

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES  
NO. 12

**THE OP-CEDAW AS A MECHANISM FOR  
IMPLEMENTING WOMEN'S HUMAN RIGHTS:  
AN ANALYSIS OF THE FIRST FIVE CASES UNDER THE  
COMMUNICATIONS PROCEDURE OF THE OP-CEDAW**

International Women's Rights  
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# THE OP-CEDAW AS A MECHANISM FOR IMPLEMENTING WOMEN'S HUMAN RIGHTS: AN ANALYSIS OF THE FIRST FIVE CASES UNDER THE COMMUNICATIONS PROCEDURE OF THE OP-CEDAW<sup>1</sup>

By Alda Facio<sup>2</sup>

## Introduction

Human rights treaties often are followed by “Optional Protocols” (OPs) which may either address a substantive issue related to the treaty which is not covered in the treaty, or provide for procedures with regard to the treaty. Optional Protocols to human rights treaties are treaties in their own right, and are open to signature, accession or ratification by countries who are party to the main treaty.

After much pressure from the international women's movement and several years of negotiations in the UN, the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter called the CEDAW Convention or the Convention) was open for signature on 10 December 1999, a very symbolic day due to the fact that December 10 is Human Rights Day. On 22 December, 2000, following receipt of the tenth instrument of ratification, the Optional Protocol entered into force.

The Optional Protocol contains a **Communications Procedure**<sup>3</sup> which gives individual women and groups of women the right to complain to the Committee on the Elimination of Discrimination against Women (hereinafter known as the Committee) about violations of the rights contained in the Convention. It

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<sup>1</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

<sup>2</sup> Alda Facio is a feminist human rights lawyer who lives in Costa Rica and teaches women's human rights in many parts of the world.

<sup>3</sup> The communications procedure established by Articles 2-7 of the OP-CEDAW is a mechanism through which an individual or a group of individuals from within the jurisdiction of a State party to the OP-CEDAW can bring to the CEDAW Committee's attention an alleged violation of a woman's right enshrined by the CEDAW Convention. Source: IRAW Asia Pacific, 2005, *A Resource Guide on OP-CEDAW: Our Rights Are Not Optional*.

also contains an **Inquiry Procedure**<sup>4</sup> which enables the Committee to conduct investigations into grave or systematic abuses.

The Committee has already begun operating the two procedures. As of August 2007, it had ruled on ten individual communications, and had completed one inquiry, in its Report on Mexico (July 2004). This paper will focus on the five first cases that were submitted to the Committee under the communications procedure of this new mechanism with the view of extracting some lessons from the analysis of each case.

## **Purpose of the OP-CEDAW mechanism**

But before discussing each case, it is important to remember that one should keep in mind at least two objectives when bringing any case under this mechanism:

- To obtain specific remedies for the victim or victims,
- To advance women's equality by transforming those structures which maintain and support discrimination against women.

Of course, by contributing to the jurisprudence of the CEDAW Committee, even a specific remedy recommended by the Committee for a specific victim will inevitably contribute to larger change for women as a group. This is so because each remedy the Committee suggests clarifies the obligations of the State party with respect to that right and makes that conceptual right, as enshrined in the Convention, more concrete.

Because of the profound impact the use of the OP-CEDAW can have on women's rights, it is very important for the women's movement to learn from the decisions and views of the Committee on each of the five cases that will be analyzed in the following sections. I have divided the analysis of each case into several areas which summarize the following:

1. The facts as presented by the author of the communication;
2. The complaint;
3. Admissibility issues;
4. Discussions on the merits of the case;

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<sup>4</sup> The inquiry procedure is a mechanism established by Articles 8-9 of OP-CEDAW through which the CEDAW Committee can issue comments and recommendations on 'grave or systematic' violations of rights in the CEDAW Convention. Source: IWRAP Asia Pacific, 2005, *A Resource Guide on OP-CEDAW: Our Rights Are Not Optional*.

5. Decision of the Committee (including dissenting opinions, if any);
6. Analysis;
7. Lessons for advocates to be extracted from the case.

Not all of the sections have the same level of analysis as in some cases the focus was on admissibility issues, while in others the discussion was more focused on the merits of the case. Also, in order to make the reading of this paper less burdensome, I have included a more detailed analysis on admissibility issues for the first case and not for the remaining four because the issues were similar. As I said before, the main objective of this paper is to extract lessons from these five cases in order to promote a better use of this mechanism by the women's movement.

## Communication No.1

### *Ms. B.J. vs. Germany*<sup>5</sup>

The communication was presented on 20 August 2002 and was declared inadmissible on 14 July 2004. In this communication the author claimed that an unwanted divorce had had a negative financial impact on her. The Committee's decision as to admissibility, together with the individual dissenting opinion of two of its members, raised an interesting admissibility issue concerning the exhaustion of domestic remedies.

#### *1. The facts as presented by the author*

In 1969 the author, although a nurse by training, agreed with her husband that she would take on the role of homemaker and not further her education so as to allow her husband to pursue his career.

Later in the marriage the author had wanted to continue her education but her husband requested her not to do so to support him in a period of professional difficulty. When these difficulties were resolved she again wished to continue her education, but the husband applied for a divorce.

In connection with her separation, the author and her husband agreed in a settlement before a family court that he would pay her separation maintenance, child support and the necessary amount to cover the mortgage on the house where she remained. When the divorce became final on 28 July 2000 the issue of the equalization of pensions was resolved but no decisions were reached regarding the equalization of accrued gains and maintenance after termination of the marriage.

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 the Constitution.

On 30 August 2000, the Federal Constitutional Court decided not to accept the complaint for decision. In April 2004, the Court of Göttingen awarded the author

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<sup>5</sup> A/59/38 Annex III Communication No.: 1/2003, <[http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany\\_E\\_.pdf](http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/BJ%20v.%20Germany_E_.pdf)>.

a maintenance payment of €280 per month with retroactive effect to August 2002, the date the husband had stopped payment of separation maintenance. The author appealed against the decision and had also written without success to different ministries, on five different dates, claiming disregard for marriage and family as well as gender-specific discrimination by the courts.

Proceedings concerning maintenance after divorce, as well as equalization of accrued gains continued after the presentation of the communication.

## ***2. The complaint***

The author alleged that she was subjected to gender-based discrimination under the law on the legal consequences of divorce (equalization of accrued gains, equalization of pensions, and maintenance after termination of marriage) and that she had 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.

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

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<sup>12</sup> This decision was adopted at the United Nations Annual Chairpersons and Inter-Committee Meeting held in Geneva, Switzerland in June 2006.

<sup>13</sup> See Office of the United Nations High Commissioner for Human Rights, "Harmonised guidelines on reporting under the international human rights treaties, including guidelines on a common core document and treaty-specific document", HRI/MC/2006/3.

<sup>14</sup> *ibid.*

<sup>15</sup> See Office of the United Nations High Commissioner for Human Rights, "Concept Paper on the High Commissioner's proposal for a Unified Standing Treaty Body", HRI/MC/2006/CRP.1.

<sup>16</sup> See Note by the Secretary General, "Effective implementation of international instruments on human rights, including reporting obligations under international instruments on human rights", A/61/385. See also, "Letter dated 14 September 2006 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary-General", A/61/351.

According to the author, women are subjected to procedural discrimination because court proceedings to resolve the consequences of divorce are carried unilaterally by women. She also claimed that all divorced women in situations similar to hers are victims of systematic discrimination.

### ***3. Admissibility issues according to the author and the State party***

The author claimed she exhausted all domestic remedies when the Constitutional Court decided not to accept for review her complaint, but the State disagreed submitting that in this case, domestic remedies would have been exhausted if the author had filed, in admissible fashion, a constitutional complaint. According to the State party, failure to lodge a required and reasonable appeal must result in inadmissibility of the complaint pursuant to Article 4.1 of the Optional Protocol. According to the State party, an abstract review of constitutionality by means of an individual complaint is inadmissible. Furthermore, the State party argued that the situation would have been different if the author was already directly adversely affected by the legal position created by existing legal provisions but according to the State party this was not the case as the law on the legal consequences of divorce had not yet been implemented by the courts in regard to the author.

The author noted that the constitutional complaint concerning the legal consequences of divorce had not been rejected as inadmissible or unfounded, but rather had not been accepted for decision. The author further submitted several arguments as to why the constitutional complaint was admissible but the Committee was not convinced relying, in this connection, 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 was 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 but rather agreed with the State party that it had been a general complaint about the legal consequences of divorce and therefore concluded that the improperly filed constitutional complaint of 10 July 2000 could not be considered an exhaustion of domestic remedies by the author.

The State party also claimed inadmissibility for lack of grievance under article 2 of the Optional Protocol as only victims can submit claims. The State party noted a series of legal observations as to why the author had not demonstrated that she was a victim of the law on the legal consequences of divorce which I will not detail due to the fact that the Committee found the complaint inadmissible on other grounds.

The State party also argued inadmissibility for lack of sufficient substantiation 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, making it impossible to examine whether and which rights set forth in the Convention were violated in the author's case.

Since the Optional Protocol entered into force for Germany on 15 April 2002, as regards inadmissibility *ratione temporis*, the State party submitted that since the divorce proceedings alone were the subject of the complaint and a final and conclusive decision had so far only been reached on the equalization of pensions in conjunction with the divorce, the decisive point for inadmissibility *ratione temporis* should be the time at which this decision became final, i.e. on 28 July 2000. To this the author replied that, while the divorce decree became final in July 2000, she continued to be directly affected by the discriminatory provisions of the law on the legal consequences of divorce.

The author rejected the State party's argument with respect to inadmissibility for lack of grievance by noting that since her divorce, she continued to be personally and directly affected by the law on the legal consequences of divorce. She maintained that she was 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.

On the issue of lack of sufficient substantiation, the author submitted 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 maintained that she had given a concrete account of her fundamental material disadvantage.

The author stated 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 per month for her old age pension had stopped. Had she not deferred to her husband's or family's needs, between €47,000 (had she remained married) and €94,000 (in case of her own income) would have been made towards her old age pension.

The author further submitted 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.

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

In regard to the divorce proceedings the author reiterated that the presumably just equalization of pensions is deeply unjust and discriminatory as it does not take into account the post-marital consequences of the division of labor and of understandings reached during marriage. In her concrete case, her divorced husband would reach a pension that would be significantly above the amount determined by the equalization of pensions. On the other hand, there still were serious doubts whether, when and to what degree she would be able to obtain the determined amount.

The author further submitted that notwithstanding her repeated urgings, the questions of post-marital support and of equalization of accrued gains were not dealt with. 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 asserted 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 favor, the views and interest of the male spouse who files for divorce.

#### ***4. Discussions on the merits***

Although there was no decision on the merits, I have included some of the issues that would have been decided had the Committee found the communication admissible because they are clearly issues that need to be addressed by the Committee in the near future.

For example, the author insisted 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, according to the author, 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.

The author furthermore claimed 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 claimed that all divorced women in situations similar to hers are victims of systematic discrimination, disadvantage and humiliation.

The author also submitted 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 behavior during marriage and after divorce, subjecting women to rigid social control by the divorced husband and the courts. Inappropriate behavior by a husband, on the other hand, is not subject to any kind of sanction. The author argued that such discrimination and disadvantage of divorced women is only possible because of insufficient and vague legislation.

The State responded that the author had not presented enough evidence supporting her claim that the law on the legal consequences of divorce had discriminated her. The State party submitted that presenting studies that refer to the economic disadvantages of divorced women did not prove that the author herself had suffered discrimination.

## 5. The decision of the Committee

The Committee decided the communication was inadmissible on two grounds:

- 1) Under Article 2(e) (the *ratione temporis* rule), since the facts presented occurred prior to the entry into force of the OP, and
- 2) because the author failed to exhaust domestic remedies.

The Committee found that the divorce proceedings 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 and that since the author had not made any convincing arguments that would indicate that the facts related to the equalization of pensions continued after that date. Therefore, in accordance with Article 4, paragraph 2 (e), of the OP, the Committee was precluded *ratione temporis* from considering the part of the communication that related to the equalization of pensions.

With regard to the issue of exhaustion of domestic remedies, the Committee agreed with the State party's argument 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. It concluded that the author had thereby not exhausted domestic remedies concerning the issue of the equalization of pensions and that the part of the communication regarding equalization of pensions was therefore inadmissible also under Article 4, paragraph 1, of the Optional Protocol.

The Committee also agreed with the State party that the filing of the Constitutional Complaint was carried out in an inadmissible manner for several reasons, including because the complaint was time-barred. The Committee was not persuaded by the author's arguments and therefore concluded that the improperly filed constitutional complaint of 10 July 2000 could not be considered an exhaustion of domestic remedies by the author.

The Committee noted that separate proceedings regarding both the equalization of accrued gains and maintenance after termination of marriage had not yet been settled definitively. In light of the fact that the author had not denied that this was the case nor argued persuasively for the purpose of admissibility that the proceedings had been unreasonably prolonged or were unlikely to bring relief, the Committee considered that those claims were inadmissible under Article 4, paragraph 1, of the OP.

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

Two Committee experts did not agree with the decision to declare the communication inadmissible even though, according to them, the claims regarding the divorce and the equalization of pensions of 28 July 2000 were inadmissible under the *ratione temporis* rule.

They argued that the separate claim regarding the ongoing proceedings concerning the issues of accrued gains and spousal maintenance in fact did meet all admissibility criteria by applying the “unreasonable prolongation” exception<sup>6</sup> to the rule that all domestic remedies must be exhausted. They recognized that the proceedings in this case had been ongoing for about five years without a final decision having been taken. They argued that whereas this length of time might not fall within the unreasonable prolongation exception in some cases, the position was different in a case in which the subject matter of the proceedings was basically the determination and granting of the financial/material sources of the survival of the author.

The dissenting opinion agreed that the author was faced with an unjust situation after three decades of marriage and commitment to her husband and home, and a divorce that took place against her will. They found that it was sad and shameful that she was forced to live without regular, reliable income.

## **6. Analysis**

I do not understand why the Committee did not consider the communication at least partially admissible, as did the dissenters, since the complaint was not based solely on the equalization of pensions but also on the two other consequences of a German divorce which, as was found by the dissenters, could be considered admissible due to the unreasonable prolongation rule. It is worrisome that the majority found that it is the author who has to demonstrate the “unreasonable prolongation” instead of deducing this from the facts of each case.

But even more worrisome for me is that the majority could say that the author had not shown that the facts, insofar as they relate to the equalization of pensions, continued after the date of the final divorce decision. True, the decision on the equalization of pensions had been taken by a court before the entry into force of the OP, but the consequences of that decision would be

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<sup>6</sup> Article 4.1 of the OP-CEDAW allows an exception to the requirement of exhaustion of domestic remedies if there has been a situation where “...the application of such remedies is unreasonably prolonged or unlikely to bring relief.”

felt several years after the entry into force. In fact, in this concrete case, the author's divorced husband would reach a pension after the entry into force of the OP which would be significantly above the amount determined by the equalization of pensions. On the other hand, at the time of the entry into force of the OP, the author was still not sure whether and to what degree she would be able to obtain the determined amount. So, from the point of view of the claimant, the effects of the decision had not even begun after the OP had entered into force with respect to Germany.

With regards to the finding that she had not exhausted domestic remedies with respect to the equalization of pensions, it is surprising to me that the Committee agreed with the State party that the author had not appealed against the final decision and disregarded the author's claim that she was denied financial assistance in order to continue her appeals.

The essence of filing a case with the CEDAW Committee is because the victim is unable to obtain remedies in the State. The Committee would be able to contribute greatly in defining the obligations of the State party relating to the Convention by finding, in this case, that the State party failed in its obligation to provide effective and immediate relief because her case had been unreasonably prolonged and also by finding violations of the State party in failing to eliminate discrimination in relation to divorce and its consequences. Clearly, the effects of the divorce continued after the OP came into force.

Fortunately, since a decision on the exhaustion of domestic remedies is one that has to be made on a case by case basis, I am hopeful that the Committee will be more gender and age sensitive when deciding future cases. Listening to the constructive dialogues with reporting countries, I cannot but be optimistic that the Committee will be more sensitive to the plight of older divorced women and not expect them to go on for over five years without financial security until they exhaust all domestic remedies!

### ***7. Lessons for advocates***

In this case, the author was denied her claim on purely procedural grounds which shows us that we must pay careful attention to all issues related to admissibility before filing a complaint in the international arena. It is important that we study the decisions of the other Committees and those of the regional courts on admissibility and cite these decisions in our case.

The lesson we can learn from this case is that when we are preparing a complaint that is based on some issues that are still pending or issues that have

no possibility of exhausting domestic remedies or ones where we know the results even before we file the complaint, we should argue that matters relating to exhaustion of domestic remedies should be analyzed in a gender sensitive manner. It is important to find domestic or international decisions that will support our contention of the unreasonable prolongation rule, or the impossibility of exhausting them or the impossibility of getting an effective remedy. We need to write more and document better the issue of exhaustion of domestic remedies from a gender perspective so that these procedural rules will be interpreted considering women who are not economically independent from their spouses or former spouses and for whom it becomes so much more difficult to exhaust domestic remedies. In other words, this case shows us that the strict application of exhaustion of domestic remedy rules is discriminatory under Article 1 of the Convention when applied in a non-gender-sensitive manner.

## Communication No. 2

### *Ms. A.T. vs. Hungary*<sup>7</sup>

This is a case concerning domestic violence, a topic that has had growing recognition as a violation of the human rights of women in the international as well as in domestic courts. The overarching issue was the positive obligation of the State to take action to eliminate domestic violence, with a focus on the failure of the State party to ensure protection of the human rights of the author from violations by a nonstate actor. In its resolution of the case, the Committee drew attention to domestic violence as a wider, societal problem, providing views and recommendations that are applicable to society as a whole. The Committee's recommendations took into account the concrete suggestions of the author, indicating an encouraging start to the communications procedure under the OP on this issue at least.

#### *1. The facts as presented by the author*

The author claimed she had suffered severe and regular domestic violence and serious threats to her life by her common law husband. There had been

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<sup>7</sup> A/59/38 Annex III, Communication No.: 2/2003, <<http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf>>.

civil proceedings regarding the husband's access to the family residence and, in September 2003, the Budapest Regional Court had issued a final decision authorizing his return to the property, which the author and the husband owned jointly.

The author claimed that since then her “physical integrity, physical and mental health, and life were at risk” and that she lived in “constant fear”. A petition for review of the above decision had been submitted to the Supreme Court and was pending in January 2004. There were ongoing criminal proceedings against the husband concerning incidents of battery and assault. While she sought assistance from the courts, the author did not approach a shelter as none in the country could accommodate her and both her children, one of whom is severely brain-damaged. Furthermore, there was no possibility of obtaining a protection/restraining order, as no such orders were available under Hungarian law.

## ***2. The complaint***

The author claimed violations by Hungary of the Convention Articles 2(a), (b), (e), 5(a) and 16, for failure to provide effective protection from her former common law husband, in breach of its positive obligations under the Convention. In particular, she claimed that the irrationally lengthy criminal procedures against her husband, the lack of protection orders or restraining orders under current Hungarian law, and the fact that he had not spent any time in custody were a breach of the Convention. She sought justice for herself and her children, including fair compensation and the Committee's intervention into the intolerable situation, which affects many women from all segments of Hungarian society. As to the nature of this intervention, the author made concrete suggestions for reform of the situation.

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

With her initial submission, the author also requested effective interim measures in accordance with Article 5, paragraph 1, of the Optional Protocol.

By submission of 20 April 2004, the State party informed the Committee that the Governmental Office for Equal Opportunities 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.

After several notes verbales<sup>8</sup> the Committee requested that the author 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 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.

### ***3. Admissibility issues***

The author maintained that she had exhausted all available domestic remedies. She referred, 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 described 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 reportedly take some six months to be resolved. The author believed that it was very unlikely that the Supreme Court would 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 submitted that this should not mean that she has failed to exhaust domestic remedies for the purposes of the Optional Protocol.

The author contended that, although most of the incidents complained of took place prior to March 2001 when the Optional Protocol entered into force in Hungary, they constituted elements of a clear continuum of regular domestic violence and that her life continued to be in danger. She alleged that one serious violent act took place after the Optional Protocol came into force in the country. She also claimed that Hungary has been bound by the Convention since becoming party to it in 1982. The author further argued that Hungary had 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.

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

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<sup>8</sup> Notes verbales are diplomatic communications between the Committee and State parties.

#### ***4. Discussions on the merits***

In its observations on the merits, the State party, having acknowledged that the system of remedies against domestic violence was incomplete and ineffective under Hungarian law, described its recent efforts to improve the system and its difficulties in doing so. Firstly, reference was made to two Parliamentary resolutions on violence in the family. Secondly, various measures had been implemented to eliminate domestic violence, including active involvement of non-governmental organizations (NGOs) in the elaboration of government policy.

In her comments on these observations, the author acknowledged the difficulties presented by the public/private dichotomy, namely that resistance to change is strong and decision-makers themselves do not understand why the state should intervene in the family sphere. The author also drew attention to the wider implications of a positive decision in her case: prevention of domestic violence is a demand of the international community and in addressing the issue the Committee would further international discourse on domestic violence and reinforce the international movement to eradicate it.

#### ***5. Decision of the Committee***

The Committee agreed with the author that the claim was admissible even if she had not exhausted all domestic remedies. In the opinion of the Committee even though some domestic proceedings were still pending, it was 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 had been at risk of irreparable harm and threats to her life during that period. Additionally, the Committee took 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.

As to the facts that were the subject of the communication, the Committee agreed with the author that the 10 incidents 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 was therefore persuaded that it was competent *ratione temporis* to consider the communication in its entirety, because the facts that were the subject of the communication covered 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.

In its views on the merits, the Committee identified the main issue before it as the violation of the rights of the author following a failure of the State party to protect her from a serious risk to her person by her common law husband. Thus, the question facing it was whether there had been a violation of the Convention, because, as the author alleged, the State party had, over a period of four years, failed in its duty to provide her with effective protection from the serious risk to her physical integrity, physical and mental health, and life by her former common law husband. The Committee recalled its past pronouncements on violence against women, specifically General Recommendation No. 19, which defined gender-based violence as a form of discrimination. Domestic violence, as a form of gender-based violence, was thus discrimination. General Recommendation No. 19 also conveys the idea that State parties can be held accountable for the conduct of private actors if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence.

The Committee found in favor of the author under Article 2 of the Convention as follows:

“...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 party are not yet ready to ensure internationally expected, coordinated, comprehensive and effective protection and support for victims of domestic violence.”

“...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 was of the opinion that the description provided of the proceedings resorted to in the present case, both the civil and criminal proceedings, coincided 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.”

“...In this connection, the Committee recalled its concluding comments from August 2002 on the State party's combined fourth and fifth periodic report that states ... “[T]he Committee is concerned about the prevalence of violence against women and girls, including domestic

violence. It is particularly concerned that no specific legislation 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 concluded that the obligations of the State party that are set out in Article 2(a), (b) and (e) of the Convention extend to the prevention of, and protection from violence against women and, in the instant case, remain unfilled and constitute a violation of the author's human rights and freedoms, particularly her right to security of person."

The author's claims under Articles 5 and 16 were also upheld. The Committee referred again to General Recommendation No. 19 and also to General Recommendation No. 21, noting the failure of the State party to provide adequate protection to the author either through a court ruling barring the husband from the apartment, or through a restraining order or by providing a shelter that could accommodate the author and both children.

The Committee also noted that before ruling on the merits it had exercised its interim measures power under Article 5, of the OP and that the State party did not respond to the request that the author 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.

The Committee noted 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.

Having determined that there had been violations of the Convention, the Committee made recommendations to the State party regarding the author, as well as recommendations of a general character. With regard to the author, the Committee urged the State party, firstly, to take immediate and effective measures to guarantee the physical and mental integrity of the author and her family and, secondly, to ensure that she be given a safe home in which to live with her children, receive appropriate child support and legal assistance and that she receive reparation proportionate to the physical and mental harm undergone and to the gravity of the violation of her rights. The recommendations of a general character called upon the State party, *inter alia*, to:

- (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 CEDAW 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.

The State party was 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.

## ***6. Analysis***

As the first OP decision on the merits, this is a good decision. It is fair to say that the Committee tackled the issue of domestic violence with rigor, supporting a worldwide movement to highlight the practice as a human rights violation. Especially encouraging is the Committee's readiness to use its new powers under the OP to request interim measures to be taken by the State party and to make recommendations of a general character.

It is important to take note that the facts in this communication have to do with domestic violence and therefore, although the case did not set a new international standard it can be argued that it definitely places the issue within the human rights framework. So, although at the time of the communication, international law had already recognized this form of violence against women as a human rights violation, the lesson we can extract from this case is that there is always room for more concrete understandings what the State party's obligations are with respect to a human rights violation, in this case, violence against women. We now have a clearer understanding of the obligation of the State to protect women from violence perpetrated by private parties.

## ***7. Lessons for advocates***

The lesson we can learn on admissibility is that the claim has a better chance of being found admissible if the author of the claim presents convincing arguments and previous decisions regarding these issues and not leave it to the Committee to deduce them from the facts. This leads us to the question of whether it is advisable to use the OP without legal assistance as even many lawyers do not know all the rules concerning admissibility, much less lay women. Fortunately, the International Women's Rights Action Watch Asia Pacific<sup>9</sup> has a campaign for the promotion of the ratification and use of the OP, and is setting up a project to give legal assistance to women around the world who want to bring a claim through the OP-CEDAW.

This case also teaches us that the Committee will be willing to request interim measures when we request them but again, we must be able to show the need for such measures.

As to the merits of the case, the fact that the Committee accepted the author's request to make general recommendations, demonstrates that the OP-CEDAW can and should be used to change structures and eliminate obstacles to all women's enjoyment of their human rights and not just focus on remedies for a particular victim. This shows us that when we are presenting our communication, we must think of the measures that are needed by different women and not only of the women in the same ethnicity, age, race, sexual orientation or economic conditions (among others) as the claimant, so that we can request measures which will benefit most women and therefore transform society. This is extremely important as what we should be aiming for with our claim is not only to compensate the victim for her suffering or ending her particular discrimination but more broadly, to end discrimination against all women.

Because this decision makes it clear that the State has concrete obligations with respect to domestic violence, and because the case is centered around a problem that exists everywhere for women, it is very important for all of us to study this case and lobby our governments for the implementation, in our own localities, of the general recommendations handed down to Hungary.<sup>10</sup>

It would be interesting to know what have been the strategies of the Hungarian women's movement to get the Hungarian State to implement the general

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<sup>9</sup> See IWRAP Asia Pacific website for more information on the campaign. [www.iwraw-ap.org](http://www.iwraw-ap.org).

<sup>10</sup> *A.T. v Hungary*, *op. cit.*, Paragraph 9.6.

recommendations that were handed down in this case. This is also important so that we can evaluate the impact of the OP-CEDAW on women's rights.

For me, the most important aspect of this decision is the fact that the Committee reinforced the idea that domestic violence is based on the unequal power relations between women and men and insisted that there is a dire need to change those customs and traditions that reinforce the notion that women are inferior to men. This means that the best strategies to end violence against women for good are those that are centered not just around criminal justice but on the elimination of all forms of discrimination in any sphere.

## Communication No. 3<sup>11</sup>

### *Dung Thi Thuy Nguyen vs. the Netherlands*

The author of the communication, dated December 8, 2003, is Ms. Dung Thi Thuy, resident of the Netherlands. She alleges being victim of a violation by the Netherlands of clause b), second paragraph, Article 11 of the CEDAW Convention.

#### *1. The facts as presented by the author*

The author worked as a part-time salaried employee as well as with her husband as a co-working spouse in his company. She gave birth to a child and took maternity leave starting 17 January 1999.

The author was insured under the Sickness Benefits Act ("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.

The author was also insured under the Invalidity Insurance (Self-Employed Persons) Act ("WAZ") for her work in her husband's company. 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 ("LISV"), the benefits agency, decided that, despite her entitlement, the author would not receive benefits during maternity leave for her loss of income

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<sup>11</sup> CEDAW/C/36/D/3/2004, Communication No. 3/2004, <<http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%203-2004%20-%20English.pdf>>.

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.

The author lodged an objection to the decision in several courts, until the Central Appeals Tribunal confirmed the contested judgment of the Breda District Court. The Tribunal found that Section 59 (4) of the WAZ does not result in unfavorable 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.

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. The complaint***

The author alleged that she was a victim of a violation by the State party of Article 11, paragraph 2 (b) of the CEDAW Convention. She contended that this provision entitles women to maternity leave with full compensation for loss of income from their work. The author claimed 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 submitted that pregnancy has a negative effect on the income of this group of women. She alleged that partial compensation for the loss of income does not fulfill the requirements of Article 11, paragraph 2 (b) of the Convention and amounts to direct discrimination of women as a result of their pregnancy.

The author asserted that Article 11 of the Convention applies to any conceivable professional activity carried out for payment and referred to legal literature on the Travaux Préparatoires of the Convention to substantiate her assertion. She also considered that the prohibition of discrimination against women means that pregnancy and maternity may not result in a subordinated position of women as compared to men.

The author requested the Committee to recommend to the State party, to take appropriate measures to comply with the requirements of Article 11, 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.

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

### ***3. Admissibility issues according to the author and the State party***

As concerns admissibility, the author considered that all domestic remedies had been exhausted, since as a last instance, she recurred the decision through which she was denied benefits under the WAZ under the highest ranking Tribunal. The author held that her communication was admissible because although the decision not to pay the author benefits under the WAZ was taken before the Netherlands ratified the OP, the decision of the Central Appeals Tribunal was delivered some time after ratification and she stated that international case law supported her view.

The State party argued that the communication was inadmissible *ratione temporis* since the subject of the communication was 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.

Since the State party did not allege that the author had not exhausted all available domestic remedies regarding benefits for her first maternity leave in 1999, the Committee found the complaint admissible regarding this claim. The question was not so clear in respect to the author's maternity benefits in 2002. In her initial draft, the author informed the Committee about the withdrawal of her appeal regarding her second maternity leave, after the appeal about her first maternity leave had been definitely rejected.

In its last observations, the State party was of the opinion that the author had not exhausted all domestic remedies available in regards to her second pregnancy. However, after offering several arguments regarding admissibility *ratione temporis*, the Committee considered that although the decision of the highest ranking tribunal in social security matters regarding this second pregnancy had not been dictated, it was unlikely that the procedure related to maternity benefits in 2002 would have satisfied the author. Therefore, the Committee considered

admissibility *ratione temporis* was justified in the part of the communication related to the author's maternity leave in 2002.

#### ***4. Discussions on the merits***

Concerning the merits of the author's claims, the State party disagreed with the author's interpretation that Article 11 prescribes full compensation for loss of income resulting from pregnancy and childbirth. According to the State party, the provision is 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.

The State then elaborated on the reasoning behind Section 59 (4) – the so-called “anti-accumulation clause” – of WAZ and concluded that even though the scheme does not allow for a woman to get the full income she made before pregnancy this did not constitute direct discrimination, the State party reiterated 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 unfavorable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause.

Regarding the direct applicability, or not, of Article 11 of the Convention, the State party alleged that in its jurisdiction the tribunals decide if a concrete provision of an international law is directly applicable attending to its nature, content and in compliance with the norm. According to the State party, for an individual to invoke directly a provision, it has to be formulated with such precision that from it derive necessarily and with no ambiguity at all, rights the recognition of which require no other measure from national authorities. The State moreover argued that the only conclusion possible is that Article 11, paragraph 2(b) of the Convention requires legislative bodies and governments of the States parties the obligation to pursue, rather than achieve, a determined objective, granting them a certain range of discretion in that regard. In the Netherlands, that discretionary faculty is exercised by the legislative power.<sup>12</sup>

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<sup>12</sup> I have included in this case the State party's allegations because according to the State's reasoning, no article in the Convention would be directly applicable. This way of thinking is dangerous, since if it were true, each State could argue that it implements the Convention when and as it can.

## ***5. Decision of the Committee***

The Committee decided that the question before it was to determine whether the concrete application of Section 59 (4) of the WAZ vis-à-vis the author insofar as it concerned 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 considered that the author had 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. The Committee was 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.

The Committee noted 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, according to the Committee, the Convention does not protect pregnant women from loss of full income because it leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfill Convention requirements.

In light of the foregoing, the Committee concluded that the application of Section 59 (4) of the WAZ did not result in any discriminatory treatment of the author and did not constitute a violation of her rights under 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)**

According to this dissenting opinion, the experts coincided that the question before the Committee was 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.

According to this dissenting opinion, the aim of Article 11, paragraph 2, in general, and Article 11, paragraph 2 (b), in particular, is to prevent 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.

The dissenters, based on the reasoning set forth above, concluded 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 59 WAZ, 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.

At the same time, they were 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, receives a maternity benefit which equals full pay for a certain period of time. In addition, the 1996 Equal Treatment Act requires full-time and part-time employees to be treated equally. Therefore, they were of the view that the so-called anti accumulation clause in Article 59 WAZ may constitute a form of *indirect* discrimination based on sex.

## ***6. Analysis***

In my opinion this is a very disappointing decision. While I agree with both the dissenters and the majority that Article 11, paragraph 2 (b), does not use the term “full” pay and therefore a certain margin of discretion is left to States parties to devise a system of maternity leave benefits, these benefits should not be less than those received by other categories of working women. If these benefits result in some working women receiving less than others, I cannot see how the majority found that the requirements of the Convention were met. The discretion that is left for States parties must not result in unequal treatment of certain categories of women, otherwise, this is a type of discrimination that is in clear violation of the Convention.

If we try to look at the author’s case in light of the essence of insurance, she paid premiums to be able to receive benefits. Hence, she should not be made

to suffer unequal treatment because she holds two jobs. Holding on to two jobs and paying the necessary premiums necessitates her receiving the maternity benefits under WAZ. It is the duty of the State party to ensure that there is no discrimination in the provision of maternity benefits.

It is also extremely disappointing that the Committee did not refer in its decision to the allegation of the State party 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 unfavorable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause.” According to this reasoning, the State has the discretion to implement any maternity leave scheme whatsoever since even the most unbeneficial scheme would still be an “advantage” in relation to men. I ask myself if the majority or the dissenters forgot about Article 4, paragraph 2 of Convention which should be interpreted to mean that protection of maternity should not be considered as giving advantages to women with respect to men just because men do not need this type of protection.

The majority decision, as well as the dissenters’, show that the Committee did not make use of the case to establish in a clear way, as requested by the author, if Article 11 is of direct application in a country with a legal system as the Netherlands’. Neither did it profit from the moment to make clear whether the State’s obligation in regards to achieving substantive equality between men and women under the Convention’s Article 11, paragraph 2(b), is limited to “pursuing rather than achieving, a determined objective” as argued by the State. The dissenters did insist that although the State has a certain margin of discretion regarding implementation of that paragraph, that implementation should be made in accordance with the principles and other articles of the Convention.

It is disappointing to note that even though the State did not provide the required information regarding its denial of the authors affirmation about there being more women than men who work simultaneously in self-employment with part-time salaried employment, the Committee did not then presume this to be true and therefore decide that the WAZ norm did constitute an indirect discrimination against women as the dissenters supposed.

### ***7. Lessons for advocates***

If the author had provided academic, scientific, or statistical studies about women’s and men’s part time work, the Committee might have found that there had been sex-based discrimination in that case.

In synthesis, this case shows that the Committee was unable to take the opportunity to clearly establish the State's obligations with regards to the interpretation of the Convention. It shows that it will be necessary to bring many more cases, with clear arguments and even case law to support each claim. I believe that we can conclude from this case that during these first years of the OP, specialized legal counsel is necessary when using the communications procedure under it. I believe that if case law and more legal arguments had been included for each of the author's arguments, the results could have been different.

## Communication No. 4

### *Ms. A.S. vs. Hungary*<sup>13</sup>

The author of the communication dated 12 February 2004, is Ms. A. S., a Hungarian Roma woman. She claimed to have been subjected to coerced sterilization by medical staff at a Hungarian hospital. Having been found admissible, this communication was decided on its merits.

#### *1. The facts as presented by the author*

The author is the mother of three children. On 30 May 2000, on examination by a doctor she found out she was pregnant and that the estimated labor date was December 20, 2000. She followed antenatal treatment and attended all the scheduled appointments with the district nurse and gynecologist.

On 2 January 2001, the author was taken to the hospital where the attending physician found that the fetus (the term "embryo" was used) had died in her womb and informed her that a caesarean section needed to be performed immediately in order to remove the dead fetus. 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. I do not intend to give birth again; neither do I wish to become pregnant."

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<sup>13</sup> CEDAW/C/36/D/4/2004, Communication No. 4/2004, <<http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/Decision%204-2004%20-%20English.pdf>>.

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

Hospital records revealed the poor health condition of the author when she arrived at the hospital, as well as that within 17 minutes of the ambulance arriving at the hospital, the caesarean section was performed, the dead fetus and placenta were removed and the author's fallopian tubes were tied. It was not until before leaving the hospital that the author learned the meaning of the word "sterilization". The author stated that the sterilization has had a profound impact on her life for which she and her partner have been treated medically for depression.

A lawyer filed a civil claim against the hospital, on behalf of the author requesting, that the Town Court find the hospital in violation of the author's civil rights. She also claimed that the hospital had acted negligently by sterilizing her without obtaining her full and informed consent. Pecuniary and non-pecuniary damages were sought.

The Town Court rejected the author's claim, despite finding some negligence on the part of the doctors. The lawyer filed an appeal that was rejected, 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.

## ***2. The complaint***

The author alleged that Hungary had violated Article 10(h), Article 12 and Article 16, paragraph 1(e) of the Convention. The author noted 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. As to the alleged violation of article 10(h) of Convention, the author argued that she did not receive specific information about the sterilization and neither was she given advice on family planning and contraceptive measures – either immediately before the operation or in the months/years before the operation was carried out. She claimed 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, quoting paragraph 22 of the Convention's General Recommendation No. 21, about marriage and family relations, in support of her argument as to the violation of Article 10 (h) of the Convention.

In support of the alleged violation of Article 12 of the Convention, the author referred to paragraphs 20 and 22 of General Recommendation No. 24 and submitted that she was unable to make an informed choice before signing the consent form for the sterilization procedure. She argued also that there was a clear causal relation between the fact that the doctors did not inform her fully about the sterilization and the physical and emotional harm it caused her.

The author asked the Committee to request the State party to provide her with a just compensation.

### ***3. Admissibility issues according to the author and the State party***

The author maintained that all domestic remedies had been exhausted because the decision of the appellate court specifically stated that no appeal against it was permitted. Further, the author considered that in regard to *ratione temporis* admissibility, the most important fact to have in mind was that the effects of the violations at issue were of an ongoing, continuing character.

The State party argued that the author failed to exhaust domestic remedies because she did not make use of judicial review (so-called “revision of judgment”), a special remedy under Hungarian law.

The State party further contended that the communication was inadmissible *ratione temporis* because the author had not sustained a permanent disability because sterilization is not irreversible surgery and has not caused permanent infertility.

The Committee considered that the arguments provided for considering the sterilization permanent were convincing. Consequently, the Committee found that the facts that were the subject of the communication, despite having occurred prior to the entry into force of the OP in Hungary, were of a continuous nature thus, admissibility *ratione temporis* was justified.

Since there was no other reason to justify inadmissibility of the communication, the Committee declared it admissible.

### ***4. Discussions on the merits***

The State argued that no articles of the Convention had been violated and emphasized that the Public Health Law authorizes the physician to practice sterilization surgery without the need of going through any special process, whenever it seems convenient in the light of circumstances. Its view was

that in this case those circumstances were given, since this was not the first caesarean surgery undergone by the author and her uterus was in very bad conditions. Further, the State party considered that the surgery was a needed measure because there was a high risk of death for the author if she should undergo another abdominal intervention, which seemed inevitable given the circumstances.

On her behalf, the author stated that claims for non patrimonial damage and harm can be lodged without the need to determine whether sterilization is or is not irreversible. What was pertinent in this case was that the hospital acted illegally, violating the author's rights to physical integrity, health, human honor and dignity. The loss of fertility caused her psychological trauma and had pernicious effects in her private life.

In this case, the author made a later communication in which she argued the impossibility to reverse the sterilization in her case and substantiated her claim referring to articles published by individuals, governments and international organizations. She referred to case law that considers sterilization to be an irreversible surgery. The same physician that practiced it declared that in the information provided about sterilization, the fact that it is an irreversible intervention should be included.

### ***5. Decision of the Committee***

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 recalled 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 noted the author's reference to the judgment of the appellate court, which found that the author had not been provided with detailed information. The Committee considered that the author had 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, because any counseling that she received must have been given under stressful and most inappropriate conditions. Considering all these factors, the Committee

found 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.

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 found that due to the precarious health conditions and the state of emotional commotion in which she was, it was not possible that in seventeen minutes the hospital personnel could have informed and counseled her 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.

According to Article 12 of the Convention, the Committee considered that in this case, the State party did not ensure that the author gave her fully informed consent to be sterilized, and that consequently her rights guaranteed by Article 12 were violated.

As to whether the State party violated the rights of the author under Article 16, paragraph 1 (e) of the Convention, the Committee found the author's rights under Article 16, paragraph 1 (e) to have been violated. Therefore, the Committee was of the view that the facts before it revealed a violation of Articles 10 (h), 12 and 16, paragraph 1 (e) of the Convention and made specific recommendations to the State party regarding compensation for the author and the following recommendations to the State party:

- Take further measures to ensure that the relevant provisions of the Convention and the pertinent paragraphs of the Committee's General Recommendation 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 centers, 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 centers, 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.

And, as is usual, the Committee required the State party to send a written response within a six-month period, which included information on whichever measure had been adopted in accordance with its opinions and recommendations, which have to be previously published and translated to Hungarian and disseminated in a manner that reaches every pertinent sector of society.

## ***6. Analysis***

In a number of cases dealing with the right to life, torture and ill-treatment, and arbitrary arrests and disappearances, the Human Rights Committee has established that the burden of proof cannot rest alone with the person complaining of the violation of rights and freedoms. The Committee also views a refutation in general terms of a complaint of a violation of a person's human rights as insufficient. I believe that in cases such as this, a gender sensitive approach would be that the State party should have the burden of proving that discrimination did not occur. I am convinced that it should be the State party the one required to present the necessary scientific and other studies since the State has so much more access to all information than any lay woman. Furthermore, it is the State party that is saying that there is no discrimination in general and so it should be the State party that has to prove it. But, through the analysis of these first cases, it seems that in order to get a good decision, it is the victim of the discrimination who has the burden of presenting all the evidence in relation to her allegations.

## ***7. Lessons for advocates***

This was not a very hard case to decide so the only lessons I can draw from it are with regard to the need to have specialized legal counsel when filing a communication through the OP. The present case shows that it is more probable that the Committee will find that there is a violation of the Convention if the author provides additional arguments after the State party responds to the communication. Moreover, if she provides academic and scientific articles to support her position and further she accompanies them with national and international case law.

## Communication No. 5

### *Rahime Kayhan vs. Turkey*<sup>14</sup>

The author of the communication dated 20 August 2004, is Ms. Rahime Kayhan, a national of Turkey. She claims to be a victim of a violation of Article 11 of the CEDAW Convention. The case was declared inadmissible.

#### *1. The facts as presented by the author*

The author, a teacher of religion and ethics, has worn a scarf covering her hair and neck (her face is exposed) since the age of 16. She had been teaching at different High Schools since her first appointment and has worn a headscarf in all of them and when she was photographed for her identification cards (for example on her driver's license, teacher ID, health insurance card, etc.).

On 16 July 1999, she received warnings and then a deduction was taken from her salary 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. 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 ideological and political objectives. She was asked to submit a written statement.

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.

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. The

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<sup>14</sup> CEDAW/C/34/D/8/2005, Communication No. 8/2005 <[http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8\\_2005.pdf](http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/8_2005.pdf)>.

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, stating 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 of 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.

The author stated that on 9 June 2000, she was arbitrarily 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 political 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 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. 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.

On 23 October 2000, the author appealed to an 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 claimed that the penalty lacked a legitimate purpose and was not a necessary intervention for a democratic society. The Administrative Court refused the appeal, finding that her punishment did not violate the law; the author appealed against this decision and it was also rejected.

## ***2. The complaint***

The author complained that she was 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.

The author also claimed 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.

The author also claimed 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 Administrative Court and the State Council were based on the application of the wrong provision. She questioned why the administration had permitted her to wear a headscarf for nine years if it had been an ideological action.

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 claimed that had she been a man with similar ideas, she would not have been so punished.

Further, she added that probably a male or female employee violating another norm in the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments would have been able to keep on working. Her behavior did not justify her exclusion from Public Office. The punishment that should have been applied in her case for having disobeyed the code relevant to attire should have been a warning, but she was fired. The severity of the sanction is proof that she has been the object of discrimination.

On account of all the above, the author felt compelled to have recourse to the Committee and requested it to find that the State party violated her rights and discriminated against her on the basis of her sex. She further requested the Committee to recommend to the State party that it amend the Regulation relevant to attire of the personnel working in Public Office and Establishments, to prevent the High Disciplinary Boards from meting out punishment for anything other than proven and concrete offences and lift the ban on wearing headscarves.

### ***3. Admissibility issues according to the author and the State party***

As to the admissibility of the communication, the author maintained that all domestic remedies had been exhausted with her appeal to the State Council.

The State party argued that domestic remedies had 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. 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.

The State party contended 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<sup>15</sup> 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.

The State party argued that the facts that are the subject of the communication occurred prior to the entry into force of the OP for Turkey in 2002. The author was dismissed on 9 June 2000 and her communication is therefore inadmissible in accordance with Article 4, paragraph 2 (e) of OP-CEDAW.

The author responded that she had exhausted domestic remedies because the means the State expected her to use were not available for her or were not within her reach. She asserted that appealing to Parliament was not a remedy to exhaust in respect to the discrimination she suffered, since remedies should deliver exact and clear solutions not only in theory, but also in practice. She maintained that the only remedies to which she is obligated to resort to are judicial remedies. The author also maintained that she need not resort to using the procedure governed by Article 54 of the administrative procedural law. She considered this to be an extraordinary remedy because it entails a review of the

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<sup>15</sup> *Leyla Şahin v. Turkey* (European Court of Human Rights, application no. 44774/98) <<http://www.echr.coe.int>>.

decision in question by the same authority that has issued the decision. By way of substantiation, the author claimed 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 believed this procedure to be a waste of time and a pecuniary burden.

The author maintained that her complaint was not the same matter that had been examined under another procedure of international investigation or settlement. She had not applied to other international bodies. The applicant before the European Court of Human Rights, Leyla Sahin, was a different individual and the case had different characteristics.

According to the State, the case of Leyla Sahin before the European Court of Human Rights and the author’s communication are the same in essence, regardless 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.

Rahime 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 OP would bar the admissibility of the communication would be 9 June 2000 – that is prior to the entry into force of the OP for Turkey.

The State party added a series of arguments to support its position that the author had not exhausted domestic remedies that can be read in the complete transcription of the case, which are not of any relevance to the present paper.

#### ***4. Discussions on the merits***

The State party based its defense on the fact that, according to the State, the communication violated the spirit of the CEDAW Convention because the author’s affirmations were not pertinent to the definition of discrimination against women as stipulated in Article 1 of the Convention. It asserted that the public employee’s attire is specified in the Regulation relevant to the Attire of the Personnel working in Public Office and Establishments, prepared in accordance with the Constitution and related laws, which are applied to public workers of both sexes, to whom apply the same legal and disciplinary measures that were applied to the author. According to the State party there is no element in the regulation, in regard to its content or application that constitutes discrimination against women because both sexes must comply with codes related to attire.

According to the State party, the competent tribunals decided that Kayhan insisted on going to work with a headscarf, in spite of the warnings and sanctions imposed on her. Consequently, she was removed from service. The State party considered that “the author’s religious beliefs only concern her, who has the right to dress and behave as she pleases in private. However, as a public worker, she must respect State’s principles and norms. In conformity with the public character of her work, she is obliged to respect laws and regulations mentioned before. There has been no discrimination in adopting such measures against the author, nor are there contradictions in the law...”

The State maintained that the communication was incompatible with the Convention dispositions, as provided by Article 4; paragraph 2(b) of OP-CEDAW, because it is not true that the author would be employed if she were a man. The same sanctions would be applied to male public officers whose actions were based on political and ideological reasons. The State party reiterated that sex was not taken into account and did not influence the sanction. Consequently, there existed no discrimination on the basis of sex.

The author reasserted that the discrimination she suffered occurred because she wore a headscarf, which is the same as saying that it was because she is a woman. In her judgment, prohibiting the use of a headscarf generates inequality in the work and education places. She reasserted that the rights the violation of which she claimed were rights protected by the CEDAW Convention.

### ***5. The decision of the Committee***

The Committee did not agree with the State party in that the communication was inadmissible under Article 4, paragraph 2 (a) of the OP because the European Court of Human Rights had examined a case that was similar because the identity of the author was one of the elements that it considered when deciding whether a communication was the same matter that was being examined under another procedure of international investigation or settlement. In *Fanali vs. 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 concluded therefore that the present communication was not inadmissible under Article 4, paragraph 2 (a) of the OP because the author is a different individual than Leyla Sahin, the woman to whom the State party referred.

As to admissibility *ratione temporis*, the Committee observed that the crucial date, according to the State party's argument, was June 9, 2000, date when the author was removed from her office as teacher and that said date was prior to the entrance into force of OP-CEDAW for Turkey, January 29, 2003. However the Committee considered that as a consequence of her dismissal, the author has lost her status as a civil servant. 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 OP for the State party and justify admissibility of the communication *ratione temporis*.

As to the exhaustion of domestic remedies, the Committee observed that for this norm to make sense it was necessary that the State party had had the opportunity of providing, through its judicial system, a remedy for a violation of any of the rights defined in the Convention before the Committee examined the violation. Therefore, no communications could be admitted the substance of which had not been lodged in a domestic competent authority.

Therefore, 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.

## ***6. Analysis***

It is quite disconcerting that the Committee declared this matter inadmissible based on arguments that the State party itself did not bring up. In international law it is usually recognized that the State has the obligation to demonstrate that the exhaustion of domestic remedies has not been completed. For example, in the case of *María Eugenia Morales de Sierra vs. Guatemala* under the Inter American Human Rights Commission case No. 11.625, report 28/98 the Commission expressly stated:

“Article 46 of the American Convention specifies that for a case to be admitted it will require: ‘recurrence and exhaustion of domestic remedies, according to generally recognized principles of International Law.’ This requirement ensures the State in question the opportunity

to solve differences within its own legal framework. The remedies generally required to be interposed in conformity with the principles of International Law are those available and are effective to solve the allegations presented... **When a State maintains that a petitioner has not observed the requisite of exhaustion of domestic remedies it has the duty of pointing out the available and effective specific remedies.**

So, why did the Committee decide that the author had not exhausted domestic remedies based on the fact that she had not argued her domestic cases on discrimination on the basis of sex when the State party had not argued this. Even more disconcerting is the fact that even if it were true that the author had not argued discrimination on the basis of her sex and a violation of the Convention's Article 11 in her proceedings under the different national bodies, the truth is that even the State manifested that: "The public officer's attire is specified in the Regulation relative to attire of personnel working in public offices and establishments, prepared in conformity with the Constitution and pertinent legislation. That regulation is applied to public officers of both sexes, to whom apply the same disciplinary and legal measures applied to the author and **there is no element in the Regulation, either in content or application that constitutes discrimination against women**". In fact the State party argued that in previous decisions "...the Supreme Court pointed out the obligation of public officers and other public employees of complying with codes relative to attire. When a person, male or female, is incorporated into public administration, he or she does it with knowledge of the provisions pertinent to the Constitution, other laws and customary law, and is obliged to respect the attire code..." When applying the pertinent norms and customary law, there is no discrimination between men and women. The Constitutional Tribunal has already issued decisions to this respect, which constitute the base for the application of laws and other rules in Turkey.

"In light of those decisions, it is possible to point out that the prohibition for public employees to wear a headscarf in their working place does not constitute discrimination against them, but has the objective of enforcing laws and other regulations in force..."

As can be read in the State party's allegations, there are decisions from different tribunals in Turkey and even from the Supreme Court and Constitutional Court that have already decided that not allowing the use of a headscarf was not considered discrimination against women. Why then does the Committee find that the State party has not had the opportunity to remedy a supposed violation of Article 1 of the CEDAW Convention in this case just because, in the Committee' view, the author did not argue discrimination based on sex before the domestic courts?

While I agree with the Committee that the domestic remedies rule exists to guarantee 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, it is quite clear in this case that the Turkish legal system had had that opportunity, definitely in other cases and probably even in this one since it is not true that the author did not argue discrimination based on sex in the domestic arena. In the facts as presented to the Committee by the author one can read that “Her lawyer made written and oral statements to the Higher Disciplinary Council, stating that ...If she were to be punished, it would amount to a violation of national and international principles of 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.”

### ***7. Lessons for advocates***

Even though I consider that the Committee made an error in interpreting the requirement of domestic remedies exhaustion, this case shows us that whenever we begin a litigation, claim or demand at the national level, we must make sure that it is substantiated, amongst others, in the definition of discriminations in the CEDAW Convention. And, if we did not use the Convention at the national level because for some reason it was not possible, we should provide all possible arguments for the reasons of not being able or not wanting to allege sexual discrimination at the domestic level. For example, in this case the author could have used the same arguments the State used to show that she was not going to achieve an effective remedy to her claim if she based her argument on sexual discrimination, and could have insisted that for that reason she had substantiated her claim under national courts on other motives.

After reading this case one can also come to the conclusion that the author herself was not sure if she was basing her claim on sexual discrimination or on freedom of religion or on another matter. For example, in a response to one of the State’s allegation, the author insisted that “...Probably, a male or female employee who violated **another rule in the regulation relative to personnel’s attire** working in public offices and establishments could continue working.” This statement seems to be trying to prove that the discrimination was for religious reasons and not for being a woman. So, while it is true that the author was not always clear, I believe that the Committee could have understood from other allegations that she was talking about discrimination against women as well as discrimination on other grounds. For many women who suffer a double or triple discrimination, it is not always so easy to tease out which discrimination is based on sex and which one is based on race or other conditions.

So the lesson we can draw from this case is that we must not allow the Committee to not examine the substance of the matter by arguing non exhaustion of domestic remedies because we were not very clear as to our claim. In this case, the author should have insisted that since only women wear a headscarf, its prohibition could be understood as a form of discrimination based on sex. If she had done that, the Committee would have had to examine the merits of the case and today we would have a better understanding of what discrimination amounts to. This case is a very difficult case to decide on the merits because other provisions of CEDAW should be taken into consideration such as Article 5 which requires the State to modify those customs or traditions that are prejudicial to women, or the State's obligation to prevent the existence of discrimination against women in any sphere, including the religious sphere, etc.

It is a real pity that the Committee chose to declare this case inadmissible, depriving us of having better jurisprudence about the issue of wearing a headscarf. However, it is to be expected that in the future, the Committee decides matters about exhaustion of domestic remedies under the spirit of the doctrine that is based on giving the State the opportunity to explain its behavior or correcting any violation through existing means within the State. This requisite does not exist to give the Committee an excuse for not issuing a view about difficult matters. The requisite of exhaustion of domestic remedies cannot be used to obstruct the international revision of States' behavior. It is of the utmost need that the requisites of domestic remedy exhaustion be understood as a way to allow a balance between the need to give the State the opportunity to explain or amend its behavior and the need of victims of violations that have not been able to find a solution to their problems to go to the international arena.

## CONCLUSIONS

Two of the reasons for adopting the OP-CEDAW were the need for a better implementation of the CEDAW Convention as well as a mechanism to develop a better understanding by the State party of the implications for the State of its obligations to eliminate discrimination against women based on what is included or contained in each of the rights established by it.

The analysis of the first five cases shows that the OP-CEDAW is proving to be able to fulfill those needs, although not to the extent activists had hoped for, mainly for reasons of admissibility which I have already referred to in each case. However, there are still many questions that remain unanswered.

For instance, it remains a question if State parties are capable of fulfilling the more general recommendations made by the Committee under the communications procedure in the context of a world globalized to comply with the needs of the “free” market instead of the needs of people.<sup>16</sup> In fact, all UN human rights committees are concerned about this, not only the CEDAW Convention. The issue is, in light of the fact that human rights theory continues to consider the State as the principle entity legally responsible for fulfilling human rights, how can private corporations also be held accountable. Especially since many of them are now politically and economically more powerful than many middle income countries. In other words, since there is a pressing need to improve the accountability of transnational corporations which commit human rights violations directly or by complicity, how will this affect the implementation, by weak States, of the recommendations made to them through the OP-CEDAW? Especially if the recommendation implies the need for a State to do something about the human rights abuses committed by transnational corporations that have invested in that State precisely because it does not hold them accountable for human rights violations. We know that when large corporations operate in weak governance zones, where the territorial State has essentially retreated, or where they operate under the jurisdiction of authoritarian States who routinely commit serious human rights abuses, the territorial State is either unable or unwilling to effectively control the operations of transnational corporations. So, what will become of those recommendations that need the cooperation of transnational corporations?

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<sup>16</sup> For a full implementation of the CEDAW Convention, it is necessary to have a strong benefactor State with enough resources and democratic institutionalality to comply with the recommendations issued by the Committee. A neo liberal State, organized only to guarantee a free market, with privatized health, education and information systems, does not have the required institutionalality or resources to fulfill its obligations.

To frame the same question within the facts of one of the cases that I have analyzed in the present paper, how will a State that has privatized its health system, make the various corporations that sell services related with health, take responsibility for implementing the recommendations set forth in Case 4? For example, how will the State be able to make sure that all competent personnel in its sanitary centers know and apply relevant provisions of the CEDAW Convention and General Recommendation Nos 19, 21 and 24 issued by the Committee concerning the reproductive rights and health of women?

In the neo liberal context of the world today, and with its present financial problems, I also ask myself if the UN will want or will be able to invest the necessary human and financial resources that the Committee needs to carry on its work in the best way. Or, when the Committee finds itself in Geneva under the Office of the High Commissioner's wing,<sup>17</sup> and not under the DAW secretariat, I also ask myself if it will be able to improve its up to now poor gender sensitive analysis of such issues as exhaustion of domestic remedies and other rules of admissibility; or on the contrary, will what is understood as a "gender perspective" be reduced to what gender mainstreaming has become in the UN?<sup>18</sup>

The answers to these and other questions will be known with time. For now, what we do know is that the Committee has 23 experts who, without pay and, at the most, through three meetings a year, have to monitor the implementation of the Convention in 185 States and be willing to receive communications from 90 States that have ratified the OP-CEDAW as well as initiating investigations in those States that have not opted out of the inquiry procedure. Without more resources for the CEDAW committee, I do not think we can be very optimistic about the result of future cases.

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<sup>17</sup> There is a decision to move the CEDAW Committee to Geneva, where it will be serviced by the Office of the High Commissioner for Human Rights (until now, the Committee was serviced by DAW, the Division for the Advancement of Women). My concern is that while the DAW has a women's human rights expertise, the OHCHR in charge of all other human rights Committees, does not.

<sup>18</sup> A gender perspective, as defined in its beginnings by the UN, made it possible to see power relationships between the sexes that created and maintained different forms of discrimination against women. This perspective implied, therefore, a capacity to see different manifestations of sexism, in order to eliminate them so as to level the playing field between the sexes. With time, the gender mainstreaming strategy in the UN has turned into a strategy that consists in treating both sexes or genders as if they were already equal, that is, before eliminating sexist obstacles that women face everyday in the public and private spheres. This way of implementing a gender perspective does not eliminate the gender structures that support sexist relationships between women and men while creating the illusion that equality has been achieved. An example of this was the proposal to eliminate programs especially directed to women, with the argument that gender mainstreaming precludes the UN from having women specific programs or agencies.

In view of this, we need a strong women's movement, organized around our human rights and able to demand from each State and the international community, that it is time to end discrimination against women once and for all. We already know that all sorts of strategies are needed to achieve substantive equality between men and women, but one of them has to be the use of the instruments we have ourselves achieved under the UN.

For these reasons, I believe it is time for us to start bringing more cases to the Committee. But we certainly have to do it in a more organized and strategic manner. Not only by improving our arguments around admissibility issues, but by informing ourselves about the real meaning of each of the CEDAW Convention's articles and the implications of these meanings for implementation. This means, of course, that we need to understand what achieving equality between men and women in all spheres and levels of our lives requires. And this means we have to understand that the equality referred to in the human rights framework, and specifically in the framework of the Convention, is not equality synonymous with identical treatment, but an equality of results, which obviously includes different treatment when required. The Convention's meaning of substantive equality is based on the reality of diversity and discrimination and is therefore an equality that takes into account biological differences and social inequalities. Instead of declaring that all human beings are equal, the CEDAW Convention and the human rights framework prohibit discrimination on any grounds so that the question is not if equality requires identical or different treatment, the question is how to eradicate discrimination in order to achieve equality.

This, in turn, means that we have to understand that equality between the sexes can only be achieved by eradicating all those patriarchal structures that maintain or support the different forms of oppression, exclusion and discrimination that women suffer. Our struggles have to be based on the conviction that all human beings are equally different from each other and that therefore the problem is not difference. The problem is that the adult white male has been considered for too long the norm. This is why, in order to achieve equality between women and men, it is also indispensable to eliminate racism and all other forms of discrimination based on that idea. The arguments we bring through the OP-CEDAW must reflect this understanding.







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