

IWRAW ASIA PACIFIC OCCASIONAL PAPERS SERIES

NO. 13

**THE OP-CEDAW AS A MECHANISM FOR
IMPLEMENTING WOMEN'S HUMAN RIGHTS:
An analysis of decisions Nos. 6-10 of the
CEDAW Committee under the
Communications procedure of the OP-CEDAW**

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Foreword

By Alda Facio

With this second set of five cases, IRAW Asia Pacific has now published analyses of each of the first ten cases the CEDAW Committee has decided under the Optional Protocol to the Convention. As can be surmised from reading these two publications, the practice of the CEDAW Committee in using its powers under the individual communications procedure of the Optional Protocol is still a cautious and limited exercise.

Of the ten cases decided as of December 2008, half were found inadmissible, mostly because of non-exhaustion of domestic remedies. Of the five cases decided on the merits, the Committee found no violation to the Convention in one of them. Of the four cases where a violation was found, three have to do with domestic violence and one with forced sterilization, none of which are controversial issues. In two of the three domestic violence cases, the actual victims were already dead. This means that out of ten cases, only two victims who have used the OP-CEDAW have been given a remedy for the violation of their human rights.

As demoralizing as this can be, I am by no means advocating that we should stop using the relatively new communications procedure established in the Optional Protocol to CEDAW. On the contrary, I am more convinced than ever that we should use it not only for seeking legal remedies for the many forms of discrimination women suffer around the world and to strengthen the implementation of CEDAW at the national level, but for two distinct yet connected reasons that I will expand on below, both of which have to do with the need to engender international human rights law and its legal procedures.

Reason # 1: We must honour our own struggles as activists for women's rights by owning and using each and every one of the legal instruments our diverse women's movements have fought so hard for, especially since most of us agree that the law is not only an instrument which has been used to enforce discrimination against women, but that the law itself can and should be used as an instrument of social transformation.

One fact that is often omitted from the history of the Optional Protocol is that we have this tool thanks to the relentless work of hundreds of women's rights activists who lobbied, researched and wrote about the need to provide the Convention

with procedures similar to those under other binding international human rights instruments in order to get the message across that discrimination against women is as unacceptable as discrimination based on race or any other factor.

What is more, women's rights activists had been lobbying for a complaints procedure since the drafting of the CEDAW Convention. They were unsuccessful at that point in time because in the 1970s, discrimination against women was still not considered a human rights violation by most international legal scholars. Most of the delegates who were drafting the Convention did not accept a proposal to include at least a communications procedure in the text of the convention.¹ They argued that complaints procedures were needed for "serious international crimes" such as apartheid and racial discrimination, rather than discrimination against women.²

Activists continued to mobilize for such a procedure during the next decade. By June 1993, at the World Conference on Human Rights in Vienna, the conference acknowledged the need for new procedures to strengthen implementation of women's human rights and called on CSW and the Committee to "quickly" examine the possibility of introducing the right of petition through the preparation of an Optional Protocol to CEDAW.

Probably because the CSW was too busy with the preparation of the 4th World Conference on Women, the CSW did not heed this recommendation by the Vienna Conference. But activists around the world kept on lobbying their governments locally, regionally and globally at the preparatory meetings. Activists had to lobby their own movements too. It should never be forgotten that most women distrust the legal system and were therefore not all that excited about spending time and energy on lobbying for something that probably would not help eliminate discrimination. It required long hours of discussions among the women's groups and caucuses to convince the women's movement to continue to demand the right to petition if only for the sake of having the same procedures men already had.

¹ The Race Convention has such a procedure in its article 14, paragraph 1, "A State party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State party which has not made such a declaration."

² See Laura Reanda, *The Commission on the Status of Women*, in *The United Nations and Human Rights, A Critical Appraisal* (Philip Alston ed., 1992) and *Progress achieved in the implementation of the Convention on the Elimination of All Forms of Discrimination against Women: Report by the Committee on the Elimination of Discrimination against Women* (A/CONF.177/7).

In September 1995, because of the petitions coming from around the world, the 4th World Conference on Women called on UN member States to support the elaboration of the Optional Protocol.

Finally, the CSW heeded the calls of the Vienna World Conference on Human Rights and the Beijing Conference on Women, as well as the constant lobbying of the women activist during the CSW session in March 1996. It was at this session that the CSW established an open-ended working group on the Optional Protocol which met again in 1997 through 1999.

In March 1999, the Working Group adopted the Optional Protocol, as did the Commission, which also adopted a draft resolution for the Economic and Social Council. The Economic and Social Council adopted the draft resolution of the Commission in its resolution 1999/13 and in October 1999, the Fifty-Fourth Session of the General Assembly adopted the Optional Protocol to the Convention. The Optional Protocol was open for signature on 10 December, 1999, Human Rights Day.

Immediately women's rights activists began lobbying their governments for ratification of this treaty and on 22 December 2000, following receipt of the tenth instrument of ratification, the Optional Protocol entered into force.

During the drafting years, the Working Group heard statements from many representatives of NGOs about issues relating to the violation of women's human rights and the difficulties women around the world faced when trying to access local justice systems. This meant that activists not only had to travel to New York to be available to the delegates during the Working Group sessions, but that they had to continue to develop convincing arguments so that the effectiveness of the Optional Protocol would not be watered down too much. This was expensive and time consuming!

One of the main reasons that the women's movements around the world were lobbying so hard for the right to petition the CEDAW was precisely because women had very little access to legal remedies at the domestic level. As early as the Nairobi World Conference on Women, the Women, Law and Development NGO Forum stressed the importance of using litigation as an instrument of social transformation. But as a few of the fifty-five papers presented at this forum pointed out, this was hard to do because of the many obstacles women faced when trying to access justice.³

This is why I find it so disheartening that the Committee has not taken into account the lack of access to justice that women face in most parts of the world

³ See Margaret Schuler, *Empowerment and the Law, Strategies of Third World Women* (Margaret Schuler, ed. 1986).

when declaring inadmissible half of the communications it has received. Even more demoralizing is the fact that the majority of these decisions declaring the communication inadmissible were based on the experts of the Committee finding that the claimant had not exhausted the domestic remedies which supposedly were available to her. It is perhaps timely to remind us all that many of the fifty five papers presented so long ago at the NGO Forum in Nairobi and even up to the more recent investigations done by such non-feminist bodies as the UNDP, have raised the need for gender sensitive perspectives in their modes of analysis of issues related to women's human rights and similarly could have guided the CEDAW Committee to a different decision on the admissibility criteria. For example, a recent study by the UNDP⁴ found that from the user's perspective, the justice system is frequently weakened by:

- Long delays; prohibitive costs of using the system; lack of available and affordable legal representation, that is reliable and has integrity; abuse of authority and powers, resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws and implementation of orders and decrees.
- Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
- Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
- Lack of *de facto* protection, especially for women, children, and men in prisons or centres of detention.
- Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
- Lack of adequate legal aid systems.
- Limited public participation in reform programmes.
- Excessive number of laws.
- Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures) which also require fulfilment of precise evidentiary tests which a victim may not be capable of, sometimes because of her traumatized state, or for other reasons.
- Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

⁴ United Nations Development Programme, Access to Justice Practice Note (9/3/2004) <<http://www.undp.org/governance/practice-notes.htm>>.

Knowing the above, it is understandable that many women are disappointed that the CEDAW experts have been conservative in their application of the admissibility requirements and in a more worrying development, were equally guarded in their interpretation of what constitutes a violation of a right as enshrined in the Convention. But as I said before, this should not discourage us from using the Optional Protocol. As we did when lobbying for this instrument, we now have to continue our struggle to engender international human rights law.

One way of doing this is by bringing more and more cases through the OP to the CEDAW wherein we can argue, for example, that most, if not all, of the admissibility criteria that the CEDAW experts have taken from other Human Rights bodies, were developed when many of the rights found in the convention were not justiciable because women's rights were not considered human rights. This means that the reality of women's experiences was not taken into consideration in the elaboration of these criteria. With our experience of using the OP-CEDAW, we can surmise that if we want social transformation, it is still up to the women's movement to mobilize for it and to eventually engender human rights law and its procedures including the OP-CEDAW. This takes me to the second reason why I think we should own and use the OP-CEDAW:

Reason # 2: If we understand that the law has to be changed in order for it to become an instrument of social transformation, we must use litigation as one more tool for enforcing women's human rights.

While it is true that the use of litigation as a tool to redress women's human rights violations has been questioned by many, its effectiveness in transforming the social structures that keep women oppressed is even more questionable. As has been already pointed out, the costliness of the procedures, the geographical distance of the courts from women's homes and the fact that in some countries women still do not have many of their rights even recognized in the law or the sexist attitudes of judges in those countries that do, makes it very difficult for women to even bring their cases to court, much less win them. The slowness and sometimes corruptness of the judicial systems in most parts of the world as well as the low representation of women in the judiciaries compound these difficulties.

While recognising these difficulties and although most would agree that litigation is not the most effective means of eliminating discrimination against women, it is definitely a tool that when used in conjunction with policy and law reform, movement building and a media strategy, can become a very potent instrument. That is why I believe that even if the analysis of the first ten cases disheartens us, we should still use the OP-CEDAW. We must learn from these first ten cases

so that in future claims, we not only give careful attention to admissibility issues before submitting a case, but we also develop convincing legal arguments that engender these and other rules.

If we combine litigation with a movement building and media strategy, we will not only be more successful in achieving the legal remedies we are trying to obtain for the victims of violations of the rights enshrined in the Convention, but we will also broaden and deepen our understanding of each right found in this convention. As the third case which is analysed in this publication shows, even when a particular claimant does not get a remedy, as Cristina Muñoz-Vargas did not, her claim was not futile. Through it we are able to deepen our understanding of equality and non discrimination thanks to the dissenting opinion of CEDAW expert Shanthi Dairiam.

In other words, even when we lose a case, we can still gain something if we have designed a good strategy. When we litigate we must remember that we are challenging the traditional patriarchal social model. Even in Human Rights Law, we are faced with the same political actors: the powerful macho-type socio-political mentality, rooted in the very notion of law. So, the strategies we must adopt have to deal with how to overcome these obstacles. Instead of adopting an elitist strategy of struggle that concentrates exclusively on legal measures, we must adopt a variety of tactics, which emphasize political tactics. These include, of course, movement and capacity building, which is why I say that even when we lose, we win. With a politically augmented strategy, even when we do not get the legal remedies we were demanding, we will still be left with a movement that is stronger and more knowledgeable about how the law and its interpretation is used in very subtle ways to keep women down, for example. Or more knowledgeable about what is needed to change a particular structure or even, just more women whose consciousnesses have been raised as to the androcentric nature of human rights concepts and procedures and will therefore be angry enough by the particular decision to feel the need to change the law and its interpreters.

It is my hope that this publication will inspire and assist many human rights activists. From our anger, we will find the energy to bring more cases to the CEDAW. From our losses, we can learn how to better argue our claims. So please, read these cases so brilliantly analysed by Geeta and then strategize, strategize, strategize...

The OP-CEDAW as a Mechanism for Implementing Women's Human Rights: An analysis of decisions No 6-10 of the CEDAW Committee under the Communications procedure of the OP-CEDAW

By Geeta Ramaseshan

Introduction

This paper is a summary and analysis of five cases before the Committee on the Elimination of Discrimination Against Women (hereinafter referred to as CEDAW Committee or Committee) under the Optional Protocol (OP) to the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW or the Convention). The Committee has till date commented on ten cases.

The first five cases are analyzed in Occasional Paper 12 published by the International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific). The remaining five cases form part of this paper.

Optional Protocols

Optional protocols are separate treaties which supplement the main treaty in 2 ways: by creating *new substantive rights* or by *developing mechanisms or procedures to address violations* of rights. Optional Protocols must be independently ratified by States parties which have already ratified the main treaty, in this case the CEDAW Convention.

In the case of the CEDAW, the Optional Protocol does not create any substantive rights but creates procedures for addressing and redressing violations of rights established under the Convention.⁵ The Protocol was created after vigorous campaigns by the women's movement and entered into force on 22 December 2000.

The communications procedure under the OP provides a mechanism to address violations of any of the rights under the CEDAW. Individual or group of individual

⁵ See, "Our Rights Are Not Optional: Advocating for the implementation of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) through its Optional Protocol, A Resource Guide", 2nd Edition (2008). International Women's Rights Action Watch Asia Pacific.

victims of a violation or concerned groups can approach the Committee with a communication provided they have exhausted all domestic remedies or if one of the exceptions to the exhaustion of domestic remedies rule applies (i.e the remedies are ineffective or unreasonably delayed). The communication can be found inadmissible in certain situations as determined under article 4.⁶

The Committee also has an inquiry procedure in cases of grave and systematic violations of rights by a State party.⁷

Overview of cases discussed in this paper

The analysis of these cases numbers 6 to 10, brought to the CEDAW Committee, indicates that the concerns raised before the CEDAW Committee address a wide ambit of discrimination. The first two cases in this paper, *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice* on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce (descendants of deceased Şahide Goekce) vs. Austria⁸ and *The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice* on behalf of Banu Akbak, Gülen Khan and Melissa Özdemir (descendants of the deceased Fatma Yildirim) vs. Austria⁹, relate to domestic violence. The third case, *Cristina Muñoz-Vargas y Sainz de Vicuña vs. Spain*¹⁰ relates to the denial of

⁶ Article 4 of the Optional Protocol lists five grounds under which a communication can be rendered inadmissible. These are in cases where:

“(a) “The matter has already been examined by Committee or has been or is being examined under another procedure of international investigation or settlement, where it is incompatible with the provisions of the Convention;

(b) It is incompatible with the provisions of the Convention;

(c) It is manifestly ill-founded or not sufficiently substantiated;

(d) It is an abuse of the right to submit a communication;

(e) The facts that are the subject matter of the communication occurred prior to the entry of force of the [Optional] Protocol for the State party concerned unless those facts continued after that date.”

For further elaboration of the rules on inadmissibility see “Our Rights Are Not Optional” *ibid*, p.p. 15.

⁷ Under article 8(1) of the Optional Protocol, if the Committee receives reliable information that indicates grave or systematic violations by a State party of rights set forth in the Convention, the Committee can invite the State party to cooperate in the examination of the information and to this end submit observations with regard to the information concerned. article 9 requires the State party to include in its report measures taken by it in response to an enquiry conducted under article 8.

⁸ CEDAW/C/39/D/5/2005, Communication No. 5/2005 CEDAW decision dated 6 August 2005.

⁹ CEDAW/C/39/D/6/2005 decision dated 1 October 2007.

¹⁰ CEDAW/C/39/D/7/2005 decision dated 6 August 2007.

a civil right with reference to a title (of nobility) on the basis of discrimination. The fourth case, *Ms N.S.F. vs. The United Kingdom of Great Britain and Northern Ireland*¹¹ addresses the contentious issue of the right of a woman to asylum when faced with domestic violence. The fifth case, *Ms Constance Ragan Salgado vs. United Kingdom of Great Britain and Northern Ireland*, raises questions on nationality. The Committee found the first two cases admissible while the others were declared inadmissible.

In each of these cases, the facts indicate some form of discrimination. But formulating them as a violation of a right under the Convention for which no domestic remedy exists or has been exhausted, poses a challenge.

Five cases are not sufficient to provide an in-depth study of the jurisprudence of the Committee. These have to be evolved over time. But the cases indicate the rich and divergent views that emerge when concerns of gender and sex discrimination are raised. Particularly interesting are the arguments of State parties who resist claims since it provides an insight on State party's obligations as well as the corresponding response by the Committee and the perspectives of the authors of the complaints (those articulating the violation to their rights and seeking remedy and redress).

The cases are discussed in detail in this paper and, wherever possible, I have referred to the domestic law to provide the reader with an understanding of the legal systems. I have found it necessary to elaborate on facts in certain cases since communications before the Committee relate to mixed questions of facts and law. While the Committee does not sift evidence in detail, if it is confronted with contradictions on facts between the author and the State party, it will examine facts in detail in such a case.

The paper follows a similar structure to Occasional Paper Series No 12,¹² which examined cases 1-5 of the CEDAW Committee. Hopefully, this paper will complement the earlier one and provide the reader with a purview of the development of feminist jurisprudence of the Committee.

I would recommend that the reader reads both the papers together in order to obtain clarity in the views of the Committee and also suggest that the reader needs to be familiar with the admissibility and exhaustion requirements under the optional protocol and utilize the resource guide and papers.¹³

¹¹ CEDAW/C/38/D/10/2005 decision dated 12 June 2007.

¹² Alda Facio, (2007) "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 Action Watch Asia Pacific, Occasional Paper Series No 12.

¹³ See reference 5 and IWRAP Asia Pacific's website for more recent publications on the OP-CEDAW <<http://www.iwraw-ap.org/>>.

Communication No. 6

*Şahide Goekce vs. Austria*¹⁴

The communication was presented on 21 July 2004 and the Committee gave its conclusion on 6 August 2007. The authors of the communication were two organizations working in Austria for the protection and support of women who were victims of gender-based violence. The claim was brought on behalf of Şahide Goekce who was killed by her husband. Şahide Goekce was an Austrian national of Turkish origin and a former client of the *Vienna Intervention Centre against Domestic Violence*. The arguments put forth by the authors, the State party, and the Committee's decision on admissibility and views and recommendations raise interesting issues and concerns on domestic violence.

1. The facts as presented by the author

The first known attack on Şahide Goekce took place on December 2 1999 when her husband Mustafa Goekce choked and threatened to kill her. Şahide Goekce spent the night with a friend and reported the incident to the police the following day. On 3 December 1999, the police issued an expulsion and prohibition to return order against Mustafa Goekce extending to their apartment under the Security Police Act. The officer in charge found two light red bruises under Şahide Goekce's right ear. Şahide Goekce did not authorize the authorities to prosecute her husband for threatening her life that was a requirement under the Penal Code and he was charged with the offence of causing bodily harm. Mustafa was acquitted because her injuries were held to be too minor for such a charge.

A series of violent incidents to the knowledge of the authors occurred on 21 and 22 August 2000. The police were themselves witness to the violent act of Mustafa grabbing Şahide by her hair and pressing her face to the floor. She later told the police that he had threatened to kill her the day before if she reported him to them. A second expulsion and prohibition to return order was issued against Mustafa that covered their apartment and staircase of their building that was valid for ten days. The police informed the Public Prosecutor that Mustafa had committed aggravated coercion by threatening her with death and sought a detention order. The request was however denied.

¹⁴ Şahide Goekce vs. Austria, Communication No. 5/2005, CEDAW/C/39/D/5/2005. Submitted by The Vienna Intervention Centre against Domestic Violence and the Association for Women's Access to Justice on behalf of Hakan Goekce, Handan Goekce and Guelue Goekce (descendants of deceased Şahide Goekce) vs. Austria.

Between December 2001 and September 2002 the police were called to the Goekce's apartment five times because of reports of disturbances and disputes and/or battering. On October 8, the police were once again called by Şahide since Mustafa had called her names, tugged her by her clothes in the apartment, hit her in the face, choked her and again threatened to kill her. Her cheek was bruised and she had haematoma on the right side of her neck. For a third time an expulsion and prohibition to return to order was issued against Mustafa that was to be valid for ten days. This time Şahide pressed charges against her husband for causing bodily harm and making a criminal dangerous threat. The police interrogated Mustafa and once again requested the Public Prosecutor that he be detained. This request was also denied by the Public Prosecutor.

On October 23, 2002, an interim injunction was issued by the District Court forbidding him to return to the apartment for three months. Mustafa was found to have violated the order by the Youth Welfare Office which informed the police that he was living in the apartment. The police, however, did not find him when they investigated. Meanwhile, Şahide's father also informed the police that Mustafa frequently phoned him and threatened to kill Şahide or another family member. Mustafa's brother also informed the police about the tension between Şahide and Mustafa and that the latter had threatened to kill Şahide many times. The statements of these two family members were not taken seriously, nor were they recorded by the police. The police also did not check whether Mustafa had a handgun even though a weapons prohibition order was in effect against him.

On December 5, 2002 the Public Prosecutor stopped the prosecution against Mustafa on the ground that there was insufficient evidence against him.

On December 7, 2002, Mustafa shot Şahide with a handgun in their apartment in front of their two daughters. The police report indicated that no officer went to their apartment to settle the dispute between Mustafa and Şahide. After committing the crime, Mustafa surrendered to the police and was sentenced to life imprisonment in an institution for mentally disturbed offenders. He was found to be of sound mind vis-à-vis the murder but was diagnosed to be mentally disturbed to a higher degree.

2. The complaint

The authors claimed that Şahide was a victim of a violation by the State party of CEDAW articles 1, 2, 3 and 5 as the State party did not actively take appropriate measures to protect Şahide's right to personal security and life and had failed to treat Mustafa as an extremely violent and dangerous offender under criminal law. The authors contended that the domestic law did not provide the means to

protect women from highly violent persons, especially repeat offenders. Other concerns cited by the authors were the failure on the part of the State to fulfill its obligations stipulated in the Committee's General Recommendations 12, 19 and 21.

The authors argued that lack of coordination between law enforcement and judicial personnel and their failure to take domestic violence seriously affected women disproportionately and violated articles 1 and 5. The lack of detention of alleged offenders in such cases also violated articles 2(a), (c), (d) and (f) and 3. The failure of the criminal justice personnel in not acting with due diligence violated 2(e).

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

The OP requires that a complainant must first attempt to seek a remedy for the violations within a State party's own judicial system. However, it also allows the CEDAW Committee to make an exception to the requirement of exhaustion of domestic remedies if the application of such remedies is *unreasonably prolonged* or *unlikely to bring effective relief*.¹⁵

The authors maintained that the domestic remedies of injunction and prohibition to return orders were ineffective. They contented that the remedy of a civil action under Austrian law that could be invoked by the heirs was not effective since it could only provide for compensation while there was a failure to prevent a homicide on the part of the State party. They distinguished between the remedy of compensation and protection. While compensation in such cases could only be awarded to the beneficiary after the death of the victim, the remedy of protection would require intervention to protect the life of the victim. The two approaches of compensation and protection thus differed in respect of the beneficiary (the heir versus the victim), the impact of the remedy (to compensate for loss versus to save a life) and the timing of the relief (i.e., after death rather than prior to death).

On the issue of *locus standi*,¹⁶ the authors maintained that consent could not be obtained from Şahide since she was dead. But as she was their client and had a personal relationship, and since they were organizations working in the

¹⁵ See IRAW Asia Pacific's resource guide "Our Rights Are Not Optional: Advocating for the implementation of CEDAW through its Optional Protocol (2008) 2nd Edition, pp. 15.

¹⁶ *Locus standi* (also referred to as the right of standing) is a basic legal principle that grants a right of appearance in a court of justice, or before any body. *Locus standi* signifies the right to be heard.

area of domestic violence they could maintain a complaint. They also had the written consent from the City of Vienna office for Youth and Family affairs that was the guardian of Şahide's children.

The State party argued that domestic remedies were exhausted since Şahide did not give the competent authorities her authorization to prosecute Mustafa and had asked the court not to punish him, and, even after filing charges, played down the incidents and denied their criminality. The Federal Act for the Protection against Violence within the family established a framework to deal with violence and provided for sufficient intervention in such cases including provisions for shelters. Şahide never made use of the Act and was not interested in further interference with her family life. She never made a clear decision to free herself and the children from the relationship with her husband and gave him the key to the apartment despite the injunction. The authorities were limited in their actions because of such conduct. With this background they argued that the use of detention against Mustafa was not justified. The State party also contented that Şahide could have addressed the Constitutional Court and challenged the provision of the domestic law that did not allow her to appeal against the decisions of the Public Prosecutor. Şahide or her surviving relatives ought to have made use of the possibility of filing an individual application before the Constitutional Court before submitting a communication to the Committee in lieu of article 4 of the Optional Protocol.

The response of the authors to that argument was that the expectation that a woman in fear of death would approach the constitutional court was not an argument in good faith since such procedures lasted two to three years and would not bring relief to the woman in threat of death. The State party was wrongfully placing the burden and responsibility of taking steps against a violent husband on the victim. They clarified that victims such as Şahide try to avoid actions that might increase the danger (the "Stockholm Syndrome"¹⁷) and are often compelled to act in the interests of the perpetrator.

The children or the authors would not have standing to review statutory provisions before the constitutional court, hence, it could not be considered as a domestic remedy.

¹⁷ Also called "Survival Identification Syndrome" this is a group of psychological symptoms that occur in some persons in a captive or hostage situation, where they form a paradoxical bond to their captor/abuser. This has subsequently also been applied by mental health practitioners and courts of law to women in abusive domestic relationships.

Source: The American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*, 4th edition, text revision. Washington, DC: American Psychiatric Association, 2000.

4. Discussion on the merits

The factual details as provided by the authors were not disputed by the State party. However, the State party argued that Şahide had informed the authorities that she had suffered an epileptic fit and bouts of depression and had denied that Mustafa had threatened to kill her. This resulted in the Prosecutor discontinuing the proceedings against Mustafa for aggravated coercion and making a criminal dangerous threat. The Court with competence over guardianship matters had noted that both Şahide and Mustafa gave an impression of living a well-ordered life and considered it important that they had reconciled shortly after each incident. Şahide was informed about possible means of protection under the law. Even during court proceedings in the absence of her husband she had stated that she would make every effort to keep her family together. They had agreed to go into partner therapy and, though the police had come to the apartment on many occasions as detailed, on November 18 2002, Şahide seemed angry at them since she had expressly declared that she wished to spend her life together with her husband. On December 6 2002 the Prosecutor's office withdrew the charges only because Şahide gave a written statement to the police that a scrap had caused her injury and that her husband had over the years repeatedly threatened to kill her. The State party further contented that it could not be proved with sufficient certainty that Mustafa was guilty of making criminal dangerous threats against his wife that went beyond the harsh statements *resulting from his background* (emphasis added). He also had no criminal record and it could not be excluded that Şahide had attacked her husband. The prosecutor's office proceeded on the assumption that the threats were a regular feature of the couple's disputes and would not be carried out. Şahide repeatedly tried to play down the incidents and contributed to the fact that he could not be convicted of a crime.

On the question of detention prior to the offence, the State party submitted that such an order would reverse the burden of proof and contradict the principles of presumption of innocence and the right to a fair hearing. Protecting women through positive discrimination by, for example, automatically arresting, detaining, prejudging and punishing men as soon as there is suspicion of domestic violence, would be unacceptable and contrary to the rule of law and fundamental rights.

The State party relied on the precedent of the European Court of Human Rights that had held that depriving a person of his or her freedom is *ultima ratio* (as a last resort)¹⁸ and may be imposed only if and insofar as it is not disproportionate to the purpose of the measure. It summarized its position by asserting that Şahide

¹⁸ The term *ultima ratio* in this context means that depriving a person of his liberty should be a last resort.

could not be granted adequate protection because she had not cooperated with the authorities.

The Committee had initially held that the complaint was admissible but the State party sought a review of the same by arguing on “associated prosecution.” The concept of “associated prosecution” involved a private party taking over the prosecution of the defendant. Thus according to the State party, after the public prosecutor had dropped the charges against Mustafa, Şahide could have brought an action known as “associated prosecution.” The Austrian legal system provided for an injured person to bring an action instead of the prosecutor, if the latter dropped the charges. This was used by the State to argue non-exhaustion of domestic remedies. The authors argued that such a plea was inadmissible since the State party was given two earlier opportunities to comment on the question of admissibility and that the OP, the rules of procedure of the Committee and general legal principles did not provide for reversing the admissibility decision. They also disputed the narration of certain factual details of the State party and stressed on the failure of the officers in tackling the violence.

5. Decision of the Committee

The Committee held that the complaint was admissible. It rejected the plea for a review on the ground that no new arguments were introduced by the State party and that the domestic remedy of filing a proceeding under the constitution was of an abstract nature and would not be effective. The concept of “associated prosecution” after the prosecutor had dropped charges was not available from a de facto position since Şahide was in a situation of protracted domestic violence and threats of violence. Besides German was not her mother tongue. The notion of “associated prosecution” was held to be obscure. Other remedies such as complaints under the Public Prosecutor’s Act were held as not being effective.

On the facts placed before it, the Committee found that apart from a pattern of violence faced by Şahide, she had called the emergency call service a few hours before she was killed yet no patrol went to the scene of the crime. The police were found to be accountable for failing to exercise due diligence to protect Şahide. The committee also held that the right of the perpetrator to fundamental freedoms including mobility and fair trial cannot supersede the woman’s right to life¹⁹ and that the public prosecutor should not have denied the request of the police to arrest Mustafa.

The Committee held that the State party had violated its obligations under article 2(a) and (c) through (f) and article 3 read in conjunction with article 1 of CEDAW

¹⁹ See page 22 para 12.1.5 of the decision.

and general recommendation 19 of the CEDAW Committee. On merits the CEDAW Committee stressed on the practical realization of the principle of equality. It also gave a series of recommendations to the State party to strengthen its domestic law and to apply due diligence. Under General Recommendation 19, the obligation of a State party concerned to exercise due diligence includes to protect women including violations performed by private actors; investigate the crime, punish the perpetrator, and provide compensation. It stressed on enhanced coordination between law enforcement and judicial officers besides strengthening training programmes and education on domestic violence for them. The State party was required under article 7 paragraph 4 to give due consideration to the Committee's views and submit to the Committee within six months a written response on action taken in this regard. The State party was also required to publish the views and recommendations of the Committee's decision in this case and to have them translated in German and widely distributed to all relevant sections of society.

6. Analysis

The recommendations can be seen as a development of the Committee's jurisprudence on state obligation.

The Convention holds both public and private actors accountable for violation of women's human rights and State parties are required to exercise due diligence in regulating and protecting women against systemic forms of violence including domestic violence.²⁰ In the context of the Convention, "due diligence" requires the State party to not only formulate laws and policies but also require the State party to provide access to them.

In this case, the State party is said to have one of the best, comprehensive legal models to address domestic violence, but that in this instance the implementation of those laws was inadequate to provide protection to the victim of violence. Some interrogation of the substance of the law as well as the legal culture of Austria may reveal other factors which provide a barrier to women's access to protection and therefore justice. For example, the CEDAW Committee also noted that although the law allows arrest due to threats and appeal on the dismissal of the Public Prosecutor of the detention/non issuance of warrant of arrest, the flaw in the law is that it is difficult for the victim to actually make such an appeal. Thus, there is *de jure* discrimination. In addition, the law does not provide for other interventions such as interim mandatory counseling for the perpetrator while the complaint was being heard. This may have revealed his dangerous mental state which was indeed found after he was convicted, where he was held in a prison for mentally disturbed offenders.

²⁰ General Recommendation 19 of CEDAW.

The State party had not exercised “due diligence” in meeting responsibilities as evidenced from the fact that despite many requests made by the police to the Public Prosecutor seeking permission to arrest Mustafa, the Public Prosecutor did not grant permission and finally dropped the charges against him. There was clearly a failure in exercising due diligence. Therefore, the Committee’s stress on practical realization of the principle of equality of men and women in the context of violence within the family has great relevance in all systems and with all State parties. The Committee’s rejection of the concept of “associated prosecution” as not being an effective remedy from the de facto position when women face domestic violence or when they do not know the language actually also formulates on *substantive equality*.²¹

The Committee also maintained the balance between fair trial process and fundamental freedoms, on the one hand, and that of domestic violence, on the other. This is a very complex area addressing evidentiary requirements. Legal systems require a high degree of proof to convict a person accused of a crime. Victims of domestic violence however often find it difficult to muster details that would assist them in prosecuting the perpetrator. The State party arguments that detention could amount to a disproportionate interference in the basic rights and fundamental freedoms of a perpetrator of domestic violence, such as the right to freedom of movement and fair trial is a fundamental poser in the criminal justice system. The right of the perpetrator to fundamental freedoms including mobility and fair trial cannot supersede the woman’s right to life and physical and mental integrity.²² The Committee’s decision clearly acknowledges the inherent tensions between two sets of rights holders and affirms between these competing rights that the States should have prioritized the woman’s right to life over the man’s right to a procedural right in the fair trial process.

7. Lessons for advocates to be extracted from the case

The case highlights the fact that domestic violence is still considered a social or domestic problem for which criminal law is not applied seriously.

²¹ This is the model of equality mandated by CEDAW which stresses the importance of equality of opportunity in terms of women’s entitlements on equal terms with men to the resources of a country. This has to be secured by a framework of laws and policies, and supported by institutions and mechanisms for their operation. It also goes beyond this in emphasising that the measure of a State’s action to secure the human rights of women and men needs to ensure equality of results. The indicators of State progress, in the eyes of the CEDAW Convention, lie not just in what the State does, but in what the State achieves in terms of real change for women.

²² See page 22 para 12.1.5 of decision.

The factual details gathered by the authors and their responses to the arguments of the State party clearly indicate the amount of work undertaken by them to put forth a strong case. The narrative of the State party had a tendency to blame the victim since it was often referred that she did not want to pursue the case. This was addressed by the authors in various ways including introducing the “Stockholm Syndrome” to victims of domestic violence. The case laid great emphasis on the lack of due diligence and the failure of law enforcement officers to deal with domestic violence. The principle of burden of proof, preventive arrests, the lack of coordination between the police and the public prosecutors and delayed court processes are often concerns that confront lawyers and persons working in the area of human rights and women’s human rights. All these were addressed in this case in ways that could be used in domestic courts while arguing cases of domestic violence. The Committee’s decision clearly affirms the hierarchy of rights to be upheld by States parties in such a situation that could further arguments in domestic courts or facilitate in addressing policy and legislative issues on domestic violence.

Yet another feature of this case is worth considering. Under article 7(5) of the OP, after the Committee gives its recommendations, the State party is required to give a written response to the Committee within six months about any action taken in light of the views and recommendations made by the Committee. The Committee also has the discretion to seek further information about measures taken by the State party. Thus recommendations given by the Committee can serve as benchmarks for monitoring the obligation of the State with reference to women’s human rights.

Communication No. 7

*Fatma Yildirim vs. Austria*²³

This communication was brought by the same authors as in the earlier case, on behalf of the heirs of Fatma Yildirim, who was also killed by her husband. Fatma was also an Austrian national of Turkish origin and a former client of the

²³ Fatma Yildirim vs. Austria, Communication No 6 /2005, CEDAW/C/39/D/6/2005 dated 1 October 2007. Submitted by *The Vienna Intervention Centre against Domestic Violence* and the *Association for Women’s Access to Justice* on behalf of Banu Akbak, Gülen Khan and Melissa Özdemir (descendants of the deceased Fatma Yildirim). The communication was submitted on 21 July 2004 with supplementary information dated 22 November and 10 December 2004.

Vienna Intervention Centre of domestic violence. The Committee's views and recommendations on domestic violence are identical to the earlier case.

1. The facts as presented by the author

Fatma Yildirim married Irfan Yildirim in July 2001. She had three children from her first marriage two of whom were adults. Irfan reportedly threatened to kill Fatma for the first time in July 2003 when they went to Turkey. They constantly argued on their return to Austria. On August 4, fearing for her life she moved in with her daughter and came back two days later to her apartment to collect her personal belongings in his absence. However he entered the apartment and grabbed her wrists and held her. She escaped but he called her on the phone and threatened to kill her. She went to the police to report him for assault and for making a criminal dangerous threat.

On 6 August 2003 the police issued an expulsion and prohibition to return order against Irfan and also requested the Vienna Public Prosecutor on duty that Irfan be detained. The Public Prosecutor rejected the request. On 8 August Fatma with the assistance of one of the authors moved the Vienna District Court for an interim injunction against Irfan. The court informed the police about the application. The same day Irfan harassed her in her workplace and though the police was called they did not report the harassment to the prosecutor. Irfan also threatened Fatma's 26 year old son who reported the incident to the police.

On 9 August Irfan once again threatened to kill her at her workplace. She called the police but by the time they came Irfan had left. He was ordered to return and the police spoke to him. He threatened her later that night and Fatma reported him once again to the police. The response of the police was to speak to Irfan on his cell phone. Irfan threatened her once again at her workplace on 11 August. On 12 August a staff of the author informed the police about the threats and the case in the court and also asked them to pay more attention to her case.

On 14 August Fatma gave a formal statement to the police who reported to the public prosecutor and requested that he be detained. Once again this request was denied. Fatma then filed proceedings for divorce and obtained an order of injunction valid until the end of divorce and an interim injunction for three months on 1 September. On 11 September, Irfan followed Fatma home from work and fatally stabbed her near their apartment.

Irfan was convicted of killing Fatma and sentenced to life imprisonment.

2. The complaint

The authors argued that the State party had violated articles 1, 2, 3 and 5 of the Convention since it had failed to take appropriate positive measures to protect Fatma's right to life and personal security. In particular, the Communication between the police and the Public Prosecutor did not adequately allow the prosecutor to assess the danger posed by Irfan and that on two occasions the prosecutor should have sought the detention of Irfan. According to the authors the State had failed to fulfill its obligations under General Recommendations Nos. 12, 19 and 21. The authors argued that there was a lack of due diligence since the criminal justice system particularly prosecutors considered domestic violence as a social or domestic problem, as a minor or petty offence. Hence, criminal law was not applied to such violence because law enforcement authorities do not take the danger seriously. They wanted recommendations on pro arrest and detention policy in cases of such violence. The authors sought an assessment from the Committee on the extent to which there was violation of the victim's human rights and rights protected under the Convention. They also wanted recommendations from the Committee to the State party on effective protection of women victims of violence particularly migrant women. The authors further requested the Committee to use its authority under article 5, paragraph 1 of the protocol concerning interim measures as it did in *A. T. vs. Hungary*. However, in this case the victim was already dead.

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

On the issue of locus standi the authors considered it appropriate to represent Fatma before the Committee since she was dead.

The youngest child of Fatma had brought a civil action against the State for compensation for psychological damages, funeral costs etc. But the authors claimed that compensation was not an effective remedy for the lack of protection of Fatma and the failure to prevent her homicide.

The State party contended that there was a further remedy available to the authors since the Constitutional Court could be addressed on grounds that no appeal was available to Fatma against the Public Prosecutor's failure to comply with her request of arresting Irfan. The surviving dependants could also challenge the pertinent provisions of the penal code before the Constitutional Court being directly and currently affected by her death. The requirement of exhausting domestic remedies according to the State parties was not complete in this case since the surviving relatives of Fatma should have filed an individual application before the Constitutional Court.

According to the State party, article 4, paragraph 1 of the OP does not include remedies that are always successful. And the authors had not stated that the constitutional procedure was unsuitable as a remedy. Since their aim was to bring effective relief with respect to the effective protection of women's life and personal security, it would have been possible to amend the problematic legal provisions by filing an individual application with the Constitution court.

The response of the authors was that asking a woman in fear of death to approach the constitutional court was not an argument in good faith since such procedures lasted two to three years and would not bring relief to the woman in threat of death. They differed with the State party's interpretation of the role of the Public Prosecutor and contended that had it been a public figure who received threats, the alleged offender would have been arrested and police protection would have been granted to the victim.

4. Discussion on the merits

The facts were not disputed by the State party. The State party submitted that the issue of filing a request for detention had to be considered *ex ante* which required the prosecutor to weigh the basic right to life and physical integrity of the person filing the complaint against the basic right to freedom of a suspect who had no known criminal record and did not give the impression to the intervening police officers of being highly aggressive. Since a suspect is presumed to be innocent the Public Prosecutor did not permit the detention of Lrfan from an *ex ante* point of view since it would not have been proportionate. As in the earlier case, the State party argued that the Federal Act for the Protection against Violence within the Family constituted a highly effective system to combat domestic violence and established a framework for effective cooperation among various organizations. On the *de facto* position, the Committee was informed that special training courses are held on a regular basis for judges and police officers on domestic violence. Various measures taken by the State party to address domestic violence was listed.

The Committee held the proceedings admissible since the procedure under the Federal Constitution could not bring an effective remedy when a woman's life was under dangerous criminal threat nor was it effective in case the heirs of the deceased wanted to seek legal redress. The Committee concluded that the authors' allegations relating to the actions or omissions of public officials were admissible. The Committee was of the opinion that there was an absence of information on effective remedies from the State party and the authors' allegations relating to the actions or omissions of public officials were admissible.²⁴

²⁴ The communication was held admissible on 27, January 2006.

The liability claim filed by the minor daughter of Fatma was rejected by the Court since it considered the measures taken by the Vienna Prosecutor justifiable. This was confirmed by the Court of Appeal. The State party sought a review and contended that the claims of the minor were rejected only because the court considered the procedure followed by the prosecutor as acceptable. According to the State party, it was difficult to make a reliable prognosis as to how dangerous an offender could be. The existing legislation was effective and was subject to regular evaluation. As in Şahide's case the concerns of a fair trial process for the perpetrator was also raised.

The authors responded that in this case the main concern was that legal proceedings were not applied. Suggestions for improvements to the existing laws and enforcement measures could not be realized by means of a constitutional complaint and hence could not be considered as a domestic remedy under article 4 paragraph 1 of the OP. Besides all legal amendments pointed out by the State party were after Fatma's death.

5. Decision of the Committee

The Committee rejected the review on the admissibility as no new arguments were addressed by the State party. In this case, the liability proceedings were filed by the family members after the communication was submitted by the authors, hence, the Committee refused to revise its admissibility on that ground. The Committee held that the remedy under the domestic law designed to determine the lawfulness of official actions of a responsible public prosecutor was not a remedy that could bring an effective relief to a woman whose life was under dangerous threat.

The Committee found that Fatma had made positive and determined efforts to save her life and the facts disclosed a situation that was extremely dangerous to her of which the authorities knew or should have known and the public prosecutor should not have denied the requests of the Police to arrest Irfan. On evidence, the Committee also found that the State party "knew of or should have known"²⁵ the potential danger that Irfan posed based on several facts such as that he had a lot to lose on a divorce as his residence permit was dependent on his staying married. Thus, failure to detain him was considered to be a breach of the State party's due diligence obligation to protect Fatma. While the State argued that preventive detention at that stage (before he had committed the murder) would have been "disproportionately invasive", the Committee held that perhaps on the facts known to the prosecutor without the benefit of hindsight that action by the State was warranted.²⁶

²⁵ Fatma Yildirim, paragraph 12.1.2.

²⁶ Ibid, paragraph 12.1.4.

The Committee held that the State party had violated its obligations under article 2(a) and (c) through (f) and article 3 read in conjunction with article 1 of the Convention and General Recommendation 19 of the Committee. General Recommendation 19 explicitly clarifies the nature of state obligations in cases of violence against women, including being held responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". For the individual woman victim of domestic violence to enjoy the practical realization of the principle of equality of men and women and of her human rights and fundamental freedoms, the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations. It also gave a series of recommendations to the State party to strengthen its domestic law and to apply due diligence. It stressed enhanced coordination between law enforcement and judicial officers besides strengthening training programmes and education on domestic violence for them. The State party was required under article 7 paragraph 4 to give due consideration to the Committee's views and submit to the committee within six months a written response on action taken in this regard. The State party was also required to publish the views and recommendations and to have them translated in German and widely distributed to all relevant sections of society.

6. Analysis

In this case, the Committee dealt with interesting issues. The first one related to proceedings launched by Fatma's heir before the domestic court *after* the communication was accepted by the Committee. The rejection of the State's arguments on this count is path breaking. The State Party sought a review of admissibility on the ground that Fatma's legal heirs did not avail themselves of the procedure under the Constitution. The Committee applied Rule 71 of the OP that permits re examination of the communication but found that no new arguments were introduced by the State party that would alter the Committee's view and that the domestic remedy was abstract in nature.

The arguments of the authors with reference to the inaction on the part of the State party in addressing domestic violence and contrasting it with violence on a public figure aimed to highlight the dichotomy that exists in law enforcement between the artificial public and private divide. The failure on the part of the police and the Public Prosecutor in not recognizing the violence was a result of not taking the statements of the deceased seriously.

Yet another interesting feature of this case and Şahide's case relates to the concern when an act of domestic violence is often seen in the narrow prism of criminal law. As the author of the complaints in both the cases allege, there is an

infringement of article 5 of the Convention, when public officials because of their mindset still continue to treat violence against women, and domestic violence, not as a serious crime in spite of it being an offence under criminal law, but as a social or domestic problem. So despite having laws to deal with Domestic Violence the de facto situation for women is still problematic. The Committee did not pronounce on the article 5 violation but it did remark on the proven linkages of traditional attitudes which placed women in positions subordinate to men and (prevalence of) domestic violence in society²⁷ and again conclude that the right of the perpetrator to basic right freedom (e.g., mobility, etc.) cannot supersede the victim's right to personal safety and life.

The State party stressed the fact that Irfan was convicted and sentenced and that it was not possible to obtain a prognosis on the psyche of a person without any criminal record. This argument addresses the obligation of the state only after an act is committed and does not suggest any pro active measures. Once again the rights of the liberty of the accused was pitted against the rights of the victims which the Committee rightfully rejected by holding that a perpetrator's basic rights such as the presumption of innocence, private and family life, right to personal freedom cannot supersede women's human rights to life and to physical and mental integrity. The Committee sought to balance the two rights, a factor that poses a great challenge in fair trial processes. Although the State party had a good domestic law it proved ineffective in this case highlighting the failure to ensure women's de facto equality.

7. Lessons for advocates to be extracted from the case

An error of judgment on the part of the public prosecutor in not sanctioning the arrest of Irfan led to the death of Fatma. The question that we can ask is how often can we actually challenge such an error? In most jurisdictions, the plea of good faith protects officials from any action. This case provides an interesting answer in this regard while addressing the failure of state obligation. In this case, the decision of the prosecutor was found to be acceptable by domestic courts but the Committee rightly held that there was a failure of due diligence obligation on the part of the State party. The Committee also raised the issue of residence and held that the authorities ought to have exercised caution when Fatma filed proceedings for divorce since Irfan could lose his right to stay in the country. This is another instance of failure of due diligence.

The authors addressed numerous factors and nuances in the communication which resulted in the Committee giving recommendations that are general in

²⁷ Fatma Yildirim vs. Austria, paragraph 12.2.

nature. Such observations of the Committee could actually lead to legislation. As stated in Şahide's case, recommendations given by the Committee can serve as benchmarks for monitoring the obligation of the State with reference to women's human rights.

Communication No. 8

*Cristina Muñoz-Vargas y Sainz de Vicuña vs. Spain*²⁸

The author of the communication dated 30 July 2004 is a Spanish national who claimed that she was a victim of violation by Spain of articles 2(c) and 2(f) of the Convention. The communication was with reference to inheritance to a title that was prima facie discriminatory. However, the Committee held it inadmissible. The dissenting opinion of CEDAW Committee member Mary Shanthi Dairiam raises many concerns about admissibility and discrimination.

1. The facts as presented by the author

The author was the first born daughter of Enrique Muñoz-Vargas y Herreros de Tejada, who held the nobility title of "Count of Bulnes". Under a 1948 law, the first born inherited the title but a woman could inherit it only if she did not have any younger brothers. According to historical rules of succession, men were given primacy over women in the ordinary line of succession to titles of nobility. Upon the death of her father in May 1978 her younger brother inherited the title and a royal decree was issued in his name in October 1980.

In 1988 the author initiated legal action against her brother and laid claim to the title of "Countess of Bulnes" basing her claim on the principle of equality and non-discrimination on the basis of sex in accordance with the Constitution of Spain and article 2(c) and (f) of CEDAW. She also based her claim on a judgment of the Constitutional court that had held that norms entered into force prior to the Spanish constitution had to be interpreted in accordance with the Constitution. Another ruling of the Supreme Court had held that precedence for males in succession to titles of nobility was discriminatory (however the Constitutional court overruled this subsequently). The court of first instance dismissed her claim and held that the historical principle of male precedence in succession to nobility titles were compatible with the principles of equality

²⁸ Cristina Muñoz-Vargas y Sainz de Vicuña vs. Spain , Communication No 7/2005, CEDAW/C/39/D/7/2005.

and non discrimination. Also since the title was given to her brother before the entry of force of the Constitution, the constitution was not applicable to her case. The appeal to the provincial High Court and the Supreme Court were also dismissed.

The author then appealed to the Constitutional Court on procedural and substantive grounds. The Constitutional Court sent the case back to the Supreme Court for reconsideration on the ground that the latter's judgment was a violation of the fundamental right to an effective defence. The Supreme Court issued a new judgment denying the author's claims and held that it was not the Constitution but the Civil Code that regulated the succession to titles of nobility. The date of reference was taken to be the date of her father's death that preceded the entry into force of the Spanish Constitution. The author once again lodged an appeal before the Constitutional Court which rejected it.

2. The complaint

The author claimed that the State party had discriminated against her on the basis of sex by denying her the right as a first born child to succeed her late father to the title of Count of Bulnes. The concept of male primacy in the order of succession to titles of nobility constituted a violation of the Convention in general and specifically article 2(f).

The author requested the Committee to find a violation of the Convention and direct the State party to provide her with an effective remedy as well as to revise the discriminatory legislation.

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

The author maintained that she had exhausted all her domestic remedies because the judgment of the Constitutional Court settled the matter of male primacy in succession to titles of nobility, and there could be no further appeal. In 2006 a new legislation was passed that pertained to successions to nobility but it would not apply to her case retroactively since her case was decided by the Constitutional Court earlier.

The State party sought the rejection of the communication since the same question was examined by the Human Rights Committee under the International Covenant on Civil and Political Rights in two different cases and the Committee declared them inadmissible since titles of nobility lay outside the underlying values behind the principles of equality before the law and non-discrimination protected under article 26 of the Covenant.

According to the State party the communication was also inadmissible under article 4 paragraph 2(e) of the Optional Protocol since the subject matter occurred prior to the entry into force of the Optional Protocol for Spain in October 2001 as well as prior to the entry into force of the Convention for Spain in February 1984.

The author's response was that the two communications before the human rights committee were based on article 26 of the ICCPR which was more restrictive than article 2(f) of the CEDAW convention. The purpose of the convention was to eradicate discrimination suffered by women in all spheres of life without any limitations (article 1). The communication was admissible since her case was still pending in the court when the OP entered into force for Spain.

4. Discussion on the merits

According to the State party titles were neither human rights nor fundamental rights. The same issue was also examined by the European Court of Human Rights which also held the same view. Succession to such titles was a "natural right" subject to other types of regulation. The author contended that the Convention is designed with the overall aim of eradication, once and for all, of discrimination suffered by women in every field, even in relation to a *nomen honoris*. The Convention did not place any limitation to equality in any field, including the social, economic, civil and political fields.

5. Decision of the Committee

The Committee found the communication inadmissible under article 4 paragraph 2(e) of the Optional Protocol. The Committee held that the author's complaint of sex discrimination stems from the succession of her younger brother to the title by royal decree in October 1980 following the death of her father in May 1978. This was before the Convention had entered into force internationally and well before it was ratified by the state party in 1984. The relevant fact for the complaint was the determination of the point of time in connection with article 4 paragraph 2(e) and this was when the title vested in the author's brother after the death of her father in October 1980.

The Committee held that the succession was under a valid law at that time and any effect the discrimination may have against women the legislation would have at that time could not justify a reversal of the royal decree of succession at the present time.

Individual Opinions Of Committee Members Magalys Arocha Dominguez, Cees Flinterman, Pramila Patten, Silvia Pimentel, Fumiko Saiga, Glenda P. Simms, Anamah Tan, Zou Xiaoqiao (concurring)

While concurring with the Committee's findings these members gave individual opinions on the case. They concluded that while the convention prohibits discrimination, titles of nobility were purely symbolic and honorific in nature devoid of any legal or social effect and consequently the claims of such titles of nobility were not compatible with the provisions of the Convention. On this basis they concluded that the author's communication was inadmissible under article 4 paragraph 2(e).

Individual Opinion of Mary Shanthi Dairiam (dissenting)

The individual member was of the opinion that the communication was admissible since the issue was to decide both on the compatibility of the communication with the provisions of the Convention as well as on the continuing nature of the violation.

Acknowledging that titles to nobility were not fundamental human rights and that under different circumstances such social hierarchies should not be supported she held that legislations and practice of State parties must in no way and in no context provide for a differential treatment of women and men in a manner that establishes the superiority of men over women and concomitantly the inferiority of women as compared to men. And that was what the Spanish law did. She did not agree with the view that the fact in issue took place in 1980 but opined that the decisions of the courts were made after Spain became a State party.

The dissenting opinion also took the view that exceptions to the constitutional guarantee for equality on the basis of history or the perceived immaterial consequence of a differential treatment, was a violation in principle of women's right to equality. Such exceptions served to subvert social progress towards the elimination of discrimination against women using the very legal processes meant to bring about this progress, reinforcing male superiority and maintaining the status quo. The member referred to article 5(a) that addresses negative effects of conduct based on culture, custom, tradition, and the ascription of stereotypical roles that entrench the inferiority of women in cases of this nature. The member was of the view that the observations of the concurrent view that stated that claims of titles are not compatible with the convention was textual in content and did not take into account the intent and spirit of the convention. She held that the complaint was compatible with the provisions of the convention and the violation was of a continuous nature.

6. Analysis

The lone voice of dissent of Ms Dairiam addresses what was not addressed by Committee. The facts would indicate that the author was discriminated by a law only because she was a woman and it was a continuous discrimination till the proceedings were heard by the Committee. Further, she emphasizes that the exemption of equal treatment in this case was argued based on the historical practice of male primacy in succession (in this case of nobility titles) a situation that in principle should be acknowledged as discriminatory and based on a cultural norm which sees women as inferior, and speaks to the very heart of CEDAW. The Committee, however, held that the cause of action ended before the State became a party to the convention and dismissed her communication.

The Spanish law excluded women to titles if they had brothers and such exclusion was on the basis of sex. It had the effect or purpose of impairing or nullifying the recognition of a civil right and was clearly within the definition of discrimination under article 1 of the Convention. The arguments of the State party sought to justify the discrimination. The State also sought to justify the discrimination on the ground of technicalities and on the argument of “natural rights.” The concept of “natural rights” evolved as a historical process but also propounded a legal philosophy that did not give equal rights to women.

It is nobody's case that succession to nobility is correct. In the past it led to social hierarchy and it might seem very anachronistic today. Several Committee members in a minority opinion were of the belief that the reason for holding the communication inadmissible should be that the author's right to hereditary title was not compatible with the provisions of CEDAW²⁹ and that a title was abstract in form without material or legal consequence. The Committee's view unfortunately does not recognize that symbols representing power though abstract in form are not immaterial, and further, this position tolerates and condones discrimination on the basis of culture and history *and does not address the underlying norms in society that continually perpetuate the subordination of women.*

The mere fact that the old law gave preference to men on the basis of sex makes the law discriminatory as it perpetuates discrimination against women. Had Spain entirely repealed its system of honorary titles to do away with social hierarchies, it would have been a different issue. However, since Spain still maintains such laws and only revised its law in 2006 providing equality

²⁹ Ibid pp, 9, Item 12.2.

in succession to titles between women and men, the old law perpetuated subordination of women by giving preference to men in succession and the new law failed to address past discrimination since the new law did not provide for an effective remedy for cases that had been definitively adjudicated before 27 July 2005.

7. Lessons for advocates to be extracted from the case

The Committee found that the author though assisted by legal counsels was inconsistent with regard to her references to articles. She referred to article 2(c) alone, article 2(f) alone at other times and to both the articles. In order to ensure these technical issues do not cause confusion to the Committee or prolong consideration of the communication to resolve such technical matters, it is advised that while drafting a communication care must be taken in quoting the correct provisions of the Convention.

The Committee also held that the complaint was inadmissible on the basis of *ratione temporis* since the subject matter of the communication occurred prior to the state party's entry into the OP as provided under article 4 (e) and did not accept the argument that it was a continuing violation.³⁰ While bringing a communication before the Committee it is important to analyze the applicability if any of the *ratione temporis* rule to the facts of the communication and address it accordingly by tracing continuing violation and discrimination.

The communication related to a heredity title that was conferred on the female only in the absence of the male, and the Committee found it inadmissible. There are many examples of such honorifics that may not have any immediate significance but are of great symbolic value in communities. One of the problems was that the author could not show any loss of benefit in the absence of a title. However, these symbolic titles bestow honor in society. The Committee's recommendation has an important lesson and that is while addressing such issues apart from tracing the historicity of the discrimination it would be relevant to argue on the actual loss that a party might face if the discrimination continues.

³⁰ The dissenting opinion of Ms Dairiam provides ample argument for the continuing discrimination violating equal treatment as the three decisions of the court dismissing the authors case were made subsequent to the States party's ratification of CEDAW continue to be based on norms which uphold the principle of male primacy. See paragraph 13.6 of the decision.

Communication No. 9

*Ms N.S.F. vs. the United Kingdom of Great Britain and Northern Ireland*³¹

The communication was presented on 21 September 2005 by the author and was declared inadmissible on 30 May 2007. The Committee requested the State party not to deport the author and her two children as an interim measure while their case was pending before it. The author sought asylum in the UK for herself and for her two children claiming that she feared for her life at the hands of her husband if she was deported to Pakistan.

1. The facts as presented by the author

The author who was married in 1996 in Pakistan had two sons born in 1998 and 2000 respectively resulting from the marriage. According to the author, her husband began to subject her to ill-treatment including marital rape. She cited various instances of his behaviour in this regard. Eventually she divorced her husband in August 2002. But he continued to harass her even after the divorce and she had to often move to flee him. She reported him to the police many times but was not granted any protection. In January 2003, the author's ex husband came to her home armed along with other men armed with knives and threatened to kill her. After this incident, she decided to flee the country with the help of an agent and funding from her parents.

The author arrived in the UK on 14 January 2003 with her two children and applied for asylum on the same day. It was rejected by the Immigration and Nationality Directorate on 27 February 2003. The author appealed against the "refusal of leave to enter after refusal of asylum" by the directorate and claimed that her removal violated the 1951 Convention on the Status of Refugees and the European Convention on Human Rights and Fundamental Freedoms. She asserted that she had a well founded fear of persecution by a non state agent for the reason she was a member of a particular social group (women of Pakistan) and that Pakistan did not offer her sufficient protection, there was no real option of internal flight and in any event it would not have been reasonable.

The Adjudicator, sitting as the first instance court while sympathizing with her plight dismissed her appeal on both asylum and human rights grounds and did not accept her submission that she could not relocate further away in Pakistan. He also concluded that the difficulties that she may experience in Pakistan could

³¹ N.S.F. vs. the United Kingdom of Great Britain and Northern Ireland, Communication No. 10/2005, CEDAW/C/38/D/10/2005.

not constitute persecution and she would be sufficiently protected in Pakistan because she was not married. The Immigration Appeal Tribunal, the High Court of Justice also dismissed her claim and accepted the reasoning of the Adjudicator. On October 15 2004 the author received a notification of temporary admission to a person who was liable to be detained. The author filed for “discretionary leave” or “temporary protection to remain in the UK on humanitarian grounds” with the Home Office. On February 1, 2005 the Directorate informed the author that she had no further right of appeal and had no basis to stay in the UK and ought to make arrangements to leave. She was appraised of where to call for help and advice on returning home.

On 29 September 2005, the author applied to the European Court of Human Rights alleging violation of her rights under article 3 (prohibition of torture) and article 8 (right to respect for private and family life). The communication was held inadmissible on the ground that it did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention or its Protocols. The author was refused discretionary leave on 8 May 2006 and no deadline was given for her deportation.

2. The complaint

The author claimed that she came to the UK to save her life and her children’s future and education. According to her as a single woman with two children, she was not safe outside the UK and if she was deported she would no longer be protected and could be killed by her ex-husband putting the future of the children at risk. She also made it clear to the committee that if she was deported she would leave the children behind. She alleged that both asylum and human rights based procedures were not fair.

3. Admissibility issues

The State party argued that the author had not exhausted domestic remedies and that the same matter was examined by the European Court of Human Rights and that the communication was not sufficiently substantiated and was ill founded. Even though the home office refused discretionary leave she could appeal against it. The State party, however, acknowledged that the decision of refusal of discretionary leave was communicated to her at the same time when the State Party was making its observations on admissibility, and so the complainant could not have exhausted the remedy before receiving the Home Office decision. The State party, however, contended that she could still seek permission for judicial review by the High Court. Interestingly enough the State party informed the Committee that on the facts of the case, it was unlikely that the permission may be granted since

the requests would be based on the same arguments advanced before the other national authorities and the European Court.

The state party also argued that the communication was inadmissible in accordance with article 4 paragraph 2(e) of the OP since the issue was already examined by the European Court of Human Rights and proceedings before the court were of international investigation or settlement.

4. Discussion on the merits

The State party argued that the communication was not sufficiently substantiated and ill founded. There was no legal basis where the author could claim a breach of the Convention in the way national authorities of State party treated her asylum and human rights case or in the way she was treated while she was residing in the UK. According to the State party, the author did not make any assertion that the state party is responsible for any breaches of the rights of the author under the Convention that may or may not have occurred in the country of her origin which is a State party to the convention.

The State party further pointed out that the author had to raise the relevant substantial right in the Convention and had to mention specific articles which she had failed to do so.

The author submitted that her communication was sufficiently substantiated and not ill founded.

5. Decision of the Committee

The Committee acknowledged that the communication raised the issue of the situation in which women who have fled their country because of fear of domestic violence find themselves and referred to General Recommendation 19 on violence against women and article 1 of the Convention including gender-based violence. The Committee noted that even though the State party had contested the author's claims on the ground that she had not exhausted her remedies it had submitted that a judicial review was uncertain. The Committee considered the fact that the author had alleged sex discrimination and as a consequence domestic courts had not yet had an opportunity to deal with this question. Considering the obligation of the state party under the Convention, and its view that an allegation of sex discrimination would be relevant to consider her case and could also form part of the arguments in support on an application for permission to apply to the high court for a judicial review, the Committee found that the author should avail herself of this remedy.

6. Analysis

Customary international law addressed asylum only in cases where persons were fleeing from persecution by the State. State parties also applied the same framework of customary international law while formulating domestic law. The grant of asylum for the conduct of non state actors which is extremely important in the context of domestic violence has emerged only recently and has to be carefully argued on the basis of sex discrimination. The observations of the Committee in the context of General Recommendation 19 and article 1 is relevant to this issue. Probably the assistance of legal counsels would have facilitated her in addressing the issue of exhausting domestic remedies and sex discrimination. The communication is important for the fact that the Committee requested interim measures of protection in accordance with article 5 paragraph of the OP.

7. Lessons for advocates to be extracted from the case

It is important to remember that the Committee is not a court of appeal, and it does not mould a relief. It is also not enough to merely seek a sympathetic response as the author seems to have done, and to which the Committee responded in the only possible way they could in these circumstances, by pointing out to the State party the reality of domestic violence driving women to seek asylum far away from where they are experiencing violence. However, it must be emphasized that proceedings before the Committee are legal in nature and there would be a lot of discussion and analysis of the de jure and de facto position of state obligations and laws. The author did not invoke specific provisions of the Convention nor demonstrated how the Convention may have been violated. The Committee was of the opinion that her claims appeared to raise issues under articles 2 and 3 of the Convention.

Hence it is necessary to do a lot of homework before taking a communication to the Committee and it would help to be assisted by lawyers because every argument put forth by the State party have to be met and countered. Proceedings have to be carefully drafted as indicated in this case since one of the objections of the state party was that the author had not stated the articles on which she was relying upon.

Communication No. 10

*Ms Constance Ragan Salgado vs. the United Kingdom of Great Britain and Northern Ireland*³²

The author a British citizen and a resident of Bogota, Colombia, claimed to be a victim of violations by the United Kingdom of articles 1, 2(f) and 9 paragraph 2 of the Convention since she was prevented from transmitting her British nationality to her eldest son by descent.

1. The facts as presented by the author

The author left England in 1954 and made her home in Colombia with her husband who was a Colombian national. The author's eldest son was born on 16 September 1954. She applied for a British nationality for her son but was told that the entitlement to it came through the paternal line; as his father was Colombian, he was an alien.

The British Nationality Act of 1981 amended the earlier law on nationality and conferred equal rights to men and women in respect of the nationality of their children under the age of eighteen. The author's son did not qualify for nationality due to his age. The author protested to the British Consul and Home Office claiming that had her son claimed British nationality through a British father instead of through a mother he would have been granted the same and no age limit would have applied to him.

British nationality legislation again changed with the Nationality and Immigration and Asylum Act 2002 as a result of which children born abroad between 7 February 1961 and 1 January 1983 of British mothers were eligible to register as British nationals on satisfying other conditions. The author's youngest son born in 1966 had acquired British nationality while her eldest son did not. In early 2003, the British Consul contacted the author to enquire whether she had any children born in 1961. When she told them about her eldest son she was informed that he did not qualify since he was born before the cut off date established under the 2002 Act.

³² Constance Ragan Salgado vs. the United Kingdom of Great Britain and Northern Ireland, Communication No. 11/2006, CEDAW/C/37/D/11/2006.

2. The complaint

The author alleged that she suffered sex discrimination on account of the British Nationality Act of 1948. The discrimination was continuous since it was neither eliminated under the 1981 Act or the 2002 Act and her son remained ineligible to acquire British nationality by registration on account of his age. The discrimination against women was only partially corrected through legislation.

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

The State party requested the rejection of the communication as inadmissible. Firstly, the objection was that the alleged violation of rights had taken place before the State party's accession to the OP in 2004. The author had only requested a British citizenship for her son and there was no evidence to suggest that she had sought to challenge the decisions through English courts. The 1948 Act also provided other means of acquiring citizenship for minor children of British citizens in applications made to the Secretary of State of the Home Department. Though it was the discretion of the Secretary of State it would have been exercised in line with the departmental policy at the time. The author had not exhausted domestic remedies since she never made any application between 1954 and 1972 on behalf of her son. Had an application made and refused she could have challenged by way of judicial review in the High Court and could have obtained a quash order. If the High Court found that there was violation of the author's rights, it could have construed the 1981 Act in a manner compatible with the author's or her son's rights under the European Convention of Human Rights or to make a declaration of incompatibility under section 4 of the Human Rights Act of 1998. The later option enables the Government to take swift remedial action.

According to the State party, the communication was also manifestly ill founded. The State party argued that it had ratified the Convention in April 1986 with certain reservations and that the Committee's jurisdiction to receive and consider the communication could be only from December 2004 when the State party ratified the OP.

The State party pointed out the reservation in relation to article 9 of the Convention which stated, as follows;

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

continuation of certain temporary or transitional provisions which will continue in force beyond that date.” According to the State party, the 1948 Act therefore was within “temporary and transitional provisions” of the 1981 Act. UK therefore had no responsibility under the Convention due to the reservation.

While by reservation on rights the State does not accept as binding upon it a certain part of the treaty, it is important to realize that a reservation can be entered provided it is not incompatible with the object and purpose of the Convention.³³ Furthermore, the Convention is an instrument to be interpreted as a whole and so while a particular article may have reservations entered against it the Committee may be able to consider the matter under other relevant articles of the Convention. In this case however the Committee did not consider this issue.

According to the author, “the temporary or transitional measures” lasted for more than twenty years and they ought to have been repealed with the 2002 Act or in 2006.

4. Discussion on the merits

The State party clarified that while under the 1948 Act British mothers did not enjoy a right of transmitting their citizenship to their children when their fathers were not of British nationality, the change in policy of 1979 did not provide any further rights to men in relation to their children. No different or new rights for men and women were provided. The critical date was the date of birth of the author’s son that was before the cut off period.

The State party argued that her eldest son was born long before the Convention was adopted by the General Assembly. The reference to children under article 9(2) of the Convention which expressly relates to equal rights for women and children must be read in line with the use of the term in other international human rights instruments such as the ICCPR, the CRC and the European Convention on Nationality. The age of majority under these Conventions and in the UK was 18 years. The author therefore ceased to be a “victim” of the denial of citizenship on 16 September 1972 when her eldest son attained majority. The State contended that as a general rule, it is only while a person is still a child that he should be able to benefit from a parent’s citizenship. Once a person has attained majority, any application for citizenship should be based on the child’s own personal connections with a country rather than through the child’s mother’s connections. Any complaint about the continuing failure to recognize or register the author’s eldest child as a British citizen had to be brought by him under the 1981 Act.

³³ Article 28(2) of the Convention.

The author submitted that once the Government acknowledged the right of selfsame persons to register as British citizens as adults in 2002 the cut-off date was no longer relevant. It was unjust and discriminatory to deny some children who had reached the age of majority born abroad to British mothers the right to apply for registration merely because they did not fall within the cut off date. The 1981 Act had only partially corrected the sex discrimination which had historically existed by recognizing the right, as from that date, for women to pass on their nationality to their children on equal terms with men. But it created a new discrimination with a cut-off date between those children born before 1961 and after 1961. In the case of the latter, mothers who had failed to register them as minors could do so as adults.

The fairness of nationality legislation that was not retroactive for those who were alive was questioned by her comparing it to the Act abolishing slavery under which all slaves were freed. On the issue of available domestic remedies, the author claimed that by making repeated applications for citizenship for her eldest son they were exhausted. The author contends that in order to get justice in her case the law had to be changed. The judicial procedure according to her was a long and complicated route which was impossible for her at her age and resources. She maintains that her complaint was even presented in the House of Lords debate as recently as in February 2006 but was firmly rejected. According to the author, she could still exhaust all her life seeking domestic remedies and still arrive at nothing. Hence she sought the help of the Committee.

5. Decision of the Committee

The Committee on consideration of facts concluded that the communication was inadmissible *ratione temporis* since the subject matter of the communication occurred prior to the state party's entry into the OP as provided under article 4 (e) and did not accept the argument that it was a continuing violation. The view of the Committee was similar to that in Cristina's case. The Committee reached this conclusion by holding that the alleged discrimination against the author to pass on her nationality to her son stopped on the date her son attained majority in 1972. The Committee accepted the State party's contention that after that date it was her son's primary right to either retain his acquired nationality or to apply for the nationality of another State, subject to the conditions set by the State. The discrimination against the author would have stopped with the new government policy of February 1979. Both dates precede the entry into force of the OP.

The Committee also observed that in accordance with article 4 paragraph 1 of the OP, a communication cannot be considered unless all available

domestic remedies were exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring relief. On the materials before it, the Committee found that the author never made an application in 1954 or between 1954 and 1972 for her son to acquire British citizenship. Any refusal on the part of the State had an application been made would have given her the remedy of judicial review.

The Committee gave a general observation stating “authors of communications are required to rise in substance before domestic courts the alleged violation of the provisions of the Convention on the Elimination of All Forms of Discrimination against Women, which enables a state party to remedy an alleged violation before the same issue may be raised before the Committee.”

6. Analysis

Citizenship laws of many States continue to be discriminatory by denying mothers the right to transfer their citizenships to children while giving fathers absolute rights in this regard. The Committee could have still stated in their decision that the law itself was discriminatory and that States should take all measures to eliminate discrimination. The 1948 Act which the author challenged was definitely discriminatory but the subsequent legislations removed this discrimination. However a cut-off date was provided in this regard which according to the author created a different set of discrimination. The legislation did not explain the rationale for the cut-off. Moreover, the impact of the cut-off in treating those born before the cut-off differently makes the differentiation not reasonable.

Though the 1948 Act did discriminate against a class of persons (in this case British mothers married to foreign nationals and who had children before 7 February 1961) the claim of the author was very remote in point of time.

One of the important factors that worked against the author was that she had not exhausted her domestic remedies. The author unfortunately due to personal reasons cited by her in the communication did not explore them. It should be remembered that this is an absolute requirement under the Protocol. Further, the test for an effective remedy cannot be whether a complaint would have been successful or not but rather whether there is a procedure available in the domestic system capable of considering and if persuaded of the merits, provides a remedy without the need for recourse to the Committee.³⁴ International law also emphasizes the high test of ineffectiveness of possible remedies which

³⁴ European Court of Human Rights Application 18304/05 Nykytina vs. United Kingdom.

must be found to exist before the general requirement of exhaustion of domestic remedies will be held no longer to apply.³⁵

While the question of whether the mother has the right to pass on her citizenship to her child has been settled under article 9 of the Convention, the case of the author failed due to the fact she had not exhausted her remedies and in any event her son had become an adult years ago.

7. Lessons for advocates to be extracted from the case

In this case, the State party raised a number of legal issues and relied on precedents of the Human Rights Committee, proceedings of the European Human Rights Court and opinion of a jurist. It has to be reiterated that proceedings before the Committee under the OP are judicial in nature. Absolute care must be taken in drafting a communication since even when there is a case on merits it could be rejected on admissibility. In this communication, the question of reservation to a substantive article of the Convention was also argued by the State party. While the Committee did not actually address this it is important to bear in mind that under article 28(2) a reservation that is incompatible with the object and purpose of the Convention is not permitted. So while addressing arguments on reservation, authors of communication should formulate arguments that the State party's reservations are not compatible with the Convention, hence, are not applicable to the case.

³⁵ C.F. Amerasinghe, (1990) *Local Remedies in International Law*. The two references were used by the State party in this case.

CONCLUSION

The Convention provides a detailed framework for civil and political rights as well as economic, social and cultural rights. Apart from addressing the *de jure* and the *de facto* position, the Convention includes violations of non-State actors within its purview where there is a direct/corresponding obligation of the State Party to prevent, punish or take other steps against the non-State actors. A wide range of communications can therefore be raised before the Committee. The cases in this paper that relate to non-State actors are the first two cases relating to domestic violence where the Committee found the communication admissible. However, in *N.S.F. vs. the United Kingdom*, the fourth case in this paper, the right of asylum in the context of the home state not fulfilling its obligation in protecting the life of a victim of domestic violence still remains unanswered.

Perpetrators of domestic violence are only one example of non-State actors. As pointed out by Alda Facio,³⁶ it remains to be seen how the Committee would respond to cases of violations by transnational corporations and other big players in the global arena. Traditional international law concerns itself with the idea of the State. But the role of the State is getting redefined and many States are distancing themselves from core areas such as health and education (to name a few) while private actors are entering the field.

These examples test the non-derogable nature of rights and state obligations and one can anticipate these new contexts in which new cases may be brought to the Committee.

The Convention is a farsighted document that can be subject to a dynamic interpretation by the Committee and can address these concerns.

For the activist and the lawyer who would want to use the OP, the cases detail how it is necessary to have thorough research on facts and law especially on the question of alternate remedies. While the Committee is not a court of appeal, it is a forum where there is a lot of legalese and arguments have to be addressed accordingly. But since the jurisprudence of the Committee has yet to evolve in a systematic fashion as the Committee has considered only ten cases so far, one must also look at the development of jurisprudence under the OPs of other international conventions such as the International Covenant on Civil and Political Rights, the Convention against Torture, and the International Convention on the Elimination of All Forms of Racial Discrimination. The communications

³⁶ See Ref 12.

also refer to decisions of the European Convention on Human Rights and it would be relevant to read decisions on similar facts and law.

More communications should be brought before the Committee even if there is a risk that cases could get dismissed on admissibility. For even in such dismissals as evidenced in the cases in this paper there are many instances of discrimination about which we need to know and understand in order to address state obligation.



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