authority that ligature can be reversed in 20 to 40 per cent of the cases by a re-fertilization operation.

6.3 The State party sustains its position that the author was given correct and appropriate information both in the pre-natal period and at the time of the surgery. She was also provided with appropriate medical services, including information, during her three previous pregnancies.

6.4 The State party stresses that there is no difference between public and private health services in terms of quality.

6.5 The State party reiterates that the Public Health Act allows physicians to perform sterilization surgery without counselling when it seems appropriate in given circumstances. Under the Act, a physician is given some discretion in certain cases. In this way, preference is given to the patient's right to life and counselling may be simplified. While sterilization is not a life-saving intervention in general, in the present case it had a life-saving function because another pregnancy or abdominal operation would have placed the author in mortal danger. The sterilization was performed to avoid such a situation.

The author's subsequent submission

7.1 By her submission of 5 October 2005, the author maintains that, while surgery to reverse sterilization is sometimes possible, sterilization is carried out with the intention of ending a woman's reproductive capacity permanently. Surgery to reverse sterilization is complex and has a low success rate. The author underpins her claim by referring to publications by individuals, Governments and international organizations. She cites case law in several jurisdictions that view sterilization as an irreversible operation. The doctor who performed the surgery testified that information about sterilization should include the fact that it is an irreversible intervention.

7.2 The success of surgery to reverse sterilization depends on many factors, such as how the sterilization was carried out, how much damage was done to the fallopian tubes or other reproductive organs, the skills of the surgeon and the availability of trained staff and facilities. There are risks associated with the surgery to reverse sterilization. There is an increased likelihood of ectopic pregnancy following reversal surgery, which is a dangerous condition that requires immediate medical attention.

7.3 The author also claims that the Hungarian medical profession regards sterilization as a permanent method of birth control. She states that the medical expert who was involved in the domestic litigation at the request of her attorney stated that a

new abdominal operation might be able to make the fallopian tubes permeable, but its success is questionable and the surgeon who performed the sterilization on the author stated that counselling should include the fact that it is an irreversible intervention.

7.4 The author further states that in order to give a valid opinion on whether the sterilization performed on her could be reversed successfully it would be necessary to know, inter alia, how much damage had been done to her fallopian tubes or other reproductive organs. The author claims that the State party's assertion that the author's operation was not irreversible was made in the abstract and is thereby contrary to the standard medical views, which the author has described.

7.5 Given that the doctors suggested, and the Hungarian Courts confirmed, that a future pregnancy might endanger the author's life as well as that of the child, the author argues that it is unlikely that her sterilization was done in a way that would promote the possibility of a reversal. She further asserts that the Hungarian Courts based their opinion about the reversibility of the author's sterilization exclusively on witness statements of medical staff employed by the respondent hospital and an expert medical report that had not been commissioned by the Court. Moreover, she was not examined for this purpose.

7.6 Despite extensive research, the author is unaware of whether successful surgery to reverse sterilization has been performed in Hungary as from the time of her sterilization. One can make a claim with confidence only when a reversal surgery has been carried out successfully. However, the author cannot be forced to undergo another operation to alleviate the damage. This major abdominal surgery under full anaesthesia carries risks and would not be covered by the State's social security fund.

7.7 The author argues that claims for non-pecuniary damages may be brought without determining whether or not the sterilization is irreversible. The rights of the author to physical integrity, health, honour and human dignity have been violated under the Hungarian Civil Code by the unlawful conduct of the hospital irrespective of any medical possibility of restoring her reproductive capacity. Her loss of fertility caused psychological

trauma and had a detrimental effect on her private life. The unlawful sterilization has had a continuous effect on her life and has not been remedied for almost five years.

7.8 The author further argues that it was questionable to carry out the sterilization — a preventive intervention — together with a reportedly life-saving operation — the caesarean section, thereby prolonging the operating time and increasing the risk to her health. The author also argues that it took 17 minutes for her to be admitted to the hospital, prepared for surgery, given information about the procedures and the risks and consequences of sterilization, sign the statements of consent, and undergo both the caesarean section and the sterilization. The author argues further that this indicates that all steps could not have been carried out properly and that the hospital could only save time on counselling and allowing time for decision-making.

Supplementary observations of the State party

8.1 By its submission of 2 November 2005, the State party continues to assert that it would have been duly justified for the author to initiate a judicial review ("revision of judgement") because even though no damages had been awarded, an actionable infringement had been established. The judicial review is an extraordinary remedy of the Supreme Court that is based on a request to remedy a defect in respect of a legal issue. Such requests are restricted to cases where a third instance review is justified because, for example, it would contribute to the evolution of the law or to the standardization of the application of the law or it would raise a substantial legal issue.

8.2 When the Supreme Court finds that there is cause for review and if it has the necessary data and facts, it hands down a new decision that partly or fully invalidates the decision of the Court of the second instance. Otherwise, when the Supreme Court lacks the necessary data and facts, it remands the case back to the Court of the first or second instance for new proceedings and a decision.

8.3 The State party adds that Council III of the Civil College of the Supreme Court focuses specifically on legal action in medical

malpractice cases and on actions for damages. The State party stresses that the Supreme Court has entertained more than 1,300 reviews since 1993. The State party argues that, therefore it would have provided the author with a suitable forum.

8.4 The State party maintains its position in respect of tubal ligature and states that the nature of the operation does not constitute an ongoing infringement because it does not cause permanent infertility, and refers to the position of the Judicial Committee of the Medical Research Council (see para 6.2 above) on this issue. Furthermore, future pregnancy is also possible through the in vitro fertilization programme, which is financed by the social security system.

Supplementary submission of the author

9.1 By her submission of 16 November 2005, the author submits that the State party disregards the effect of the non-consensual sterilization on her physical integrity and mental health and dignity. In Hungarian medical law, respect for human dignity is a core right from which other rights flow. The Committee recognized in its general recommendation No. 19 that compulsory sterilization adversely affects women's physical and mental health.

9.2 The author argues that informed consent to sterilization is required by international standards and under national law and derives from respect for a woman's human rights as laid down in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, in Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child.

9.3 The author contends that physicians are under an ethical obligation to ensure a woman's right to self-determination by the counselling that precedes any informed decision-making. The Convention on Human Rights and Biomedicine of the Council of Europe, to which Hungary is a party, recognizes the importance of ensuring the dignity of the human being. The instrument's Explanatory Report states that the rule whereby

no one may be forced to undergo an intervention without his or her consent makes clear patients' autonomy in their relationship with health-care professionals.

9.4 The author recalls her extremely vulnerable situation when she sought medical attention on 2 January 2001 as a woman who would lose her child and as a member of a marginalized group of society — the Roma.

9.5 In support of her claims, the author submits a brief prepared by the Center for Reproductive Rights, Inc., in which the latter organization supports the arguments made by the author. The Center for Reproductive Rights contends that the argument of the State party to the effect that the author did not suffer a permanent violation of rights goes against internationally accepted medical standards, which assert that sterilization is a permanent, irreversible procedure.

9.6 The Center for Reproductive Rights underlines that informed consent and the right to information are critical components of any sterilization procedure and that human rights are violated when sterilization is performed without the full and informed consent of the patient. In the instant case the author was not provided with information or advice concerning sterilization, and its effects, risks, or consequences. Nor did she receive information or advice about alternative methods of contraception and family planning in violation of the State party's obligation under article 10 (h) of the Convention.

9.7 The Center for Reproductive Rights states that in the present case, the barely readable, hand-written consent form, which contained the Latin, rather than the Hungarian word for sterilization, while signed, did not indicate that informed consent had been given to the sterilization procedure. Medical personnel failed to communicate to the author in a way that she was capable of understanding and did not take into account her state of shock after losing her child and her very weak physical condition after having lost substantial amounts of blood.

9.8 The Center for Reproductive Rights notes that several international medical bodies, including the World Health Organization, have created specific guidelines and considerations to ensure informed consent in cases of sterilization demonstrates

just how crucial it is that informed consent is obtained prior to delivering the life-altering procedure of sterilization that seriously impacts upon an individual's human rights.

9.9 Given the 17-minute time span between the author's arrival at the hospital and the completion of two operations, the Center for Reproductive Rights contends that it is not feasible that health-care personnel provided the author with thorough information in accordance with international human rights and medical standards. Without that information, the author could not have made a well-considered and voluntary decision. The fact that the author asked the doctor when it would be safe to have another child clearly indicates that it was not explained to the author that she would be prevented from having any more children after the procedure.

9.10 The Center for Reproductive Rights states that international medical standards clearly note that patients must always give their informed consent to sterilization procedures, even in cases that pose a health risk.

9.11 The Center for Reproductive Rights is of the view that by sterilizing the author without her fully informed consent, the State party, through the doctors at the public hospital, violated the author's right to decide on the number and spacing of children by limiting her access to the information that would have allowed her to make the decision as to whether to be sterilized. As a result of the sterilization that was performed without consent, the author no longer has, and will never have the freedom to make decisions as to the number and spacing of children.

Issues and proceedings before the Committee

Consideration of admissibility

10.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

10.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of

international investigation or settlement.

10.3 With regard to the requirement laid down in article 4, paragraph 1, of the Optional Protocol that the Committee ascertain that all available domestic remedies have been exhausted, the Committee notes that the State party drew attention to the special or extraordinary remedy of judicial review (so-called "revision of judgement") of which the author did not make use. According to the State party, this remedy is restricted to cases where a third instance review is justified to remedy a defect in respect of a legal issue. The Committee has to determine whether this remedy was available to the author and, if so should have been pursued by her. In this context, the Committee notes that, according to the author, the criteria for the remedy of judicial review that applied at the time that the appellate court handed down its decision in the author's case have, since that time, been declared unconstitutional by the Constitutional Court of Hungary because they were unpredictable. The State party has not contested this information. The author also maintains that her case did not fulfil the criteria for this remedy. She further maintains that the decision of the Court of Second Instance had specifically stated that no appeal against it was permitted. The State party has acknowledged the extraordinary nature of the remedy. Under these circumstances, the Committee considers that it cannot be expected of the author that she would have availed herself of the remedy. The Committee therefore finds that article 4, paragraph 1, of the Optional Protocol does not preclude the Committee's consideration of the communication of the author.

10.4 In accordance with article 4, paragraph 2 (e) of the Optional Protocol, the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those facts continued after that date. In considering this provision, the Committee notes that the incident which has given rise to the communication occurred on 2 January 2001. This date preceded the entry into force of the Optional Protocol for Hungary 22 March 2001. However, the author has called upon the Committee to determine whether a number of her rights under the Convention have been and continue to be violated as a

result of the sterilization surgery. It has been put forward convincingly that sterilization should be viewed as permanent, in particular: sterilization is intended to be irreversible; the success rate of surgery to reverse sterilization is low and depends on many factors, such as how the sterilization was carried out, how much damage was done to the fallopian tubes or other reproductive organs and the skills of the surgeon; there are risks associated with reversal surgery; and an increased likelihood of ectopic pregnancy following such surgery. The Committee thus considers the facts that are the subject of the communication to be of a continuous nature and that admissibility *ratione temporis* is thereby justified.

10.5 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication admissible.

Consideration of the merits

11.1 The Committee has considered the present communication in light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

11.2 *According to Article 10 (h) of the Convention:*

> ***States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure,on a basis of equality of men and women:***
>
> ***(...)***
>
> ***(h) Access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.***

With respect to the claim that the State party violated article 10 (h) of the Convention by failing to provide information and advice on family planning, the Committee recalls its general recommendation No. 21 on equality in marriage and family relations, which recognizes in the context of "coercive practices

which have serious consequences for women, such as forced … sterilization" that informed decision-making about safe and reliable contraceptive measures depends upon a woman having "information about contraceptive measures and their use, and guaranteed access to sex education and family planning services". The Committee notes the State party's arguments that the author was given correct and appropriate information at the time of the operation, during prenatal care and during her three previous pregnancies as well as its argument that, according to the decision of the lower court, the author had been in a condition in which she was able to understand the information provided. On the other hand, the Committee notes the author's reference to the judgement of the appellate court, which found that the author had not been provided with detailed information about the sterilization, including the risks involved and the consequences of the surgery, alternative procedures or contraceptive methods. The Committee considers that the author has a right protected by article 10 (h) of the Convention to specific information on sterilization and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice. Furthermore, the Committee notes the description given of the author's state of health on arrival at the hospital and observes that any counselling that she received must have been given under stressful and most inappropriate conditions. Considering all these factors, the Committee finds a failure of the State party, through the hospital personnel, to provide appropriate information and advice on family planning, which constitutes a violation of the author's right under article 10 (h) of the Convention.

11.3 *Article 12 of the Convention reads:*

> ***1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health-care services, including those related to family planning.***
>
> ***2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women***

appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

With regard to the question of whether the State party violated the author's rights under article 12 of the Convention by performing the sterilization surgery without obtaining her informed consent, the Committee takes note of the author's description of the 17 minute timespan from her admission to the hospital up to the completion of two medical procedures. Medical records revealed that the author was in a very poor state of health upon arrival at the hospital; she was feeling dizzy, was bleeding more heavily than average and was in a state of shock. During those 17 minutes, she was prepared for surgery, signed the statements of consent for the caesarean section, the sterilization, a blood transfusion and anaesthesia and underwent two medical procedures, namely, the caesarean section to remove the remains of the dead foetus and the sterilization. The Committee further takes note of the author's claim that she did not understand the Latin term for sterilization that was used on the barely legible consent note that had been handwritten by the doctor attending to her, which she signed. The Committee also takes note of the averment of the State party to the effect that, during those 17 minutes, the author was given all appropriate information in a way in which she was able to understand it. The Committee finds that it is not plausible that during that period of time hospital personnel provided the author with thorough enough counselling and information about sterilization, as well as alternatives, risks and benefits, to ensure that the author could make a well-considered and voluntary decision to be sterilized. The Committee also takes note of the unchallenged fact that the author enquired of the doctor when it would be safe to conceive again, clearly indicating that she was unaware of the consequences of sterilization. According to article 12 of the Convention, States parties shall "ensure to women appropriate services in connexion with pregnancy, confinement, and the post-natal period". The Committee explained in its general recommendation No. 24 on women and health that "[A]cceptable services are those that are delivered in a way that ensures that a woman gives her fully informed consent,

respects her dignity…" The Committee further stated that "States parties should not permit forms of coercion, such as non-consensual sterilization … that violate women's rights to informed consent and dignity". The Committee considers in the present case that the State party has not ensured that the author gave her fully informed consent to be sterilized and that consequently the rights of the author under article 12 were violated.

11.4 *Article 16, paragraph 1 (e) of the Convention states:*

> ***States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:***
>
> ***(…)***
>
> ***(e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;***

As to whether the State party violated the rights of the author under article 16, paragraph 1 (e) of the Convention, the Committee recalls its general recommendation No. 19 on violence against women in which it states that "[C]ompulsory sterilization ... adversely affects women's physical and mental health, and infringes the right of women to decide on the number and spacing of their children". The sterilization surgery was performed on the author without her full and informed consent and must be considered to have permanently deprived her of her natural reproductive capacity. Accordingly, the Committee finds the author's rights under article 16, paragraph 1 (e) to have been violated.

11.5 Acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention and makes the following recommendations to the State party:

I. Concerning the author of the communication: provide appropriate compensation to Ms. A. S. commensurate with the gravity of the violations of her rights.

II. General:

- Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee's general recommendations Nos. 19, 21 and 24 in relation to women's reproductive health and rights are known and adhered to by all relevant personnel in public and private health centres, including hospitals and clinics.
- Review domestic legislation on the principle of informed consent in cases of sterilization and ensure its conformity with international human rights and medical standards, including the Convention of the Council of Europe on Human Rights and Biomedicine ("the Oviedo Convention") and World Health Organization guidelines. In that connection, consider amending the provision in the Public Health Act whereby a physician is allowed "to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances".
- Monitor public and private health centres, including hospitals and clinics, which perform sterilization procedures so as to ensure that fully informed consent is being given by the patient before any sterilization procedure is carried out, with appropriate sanctions in place in the event of a breach.

11.6 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the Hungarian language and widely distributed in order to reach all relevant sectors of society.

Committee on the Elimination of Discrimination against Women

Thirty-seventh session

15 January-2 February 2007

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No. 11/2006*

Submitted by	:	Ms. Constance Ragan Salgado
Alleged victim	:	The author
State party	:	United Kingdom of Great Britain and Northern Ireland
Date of communication	:	11 April 2005 (initial submission)
Document references	:	Transmitted to the State party on 15 February 2006 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 22 January 2007

* The following members of the Committee participated in the examination of the present communication: Ferdous Ara Begum, Magalys Arocha Dominguez, Meriem Belmihoub-Zerdani, Saisuree Chutikul, Dorcas Coker-Appiah, Mary Shanthi Dairiam, Cees Flinterman, Naela Mohamed Gabr, Françoise Gaspard, Hazel Gumede Shelton, Ruth Halperin-Kaddari, Tiziana Maiolo, Violeta Neubauer, Pramila Patten, Silvia Pimentel, Fumiko Saiga, Heisoo Shin, Glenda P. Simms, Dubravka Šimonoviæ, Anamah Tan, Maria Regina Tavares da Silva, Zou Xiaoqiao.

Adopts the following:

1. Decision on admissibility

The author of the communication dated 11 April 2005 is Constance Ragan Salgado, a British citizen born on 24 November 1927 in Bournemouth, United Kingdom of Great Britain and Northern Ireland, currently residing in Bogotá, Colombia. She claims to have been a victim of violations by the United Kingdom of Great Britain and Northern Ireland of articles 1, 2 (f) and 9, paragraph 2, of the Convention on the Elimination of All Forms of Discrimination against Women by having been prevented from transmitting her British nationality to her eldest son by descent. The author is representing herself. The Convention and its Optional Protocol entered into force for the State party on 7 May 1986 and 17 March 2004, respectively.

2. The facts as presented by the author

2.1 In 1954, the author left England to make her home in Colombia with her husband. On 16 September 1954, the author's eldest son, Alvaro John Salgado, was born in Colombia of a Colombian father. At that time, the author made an application to the United Kingdom Consulate to obtain British nationality for her son and was told that the entitlement to British nationality came through the paternal line; as his father was Colombian, her son was considered an alien.

2.2 The British Nationality Act 1981 ("the 1981 Act"), which entered into force in 1983, amended previous nationality legislation and conferred equal rights to women and men in respect of the nationality of their children under the age of 18. The author was told that her son still did not qualify for British citizenship under the 1981 Act. The author protested by letter to the British Consul and to the Home Office, claiming that, had her son claimed British nationality through a British father instead of through her, no age limit would have applied to him.

2.3 British nationality legislation again changed when the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") entered into force on 30 April 2003 and added section 4C to the 1981 Act ("Acquisition by Registration: Certain persons born between 1961 and 1983"). Children — by now adults — born abroad

between 7 February 1961 and 1 January 1983 of British mothers would now be eligible to register as British nationals if they satisfied certain other conditions.

2.4 In early 2003, the British Consul in Bogotá contacted the author to enquire as to whether she had any children born after 7 February 1961. She replied that her youngest son was born in 1966 and had acquired British nationality, but that her eldest son still had not. She was told that he did not qualify due to the fact that he was born before the cut-off date established under the 2002 Act.

3. The complaint

3.1 The author alleges that she suffered sex-based discrimination on account of the British Nationality Act 1948 ("the 1948 Act"), under which she was unable to register her son as a British national because the 1948 Act provided for citizenship by descent from a father but not from a mother. She claims that the discrimination has been continuous because it was neither eliminated under the 1981 Act nor under the 2002 Act and her son remains ineligible to acquire British nationality by registration on account of his age. The author maintains that discrimination against women has only been partially corrected through legislation.

3.2 The author claims that, although women are supposed to be able to transmit their citizenship to any children born abroad "on equal terms with men", she has continued to be unable to do so, because children who were already adults before 1981 are not covered under current legislation. She maintains that the 2002 Act discriminates against her and other British mothers whose children, having foreign fathers, were born abroad before 7 February 1961.

3.3 All of the author's efforts to obtain citizenship for her eldest son have been to no avail. She has sent letters to various government officials, including the British Embassy in Bogotá and the Home Office, as well as to the Prime Minister and a number of Members of Parliament.

4. The State party's observations on admissibility

4.1 By its submission of 13 April 2006, the State party requests that

the communication be rejected as inadmissible. It notes that the United Kingdom ratified the Convention, subject to certain reservations, on 7 April 1986, and that the Committee's jurisdiction to receive and consider this communication in relation to alleged violations of the rights set out in the Convention derives from the State party's accession to the Optional Protocol to the Convention with effect from 17 December 2004.

4.2 As to the facts, the State party states that there is no indication of the nature of the application that the author made to the United Kingdom Consulate in Bogotá in 1954, but from the summary contained in the communication, it appears to have been no more than a request for recognition of the British citizenship of Alvaro John Salgado on the basis of his birth as the son of a mother who was a British citizen. This application could not have succeeded as a matter of the domestic law in force at that time.

4.3 Following repeated approaches to the United Kingdom Government, whether through its embassy or consulate in Bogotá or directly, the State party points out that the author has been informed that her eldest son remains ineligible for registration as a British citizen on the basis of having been born to a mother who had British citizenship.

4.4 According to the State party, there is no evidence to suggest that the author has ever sought to challenge any of these decisions through the English courts and the State party is not aware of any such proceedings having been brought by the author.

4.5 As regards relevant domestic law, the State party holds that, as a matter of general principle, under English law the acquisition of British citizenship by birth or descent is determined by reference to the individual's circumstances at the time of his or her birth and by reference to the law in force at the time of his or her birth. Exceptions would have to be expressly provided for in subsequent legislation.

4.6 The State party explains that, at the time of the birth of the author's eldest son, i.e., 16 September 1954, British nationality law was governed by the 1948 Act. Under section 5 of the 1948 Act, a person born after the commencement of the Act (subject to a number of exceptions) had a right to British citizenship by

descent if his or her father was a British citizen at the time of birth. This automatic right by descent was not available to persons whose mother was a British citizen at the time of birth. The 1948 Act provided other means of acquiring British citizenship. Minor children of any British citizen could also be registered as a British citizen upon application made in the prescribed manner by a parent or guardian at the discretion of the Secretary of State of the Home Department, who, in principle, would have exercised his discretion in line with Departmental policy at the time. Naturalization was subject to a number of conditions, including that the applicant was of full age and capacity.

4.7 The State party states that, in the mid- to late 1970s, the United Kingdom Government recognized the discriminatory impact of section 5 of the 1948 Act and, as a result, the (then) Home Secretary, Merlyn Rees, announced to the House of Commons on 7 February 1979 a transitional policy change with regard to applications by women who were born in the United Kingdom to have their minor children registered as British citizens. This general and transitional policy would apply to anyone under the age of 18 on the date that the new policy was announced (i.e., any child born to a British citizen mother after 7 February 1961).

4.8 The State party further explains that, on 1 January 1983, the 1981 Act entered into force and repealed the provisions of the 1948 Act. Section 2 (1) of the 1981 Act made provision for acquisition of citizenship by descent from either parent under certain conditions. The 1981 Act was further amended by section 13 of the 2002 Act. The amendment introduced section 4C into the 1981 Act, which gave persons who were covered by the policy announced on 7 February 1979 a statutory entitlement to register as British citizens. The effect of the new provision was that they were able to apply for registration even after they had attained the age of majority; the applicant had to have been born after 7 February 1961 and before 1 January 1983. These two dates reflect the fact that the policy announced on 7 February 1979 applied to persons born after 7 February 1961 and that 1 January 1983 was the date on which the 1981 Act came into force, from which time a mother who was a British citizen could transmit her citizenship in the same way as a British citizen father.

4.9 As regards inadmissibility *ratione temporis*, the State party states that the author complains that the United Kingdom violated her rights under article 9 (2) of the Convention and that she rightly draws the Committee's attention to the definition of discrimination against women in article 1 of the Convention and the obligation assumed under article 2 (f). The State party submits that, in order to determine whether the communication is inadmissible *ratione temporis*, it is important to consider with care the actual content of the complaint that is being made. The author complains that, in relation to her son born in 1954, she does not enjoy equal rights with men in relation to the passing on of her nationality to that son. She clearly did enjoy such equal treatment in relation to her younger son. As a result, the State party states that it is important to consider what rights, as a matter of domestic law, men have (or had) in relation to passing on their nationality to their children in relation to which women did not have "equal rights".

4.10 The State party clarifies that, under section 5 of the 1948 Act, children of British citizen fathers would be automatically, as from the time of their birth, British citizens by descent, while the children of British citizen mothers (whose father was not also British) did not enjoy such a right. The change in policy of 7 February 1979 did not provide any further rights for men in relation to the nationality of their children. On the contrary, it sought to modify, long before the United Kingdom ratified the Convention, existing practice in order to mitigate the effects of what was recognized as discrimination against women in the operation of the 1948 Act. The 1981 Act also did not provide any different rights for men in relation to the nationality of their children. Finally, section 4C of the 1981 Act, introduced by the 2002 Act, also provided no new or different rights for men in relation to the nationality of their children, but rather made statutory provision for persons born to British mothers, who were covered by the change in policy of 7 February 1979. As a result, it is submitted that the author's complaint can only be directed at the right provided under section 5 of the 1948 Act (at that time for men only) to pass on their nationality to their child born abroad automatically at the time of their birth. In temporal terms, the critical date, therefore, is the date of birth of the author's eldest son, namely 16 September 1954, i.e., long before the Convention was

adopted by the General Assembly or came into force, and even longer before the United Kingdom ratified the Convention and/or acceded to the Optional Protocol. This would also be in line with the general principle underlying United Kingdom nationality law and the nationality law of most States, namely that a person's entitlement to acquisition of (British) citizenship by birth or descent is determined by reference to that person's circumstances and the law applicable at the time of their birth. Reference to the child's date of birth (or at the very least, the period of time during which the child can still be described as such) is also clearly in line with the wording of article 9 (2) of the Convention, which expressly relates to equal rights for women in relation to the nationality of their children. This reference to "children" must be read in line with the use of the term in other relevant international (human rights) instruments, such as article 24 (3) of the International Covenant on Civil and Political Rights; article 7 (1) of the United Nations Convention on the Rights of the Child; and articles 6 (1) and (2) of the European Convention on Nationality. In the United Kingdom, the age of majority was, at all material times, 18 years.

4.11 The State party further submits that, at the very least, from the date on which the author's eldest son achieved his majority, i.e., 16 September 1972, the author ceased to be the "victim" of the denial of British citizenship to her oldest son. As a general rule, it is only while a person is still a child that he should be able to benefit from a parent's citizenship; once a person has attained the age of majority, any application for citizenship should be based on the child's own personal connections with a country rather than through the child's mother's connections. Section 4C of the 1981 Act is very much an exception to this general rule and applies to a very limited category of persons. Therefore, any complaint about the continuing failure to recognize or register the author's eldest child as a British citizen would have to be brought by him.

4.12 The State party maintains that this analysis would not be undermined by a suggestion, if it were made, that the author has repeatedly and unsuccessfully sought the registration of her eldest son as a British citizen, whether under section 7 of the 1948 Act as applied following the announcement of the change

of policy on 7 February 1979 or under the 1981 Act. Any refusal to register the author's eldest child under those provisions could not, by itself, form the basis of a complaint that the author has not been granted "equal rights with men", because none of these provisions are addressed to or provide specific rights for men. In any event, it is not clear that the author ever made an application for registration in relation to her eldest son at any time while he was still a child and, if so, that she pursued the available domestic remedies in the English courts.

4.13 The State party submits that, for these reasons, it cannot be said that this is a case in which "the facts that are the subject of the communication continued after that date", i.e., of entry into force of the Optional Protocol for the United Kingdom; nor can it be said that the latest correspondence gives rise to a new violation. While the consequences of the difference in treatment experienced by the author in 1954 (or between 1954 and 1972) subsist in that the author's son remains without British citizenship, the State party also submits that the situation as it relates to the son's nationality does not, by itself, constitute a continuing or new violation of the author's rights under article 9 (2) of the Convention.[1]

4.14 As regards exhaustion of domestic remedies, the State party states that article 4 (1) of the Optional Protocol requires the exhaustion of all available domestic remedies. The State party submits that this requires the author to have made "use of all judicial or administrative avenues that offer [her] a reasonable prospect of success".[2] There is no indication in the author's communication that, at the relevant time (in 1954 or between 1954 and 1972), she ever made an application for registration of her eldest son as a British citizen under section 7 (1) of the 1948 Act, an option that was clearly open to her. Furthermore, any refusal of such an application could and should have been challenged by way of judicial review in the High Court, which body exercised then

1 Reference is made by analogy to the following two decisions of the Human Rights Committee: communication No. 174/1984 J. K. v Canada (CCPR/C/23/D/174/1984) and communication No. 872/1999 Kurowski v Poland (CCPR/C/77/D/872/1999).

2 The State party quotes from communication No. 437/1990 Patiño v Panama (CCPR/C/52/D/437/1990) and refers to communication No. 942/2000 Jonassen et al. v Norway (CCPR/C/76/D/942/2000).

and continues to exercise a supervisory jurisdiction over the exercise of statutory functions and/or the exercise of discretion by public authorities, including the Home Office in relation, inter alia, to decisions concerning questions of acquisition of nationality. The High Court, in exercising that jurisdiction, had and continues to have the power to quash decisions and/or make mandatory orders requiring a different decision to be made where it concludes that the public authority has acted unlawfully or irrationally. While the Convention had not been concluded at that stage, it would have been open to the author to challenge any refusal to exercise the discretion under section 7 (1) of the 1948 Act in favour of her eldest son on the basis that it was unreasonable under domestic law. She might have referred to the European Convention on Human Rights, which formed an international obligation to which the United Kingdom was subject and which would have been relevant to the exercise of statutory discretion.

4.15 The State party submits that the test for an effective remedy cannot be whether a complaint would have been successful or not but rather whether there is a procedure available in the domestic system capable of considering and, if persuaded of the merits, providing a remedy without the need for recourse to the Committee.[3] If the Committee were to consider, contrary to the above submissions, that the matter complained of by the author amounts not to a continuing violation but to a fresh violation which is not inadmissible *ratione temporis*, the State party maintains that the complaint would be equally inadmissible by reason of the author's failure to have exhausted all available domestic remedies. While there is ample evidence that the author has sought to exhaust the available administrative remedies (and any legislative redress, through her communications with the United Kingdom Government and sympathetic members of Parliament), she has wholly failed to exhaust the judicial remedies

3 The State party refers to the European Court of Human Rights application No. 18304/05 Nykytina v United Kingdom and suggests that the case applies mutatis mutandis in relation to the present communication.

available.[4] The State party further maintains that the rule that local remedies must be exhausted before international proceedings may be instituted is also a well-established rule of customary international law. The rule reflects the view that "the State, where a violation occurred, should have an opportunity to redress it by its own means, within the framework of its own domestic legal system" (International Court of Justice in the *Interhandel* Case, ICJ Reports, 1959, p. 6 (27)).

4.16 The State party also maintains that the rules of international law emphasize the high test of ineffectiveness of possible remedies which must be found to exist before the general requirement of exhaustion of domestic remedies will be held no longer to apply.[5] The author could and should have brought proceedings under the Human Rights Act 1998 to challenge the lawfulness of the continuing refusal to register her eldest son as a British citizen.

4.17 The State party states that if, and insofar as the High Court were to find a violation of the author's rights under the European Convention, the High Court would have had two options: either to seek to construe the 1981 Act in a manner compatible with the author's or her son's rights under the European Convention on Human Rights; or to make a declaration of incompatibility under section 4 of the Human Rights Act 1998. The latter option enables the United Kingdom Government to take swift remedial action. The State party further states that, while it is impossible to assess with any certainty whether such an application to the High Court would, in the end, be successful, there can be no suggestion that such access to the High Court does not amount to an effective remedy which the author is required to have exhausted.

4.18 The State party also puts forward that the communication is inadmissible because it is manifestly ill-founded. Upon ratification

4 The State party refers to the jurisprudence on the matter of the Human Rights Committee, in particular, to communication No. 222/1987 H. K. v France (CCPR/C/37/D/222/1987) and to jurisprudence of the European Court of Human Rights, including Fressoz and Roire v France [GC] No. 29183/95, paragraph 37, ECHR 1999-I; Kudla v Poland [GC], No. 30210/96, paragraph 152, ECHR 2000-XI; and Banfield v UK, app. No. 6223/04, decision of 18 October 2005.

5 The State party refers to C. F. Amerasinghe's Local Remedies in International Law (1990), p. 195; and Oppenheim's International Law (9th edition), p. 525.

of the Convention, the United Kingdom entered the following reservation in relation to article 9:

> The British Nationality Act 1981, which was brought into force with effect from January 1983, is based on principles which do not allow of any discrimination against women within the meaning of article 1 as regards acquisition, change or retention of their nationality or as regards the nationality of their children. The United Kingdom's acceptance of article 9 shall not, however, be taken to invalidate the continuation of certain temporary or transitional provisions which will continue in force beyond that date.

The State party considers that the continuing consequences of the application of section 5 of the 1948 Act, which is at the heart of the communication, clearly falls within the "temporary and transitional provisions" contained in the 1981 Act. As a consequence, the effect of the reservation is that the United Kingdom incurs no responsibility under the Convention. The State party refers to the statement on reservations to the Convention of the Committee on the Elimination of Discrimination against Women, published as part of its report on its nineteenth session (see A/53/38/Rev.1). The State party considers that certain passages in that statement rightly reflect the position under international law, and in particular articles 19-23 of the Vienna Convention on the Law of Treaties, that it is for the States parties rather than the Committee to make binding determinations of whether a reservation entered by another State party is impermissible as being incompatible with the object and purpose of the Convention. The State party submits that the reservation to article 9 cannot be classified as "incompatible with the object and purpose of the present Convention" so as to be prohibited by article 28 (2) of the Convention. The State party considers it noteworthy that none of the other States parties to the Convention has sought to object to or challenge the compatibility of this reservation with the object and purpose of the Convention; nor has the Committee, other than through its general expression of concern about the number of reservations to the Convention contained in its general recommendations 4, 20, and 21 (paras. 41-48) and its statement

on reservations, in its concluding comments on the United Kingdom raised any specific concerns about this reservation to article 9. As a consequence, the State party argues that the present communication, insofar as it is not inadmissible for any of the reasons set out above, is manifestly ill-founded because its subject matter falls squarely within the reservation entered by the United Kingdom upon ratification.

4.19 For the reasons set out above, the State party submits that the communication is inadmissible under article 4 (1) and/or article 4 (2) of the Optional Protocol; and insofar as that is relevant, at the very latest through the adoption of the 1981 Act, the United Kingdom has fulfilled its obligations under article 9 (2) read with articles 1 and 2 (f) of the Convention.

5. The author's comments on the State party's observations on admissibility

5.1 By her submission of 29 May 2006, the author reiterates her contention that her communication should be considered admissible as the facts that are the subject of the communication clearly continued after the entry into force of the Optional Protocol for the State party concerned inasmuch as the discrimination was once again made obvious on 7 February 2006 at the second reading of the Nationality, Immigration and Asylum Act 2006, when amendment 67, which mentioned her name as well as others and would have lifted the discrimination against them, was denied.

5.2 The author points out that the "temporary or transitional provisions" mentioned in the reservation of the United Kingdom have lasted for more than 20 years. The author is of the view that the temporary or transitional provisions ought to have been repealed with the 2002 Act or in 2006. She adds that the Government has deliberately blocked the legal route to redress by way of the reservation vis-à-vis those British mothers with children born before 1961 of foreign fathers.

5.3 The author maintains that the State party has not gone as far as it reasonably and practicably could to address the fact that persons, such as her son, are still unable to acquire British citizenship through the maternal line.

5.4 The author points out that the 1981 Act acknowledged the right of minor children born abroad after 7 February 1961 to British mothers (and foreign fathers) to register as British citizens. She maintains that once the Government acknowledged the right of selfsame persons to register as British citizens as adults under the 2002 Act, the cut-off date of 7 February 1961 was no longer relevant. If it was unjust and discriminatory to deny some children (who had now reached the age of majority) born abroad to British mothers the right to apply for registration, it would be equally unjust and discriminatory to deny the same right to others. The author wonders why the same right of registration could not be given to those adults who had previously been discriminated against under the 1981 Act.

5.5 The author disputes that nationality is determined by applying the legislation in force at the time of the individual's birth inasmuch as certain persons were able to register through their mothers in 1981 under the 1981 Act and on their own behalf as adults in 2002.

5.6 The author concedes that the 1981 Act partially corrected the sex discrimination which had historically existed by recognizing the right, as from that date, for women to pass on their nationality to their children on equal terms with men. However, it created new discrimination between certain mothers, those with children born before 1961 and those with children born after 1961. She submits that the discrimination was retained under the 2002 Act because those children who were born after 1961, whose mothers had failed to register them as minors, were able to do so as adults.

5.7 The author questions the fairness of nationality legislation that has not been made retroactive at least for those people who are still alive and affected by it and compares the situation with the Act abolishing slavery under which all slaves were freed. She believes that there should be a legitimate aim before a difference in treatment can be justified and wonders what that legitimate aim could be to single out one group of mothers. While the author recognizes that no Government can redress all the injustices of history and past generations, she thinks that it is any Government's obligation to redress those injustices which are within their capabilities, such as the present-day discrimination

against living people, particularly if formal commitments, such as the Human Rights Act and the Convention on the Elimination of All Forms of Discrimination against Women, have been made by that Government to the rest of the world. She furthermore submits that the only possible excuse for a State not to fulfil its human rights obligations to its citizens would perhaps be overwhelmingly damaging consequences for the country (which is certainly not perceived as being the case) and, if this were so, the Government would have the moral duty to explain such consequences fully and satisfactorily.

5.8 The author maintains that a mother has a fundamental human right to pass on her nationality to her child on equal terms with men and with other mothers, whether that child be a minor or an adult, particularly as the same right has already been recognized for other persons, as minors and as adults, by two different nationality acts. She considers all continuing injustices, predicated or defended on the grounds that they were legal when they originated, unacceptable.

6. Additional comments of the State party on admissibility

6.1 By its submission of 21 July 2006, the State party continues to rely on its submissions on admissibility made on 13 April 2006.

6.2 The State party notes that the author has not expressly sought to engage with or dispute the State party's submission regarding the following: that the communication is inadmissible *ratione temporis*, by reason of the fact that, at the very least from the date on which the author's eldest son achieved his majority on 16 September 1972 (i.e., well before the adoption of the Convention by the General Assembly and, a fortiori, well before the State party's ratification of the Convention), the author had ceased to be a victim; that the communication is inadmissible by reason of her failure to exhaust all available domestic remedies; and/or that the provisions of the continuing consequences of section 5 of the 1948 Act are clearly covered by the actual terms of the reservation entered by the State party upon ratification of the Convention. The State party submits that any one of the first two grounds alone or these grounds in combination are sufficient to render this communication inadmissible.

6.3 The State party states that the author's comments appear to have focused primarily on the assertion that the legislative provisions covered by the reservation have been more than "temporary" but have been "prolonged for more than 20 years", and on the implicit invitation to the Committee to rule that the reservation is impermissible and invalid.

6.4 The State party furthermore argues that the author's comments ignore the fact that the reservation refers to certain temporary and transitional provisions which will continue in force beyond January 1983 and that the continued consequences of section 5 of the 1948 Act clearly fall within the definition of such a temporary, and more importantly, transitional provision. The State party explains that the word "transitional" is intended to refer to measures in place until the transfer from an "old" to a "new" regime has been completed, and not merely to provisions that remain in place until appropriate legislative changes can be made. Section 5 of the 1948 Act is the sole remnant of the old regime following the transition to the new, non-discriminatory regime set up under the 1981 Act. The State party further submits that, ever since the introduction of the 1981 Act, women have been able to pass their nationality to their newborn children in the same way as men have.

6.5 Moreover, the State party submits that the author's comments ignore the position that, as a matter of international law, the Committee is not competent to make binding determinations of whether the reservation is impermissible owing to incompatibility with the object and purpose of the Convention; and the State party's submissions that the reservation is, in any event, not incompatible with the object and purpose of the Convention.

7. Additional comments of the author on admissibility

7.1 By her submission of 9 August 2006, the author reiterates that her communication should not be declared inadmissible *ratione temporis*. She claims that the nationality law in force at the time of her son's birth in 1954 was discriminatory and that the current nationality law is discriminatory and that she is indeed still a victim.

7.2 As regards the exhaustion of all available domestic remedies, the author claims that, by making repeated applications for the

citizenship of her eldest son since his birth through the British Consulate, the Home Office, correspondence with government officials and legal advisers, she has exhausted all those remedies available to her. Her complaint was even presented in the House of Lords debate as recently as 7 February 2006 and was firmly rejected. She further asserts that, in order to obtain the justice she seeks, the law has to be changed. She maintains that the avenue of judicial procedure is a long and complicated route and would present for her, at her age and with her resources, an enormous and impossible task far beyond her capabilities and energies; to challenge an Act of Parliament and all that it implies is an impossible mission for her to carry out. She states that she could easily exhaust what is left of her life seeking to exhaust all available domestic remedies and still arrive at nothing. She sought the help of the Committee for this reason.

7.3 As regards the provisions of the continuing consequences of section 5 of the 1948 Act being clearly covered by the reservation, the author finds it hard to imagine that any continuing violation of human rights can be maintained indefinitely on grounds that a reservation exists to allow it. She would like to assume that this was not the interpretation intended when the reservation was originally made.

7.4 The author argues that the State party is relying on semantics when it refers to the meaning of "temporary" and "transitional". The author's interpretation is that anything declared "temporary" and "transitional" will eventually be reviewed and changed. She claims that the State party took the route of solving the injustice by waiting it out until all the people who are suffering the injustice become irrelevant by death and, as a consequence, the problem is solved by its disappearance — rather than by extirpating the old remnant of medieval legislation which discriminated against old ladies and their adult children both in reference to men and to other women. She considers this route to be contrary to the object and purpose of the Convention as well as to official statements made publicly by the State party to the effect that discrimination has no place in British society.

7.5 The author submits that the Committee is competent to make binding determinations on whether the reservation entered by the State party upon ratification was impermissible and invalid

and she also submits that the reservation is indeed incompatible with the object and purpose of the Convention.

8. Issues and proceedings before the Committee concerning admissibility

8.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

8.2 In accordance with rule 66 of its rules of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

8.3 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

8.4 In accordance with article 4, paragraph 2 (e), of the Optional Protocol, the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date. The Committee observes that the Optional Protocol entered into force for the United Kingdom of Great Britain and Northern Ireland on 17 March 2004. The Committee considers that the alleged discrimination complained of originated at the time of the birth of the author's eldest son (16 September 1954), well before the Optional Protocol or even the Convention were adopted. In those days, British nationality law did not grant women — the author included — the right to pass on British citizenship to their children, whereas their husbands, had they been British, would have had such a right. The Committee notes that on 7 February 1979 there was a change in government policy, which allowed applications by British women to have their minor children born on or after 7 February 1961 registered as British citizens. As a result of this change, the author acquired the right to pass on her nationality in 1980 through registration to her youngest son, who was born in 1966 and was still a minor, whereas she was unable to do so for her eldest son, who remained ineligible on account of his age. Bearing this in mind, the Committee considers that the relevant facts of the case, i.e., the alleged discrimination against

the author as manifested in her inability, as compared to a British male citizen, to pass on her nationality to her eldest son (as opposed to any discrimination against her eldest son) stopped on the date on which her son achieved his majority, i.e., 16 September 1972. After that date, her son had a primary right to either retain his acquired nationality or to apply for the nationality of another State, subject to the conditions set by that State. More generally, such discrimination against the author and other women stopped on 7 February 1979 with the new government policy. Both dates precede the entry into force of the Optional Protocol. The Committee, therefore, concludes that the communication is inadmissible *ratione temporis*.

8.5 In accordance with article 4, paragraph 1 of the Optional Protocol, the Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted, unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief. The Committee notes the State party's unchallenged assertion that, at the relevant time, i.e., in 1954 or between 1954 and 1972, the author never made an application for registration of her eldest son as a British citizen under section 7(1) of the 1948 Act and that, had she done so, any refusal of such an application could have been challenged by way of judicial review in the High Court, which body exercised then and continues to exercise a supervisory jurisdiction over the exercise of statutory functions and/or the exercise of discretion by public authorities. Neither has the author ever since 1972 challenged in the High Court the continuing refusal of the British authorities to grant her eldest son British nationality. In line with a longstanding jurisprudence of other international human rights treaty bodies, in particular the Human Rights Committee,[6] the Committee on the Elimination of Discrimination against Women considers that authors of communications are required to raise in substance before domestic courts the alleged violation of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women, which enables a State party to remedy an alleged

6 See for example communication Nos. 222/1987 M. K. v France, 1356/2005 Antonio Parra Corral v Spain and 1420/2005 Eugene Linder v Finland.

violation before the same issue may be raised before the Committee. The Committee on the Elimination of Discrimination against Women for this reason finds the present communication inadmissible under article 4, paragraph 1, of the Optional Protocol.

8.6 The Committee sees no reason to find the communication inadmissible on any other grounds.

8.7 The Committee therefore decides:

(a) That the communication is inadmissible under article 4, paragraph 2 (e), of the Optional Protocol because the disputed facts occurred prior to the entry into force of the Optional Protocol for the State party and did not continue after that date and under article 4, paragraph 1, of the Optional Protocol because of the author's failure to exhaust domestic remedies;

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

Committee on the Elimination of Discrimination against Women

Thirty-eighth session

14 May-1 June 2007

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (Thirty-eighth session)

Communication No. 10/2005*

Submitted by	:	Ms. N. S. F.
Alleged victim	:	The author
State party	:	The United Kingdom of Great Britain and Northern Ireland
Date of communication	:	21 September 2005 (initial submission)
Document references	:	Transmitted to the State party on 8 March 2006 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 30 May 2007

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* The following members of the Committee participated in the examination of the present communication: Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Saisuree Chutikul, Ms. Dorcas Coker-Appiah, Ms. Mary Shanthi Dairiam, Mr. Cees Flinterman, Ms. Naela Mohamed Gabr, Ms. Françoise Gaspard, Ms. Ruth Halperin-Kaddari, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Hanna Beate Schöpp-Schilling, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonoviæ, Ms. Anamah Tan and Ms. Maria Regina Tavares da Silva.

Adopts the following:

Decision on admissibility

1.1 The author of the communication dated 21 September 2005 with supplementary information dated 16 October and 2 December 2005, is Ms. N. F. S. a Pakistani asylum seeker born on 15 November 1976 and currently living in the United Kingdom with her two children. She claims to fear for her life at the hands of her former husband in Pakistan and for her two sons' future and education if the authorities of the United Kingdom deport her. She does not invoke specific provisions of the Convention on the Elimination of All Forms of Discrimination against Women nor demonstrate how the Convention may have been violated but her claims appear to raise issues under article 2 and 3 of the Convention. The author is representing herself. The Convention and its Optional Protocol entered into force for the State party on 7 April 1986 and 17 December 2004 respectively.

1.2 The author requested interim measures of protection in accordance with article 5, paragraph 1 of the Optional Protocol.

1.3 On 8 March 2006, the Committee requested the State Party not to deport the author and her two children, U. S. and I. S., while their case was pending before the Committee.

The facts as presented by the author

2.1 The author got married on 17 May 1996 and had two sons, born respectively in 1998 and 2000, resulting from this union. Her husband's personality and behaviour changed towards the author immediately after the marriage took place and he started to subject her to numerous instances of ill-treatment – particularly when he was affected by alcohol and drugs or after he had incurred gambling losses. He compelled her with threats to obtain money from her parents and he used the money to feed his habits.

2.2 She endured marital rape and eventually divorced her husband in August 2002. She subsequently fled to a nearby village with her two sons. She continued to be harassed by her ex-husband after the divorce and had to move two more times. She reported

him to the police but did not receive any protection.

2.3 In January 2003, the author's ex-husband came to her home with other men armed with knives and threatened to kill her. After this incident, the author decided to flee the country with the help of an agent and funding from her parents.

2.4 The author arrived in the United Kingdom on 14 January 2003 with her two children and applied for asylum the same day. She was in transit in Cairo, Egypt, for one day prior to her arrival in the United Kingdom. On 27 February 2003, the Immigration and Nationality Directorate of the Home Office rejected the author's asylum application.

2.5 The author appealed against the "Refusal of Leave to Enter after Refusal of Asylum" by the Immigration and Nationality Directorate of the Home Office, claiming that her removal would be a violation of the 1951 Convention on the Status of Refugees and the European Convention on Human Rights and Fundamental Freedoms. She asserted that her claim was credible; that she had a well-founded fear of persecution by a non-state agent, for the 1951 Convention reason of her membership in a particular social group (women in Pakistan); that Pakistan did not offer her sufficient protection; that there was no real option of internal flight and, in any event it would not be reasonable; and that article 3 of the European Convention on Human Rights and Fundamental Freedoms was violated.

2.6 On 16 April 2004, the Adjudicator, sitting as the first instance court, dismissed the author's appeal on both asylum and human rights grounds. The Adjudicator, while sympathizing with the author's situation and accepting the author's factual case, did not accept the author's submission that she could not relocate further away from her ex-husband within Pakistan. As a result, he concluded that he could not see why there would be a serious possibility or reasonable chance of her being at risk of further persecution on return to Pakistan if she relocated within the country. He also found that the difficulties that she might experience on return would not constitute persecution as such and that she would be sufficiently protected in Pakistan, including because the parties were no longer married.

2.7 On 31 July 2004, the Immigration Appeal Tribunal refused the author's application for permission to appeal. The decision was communicated to the author on 10 August 2004.

2.8 The author challenged the decision of the Immigration Appeal Tribunal by applying for Statutory Review in accordance with the relevant Civil Procedure Rules before the High Court of Justice, Queens Bench Division, Administrative Court.

2.9 On 14 October 2004, the High Court affirmed the decision. It found no error of law; that the Adjudicator had been entitled to conclude, for the reasons he gave, that, even accepting the central core of the claimant's story as he did, she would not be at risk if on return to Pakistan she relocated to a place sufficiently far away from her former husband's residence; and that there would be no real prospect of an appeal succeeding. The decision was final.

2.10 On 15 October 2004, the author received "notification of temporary admission to a person who is liable to be detained".

2.11 The author filed for "discretionary leave" or "temporary protection" to remain in the United Kingdom on humanitarian grounds with the Home Office on 4 January 2005.

2.12 On 1 February 2005, the Immigration and Nationality Directorate wrote to the author informing her that she had no further right of appeal and that the decision on her earlier claim would not be reversed. She was reminded that she had no basis to stay in the United Kingdom and should make arrangements to leave the United Kingdom without delay. She was apprised of where to call for help and advice on returning home.

2.13 On 29 September 2005, the author made an application to the European Court of Human Rights alleging a violation by the United Kingdom of her rights under article 3 (prohibition of torture) and article 8 (right to respect for private and family life). On 24 November 2005, the European Court of Human Rights, sitting as a Committee of three judges, declared the communication inadmissible on the basis that it "did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

2.14 On 8 May 2006, the Home Office refused her request for discretionary leave on humanitarian grounds. The decision indicated that the author had no basis to stay in the United Kingdom and should make arrangement to leave the country without delay. If she failed to do so, the Home Department would take steps to ensure her removal to Pakistan. No deadline was given.

The complaint

3.1 The author claims that she came to the United Kingdom to save her life and her children's future and education. She alleges that as a single woman with two children, she would not be safe outside of the United Kingdom. She claims that if she is deported back to Pakistan, she will no longer be protected and will be killed by her ex-husband and her children's future and education will be put at risk. She therefore asks that she and her two children be allowed to live in the United Kingdom and be granted temporary protection. The author makes it clear that if she is deported, she will leave her children behind.

3.2 She also alleges that both the asylum and human rights based procedures were not fair.

The State party's observations on admissibility

4.1 By its submission of 5 May 2006, the State party challenges the admissibility of the communication, arguing that the author failed to exhaust domestic remedies, that the same matter has been examined by the European Court of Human Rights, and that the communication was not sufficiently substantiated and/or manifestly ill-founded.

4.2 As regards exhaustion of domestic remedies, the State party alleges that there are effective remedies against the decision of 8 May 2006 by the Home Office, which refused the author's request for discretionary leave on humanitarian grounds. It nevertheless acknowledges that because this decision was communicated to the author at the same time as the State party's observations on admissibility, the author could not have exhausted this remedy before actually getting the Home Office

decision. Therefore, the Government alleges that now, the author can seek permission to apply for judicial review by the High Court. The State party considers the granting of such permission very unlikely, in the light of the history of the case and the fact that such a request would be based upon the same factual and legal arguments developed previously before the national authorities (and the European Court of Human Rights). The State party notes that no allegation based on discrimination against the author as a woman was ever formulated by the author before the domestic authorities and/or courts and that, as a consequence, the domestic authorities and/or courts have not yet had an opportunity to deal with the author's assertion that the decisions involved sex discrimination. The State party refers in that regard to the jurisprudence of the Human Rights Committee explaining the purpose of the exhaustion of domestic remedies.[1]

The State party further notes that such an allegation would be relevant for consideration by the Home Office when considering the author's case and, in due course, could therefore form part of the arguments in support of an application for permission to apply to the High Court for judicial review. While recognizing that it might not have been necessary for the author to have referred specifically to any specific articles before the national authorities, the State party maintains that the author has to raise the relevant substantive right(s) in the Convention for an application to be admissible.

4.3 The State party also contends that the communication is inadmissible on the basis that the same matter has already been examined under another procedure of international investigation or settlement pursuant to article 4, paragraph 2 (a) of the Optional Protocol, i.e. the European Court of Human Rights. The State party submits that individual proceedings before the European Convention on Human Rights constitute proceedings of international investigation or settlement.[2] It further refers to

1 The State party refers to paragraph 8.3 of the Human Right Committee communication 222/78 T.K. v France (CCPR/C/37/D/222/1987).

2 The State party refers to Joseph, Schultz and Castan's The International Covenant on Civil and Political Rights – Cases, Materials and Commentary(2nd edition, 2004) para 5.06.

the concept of "same matter"[3] and maintains that the same author has brought an identical complaint to the European Court of Human Rights,[4] which was given an application number 116/05. The application was dismissed as inadmissible by the European Court of Human Rights on the basis that it "did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols". Therefore, the State party contends that present communication is inadmissible in accordance with article 4, paragraph 2 (a) of the Optional Protocol.

4.4 The State party further submits that the present communication is both not sufficiently substantiated and manifestly ill-founded. The communication is allegedly not sufficiently substantiated as it is based on the same facts as the asylum claim considered and rejected by the national authorities; and does not explain the legal basis on which the author could claim a breach of the Convention by the State party in the way its national authorities treated her asylum and human rights case or in the way the author (and their children) are being treated while residing in the United Kingdom on a temporary basis. The author does not make any assertion that the State party is responsible for any breaches of the author's Convention rights that may or may not have occurred in her country of origin, which is a State party to the Convention. The author has not identified the Convention provision she is relying on in her communication or before the national authorities and European Court of Human Right and both have considered and rejected her assertion that her removal to Pakistan creates "substantial grounds for believing that there is a real risk" of a violation of her right not to be tortured or subjected to inhuman or degrading treatment of punishment. In addition, the author has produced no new facts or arguments to refute this assessment.

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3 The State party refers to the jurisprudence on the notion of "same matter" of the Human Rights Committee, communications 75/80 Fanaly v Italy (CCPR/C/18/D/75/1980) para. 7.2 and 168/84 V.O. v Norway (CCPR/C/25/D/168/1984) para. 4.4. It also refers to the Human Rights Committee communications 993/2001, 994/2001 and 995/2001, para. 6.4.

4 The State party adds "even if perhaps slightly more focused in relation to the provisions of the European Convention on Human Rights which were alleged to have been violated".

4.5 For the reasons set out above, the State party submits that the communication is inadmissible under article 4(1) and/or article 4(2) of the Optional Protocol.

The author's comments on the State party's observations on admissibility

5.1 By her submission of 25 July 2006, the author reiterates the following contention : that she and her two children were victims of brutalities by her husband; that after the family court ruled in her favour for divorce, her ex-husband attempted to kill her and to snatch the children from her; that she had no adequate protection from the Pakistani authorities; and that as a consequence, she had no other option but to save herself and her children by leaving her relatives and her country to seek refuge in the United Kingdom. She claims she is now living free from fear and only wants the best future and education for her children.

5.2 The author claims that on 31 July 2004 she was refused permission from the Immigration Appeal Tribunal to appeal the decision of the Adjudicator. She also claims that she challenged the decision of the Immigration Appeal Tribunal by applying for Statutory Review but that the High Court dismissed it on 14 October 2004. Furthermore, she contends that the High Court decision indicated that the decision was final and that no appeal was possible. The author nevertheless applied on 7 December 2005 for judicial review to the Civil Appeal Office of the Royal Court but her application was rejected on 9 December 2005. The author further claims she had exhausted all remedies in relation to her applicationfor reconsideration of her case on humanitarian grounds. She also argues that she has availed herself of two extraordinary remedies, namely two letters she sent to the Prime Minister and Her Majesty the Queen respectively, asking for a grant of discretionary leave on humanitarian grounds.

5.3 The author acknowledges that she applied to the European Court of Human Rights under article 3 (prohibition of torture) and article 8 (right to respect for private and family life) but maintains that her application was dismissed because at the time, she had

informed the Court that she was awaiting the decision from the Home Office on her application for "discretionary leave" or "temporary protection". She also maintains that her complaint is not the same matter that has been examined under the European Court of Human Rights.

5.4 The author submitted a copy of the decision of the European Court of Human Rights which reads: "In the light of all the material in its possession, and in so far as the matters complained of were within its competence, the Court found that they did not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols".

5.5 The author submits that her communication is sufficiently substantiated and not ill- founded.

Additional comments of the State party on admissibility

6. By its submission of 11 September 2006, the State party stated that it did not intend to submit further comments on the author's submission.

Issues and proceedings before the Committee concerning admissibility

7.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

7.2 In accordance with rule 66 of its rules of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

7.3 The Committee considers that the communication submitted by the author raise the issue of the situation in which women who have fled their country because of fear of domestic violence often find themselves. It recalls that in its General Recommendation No. 19 on violence against women, the Committee states that the definition of discrimination against women in article 1 of the Convention includes gender-based violence, i.e. violence that is directed against a woman because she is a woman or that affects women disproportionately. It notes

the State party's challenge to the admissibility of the author's claim under article 4, paragraph 1, of the Optional Protocol because the author did not avail herself of the possibility of seeking permission to apply for a judicial review by the High Court of the refusal to grant her discretionary leave to remain in the country on humanitarian grounds. In this regard, the Committee notes that the State party is of the view that the granting of permission to the author to apply for a judicial review is uncertain. It further notes the State party's contention that no allegation of sex discrimination has ever been formulated by the author and, as a consequence, the domestic authorities and/or courts have not yet had an opportunity to deal with such an assertion, which, in the opinion of the Committee, needs to be considered in the light of the State party's obligations under the Convention. As a consequence, and in the light of the State party's view that an allegation of sex discrimination would be relevant for consideration by the Home Office when again considering the author's case and, in due course, could form part of the arguments in support of an application for permission to apply to the High Court for a judicial review, the Committee finds that the author should avail herself of this remedy. For this reason, the Committee on the Elimination of Discrimination against Women finds the present communication inadmissible under article 4, paragraph 1, of the Optional Protocol.

7.4 The Committee sees no reason to find the communication inadmissible on any other grounds.

7.5 The Committee therefore decides:

(a) That the communication is inadmissible under article 4, paragraph 1, of the Optional Protocol on the basis that all available domestic remedies have not yet been exhausted;

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

Committee on the Elimination of Discrimination against Women

Thirty-ninth session

23 July-10 August 2007

Views

Communication No. 5/2005

Submitted by	: The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased)
Alleged victim	: Sahide Goekce (deceased)
State party	: Austria
Date of communication	: 21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

On 6 August 2007 the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 5/2005. The views are appended to the present document.

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-ninth session)

Communication No. 5/2005*

Submitted by	:	The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce, and Guelue Goekce (descendants of the deceased)
Alleged victim	:	Sahide Goekce (deceased)
State party	:	Austria
Date of communication	:	21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 6 August 2007,

Having concluded its consideration of communication No. 5/2005, submitted to the Committee on the Elimination of Discrimination against Women by the

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* The following members of the Committee participated in the examination of the present communication: Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Saisuree Chutikul, Ms. Mary Shanthi Dairiam, Mr. Cees Flinterman, Ms. Naela Mohamed Gabr, Mr. Françoise Gaspard, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonoviæ, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao.

Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce, descendants of Sahide Goekce (deceased) under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

1. The authors of the communication dated 21 July 2004 with supplementary information dated 22 November and 10 December 2004, are the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organizations in Vienna, Austria, that protect and support women victims of gender-based violence. They claim that Sahide Goekce (deceased), an Austrian national of Turkish origin and former client of the Vienna Intervention Centre against Domestic Violence, is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 30 April 1982 and 22 December 2000, respectively.

The facts as presented by the authors

2.1 The first violent attack against Sahide Goekce by her husband, Mustafa Goekce, that the authors are aware of took place on 2 December 1999 at approximately 4 p.m. in the victim's apartment at which time Mustafa Goekce choked Sahide Goekce and threatened to kill her. Sahide Goekce spent the night with a friend of hers and reported the incident to the police with the help of the Youth Welfare Office of the 15th district of Vienna the following day.

2.2 On 3 December 1999, the police issued an expulsion and prohibition to return order against Mustafa Goekce covering the Goekce apartment, pursuant to Section 38a of the Security Police Act (Sicherheitspolizeigesetz).[1] In the documentation supporting the order, the police officer in charge of the case stated that two light red bruises were visible under Sahide Goekce's right ear that, according to her, were from the choking.

2.3 Under section 107, paragraph 4, of the Penal Code (Strafgesetzbuch), a threatened spouse, direct descendant, brother or sister or relative who lives in the same household of the accused must give authorization in order to prosecute the alleged offender for making a criminal dangerous threat. Sahide Goekce did not authorize the Austrian authorities to prosecute Mustafa Goekce for threatening her life. Mustafa Goekce was, therefore, charged only with the offence of causing bodily harm. He was acquitted because Sahide Goekce's injuries were too minor to constitute bodily harm.

2.4 The next violent incidents of which the authors have knowledge occurred on 21 and 22 August 2000. When the police arrived at the Goekce's apartment on 22 August 2000, Mustafa Goekce was grabbing Sahide Goekce by her hair and was pressing her face to the floor. She later told the police that Mustafa Goekce had threatened to kill her the day before if she reported him to the police. The police issued a second expulsion and prohibition to return order against Mustafa Goekce covering the Goekce's apartment and the staircase of the apartment building, which was valid for 10 days. They informed the Public Prosecutor that Mustafa Goekce had committed aggravated coercion (because of the death threat) and asked that he be detained. The request was denied.

2.5 On 17 December 2001, 30 June 2002, 6 July 2002, 25 August 2002 and 16 September 2002 the police were called to the Goekce's apartment because of reports of disturbances and disputes and/or battering.

1 This act has been translated as both the Security Police Act and the maintenance of Law and Order Act.

2.6 The police issued the third expulsion and prohibition to return order against Mustafa Goekce (valid for 10 days) as a result of an incident on 8 October 2002 that Sahide Goekce had called in; she claimed that Mustafa Goekce called her names, tugged her by her clothes through the apartment, hit her in the face, choked her and again threatened to kill her. Her cheek was bruised and she had haematoma on the right side of her neck. Sahide Goekce pressed charges against her husband for causing bodily harm and making a criminal dangerous threat. The police interrogated Mustafa Goekce and again requested that he be detained. Again, the Public Prosecutor denied the request.

2.7 On 23 October 2002, the Vienna District Court of Hernals issued an interim injunction for a period of three months against Mustafa Goekce, which forbade Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Sahide Goekce or the children. The order was to be effective immediately and entrusted to the police for execution. The children are all minors (two daughters and one son) born between 1989 and 1996.

2.8 On 18 November 2002, the Youth Welfare Office (which had been in constant contact with the Goekce family because of the violent assaults that took place in front of the children) informed the police that Mustafa Goekce had not obeyed the interim injunction and was living in the family apartment. The police did not find him there when they checked.

2.9 The authors indicate that the police knew from other sources that Mustafa Goekce was dangerous and owned a handgun. At the end of November 2002, Remzi Birkent, the father of Sahide Goekce, informed the police that Mustafa Goekce had frequently phoned him and threatened to kill Sahide Goekce or another family member; no police report was filed by the police officer taking the statement of Mr. Birkent. Mustafa Goekce's brother also informed the police about the tension between Sahide Goekce and her husband and that Mustafa Goekce had threatened to kill her several times. His statement was not taken seriously by the police or recorded. The police did not check whether Mustafa Goekce had a handgun even though a weapons prohibition was in effect against him.

2.10 On 5 December 2002, the Vienna Public Prosecutor stopped the prosecution of Mustafa Goekce for causing bodily harm and making a criminal dangerous threat on grounds that there was insufficient reason to prosecute him.

2.11 On 7 December 2002, Mustafa Goekce shot Sahide Goekce with a handgun in their apartment in front of their two daughters. The police report reads that no officer went to the apartment to settle the dispute between Mustafa Goekce and Sahide Goekce prior to the shooting.

2.12 Two-and-a-half hours after the commission of the crime, Mustafa Goekce surrendered to the police. He is reportedly currently serving a sentence of life imprisonment in an institution for mentally disturbed offenders.[2]

The complaint

3.1 The authors complain that Sahide Goekce is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women because the State party did not actively take all appropriate measures to protect Sahide Goekce's right to personal security and life. The State party failed to treat Mustafa Goekce as an extremely violent and dangerous offender in accordance with criminal law. The authors claim that the Federal Act for the Protection against Violence within the Family (Bundesgesetz zum Schutz vor Gewalt in der Familie) does not provide the means to protect women from highly violent persons, especially in cases of repeated, severe violence and death threats. Instead, the authors insist that detention is necessary. The authors also allege that had the communication between the police and Public Prosecutor been better and faster, the Public Prosecutor would have known about the ongoing violence and death threats and may have found that he had sufficient reason to prosecute Mustafa Goekce.

2 He is reportedly of sound mind (compos mentis) vis-à-vis the murder but was diagnosed to be mentally disturbed to a higher degree generally.

3.2 The authors further contend that the State party also failed to fulfil its obligations stipulated in the general recommendations Nos. 12, 19 and 21 of the Committee on the Elimination of Discrimination against Women, the United Nations Declaration on the Elimination of Violence against Women, the concluding comments of the Committee (June 2000) on the combined third and fourth periodic report and the fifth periodic report of Austria, the United Nations Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, several provisions of the outcome document of the twenty-third special session of the General Assembly, article 3 of the United Nations Universal Declaration of Human Rights, articles 6 and 9 of the International Covenant on Civil and Political Rights, several provisions of other international instruments, and the Austrian Constitution.

3.3 With regard to article 1 of the Convention, the authors contend that women are far more affected than men by the failure of public prosecutors to take domestic violence seriously as a real threat to life and their failure to request detention of alleged offenders as a matter of principle in such cases. Women are also disproportionately affected by the practice of not prosecuting and punishing offenders in domestic violence cases appropriately. Furthermore, women are disproportionately affected by the lack of coordination of law enforcement and judicial personnel, the failure to educate law enforcement and judicial personnel about domestic violence and the failure to collect data and maintain statistics on domestic violence.

3.4 With regard to article 1 together with article 2 (a), (c), (d) and (f) and article 3 of the Convention, the authors maintain that the lack of detention of alleged offenders in domestic violence cases, inadequate prosecution and lack of coordination among law enforcement and judicial officials and the failure to collect data and maintain statistics of incidences of domestic violence resulted in inequality in practice and the denial of Sahide Goekce's enjoyment of her human rights. She was exposed to violent assault, battery, coercion and death threats and when Mustafa Goekce was not detained, she was murdered.

3.5 With regard to articles 1 together with 2 (e) of the Convention, the authors state that the Austrian criminal justice personnel failed

to act with due diligence to investigate and prosecute acts of violence and protect Sahide Goekce's human rights to life and personal security.

3.6 With regard to article 1 together with article 5 of the Convention, the authors claim that the murder of Sahide Goekce is one tragic example of the prevailing lack of seriousness with which violence against women is taken by the public and by the Austrian authorities. The criminal justice system, particularly public prosecutors and judges, consider the issue a social or domestic problem, a minor or petty offence that happens in certain social classes. They do not apply criminal law to such violence because they do not take the danger seriously and view women's fears and concerns with a lack of gravity.

3.7 The authors request the Committee to assess the extent to which there have been violations of the victim's human rights and rights protected under the Convention and the responsibility of the State party for not detaining the dangerous suspect. The authors also request the Committee to recommend that the State party offer effective protection to women victims of violence, particularly migrant women, by clearly instructing public prosecutors and investigating judges about what they ought to do in cases of severe violence against women.

3.8 The authors further request the Committee to recommend to the State party to implement a "pro-arrest and detention" policy in order to effectively provide safety for women victims of domestic violence and a "pro-prosecution" policy that would convey to offenders and the public that society condemns domestic violence and ensure coordination among the various law enforcement authorities.

3.9 The authors also request the Committee to recommend to the State party to ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with organizations that work to protect and support women victims of gender-based violence and to ensure that training programmes and education on domestic violence be compulsory for criminal justice personnel.

3.10 As to the admissibility of the communication, the authors maintain that there are no other domestic remedies that could possibly

have been used to protect Sahide Goekce's personal security and to prevent her homicide. Both the expulsion and prohibition to return orders and the interim injunction proved ineffective. All of the deceased's own attempts to obtain protection (calling the Vienna Police several times when Mustafa Goekce assaulted and choked her; three formal complaints to the police; pressing charges against Mustafa Goekce) and the attempts of others (neighbours calling the Vienna Police; the victim's father reporting on the death threats; Mustafa Goekce's brother reporting that Mustafa Goekce had a handgun) were in vain.

3.11 In the submission of 10 December 2004, the authors indicate that no civil action has been brought by the heirs under the Act on Official [State] Liability. The authors contend that such an action would not be an effective remedy against the lack of protection of Sahide Goekce and the failure to prevent her homicide. Suing the State for omissions and negligence would not bring her back and would serve the different purpose of providing the heirs with compensation for sustaining a loss and other damages. The two approaches, compensation on the one hand and protection on the other are opposites. They differ in respect of the beneficiary (the heirs versus the victim), what the intentions are (to compensate for loss versus to save a life) and timing (after death rather than prior to death). If the State party protected women effectively, there would be no need to establish State liability. Additionally, compensation suits entail huge costs. The authors state that they have submitted the communication in order to call the State party to account for its omissions and negligence rather than to obtain compensation for the heirs. Finally, suing the State party would be unlikely to bring effective relief in accordance with article 4 of the Optional Protocol.

3.12 The authors also state that they have not submitted the communication to any other body of the United Nations or any regional mechanism of international settlement or investigation.

3.13 On the issue of *locus standi*, the authors maintain that it is justified and appropriate for them to submit the complaint on behalf of Sahide Goekce — who cannot give consent because she is dead. They consider it appropriate to represent her before the Committee because she was a client of theirs and had a personal relationship with them and because they are special protection

and support organizations for women victims of domestic violence; one of the two organizations is an intervention centre against domestic violence that was reportedly established pursuant to Section 25, paragraph 3, of the Federal Security Police Act. They are seeking justice for Sahide Goekce and to improve the protection of women in Austria from domestic violence so that her death would not be in vain. This being said, the authors have obtained the written consent of the City of Vienna Office for Youth and Family Affairs, the guardian of Sahide Goekce's three minor children.

The State party's submission on admissibility

4.1 By its submission of 4 May 2005, the State party describes the sequence of events leading up to the murder of Sahide Goekce. Mustafa Goekce was not prosecuted for making a criminal dangerous threat against Sahide Goekce on 2 December 1999 because she did not authorize the authorities to do so. The authorities proceeded to prosecute him for maliciously inflicting bodily harm. According to the court records, Sahide Goekce did not want to testify against Mustafa Goekce and expressly asked the court not to punish her husband. He was acquitted because of an absence of evidence.

4.2 On 23 August 2000, the police issued an expulsion and prohibition to return order against Mustafa Goekce. They reported by phone to the Public Prosecutor about an incident involving aggravated coercion and making a criminal dangerous threat that had occurred the previous day.

4.3 On 18 September 2000, the Public Prosecutor received a written complaint (Anzeige) regarding the incident of 22 August 2000. When interrogated, Sahide Goekce said that she had suffered an epileptic fit and bouts of depression and denied that Mustafa Goekce had threatened to kill her. As a consequence, the Public Prosecutor discontinued the proceedings against Mustafa Goekce for aggravated coercion and making a criminal dangerous threat.

4.4 On 13 January 2001, the court with competence over guardianship matters restricted Mustafa Goekce's and Sahide Goekce's role in the care and upbringing of their children and required them to comply with measures agreed upon in

cooperation with the Youth Welfare Office. In its decision, the court noted that Mustafa Goekce and Sahide Goekce always tried to give an impression of living a well-ordered life. When asked about the charges of inflicting bodily harm and making a criminal dangerous threat, both Mustafa Goekce and Sahide Goekce considered it important to note that they had reconciled fully shortly after each incident.

4.5 Mustafa Goekce and Sahide Goekce agreed to go into partner therapy and to stay in contact with the Youth Welfare Office. Until summer 2002, they were in therapy. The city administration also offered them a new and more spacious apartment to meet their pressing accommodation needs. In spite of these arrangements, the police repeatedly intervened in the couple's disputes on 17 December 2001, 30 June 2002, 6 July 2002, 25 August 2002 and 16 September 2002.

4.6 On 23 October 2002 the Hernals District Court issued an interim injunction against Mustafa Goekce pursuant to section 382b of the Act on the Enforcement of Judgments (Exekutionsordnung) that prohibited him from returning to the apartment and its immediate surroundings and from contacting the children and Sahide Goekce. She gave testimony before the judge in the presence of Mustafa Goekce (although she had been informed of her rights) that she would make every effort to keep the family together, that Mustafa Goekce had a very good relationship with the children and that he assisted her in the household because of her epilepsy.

4.7 A police report of 18 November 2002 showed that the Youth Welfare Office requested the police to come to the Goekce apartment because he had violated the interim injunction and was in the apartment. Mustafa Goekce was no longer there when the police arrived. Sahide Goekce seemed angry that the police had come and asked them why they came almost on a daily basis although she had expressly declared that she wished to spend her life together with her husband.

4.8 On 6 December 2002, the Vienna Public Prosecutor's Office withdrew the charges of making a criminal dangerous threat that related to an incident that took place on 8 October 2002, because Sahide Goekce gave a written statement to the Police in which she claimed that a scrap had caused her injury. She

also stated that her husband had repeatedly over a number of years threatened to kill her. The Public Prosecutor proceeded on the assumption that the threats were a regular feature of the couple's disputes and would not be carried out. Sahide Goekce repeatedly tried to play down the incidents in the interest of preventing the prosecution of Mustafa Goekce. By doing this and refusing to testify in the criminal proceedings, she contributed to the fact that he could not be convicted of a crime.

4.9 On 7 December 2002, Mustafa Goekce came to the apartment in the early hours of the morning and opened the door with a key given to him by Sahide Goekce one week earlier. He left the apartment at 8.30 a.m. only to return at noon. Sahide Goekce shouted at him that he was not the father of all her children and Mustafa Goekce shot her dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him.

4.10 According to an expert witness at the trial of Mustafa Goekce, he had committed the murder under the influence of a paranoid jealousy psychosis which absolved him of criminal responsibility. For this reason, the Vienna Public Prosecutor's Office requested that he be placed in an institution for the criminally insane. On 23 October 2003, the Vienna Regional Criminal Court ordered Mustafa Goekce to be placed in such an institution.

4.11 As to admissibility, the State party disputes that domestic remedies have been exhausted. Firstly, Sahide Goekce did not give the competent authorities her authorization to prosecute Mustafa Goekce for making a criminal dangerous threat. Nor was she prepared to testify against him. She asked the court not to punish her husband and, after filing charges, regularly made great efforts to play down the incidents and deny their criminality.

4.12 The State party further argues that the Federal Act for the Protection against Violence within the Family constitutes a highly effective system to combat domestic violence and establishes a framework for effective cooperation among various institutions. Details are provided about aspects of the system, including the role of intervention centres. In addition to criminal measures, there are a number of police and civil-law measures to protect against domestic violence. Shelters supplement the system. It is possible to settle disputes in less severe cases under the

Maintenance of Law and Order Act (Sicherheitspolizeigesetz).

4.13 Sahide Goekce never made use of section 382b of the Act on the Enforcement of Judgments to request an interim injunction against Mustafa Goekce. Instead, she made it clear that she was not interested in further interference with her family life. She never made a clear decision to free herself and the children from their relationship with her husband (for example, she gave him the keys to the apartment, despite there being a valid interim injunction). Without such a decision on the part of Ms. Goekce, the authorities were limited in the actions that they could take to protect her. Effective protection was doomed to fail without her cooperation.

4.14 Against this background, the use of detention was not justified in relation to the incident of 8 October 2002. Mustafa Goekce had no criminal record and the Public Prosecutor did not know at the time that Mustafa Goekce had a weapon. The Public Prosecutor did not consider that the known facts indicated an imminent danger of Mustafa Goekce committing a homicide; detention could only be justified *ultima ratio*. In light of Sahide Goekce's apparent anger at the police intervention on 18 November 2002 (see above paragraph 4.7), the Public Prosecutor could not assume that the charge would lead to a conviction and prison sentence. The court must take the principle of proportionality into account when detaining a defendant and must, in any event, set aside the detention if the duration becomes disproportionate to the expected sentence.

4.15 Furthermore, Sahide Goekce would have been free to address the Constitutional Court (Verfassungsgerichtshof) with a complaint in accordance with article 140, paragraph 1, of the Federal Constitution (Bundes-Verfassungsgesetz) that would challenge the provision that did not allow her to appeal against the decisions of the Public Prosecutor not to issue a warrant for the arrest of Mustafa Goekce. Assuming that they can show a current and direct interest in the preventive effect of the repeal of the pertinent provision for the benefit of victims of domestic violence, such as Sahide Goekce, it may still be possible for her surviving heirs to address the Constitutional Court on this question.

4.16 The State party also argues that special training courses are held on a regular basis for judges and the police on domestic violence. Cooperation between judges and the police is constantly reviewed in order to ensure more rapid intervention by organs of the State — the aim being to prevent as far as possible tragedies such as that of Sahide Goekce without improper interference into a person's family life and other basic rights.

The author's comments on the State party's observations on admissibility

5.1 By their submission of 31 July 2005, the authors contend that the victim and the authors have exhausted all domestic remedies, which would have been likely to bring sufficient relief. They claim that there is no legal obligation to apply for civil measures — such as an interim injunction.

5.2 The authors also are of the view that the idea of requiring a woman who is under threat of death to file an application to the Constitutional Court was not an argument put forward by the State party in good faith. The procedure lasts for some two to three years and, for this reason, would be unlikely to bring sufficient relief to a woman who has been threatened with death.

5.3 The authors consider that the State party has wrongfully placed the burden and responsibility of taking steps against a violent husband on the victim and has failed to understand the danger the victim faces and the power of the perpetrator over the victim. The authors, therefore, believe that section 107, paragraph 4, of the Penal Code covering authorization for prosecutions against persons who make criminal dangerous threats should be repealed so that the burden will be placed on the State — where it belongs — and would reinforce the fact that making a criminal threat is a crime against the community as well as a crime against an individual victim.

5.4 The authors clarify that Sahide Goekce was afraid to leave her violent husband. Victims try to avoid actions that might increase the danger they face (the "Stockholm Syndrome") and often feel compelled to act in the interest of the perpetrator. She should not be blamed for not being in a position to separate due to psychological, economic and social factors.

5.5 The authors also dispute the State party's description of certain facts; Mustafa Goekce (and not Sahide Goekce) stated that she had an epileptic fit and suffered from depression. She did not, as claimed by the State party, deny the threats of her husband. She refused to testify against Mustafa Goekce only once. If Sahide Goekce played down the incidents in front of the Youth Welfare Office, it was because she was afraid to lose her children. The authors also point out that Mustafa Goekce quit therapy and that it would have been easy for the police to discover that Mustafa Goekce was carrying a gun. They also point out that Sahide Goekce called the police the night before she was killed — a fact that demonstrates how great her fear was and that she was willing to take steps to prevent him from coming to the apartment.

5.6 As to the State party's comments about effective cooperation among various institutions, the police and the Public Prosecutor only began to talk to the Vienna Intervention Centre against Domestic Violence after Sahide Goekce's death.

Additional comments of the State party on admissibility

6.1 By its submission of 21 October 2005, the State party firmly rejects the arguments put forward by the authors and maintains its previous submission. The State party points out that the authors not only refer to alleged failures on the part of the competent Public Prosecutor and investigating judge but to the law itself. Their criticism relates to the legal framework, the application of legal provisions that protect the right to life, physical integrity and the right to respect for private and family life and the failure to take enough effective measures in a general, abstract way.

6.2 Under article 140, paragraph 1, of the Federal Constitution any individual may challenge legal provisions for being unconstitutional if he/she alleges direct infringement of individual rights insofar as the law has been operative for that individual without the delivery of a judicial decision or ruling. There are no time limits for filing such applications.

6.3 The aim of the procedure would be to redress an alleged violation in law. The Constitutional Court only considers the application legitimate if in repealing the provision at issue, the legal position

of the applicant would be changed to such an extent that the alleged negative legal implications no longer exist. Furthermore, the legally protected interests of the applicant must be actually affected. This must be the case both at the time that the application is filed and when the Constitutional Court takes its decision. Successful applicants are entitled to compensation.

6.4 Section 15 of the Constitutional Court Act (Verfassungsgerichtshofgesetz) contains the general requirements as to form when addressing the Constitutional Court. These requirements include: that the application must be in writing; that the application must refer to a specific provision in the Constitution; the applicant must set out the facts; and the application must contain a specific request. Under section 62, paragraph 1 of the Act, the application must state precisely which provisions should be repealed. Moreover, the application must explain in detail why the challenged provisions are unlawful and to what extent the law had been operative for the applicant without the delivery of a judicial decision or ruling. Under section 17, paragraph 2 of the Act, applications must be filed by an authorized lawyer.

6.5 If the Constitutional Court agrees with the applicant, it issues a ruling setting aside these provisions. The Federal Chancellor is then under an obligation to promulgate the repeal of these provisions in the Federal Law Gazette, which comes into force at the end of the day of its promulgation. The Constitutional Court may also set a maximum deadline of 18 months for the repeal — which does not necessarily apply to the applicants, themselves. A time limit is fixed if the legislature is to be given an opportunity to introduce a new system that complies with the constitutional framework. In light of its previous decisions, it can be assumed that the Constitutional Court would make use of the latter possibility if it were to decide that a provision should be repealed.

6.6 The procedure under article 140, paragraph 1, of the Federal Constitution may indeed take two to three years, as stated by the authors. However, proceedings may be shorter if their urgency is explained to the Constitutional Court. Constitutional Court proceedings do not provide rapid redress. However, article 4, paragraph 1, of the Optional Protocol to the Convention on

the Elimination of All Forms of Discrimination against Women prescribes the exhaustion of all available domestic remedies unless the proceedings would be unreasonably prolonged or no effective relief could be expected.

6.7 The requirement of exhausting domestic remedies reflects a general principle of international law and a usual element of international human rights mechanisms. It gives the State concerned an opportunity to remedy human rights violations first at the domestic level.

6.8 The State party argues that Sahide Goekce or her surviving relatives should have made use of the possibility of filing an individual application before the Constitutional Court before submitting a communication to the Committee, as required by article 4, paragraph 1, of the Optional Protocol. The proceedings before the Constitutional Court are not unreasonably prolonged. Moreover, it cannot be said, in light of the case law of the Court, that the surviving relatives would not be entitled to file an individual application because — as far as can be seen — no similar cases have been brought before the Court.

6.9 The State party further maintains that article 4, paragraph 1, of the Optional Protocol does not include only remedies that are successful in any event. If successful, the application could lead to the repeal of the procedural provisions in dispute or to the introduction by the legislature of a new system in the field of domestic violence in line with the intentions of the authors. It is true that now, after the death of Sahide Goekce, there is no effective relief with respect to the effective protection of her personal security and life. However, in the present proceedings, the Committee should examine at the admissibility stage whether Sahide Goekce had an opportunity under domestic law to subject the legal provisions which prevented her from asserting her rights to a constitutional review and whether her surviving relatives have an opportunity to make use of the same mechanism to repeal the legal provisions of concern at the domestic level in order to realize their aims.

Issues and proceedings before the Committee concerning admissibility

7.1 During its thirty-fourth session (16 January to 3 February 2006), the Committee considered the admissibility of the communication in accordance with rules 64 and 66 of its rules of procedure. It ascertained that the matter had not already been or was being examined under another procedure of international investigation or settlement.

7.2 With regard to article 4, paragraph 1, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the domestic remedies rule), the Committee noted that authors must use the remedies in the domestic legal system that were available to them and would enable them to obtain redress for the alleged violations. The substance of their complaints that were subsequently brought before the Committee should first be made to an appropriate domestic body. Otherwise, the motivation behind the provision would be lost. The domestic remedies rule was designed so that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee addresses the same issues. The Human Rights Committee had recently recalled the rationale of its corresponding rule in Panayote Celal, on behalf of his son, Angelo Celal, v. Greece (1235/2003), paragraph 6.3:

> "The Committee recalls that the function of the exhaustion requirement under article 5, paragraph 2 (b), of the Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered …"

7.3 The Committee noted that, in communications denouncing domestic violence, the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect; investigate the crime, punish the perpetrator, and provide compensation as set out in general recommendation 19 of the Committee.

7.4 The Committee considered that the allegations made relating to the obligation of the State party to have exercised due diligence to protect Sahide Goekce were at the heart of the

communication and were of great relevance to the heirs. Thus, the question as to whether domestic remedies had been exhausted in accordance with article 4, paragraph 1, of the Optional Protocol must be examined in relation to these allegations. The allegations essentially related to flaws in law as well as the alleged misconduct or negligence of the authorities in applying the measures that the law provided. With regard to alleged flaws in law, the authors claimed that, according to the Penal Code, Sahide Goekce was unable to appeal against the decisions made by the Public Prosecutor not to detain her husband for making a criminal dangerous threat against her. The State party argued that a procedure, the aim of which would be to redress an alleged violation in law, was set out under article 140, paragraph 1, of the Federal Constitution and would have been available to the deceased and remained available to her descendants. The State party submitted that the failure of the deceased and her descendants to use the procedure should have barred the admissibility of the communication.

7.5 The Committee noted that the procedure under article 140, paragraph 1, of the Federal Constitution could not be regarded as a remedy, which was likely to bring effective relief to a woman whose life was under a criminal dangerous threat. Neither did the Committee regard this domestic remedy as being likely to bring effective relief in the case of the deceased's descendants in light of the abstract nature of such a constitutional remedy. Accordingly, the Committee concluded that, for purposes of admissibility with regard to the authors' allegations about the legal framework for the protection of women in domestic violence situations in relation to the deceased no remedies existed which were likely to bring effective relief and that the communication in this respect was therefore admissible. In the absence of information on other available, effective remedies, which Sahide Goekce or her heirs could have pursued or still might have pursued, the Committee concluded that the authors' allegations relating to the actions or omissions of public officials were admissible.

7.6 On 27 January 2006, the Committee declared the communication admissible.

The State party's request for a review of admissibility and submission on the merits

8.1 By its submission of 12 June 2006, the State party requests the Committee to review its decision on admissibility. The State party reiterates that the descendants of Sahide Goekce should avail themselves of the procedure under article 140, paragraph 1, of the Federal Constitution in order to try to bring about an amendment to the legal provision that barred Sahide Goekce from appealing against the decisions made by the Public Prosecutor not to detain Mustafa Goekce. It maintains that this remedy is quite effective to pursue the aim of the communication at the domestic level.

8.2 The State party also submits that, after the Public Prosecutor dropped the charges against Mustafa Goekce, Sahide Goekce would have been free to bring an action, known as "associated prosecution" (Subsidiaranklage), against her husband. The Austrian legal system provides that an injured person may bring an action instead of the Public Prosecutor if the latter drops the charges and refuses to prosecute the offender. The Public Prosecutor is under an obligation to inform the injured person of this option.

8.3 The State party revisits the sequence of events leading up to the murder of Sahide Goekce. The State party indicates that a comprehensive report on the case of Mustafa Goekce by the Vienna Senior Public Prosecutor's Office confirms that Sahide Goekce did not authorize the prosecution of her husband for making a criminal dangerous threat against her on 2 December 1999 and that the charges against him had to be dropped as a result. With regard to the ex officio prosecution of Mustafa Goekce for maliciously inflicting bodily harm in relation to the same incident, Sahide Goekce confirmed in the Fünfhaus District Court what her husband had stated, i.e. that she was epileptic and was suffering bouts of depression and that the bruising on her neck was caused by her husband holding her. Mustafa Goekce was acquitted of the charges of maliciously inflicting bodily harm in the absence of further evidence against him.

8.4 The State party provides more information relating to the incident that occurred on 21 August 2000: records show that Sahide Goekce was not injured and that Mustafa Goekce did not hit

her; she was informed about possible means of protection that the Federal Act for the Protection against Violence within the Family provides and given a leaflet with information for victims of violence; the Vienna Intervention Centre and the Youth Welfare Office were also informed ex officio about this incident; and on 24 August 2000, Mustafa Goekce went to the Schmelz police office together with the couple's son, Hakan Goekce, who stated that his mother had started quarrelling with his father and had attacked him.

8.5 The State party asserts that, on 1 September 2000, Sahide Goekce (who, according to the record was questioned in her husband's absence) stated that her husband never threatened to kill her. She had had an epileptic fit and perhaps in her confusion made the accusations against her husband; during such fits she made weird statements, which she could not remember afterwards. On 20 September 2000, the Public Prosecutor withdrew the charges against Mustafa Goekce.

8.6 The State party submits that the Public Prosecutor brought charges against Mustafa Goekce for causing bodily harm and threatening to kill Sahide Goekce immediately following the 8 October 2002 incident. However, he did not request that Mustafa Goekce be arrested. Sahide Goekce reported to the police without her husband being present that he had choked her and threatened to kill her. She was again informed in detail about the possibility of filing a request for an interim injunction under section 382b of the Act on the Enforcement of Judgments and was given an information sheet for victims of violence. Mustafa Goekce completely denied the charges against him. There was evidence that Mustafa Goekce was slightly injured during the quarrel on 8 October 2002.

8.7 The State party submits that Sahide Goekce was given the opportunity to testify without her husband being present at the interim injunction hearings at the Hernals District Court. At those hearings Sahide Goekce stated that she would make every effort to keep the family together. She also stated that he had a very good relationship with the children and helped her with the household. According to a report of the police inspectorate Kriminalkommissariat West, Mustafa Goekce subsequently repeatedly disregarded the interim injunction and the police

responded by coming to the Goekce home several times to the annoyance of Sahide Goekce.

8.8 The State party submits that the Public Prosecutor withdrew the charges against Mustafa Goekce on 6 December 2002 because it could not be proved with sufficient certainty that Mustafa Goekce was guilty of making criminal dangerous threats against his wife that went beyond the harsh statements resulting from his background. As regards the physical evidence, the State party maintains that it could not be ascertained which spouse started the aggressive acts. The State party also submits that proceedings against Mustafa Goekce for causing bodily harm were discontinued because he had no criminal record and because it could not be excluded that Sahide Goekce had attacked her husband.

8.9 By judgement of 17 October 2003, the Vienna Regional Criminal Court ordered that Mustafa Goekce be placed in an institution for mentally deranged offenders for killing Sahide Goekce. According to the expert opinion obtained by the Court, Mustafa Goekce committed the offence under the influence of a jealousy psychosis that absolved him of criminal responsibility.

8.10 The State party notes that it is difficult to make a reliable prognosis as to how dangerous an offender is and that it is necessary to determine whether detention would amount to a disproportionate interference in a person's basic rights and fundamental freedoms. The Federal Act for the Protection against Violence within the Family aims to provide a highly effective yet proportionate way of combating domestic violence through a combination of criminal and civil-law measures, police activities and support measures. Close cooperation is required between criminal and civil courts, police organs, youth welfare institutions and institutions for the protection of victims, including in particular, intervention centres for protection against violence within the family, as well as rapid exchange of information between the authorities and institutions involved.

8.11 The State party points out that, aside from settling disputes, the police issue expulsion and prohibition to return orders, which are less severe measures than detention. Section 38a, paragraph 7, of the Security Police Act requires the police to review

compliance with expulsion and prohibition to return orders at least once in the first three days. According to the instructions of the Vienna Federal Police Directorate, it is best for the police to carry out the review through personal contact with the person at risk in the home without prior warning at a time when it is likely that someone will be at home. Police inspectorates in Vienna must keep a domestic violence index file in order to be able to rapidly access reliable information.

8.12 The State party indicates that its legislation is subject to regular evaluation as is the electronic register of judicial proceedings. Increased awareness has led to significant law reform and enhanced protection of victims of domestic violence, such as the abolition of the requirement in section 107, paragraph 4, of the Penal Code that a threatened family member must authorize the prosecution of a perpetrator who has made a criminal dangerous threat.

8.13 The State party maintains that the issue of domestic violence and promising counterstrategies have regularly been discussed at meetings between the heads of the Public Prosecutor's Offices and representatives of the Federal Ministry of the Interior, including in connection with the case at issue. It also maintains that considerable efforts are being made to improve cooperation between Public Prosecutor's Offices and intervention centres against violence within the family. The State party also refers to efforts in the area of statistics made by the Federal Ministry of the Interior and its subordinate bodies.

8.14 The State party indicates that the Federal Act for the Protection against Violence within the Family and its application in practice are key elements of the training of judges and public prosecutors. Examples of seminars and local events on victim protection are given. Future judges are provided each year with information on "violence within the family", "protection of victims" and "law and the family". Programmes cover the basics of the phenomenon of violence against women and children, including forms, trauma, post-traumatic consequences, dynamics of violent relationship, psychology of offenders, assessment factors of how dangerous an offender is, institutions of support, laws and regulations and the electronic registers. Interdisciplinary and comprehensive training has also been carried out.

8.15 The State party recognizes the need for persons affected by domestic violence to be informed about legal avenues and available counselling services. The State party reports that judges provide information at district courts free of charge once a week to anyone interested in the existing legal protection instruments. Psychological advice is also provided, including at the Hernals District Court. The State party also indicates that pertinent information is offered (posters and flyers in Arabic, German, English, French, Polish, Russian, Serbo-Croat, Spanish and Hungarian) at district courts. A toll-free Hotline for Victims has also been installed where lawyers provide legal advice around the clock free of charge. The State party further submits that women's homes act as shelters where women victims of violence are offered counselling, care and assistance in dealing with public authorities. In domestic violence cases where an expulsion and prohibition to return order has been issued, police officers must inform persons at risk of the possibility of obtaining an interim injunction under section 382a of the Act on the Enforcement of Judgments. In Vienna, the person concerned is given an information sheet (available in English, French, Serbian, Spanish and Turkish).

8.16 The State party submits that the authors of the present communication give abstract explanations as to why the Federal Act for the Protection Against Violence in the Family as well as practice regarding detentions in domestic violence cases and prosecution and punishment of offenders allegedly violate articles 1, 2, 3 and 5 of the Convention. The State party considers that it is evident that its legal system provides for comprehensive measures to combat domestic violence adequately and efficiently. The State party maintains that Sahide Goekce was offered numerous forms of assistance by the State in the case at issue.

8.17 The State party further submits that detention is ordered when there are sufficiently substantiated fears that a suspect would carry out a threat if he/she were not detained. It maintains that mistakes in assessing how dangerous an offender is cannot be excluded in an individual case. The State party asserts that, although the present case is an extremely tragic one, the fact that detention must be weighed against an alleged perpetrator's right to personal freedom and a fair trial cannot be overlooked.

Reference is made to the case law of the European Court of Human Rights that depriving a person of his or her freedom is, in any event, *ultima ratio* and may be imposed only if and insofar as this is not disproportionate to the purpose of the measure. The State party also contends that, were all sources of danger to be excluded, detention would need to be ordered in situations of domestic violence as a preventive measure. This would reverse the burden of proof and be in strong contradiction with the principles of the presumption of innocence and the right to a fair hearing. Protecting women through positive discrimination by, for example, automatically arresting, detaining, prejudging and punishing men as soon as there is suspicion of domestic violence, would be unacceptable and contrary to the rule of law and fundamental rights.

8.18 The State party maintains that it would have been possible for the author to file a complaint at any time against the Public Prosecutor for his/her conduct pursuant to section 37 of the Public Prosecutors Act. Furthermore, Sahide Goekce did not avail herself of any of the various available avenues of redress. Her failure to authorize the prosecution of Mustafa Goekce for making a criminal dangerous threat in December 1999 and the fact that she largely refused to testify and asked the Court not to punish her husband resulted in his acquittal. Sahide Goekce claimed that her allegations regarding the August 2000 incident were made while she was in a state of confusion as a result of depression and again, the Public Prosecutor determined that there was no adequate basis to prosecute Mustafa Goekce. The State party further submits that the facts that were available concerning the incident of 8 October 2002 did not indicate that Mustafa Goekce should be detained either. The Public Prosecutor was unaware that Mustafa Goekce was in possession of a firearm. Lastly, the State party submits that it could not be deduced from police reports and other records that there was a danger that Mustafa Goekce would actually commit the criminal act.

8.19 The State party summarizes its position by asserting that Sahide Goekce could not be guaranteed effective protection because she had not been prepared to cooperate with the Austrian authorities. In light of the information available to the public authorities, any further interference by the State in the

fundamental rights and freedoms of Mustafa Goekce would not have been permissible under the Constitution.

8.20 The State party asserts that its system of comprehensive measures[3] aimed at combating domestic violence does not discriminate against women and the authors' allegations to the contrary are unsubstantiated. Decisions, which appear to be inappropriate in retrospect (when more comprehensive information is available) — are not discriminatory *eo ipso*. The State party maintains that it complies with its obligations under the Convention concerning legislation and implementation and that there has been no discrimination against Sahide Goekce as a woman.

8.21 In the light of the above, the State party asks the Committee to reject the present communication as inadmissible; *in eventu*, to reject it for being manifestly ill-founded and, *in eventu*, to hold that the rights of Sahide Goekce under the Convention have not been violated.

Authors' comments on the State party's request for a review of admissibility and submission on the merits

9.1 By their submission of 30 November 2006, the authors argue that neither the children of the victim nor the authors intended to have statutory provisions reviewed by the Constitutional Court — a motion that would be deemed inadmissible. They would have lacked standing to bring such an action before the Constitutional Court. The authors note that the main focus of the communication is that legal provisions were not applied — not that those provisions should be amended or repealed. Furthermore, the authors claim that their suggestions for improvements to the existing laws and enforcement measures could never be realized by means of a constitutional complaint. Therefore, bringing a constitutional complaint should not be regarded as a domestic remedy for purposes of article 4, paragraph 1, of the Optional Protocol.

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3 To illustrate the effectiveness of the measures, which are applied, the State party submits the statistics on prohibition orders to enter the common home and other legal measures.

9.2 The authors consider that it is inadmissible at this stage for the State party to introduce an argument concerning the remedy of "associated prosecution" in light of the fact that the State party was given two earlier opportunities to comment on the question of admissibility, besides which this remedy would be costly and would not bring any effective relief. The authors are of the view that the Optional Protocol and the rules of procedure of the Committee as well as general legal principles ("ne bis in idem") do not provide for reversing the admissibility decision of 27 January 2006.

9.3 The authors note that the State party refers to actions taken and legal provisions that entered into force years after the murder of Sahide Goekce.

9.4 The authors submit that the observations of the State party place the burden and responsibility for dealing with the violent husband on the victim and place the blame on her for not having taken appropriate action. The authors assert that this position demonstrates how little the authorities understand about the dynamics of partner violence, the dangerous situation of the victim and the power that the perpetrator has over the victim, whom he ended up killing.

9.5 The authors note that the State party acknowledged every violent incident that took place. However, the authors maintain that the State party did not describe some of the details accurately. The authors claim that it was Mustafa Goekce who stated that Sahide Goekce had had an epileptic fit — the explanation for the bruising on her neck — and that he comforted her.

9.6 The authors dispute the State party's contention that Sahide Goekce asked the Court not to punish her husband or denied that he had threatened to kill her. They claim that the record of the interrogation shows that Mustafa Goekce repeatedly said that he would kill Sahide Goekce. Moreover, Sahide Goekce only once refused to testify against her husband and the reason for there being no further criminal proceedings was that the Public Prosecutor did not initiate them. As to the State party's assertion that Sahide Goekce played down the incidents before the Youth Welfare Office, the authors submit that Sahide Goekce would have been afraid of losing her children and of the social

and cultural contempt for a woman of Turkish descent whose children had been taken away.

9.7 The authors point out that the State party admits that Mustafa Goekce repeatedly ignored the interim injunction issued by the District Court of Hernals. The authors criticize the police for not having taken seriously the information that they received from the brother of Mustafa Goekce about the weapon.

9.8 The authors argue that the State party has not taken responsibility for the failures of the authorities and officers. They submit that when making a determination about detaining Mustafa Goekce, the State party should have conducted a comprehensive assessment of how dangerous Mustafa Goekce would become. Furthermore, the State party should have considered the social and psychological circumstances of the case. The authors consider that the exclusive use of civil remedies was inappropriate because they do not prevent very dangerous violent criminals from committing or repeating offences.

9.9 The authors draw attention to flaws in the system of protection. One such flaw is that the police and public prosecutors are unable to communicate with each other rapidly enough. Another such flaw is that police files regarding domestic violence are not made available to the officers who operate the emergency call services. The authors also complain that systematically coordinated and/or institutionalized communication between the Public Prosecutor's Office and the Family Court does not exist. They also maintain that government funding remains inadequate to provide extensive care for all victims of domestic violence.

9.10 The authors refer to an exchange of information between representatives of the police and a representative of the Intervention Centre shortly after Sahide Goekce was killed, during which the Chief of Police admitted to deficits in the emergency call service. The authors state that in the instant case, Sahide Goekce called this service a few hours before she was killed, yet no patrol car was sent to the scene. While the Chief of Police requested representatives of the Intervention Centre to instruct victims about the information that they should provide to the police, the authors argue that it would not be reasonable to expect victims of violence to provide in an emergency all

information that may be relevant considering their mental state. Furthermore, regarding the instant case, German was not Sahide Goekce's mother tongue. The authors maintain that the authorities should gather data about dangerous violent offenders in a systematic manner that can be retrieved anywhere in an emergency.

9.11 The authors submit that it is incorrect to claim that Sahide Goekce did not avail herself of the available avenues of redress. In 2002, the year she was killed, Sahide Goekce repeatedly tried to obtain help from the police — but she and her family were not taken seriously; often their complaints were not recorded. Further, the authors argue that several physical attacks by Mustafa Goekce were known to the police but not adequately documented such that the information could be retrieved for use in assessing how dangerous he might become. The authors maintain that the potential for violence on the part of a spouse who does not accept being separated from the other spouse/family is extremely high. In the specific case of Sahide Goekce, her spouse was unreasonably jealous and unwilling to accept a separation, which constituted a high risk that was not taken into account.

The State party's supplementary observations

10.1 By its submission of 19 January 2007, the State party provides detailed information about the so-called "associated prosecution", whereby a private party takes over the prosecution of the defendant. The State party submits that the requirements are more stringent than those that apply to the Public Prosecutor in order to prevent chicanery. Under this procedure, a person whose rights have allegedly been violated through the commission of a crime becomes a private party to the proceedings.

10.2 The State party indicates that Sahide Goekce was informed of her right to "associated prosecution" on 14 December 1999, 20 September 2000 and 6 December 2002.

10.3 The State party also submits that Sahide Goekce would have been entitled to bring a complaint under section 37 of the Public Prosecutor's Act (Staatsanwaltschaftsgesetz) to either the head of the Public Prosecutor's Office in Vienna, the Senior Public Prosecutor's Office or the Federal Ministry of Justice, had she

considered the official actions of the responsible Public Prosecutor to have been unlawful. There are no formal requirements and complaints may be filed in writing, by e-mail or by fax or telephone.

10.4 The State party indicates that an interim injunction for protection against domestic violence may be sought by persons who live or have lived with a perpetrator in a family relationship or a family-like relationship under section 382b of the Act on the Enforcement of Judgments, when there have been physical attacks, threats of physical attacks or any conduct that severely affects the mental health of the victim and when the home fulfils the urgent accommodation needs of the applicant. The perpetrator may be ordered to leave the home and the immediate surroundings and prohibited from returning. If further encounters become unacceptable, the perpetrator may be banned from specifically defined places and given orders to avoid encounters as well as contact with the applicant so long as this does not infringe upon important interests of the perpetrator. In cases where an interim injunction has been issued, the public security authorities may determine that an expulsion order (Wegweisung) is also necessary as a preventive measure.

10.5 The State party states that interim injunctions can be issued during divorce proceedings, marriage annulment and nullification proceedings, during proceedings to determine the division of matrimonial property or the right to use the home. In such cases, the interim injunction is valid for the duration of the proceedings. If no such proceedings are pending, an interim injunction may be issued for a maximum of three months. An expulsion and prohibition to return order expires after 10 days but is extended for another 10 days if a request for an interim injunction is filed.

Review of admissibility

11.1 In accordance with rule 71, paragraph 2, of its rules of procedure, the Committee has re-examined the communication in light of all the information made available to it by the parties, as provided for in article 7, paragraph 1, of the Optional Protocol.

11.2 As to the State party's request to review admissibility on the grounds that Sahide Goekce's heirs did not avail themselves of the procedure under article 140, paragraph 1, of the Federal Constitution, the Committee notes that the State party has not introduced new arguments that would alter the Committee's view that, in light of its abstract nature, this domestic remedy would not be likely to bring effective relief.

11.3 As to the State party's argument that Sahide Goekce, as a private individual, would have been free to bring an action, known as "associated prosecution" against her husband after the Public Prosecutor decided to drop the charges against him, the Committee does not regard this remedy as having been de facto available to the author, considering that the requirements for a private individual to take over the prosecution of the defendant are more stringent than those for the Public Prosecutor, that German was not Sahide Goekce's mother tongue and, most importantly, that she was in a situation of protracted domestic violence and threats of violence. Moreover, the fact that the State party introduced the notion of "associated prosecution" late in the proceedings indicates that this remedy is rather obscure. Accordingly, the Committee does not find the remedy of "associated prosecution" to be a remedy that Sahide Goekce would have been obliged to exhaust under article 4, paragraph 1, of the Optional Protocol.

11.4 As to the State party's contention that Sahide Goekce would have been entitled to bring a complaint under section 37 of the Public Prosecutor's Act, the Committee considers that this remedy — designed to determine the lawfulness of official actions of the responsible Public Prosecutor — cannot be regarded as a remedy which is likely to bring effective relief to a woman whose life is under a dangerous threat, and should thus not bar the admissibility of the communication.

11.5 The Committee will proceed to consideration of the merits of the communication.

Consideration of the merits

12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to

Sahide Goekce in articles 2 (a) and (c) through (f), and article 3 of the Convention, the Committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that "… discrimination under the Convention is not restricted to action by or on behalf of Governments …" and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

12.1.2 The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

12.1.3 In the instant case, the Committee notes that during the three-year period starting with the violent episode that was reported to the police on 3 December 1999 and ending with the shooting of Sahide Goekce on 7 December 2002, the frequency of calls to the police about disturbances and disputes and/or battering increased; the police issued prohibition to return orders on three separate occasions and twice requested the Public Prosecutor to order that Mustafa Goekce be detained; and a three-month interim injunction was in effect at the time of her death that prohibited Mustafa Goekce from returning to the family apartment and its immediate environs and from contacting Sahide Goekce or the children. The Committee notes that Mustafa Goekce shot Sahide Goekce dead with a handgun that he had purchased three weeks earlier, despite a valid weapons prohibition against him as well as the uncontested contention by the authors that the police had received information about

the weapon from the brother of Mustafa Goekce. In addition, the Committee notes the unchallenged fact that Sahide Goekce called the emergency call service a few hours before she was killed, yet no patrol car was sent to the scene of the crime.

12.1.4 The Committee considers that given this combination of factors, the police knew or should have known that Sahide Goekce was in serious danger; they should have treated the last call from her as an emergency, in particular because Mustafa Goekce had shown that he had the potential to be a very dangerous and violent criminal. The Committee considers that in light of the long record of earlier disturbances and battering, by not responding to the call immediately, the police are accountable for failing to exercise due diligence to protect Sahide Goekce.

12.1.5 Although, the State party rightly maintains that, it is necessary in each case to determine whether detention would amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and to a fair trial, the Committee is of the view, as expressed in its views on another communication on domestic violence, that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.[4] In the present case, the Committee considers that the behaviour (threats, intimidation and battering) of Mustafa Goekce crossed a high threshold of violence of which the Public Prosecutor was aware and as such the Public Prosecutor should not have denied the requests of the police to arrest Mustafa Goekce and detain him in connection with the incidents of August 2000 and October 2002.

12.1.6 While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Sahide Goekce, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Sahide Goekce to life and physical and mental integrity.

4 See paragraph 9.3 of the Committee's views on communication No. 2/2003, A.T. v. Hungary.

12.2 The Committee notes that the authors also made claims that articles 1 and 5 of the Convention were violated by the State party. The Committee has stated in its general recommendation 19 that the definition of discrimination in article 1 of the Convention includes gender-based violence. It has also recognized that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence. At the same time, the Committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of the rights of the deceased Sahide Goekce to life and physical and mental integrity under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and makes the following recommendations to the State party:

(a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;

(b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim; and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

(c) Ensure enhanced coordination among law enforcement and judicial officers and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;

(d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.

12.4 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the German language and widely distributed in order to reach all relevant sectors of society.

Committee on the Elimination of Discrimination against Women

Thirty-ninth session

23 July-10 August 2007

Views

Communication No. 6/2005*

Submitted by	:	The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased)
Alleged victim	:	Fatma Yildirim (deceased)
State party	:	Austria
Date of communication	:	21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

On 6 August 2007, the Committee on the Elimination of Discrimination against Women adopted the annexed text as the Committee's views under article 7, paragraph 3, of the Optional Protocol in respect of communication No. 6/2005. The views are appended to the present document.

* Reissued for technical reasons.

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (thirty-ninth session)

Communication No. 6/2005*

Submitted by	:	The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir (descendants of the deceased)
Alleged victim	:	Fatma Yildirim (deceased)
State party	:	Austria
Date of communication	:	21 July 2004 with supplementary information dated 22 November and 10 December 2004 (initial submissions)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 6 August 2007,

Having concluded its consideration of communication No. 6/2005, submitted to the Committee on the

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* The following members of the Committee participated in the examination of the present communication: Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Saisuree Chutikul, Ms. Mary Shanthi Dairiam, Mr. Cees Flinterman, Ms. Naela Mohamed Gabr, Ms. Françoise Gaspard, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonoviæ, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao.

Elimination of Discrimination against Women by the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Banu Akbak, Gülen Khan, and Melissa Özdemir, descendants of Fatma Yildirim (deceased), under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women,

Having taken into account all written information made available to it by the authors of the communication and the State party,

Adopts the following:

Views under article 7, paragraph 3, of the Optional Protocol

1. The authors of the communication dated 21 July 2004 with supplementary information dated 22 November and 10 December 2004, are the Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice, two organizations in Vienna, Austria, that protect and support women victims of gender-based violence. They claim that Fatma Yildirim (deceased), an Austrian national of Turkish origin and former client of the Vienna Intervention Centre against Domestic Violence, is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women. The Convention and its Optional Protocol entered into force for the State party on 30 April 1982 and 22 December 2000, respectively.

The facts as presented by the authors

2.1 The authors state that Fatma Yildirim married Irfan Yildirim on 24 July 2001. She had three children from her first marriage,[1] two of whom are adults. Her youngest daughter, Melissa, was born on 30 July 1998.

[1] Signed consent forms from two adult children and one minor represented by her father have been received.

2.2 Irfan Yildirim reportedly threatened to kill Fatma Yildirim for the first time during an argument while the couple was on a trip to Turkey in July 2003. On their return to Austria, they constantly argued. Fatma Yildirim wanted to divorce Irfan Yildirim, but he would not agree and threatened to kill her and her children should she divorce him.

2.3 On 4 August 2003, fearing for her life, Fatma Yildirim and her five-year-old daughter, Melissa, moved in with her eldest daughter, Gülen, at 18/29-30 Haymerlegasse. On 6 August 2003, believing that Irfan Yildirim was at work, she returned to their apartment to pick up some of her personal belongings. Irfan Yildirim entered the apartment while she was still there. He grabbed her wrists and held her — but she managed to escape. Subsequently, he called her on her cell phone and threatened to kill her again and she went to the Vienna Federal Police, District Department Ottakring, to report Irfan Yildirim for assault and for making a criminal dangerous threat.

2.4 On 6 August 2003 the police issued an expulsion and prohibition to return order against Irfan Yildirim covering the apartment pursuant to section 38a of the Security Police Act (Sichersheitspolizeigesetz)[2] and informed the Vienna Intervention Centre against Domestic Violence and the Youth Welfare Office of the issuance of the order and the grounds therefore. The police also reported to the Vienna Public Prosecutor on duty that Irfan Yildirim had made a criminal dangerous threat against Fatma Yildirim and requested that Irfan Yildirim be detained. The Public Prosecutor rejected that request.

2.5 On 8 August 2003, with the assistance of the Vienna Intervention Centre against Domestic Violence, Fatma Yildirim applied on her own behalf and on behalf of her youngest daughter, to the Vienna District Court of Hernals for an interim injunction against Irfan Yildirim. The Vienna District Court of Hernals informed the Vienna Federal Police, District Department Ottakring, about the application.

[2] This act has been translated as both the Security Police Act and the Maintenance of Law and Order Act.

2.6 That same day, Irfan Yildirim appeared at Fatma Yildirim's workplace and harassed her. The police were called in to settle the dispute, but they did not report the incident to the Public Prosecutor. Later on, Irfan Yildirim threatened Fatma Yildirim's 26-year-old son, who reported the incident to the police.

2.7 On 9 August, Irfan Yildirim threatened to kill Fatma Yildirim at her workplace. She called the police from her cell phone. By the time that the police arrived at Fatma Yildirim's workplace Irfan Yildirim had left — but was ordered to return there and the police spoke to him. Fatma Yildirim reported Irfan Yildirim to the police again after he threatened her and her son later that night and the police responded by speaking to him on his cell phone.

2.8 On 11 August 2003, Irfan Yildirim came to Fatma Yildirim's workplace at 7:00 pm. He stated that his life was over, that he would kill her and that her homicide would appear in the newspaper. When she called the police, Irfan Yildirim ran away. The police passed on the complaint to police inspectorate 17.

2.9 On 12 August 2003, a staff member (name is given) of the Vienna Intervention Centre against Domestic Violence informed the police at the Vienna Federal Police, District Department Ottakring, by fax message of the death threats made on 9 and 11 August 2003, of the harassment at Fatma Yildirim's workplace, and of her application for an interim injunction. The police were given Fatma Yildirim's new cell phone number so that the police would always be able to reach her. The police were also asked to pay more attention to her case.

2.10 On 14 August 2003, Fatma Yildirim gave a formal statement about the threats made to her life to the police, who in turn reported to the Vienna Public Prosecutor on duty, requesting that Irfan Yildirim be detained. Again, this request was refused.

2.11 On 26 August 2003, Fatma Yildirim filed a petition for divorce at the Vienna District Court of Hernals.

2.12 On 1 September 2003, the Vienna District Court of Hernals issued an interim injunction pursuant to section 382b of the Act on the Enforcement of Judgments (Exekutionsordnung) against Irfan Yildirim for Fatma Yildirim valid until the end of the divorce proceedings and an interim injunction for Melissa valid for three

months. The order forbade Irfan Yildirim from returning to the family's apartment and its immediate surroundings, from going to Fatma Yildirim's workplace and from meeting or contacting Fatma Yildirim or Melissa.

2.13 On 11 September 2003, at approximately 10:50 pm, Irfan Yildirim followed Fatma Yildirim home from work and fatally stabbed her on Roggendorfgasse, which is near the family's apartment.

2.14 Irfan Yildirim was arrested while trying to enter Bulgaria on 19 September 2003. He has been convicted of killing Fatma Yildirim and is serving a sentence of life imprisonment.

The complaint

3.1 The authors complain that Fatma Yildirim is a victim of a violation by the State party of articles 1, 2, 3 and 5 of the Convention on the Elimination of All Forms of Discrimination against Women because of the failure of the State party to take all appropriate positive measures to protect Fatma Yildirim's right to life and personal security. In particular, the authors allege that communication between the police and Public Prosecutor did not adequately allow the Public Prosecutor to assess the danger posed by Irfan Yildirim and that on two occasions the Public Prosecutor should have requested the investigating judge to order the detention of Irfan Yildirim under section 180, paragraph 2, subparagraph 3 of the Code of Criminal Procedure (Strafprozessordnung).

3.2 The authors further contend that the State party also failed to fulfil its obligations stipulated in general recommendations Nos. 12, 19 and 21, of the Committee on the Elimination of Discrimination against women, the United Nations Declaration on the Elimination of Violence against Women, the concluding comments of the Committee (June 2000) on the combined third and fourth periodic report and the fifth periodic report of Austria, the United Nations Resolution on Crime Prevention and Criminal Justice Measures to Eliminate Violence against Women, several provisions of the outcome document of the twenty-third special session of the General Assembly, article 3 of the United Nations Universal Declaration of Human Rights, articles 6 and 9 of the

International Covenant on Civil and Political Rights, several provisions of other international instruments, and the Austrian Constitution.

3.3 With regard to article 1 of the Convention, the authors contend that in practice the criminal justice system predominantly and disproportionately negatively affects women. They mention in particular that women are far more affected than men by the failure of public prosecutors to request that alleged offenders be detained. They are also disproportionately affected by the practice of not appropriately prosecuting and punishing offenders in domestic violence cases. Furthermore, women are disproportionately affected by the lack of coordination of law enforcement and judicial personnel, the failure to educate law enforcement and judicial personnel about domestic violence and the failure to collect data and maintain statistics on domestic violence.

3.4 With regard to article 1 together with article 2 (a), (c), (d) and (f) and article 3 of the Convention, the authors maintain that the lack of detention of offenders in domestic violence cases, inadequate prosecution and lack of coordination amongst law enforcement and judicial officials and the failure to collect data and maintain statistics of incidences of domestic violence resulted in inequality in practice and the denial of Fatma Yildirim's enjoyment of her human rights.

3.5 With regard to articles 1 together with 2 (e) of the Convention, the authors state that the Austrian criminal justice personnel failed to act with due diligence to investigate and prosecute acts of violence and protect Fatma Yildirim's human rights to life and personal security.

3.6 With regard to article 1 together with article 5 of the Convention, the authors claim that the murder of Fatma Yildirim is one tragic example of the prevailing lack of seriousness with which violence against women is viewed by the public and by the Austrian authorities. The criminal justice system, particularly public prosecutors and judges, consider the issue a social or domestic problem, a minor or petty offence that happens in certain social classes. They do not apply criminal law to such violence because they do not take the danger seriously.

3.7 The authors request the Committee to assess the extent to which there have been violations of the victim's human rights and rights protected under the Convention and the responsibility of the State party for not detaining the dangerous suspect. The authors also request the Committee to recommend that the State party offer effective protection to women victims of violence, particularly migrant women, by clearly instructing public prosecutors and investigating judges what they ought to do in cases of severe violence against women.

3.8 The authors request the Committee to recommend to the State party, to implement a "pro-arrest and detention" policy in order to effectively provide safety for women victims of domestic violence and a "pro-prosecution" policy that would convey to offenders and the public that society condemns domestic violence and ensure coordination among the various law enforcement authorities. They also request the Committee generally to use its authority under article 5, paragraph 1 of the Optional Protocol concerning interim measures as it did in A. T. v Hungary (communication No. 2/2003).

3.9 The authors also request the Committee to recommend to the State party to ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with organizations that work to protect and support women victims of gender-based violence and to ensure that training programmes and education on domestic violence is compulsory.

3.10 As to the admissibility of the communication, the authors maintain that there are no other domestic remedies that could possibly have been taken to protect Fatma Yildirim's personal security and to prevent her homicide. Both the expulsion and prohibition to return order and the interim injunction proved ineffective.

3.11 In the submission of 10 December 2004 it is said that Fatma Yildirim's youngest child (represented by her biological father) has brought a civil action under the Act on Official [State] Liability.[3] Under this Act the children are able to sue the State

[3] The earlier submission of 27 July 2004 states that the children are suing the Vienna Federal Police and the Ministry of the Interior or the Vienna Public Prosecutor and the Ministry of Justice, respectively.

for compensation for psychological damages, expenses for psychotherapy in order to cope with the death of their mother, compensation for funeral costs and child support for the youngest child. The authors contend that this is not an effective remedy for the lack of protection of Fatma Yildirim and the failure to prevent her homicide. Suing for omissions and negligence does not bring her back and serves the different purpose of providing compensation for a sustained loss and damages. The two approaches, compensation on the one hand and protection on the other are opposites. They differ in respect of the beneficiary (the heirs versus the victim), what the intentions are (to compensate for loss versus to save a life) and timing (after death rather than prior to death). If the State party protected women effectively, there would be no need to establish State liability. Additionally, compensation suits entail huge costs. The authors state that they have submitted the communication in order to call the State party to account for its omissions and negligence rather than to obtain compensation for the heirs. Finally, suing the State party would be unlikely to bring effective relief in accordance with article 4 of the Optional Protocol.

3.12 The authors also state that they have not submitted the communication to any other body of the United Nations or any regional mechanism of international settlement or investigation.

3.13 On the issue of *locus standi*, the authors maintain that it is justified and appropriate for them to submit the complaint on behalf of Fatma Yildirim — who cannot give consent because she is dead. They consider it appropriate to represent her before the Committee because she was a client of theirs and had a personal relationship to them and because they are special protection and support organizations for women victims of domestic violence; one of the two organizations is an intervention centre against domestic violence that was reportedly established pursuant to Section 25, paragraph 3 of the Federal Security Police Act. They are seeking justice for Fatma Yildirim and to improve the protection of women in Austria from domestic violence so that her death would not be in vain. This being said, the authors have obtained the written consent of the adult children and of the father of the child who is still a minor.

The State party's submission on admissibility

4.1 By its submission of 4 May 2005, the State party confirms the facts of the communication and adds that Irfan Yildirim was sentenced to life imprisonment by the final judgment of the Vienna Regional Criminal Court (Landesgericht für Strafsachen) of 14 September 2004 on charges of murder and making a dangerous criminal threat.

4.2 Melissa Özdemir, the minor daughter of the deceased officially filed liability claims against Austria, which were, however, rejected because the Court considered that the measures taken by the Vienna Public Prosecutor's Office were justifiable. The Public Prosecutor had to consider *ex ante* the issue of filing a request for detention and — in addition to examining the further requirements — had to weigh the basic right to life and physical integrity of the person filing the complaint against the basic right to freedom of the suspect, who had no criminal record at the time and did not give the impression to the intervening police officers of being highly aggressive. That this assessment later proved insufficient, despite a comprehensive evaluation of the relevant circumstances, did not make the Public Prosecutor's action unjustifiable. Melissa Özdemir may still assert her claims under civil law.

4.3 The State party argues that the Federal Act for the Protection against Violence within the Family (Bundesgesetz zum Schutz vor Gewalt in der Familie) constitutes a highly effective system to combat domestic violence and establishes a framework for effective cooperation among various institutions. Police officers are able to order a potential offender to leave (Wegweisung). A prohibition order to enter the common home (Betretungsverbot) is issued if there are no grounds for detention under the penal code and "less severe" means are to be used. The law provides for victim support by intervention centres against violence within the family. Police officers are obliged to notify such a centre when a prohibition order is issued. The centre subsequently must support and advise the victim — but does not have the right to represent the person concerned. These prohibition orders are usually valid for 10 days. When the person concerned files an application with a court for an interim injunction the prohibition order is extended to 20 days. In

addition to the penal measures, there are a number of police and civil-law measures to protect against domestic violence. The system is supplemented by shelters. It is possible to settle disputes in less severe cases under the Maintenance of Law and Order Act (Sichersheitspolizeigesetz). Section 382b of the Act on the Enforcement of Judgments (Executionsordnung) allows courts to issue injunctions against alleged offenders for a period of three months. The period may be extended under certain circumstances at the request of the alleged victim.

4.4 The State party also argues that special training courses are held on a regular basis for judges and the police on domestic violence. Cooperation between judges and the police is constantly reviewed in order to ensure more rapid intervention by organs of the State — the aim being to prevent as far as possible the tragedy that befell Fatma Yildirim without improper interference into a person's family life and other basic rights. Such tragedies do not indicate discrimination against women under the Convention.

4.5 The State party suggests that the imposition of detention constitutes massive interference with a person's fundamental freedoms, which is why detention may only be imposed as *ultima ratio.* The proportionality assessment is a forward-looking evaluation of how dangerous the person concerned is and whether that person will commit an offence that must be weighed against a suspect's fundamental freedoms and rights. Moreover, Irfan Yildirim had no criminal record, did not use a weapon and appeared quiet and cooperative to the police officers who intervened. Fatma Yildirim had no apparent injuries. On this basis, and taking into account that a suspect must be presumed innocent, the Public Prosecutor finally decided in the concrete case not to file a request to detain Irfan Yildirim because — from an *ex ante* point of view — this would not have been proportionate.

4.6 The State party furthermore argues that the persons who are now intervening on behalf of the victim would have been free to address the Constitutional Court on grounds that no appeal was available to Fatma Yildirim against the Public Prosecutor's failure twice to comply with the request to issue an arrest warrant. Her surviving dependants might be free under article 140,

paragraph 1 of the Federal Constitution to challenge the pertinent provisions of the penal code before the Constitutional Court. They could claim to be currently and directly affected, stating that they have a current and direct interest in the preventive effect of an annulment of the pertinent provisions for the benefit of victims of domestic violence such as Fatma Yildirim. This Court would be the competent one to review the relevant legal provisions and to set them aside, if necessary.

The author's comments on the State party's observations on admissibility

5.1 By their submission of 31 July 2005, the authors contend that the victim and the authors have exhausted all domestic remedies, which would have been likely to bring sufficient relief. They argue that the fact that the daughter of the deceased may still bring a civil action should not prevent them from submitting a communication, and has no legal effect on admissibility.

5.2 The authors also are of the view that the idea of requiring a woman who is under threat of death to file an application to the Constitutional Court was not an argument put forward by the State party in good faith. The procedure lasts for some two to three years and for this reason would be unlikely to bring sufficient relief to a woman who has been threatened with death.

5.3 The authors dispute the State party's interpretation of the fact that the Public Prosecutor did not order that Irfan Yildirim be detained. He had been aware of all the violent incidents. The Public Prosecutor would have reacted differently had a public figure received death threats; the alleged offender would have very likely been arrested immediately and the public figure would have had police protection until the arrest. To the contention of the State party that Irfan Yildirim had not given the impression to the intervening police officers of being highly aggressive, the authors argue that his aggression was directed towards Fatma Yildirim and not the police and that the type of risk assessment used by the authorities was simplistic and unprofessional. The case of Fatma Yildirim shows that even when the victim reported all incidents and threats and is willing to authorize prosecution of an alleged offender, the Public Prosecutor does not offer

effective protection from further violence. The Public Prosecutor had no contact with the alleged offender and relied on oral reports from a lawyer in the police department who had no direct experience with the case or direct contact with the deceased. The evaluation of how dangerous Irfan Yildirim was had not been comprehensive and important facts had not been taken into account or taken seriously enough. Irfan Yildirim may not have had a criminal record, but police reports had mentioned the death threats that he had made. Hence there was no protection against an alleged offender who had never been convicted.

Additional comments of the State party on admissibility

6.1 By its submission of 21 October 2005, the State party fully maintains its previous submission.

6.2 The State party points out that the authors state that it is not possible to complain against those decisions made by the Public Prosecutor against detaining alleged offenders or against prosecuting them. They contend that the measures provided under the Federal Law on Protection against Domestic Violence are not efficient enough to protect women really effectively. They also mention that the Public Prosecutor may only request that a suspect be placed in detention if the Public Prosecutor also decides to conduct a criminal investigation and prosecute. Hence, the authors refer to alleged failures of the competent Public Prosecutor and investigating judge as well as to the law, itself — i.e. to the application of the law and the legal framework.

6.3 Any individual may challenge the constitutionality of legal provisions so long has he/she alleges direct infringement of individual rights insofar as the law has become operative for that individual — without the delivery of a decision or ruling by the courts (Individualantrag). There are no time limits for filing such an application.

6.4 The aim of the procedure would be to redress an alleged violation in law. The Constitutional Court only considers the application legitimate if in repealing the provision at issue, the legal position of the applicant would be changed to such an extent that the alleged negative legal implications no longer exist. Furthermore,

the legally protected interests of the applicant must be actually affected. This must be the case both at the time that the application is filed and when the Constitutional Court takes its decision. Successful applicants are entitled to compensation.

6.5 Section 15 of the Constitutional Court Act (Verfassungsgerichtshofgesetz) contains the general requirements as to form when addressing the Constitutional Court. These requirements include: that the application must be in writing; that the application must refer to a specific provision in the Constitution; the applicant must set out the facts; and the application must contain a specific request. Under section 62, paragraph 1 of the Act, the application must state precisely which provisions should be repealed. Moreover, the application must explain in detail why the challenged provisions are unlawful and to what extent the law had been operative for the applicant without the delivery of a judicial decision or ruling. Under section 17, paragraph 2 of the Act, applications must be filed by an authorized lawyer.

6.6 If the Constitutional Court concludes that the challenged provisions are contrary to the Constitution, it issues a ruling setting aside these provisions. The Federal Chancellor will then be under an obligation to promulgate the repeal of these provisions in the Federal Law Gazette (Bundesgesetzblatt), which comes into force at the end of the day of its promulgation. The Constitutional Court may also set a maximum deadline of 18 months for the repeal — which does not necessarily apply to the applicants, themselves. A time limit is fixed if the legislature is to be given an opportunity to introduce a new system that complies with the constitutional framework. In light of its previous decisions, it can be assumed that the Constitutional Court would make use of this possibility if the Court were to decide that a provision should be repealed.

6.7 The State party admits that proceedings before the Constitutional Court under article 140, paragraph 1 of the Federal Constitution do not provide an avenue of very rapid redress. However, article 4, paragraph 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women prescribes the exhaustion of all available domestic remedies unless the proceedings would be unreasonably prolonged or

no effective relief could be expected.

6.8 The requirement of exhausting domestic remedies reflects a general principle of international law and a usual element of international human rights mechanisms. It gives the State concerned an opportunity to remedy human rights violations first at the domestic level (subsidiarity of the international instrument of legal protection).

6.9 In the concrete case, the individual application should state in detail which elements or words in the legal provision should be repealed. In the present case, it appears, that the relevant words appear to be "only upon the Public Prosecutor's request", in section 180, paragraph 1 of the Code of Criminal Procedure (Strafprozessordnung). An application to the Constitutional Court would need to set out all legal provisions which, in the applicants' view, are contrary to their interest in asserting their rights guaranteed by the Constitution.

6.10 The State party maintains that the surviving relatives of Fatma Yildirim should have made use of the possibility of filing an individual application before the Constitutional Court before addressing the Committee, as required by article 4, paragraph 1 of the Optional Protocol. The proceedings before the Constitutional Court are not unreasonably prolonged. Moreover, it cannot be said, in light of the case law of the Court, that the surviving relatives would not be entitled to file an individual application because — as far as can be seen — no similar cases have been brought before the Court.

6.11 Article 4, paragraph 1 of the Optional Protocol does not only include remedies that are always successful. Then again, the authors have not alleged that the constitutional procedure under article 140, paragraph 1 of the Federal Constitution is totally unsuitable as a remedy. The authors aim to bring effective relief with respect to the effective protection of women's life and personal security. To that end, it would have been possible to initiate the procedure to amend the problematic legal provisions by filing an individual application with the Constitutional Court.

6.12 Although it is true that, after her death, there is no effective relief with respect to the protection of the life and personal security of Fatma Yildirim, it is Austria's view that this question

should not be examined at the admissibility stage of the proceedings under the Optional Protocol. The question is rather whether her surviving relatives would have had an opportunity to make use of a remedy that is suited to repealing legal provisions at the domestic level in order to realize their aims.

Issues and proceedings before the Committee concerning admissibility

7.1 During its thirty-fourth session (16 January-3 February 2006), the Committee considered the admissibility of the communication in accordance with rules 64 and 66 of its rules of procedure. It ascertained that the matter had not already been or was being examined under another procedure of international investigation or settlement.

7.2 With regard to article 4, paragraph 1 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (the domestic remedies rule), the Committee noted that authors must use the remedies in the domestic legal system that were available to them and would enable them to obtain redress for the alleged violations. The substance of their complaints that were subsequently brought before the Committee should first be made to an appropriate domestic body. Otherwise, the motivation behind the provision would be lost. The domestic remedies rule was designed so that States parties have an opportunity to remedy a violation of any of the rights set forth under the Convention through their legal systems before the Committee addresses the same issues. The Human Rights Committee had recently recalled the rationale of its corresponding rule in Panayote Celal, on behalf of his son, Angelo Celal, v. Greece (1235/2003), paragraph 6.3:

> "The Committee recalls that the function of the exhaustion requirement under article 5, paragraph 2 (b), of the Optional Protocol is to provide the State party itself with the opportunity to remedy the violation suffered … "

7.3 The Committee noted that in communications denouncing domestic violence, the remedies that came to mind for purposes of admissibility related to the obligation of a State party concerned to exercise due diligence to protect; investigate the

crime, punish the perpetrator, and provide compensation as set out in general recommendation 19 of the Committee.

7.4 The Committee considered that the allegations made relating to the obligation of the State party to have exercised due diligence to protect Fatma Yildirim were at the heart of the communication and were of great relevance to the heirs. Thus, the question as to whether domestic remedies had been exhausted in accordance with article 4, paragraph 1 of the Optional Protocol must be examined in relation to these allegations. The allegations essentially related to flaws in law as well as the alleged misconduct or negligence of the authorities in applying the measures that the law provided. With regard to alleged flaws in law, the authors claimed that, according to the Penal Code, Fatma Yildirim was unable to appeal against the decisions made by the Public Prosecutor not to detain her husband for making a criminal threat against her. The State party argued that a procedure, the aim of which would be to redress an alleged violation in law, was set out under article 140, paragraph 1 of the Federal Constitution and would have been available to the deceased and remains available to her descendants. The State party submitted that the failure of the deceased and her descendants to use the procedure should have barred the admissibility of the communication.

7.5 The Committee noted that the procedure under article 140 paragraph 1 of the Federal Constitution could not be regarded as a remedy which was likely to bring effective relief to a woman whose life was under a dangerous criminal threat. Neither did the Committee regard this domestic remedy as being likely to bring effective relief in the case of the deceased's descendants in light of the abstract nature of such a constitutional remedy. Accordingly, the Committee concluded that for purposes of admissibility with regard to the authors' allegations about the legal framework for the protection of women in domestic violence situations in relation to the deceased no remedies existed which were likely to bring effective relief and that the communication in this respect was therefore admissible. In the absence of information on other available, effective remedies, which Fatma Yildirim or her heirs could have pursued or still might have pursued, the Committee concluded that the authors' allegations relating to the actions or omissions of public officials were admissible.

7.6 The Committee noted that Melissa Özdemir, the minor daughter of the deceased filed liability claims against Austria, which were, however, rejected. It noted that the State party argued that claims may still be made under civil law. In the absence of information on this or any other available, effective remedies, which Fatma Yildirim or her heirs could have or still might have pursued, the Committee concluded that the authors' allegations relating to the actions or omissions of public officials were admissible.

7.7 On 27 January 2006, the Committee declared the communication admissible.

The State party's request for a review of admissibility and submission on the merits

8.1 By its submission of 12 June 2006, the State party requests the Committee to review its decision on admissibility. The State party reiterates that the descendants of Fatma Yildirim should avail themselves of the procedure under article 140, paragraph 1 of the Federal Constitution, because this is the only way within the Austrian system to assert that a legal provision should be amended. The Constitutional Court might take a decision that would aim to induce the legislator to enact without delay another regulation that would conform to the Constitution. Such decisions are always substantiated and often also contain references to the elements that a new regulation should contain. Therefore, the State party maintains that this remedy is quite effective to pursue the aim of the communication at the domestic level.

8.2 The State party refers to the liability proceedings pursued by Melissa Özdemir, the surviving minor daughter of Fatma Yildirim. It indicates that, at the time that the State party submitted its first observations, she had written a letter to the Austrian authorities asserting that she should be compensated by the Federal Government, represented by the Attorney General's Department.

8.3 The State party explains that in civil law, the Federal Government can be held liable for damage to property or persons when that damage is inflicted as a result of unlawful conduct. The State party specifies that the claims of Melissa Özdemir were not

recognized by the Government of Austria because, in the circumstance of the case, the procedure followed by the Vienna Public Prosecutor's Office was considered to have been acceptable. Melissa Özdemir subsequently filed a court action against the Government of Austria. The decision dated 21 October 2005 of the first instance court, the Vienna Regional Civil Court (Landesgericht für Zivilrechtssachen), dismissed her action. The Vienna Court of Appeal (Oberlandesgericht) confirmed that decision on 31 May 2006.

8.4 The State party revisits the sequence of events leading up to the murder of Fatma Yildirim. As of July 2003, after Fatma Yildirim stated that she intended to divorce her husband, Irfan Yildirim, he had threatened her by phone and later at her place of work; his threats included that he would kill her. As of August 2003, Irfan Yildirim had also threatened to murder her son. On 4 August 2003, Fatma Yildirim moved out of the couple's apartment. Two days later she reported her husband to the police because of the threats. As a result, the police issued an expulsion and prohibition to return order against Irfan Yildirim and immediately informed the Public Prosecutor's Office thereof. The Public Prosecutor's Office decided to bring charges against him but did not order that he be detained. Subsequently, upon a request from Fatma Yildirim, the Hernals District Court issued an interim injunction, prohibiting her husband from returning to the couple's apartment and the immediate surroundings and her workplace as well as from contacting her. Despite police interventions and court orders, Irfan Yildirim made continuous efforts to contact Fatma Yildirim and threaten her. The Vienna Public Prosecutor instituted charges against Irfan Yildirim for making a criminal dangerous threat. The State party maintains that, at that time an arrest warrant seemed disproportionately invasive since Irfan Yildirim had no criminal record and was socially integrated. Irfan Yildirim killed Fatma Yildirim on 11 September 2003 on her way from her workplace to her home.

8.5 The State party further recalls that Irfan Yildirim was sentenced to life imprisonment on charges of murder pursuant to section 75 of the Penal Code (Strafgesetzbuch); the final judgment was rendered by the Vienna Regional Criminal Court on 14 September 2004. He is currently serving his sentence.

8.6 The State party notes that it is difficult to make a reliable prognosis as to how dangerous an offender is and that it is necessary to determine whether detention would amount to a disproportionate interference in a person's basic rights and fundamental freedoms. The Federal Act for the Protection against Violence within the Family aims to provide a highly effective yet proportionate way of combating domestic violence through a combination of criminal and civil-law measures, police activities and support measures. Close cooperation is required between criminal and civil courts, police organs, youth welfare institutions and institutions for the protection of victims, including in particular intervention centres for protection against violence within the family, as well as rapid exchange of information between the authorities and institutions involved. In the case of Fatma Yildirim, it is evident from the file that the Vienna Intervention Centre against Domestic Violence was informed by fax two hours after the expulsion and prohibition to return order against Irfan Yildirim entered into force.

8.7 The State party points out that, aside from settling disputes, the police issue expulsion and prohibition to return orders, which are less severe measures than detention. Section 38a, paragraph 7 of the Security Police Act requires the police to review compliance with expulsion and prohibition to return orders at least once in the first three days. In the case of Fatma Yildirim, the control took place on the evening of the same day on which the prohibition to return was issued. According to the instructions of the Vienna Federal Police Directorate, it is best for the police to carry out the review through personal contact with the person at risk in the home without prior warning at a time when it is likely that someone will be at home. Police inspectorates in Vienna must keep a domestic violence index file in order to be able to rapidly access reliable information.

8.8 The State party indicates that its legislation is subject to regular evaluation as is the electronic register of judicial proceedings. Increased awareness has led to significant law reform and enhanced protection of victims of domestic violence, such as the abolition of the requirement in section 107 paragraph 4 of the Penal Code that a threatened family member must authorise the prosecution of a perpetrator who has made a criminal dangerous threat.

8.9 The State party maintains that the issue of domestic violence and promising counterstrategies have regularly been discussed at meetings between the heads of the Public Prosecutor's Offices and representatives of the Federal Ministry of the Interior, including in connection with the case at issue. It also maintains that considerable efforts are being made to improve cooperation between Public Prosecutor's Offices and intervention centres against violence within the family. The State party also refers to efforts in the area of statistics made by the Federal Ministry of the Interior and its subordinate bodies.

8.10 The State party indicates that the Federal Act for the Protection against Violence within the Family and its application in practice are key elements of the training of judges and public prosecutors. Examples of seminars and local events on victim protection are given. Future judges are provided each year with information on "violence within the family", "protection of victims" and "law and the family".

Programmes cover the basics of the phenomenon of violence against women and children, including forms, trauma, post-traumatic consequences, dynamics of violent relationship, psychology of offenders, assessment factors of how dangerous an offender is, institutions of support, laws and regulations and the electronic registers. Interdisciplinary and comprehensive training has also been carried out.

8.11 The State party recognizes the need for persons affected by domestic violence to be informed about legal avenues and available counselling services. The State party reports that judges provide information at district courts free of charge once a week to anyone interested in the existing legal protection instruments. Psychological advice is also provided, including at the Hernals District Court. The State party also indicates that pertinent information is offered (posters and flyers in Arabic, German, English, French, Polish, Russian, Serbo-Croat, Spanish and Hungarian) at district courts. A toll-free Hotline for Victims has also been installed where lawyers provide legal advice around the clock free of charge. The State party further submits that women's homes act as shelters where women victims of violence are offered counselling, care and assistance in dealing with public authorities. In domestic violence cases where an expulsion and

prohibition to return order has been issued, police officers must inform persons at risk of the possibility of obtaining an interim injunction under section 382a of the Act on the Enforcement of Judgments. In Vienna, the person concerned is given an information sheet (available in English, French, Serbian, Spanish and Turkish).

8.12 The State party submits that the authors of the present communication give abstract explanations as to why the Federal Act for the Protection Against Violence in the Family as well as practice regarding detentions in domestic violence cases and prosecution and punishment of offenders allegedly violate articles 1, 2, 3 and 5 of the Convention. The State party considers that it is evident that its legal system provides for comprehensive measures to combat domestic violence adequately and efficiently.

8.13 The State party further submits that detention is ordered when there are sufficiently substantiated fears that a suspect would carry out a threat if he/she were not detained. It maintains that mistakes in assessing how dangerous an offender is cannot be excluded in an individual case. The State party asserts that, although the present case is an extremely tragic one, the fact that detention must be weighed against an alleged perpetrator's right to personal freedom and a fair trial cannot be overlooked. Reference is made to the case law of the European Court of Human Rights that depriving a person of his or her freedom is, in any event, *ultima ratio* and may be imposed only if and insofar as this is not disproportionate to the purpose of the measure. The State party also contends that, were all sources of danger to be excluded, detention would need to be ordered in situations of domestic violence as a preventive measure. This would reverse the burden of proof and be in strong contradiction with the principles of the presumption of innocence and the right to a fair hearing. Protecting women through positive discrimination by, for example, automatically arresting, detaining, prejudging and punishing men as soon as there is suspicion of domestic violence, would be unacceptable and contrary to the rule of law and fundamental rights.

8.14 The State party submits that, when charges were brought against the husband of Fatma Yildirim, the Public Prosecutor and the investigating judge were faced with a situation where the reported

threat was not followed by physical force. On the basis of the information available to the investigating judge, an interim injunction appeared sufficient to protect Fatma Yildirim. Furthermore, the State party submits that Irfan Yildirim was socially integrated and did not have a criminal record. It asserts that Irfan Yildirim's basic rights (such as the presumption of innocence, private and family life, right to personal freedom) would have been directly violated had he been detained.

8.15 The State party maintains that it would have been possible for the author to file a complaint at any time against the Public Prosecutor for his/her conduct pursuant to section 37 of the Public Prosecutors Act.

8.16 The State party asserts that its system of comprehensive measures[4] aimed at combating domestic violence does not discriminate against women and the authors' allegations to the contrary are unsubstantiated. Decisions, which appear to be inappropriate in retrospect (when more comprehensive information is available) — are not discriminatory *eo ipso*. The State party maintains that it complies with its obligations under the Convention concerning legislation and implementation and that there has been no discernable discrimination within the meaning of the Convention against Fatma Yildirim.

8.17 In the light of the above, the State party asks the Committee to reject the present communication as inadmissible; *in eventu*, to reject it for being manifestly ill founded and, *in eventu*, to hold that the rights of Fatma Yildirim under the Convention have not been violated.

Authors' comments on the State party's request for a review of admissibility and submission on the merits

9.1 By their submission of 30 November 2006, the authors argue that neither the victim's child nor the authors intended to have statutory provisions reviewed by the Constitutional Court — a motion that would be deemed inadmissible. They would have

[4] To illustrate the effectiveness of the measures, which are applied, the State party submits the statistics on prohibition orders to enter the common home and other legal measures.

lacked standing to bring such an action before the Constitutional Court. The authors note that the main focus of the communication is that legal provisions were not applied — not that those provisions should be amended or repealed. Furthermore, the authors claim that their suggestions for improvements to the existing laws and enforcement measures could never be realized by means of a constitutional complaint. Therefore, bringing a constitutional complaint should not be regarded as a domestic remedy for purposes of article 4, paragraph 1 of the Optional Protocol.

9.2 The authors point out that the State party referred to amendments of legal provisions that entered into force years after the murder of Fatma Yildirim.

9.3 The authors argue that the State party has not taken responsibility for the failures of the authorities and officers. The State party remains of the view that it would have been a disproportionate violation of Irfan Yildirim's rights to arrest and detain him because he had no criminal record and was socially integrated. The authors assert that the State party should have conducted a comprehensive assessment of how dangerous Irfan Yildirim would become and considered the numerous threats and attacks that he had made. As to his being socially integrated, the authors note that Irfan Yildirim was not an Austrian citizen and he would have lost his residence permit if he were no longer married to Fatma Yildirim. Furthermore, the State party should have considered the social and psychological circumstances of the case.

9.4 The authors dispute the State party's contention that there was no adequate reason to detain Irfan Yildirim. The authors submit that the risk that he would commit the same or a similar offences would have justified detention. This case shows that any place may become a crime scene when a dangerous offender is involved. The authors consider that the exclusive use of civil remedies was therefore inappropriate because they do not prevent very dangerous violent criminals from committing or repeating offences.

9.5 The authors draw attention to the fact that a spokesperson for the Minister of Justice said in a television interview in June 2005 that "in a retroactive view" the Public Prosecutor assessed the

case wrongly in failing to request that Irfan Yildirim be placed in detention.

9.6 The authors draw attention to flaws in the system of protection. One such flaw is that the police and public prosecutors are unable to communicate with each other rapidly enough. Another such flaw is that police files regarding domestic violence are not made available to the officers who operate the emergency call services. The authors also complain that systematically coordinated and/or institutionalized communication between the Public Prosecutor's Office and the Family Court does not exist. They also maintain that government funding remains inadequate to provide extensive care for all victims of domestic violence.

9.7 The authors argue that it would not be reasonable to expect victims of violence to provide in an emergency all information that may be relevant considering their mental state. Furthermore, regarding the instant case, German was not Fatma Yildirim's mother tongue. The authors maintain that the authorities should gather data about dangerous violent offenders in a systematic manner that can be retried anywhere in an emergency.

The State party's supplementary observations

10.1 By its submission of 19 January 2007, the State party submits that on 21 October 2005, the Vienna Regional Civil Court dismissed the liability claim of Melissa Özdemir (represented by her father Rasim Özdemir), minor daughter of Fatma Yildirim. The Court found no unlawful or culpable action on the part of the competent State organs. The Vienna Court of Appeal confirmed the decision on 30 May 2006 and the decision thus became final.

10.2 The State party states that Fatma Yildirim would have been entitled to bring a complaint under section 37 of the Public Prosecutor's Act (Staatsanwaltschaftsgesetz) to either the head of the Public Prosecutor's Office in Vienna, the Senior Public Prosecutor's Office or the Federal Ministry of Justice, had she considered the official actions of the responsible Public Prosecutor to have been unlawful. There are no formal requirements and complaints may be filed in writing, by e-mail or by fax or telephone.

10.3 The State party indicates that an interim injunction for protection against domestic violence may be sought by persons who live or have lived with a perpetrator in a family relationship or a family-like relationship under section 382b of the Act on the Enforcement of Judgments, when there have been physical attacks, threats of physical attacks or any conduct that severely affects the mental health of the victim and when the home fulfils the urgent accommodation needs of the applicant. The perpetrator may be ordered to leave the home and the immediate surroundings and prohibited from returning. If further encounters become unacceptable, the perpetrator may be banned from specifically defined places and given orders to avoid encounters as well as contact with the applicant so long as this does not infringe upon important interests of the perpetrator. In cases where an interim injunction has been issued, the public security authorities may determine that an expulsion order (Wegweisung) is also necessary as a preventive measure.

10.4 The State party states that interim injunctions can be issued during divorce proceedings, marriage annulment and nullification proceedings, during proceedings to determine the division of matrimonial property or the right to use the home. In such cases, the interim injunction is valid for the duration of the proceedings. If no such proceedings are pending, an interim injunction may be issued for a maximum of three months. An expulsion and prohibition to return order expires after 10 days but is extended for another 10 days if a request for an interim injunction is filed.

Review of admissibility

11.1 In accordance with rule 71, paragraph 2 of its rules of procedure, the Committee has re-examined the communication in light of all the information made available to it by the parties, as provided for in article 7, paragraph 1, of the Optional Protocol.

11.2 As to the State party's request to review admissibility on the grounds that Fatma Yildirim's heirs did not avail themselves of the procedure under article 140, paragraph 1 of the Federal Constitution, the Committee notes that the State party has not introduced new arguments that would alter the Committee's

view that, in light of its abstract nature, this domestic remedy would not be likely to bring effective relief.

11.3 As to the State party's reference to the liability proceedings pursued by Melissa Özdemir, the surviving minor daughter of Fatma Yildirim, the Committee notes that both the decision of the First Instance Court of 21 October 2005 and the decision of the Appeals Court of 31 March 2006 were taken after the authors submitted the communication to the Committee and the communication was registered. The Committee notes that the Human Rights Committee generally makes an assessment of whether an author has exhausted domestic remedies at the time of its consideration of a communication in line with other international decision-making bodies, save in exceptional circumstances, the reason being that "rejecting a communication as inadmissible when domestic remedies have been exhausted at the time of consideration would be pointless, as the author could merely submit a new communication relating to the same alleged violation".[5] In this connection, the Committee on the Elimination of Discrimination against Women draws attention to rule 70 (inadmissible communications) of its rules of procedure, which allows it to review inadmissibility decisions when the reasons for inadmissibility no longer apply. Therefore, the Committee on the Elimination of Discrimination against Women will not revise its admissibility decision on this ground.

11.4 As to the State party's contention that it would have been possible for Fatma Yildirim to bring a complaint under section 37 of the Public Prosecutor's Act, the Committee considers that this remedy — designed to determine the lawfulness of official actions of the responsible Public Prosecutor — cannot be regarded as a remedy which is likely to bring effective relief to a woman whose life is under a dangerous threat, and should thus not bar the admissibility of the communication.

11.5 The Committee will proceed to consideration of the merits of the communication.

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[5] See communication No. 1085/2002, Abdelhamid Taright, Ahmed Touadi, Mohamed Remli and Amar Yousfi v. Algeria, views adopted on 15 March 2006, para. 7.3, and communication No. 925/2000, Kuok Koi v. Portugal, decision of inadmissibility adopted on 22 October 2003, para. 6.4.

Consideration of the merits

12.1.1 As to the alleged violation of the State party's obligation to eliminate violence against women in all its forms in relation to Fatma Yildirim in articles 2 (a) and (c) through (f), and article 3 of the Convention, the Committee recalls its general recommendation 19 on violence against women. This general recommendation addresses the question of whether States parties can be held accountable for the conduct of non-State actors in stating that " … discrimination under the Convention is not restricted to action by or on behalf of Governments … " and that "[U]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation".

12.1.2 The Committee notes that the State party has established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness raising, education and training, shelters, counselling for victims of violence and work with perpetrators. However, in order for the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations.

12.1.3 In the instant case, the Committee notes the undisputed sequence of events leading to the fatal stabbing of Fatma Yildirim, in particular that Irfan Yildirim made continuous efforts to contact her and threatened by phone and in person to kill her, despite an interim injunction prohibiting him from returning to the couple's apartment, the immediate surroundings and her workplace as well as from contacting her, and regular police interventions. The Committee also notes that Fatma Yildirim made positive and determined efforts to attempt to sever ties with her spouse and save her own life — by moving out of the apartment with her minor daughter, establishing ongoing contact with the police, seeking an injunction and giving her authorization for the prosecution of Irfan Yildirim.

12.1.4 The Committee considers that the facts disclose a situation that was extremely dangerous to Fatma Yildirim of which the Austrian authorities knew or should have known, and as such the Public Prosecutor should not have denied the requests of the Police to arrest Irfan Yildirim and place him in detention. The Committee notes in this connection that Irfan Yildirim had a lot to lose should his marriage end in divorce (i.e. his residence permit in Austria was dependent on his staying married) and that this fact had the potential to influence how dangerous he would become.

12.1.5 The Committee considers the failure to have detained Irfan Yildirim as having been in breach of the State party's due diligence obligation to protect Fatma Yildirim. Although, the State party maintains that, at that time — an arrest warrant seemed disproportionately invasive, the Committee is of the view, as expressed in its views on another communication on domestic violence that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.[6]

12.1.6 While noting that that Irfan Yildirim was prosecuted to the full extent of the law for killing Fatma Yildirim, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Fatma Yildirim to life and to physical and mental integrity.

12.2 The Committee notes that the authors also made claims that articles 1 and 5 of the Convention were violated by the State party. The Committee has stated in its general recommendation 19 that the definition of discrimination in article 1 of the Convention includes gender-based violence. It has also recognized that there are linkages between traditional attitudes by which women are regarded as subordinate to men and domestic violence. At the same time, the Committee is of the view that the submissions of the authors of the communication and the State party do not warrant further findings.

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[6] See paragraph 9.3 of the Committee's views on communication No. 2/2003, A.T. v. Hungary.

12.3 Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, the Committee on the Elimination of Discrimination against Women is of the view that the facts before it reveal a violation of the rights of the deceased Fatma Yildirim to life and to physical and mental integrity under article 2 (a) and (c) through (f) and article 3 of the Convention read in conjunction with article 1 and general recommendation 19 of the Committee and makes the following recommendations to the State party:

(a) Strengthen implementation and monitoring of the Federal Act for the Protection against Violence within the Family and related criminal law, by acting with due diligence to prevent and respond to such violence against women and adequately providing for sanctions for the failure to do so;

(b) Vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous threat to the victim and also ensure that in all action taken to protect women from violence, due consideration is given to the safety of women, emphasizing that the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity;

(c) Ensure enhanced coordination among law enforcement and judicial officers, and also ensure that all levels of the criminal justice system (police, public prosecutors, judges) routinely cooperate with non-governmental organizations that work to protect and support women victims of gender-based violence;

(d) Strengthen training programmes and education on domestic violence for judges, lawyers and law enforcement officials, including on the Convention on the Elimination of All Forms of Discrimination against Women, general recommendation 19 of the Committee, and the Optional Protocol thereto.

12.4 In accordance with article 7, paragraph 4, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including any information on any action taken in the light of the views and recommendations of the Committee. The State party is also requested to publish the Committee's views and recommendations and to have them translated into the German language and widely distributed in order to reach all relevant sectors of society.

Committee on the Elimination of Discrimination against Women

Thirty-ninth session

23 July-10 August 2007

Decision of the Committee on the Elimination of Discrimination against Women under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

Communication No. 7/2005* #

Submitted by	:	Cristina Muñoz-Vargas y Sainz de Vicuña
Alleged victim	:	The author
State party	:	Spain
Date of communication	:	30 July 2004 (initial submission)
Document references	:	Transmitted to the State party on 24 February 2005 (not issued in document form)

The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 9 August 2007

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* The following members of the Committee participated in the examination of the present communication: Ms. Ferdous Ara Begum, Ms. Magalys Arocha Dominguez, Ms. Meriem Belmihoub-Zerdani, Ms. Saisuree Chutikul, Ms. Mary Shanthi Dairiam, Mr. Cees Flinterman, Ms. Naela Mohamed Gabr, Ms. Françoise Gaspard, Ms. Violeta Neubauer, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Heisoo Shin, Ms. Glenda P. Simms, Ms. Dubravka Šimonoviæ, Ms. Anamah Tan, Ms. Maria Regina Tavares da Silva and Ms. Zou Xiaoqiao.

\# The text of two individual opinions, one signed by Ms. Magalys Arocha Dominguez, Mr. Cees Flinterman, Ms. Pramila Patten, Ms. Silvia Pimentel, Ms. Fumiko Saiga, Ms. Glenda P. Simms, Ms. Anamah Tan and Ms. Zou Xiaoqiao, and the other one signed by Ms. Mary Shanthi Dairiam are included in the present document.

Adopts the following:

Decision on admissibility

1. The author of the communication dated 30 July 2004 is Cristina Muñoz-Vargas y Sainz de Vicuña, a Spanish national who claims to be a victim of a violation by Spain of articles 2 (c) and 2 (f)[1] of the Convention on the Elimination of All Forms of Discrimination against Women. The author is represented by counsels, Carlos Texidor Nachón and Jose Luis Mazón Costa.[2] The Convention entered into force for the State party on 4 February 1984 and its Optional Protocol on 6 October 2001. A declaration was made by Spain on ratification that the ratification of the Convention shall not affect the constitutional provisions concerning succession to the Spanish crown.

The facts as presented by the author

2.1 The author is the first-born daughter of Enrique Muñoz-Vargas y Herreros de Tejada, who held the nobility title of "Count of Bulnes".

2.2 In accordance with article 5 of the Decree/Law on the order of succession to titles of nobility of 4 June 1948, the first-born inherits the title, but a woman inherits the title only if she does not have any younger brothers. According to the historical rules of succession, men are given primacy over women in the ordinary line of succession to titles of nobility.

2.3 The author's younger brother, José Muñoz-Vargas y Sainz de Vicuña, succeeded to the title upon the death of their father on

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1 The author is inconsistent with regard to her references to articles. She refers to article 2 (c) alone, to article 2 (f) alone at other times and to both articles in the annexes.

2 The lawyers Carlos Texidor Nachón and Jose Luis Mazón Costa were also the representatives of Mercedez Carrion Barcaiztegui (Spain), who submitted a communication to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights, alleging discrimination in succession to the titles of nobility, on 8 March 2001 (communication No. 1019/2001). The Human Rights Committee declared the case inadmissible (30 March 2004).

23 May 1978. On 30 December 1978, he requested that the royal decree of succession be issued. The decree was issued on 3 October 1980.

2.4 On 30 December 1988, the author, as first-born, initiated legal action against her younger brother, José Muñoz-Vargas y Sainz de Vicuña, claiming the title of "Countess of Bulnes", basing her claim on the principle of equality and non-discrimination on the basis of sex proclaimed in article 14 of the Constitution of Spain of 1978[3] and article 2 (c) and (f) of the Convention on the Elimination of All Forms of Discrimination against Women. The author argued that she had the greater right to inherit the title of nobility as the first-born child of the former holder of the title, and that article 5 of the Decree/Law on the order of succession to titles of nobility of 4 June 1948 should have been interpreted in the light of the principle of equality and non-discrimination on the basis of sex as stated in article 14 of the Spanish Constitution. The author referred to a judgement by the Constitutional Court of 2 February 1981 finding that norms that had entered into force prior to the Spanish Constitution had to be interpreted in accordance with the Constitution and that incompatible norms had to be repealed. She further referred to a ruling by the Supreme Court of 27 July 1981 finding that the precedence for males in succession to titles of nobility was discriminatory and therefore unconstitutional. She also referred to a ruling by the Supreme Court of 7 December 1988 finding that the Spanish Constitution was applicable to the succession of titles of nobility.

2.5 The Madrid Court No. 6 of First Instance dismissed the author's claim on 10 December 1991. It considered the historical principle of male precedence in succession to nobility titles to be compatible with the principle of equality and non-discrimination on grounds of sex contained in article 14 of the Spanish Constitution. Furthermore, the title had been given to the author's brother before the entry into force of the 1978 Constitution, and the Constitution was not applicable to the Civil Code that regulated that issue.

[3] The Spanish Constitution entered into force on 29 December 1978.

2.6 The author filed an appeal with the Eighteenth Section of the Provincial High Court of Madrid, which dismissed the appeal on 27 September 1993, on the same grounds as the Madrid Court No. 6 of First Instance.

2.7 The author appealed to the Supreme Court (*recurso de casacion*). After a date for a hearing had been set, she requested that it be rescheduled as her lawyer could not attend owing to sickness. The Supreme Court did not accede to her request and dismissed her appeal on 13 December 1997. The Supreme Court ruled that, although it had previously found that male precedence in succession to titles of nobility was discriminatory and unconstitutional, judgement 126/1997 of the Constitutional Court, of 3 July 1997, reversed that jurisprudence. That judgement established that male primacy in the order of succession to titles of nobility, provided for in the laws of 4 May 1948 and 11 October 1820, was neither discriminatory nor unconstitutional since article 14 of the Spanish Constitution, which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of those titles.

2.8 The author appealed to the Constitutional Court (*recurso de amparo*) against the judgement of the Supreme Court on both procedural and substantive grounds. The author claimed that article 14 of the Constitution should have been applied to the succession to the title even if the Constitution had not yet entered into force at the time of the death of her father. The author stressed that the title had been transmitted to her brother through royal decree after 29 December 1978, that is, after the date of the entry into force of the 1978 Constitution. She also claimed that the Supreme Court judgement violated article 6, paragraph 1 and article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms and article 1 of its Protocol as well as articles 1, 2 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women.

2.9 By a decision of 20 May 2002, the Constitutional Court set aside the judgement of the Supreme Court of 13 December 1997 as a violation of the fundamental right to an effective defence and sent it back to the Supreme Court for reconsideration.

2.10 On 17 September 2002, the Supreme Court issued a new judgement denying the author's claims. The judgement reiterated

that the Civil Code regulated the succession to titles of nobility. It also noted that, since the date of reference, 23 May 1978 — the date of the father's death — preceded the entry into force of the 1978 Constitution, the issue of the applicability of article 14 of the Constitution did not arise. The Supreme Court also referred to the decision of the Constitutional Court of 3 July 1997 finding that, given the honorary and historic nature of titles, the laws of 1948 and 1820 determining male precedence with regard to the succession to titles of nobility upon death in the same line and degree were not contrary to article 14 of the Spanish Constitution.

2.11 On 17 October 2002, the author lodged a new *amparo* appeal before the Constitutional Court claiming, among other things, that the judgement of the Supreme Court of 17 September 2002 violated article 14 of the Constitution and articles 1, 2 and 15 of the Convention on the Elimination of All Forms of Discrimination against Women.

2.12 On 24 March 2003, the Constitutional Court rejected her *amparo* appeal for lack of constitutional content.

The complaint

3.1 The author claims that the State party discriminated against her on the basis of sex by denying her right, as the first-born child, to succeed her late father to the title of Count of Bulnes. She alleges that male primacy in the order of succession to titles of nobility constitutes a violation of the Convention in general, and specifically of its article 2 (f). She asserts that Spain has an obligation under the Convention to amend or revise the laws of 4 May 1948 and 11 October 1820 which establish male primacy in the order of succession to titles of nobility.

3.2 As to admissibility of the communication, the author claims that she has exhausted all domestic remedies. She contends that, by virtue of judgement 126/1997 of the Constitutional Court of 3 July 1997, which definitely settled the matter of male primacy in succession to titles of nobility, no *amparo* appeal on the question could be successful, thereby rendering such a remedy ineffective.

3.3 The author requests the Committee to find a violation of the Convention, and to direct the State party to provide her with an effective remedy as well as to revise the discriminatory legislation.

The State party's observations on admissibility

4. By submission of 4 August 2005, the State party requests that the communication be rejected as inadmissible. It asserts that the same question has already been examined by the Human Rights Committee in its communications 1008/2001 and 1019/2001.

The author's comments on the State party's observations on admissibility

5.1 By submission of 25 October 2005, the author acknowledges that similar cases have been brought before the Human Rights Committee but claims that the scope of the right to equality under article 26 of the International Covenant on Civil and Political Rights is not the same as the right to equality under the Convention, in particular article 1 and article 2 (f). She contends that the Convention has been designed with the overall aim of eradication, once and for all, of discrimination suffered by women in every field, even in relation to a *nomen honoris*. She further contends that the view of the Human Right Committee that discrimination suffered by women in the succession to titles of nobility was outside the scope of article 26 of the International Covenant on Civil and Political Rights was not relevant. According to the author, the Convention does not place any limitations on the right to equality in any field, including the social, economic, civil and political fields. For that reason, she argues that her communication is admissible.

5.2 The author reiterates her request that the Committee direct the State party to repeal legislation, rules and customs that support a greater right of males over females in the succession to titles of nobility. The author contends that the fact that draft legislation on equality between men and women in the order of succession to titles of nobility has been presented to the Parliament was further confirmation that male preference over females was discriminatory.

Additional information provided by the author on admissibility

6. On 20 July 2006, the author submitted additional information about the legislation on succession to titles of nobility, which had been published in the *Boletín Oficial de las Cortes Generales* on 4 July 2006. The legislation would apply only to those proceedings which remained pending at any level on 27 July 2005, the date on which the draft law had to be presented to the Congress of Deputies. The author argues that the new legislation would not be applicable to her because her case had been definitively settled by the Constitutional Court prior to that date. She claims that the fact that the law would not apply retroactively to the time that the Convention entered into force for Spain was, in itself, a violation of the Convention.

The State party's further submission on admissibility

7.1 By its submission of 3 August 2006, the State party disputes the admissibility of the communication, arguing that the author failed to exhaust domestic remedies, that the same matter has been examined under another procedure of international investigation or settlement and that the communication is inadmissible *ratione temporis*.

7.2 With respect to the exhaustion of domestic remedies, the State party asserts that a *recurso de amparo* lodged by the applicant was still ongoing before the Constitutional Court. The State party submits that such a remedy would indeed be an effective one. The State party also challenges the author's allegation that decision 126/1997 of the Constitutional Court, of 3 July 1997, made a *recurso de amparo* on her question of succession to titles of nobility an ineffective remedy. It submits that the jurisprudence of the Constitutional Court was not static and that it evolved with the times. The State party therefore considers that the Constitutional Court could revise its jurisprudence in the light of the social reality of the moment or in the light of changes in its composition. The State party notes that the author did not allege that this remedy was unreasonably prolonged.

7.3 The State party further notes that, with the enactment of the new legislation pertaining to succession to titles of nobility, the author would benefit from an additional domestic remedy. The

State party maintains that this new law, once it enters into force, will apply to the author's case because her legal proceedings (*recurso de amparo*) are ongoing and the new law will apply retroactively to all legal proceedings that remain pending as at 27 July 2005. It further considers that the entry into force of the new law may also influence the Constitutional Court in the resolution of the author's pending *recurso de amparo*.

7.4 The State party further contends that the communication is inadmissible in accordance with article 4, paragraph 2 (a) of the Optional Protocol, as the same matter has already been examined under another procedure of international investigation or settlement. Specifically, the Human Rights Committee examined two similar cases (communications 1008/2001 and 1019/2001) in which the applicants claimed that the law governing succession to titles of nobility was discriminatory as male descendants were given preference as heirs to the detriment of women. The State party notes that in both cases the Human Rights Committee found the complaints incompatible *ratione materiae* with the International Covenant on Civil and Political Rights and declared the communications inadmissible for the reason that titles of nobility lay outside the underlying values behind the principles of equality before the law and non-discrimination protected by article 26 of the International Covenant. The State party therefore asserts that titles of nobility constitute neither a human right nor a fundamental freedom according to article 1 of the Convention, in conjunction with article 2 of the Optional Protocol. The State party further alleges that the same matter has also already been examined by the European Court of Human Rights[4] with a similar finding, that the complaint is incompatible *ratione materiae* with the Convention for the Protection of Human Rights and Fundamental Freedoms. It finally argues that the fact that parliament (*Cortes Generales*) is examining a draft law about the matter does not constitute a

[4] See De la Cierva Osorio De Moscoso and others v. Spain, communications 41127/98, 41503/98, 41717/98 and 45726/99, decision of inadmissibility, 28 October 1999, in which the Court reiterates that article 14 concerns only discrimination affecting the rights and freedoms guaranteed by the Convention and its Protocols. It has found that the applicants' complaints are incompatible with the Convention ratione materiae.

recognition of a violation of the State party's international obligations under the Convention on the Elimination of All Forms of Discrimination against Women. The doctrine and case law indicate that the right to succeed to a title of nobility is neither a human right nor a fundamental freedom and is outside the scope of application of human rights instruments (the International Covenant on Civil and Political Rights and the Convention on the Elimination of Discrimination against Women). According to the State party, succession to titles of nobility is a "natural right" subject to other types of regulation. Therefore, the drafting of a new law was not within the scope of the State party's international obligations pertaining to the equality of men and women.

7.5 The State party also argues that the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for Spain on 6 October 2001, as well as prior to the entry into force of the Convention itself. It further argues that the possession of a title of nobility is without legal effects. The State party thus submits that the author's communication is inadmissible in accordance with article 4, paragraph 2 (*e*) of the Optional Protocol.

The author's further comments on the State party's further observations on admissibility

8.1 The author submits that the State party's belief that her *amparo* appeal remained pending before the Constitutional Court may be based on a misinterpretation of the relevant part of her communication. The Court had indeed rejected her *amparo* appeal on 24 March 2003, for lack of constitutional content. Since then, the author had not lodged any other appeal. Even if such an appeal were pending, the author would claim that it would not constitute an effective remedy. While the Constitutional Court might change its case law, such a change could not affect the author as her case has been definitely litigated, and no appeal was available to revive or revisit the matter for reasons that the case law had changed. Therefore, the author reiterates that she has exhausted all available domestic remedies.

8.2 The author asserts that she will not be able to benefit from any additional procedures under the new legislation on succession to titles of nobility as the law will not be applicable in her case.

As it had been recognized by the State party, the new legislation will apply retroactively only to those cases which were still pending as at 27 July 2005. Her case was closed with the rejection of her *amparo* appeal by the Constitutional Court on 24 March 2003.

8.3 The author reiterates that the two communications brought before the Human Rights Committee were based on article 26 of the International Covenant on Civil and Political Rights (right to equality), which was more restrictive than articles 1 and 2 (f) of the Convention. The purpose of the Convention is to eradicate discrimination suffered by women in all spheres of life, without any limitations (article 1). Therefore, the same matter has not been examined under another procedure of international investigation or settlement. For the same reasons, the petition brought before the European Court of Human Rights should also not be considered as the same matter as a communication brought before the Committee on the Elimination of Discrimination against Women.

8.4 The author maintains that the new law was an implicit and explicit recognition that the current acts were discriminatory as its sole purpose was to eradicate the inequality between women and men pertaining to the transmission of titles of nobility and to be in line with the Convention, as explained in its preamble. No measures have, however, been taken by the State party to remedy discrimination already suffered, as in her case.

8.5 The author argues that her communication is not inadmissible *ratione temporis* since her case was still pending when the Optional Protocol entered into force for Spain in 2001. It became *res judicata* on 24 March 2003. Furthermore, she claims that the effects of the discrimination continued to the present time and rejects the State party's allegation that titles of nobility do not entail any type of privilege.

Supplementary observations by the author

9. In a submission of 8 November 2006, the author states that the law on equality between men and women on succession to titles of nobility has been published in the official bulletin on 31 October 2006 and would enter into force on 20 November 2006. She reiterates that, in the light of its transitional provisions,

the new law would not be applicable to her case. The author claims that since the new law does not provide for an effective remedy for cases that had been definitively adjudicated before 27 July 2005, the State party is in violation of the Convention.

Supplementary submissions of the State party

10. By its submission of 16 November 2006, the State party reiterates that the same matter has already been examined by the Human Rights Committee. It also contends that legal certainty made it necessary to avoid a situation in which all titles of nobility would be open to re-examination, especially since titles of nobility were devoid of legal or material content, as had been stated by the Constitutional Court, the Human Rights Committee and the European Court of Human Rights. By its submission of 22 December 2006, the State party confirms the entry into force of the law on equality between men and women on succession to titles of nobility and reiterates that the time criteria established for the retroactive application of the law was reasonable and necessary to avoid a state of legal uncertainty.

Issues and proceedings before the Committee concerning admissibility

11.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol.

11.2 In accordance with rule 66 of its rules of procedure, the Committee may decide to consider the question of admissibility and merits of a communication separately.

11.3 The Committee notes that the State party claims that the communication is inadmissible in accordance with article 4, paragraph 2 (e) of the Optional Protocol since the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for Spain on 6 October 2001, as well as prior to the entry into force of the Convention for Spain on 4 February 1984. The author challenges that argument because her case was still pending when the Optional Protocol entered into force for Spain and became *res judicata* on 24 March 2003 with the rejection by the Constitutional Court of

her *amparo* appeal. The Committee notes the State party's assertion that the possession of a title of nobility is without legal effect. It also notes that the author claims that the effects of the discrimination continued to the present time and that the author rejects the State party's allegation that titles of nobility do not entail any type of privilege.

11.4 The Committee shall declare a communication inadmissible under article 4, paragraph 2 (e) of the Optional Protocol where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date. In other words, the Committee cannot consider the merits of alleged violations that took place before the Optional Protocol entered into force for the State party, unless such alleged violations continue after the entry into force of the Optional Protocol.[5]

11.5 The rationale behind article 4, paragraph 2 (e) is that a treaty is not applicable to situations that occurred or ceased to exist prior to the entry into force of the treaty for the State concerned. The Committee notes that the author's complaint of sex-based discrimination stems from the succession of her younger brother to the title by royal decree of succession issued on 3 October 1980 following the death of their father on 23 May 1978. The Committee notes that this event took place at a time when the Convention had not yet entered into force internationally and well before it was ratified by the State party on 4 February 1984. Neither had the Optional Protocol been adopted. It considers that the relevant fact — and thus determination of the point in time in connection with article 4, paragraph 2 (e) — is when the right to succession to the title of the author's father was vested in the author's brother. That date was on 3 October 1980 when the royal decree of succession was issued. The Committee considers that this event, which was the basis of the author's complaint, occurred and was completed at the time of the issuance of the decree and as such was not of a continuous nature. The Committee further notes her brother succeeded to

[5] In communication No. 871/1999, the Human Rights Committee stated that "a persistent violation is understood to mean the continuation of violations which the State party committed previously, either through actions or implicitly".

the title in accordance with legislation that was valid at the time. Therefore, the Committee considers that any effect that the discrimination against women that Spanish legislation of the time enshrined may have had on the life of the author would not justify a reversal of the royal decree of succession at the present time. For all these reasons, the Committee can only conclude that the facts that are subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party and were not of a continuous nature. Consequently, the Committee declares the communication inadmissible *ratione temporis*, article 4, paragraph 2 (e) of the Optional Protocol.

11.6 The Committee sees no reason to find the communication inadmissible on any other grounds.

11.7 The Committee therefore decides:

(a) That the communication is inadmissible *ratione temporis* under article 4, paragraph 2 (e) of the Optional Protocol;

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

Individual opinions by Committee members Magalys Arocha Dominguez, Cees Flinterman, Pramila Patten, Silvia Pimentel, Fumiko Saiga, Glenda P. Simms, Anamah Tan, Zou Xiaoqiao (concurring)

12.1 Although we agree with the conclusion that the communication is inadmissible, we disagree with the majority in relation to the reasons for inadmissibility. In our opinion, the communication should have been declared inadmissible under article 4, paragraph 2 (b) of the Optional Protocol because it is incompatible with the provisions of the Convention.

12.2 In accordance with article 4, paragraph 2 (b) of the Optional Protocol, a communication shall be declared inadmissible where it is incompatible with the provisions of the Convention. We note that the communication relates to a woman who, under the then existing legislation that has since been amended, was unable to succeed to a title of nobility involving a hereditary title, whereas her younger brother was. We recall that the

Convention on the Elimination of All Forms of Discrimination against Women protects women's right to be free from all forms of discrimination, commits States parties to ensuring the practical realization of the principle of equality of women and men and sets out the normative standards of such equality and non-discrimination in all fields. To that end, the Convention provides a comprehensive definition of discrimination against women which shall mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (article 1). It is undisputed in the present case that the title of nobility in question is of a purely symbolic and honorific nature, devoid of any legal or material effect. Consequently, we consider that claims of succession to such titles of nobility are not compatible with the provisions of the Convention, which are aimed at protecting women from discrimination which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women on a basis of equality of men and women, of human rights and fundamental freedoms in all fields. We therefore conclude that the author's communication is incompatible with the provisions of the Convention pursuant to article 4, paragraph 2 (b) of the Optional Protocol.

(*Signed*) Magalys **Arocha Dominguez**

(*Signed*) Cees **Flinterman**

(*Signed*) Pramila **Patten**

(*Signed*) Silvia **Pimentel**

(*Signed*) Fumiko **Saiga**

(*Signed*) Glenda P. **Simms**

(*Signed*) Anamah **Tan**

(*Signed*) **Zou** Xiaoqiao

Individual opinion by Committee member Mary Shanthi Dairiam (dissenting)

13.1 At its meeting on 9 August 2007, the Committee on the Elimination of All Forms of Discrimination against Women (the Committee) decided to rule communication No. 7/2005 inadmissible under article 4 of the Optional Protocol. Under this communication, the author claims that the State party discriminated against her on the basis of sex by denying her right as the first-born child, to succeed her late father to the title of Count of Bulnes. She alleged that male primacy in the order of succession in titles of nobility constitutes a violation of the Convention in general, and specifically of article 2 (f) of the Convention. The Committee's decision made by a slim majority stated that the complaint is inadmissible *ratione temporis* under article 4, paragraph 2 (e) of the Optional Protocol. There was a concurring opinion that also found the said communication inadmissible but under article 4, paragraph 2 (b), stating that the communication is incompatible with the provisions of the Convention.

13.2 The Committee is of the view that the author's complaint of sex-based discrimination is inadmissible *ratione temporis* because it stems from the succession of the author's younger brother to the title by royal decree of succession issued on 3 October 1980 following the death of their father on 23 May 1978, all of which took place before the entry into force of the Optional Protocol for Spain on 6 October 2001, as well as prior to the entry into force of the Convention for Spain on 4 February 1984. The Committee expresses the view that the event of the succession of her brother to the title of nobility occurred and was completed on 3 October 1980 at the time of the issuance of the decree and was not of a continuous nature.[6] The Committee did not see it as necessary to find any other grounds for inadmissibility so the

[6] The Committee has relied on the Human Rights Committee's jurisprudence that states that a continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication of the previous violation of the State party, to interpret article 4, paragraph 2 (e) of the Optional Protocol to the Convention.

question of whether the communication was incompatible with the provisions of the Convention is left untouched.

13.3 The concurring opinion refers to article 1 of the Convention, which defines discrimination as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". The view expressed is that titles to nobility are purely symbolic and honorific, devoid of any legal or material effect. Consequently claims of titles to nobility are not compatible with the provisions of the Convention as denial of such claims do not nullify or impair the exercise by women of human rights and fundamental freedoms.

13.4 I am of the view that the communication is admissible. The issue here is one of deciding both on the compatibility of the communication with the provisions of the Convention as well as on the continuing nature of the violation. While it is true that the succession of the author's younger brother to the title by royal decree of succession occurred before the entry into force of the Optional Protocol for Spain, as well as prior to the entry into force of the Convention, it has to be ascertained whether this event has been affirmed subsequently post entry into force of the Convention and its Optional Protocol by an act or implication (refer to footnote 6).

13.5 First of all I acknowledge that the right to titles of nobility is not a fundamental human right and may not be of much material consequence to the author. However, the legislation and practice of States parties must in no way and in no context provide for a differential treatment of women and men in a manner that establishes the superiority of men over women and concomitantly, the inferiority of women as compared to men. This is what the law of 4 May 1948 and 11 October 1820 does. The author in her complaint has submitted that she filed a case in the Madrid Court and an appeal in the Provincial High Court claiming the title of Countess of Bulnes basing her claim on the principle of equality and non-discrimination on the basis of sex proclaimed in article 14 of the Constitution of Spain. These cases

were dismissed on 10 December 1991 and 27 September 1993 respectively on the grounds that the historical principle of male precedence in succession to nobility titles was compatible with the principle of equality. In my view, the decision of the courts could be interpreted to mean that such historical principles were above the norm of equality guaranteed in the Constitution. The courts were also of the view that the title had been given to her brother before the entry into force of the 1978 Constitution, and the Constitution was not applicable to the Civil Code that regulated that issue.

13.6 I wish to point out that these decisions by the courts of Spain were made after Spain became a party to the Convention and in spite of a judgement by the Supreme Court of 2 February 1981 that norms that had entered into force prior to the Spanish Constitution had to be interpreted in accordance with the Constitution. The author's appeal to the Supreme Court (*recurso de casacion*) was dismissed on 13 December 1997. This judgement of the Supreme Court established that male primacy in the order of succession to titles of nobility, provided for in the laws of 4 May 1948 and 11 October 1820 was neither discriminatory nor unconstitutional since article 14 of the Spanish Constitution which guaranteed equality before the law, was not applicable in view of the historical and symbolic nature of those titles (paragraph 2.7 of the text of the Committee's decision). The author has further pointed out that there was another Supreme Court judgement on 17 September 2002 denying her claim. This Supreme Court judgement also referred to decision 126/1997 of the Constitutional Court of July 1997 finding that given the honorary and historic nature of titles, the laws of 1948 and 1820 determining male precedence with regard to the succession to titles of nobility upon death in the same line and degree were not contrary to article 14 of the Spanish Constitution (paragraph 2.10 of the text of the Committee's decision). The author lodged an *amparo* appeal with the Constitutional Court which was rejected on 24 March 2004 (paragraph 2.12 of the text of the Committee's decision).

13.7 What needs to be noted in all of this is that when Spanish law, enforced by Spanish courts, provides for exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment,

it is a violation, in principle, of women's right to equality. Such exceptions serve to subvert social progress towards the elimination of discrimination against women using the very legal processes meant to bring about this progress, reinforce male superiority and maintain the status quo. This should neither be tolerated nor condoned on the basis of culture and history. Such attempts do not recognize the inalienable right to non-discrimination on the basis of sex which is a stand-alone right. If this right is not recognized in principle regardless of its material consequences, it serves to maintain an ideology and a norm entrenching the inferiority of women that could lead to the denial of other rights that are much more substantive and material.

13.8 As acknowledged, the title to nobility is certainly not a human right. In fact under different circumstances such social hierarchies should not be supported. The focus of my defence here is not the right of the author to a nobility title but to recognize the element of discrimination against women that takes place in the distribution of social privileges using the law and legal processes. The author maintains that she was right in her view of the discriminatory nature of the law of succession to nobility titles as the State party has now amended this law in 2006 to give equal rights of succession to women and men.

13.9 The Human Rights Committee in its general comment No. 28 on equality of rights between men and women has stated,

> "Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes."

This statement reminds us that the ideology of the subordination of women based on history, culture and religion has manifested itself in material ways creating inequality. The entire intent and spirit of the Convention is the elimination of all forms of discrimination against women and the achievement of equality for women. In pursuing this goal, the Convention recognizes, in article 5 (a), the negative effects of conduct based on culture, custom, tradition and the ascription of stereotypical roles that entrench the inferiority of women. The Convention sees this as an impediment to the pursuit of equality for women that has to be eradicated in the conduct of both public and private agents. The immediate material consequence of such patterns of

behaviour does not have to be demonstrated. Because of its mandate, the Committee on the Elimination of Discrimination against Women, more than any other treaty body, must be broad in its interpretation and recognition of the violations of women's right to equality, going beyond the obvious consequences of discriminatory acts and recognizing the dangers of ideology and norms that underpin such acts. A textural reading of article 1 of the Convention as seen in the concurring opinion, stating that claims of titles to nobility are not compatible with the provisions of the Convention as denial of such claims do not nullify or impair the exercise by women of human rights and fundamental freedoms, does not take into account the intent and spirit of the Convention. I therefore conclude that the complaint is compatible with the provisions of the Convention.

13.10 On the question of the continuing nature of the violation, I am of the view that there have been affirmations of the previous violation after the entry into force of the Optional Protocol for Spain on 6 October 2001. Hence the violation is of a continuous nature. The issuance of the royal decree of succession and the conferring of the title of nobility to the author's brother, which was the basis of the author's complaint, took place on 3 October 1980 before the entry into force of the Convention and the Optional Protocol. But in my opinion this violation was not completed then, as the decision of the Committee finds. The author had initiated legal action with regard to the conferring of the nobility title on 30 December 1988 and this had been followed by a series of appeals all of which the author lost. The last of the two appeals at the Supreme Court and the Constitutional Court were dismissed on 17 September 2002 and 24 March 2003, respectively. These dismissals need to be seen as affirming the previous violation of the State party by an act[7] as they continued to deny the claim of the author to the title of nobility and affirmed male primacy in the order of succession to titles of nobility, provided for in the laws of 4 May 1948 and 11 October 1820. They further affirm that these laws were neither discriminatory nor unconstitutional since article 14 of the Spanish Constitution which guaranteed equality before the

7 Ibid

law, was not applicable in view of the historical and symbolic nature of those titles. A similar basis for deciding on continuing violation where a previous violation is subsequently affirmed through a court judgement is supported by the jurisprudence of the Human Rights Committee.[8] On this basis my conclusion is that the violation which is the basis of the author's complaint is of a continuing nature.

13.11 I therefore find the complaint admissible both *ratione materiae* and *ratione temporis*.

13.12 The author has requested that the Committee find a violation of the Convention and to direct the State party to provide her with an effective remedy as well as to revise the discriminatory legislation.

13.13 With regard to the author's request, I find that there is a violation of the Convention in general. As for her request for reform of the discriminatory legislation concerned, the State party has already done this. Her request for an effective remedy may not be granted. I acknowledge there was discrimination against the author in the Spanish legislation of the time, but this would not justify a reversal of the royal decree in the present time. Hopefully the author will feel vindicated that she was indeed discriminated against.

(*Signed*) Mary Shanthi **Dairiam**

[8] See Nallaratnam Singarasa v. Sri Lanka, case No. 1033/2001, views adopted on 21 July 2004; Alexander Kouidis v. Greece, case No. 1070/2002, views adopted in March 2006.

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HUMAN RIGHTS COMMITTEE

Eighty-fifth session

17 October -3 November 2005

VIEWS

Communication No. 1153/2003

Submitted by	:	K.L. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
Alleged victim	:	The author
State party	:	Peru
Date of communication	:	13 November 2002 (initial submission)
Document reference	:	Special Rapporteur's rule 91 decision, transmitted to the State party on 8 January 2003 (not issued in document form)
Date of adoption of Views	:	24 October 2005

Subject matter: Refusal to provide medical services to the author in connection with a therapeutic abortion which

* Made public by decision of the Human Rights Committee.

is not a punishable offence and for which express provision has been made in the law.

Procedural issues: Substantiation of the alleged violation — unavailability of effective domestic remedies.

Substantive issues: Right to an effective remedy; right to equality between men and women; right to life, right not to be subjected to cruel, inhuman or degrading treatment; right not to be the victim of arbitrary or unlawful interference in one's privacy; right to such measures of protection as are required by the status of a minor and right to equality before the law.

Articles of the Covenant: 2, 3, 6, 7, 17, 24 and 26

Article of the Optional Protocol: 2

On 24 October 2005 the Human Rights Committee adopted the annexed draft as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1153/2003. The text is appended to the present document.

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Eighty-fifth session

concerning

Communication No. 1153/2003**

** The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Edwin Johnson, Mr. Walter Kälin, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer, Mr. Hipólito Solari-Yrigoyen and Mr. Roman Wieruszewski.

The text of an individual opinion signed by Committee member Mr. Hipólito Solari-Yrigoyen is appended to the present document.

Submitted by	:	K.L. (represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy)
Alleged victim	:	The author
State party	:	Peru
Date of communication	:	13 November 2002 (initial submission)

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

Meeting on 24 October 2005,

Having concluded its consideration of communication No. 1153/2003, submitted on behalf of K.L. under the Optional Protocol to the International Covenant on Civil and Political Rights,

Having taken into account all written information made available to it by the author of the communication and the State party,

Adopts the following:

Views under article 5 paragraph 4 of the Optional Protocol

1. The author of the communication is K.L., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

Factual background

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop

Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of [K.L.] and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that "the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in

advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient's future mental health".

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter's death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Tavara, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author's clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother's life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

The complaint

3.1 The author claims a violation of article 2 of the Covenant, since the State party failed to comply with its obligation to guarantee the exercise of a right. The State should have taken steps to respond to the systematic reluctance of the medical community to comply with the legal provision authorizing therapeutic abortion, and its restrictive interpretation thereof. This restrictive interpretation was clear in the author's case, in which a pregnancy involving an anencephalic foetus was considered not to endanger her life and health. The State should have taken steps to ensure that an exception could be made to the rule criminalizing abortion, so that, in cases where the physical and mental health of the mother was at risk, she could undergo an abortion in safety.

3.2 The author claims to have suffered discrimination in breach of article 3 of the Covenant, in the following forms:

(a) In access to the health services, since her different and special needs were ignored because of her sex. In the view of the author, the fact that the State lacked any means to prevent a violation of her right to a legal abortion on therapeutic grounds, which is applicable only to women, together with the arbitrary conduct of the medical personnel, resulted in a discriminatory practice that violated her rights — a breach which was all the more serious since the victim was a minor.

(b) Discrimination in the exercise of her rights, since although the author was entitled to a therapeutic abortion, none was carried out because of social attitudes and prejudices, thus preventing her from enjoying her right to life, to health, to privacy and to freedom from cruel, inhuman and degrading treatment on an equal footing with men.

(c) Discrimination in access to the courts, bearing in mind the prejudices of officials in the health system and the judicial system where women are concerned and the lack of appropriate legal means of enforcing respect for the right to obtain a legal abortion when the temporal and other conditions laid down in the law are met.

3.3 The author claims a violation of article 6 of the Covenant. She states that her experience had a serious impact on her mental health from which she has still not recovered. She points out that the Committee has stated that the right to life cannot be interpreted in a restrictive manner, but requires States to take positive steps to protect it, including the measures necessary to ensure that women do not resort to clandestine abortions which endanger their life and health, especially in the case of poor women. She adds that the Committee has viewed lack of access for women to reproductive health services, including abortion, as a violation of women's right to life, and that this has been reiterated by other committees such as the Committee on the Elimination of Discrimination against Women and the Committee on Economic, Social and Cultural Rights. The author claims that in the present case, the violation of the right to life lay in the fact that Peru did not take steps to ensure that the author secured a safe termination of pregnancy on the grounds that the foetus was not viable. She states that the refusal to provide a legal abortion service left her with two options which posed an equal risk to her health and safety: to seek clandestine (and hence highly risky) abortion services, or to continue a dangerous and traumatic pregnancy which put her life at risk.

3.4 The author claims a violation of article 7 of the Covenant. The fact that she was obliged to continue with the pregnancy amounts to cruel and inhuman treatment, in her view, since she had to endure the distress of seeing her daughter's marked deformities and knowing that her life expectancy was short. She states that this was an awful experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy, since she was subjected to an "extended funeral" for her daughter, and sank into a deep depression after her death.

3.5 The author points out that the Committee has stated that the prohibition in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that this protection is particularly important in the case of minors.[1] She points out that, after considering Peru's report in 1996, the Committee

[1] Human Rights Committee, General Comment No. 20, 10 March 1992 (HRI/GEN/1/Rev.7), paras. 2 and 5.

expressed the view that restrictive provisions on abortion subjected women to inhumane treatment, in violation of article 7 of the Covenant, and that in 2000, the Committee reminded the State party that the criminalization of abortion was incompatible with articles 3, 6 and 7 of the Covenant.[2]

3.6 The author claims a violation of article 17, arguing that this article protects women from interference in decisions which affect their bodies and their lives, and offers them the opportunity to exercise their right to make independent decisions on their reproductive lives. The author points out that the State party interfered arbitrarily in her private life, taking on her behalf a decision relating to her life and reproductive health which obliged her to carry a pregnancy to term, and thereby breaching her right to privacy. She adds that the service was available, and that if it had not been for the interference of State officials in her decision, which enjoyed the protection of the law, she would have been able to terminate the pregnancy. She reminds the Committee that children and young people enjoy special protection by virtue of their status as minors, as recognized in article 24 of the Covenant and in the Convention on the Rights of the Child.

3.7 The author claims a violation of article 24, since she did not receive the special care she needed from the health authorities, as an adolescent girl. Neither her welfare nor her state of health were objectives pursued by the authorities which refused to carry out an abortion on her. The author points out that the Committee laid down in its General Comment No. 17, relating to article 24, that the State should also adopt economic, social and cultural measures to safeguard this right. For example, every possible economic and social measure should be taken to reduce infant mortality and to prevent children from being subjected to acts of violence or cruel or inhuman treatment, among other possible violations.

3.8 The author claims a violation of article 26, arguing that the Peruvian authorities' position that hers was not a case of therapeutic abortion, which is not punishable under the Criminal Code, left her in an unprotected state incompatible with the

[2] Concluding observations of the Human Rights Committee: Peru, 15 November 2000 (CCPR/CO/70/PER), para. 20.

assurance of the protection of the law set out in article 26. The guarantee of the equal protection of the law implies that special protection will be given to certain categories of situation in which specific treatment is required. In the present case, as a result of a highly restrictive interpretation of the criminal law, the health authorities failed to protect the author and neglected the special protection which her situation required.

3.9 The author claims that the administration of the health centre left her without protection as a result of a restrictive interpretation of article 119 of the Criminal Code. She adds that the text of the law contains nothing to indicate that the exception relating to therapeutic abortion should apply only in cases of danger to physical health. But the hospital authorities had drawn a distinction and divided up the concept of health, and had thus violated the legal principle that no distinction should be drawn where there is none in the law. She points out that health is "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity", so that when the Peruvian Criminal Code refers to health, it does so in the broad and all-embracing sense, protecting both the physical and the mental health of the mother.

State party's failure to cooperate under article 4 of the Optional Protocol

4. On 23 July 2003, 15 March 2004 and 25 October 2004, reminders were sent to the State party inviting it to submit information to the Committee concerning the admissibility and the merits of the complaint. The Committee notes that no such information has been received. It regrets that the State party has not supplied any information concerning the admissibility or the merits of the author's allegations. It points out that it is implicit in the Optional Protocol that States parties make available to the Committee all information at their disposal. In the absence of a reply from the State party, due weight must be given to the author's allegations, to the extent that these have been properly substantiated.[3]

[3] See communication No. 760/1997, J. G. A. Diergaart et al. v. Namibia; Views adopted on 25 July 2000, para. 10.2, and Communication No. 1117/2002, Saodat Khomidova v. Tajikistan; Views adopted on 29 July 2004, para. 4.

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol.[4] In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the

[4] See Communication No. 701/1996, Cesáreo Gómez Vázquez v. Spain; Views adopted on 20 July 2000, para. 6.2.

Optional Protocol.[5] Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

Consideration of the merits

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The Committee notes

[5] See Communication No. 802/1998, Andrew Rogerson v. Australia; Views adopted on 3 April 2002, para. 7.9.

that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the case of minors.[6] In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to made a finding on article 6 of the Covenant.

6.4 The author states that the State party, in denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further note that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

[6] Human Rights Committee, General Comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992 (HRI/GEN/1/Rev.7, paras. 2 and 5).

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

8. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is required to furnish the author with an effective remedy, including compensation. The State party has an obligation to take steps to ensure that similar violations do not occur in the future.

9. Bearing in mind that, as a party to the Optional Protocol, the State party recognizes the competence of the Committee to determine whether there has been a violation of the Covenant, and that, under article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the Covenant and to offer an effective and enforceable remedy when a violation is found to have occurred, the Committee wishes to receive from the State party, within 90 days, information about the measures taken to give effect to the present Views. The State party is also requested to publish the Committee's Views.

[Adopted in English, French and Spanish, the Spanish 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.]

APPENDIX

DISSENTING OPINION BY COMMITTEE MEMBER HIPÓLITO SOLARI YRIGOYEN

My dissenting opinion on this communication -the majority not considering that article 6 of the Covenant was violated -is based on the following grounds:

Consideration of the merits

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article 6 of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

[Signed]: Hipólito Solari--Yrigoyen

[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.]

EUROPEAN COURT OF HUMAN RIGHTS

FOURTH SECTION

CASE OF TYSI¥C v. POLAND

(Application no. 5410/03)

JUDGMENT

STRASBOURG 20 March 2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tysi¹c v. Poland,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Sir Nicolas BRATZA, President,

Mr G. BONELLO,

Mr M. PELLONPÄÄ,

Mr K. TRAJA,

Mr L. GARLICKI,

Mr J. BORREGO BORREGO,

Ms L. MIJOVIÆ, judges,

and Mr T.L. EARLY, Section Registrar,

Having deliberated in private on 20 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 5410/03) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and

Fundamental Freedoms ("the Convention") by a Polish national, Ms Alicja Tysi[1]c ("the applicant"), on 15 January 2003.

2. The applicant, who had been granted legal aid, was represented by Ms Monika G[1]siorowska and Ms Anna WilkowskaLandowska, lawyers practising in Warszawa and Sopot respectively, assisted by Ms Andrea Coomber and Ms Veselina Vandova of Interights, London. The Polish Government ("the Government") were represented by their Agent, Mr Jakub Wo[31]siewicz of the Ministry of Foreign Affairs.

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8 of the Convention. She also invoked Article 3. The applicant further complained under Article 13 that she did not have an effective remedy at her disposal. She also submitted, relying on Article 14 of the Convention, that she had been discriminated against in realising her rights guaranteed by Article 8.

4. By a decision of 7 February 2006, following a hearing on admissibility and the merits (Rule 54 § 3), the Court declared the application admissible. It decided to join to the merits of the case the examination of the Government's preliminary objection based on nonexhaustion of domestic remedies.

5. The applicant and the Government each filed further written observations (Rule 59 § 1). The parties replied in writing to each other's observations. In addition, thirdparty comments were received from the Center for Reproductive Rights, based in New York, the Polish Federation for Women and Family Planning together with the Polish Helsinki Foundation for Human Rights, Warsaw, the Forum of Polish Women, Gdañsk and the Association of Catholic Families, Kraków, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

6. A hearing took place in public in the Human Rights Building, Strasbourg, on 7 February 2006 (Rule 59 § 3). There appeared before the Court:

(a) for the Government

Mr Jakub Wolasiewicz, Ministry of Foreign Affairs, *Agent,*

Mrs Anna Grêziak, Undersecretary of State, Ministry of Health,

Prof. Jerzy Szaflik,
Prof. Bogdan Chazan,
Dr Krzysztof Wiak,
MS Katarzyna Bralczyk, *Advisers;*
(b) for the applicant
Ms Monika Gasiorowska,
Ms Anna Wilkowska-Landowska, *Counsel,*
Ms Veselina Vandova,
Ms Andrea Coomber, *Advisers.*

The Court heard addresses by Mrs Grêziak, Mr Wolasiewicz, Ms WilkowskaLandowska, Ms Gasiorowska, Prof. Chazan and Prof. Szaflik.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1971 and lives in Warsaw.

8. Since 1977 the applicant has suffered from severe myopia, the degree of which was established at 0.2 in the left eye and 0.8 in the right eye. Before her pregnancy, she was assessed by a State medical panel, for the purposes of social insurance, as suffering from a disability of medium severity.

9. The applicant became pregnant in February 2000. She had previously had two children, both born by caesarean section. As the applicant was worried about the possible impact of the delivery on her health, she decided to consult her doctors. She was examined by three ophthalmologists (Dr M.S., Dr N. S.B., Dr K.W.). It transpires from the documents submitted by the applicant that Dr M.S. recommended that the applicant have frequent health checks and avoid physical exertion. Dr N. S.B. stated that the applicant should consider sterilisation after the birth. All of them concluded that, due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate

for the pregnancy to be terminated, despite the applicant's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

10. Subsequently, the applicant sought further medical advice. On 20 April 2000 Dr O. R. G., a general practitioner (GP), issued a certificate stating that the third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her two previous deliveries by caesarean section. She further referred to the applicant's shortsightedness and to significant pathological changes in her retina. These considerations, according to the GP, also required that the applicant should avoid physical strain which in any case would hardly be possible as at that time the applicant was raising two small children on her own. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully.

11. On 14 April 2000, in the second month of the pregnancy, the applicant's eyesight was examined. It was established that she needed glasses to correct her vision in both eyes by 24 dioptres.

12. Subsequently, the applicant contacted a state hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. On 26 April 2000 she had an appointment with Dr R.D., head of the Gynaecology and Obstetrics Department of the Clinic.

13. Dr R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. Afterwards, he made a note on the back of the certificate issued by Dr O.R.G. that neither her shortsightedness nor her two previous deliveries by caesarean section constituted grounds for therapeutic termination of the pregnancy. He was of the view that, in these circumstances, the applicant should give birth by caesarean section. During the applicant's visit Dr R.D. consulted an endocrinologist, Dr B., whispering to her in the presence of the applicant. The endocrinologist cosigned the note written by Dr R.D., but did not talk to the applicant.

14. The applicant's examination was carried out in a room with the door open to the corridor, which, in the applicant's submission,

did not provide a comfortable environment for a medical examination. At the end of the appointment Dr R.D. told the applicant that she could even have eight children if they were delivered by caesarean section.

15. As a result, the applicant's pregnancy was not terminated. The applicant delivered the child by caesarean section in November 2000.

16. After the delivery her eyesight deteriorated badly. On 2 January 2001, approximately six weeks after the delivery, she was taken to the Emergency Unit of the Ophthalmological Clinic in Warsaw. While doing a test of counting fingers, she was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye.

17. According to a medical certificate issued on 14 March 2001 by an ophthalmologist, the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a result, the applicant is currently facing a risk of blindness. Dr M.S., the ophthalmologist who examined the applicant, suggested that she should be learning the Braille alphabet. She also informed the applicant that, as the changes to her retina were at a very advanced stage, there were no prospects of having them corrected by surgical intervention.

18. On 13 September 2001 the disability panel declared the applicant to be significantly disabled, while previously she had been recognised as suffering from a disability of medium severity. It further held that she needed constant care and assistance in her everyday life.

19. On 29 March 2001 the applicant lodged a criminal complaint against Dr R.D., alleging that he had prevented her from having her pregnancy terminated on medical grounds as recommended by the GP and permissible as one of the exceptions to a general ban on abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of her eyesight. She relied on Article 156 § 1 of the Criminal Code, which lays down the penalty for the

offence of causing grievous bodily harm, and also submitted that, under the applicable provisions of socialinsurance law, she was not entitled to a disability pension as she had not been working the requisite number of years before the disability developed because she had been raising her children.

20. The investigation of the applicant's complaint was carried out by the WarsawŒródmieœcie District Prosecutor. The prosecutor heard evidence from the ophthalmologists who had examined the applicant during her pregnancy. They stated that she could have had a safe delivery by caesarean section.

21. The prosecutor further requested the preparation of an expert report by a panel of three medical experts (ophthalmologist, gynaecologist and specialist in forensic medicine) from the Bia³ystok Medical Academy. According to the report, the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight. Given the serious nature of the applicant's sight impairment, the risk of retinal detachment had always been present and continued to exist, and the pregnancy and delivery had not contributed to increasing that risk. Furthermore, the experts found that in the applicant's case there had been no factors militating against the applicant's carrying her baby to term and delivering it.

22. During the investigations neither Dr R.D. nor Dr B., who had cosigned the certificate of 26 April 2000, were interviewed.

23. On 31 December 2001 the district prosecutor discontinued the investigations, considering that Dr R.D. had no case to answer. Having regard to the expert report, the prosecutor found that there was no causal link between his actions and the deterioration of the applicant's vision. He observed that this deterioration "had not been caused by the gynaecologist's actions, or by any other human action."

24. The applicant appealed against that decision to the Warsaw Regional Prosecutor. She challenged the report drawn up by the experts from the Bia³ystok Medical Academy. In particular, she submitted that she had in fact been examined by only one of the experts, namely the ophthalmologist, whereas the report was signed by all of them. During that examination use had not been made of all the specialised ophthalmological equipment

that would normally be used to test the applicant's sight. Moreover, the examination had lasted only ten minutes. The other two experts who had signed the report, including a gynaecologist, had not examined her at all.

25. She further emphasised inconsistencies in the report. She also submitted that, before the second and third deliveries, the doctors had recommended that she be sterilised during the caesarean section to avoid any further pregnancies. She argued that, although the deterioration of her eyesight was related to her condition, she felt that the process of deterioration had accelerated during the third pregnancy. She submitted that there had been a causal link between the refusal to terminate her pregnancy and the deterioration of her vision. The applicant also complained that the prosecuting authorities had failed to give any consideration to the certificate issued by her GP.

26. She further pointed out that she had been unable to familiarise herself with the case file because the summaries of witnesses' testimonies and other documents were written in a highly illegible manner. The prosecutor, when asked for assistance in reading the file, had repeatedly refused to assist, even though he had been aware that the applicant was suffering from very severe myopia. The applicant had been unable to read the documents in the case file, which had affected her ability to exercise her procedural rights in the course of the investigation.

27. On 21 March 2002 the Warsaw Regional Prosecutor, in a decision of one paragraph, upheld the decision of the district prosecutor, finding that the latter's conclusions had been based on the expert report. The Regional Prosecutor countered the applicant's argument that she had not been examined by all three experts, stating that the other two experts had relied on an examination of her medical records. The prosecutor did not address the procedural issue raised by the applicant in her appeal.

28. Subsequently, the decision not to prosecute was transmitted to the Warsaw-Œródmieœcie District Court for judicial review.

29. In a final decision of 2 August 2002, not subject to a further appeal and numbering twentythree lines, the District Court upheld the decision to discontinue the case. Having regard to the medical expert report, the court considered that the refusal

to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision. Furthermore, the court found that the haemorrhage in the applicant's eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the decision of the district prosecutor.

30. The applicant also attempted to bring disciplinary proceedings against Dr R.D. and Dr B. However, those proceedings were finally discontinued on 19 June 2002, the competent authorities of the Chamber of Physicians finding that there had been no professional negligence.

31. Currently, the applicant can see objects only from a distance of approximately 1.5 metres and is afraid of going blind. On 11 January 2001 the social welfare centre issued a certificate to the effect that the applicant was unable to take care of her children as she could not see from a distance of more than 1.5 metres. On 28 May 2001 a medical panel gave a decision certifying that she suffered from a significant disability. She is at present unemployed and in receipt of a monthly disability pension of PLN 560. She raises her three children alone.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution

32. Article 38 of the Constitution reads as follows:

> "The Republic of Poland shall ensure legal protection of the life of every human being."

33. Article 47 of the Constitution reads:

> "Everyone shall have the right to legal protection of his private and family life, of his honour and good reputation and to make decisions about his personal life."

B. The 1993 Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act and related statutes

34. The Family Planning (Protection of the Human Foetus and Conditions Permitting Pregnancy Termination) Act, which is still

in force, was passed by Parliament in 1993. Section 1 provided at that time that "every human being shall have an inherent right to life from the moment of conception".

35. This Act provided that legal abortion was possible only until the twelfth week of pregnancy where the pregnancy endangered the mother's life or health; or prenatal tests or other medical findings indicated a high risk that the foetus would be severely and irreversibly damaged or suffering from an incurable lifethreatening disease; or there were strong grounds for believing that the pregnancy was a result of rape or incest.

36. On 4 January 1997 an amended text of the 1993 Act, passed on 30 June 1996, entered into force. Section 1(2) provided that "the right to life, including the prenatal stage thereof, shall be protected to the extent laid down by law". This amendment provided that pregnancy could also be terminated during the first twelve weeks where the mother either suffered from material hardship or was in a difficult personal situation.

37. In December 1997 further amendments were made to the text of the Act of 1993, following a judgment of the Constitutional Court given in May 1997. In that judgment the Court held that the provision legalising abortion on grounds of material or personal hardship was incompatible with the Constitution as it stood at that time.[1]

38. Section 4(a) of the 1993 Act, as it stands at present, reads, in its relevant part:

> "1. An abortion can be carried out only by a physician where
>
> 1) pregnancy endangers the mother's life or health;
>
> 2) prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffering from an incurable lifethreatening disease;
>
> 3) there are strong grounds for believing that the pregnancy is a result of a criminal act.

[1] Three separate opinions were appended to that judgment which did not examine any other grounds for legal abortion, including therapeutic abortion which is concerned in the present case.

> 2. In the cases listed above under 2), an abortion can be performed until such time as the foetus is capable of surviving outside the mother's body; in cases listed under 3) above, until the end of the twelfth week of pregnancy.
>
> 3. In the cases listed under 1) and 2) above the abortion shall be carried out by a physician working in a hospital. ...
>
> 5. Circumstances in which abortion is permitted under paragraph 1, subparagraphs 1) and 2) above shall be certified by a physician other than the one who is to perform the abortion, unless the pregnancy entails a direct threat to the woman's life."

39. An ordinance issued by the Minister of Health on 22 January 1997 on qualifications of doctors authorised to perform abortions contains two substantive sections. In its section 1, the requisite qualifications of doctors who can perform legal abortions in the conditions specified in the 1993 Act are stipulated. Section 2 of that ordinance reads:

> "The circumstances indicating that pregnancy constitutes a threat to the woman's life or health shall be attested by a consultant specialising in the field of medicine relevant to the woman's condition."

40. Section 37 of the 1996 Medical Profession Act provides that in the event of any diagnostic or therapeutic doubts, a doctor may, on his or her own initiative or upon a patient's request and if he or she finds it reasonable in the light of requirements of medical science, obtain an opinion of a relevant specialist or arrange a consultation with other doctors.

C. Criminal offence of abortion performed in contravention of the 1993 Act

41. Termination of pregnancy in breach of the conditions specified in the 1993 Act is a criminal offence punishable under Article 152 § 1 of the Criminal Code. Anyone who terminates a pregnancy in violation of the Act or assists such a termination may be sentenced to up to three years' imprisonment. The pregnant woman herself does not incur criminal liability for an abortion performed in contravention of the 1993 Act.

D. Provisions of the Code of Criminal Procedure

42. A person accused in criminal proceedings, if he or she cannot

afford lawyers' fees, may request legal aid under Article 78 § 1 of the Code of Criminal Procedure. Under Articles 87 § 1 and 88 § 1 of that Code, a victim of an alleged criminal offence is similarly entitled to request that legal aid be granted to him or her for the purpose of legal representation in the course of criminal investigations and proceedings.

E. Offence of causing grievous bodily harm

43. Article 156 § 1 of the Criminal Code of 1997 provides that a person who causes grievous bodily harm shall be sentenced to between one and ten years' imprisonment.

F. Civil liability in tort

44. Articles 415 et seq. of the Polish Civil Code provide for liability in tort. Under this provision, whoever by his or her fault causes damage to another person, is obliged to redress it.

45. Pursuant to Article 444 of the Civil Code, in cases of bodily injury or harm to health, a perpetrator shall be liable to cover all pecuniary damage resulting therefrom.

G. Caselaw of the Polish courts

46. In a judgment of 21 November 2003 (V CK 167/03) the Supreme Court held that unlawful refusal to terminate a pregnancy where it had been caused by rape, i.e. in circumstances provided for by section 4 (a) 1.3 of the 1993 Act, could give rise to a compensation claim for pecuniary damage sustained as a result of such refusal.

47. In a judgment of 13 October 2005 (IV CJ 161/05) the Supreme Court expressed the view that a refusal of prenatal tests in circumstances where it could be reasonably surmised that a pregnant woman ran a risk of giving birth to a severely and irreversibly damaged child, i.e. in circumstances set out by section 4 (a) 1.2 of that Act, gave rise to a compensation claim.

III. RELEVANT NONCONVENTION MATERIAL

1. Observations of the ICCPR Committee

48. The Committee, having considered in 1999 the fourth periodic report on the observance of the UN Covenant on Civil and

Political Rights submitted by Poland, adopted the following conclusions (Document CCPR/C/SR.1779):

> "11. The Committee notes with concern: (a) strict laws on abortion which lead to high numbers of clandestine abortions with attendant risks to life and health of women; (b) limited accessibility for women to contraceptives due to high prices and restricted access to suitable prescriptions; (c) the elimination of sexual education from the school curriculum; and (d) the insufficiency of public family planning programmes. (Arts. 3, 6, 9 and 26)
>
> The State party should introduce policies and programmes promoting full and nondiscriminatory access to all methods of family planning and reintroduce sexual education at public schools."

49. The Polish Government, in their fifth periodic report submitted to the Committee (CCPR/C/POL/2004/5), stated:

> "106. In Poland data about abortions relate solely to abortions conducted in hospitals, i.e. those legally admissible under a law. The number of abortions contained in the present official statistics is low in comparison with previous years. Nongovernmental organisations on the basis of their own research estimate that the number of abortions conducted illegally in Poland amounts to 80,000 to 200,000 annually.
>
> 107. It follows from the Government's annual Reports of the execution of the [1993] Law [which the Government is obliged to submit to the Parliament] and from reports of nongovernmental organisations that the Law's provisions are not fully implemented and that some women, in spite of meeting the criteria for an abortion, are not subject to it. There are refusals to conduct an abortion by physicians employed in public health care system units who invoke the socalled conscience clause, while at the same time women who are eligible for a legal abortion are not informed about where they should go. It happens that women are required to provide additional certificates, which lengthens the procedure until the time when an abortion becomes hazardous for the health and life of the woman. There [are] no official statistical data concerning complaints related to physicians' refusals to perform an abortion. (...) In the opinion of the Government, there is a need to [implement] already existing regulations with respect to the (...) performance of abortions."[2]

50. The Committee, having considered Poland's fifth periodic report at its meetings, held on 27 and 28 October 2004 and 4 November 2004, adopted in its concluding observations (Document CCPR/C/SR.2251) the following relevant comments:

> "8. The Committee reiterates its deep concern about restrictive abortion laws in Poland, which may incite women to seek unsafe, illegal abortions, with attendant risks to their life and health. It is also concerned at the unavailability of abortion in practice even when the law permits it, for example in cases of pregnancy resulting from rape, and by the lack of information on the use of the conscientious objection clause by medical practitioners who refuse to carry out legal abortions. The Committee further regrets the lack of information on the extent of illegal abortions and their consequences for the women concerned.
>
> The State Party should liberalize its legislation and practice on abortion. It should provide further information on the use of the conscientious objection clause by doctors, and, so far as possible, on the number of illegal abortions that take place in Poland. These recommendations should be taken into account when the draft Law on Parental Awareness is discussed in Parliament."

2. Observations of nongovernmental organisations

51. In a report prepared by ASTRA Network on Reproductive Health and Rights in Central and Eastern Europe for the European Population Forum, Geneva, January 1214, 2004, it is stated that:

> "(t)he antiabortion law which was in force in Poland since 1993 resulted in many negative consequences for women's reproductive health, such as:
>
> many women who are entitled to legal abortions are often denied this right in their local hospitals
>
> abortions on social grounds are not stopped but simply pushed "underground", as women seeking abortions can find a doctor who would perform it illegally or go abroad

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[2] The report is issued unedited, in compliance with the wish expressed by the Human Rights Committee at its sixtysixth session in July 1999.

> the effects of the law are felt primarily on the poorest and uneducated members of the society, as illegal abortions are expensive.

Lack of knowledge about family planning lowers women's quality of life. Their sexuality is endangered either by constant fear of unwanted pregnancies or by seeking unsafe abortion. There is a strong disapproval and obstruction towards those who choose abortions under the few conditions that still allow for it to occur. Doctors and hospitals frequently misguide or misinform women, who are legally entitled to terminate pregnancies, thereby placing the health of the women at serious risk. Doctors (and even whole hospitals, even though they have no right to do so) often refuse to perform abortions in hospitals they work in, invoking the socalled clause of conscience – the right to refuse to perform abortions due to one's religious beliefs or moral objections – or even giving no justifications, creating problems as long as it is needed to make performing an abortion impossible under the law. There exists however a well organised abortion underground – terminations are performed illegally in private clinics, very often by the same doctors who refuse to perform abortions in hospitals. The average cost of abortion is ca 2000 PLN (equivalent of country's average gross salary). Federation for Women and Family Planning estimates that the real number of abortions in Poland amounts to 80,000200,000 each year."

3. Synthesis Report of EU Network of Independent Experts on Fundamental Rights

52. In its report entitled "The Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2004" dated 15 April 2005, the Network stated, inter alia:

> "While acknowledging that there is at yet no settled caselaw in international or European human rights law concerning where the adequate balance must be struck between the right of the women to interrupt her pregnancy on the one hand, as a particular manifestation of the general right to the autonomy of the person underlying the right to respect for private life, and the protection of the potentiality of human life on the other hand, the Network nevertheless expresses its concern at a number of situations which, in the view of the independent experts, are questionable in the present state of the international

law of human rights.

A woman seeking abortion should not be obliged to travel abroad to obtain it, because of the lack of available services in her home country even where it would be legal for her to seek abortion, or because, although legal when performed abroad, abortion in identical circumstances is prohibited in the country of residence. This may be the source of discrimination between women who may travel abroad and those who, because of a disability, their state of health, the lack of resources, their administrative situation, or even the lack of adequate information may not do so (...). A woman should not be seeking abortion because of the insufficiency of support services, for example for young mothers, because of lack of information about support which would be available, or because of the fear that this might lead to the loss of employment: this requires, at the very least, a close monitoring of the pattern of abortions performed in the jurisdiction were abortion is legal, in order to identify the needs of the persons resorting to abortion and the circumstances which ought to be created in order to better respond to these needs. (...) Referring to the Concluding Observations adopted on 5 November 2004 by the Human Rights Committee upon the examination of the report submitted by Poland under the International Covenant on civil and Political Rights (CCPR/CO/82/POL/Rev. 1, para. 8), the Network notes that a prohibition on notherapeutic abortion or the practical unavailability of abortion may in fact have the effect of raising the number of clandestine abortions which are practised, as the women concerned may be tempted to resort to clandestine abortion in the absence of adequate counselling services who may inform them about the different alternatives opened to them. (...)

Where a State does choose to prohibit abortion, it should at least closely monitor the impact of this prohibition on the practice of abortion, and provide this information in order to feed into an informed public debate. Finally, in the circumstances where abortion is legal, women should have effective access to abortion services without any discrimination."

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

53. Pursuant to Article 35 § 1 of the Convention, the Court may

only deal with the matter after all domestic remedies have been exhausted.

54. In this connection, the Government argued that the applicant had failed to exhaust all the remedies available under Polish law as required by Article 35 § 1 of the Convention.

55. The Government referred to the Court's caselaw to the effect that there were certain positive obligations under the Convention which required States to make regulations compelling hospitals to adopt appropriate measures for the protection of their patients' lives. They also required an effective independent judicial system to be set up so that the cause of death of patients in the care of the medical profession could be determined and those responsible made accountable (see *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000V). That positive obligation did not necessarily require the provision of a criminallaw remedy in every case. In the specific sphere of medical negligence the obligation could, for instance, also be satisfied if the legal system afforded victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages, to be obtained (*Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002I).

56. The Government further asserted that the Polish legal system provided for legal avenues which made it possible to establish liability on the part of doctors for any damage caused by medical malpractice, either by way of criminal proceedings or by civil compensation claims. In the applicant's case, a compensation claim would have offered good prospects of success.

57. The Government referred in that connection to the provisions of the Civil Code governing liability in tort. They further referred to two judgments given by the civil courts against the background of the 1993 Act. In the first judgment, given by the Supreme Court on 21 November 2003, the court had held that the unlawful refusal to terminate a pregnancy caused by rape had given rise to a compensation claim. In the second the £omza Regional Court had dismissed, on 6 May 2004, a claim for nonpecuniary damages filed by parents who had been refused

access to prenatal tests and whose child had been born with serious malformations.

58. The applicant submitted that, under the Court's caselaw, she should not be required to have recourse both to civil and criminal remedies in respect of the alleged violation of Article 8 of the Convention. If there was more than one remedy available, the applicant need not exhaust more than one (*Yaðcý and Sargýn v. Turkey*, judgment of 8 June 1995, Series A no. 319A, §§ 4244). She further referred to a judgment in which the Court had found that the applicants, having exhausted all possible means available to them in the criminal justice system, were not required, in the absence of a criminal prosecution in connection with their complaints, to embark on another attempt to obtain redress by bringing an action for damages (see *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998VIII, § 86).

59. The applicant argued that pursuing civil proceedings would not be effective in her case. To date, there had been no final judgment of a Polish court in a case in which compensation had been awarded for damage to a woman's health caused by a refusal of a therapeutic abortion allowed under the 1993 Act. She emphasised that the two cases referred to by the Government postdated her petition to the Court under Article 34 of the Convention. Importantly, they were immaterial to her case because they concerned situations fundamentally different from the applicant's, both as to the facts and law. One related to a claim for damages arising from the unlawful refusal of an abortion where the pregnancy had been caused by rape and the second concerned a claim for damages arising from the refusal of a prenatal examination.

60. Finally, she pointed out that under the Court's caselaw it was for an applicant to select the legal remedy most appropriate in the circumstances of the case (Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, § 23). Effective deterrence against grave attacks on personal integrity (such as rape in the case of M.C.), where fundamental values and essential aspects of private life were at stake, required the effective application of criminallaw provisions (M.C. v. Bulgaria, no. 39272/98, §§ 124, 14853, and X and Y v. the Netherlands, judgment of 26 March

1985, Series A no. 91, §§ 23 and 24). In the circumstances, the criminal remedy chosen by the applicant was the most appropriate one.

61. The Court reiterates that in its decision on the admissibility of the application it joined to the merits of the case the examination of the question of exhaustion of domestic remedies (see paragraph 4 above). The Court confirms its approach to the exhaustion issue.

II. THE MERITS OF THE CASE

A. Alleged violation of Article 3 of the Convention

62. The applicant complained that the facts of the case gave rise to a breach of Article 3 of the Convention which, insofar as relevant, reads as follows:

> "No one shall be subjected to ... inhuman or degrading treatment... "

63. The Government disagreed.

64. The applicant submitted that the circumstances of the case had amounted to inhuman and degrading treatment in breach of Article 3 of the Convention.

65. She argued that treatment was degrading if it aroused in its victim "feelings of fear, anguish and inferiority capable of humiliating and debasing them" (Ireland v. the United Kingdom, judgment of 18 January 1978, Series A no. 25, § 167). The failure of the State to make a legal abortion possible in circumstances which threatened her health, and to put in place the procedural mechanism necessary to allow her to have this right realised, meant that the applicant was forced to continue with a pregnancy for six months knowing that she would be nearly blind by the time she gave birth. The resultant anguish and distress and the subsequent devastating effect of the loss of her sight on her life and that of her family could not be overstated. She had been a young woman with a young family already grappling with poor sight and knowing that her pregnancy would ruin her remaining ability to see. As predicted by her doctor in April 2000, her sight has severely deteriorated, causing her immense personal hardship and psychological distress.

66. The Court reiterates its caselaw on the notion of illtreatment and the circumstances in which the responsibility of a Contracting State may be engaged, including under Article 3 of the Convention by reason of the failure to provide appropriate medical treatment (see, among other authorities, Ðlhan v. Turkey [GC], no. 22277/93, § 87, ECHR 2000VII, mutatis mutandis). In the circumstances of the instant case, the Court finds that the facts alleged do not disclose a breach of Article 3. The Court further considers that the applicant's complaints are more appropriately examined under Article 8 of the Convention.

B. Alleged violation of Article 8 of the Convention

67. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention insofar as relevant, reads as follows:

> "1. Everyone has the right to respect for his private ... life ...
>
> 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 wellbeing 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."

1. The parties' submissions

a. The Government

68. The Government first emphasised that pregnancy and its interruption did not, as a matter of principle, pertain uniquely to the sphere of the mother's private life. Whenever a woman was pregnant, her private life became closely connected with the developing foetus. There could be no doubt that certain interests relating to pregnancy were legally protected (Eur. Comm. HR, Brüggemann and Scheuten v. Germany, Report of 12 July 1977, DR 10, p. 100). Polish law also protected the

foetus and therefore allowed for termination of a pregnancy under the 1993 Act only in strictly defined circumstances. The Government were of the view that in the applicant's case the conditions for lawful termination on health grounds as defined by that Act had not been satisfied.

69. The Government argued that insofar as the applicant had submitted that her pregnancy had posed a threat to her eyesight because of her severe myopia, only a specialist in ophthalmology could decide whether an abortion was medically advisable. The ophthalmologists who had examined the applicant during her pregnancy had not considered that her pregnancy and delivery constituted any threat to her health or life. The intention of the doctors had actually been to protect the applicant's health. They had concurred in their opinions that the applicant should deliver her child by caesarean section, which had ultimately happened.

70. The Government stressed that there existed a possibility of delivery which had not posed any threat to the applicant's health. Hence, under the 1993 Act the doctors had not been authorised to issue a medical certificate permitting abortion. Consequently, the applicant had been unable to obtain abortion as her situation had not complied with the conditions laid down by that Act.

71. Insofar as the applicant argued that no procedure was available under the Polish law to assess the advisability of a therapeutic abortion, the Government disagreed. They referred to the provisions of the Minister of Health's ordinance of 22 January 1997 and argued that this ordinance provided for a procedure governing decisions on access to a therapeutic abortion.

72. The Government further stated that section 37 of the 1996 Medical Professions Act made it possible for a patient to have a decision taken by a doctor as to the advisability of an abortion reviewed by his or her colleagues. Lastly, had the applicant been dissatisfied with decisions given in her case by the doctors, she could have availed herself of the possibilities provided for by administrative law.

73. The Government concluded that it was open to the applicant to challenge the medical decisions given in her case by having recourse to procedures available under the law.

b. The applicant

74. The applicant disagreed with the Government's argument that under the caselaw of the Convention institutions the legal protection of life afforded by Article 2 extended to foetuses. Under that caselaw "[t]he life of the foetus was intimately connected with, and could not be regarded in isolation from, the life of the pregnant woman" (Eur. Comm. HR, X. v. the United Kingdom, dec. 13 May 1980, DR 19, p. 244). The Court itself had observed that legislative provisions as to when life commenced fell within the State's margin of appreciation, but it had rejected suggestions that the Convention ensured such protection. It had noted that the issue of such protection was not resolved within the majority of the Contracting States themselves and that there was no European consensus on the scientific and legal definition of the beginning of life (Vo v. France [GC], no. 53924/00, § 82, ECHR 2004VIII.)

75. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. As to the applicability of this provision, the applicant emphasised that the facts underlying the application had concerned a matter of "private life", a concept which covered the physical and moral integrity of the person (X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, § 22).

76. The applicant argued that in the circumstances of her case her Article 8 rights had been violated both substantively, by failing to provide her with a legal abortion, and with respect to the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights by appropriate procedural means.

77. As to the first limb of this complaint, the applicant argued that the very special facts of this case had given rise to a violation of Article 8. She had been seeking to have an abortion in the face of a risk to her health. The refusal to terminate the pregnancy had exposed her to a serious health risk and amounted to a violation of her right to respect for her private life.

78. The applicant countered the Government's suggestion that her condition had not been such as to meet the requirements for a lawful abortion on the medical grounds set forth in section 4 (a)

of the 1993 Act in that it had not been established that the deterioration of her vision after the delivery had been a direct result of the pregnancy and birth. She stressed that this issue had, in any event, been irrelevant for the assessment of the case, because the 1993 Act provided that it was merely the threat to the pregnant woman's health which made an abortion legal. The actual materialisation of such a threat was not required.

In any event, and regrettably, in the applicant's case this threat had materialised and brought about a severe deterioration of her eyesight after the delivery.

79. The applicant further emphasised that the interference complained of had not been "in accordance with the law" within the meaning of Article 8 of the Convention. Section 4 of the 1993 Act allowed a termination where the continuation of a pregnancy constituted a threat to the mother's life or health. Hence, the applicant had had a legal right under Polish law to have an abortion on health grounds.

80. As to the second limb of her complaint, relating to the positive obligations of the State, the applicant considered that the facts of the case had disclosed a breach of the right to effective respect for her private life. The State had been under a positive obligation to provide a comprehensive legal framework regulating disputes between pregnant women and doctors as to the need to terminate pregnancy in cases of a threat to a woman's health. However, there was no effective institutional and procedural mechanism by which such cases were to be adjudicated and resolved in practice.

81. The applicant emphasised that the need for such a mechanism had been and remained acute. The provisions of the 1997 Ordinance and of the Medical Profession Act, relied on by the Government, had not provided clarity because all these provisions had been drafted in the broadest terms. They provided that doctors could make referrals for therapeutic abortion, but gave no details as to how that process worked or within what timeframe. Critically, there had been no provision for any meaningful review of or scope for challenge of a doctor's decision not to make a referral for termination.

82. The applicant further stressed that section 4 of the 1993 Act, insofar as it contained an exemption from the rule that abortion was prohibited, related to a very sensitive area of medical practice. Doctors were hesitant to perform abortions necessary to protect the health of a woman because of the highly charged nature of the abortion debate in Poland. Furthermore, they feared damage to their reputation if it was found out that they had performed a termination in circumstances provided for under section 4. They might also fear criminal prosecution.

83. The applicant argued that as a result of the State's failure to put in place at least some rudimentary decisionmaking procedure, the process in her case had not been fair and had not afforded due respect for her private life and her physical and moral integrity.

84. The applicant submitted that the onus was on the State to ensure that medical services required by pregnant women and available in law were available in practice. The legal system in Poland, viewed as a whole, had been operating with the opposite effect, offering a strong disincentive to the medical profession to provide the abortion services that were available in law. The flexibility that the law appeared to afford in determining what constituted a "threat to a woman's health" within the meaning of section 4 (a) of the 1993 Act and the lack of adequate procedures and scrutiny contrasted with the strict approach under the criminal law penalising doctors for carrying out unlawful abortions.

85. The applicant contended that in the circumstances where there had been a fundamental disagreement between her, a pregnant woman fearful of losing her eyesight as a result of a third delivery, and doctors, it had been inappropriate and unreasonable to leave the task of balancing fundamental rights to doctors exclusively. In the absence of any provision for a fair and independent review, given the vulnerability of women in such circumstances, doctors would practically always be in a position to impose their views on access to termination, despite the paramount importance their decisions have for a woman's private life. The circumstances of the case revealed the existence of an underlying systemic failure of the Polish legal system when it came to determining whether or not the conditions for lawful abortion obtained in a particular case.

2. The third parties' submissions

a. The Center for Reproductive Rights

86. The Center for Reproductive Rights submitted, in its comments to the Court of 23 September 2005, that the central issue in the present case was whether a State Party which had by law afforded women a right to choose abortion in cases where pregnancy threatened their physical health, but failed to take effective legal and policy steps to ensure that eligible women who made that choice could exercise their right, violated its obligations under Article 8 of the Convention. It was of the opinion that States undertaking to allow abortion in prescribed circumstances have a corresponding obligation to ensure that the textual guarantee of abortion in their national laws is an effective right in practice. To that end, States should take effective steps to ensure women's effective access to services. These steps include the institution of procedures for appeal or review of medical decisions denying a woman's request for abortion.

87. Poland's lack of effective legal and administrative mechanisms providing for appeal or review of medical professionals' decisions in cases where they determine that the conditions for termination of pregnancy have not been met were inconsistent with the practice of many other member States. The establishment of an appeals or review process in countries across Europe, such as Bulgaria, Croatia, the Czech Republic, Denmark, Finland, Norway, Slovakia, Slovenia or Sweden reflected a common understanding of the need to protect women's right to legal abortion in situations where a health care provider denies such a request, including in cases where a woman's health was at risk.

88. Most laws and regulations on abortion appeals processes had strict timelimits within which such appeals and reviews had to be decided, recognising the inherent timesensitive nature of abortion procedures and the inability of regular administrative review or other legal processes to respond in a timely manner. While such time limitations implicitly obliged the medical professional denying the request for abortion to immediately forward medical records of a woman to the review or appeals body, some laws had explicit language requiring doctors to do so. In certain countries the appeals or review body had to inform the woman

where the abortion would be performed should her appeal be granted. Where an appeal or review body found that the conditions for a termination of pregnancy had not been met, some laws required a written notice to the woman of the decision. In all countries, appeals procedures did not need to be followed when pregnancy posed a threat to the health or life of the pregnant woman. In certain member States, such as Norway and Sweden, a rejected request for abortion was automatically examined by a review body. In Norway, a committee was formed by the county medical officer, which also includes the pregnant woman.

89. They indicated that the legislation of many member States contained express language underscoring a woman's rights to dignity and autonomous decisionmaking within the context of requests for and provision of abortion services. They referred to Norwegian and French legislation which strongly emphasised the woman's autonomy and active participation throughout the process in which access to abortion was decided.

90. They concluded that in Poland the lack of a timely appeals process undermined women's right to have access to reproductive health care, with potentially grave consequences for their life and health. It also denied women the right to an effective remedy as guaranteed by Article 13 of the Convention.

b. The Polish Federation for Women and Family Planning and the Polish Helsinki Foundation for Human Rights

91. The Polish Federation for Women and Family Planning and the Helsinki Foundation for Human Rights submitted, in their submissions of 6 October 2005, that the case essentially concerned the issue of inadequate access to therapeutic abortion which was permissible when one of the conditions enumerated in section 4 of the 1993 Act was met. They emphasised that it often happened in practice in Poland that physicians refused to issue a certificate required for a therapeutic abortion, even when there were genuine grounds for issuing one. It was also often the case that when a woman obtained a certificate, the physicians to whom she went to obtain an abortion questioned its validity and the competence of the physicians who issued it and eventually refused the service, sometimes after the timelimits for obtaining a legal abortion set by law had expired.

92. The fact that under Polish law abortion was essentially a criminal offence, in the absence of transparent and clearly defined procedures by which it had to be established that a therapeutic abortion could be performed, was one of the factors deterring physicians from having recourse to this medical procedure. Hence, stakes were set high in favour of negative decisions in respect of therapeutic abortion.

93. There were no guidelines as to what constituted a "threat to a woman's health or life" within the meaning of section 4 (a). It appeared that some physicians did not take account of any threat to a woman's health as long as she was likely to survive the delivery of a child. In addition, there was a problem with assessment of whether pregnancy constituted a threat to a woman's health or life in cases of women suffering from multiple and complex health problems. In such situations it was not clear who should be recognised as a specialist competent to issue the medical certificate referred to in section 2 of the 1997 Ordinance.

94. The Polish law did not foresee effective measures to review refusals of abortion on medical grounds. As a result, women to whom an abortion on health grounds was denied, did not have any possibility of consulting an independent body or to have such decisions reviewed.

95. To sum up, the current practice in Poland as regards the application of the guarantees provided for by section 4(a) of the 1993 Act ran counter to the requirements of Article 8 of the Convention.

c. The Forum of Polish Women

96. The Forum of Polish Women argued, in its submissions of 3 November 2005, that the rights guaranteed by Article 8 of the Convention imposed on the State an obligation to refrain from arbitrary interference, but not an obligation to act. This provision of the Convention aimed essentially to protect an individual against arbitrary activities of public authorities (Kroon and Others v. the Netherlands, judgment of 27 October 1994, Series A no. 297C, § 31). For that reason alone, it was not possible to derive from this provision an obligation to have medical interventions performed, in particular when the medical intervention consisted of abortion.

97. It further asserted that in the context of abortion it could not be said that pregnancy belonged exclusively to the sphere of private life. Even assuming that the legal issues involved in pregnancy could be assessed under Article 8 of the Convention, the States could enact legal restrictions in the private sphere if such restrictions served the aim of protecting morals or the rights and freedoms of others. In the hitherto interpretation of this provision, the Court had not challenged the view that the rights of the foetus should be protected by the Convention.

98. In particular, the Court had not ruled out the possibility that in certain circumstances safeguards could be extended to the unborn child (see Vo v. France cited above, § 85). The Polish legal system ensured constitutional protection of the life of the foetus, based on the concept that a human life has to be legally protected at all stages of development. The 1993 Act accepted exceptions to this principle of legal protection of human life from the moment of conception.

99. However, contrary to the applicant's arguments, under the applicable Polish legislation, there was no right to have an abortion, even when exceptions from the general prohibition on abortion provided by section 4 (a) of the 1993 Act were concerned. This provision had not conferred on a pregnant woman any right to abortion, but only abrogated the general unlawfulness of abortion under Polish law, in situations of conflict between the foetus' right to life and other interests. In any event, the mere fact that abortion was lawful in certain situations, as an exception to a general principle, did not justify a conclusion that it was a solution preferred by the State.

100. The intervenor further argued that under the 1997 Ordinance the determination of the conditions in which abortion on medical grounds could be performed was left to medical professionals. Circumstances indicating that pregnancy constituted a threat to a woman's life or health had to be attested by a consultant specialising in the field of medicine relevant to the woman's condition. However, a gynaecologist could refuse to perform an abortion on grounds of conscience. Therefore, a patient could not bring a doctor to justice for refusing to perform an abortion and hold him or her responsible for a deterioration in her health after the delivery.

101. Finally, it was of the view that a threat of the deterioration of a pregnant woman's health resulting from pregnancy could not be concluded retrospectively, if it had occurred after the birth of a child.

d. The Association of Catholic Families

102. The Association of Catholic Families argued, in its observations of 20 December 2005, that the applicant had erred in law in her contention that the Convention guaranteed a right to abortion. In fact, the Convention did not guarantee such a right. On the contrary, Article 2 guaranteed the right to life, which was an inalienable attribute of human beings and formed the supreme value in the hierarchy of human rights. Further, the Court in its caselaw opposed the right to life to any hypothetical right to terminate life (Pretty v. the United Kingdom, no. 2346/02, ECHR 2002III).

2. The Court's assessment

a. The scope of the case

103. The Court notes that in its decision on admissibility of 7 February 2006 it declared admissible the applicant's complaints Articles 3, 8, 13 and 8 read together with Article 14 of the Convention. Thus, the scope of the case before the Court is limited to the complaints which it has already declared admissible (see, among many authorities, Sokur v. Ukraine, no. 29439/02, § 25, 26 April 2005).

104. In this context, the Court observes that the applicable Polish law, the 1993 Act, while it prohibits abortion, provides for certain exceptions. In particular, under section 4 (a) 1 (1) of that Act, abortion is lawful where pregnancy poses a threat to the woman's life or health, certified by two medical certificates, irrespective of the stage reached in pregnancy. Hence, it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion.

b. Applicability of Article 8 of the Convention

105. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and

that it relates to the applicant's right to respect for her private life.

106. The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur. Comm. HR, Bruggeman and Scheuten v. Germany, cited above).

107. The Court also reiterates that "private life" is a broad term, encompassing, inter alia, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see, among many other authorities, Pretty v. the United Kingdom, § 61). Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity (Glass v. the United Kingdom, no. 61827/00, §§ 7483, ECHR 2004II; Sentges v. the Netherlands (dec.) no. 27677/02, 8 July 2003; Pentiacova and Others v. Moldova (dec.), no. 14462/03, ECHR 2005...; Nitecki v. Poland (dec.), no. 65653/01, 21 March 2002; Odièvre v. France [GC], no. 42326/98, ECHR 2003III; mutatis mutandis). The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of motherstobe.

108. The Court finally observes that the applicant submitted that the refusal of an abortion had also amounted to an interference with her rights guaranteed by Article 8. However, the Court is of the view that the circumstances of the applicant's case and in particular the nature of her complaint are more appropriately examined from the standpoint of the respondent State's abovementioned positive obligations alone.

c. General principles

109. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being "in accordance with the law" and "necessary in a democratic society" for one or more of the legitimate aims listed therein. According to settled caselaw, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see e.g. Olsson v. Sweden (No. 1), judgment of 24 March 1988, Series A no. 130, § 67).

110. In addition, there may also be positive obligations inherent in an effective "respect" for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see, among other authorities, X and Y v. the Netherlands, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

111. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, Keegan v. Ireland, judgment of 26 May 1994, Series A no. 290, p.19, § 49; Ró\añski v. Poland, no. 55339/00, § 61, 18 May 2006).

112. The Court observes that the notion of "respect" is not clearcut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the

fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see Iatridis v. Greece [GC], no. 31107/96, § 58, ECHR 1999II; Carbonara and Ventura v. Italy, no. 24638/94, § 63, ECHR 2000VI; and Capital Bank AD v. Bulgaria, no. 49429/99, § 133, ECHR 2005...). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention (see Malone v. the United Kingdom, judgment of 2 August 1984, Series A no. 82, p. 32, § 67 and, more recently, Hasan and Chaush v. Bulgaria [GC], no. 30985/96, § 84, ECHR 2000XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see Airey v. Ireland, judgment of 9 October 1979, Series A no. 32, p. 1213, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decisionmaking process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decisionmaking process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, mutatis mutandis, Hatton and Others v. the United Kingdom [GC], no. 36022/97,§ 99, ECHR 2003VIII).

d. Compliance with Article 8 of the Convention

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 41 above).

According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular

in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

115. The Court also notes that in its fifth periodical report to the ICCPR Committee the Polish Government acknowledged, inter alia, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 49 above). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act.

116. A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position.

The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.

117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, Rotaru v. Romania [GC], no. 28341/95, ECHR 2000V, §§ 5563). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (AGOSI v. the United Kingdom, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and Jokela v. Finland, no. 28856/95, § 45, ECHR 2002IV, mutatis mutandis). In circumstances

such as those in issue in the instant case such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

118. In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed post factum cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.

119. Against this general background the Court observes that it is not in dispute that the applicant suffered from severe myopia from 1977. Even before her pregnancy she had been officially certified as suffering from a disability of medium severity (see paragraph 8 above).

Having regard to her condition, during her third pregnancy the applicant sought medical advice. The Court observes that a disagreement arose between her doctors as to how the pregnancy and delivery might affect her already fragile vision. The advice given by the two ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition. The Court also notes that the GP issued a certificate that her pregnancy constituted a threat to her health, while a gynaecologist was of a contrary view.

The Court stresses that it is not its function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition (Glass v. the United Kingdom, no. 61827/00, § 87, ECHR 2004II, mutatis mutandis). Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their conclusions as to whether her pregnancy could or could not lead to a deterioration of her eyesight in the future were correct. It is sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight. In the light of the medical advice she obtained during

the pregnancy and, significantly, the applicant's condition at that time, taken together with her medical history, the Court is of the view that her fears cannot be said to have been irrational.

120. The Court has examined how the legal framework regulating the availability of a therapeutic abortion in Polish law was applied to the applicant's case and how it addressed her concerns about the possible negative impact of pregnancy and delivery on her health.

121. The Court notes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 71 above). However, the Court observes that this Ordinance only stipulated the professional qualifications of doctors who could perform a legal abortion. It also made it necessary for a woman seeking an abortion on health grounds to obtain a certificate from a physician "specialising in the field of medicine relevant to [her] condition".

The Court notes that the Ordinance provides for a relatively simple procedure for obtaining a lawful abortion based on medical considerations: two concurring opinions of specialists other than the doctor who would perform an abortion are sufficient. Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States.

However, the Ordinance does not distinguish between situations in which there is a full agreement between the pregnant woman and the doctors where such a procedure is clearly practicable and cases where a disagreement arises between the pregnant woman and her doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies. It only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged.

122. It is further noted that the Government referred also to Article 37 of the 1996 Medical Profession Act (see paragraph 72 above). This provision makes it possible for a doctor, in the event of any diagnostic or therapeutic doubts, or upon a patient's request, to obtain a second opinion of a colleague. However, the Court

notes that this provision is addressed to members of the medical profession. It only specifies the conditions in which they could obtain a second opinion of a colleague on a diagnosis or on the treatment to be followed in an individual case. The Court emphasises that this provision does not create any procedural guarantee for a patient to obtain such an opinion or to contest it in the event of a disagreement. Nor does it specifically address the situation of a pregnant woman seeking a lawful abortion.

123. In this connection, the Court notes that in certain State Parties various procedural and institutional mechanisms have been put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion (see paragraphs 8687 above).

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

125. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. It could only, and if the applicant had been successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery.

126. The Court further notes that the applicant requested that criminal proceedings against Dr R.D. be instituted, alleging that he had exposed her to grievous bodily harm by his refusal to terminate her pregnancy. The Court first observes that for the purposes of criminal responsibility it was necessary to establish a direct causal link between the acts complained of – in the present case, the refusal of an abortion – and the serious deterioration of the applicant's health. Consequently, the examination of whether there was a causal link between the refusal of leave to have an abortion and the subsequent deterioration of the applicant's

eyesight did not concern the question whether the pregnancy had constituted a "threat" to her health within the meaning of section 4 of the 1993 Act.

Crucially, the examination of the circumstances of the case in the context of criminal investigations could not have prevented the damage to the applicant's health from arising. The same applies to disciplinary proceedings before the organs of the Chamber of Physicians.

127. The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant (Storck v. Germany, no. 61603/00, § 150, ECHR 2005...).

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.

129. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.

130. The Court concludes that there has been a breach of Article 8 the Convention.

C. Alleged violation of Article 13 of the Convention

131. The applicant complained that the facts of the case gave rise to a breach of Article 13 of the Convention.

Article 13 of the Convention reads as follows:

> "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

132. The Government submitted that Polish law provided for a procedure governing medical decisions concerning abortion on

medical grounds. They referred to the 1993 Act and to the Ordinance of the Minister of Health of 22 January 1997. They further referred to section 37 of the Medical Profession Act of 1996. They argued that it provided for the possibility of reviewing a therapeutic decision taken by a specialist.

133. The applicant submitted that the Polish legal framework governing the termination of pregnancy had proved to be inadequate. It had failed to provide her with reasonable procedural protection to safeguard her rights guaranteed by Article 8 of the Convention.

134. Article 13 has been consistently interpreted by the Court as requiring a remedy in domestic law in respect of grievances which can be regarded as "arguable" in terms of the Convention (see, for example, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, § 54). In the present case, there has been a finding of a violation of Article 8, and the complaint under Article 13 must therefore be considered.

135. However, the Court observes that the applicant's complaint about the State's failure to put in place an adequate legal framework allowing for the determination of disputes arising in the context of the application of the 1993 Act insofar as it allowed for legal abortion essentially overlaps with the issues which have been examined under Article 8 of the Convention. The Court has found a violation of this provision on account of the State's failure to meet its positive obligations. It holds that no separate issue arises under Article 13 of the Convention.

D. Alleged violation of Article 14 of the Convention read together with Article 8

136. The applicant complained that the facts of the case gave rise to a breach of Article 14 of the Convention read together with Article 8. In her case, Article 8 was applicable and therefore Article 14 could be relied on.

Article 14 of the Convention reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] 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."

1. The parties' submissions

i. The applicant

137. The applicant pointed out that the Court had repeatedly held that the accessory nature of Article 14 of the Convention meant that a complaint about discrimination had to fall within the scope of a Convention right.

138. The applicant further argued that she had not been given a meaningful opportunity to participate in the investigations, despite the fact that the prosecuting authorities had been fully aware of the problems with her eyesight. It was her nearblindness which had formed the very basis of her complaint that a criminal offence had been committed. In such a situation, she argued, the failure to provide her with effective access to the documents of the criminal investigation or another form of assistance had prevented her from participating effectively in the proceedings.

The applicant was of the view that the investigation carried out by the authorities had been characterised by a number of important failings. First, the firstinstance prosecutor had not heard evidence from a crucial witness in this case, i.e. Dr R.D. Second, the prosecutor's decision to discontinue the investigation had relied heavily on the report submitted by three experts from the Bia[3]ystok Medical Academy. However, this report could not be viewed as reliable as it had been prepared on the basis of a short examination of the applicant by only one of the experts (an ophthalmologist). The other two experts had limited themselves to an examination of the applicant's medical records. Third, the applicant had effectively been precluded from exercising her procedural rights, such as submitting requests to obtain evidence in support of her complaint. It was caused by the authorities' failure to accommodate in any way the applicant's disability which had prevented her from reading the case file of the investigation. Fourth, the District Prosecutor had not given any consideration to the certificate issued by the GP, Dr O. R.G., and failed to consider the fact that the doctors had recommended to the applicant a sterilisation before the second and third delivery.

The applicant submitted that the reasoning of the secondinstance prosecutor had failed to address essential arguments which she

had raised in her appeal. The authorities had attached little weight to her particular vulnerability as a disabled person suffering from a very severe eyesight impairment bordering on blindness. She maintained that, as a result, she had not been involved in the investigation to a degree sufficient to provide her with the requisite protection of her interests.

139. The applicant concluded that the failure of the authorities to reasonably accommodate her disability during the investigations had amounted to discrimination on the ground of her disability.

ii. The Government

140. The Government first argued that a violation of substantive rights and freedoms protected by the Convention would first have to be established before a complaint of a violation of Article 14 read together with a substantive provision of the Convention could be examined.

141. The Government were further of the view that the investigations of the applicant's complaint that a criminal offence had been committed in connection with the refusal to perform an abortion were conducted with diligence. The prosecutor had questioned all witnesses who could submit evidence relevant to the case. The prosecutor had not interviewed Dr R.D. because he had not considered it necessary in view of the fact that three experts had stated in their opinion that there had been no causal link between the refusal to terminate the pregnancy and the subsequent deterioration of the applicant's eyesight.

142. The Government argued that the decision to discontinue the investigations had been justified since it had been based on that expert opinion. They stressed in this connection that the experts had been acquainted with the applicant's medical records.

143. The Government further submitted that on 6 June 2001 the applicant had been informed by the prosecutor of her rights and obligations as a party to criminal proceedings. Thus, she had known that if she had had any problem examining the case file because of her bad eyesight, she could at any stage of the proceedings have applied for a legalaid lawyer to be assigned to the case.

2. The Court's assessment

144. The Court, having regard to its reasons for finding a violation of Article 8 above and for rejecting the Government's preliminary objection, does not consider it necessary to examine the applicant's complaints separately under Article 14 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

145. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

146. The applicant argued that the outcome of the events complained of had been extremely severe. She had become almost blind and had been officially declared to be significantly disabled. She needed constant care and assistance in her everyday life. She had also been told that her condition was irreversible. The loss of her eyesight had had a devastating effect on her ability to take care of her children and to work.

147. The applicant claimed compensation for pecuniary damage in the amount of EUR 36,000 (PLN 144,000). This sum consisted of the estimated future medical expenses she would be obliged to bear in connection with her condition. She estimated her expenditure on adequate medical treatment to be approximately PLN 300 per month. This amount covered regular medical visits, at a cost of approximately PLN 140 per visit, and also medication (including antidepressants) which the applicant was required to take in order to prevent a further deterioration of her condition. The total expenditure has been estimated on the basis of the assumption of a 79 years' life expectancy in Poland adopted by the World Health Organisation.

148. The applicant further requested the Court to award her compensation in the amount of EUR 40,000 for the nonpecuniary damage she had suffered, which consisted of pain

and suffering, distress and anguish which she had experienced and continued to experience in connection with the circumstances complained of.

149. The Government were of the view that the applicant had not sustained pecuniary damage in the amount claimed, which was purely speculative and exorbitant. It was impossible to assess the medical expenses, if any, that would be incurred by the applicant in the future.

150. As to the applicant's claim for nonpecuniary damage, the Government submitted that it was excessive and should therefore be rejected.

151. The Court observes that the applicant's claim for pecuniary damage was based on the alleged negative impact on her health suffered as a result of the refusal to terminate the pregnancy. In this connection, it recalls that it has found that it cannot speculate on whether the doctors' conclusions as to whether the applicant's pregnancy could or could not lead to a future deterioration of her eyesight were correct (see paragraph 119 above). Consequently, the Court rejects the applicant's claim for just satisfaction for pecuniary damage.

152. On the other hand, the Court, having regard to the applicant's submissions, is of the view that she must have experienced considerable anguish and suffering, including her fears about her physical capacity to take care of another child and to ensure its welfare and happiness, which would not be satisfied by a mere finding of a violation of the Convention. Having regard to the circumstances of the case seen as a whole and deciding on equitable basis, the Court awards the applicant EUR 25,000 for nonpecuniary damage.

B. Costs and expenses

153. The applicant claimed reimbursement of the costs and expenses incurred in the proceedings before the Court. The applicant had instructed two Polish lawyers and two lawyers from Interights, the International Centre for the Legal Protection of Human Rights in London, to represent her before the Court.

154. She argued that it had been wellestablished in the Court's caselaw that costs could reasonably be incurred by more than one lawyer

and that an applicant's lawyers could be situated in different jurisdictions (Kurt v. Turkey, judgment of 25 May 1998, Reports of Judgments and Decisions 1998III, Yaa v. Turkey, judgment of 2 September 1998, Reports 1998VI,). Certain consequences flow from the involvement of foreign lawyers. The fee levels in their own jurisdiction may be different from those in the respondent State. In Tolstoy Miloslavsky v. the United Kingdom the Court stated that "given the great differences at present in rates of fees from one Contracting State to another, a uniform approach to the assessment of fees ... does not seem appropriate" (Tolstoy Miloslavsky v. the United Kingdom, judgment of 13 July 1995, § 77, Series A no. 316B).

155. The applicant claimed, with reference to invoices they had submitted, EUR 10,304 in respect of fees and costs incurred in connection with work carried out by Ms M. G¹siorowska and A. WilkowskaLandowska. Legal fees, in the amount of EUR 10,050, corresponded to 201 hours spent in preparation of the applicant's submissions in the case, at an hourly rate of EUR 50. The applicant further submitted that the costs incurred in connection with the case, in the amount of EUR 254, consisted of travel expenses and accommodation of Ms Wilkowska in connection with the hearing held in the case. The applicant further claimed reimbursement, again with reference to an invoice, of legal fees and costs incurred in connection with work carried out by Ms A. Coomber and V. Vandova, in the total amount of EUR 11,136. Legal fees corresponded to 98 hours spent in preparation of the applicant's submissions, at an hourly rate of EUR 103,60. The total amount of legal fees claimed by the applicant was therefore EUR 21,186. The applicant relied on invoices of legal fees submitted to the Court. Further costs, in the amount of EUR 959, consisted of travel expenses and accommodation incurred in connection with the hearing held in the case before the Strasbourg Court.

156. The Government requested the Court to decide on the reimbursement of legal costs and expenses only in so far as these costs and expenses were actually and necessarily incurred and were reasonable as to the quantum. The Government further submitted that the applicant had not submitted invoices in respect of accommodation costs or travel expenses claimed by her

representatives. In any event, the Government were of the view that the amounts claimed by the applicant were exorbitant, bearing in mind the costs awarded by the Court in similar cases.

157. The Government also requested the Court to assess whether it was reasonable for the applicant to receive reimbursement of legal costs and expenses borne by four lawyers.

158. The Court reiterates that only legal costs and expenses found to have been actually and necessarily incurred and which are reasonable as to quantum are recoverable under Article 41 of the Convention (see, among other authorities, Nikolova v. Bulgaria [GC], no. 31195/96, 25 March 1999, § 79, and Smith and Grady v. the United Kingdom (just satisfaction), nos. 33985/96 and 33986/96, § 28, ECHR 2000IX). In the light of the documents submitted, the Court is satisfied that the legal costs concerned in the present case have actually been incurred.

159. As to the amounts concerned, the Court first points out that it has already held that the use of more than one lawyer may sometimes be justified by the importance of the issues raised in a case (see, among many other authorities, Sunday Times v. the United Kingdom (no. 1) (former Article 50), judgment of 6 November 1980, Series A no. 38, § 30). The Court notes, in this connection, that the issues involved in the present case have given rise to a heated and ongoing legal debate in Poland. It further refers to its finding in its admissibility decision that the issues linked to the exhaustion of domestic remedies were complex enough to be examined together with the merits of the case (see paragraph 61 above). It is also relevant to note in this connection the scarcity of relevant caselaw of the Polish courts. The Court is further of the view that the Convention issues involved in the case were also of considerable novelty and complexity.

160. On the whole, having regard both to the national and the Convention law aspects of the case, the Court is of the opinion that they justified recourse to four lawyers.

161. On the other hand, while acknowledging the complexity of the case, the Court is however not persuaded that the number of hours' work claimed by the applicant can be said to be a fair reflection of the time actually required to address the issues raised

by the case. As to the hourly rates claimed, the Court is of the view that they are consistent with domestic practice in both jurisdictions where the lawyers representing the applicant practise and cannot be considered excessive.

162. However, the Court notes that all four lawyers attended the hearing before the Court. It does not consider that this part of the expenses can be said to have been "necessarily" incurred, given that the applicant had been granted legal aid for the purpose of the proceedings before the Court.

163. The Court, deciding on an equitable basis and having regard to the details of the claims submitted, awards the applicant a global sum of EUR 14,000 in respect of fees and expenses. This amount is inclusive of any VAT which may be chargeable, less the amount of EUR 2,442.91 paid to the applicant by the Council of Europe in legal aid.

C. Default interest

164. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. Dismisses unanimously the Government's preliminary objection;

2. Holds unanimously that there has been no violation of Article 3 of the Convention;

3. Holds by six votes to one that there has been a violation of Article 8 of the Convention in that the State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life;

4. Holds unanimously that it is not necessary to examine separately whether there has been a violation of Article 13 of the Convention;

5. Holds unanimously that it is not necessary to examine separately the applicant's complaint under Article 14 of the Convention read together with Article 8;

6. Holds unanimously

(a) that the respondent State is to pay the applicant, from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable:

i) EUR 25,000 (twentyfive thousand euros) in respect of nonpecuniary damage; ii) EUR 14,000 (fourteen thousand euros) in respect of costs and expenses, less EUR 2,442.91 (two thousand four hundred and fortytwo euros and ninetyone cents) paid to the applicant by the Council of Europe in legal aid;

(b) that from the expiry of the abovementioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

7. Dismisses unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 March 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY	Nicolas BRATZA
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) separate opinion of Mr Bonello

(b) dissenting opinion of Mr Borrego Borrego

SEPARATE OPINION OF JUDGE BONELLO

1. In this case the Court was neither concerned with any abstract right to abortion, nor, equally so, with any fundamental human right to abortion lying low somewhere in the penumbral fringes of the Convention.

2. The decision in this case related to a country which had already made medical abortion legally available in certain specific situations of fact. The Court was only called upon to decide whether, in cases of conflicting views (between a pregnant woman and doctors, or between the doctors themselves) as to whether the conditions to obtain a legal abortion were satisfied or not, effective mechanisms capable of determining the issue were in place.

3. My vote for finding a violation goes no further than that.

DISSENTING OPINION OF JUDGE BORREGO BORREGO

1. To my regret, I cannot agree with the opinion of the majority in this case.

2. The facts are very simple: a woman who suffered from severe myopia became pregnant for the third time and, as she was "... worried about the possible impact of the delivery on her health, she decided to consult her doctors" (see paragraph 9 of the judgment). Polish law allows abortion under the condition that there is "a threat to the woman's life or health attested by a consultant specialising in the field of medicine relevant to the woman's condition" (see paragraph 39). Not only one, but three ophthalmologists examined the applicant and all of them concluded that, owing to pathological changes in her retina, it might become detached as a result of pregnancy, but that this was not certain (see paragraph 9). The applicant obtained medical advice in favour of abortion from a general practitioner. However, a general practitioner is not a specialist and the gynaecologist refused to perform the abortion because only a specialist in ophthalmology could decide whether an abortion was medically advisable (see paragraph 69).

   Some months after the delivery, the applicant's eyesight suffered deterioration and she lodged a criminal complaint against the gynaecologist. After consideration of the statements of the three ophthalmologists who had examined the applicant during her pregnancy and a report by a panel of three medical experts, it was concluded that "there was no causal link between [the gynaecologist's] actions and the deterioration of the applicant's vision".

3. It is true that the applicant's eyesight has deteriorated. And it is also true that Poland is not an island country in Europe. But the Court is neither a charity institution nor the substitute for a national parliament. I consider that this judgment runs counter to the Court's caselaw, in its approach and in its conclusions. I also think it goes too far.

4. Eight months ago, the same Section of the Court gave a decision concerning the application D. v. Ireland (no. 26499/02, 27 June 2006). I do not understand why the Court's decision is so different today in the present case.

5. There is no unanimous position among the member States of the Council of Europe with regard to abortion. Some of them are quite restrictive, others are very permissive, but nevertheless the majority adopt an intermediate position.

   Ireland is one of the most restrictive countries. As stated in Article 40 § 3 (3) of its Constitution, "the State acknowledges the right to life of the unborn ...". Only in case of a "real and substantial risk" to the mother's life is there a possibility of a constitutional action, involving proceedings which are in principle nonconfidential and of an unknown length, to obtain authorisation for a legal abortion.

   Poland adopts an intermediate position: the Contracting Party's legislation provides for a "relatively simple procedure for obtaining a lawful abortion based on medical considerations ... Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States" (see paragraphs 34 and 121 of the judgment).

6. As to the debate on abortion, in D. v Ireland (cited above, § 97) the Court also noted "the sensitive, heated and often polarised nature of the debate in Ireland".

   In the present case, the Court neglects the debate concerning abortion in Poland.

7. Concerning the applicant in D. v. Ireland, there was a real risk to the life of the mother. The applicant is a woman who was eighteen weeks pregnant with twin sons when she was informed that one foetus had "stopped developing" by that stage and the second

had a severe chromosomal abnormality ("a lethal genetic condition"). Some days later, an abortion was performed on her in the United Kingdom. As a result of the strain, she and her partner ended their relationship, she stopped working, and so on.

8. The Court's approach with regard to abortion is different in both cases. I should say it is quite respectful in D. v. Ireland: "This is particularly the case when the central issue is a novel one, requiring a complex and sensitive balancing of equal rights to life and demanding a delicate analysis of countryspecific values and morals. Moreover, it is precisely the interplay of the equal right to life of the mother and the 'unborn'..." (ibid., § 90).

   On the contrary, in the Polish case all the debate is focused on the State's positive obligation of "effective respect" for private life in protecting the individual against arbitrary interference by the public authorities (see paragraphs 109 and 110 of the judgment). No reference is made to "the complex and sensitive balancing of equal rights to life ... of the mother and the unborn" mentioned in D. v. Ireland. In the present case, the balance is one of a very different nature: "the fair balance that has to be struck between the competing interests of the individual and of the community as a whole" (see paragraph 111).

9. In D. v. Ireland, everything must be objective. In the present case, everything is subjective.

   Concerning the Irish woman, the Court's decision states: "It is undoubtedly the case that the applicant was deeply distressed by, inter alia, the diagnosis and its consequences. However, such distress cannot, of itself, exempt an applicant from the obligation to exhaust domestic remedies" (see D. v. Ireland, cited above, § 101).

   In the eighteenth week of pregnancy, with a real risk to her life and facing a nonconfidential procedure of unknown length, the Irish woman was obliged to exhaust domestic remedies. She "sought advice, informally, from a friend who was a lawyer who had told her that if she wrote to the authorities to protest, the State might try and prevent her travelling abroad for a termination and ... she was not prepared to take this risk". But, in her case, the Court did not consider "that informally consulting

a friend amounts to instructing a solicitor or barrister and obtaining a formal opinion" (ibid., § 102).

It is very interesting to compare this statement with the one in the Polish case, in which the applicant "feared that the pregnancy and delivery might further endanger her eyesight". In this case the Court considers this fear "sufficient" and "is of the view that her fears cannot be said to have been irrational" (see paragraph 119 of the judgment).

10. The majority have based their decision that there has been a violation of Article 8 on the fact that the Contracting Party has not fulfilled its positive obligation to respect the applicant's private life.

I disagree: before the delivery, five experts (three ophthalmologists, one gynaecologist and one endocrinologist) did not think that the woman's health might be threatened by the pregnancy and the delivery.

After the delivery, the three ophthalmologists and a panel of three medical experts (ophthalmologist, gynaecologist and forensic pathologist) concluded that "the applicant's pregnancies and deliveries had not affected the deterioration of her eyesight" (see paragraph 21).

That being said, the Court "observes that a disagreement arose between her doctors" (see paragraph 119). Good. On the one hand, eight specialists unanimously declared that they had not found any threat or any link between the pregnancy and delivery and the deterioration of the applicant's eyesight. On the other hand, a general practitioner issued a certificate as if she were an expert in three medical specialities: gynaecology, ophthalmology and psychiatry, and in a totum revolutum (muddled opinion), advised abortion (see paragraph 10).

I have difficulty understanding the reasons that led the Court to consider in the Irish case that the opinion of a lawyer – a friend of the applicant's – was not "a formal opinion" and consequently should not be taken into account, whereas such status was granted to the opinion of a general practitioner in the present case.

11. If the experts' opinion was unanimous and strong, why was it not taken into consideration?

I am afraid the answer is very simple: in paragraph 116 the Court "further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case" ("legal prohibition on abortion"/"legal abortion": no comment).

I find it very difficult to accept that such a discreditable assessment with regard to the medical profession in Poland comes not from one of the Parties, but from the Court.

12. Abortion is legal under Polish law, but the circumstances in this case do not correspond to those in which Polish law allows an abortion. The reasoning behind the Court's conclusion that there has been a violation of the Convention is as follows.

Firstly, the Court attaches great relevance to the applicant's fears, although these fears were not verified and, what is more, they turned out to be unfounded.

Secondly, the Court tries to compare the unanimous opinion of eight specialists to the isolated and muddled opinion of a general practitioner.

Thirdly, it discredits the Polish medical specialists.

And finally, the judgment goes too far as it contains indications to the

Polish authorities concerning "the implementation of legislation specifying the conditions governing access to a lawful abortion" (see paragraph 123).

13. The Court appears to be proposing that the High Contracting Party, Poland, join those States that have adopted a more permissive approach with regard to abortion. It must be stressed that "certain State Parties" referred to in paragraph 123 allow "abortion on demand" until eighteen weeks of pregnancy. Is this the law that the Court is laying down to Poland? I consider that the Court contradicts itself in the last sentence of paragraph 104: "It is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion."

In conclusion, this judgment, despite the relevant Polish law, is focused on the applicant's opinion: "It [the Ordinance of 22 January 1997] only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged" (see paragraph 121).

I consider that the Court's decision in the instant case favours "abortion on demand", as is clearly stated in paragraph 128: "Having regard to the circumstances of the case as a whole, it cannot therefore be said that ... the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion."

14. I respectfully consider that it is not the task of the Court to make such statements. I regret to have to say this.

It is true that there was a controversy in this case. On the one hand, we have Polish law, the unanimous opinion of the medical experts and the confirmed lack of a causal link between the delivery and the deterioration of the applicant's eyesight. On the other hand, we have the applicant's fears.

How did the Contracting Party solve this controversy? In accordance with domestic law. But the Court decided that this was not a proper solution, and that the State had not fulfilled its positive obligation to protect the applicant. Protection with regard to domestic law and medical opinion? According to the Court, the State should have protected the applicant, despite the relevant domestic law and medical opinions, because she was afraid. And the judgment, on the sole basis of the applicant's fears, concludes that there has been a violation of the Convention.

15. All human beings are born free and equal in dignity and rights. Today the Court has decided that a human being was born as a result of a violation of the European Convention on Human Rights. According to this reasoning, there is a Polish child, currently six years old, whose right to be born contradicts the Convention.

I would never have thought that the Convention would go so far, and I find it frightening.

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