

Tools for the
Protection of
Human Rights

Summaries of
Jurisprudence

HEALTH AND
REPRODUCTIVE
RIGHTS



CEJIL

*SUMMARIES OF
JURISPRUDENCE*

*Health and
Reproductive Rights*

CEJIL

Centro por la Justicia y el Derecho Internacional
Center for Justice and International Law
Centro pela Justiça e o Direito Internacional
Perronton Kowantok Wacupe Yuwanin Pataset



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Compilation:

Liliana Tojo

Compilation Assistant:

Pilar Elizalde

Federico Taboada

Translation Team (spanish edition):

Ludmila Novotny (intern)

María Pía Rebusone (intern)

Edition, editorial and cover design:

Folio Uno S.A.

CEJIL's Board of Directors:

José Miguel Vivanco (President)

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PRESENTATION

CEJIL is proud to present a new addition to the series: *Tools for the Protection of Human Rights: Summaries of Jurisprudence*. The focus of the present publication is *Health and Reproductive Rights*.

Access to health services, including those pertaining to reproductive health, is recognized as a basic right by international bodies dedicated to the protection of human rights. Indeed, according to the recommendations made by the Committee on the Elimination of Discrimination Against Women (CEDAW), States must guarantee that all health services are “consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice” (General Recommendation N° 24, Paragraph 31.e)

The rulings included in this volume have been selected as examples that illustrate the systemic inadequacies affecting the effective possession of these rights. Furthermore, they demonstrate how this directly affects the rights of women to make choices regarding maternity, to access relevant health information and to ensure respect for their [physical] autonomy and privacy.

This publication aims to cast light on the scope of relevant jurisprudence in relation to health and reproductive rights. The following pages contain a selection of rulings and sentences dictated by the Inter-American Commission and Inter-American Court on Human Rights as well as the European Court of Human Rights, the Committee on the Elimination of Discrimination against Women (CEDAW) and the Human Rights Committee. They have been selected for their explicit or implicit reference to discussions or judicial interpretations which contribute to the defense of the aforementioned.

In addition to the included thematic index, whose purpose is to facilitate the location of information through keyword searches, a supplementary annex has been included. This document contains extracts from various relevant instruments which prove to be useful when approaching the issues of health and reproductive rights. We hope that this book represents a valuable tool in their defence and protection.

Finally, we would like to offer our sincere thanks for the invaluable contributions of all those who have made the publication of this book possible: Martine Lemmens, who saw

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Viviana Krsticevic
Executive Director

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*Inter-American Court
of Human Rights*

De La Cruz Flores v. Peru

Merits, Reparations and Costs

*Judgment of
November 18, 2004*



[...]

I. INTRODUCTION OF THE CASE

1. On June 11, 2003, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court an application against the State of Peru (hereinafter “the State” or “Peru”) originating from petition No. 12,138, received by the Secretariat of the Commission on September 1, 1998.

[...]

3. According to the Commission, María Teresa De La Cruz Flores, a physician by profession; was detained by police agents on March 27, 1996, after she had completed her shift as a pediatrician with the Peruvian Social Security Institute. She was charged with terrorism, processed under file No. 113-95 and, after she had been detained, was notified of a warrant for her arrest in file No. 723-93 for the crime of terrorism, a file which, according to the Commission, had been reported to be mislaid at that time. The alleged victim was prosecuted by a court composed of a “faceless” judge, which sentenced her on November 21, 1996, for the crime of terrorism to 20 years’ imprisonment, under the provisions of Decree Law No. 25,475. This sentence was confirmed by the judgment of the Special Criminal Chamber of the Supreme Court of Justice on June 8, 1998. The Commission also stated that, on January 3, 2003, the Constitutional Court of Peru had delivered a judgment in which it declared the unconstitutionality of several provisions of Decree Laws Nos. 25,475 and 25,659; although it did not issue any special ruling in relation to Article 2 of Decree Law 25,475, which defined the crime of terrorism. Following that decision, the Government issued Legislative Decrees Nos. 923, 924, 925, 926 and 927, on February 19, 2003. These decrees established that, within sixty working days from the entry into force of this legislation, the National Terrorism Chamber should gradually annul, de oficio, the judgment and the oral proceeding and, if applicable, declare the absence of grounds for the charge, in criminal trials for offences of terrorism conducted before secret judges or prosecutors, unless the person convicted waived this right. However, the Commission indicated that, at the date the application was submitted, Mrs. De La Cruz Flores was still detained, convicted of the crime of terrorism.

[...]

VII. ARTICLES 9, 7, 8 AND 24 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1.1 THEREOF (FREEDOM FROM EX POST FACTO LAWS, RIGHT TO PERSONAL LIBERTY, RIGHT TO A FAIR TRIAL AND RIGHT TO EQUAL PROTECTION)

[...]

Considerations of the Court

77. Article 9 of the American Convention establishes that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

78. First, it should be noted that the Inter-American Commission and the representatives have alleged that the definition of the crime of terrorism in article 2 of Decree Law No. 25,475 violates the principle of legality embodied in Article 9 of the American Convention (*supra* paras. 74(e), (g) and (h), and 75(b)). In this regard, the Court observes that article 2 of Decree Law No. 25,475 (crime of terrorism) was not applied in the proceeding against the alleged victim; consequently, this Court will not examine it and will proceed to consider the arguments presented by the parties in relation to article 4 of this Decree Law (crime of acts of collaboration with terrorism).

[...]

83. María Teresa De La Cruz Flores was prosecuted and convicted for acts of collaboration with terrorism, under article 4 of Decree Law No. 25,475 in a judgment of November 21, 1996. Even though, in this judgment, the judge declared that María Teresa de La Cruz Flores was convicted as perpetrator of the "crime of terrorism against the State," the Court observes that the article on which the domestic court based itself to deliver this sentence is article 4 of Decree Law No. 25,475, which defines the crime of acts of collaboration with terrorism. (...)

84. In relation to the principle of legality, the Court will now refer to the following issues: a) the relationship between the behavior that Mrs. De La Cruz Flores was charged

with in the judgment of November 21, 1996, and article 4 of Decree Law No. 25,475; b) the failure to specify which of the acts defined in the said article 4 encompassed the behavior of Mrs. De La Cruz Flores; c) the penalization of a medical activity; and d) the obligation to report possible criminal acts by physicians.

[...]

c) *Penalization of medical activities*

90. On September 16, 1995, during the trial against the alleged victim, the Lima Fourteenth Criminal Court issued an order to open the pre-trial investigation against María Teresa De La Cruz Flores and others, because they “were members of the Peruvian Communist Party (*Sendero Luminoso*), and had provided medical care, treatment and operations, and supplied medication and medical equipment for the treatment of terrorist criminals[;] acts [which] constitute the crime established and penalized in article 4 of [D]ecree [L]aw [No.] 25,475.”

91. On April 1, 1996, the Prosecutor of the Lima Fourteenth Provincial Prosecutor’s office indicated in his report (*supra* para. 73(22)) that María Teresa De La Cruz Flores had “used her professional activities in the field of medicine [... and] that her actions were designed to save rights [...] such as life.”

92. On June 7, 1996, the Lima Superior Prosecutor issued his report (*supra* para. 73(23)), in which he indicated, with regard to María Teresa de La Cruz Flores, that “her participation had consisted in providing medical care to militants.”

93. In relation to María Teresa De la Cruz Flores, the judgment of November 21, 1996 (*supra* para. 73(27)), considered that:

[the case file] describes the documentation found in 1992 on Víctor Zavala Castaño, Francisco Morales Zapata, Eduviges Crisóstomo Huayanay, Felipe Crisóstomo Huayanay, Rosa Esther Malo Vilca and Miriam Rosa Juárez Cruzatt, which implicates the defendant, and in which she appears under the alias “Elíana”; one of these documents refers not only to meetings with the defendant, but also, examines her doctrinal and ideological evolution within the organization, there are descriptions of talks that she has given, as a physician; that she has taken part in an operation as the assistant surgeon, and of problems within the health sector, all of which has been corroborated [...] by the defendant, Elisa Mabel Mantilla Moreno, who, in the presence of the Prosecutor states that, on one occasion, she met with María

Teresa De la Cruz on the orders of her 'handler,' to coordinate several matters; [...] the same defendant [...] accuses her of being one of the supportive elements responsible for providing treatment and performing operations; [...] accuses her of participating in an operation on 'Mario' whose hand had been burned, which corroborates the foregoing; namely, that she took part as assistant surgeon in a skin-grafting operation; and it is evident that the defendant has denied this during the proceeding so as to elude her criminal liability, which has been adequately proved[.]

94. The Court observes that the medical act is acknowledged in numerous normative and declarative documents relating to the medical profession⁹⁹. For example, article 12 of the Code of Ethics and Deontology of the Physician's Professional Association states that "[the] medical act is any activity or procedure performed by a physician in the exercise of the medical profession. It includes the following: acts of diagnosis, therapeutics and prognosis carried out by a physician when providing comprehensive care to patients, and also acts deriving directly therefrom. Such medical acts may only be exercised by members of the medical profession."

95. For information only, the Court recalls that Article 18 of the First Geneva Convention of 1949 states that: "[n]o one may ever be molested or convicted for having nursed the wounded or sick." Also, Article 16 of Protocol I and Article 10 of Protocol II, both Protocols to the 1949 Geneva Conventions, establish that "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom." At the time of the facts of this case, Peru was a party to those international instruments.

d) A physician's reporting obligation concerning possible criminal acts

96. The judgment of November 21, 1996 (*supra* para. 73(27)), also considered "that when the physician merely presumes or knows the unlawful origin of the injuries caused to an individual, he is obliged to report the fact or advise the authorities so that they may conduct the respective investigation."

99 Cf. International Code of Medical Ethics, World Medical Association; Regulations in time of armed conflict, World Medical Association; European Principles of Medical Ethics; Code of Ethics and Deontology of the Peruvian Physicians' Professional Association (file on merits, reparations, and costs, tome IV, folios 846 to 857); and Law, Statute and Rules of Procedure of the Peruvian Physicians' Professional Association (file on merits, reparations, and costs, tome IV, folios 858 to 941)

97. In this regard, the Court considers that the information a physician obtains in the exercise of his profession is privileged by professional confidentiality. For example, the International Code of Medical Ethics of the World Medical Association establishes that “a physician must keep absolutely secret everything that has been confided in him, even after the death of the patient.”

98. In this regard, Article 2(18) of the 1993 Constitution of Peru, which has precedence over any other domestic norm in Peruvian legislation, establishes that everyone has the right: Not to make known his political, philosophical, religious or any other kind of beliefs, and also to respect professional confidentiality.

99. Moreover, Article 141 of the Code of Criminal Procedure establishes that: “the following shall not be obliged to testify: 1. members of religious orders, lawyers, physicians, notaries and midwives, with regard to the secrets confided to them in the exercise of their profession.

100. The Human Rights Committee has already recommended that domestic legislation be modified to protect the confidentiality of medical information¹⁰⁰.

101. The Court considers that physicians have a right and an obligation to protect the confidentiality of the information to which, as physicians, they have access.

102. Consequently, in light of the above considerations, the Court believes that, when delivering the judgment of November 21, 1996, the State violated the principle of legality: by taking into account as elements that gave rise to criminal liability, membership in a terrorist organization and failure to comply with the reporting obligation, but only applying an article that did not define these behaviors; by not specifying which of the behaviors established in article 4 of Decree Law No. 25,475 had been committed by the alleged victim in order to be found guilty of the crime; for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician’s obligation to provide; and for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession.

103. In view of the above, the Court considers that the State violated the principle of legality established in Article 9 of the American Convention, to the detriment of Mrs. De La Cruz Flores.

[...]

XII. OPERATIVE PARAGRAPHS

188. Therefore,

THE COURT, DECLARES:

Unanimously, that:

1. The State violated the right to freedom from *ex post facto* laws embodied in Article 9 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of María Teresa De La Cruz Flores, (...).

(...)

[...]

SEPARATE OPINION OF JUDGE SERGIO GARCIA RAMIREZ (...)

1. In this *separate opinion* I refer to only one issue examined in the judgment delivered by the Inter-American Court of Human Rights on November 18, 2004, in the *Case of De La Cruz Flores*: the medical act and criminal legislation, from the perspective of human rights and in the circumstances ratified in this case. I refer to the expression 'medical act' as it is used in the judgment, which borrows the definition from article 12 of the Code of Ethics and Deontology of the Doctors' Professional Association of Peru (the State referred to in the matter *sub judice*), which includes generally accepted concepts: "a medical act is any activity or procedure carried out by a doctor in the exercise of the medical profession. It includes the following: acts of diagnosis, therapeutics and prognosis performed by a doctor when providing comprehensive care to patients, and also acts deriving directly therefrom. Such medical acts may only be exercised by the members of the medical profession."

2. A clear distinction should be established between this activity (which falls within the framework of the exercise of a profession and responds the corresponding purposes and

methods), from any other activity that is penally typical or atypical, and that is subject to its own type of regulation and to the legal consequences established by law, including those of a penal nature. It should not be forgotten that, at times, it may be difficult to make a distinction and that some situations may suggest the existence of a criminal violation behind an alleged medical procedure. However, these practical problems do not invalidate the significance of the affirmation contained in this opinion, which supports the judgment delivered by the Court. On the one hand, there are the characteristics of each fact, act or conduct, which must be assessed in their own terms, and on the other hand, the problems involved in the investigation and identification of the facts. The former is a matter for the legislator and the judge, and the latter for the investigator. The Court must avoid a flawed investigation, with uncertain or erroneous results, contaminating its assessment of the nature of the conduct and the appropriate legal response.

3. It is obviously possible that someone exercising the medical profession may, independent of this, perform acts that might be established in criminal legislation and therefore merit different types of penalties. This leads us to insist on the need to trace a borderline, as precisely as possible – at the threefold level of legal classification, investigation and prosecution – between such punishable conducts and others that are performed exclusively within the framework of the medical act; that is, within the framework of the activities of a professional in the field of medicine, using his knowledge and expertise in this discipline to safeguard the lives and health of others. In brief, this is the purpose of the medical act, which contributes to its legal classification.

4. For the purpose of establishing penalties, criminal legislation must include certain behaviors that gravely affect the most relevant juridical rights. The idea of a minimum criminal law, associated with guaranteeism which today faces attacks from different sources, supposes the incrimination of such unlawful behaviors, in view of their gravity and the harm they produce, when there are no alternate social or legal means to avoid them or punish them. According to this concept, criminal legislation should be used as a last resort for social control, and focus on those behaviors of extreme gravity. Even when classifying certain behaviors as crimes is justified, this must be done objectively and prudently – which could be called “Beccarian prudence” – fitting the penalties to the gravity of the offence and to the guilt of the perpetrator, without losing sight of the possible differences within the same category – murder and culpable homicide, for example - which call for a different sanction. This matter has been examined in the Inter-American Court’s case law, with regard to Article 4(2) of the American Convention – concerning protection of the right to life – in the judgment delivered in *Hilaire, Constantine y Benjamin et al. v. Trinidad and Tobago*, on June 21, 2002. I refer to what I said in my separate opinion accompanying that judgment.

5. If, when incriminating unlawful conducts, the penal legislator must distinguish between the different possible hypotheses and deal with each one appropriately, rationally and specifically, with all the more reason must he avoid incriminating conducts that are not unlawful. The fact that a conduct is objectively established in a category of crime included in the relevant legislation does not imply that this automatically satisfies the requirement of the legitimacy of criminal laws. Otherwise, one could justify accepting acts, which are materially admissible and even plausible, established by authoritarian regimes to combat dissent, differences and discrepancies, an occurrence that is well known throughout history and widely condemned. The Inter-American Court has ruled on this issue also when examining the characteristics of legislation that provides for limitations or restrictions to the exercise of rights. The rulings contained in Advisory Opinion OC-6/86 of May 9, 1986, on “The Word “Laws” in Article 30 of the American Convention of Human Rights,” should be recalled, in this respect.

6. When a conduct is carried out with the intention of harming a juridical right, the application of a penalty to the author can be justified – with the abovementioned limitations. However, the situation is very different when the intention of the agent is to preserve a high-ranking juridical right whose protection also constitutes an immediate and direct obligation of the person executing the behavior. It must be borne in mind that the safeguard and development of the lives of the individual and the group have led to identifying, encouraging and regulating the performance of certain activities – scientific, technical, artistic, relating to public or social service, etc. – which are considered to be socially useful and even necessary, and which are generally surrounded by appropriate guarantees. The systematic recognition of these activities, at times converted into social functions, constitutes a point of reference to qualify their lawfulness and establish the pertinent legal consequences.

7. One of the oldest and most noble activities is that designed to safeguard the life and health of the individual. In this case, what is involved is the protection of the highest-ranking rights, a condition for the enjoyment of all the others. Society as a whole has an interest in it and the State must protect it. This is precisely, the case of the medical profession, whose regulation includes an important ethical component, in addition to elements relating to the techniques to be applied in each case, in keeping with the duty to provide care inferred from the *lex artis*. The medical professional who takes care of the health of his fellow men and protects them from disease and death fulfills his natural obligation, and the law must protect this carefully. This task and this protection have their own meaning, totally independent of the political, religious or philosophical ideas of the doctor and his patient. If the State imposed on or authorized doctors to misuse their

profession, as has occurred under totalitarian regimes, it would be just as censurable as if it prevented them from complying with their ethical and juridical duty, and even imposed penalties for such compliance. In both cases the State would be harming the right to life and health of the individual, both directly and by intimidation or restrictions imposed on those who, due to their profession, are regularly obliged to intervene in the protection of those rights.

8. In my opinion, the State cannot violate the protection of health and life for which doctors are responsible, by norms or interpretations of norms that dissuade a doctor from complying with his duty, either because they threaten him with the application of a penalty (a threat that can prevent him from providing medical services), or because they induce him to make distinctions contrary to the principles of equality and non-discrimination, or because they oblige him to deviate from his proper functions and assume others that enter into conflict with the former, pose unacceptable dilemmas, or change the basis of the relationship between doctor and patient, as would happen if doctors were obliged to inform on the patients they treat. A similar situation would arise, if lawyers were forced to report the unlawful acts committed by their clients (which they learn about through their relationship of assistance and defense), or priests to reveal the secrets of the confessional.

9. This does not mean trying to prevent the legitimate prosecution of unlawful conducts, which must be combated with appropriate means, but rather maintaining each social relationship in its corresponding niche, not only for the benefit of the individual, but also for the benefit of society. Given their functions, the prosecutor and the investigator must ask the necessary questions. The doctor, the defense lawyer and the priest must do the same, fully protected by the State, in the exercise of their mission, and this is evidently not the investigation of offences and the prosecution of perpetrators. It is not necessary to describe the crisis that would occur if the professional and social roles were disrupted and doctors, defense lawyers and priests were tacitly incorporated into the ranks of the police. If confidential communications between the lawyer and the accused are protected from interference, and it is accepted that the priest is not obliged to violate the secret of the confessional (an essential characteristic of this specific communication, which believers consider a sacrament), the relationship between doctor and patient should receive, at least, the same consideration.

10. The concept that a doctor is obliged to attend all individuals equally without entering into considerations on their moral or legal status, and that healthcare is an obligation for the doctor and also a right, and acceptance of the confidential nature of the doctor-patient relationship as regards what the patient reveals, has long been recognized and

has been firmly established in several of this profession's best-known ethical-judicial instruments, which include, inter alia, the particularities of the doctor-patient relationship and the characteristics of the loyalty that the doctor owes to his patient. Aesculapius wrote to his son: "Your door shall remain open to all [...] The evildoer shall have the same right to your help as the honorable man." The Hippocratic oath, which is still sworn by many young people when they receive their professional diploma in medicine, states: "What I may see or hear in the course of the treatment or even outside [...], which on no account must be spread abroad, I will keep to myself, holding such things secret."

11. The judgment, which this opinion accompanies, mentions the conclusive text of several principles of international humanitarian law. The reference to these texts is given merely for information because, as the Court's case law has indicated, it helps illustrate the interpretation given to the provisions that are directly applicable. Thus, Article 18 of the First Geneva Convention of 1949 indicates that, "No one may ever be molested or convicted for having nursed the wounded or sick." Article 16 of Protocol 1 and Article 10 of Protocol II, both to the 1949 Geneva Conventions, state that "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."

12. The Declaration of Geneva of the World Medical Association (WMA), 1948-1968-1983, proclaimed the physician's promise that "The health of my patient will be my first consideration"; "I will respect the secrets which are confided in me" and "I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient." The WMA International Code of Medical Ethics repeats that: "A physician shall preserve absolute confidentiality [...] about his patient even after the patient has died"; "A physician shall act only in the patient's interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient."; "A physician shall owe his patients complete loyalty and all the resources of his science." The WMA Declaration of Lisbon on the rights of the patient of 1981-1995, states that: "All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind, must be kept confidential, even after death." The WMA Declaration of Helsinki, 1964-1975-1983-1989-1996-2000-2002, states that: "It is the duty of the physician to promote and safeguard the health of the people. The physician's knowledge and conscience are dedicated to the fulfillment of this duty."

13. In brief, I consider that it is inadmissible – a consideration that coincides with the opinion of the Inter-American Court, as stated in the judgment in this case – to criminally

penalize the conduct of a doctor who provides care designed to protect the health and life of other individuals, notwithstanding their characteristics, activities and beliefs, and the origin of their injuries or illnesses. I also consider it necessary to prohibit incriminating the conduct of a doctor who abstains from providing information to the authorities about his patient's punishable conduct, which he is aware of through information provided to him by the patient in connection with the medical procedure. In that case, there could be an absolatory excuse similar to that which protects the next of kin of the defendant in cases of concealment owing to kinship.

14. Once again, it should be emphasized that the considerations and decisions of the inter-American jurisdiction in the cases it has heard have never justified, in any case and for any reason, the committing of crimes established in legislation enacted in accordance with the principles and postulates of a democratic society. It is clear that the State must protect individuals and society from attacks on their juridical rights, and also safeguard democratic institutions. It is also evident, from the perspective of human rights, that this protection must be exercised observing the conditions that characterize the rule of law.

[...].

*Inter-American Court
of Human Rights*

*The Xákmok Kásek
Indigenous Community v. Paraguay*

Merits, Reparations and Costs

*Judgment of
August 24, 2010*



I. INTRODUCTION OF THE CASE AND PURPOSE OF THE DISPUTE

1. On July 3, 2009, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”), in accordance with Articles 51 and 61 of the Convention, submitted an application against the Republic of Paraguay (hereinafter “the State” or “Paraguay”), based on which the instant case was commenced. (...)

2. The application relates to the State’s alleged international responsibility for the alleged failure to ensure the right of the Xákmok Kásek Indigenous Community (hereinafter “the Xákmok Kásek Indigenous Community,” “the Xákmok Kásek Community,” “the Indigenous Community,” or “the Community”) and its members’ (hereinafter “the members of the Community”) to their ancestral property, because the actions concerning the territorial claims of the Community were being processed since 1990 “and had not yet been decided satisfactorily.” According to the Commission, “[t]his has meant that, not only has it been impossible for the Community to access the property and take possession of their territory, but also, owing to the characteristics of the Community, that it has been kept in a vulnerable situation with regard to food, medicine and sanitation that continuously threatens the Community’s integrity and the survival of its members.”

[...]

VII. RIGHT TO LIFE (ARTICLE 4.1 OF THE AMERICAN CONVENTION)

[...]

186. The Court has indicated that the right to life is a fundamental human right, the full enjoyment of which is a precondition for the enjoyment of all the other human rights¹⁹². If this right is not respected, all the other rights are meaningless. Therefore, restrictive notions with regard to this right are not admissible¹⁹³.

192 Cf. *Case of the “Street Children” (Villagrán Morales and et al.) v. Guatemala. Merits*, *supra* para. 167, para. 144; *Case of Montero Aragorn et al. (Retén de Catia) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of July 5, 2006, Series C. No. 150, para. 63, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs*. Judgment of July 4, 2007. Series C No. 166, para. 78.

193 Cf. *Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits*, *supra* note 167, para. 144; *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*, *supra* note 192, para. 63, and *Case of Zambrano Vélez et al. v. Ecuador*, *supra* note 192, para. 78.

187. Consequently, the States are obliged to ensure the creation of the necessary conditions to prevent violations of this right and, in particular, the obligation to prevent its agents from endangering it. The observance of Article 4, in relation to Article 1(1) of the Convention, not only presumes that no one be deprived of their life arbitrarily (negative obligation), but also requires the States to take all appropriate measures to protect and preserve the right to life (positive obligation)¹⁹⁴, in keeping with the obligation to ensure the full and free exercise, without discrimination, of the rights of all persons under their jurisdiction¹⁹⁵.

188. The Court has emphasized that a State cannot be held responsible for every situation that jeopardizes the right to life. Taking into account the difficulties involved in the planning and adoption of public policies and the operational choices that must be made based on priorities and resources, the positive obligations of the State must be interpreted in such a way that an impossible or disproportionate burden is not placed on the authorities¹⁹⁶. To give rise to this positive obligation, it must be established that, at the time of the facts, the authorities knew or should have known of the existence of a situation of real and immediate risk to the life of an individual or Group of specific individuals, and that they did not take the necessary measures within their powers that could reasonably be expected to prevent or avoid that risk¹⁹⁷.

189. In the instant case, on June 11, 1991¹⁹⁸, and on September 22, 1992¹⁹⁹, INDI officials verified the situation of special vulnerability of the members of the Community because

194 Cf. Case of the “Street Children” (Villagrán Morales et al.) v. Guatemala. Merits, *supra* note 167 para. 144; Case of Kawas Fernández v. Honduras, *supra* note 14, para. 74, and Case of González et al. (“Cotton Field”) v. Mexico, *supra* note 14 para. 245.

195 Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, reparations and costs. Judgment of January 31, 2006. Series C No. 140, para. 120; Case of Kawas Fernández v. Honduras, *supra* note 14 para. 74, and Case of González et al. (“Cotton Field”) v. Mexico, *supra* note 14, para. 245.

196 Cf. *Case of the Pueblo Bello Massacre*, *supra* note 195, para. 124, and *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, *supra* note 20, para. 155..

197 Cf. Case of the Pueblo Bello Massacre, *supra* note 195, paras. 123 and 124, and Case of the Sawhoyamaya Indigenous Community v. Paraguay, *supra* note 20, para. 155.

198 Cf. Handwritten record of an on-site inspection of the Xákmok Kásek Community made on June 11, 1991, in relation to the land claimed (file of appendices to the application, appendix 3, tome II, folio 790), and report of on-site visit made by Pastor Cabanellas, *supra* note 62, folios 791 to 794).

199 Cf. Report on the expanded on-site visit on September 22, 1992, *supra* note 62, folios 883 and 884).

they did not have title to their land. On November 11, 1993, the indigenous leaders repeated to the IBR that their land claim was a priority because “they [were] living in extremely difficult and precarious conditions and [did] not know how long they [could] hold out²⁰⁰.”

190. The Prosecutor for labor matters inspected the Salazar, Cora-i, and Maroma Ranches. He recorded “the precarious situation in which [the members of the Community live] [...] without minimum conditions of hygiene, clothing, and space sufficient for the number of inhabitants; and also [the] houses [...] do not have impermeable walls or tile roofs and were built in such a way that they endangered the safety and health of the indigenous people; the floors [were] of earth²⁰¹.” In addition, the said report indicated “that they received very limited rations²⁰².” During the visit, irregularities were also verified with regard to the labor exploitation suffered by the members of the Community.

191. On April 17, 2009, the President of the Republic and the Ministry of Education and Culture, issued Decree No. 1830²⁰³, declaring a state of emergency in two indigenous communities²⁰⁴, one of them the Xákmok Kásek Community. The pertinent part of Decree No. 1830 indicates that:

Due to situations beyond their control, these Communities are deprived of access to the traditional means of subsistence related to their pre-colonial identity, within the territories claimed as part of their ancestral territories, [...] [and this] hampers the normal way of life of the said communities [...] owing to the absence of minimum and essential food and medical care, which is a concern of the Government that requires urgent response [...].

[Consequently, it ordered that]

The [INDI], together with the National Emergency Secretariat and the Ministry of Public Health and Social Welfare take the necessary measures to immediately provide medical care and food to the families that are members of [the Xákmok Kásek

200 Communication of the Community addressed to the IBR President of November 11, 1993, *supra* note 65 (file of appendices to the application, attachment 5, folio 2351).

201 *Cf.* Report prepared by the Prosecutor for labor matters, undated (file of appendices to the application, appendix 3, tome IV, folio 1808).

202 *Cf.* Report prepared by the Prosecutor for labor matters, undated, *supra* note 201, folio 1810.

203 *Cf.* Decree No. 1830 of April 17, 2009 (file of attachments to the answer to the application, attachment 7, folios 3643 to 3646).

204 The said Decree No. 1830 of April 17, 2009, *supra* note 203, also refers to the Kelyenmagategma Community of the Enxet and Y'ara Marantu People.

Community] until the conclusion of the legal and administrative procedures regarding the legalization of the land claimed as part of the its traditional habitat²⁰⁵.

192. In brief, in this case the domestic authorities knew of the existence of a situation of real and immediate risk to the life of the members of the Community. Consequently, this gave rise to certain State obligations of prevention – under the American Convention (Article 4 in relation to Article 1[1]) and under its own domestic law (Decree No. 1830) – that obliged it to take the necessary measures that could reasonably be expected, to prevent or avoid this risk.

193. Based on the above, the Court must assess the measures taken by the State to comply with its obligation to guarantee the right to life of the members of the Xákmok Kásek Community. To this end, the Court will analyze the alleged violation of this right in two parts: (1) the right to a decent existence, and (2) the alleged international responsibility of the State for the alleged deaths.

1. *The right to a decent existence*

[...]

1.3 *Health*

203. Regarding access to health care services, the Commission argued that the children “suffer from malnutrition” and, in general, the other members of the Community suffer from diseases such as tuberculosis, diarrhea, Chagas disease, and other occasional epidemics. In addition, it indicated that the Community has not been provided with adequate medical care and the children do not receive the necessary vaccines. The representatives agreed with the Commission’s arguments and clarified that the new settlement (the village of “25 de Febrero”), is located 75 kilometers from the nearest health clinic, which operates “deficiently and does not have a vehicle that could, eventually, reach the Community.” Consequently, “the seriously ill must be attended to in the hospital in Limpio, which is more than 400 km from the Community’s settlement, and the bus fare is beyond the means of the members of the Community.”

204. The State indicated that the “complaints of the Xákmok Kásek leaders concerning medical care and medicines have been attended to” and indicated that the public health-

205 Cf. Decree No. 1830, *supra* note 203.

care service is free in Paraguay. It reported that, since October 2009, the State has been employing an indigenous health care promoter to provide services to the Community, and a Family Health Unit had been assigned²³⁷. Additionally, the State indicated that it had provided health-care assistance to the Community in its habitat and that the General Directorate for Vulnerable Groups provided medical assistance and had designed the health-care policy to be implemented.

205. The case file indicates that, prior to Decree No. 1830, the members of the Community had “receiv[ed] [...] minimal medical assistance²³⁸” and the health clinics were few and far apart. In addition, for years “the children had not received general medical care or vaccinations²³⁹.” Regarding access to health-care services, “only those who work on ranches [could] access the [Health Insurance Institute], and even [then], the use of this insurance is not possible because the cards are not delivered or [the Community members] do not have the resources to travel to and stay in the Loma Plata Hospital, which is the closest one²⁴⁰.” Also, “a 1993 health census conducted by the National Health Service (SENASA) [...] confirmed that a large percentage of the current Xákmok Kásek population carried the Chagas disease virus²⁴¹.”

206. Regarding current conditions, the Court has verified that an indigenous community health care promoter was hired on November 2, 2009²⁴². Also, following the issue of Decree No. 1830 on April 17, 2009, the State has organized nine health-care workshops with the Community²⁴³, during which it attended 474 consultations, providing treatment and medicines in some cases²⁴⁴. In addition, the State forwarded documentation on a project to build a health clinic for the Community, at an estimated cost of Gs. 120,000,000 (one hundred and twenty million guaraníes)²⁴⁵.

237 Cf. Report of December 16, 2009, signed by María Filomena Bejarano, General Director of the General Directorate for Assistance to Vulnerable Groups (file of attachments to the answer to the application, attachment 1(4), folios 3307 to 3308)

238 Cf. CEADUC Anthropological Report, *supra* note 55, folio 1742.

239 Cf. CEADUC Anthropological Report, *supra* note 55, folio 1742.

240 Cf. CEADUC Anthropological Report, *supra* note 55, folio 1742.

241 Cf. CEADUC Anthropological Report, *supra* note 55, folio 1742.

242 Cf. Communication MSPyBS/DGAPS No. 865/2009 of December 18, 2009 (file of attachments to the answer to the application, attachment 1.4, folio 3306).

243 Cf. Report of the General Directorate for Assistance to Vulnerable Groups of December 16, 2009, *supra* note 237.

207. Nevertheless, according to Marcelino Lopez, Community leader, and Gerardo Larrosa, the Community's health-care promoter, the health situation is fairly critical. They indicated that "indigenous people die owing to lack of transportation [or] medicine²⁴⁶," and their perception is that, in the case of "most of the indigenous people concerned, this is because of the [...] Government²⁴⁷." Specifically, Gerardo Larrosa indicated that "the health brigades almost never provide assistance, except on a few occasions," and "[t]here is no stock of basic medicines for primary care, or even an adequate place to store them²⁴⁸."

208. The Court acknowledges the progress made by the State. However, the measures taken following Decree No. 1830 (2009) are characterized by being temporary and transitory. In addition, the State has not guaranteed members of the Community physical or geographical access to health-care establishments and, from the evidence provided, there is no indication that positive measures were taken to guarantee that the medical supplies and services provided would be acceptable, or that any educational measures were taken on health matters that respected traditional customs and practices.

[...]

214. In short, this Court emphasizes that the assistance provided by the State under Decree No. 1830 of April 17, 2009, has been insufficient to overcome the conditions of special vulnerability of the Xákmok Kásek Community verified in the decree.

215. The situation of the members of the Community is closely tied to its lack of its lands. Indeed, the absence of possibilities for the members to provide for and support themselves, according to their ancestral traditions, has led them to depend almost exclusively on State actions and be forced to live not only in a way that is different from their cultural

244 Cf. Information presented by the Ministry of Public Health and Social Welfare on December 16, 2009, with data on medical attention provided between May 1 and November 4, 2009, and data from the lists forwarded by the General Directorate for Assistance to Vulnerable Groups to the Ministry of Public Health and Welfare (file of attachments to the answer to the application, tome VIII, attachment 4, folios 3292 to 3305), and records of attention provided in January and February 2010 (file of attachments to the final arguments of the State, folios 4423 to 4435).

245 Cf. Report on the "medical clinic – for the indigenous settlement of the XV sanitary region of President Hayes" (file of attachments to the answer to the application, attachment 4, folios 3315 to 3321).

246 Testimony of Marcelino López, *supra* note 63, folio 587.

247 Testimony of Marcelino López, *supra* note 63, folio 587

248 Testimony of Marcelino López, *supra* note 63, folio 606

patterns, but in squalor. This was noted by Marcelino López, Community leader, who said, “[i]f we have our land, then everything else will improve and, above all, we will be able to live openly as indigenous people; otherwise, it will be very difficult to survive²⁵⁵.”

216. On this point, it should be noted that, as the United Nations Committee on Economic, Social and Cultural Rights has said, “in practice, poverty seriously restricts the ability of a person or a group of persons to exercise the right to take part in, gain access and contribute to, on equal terms, all spheres of cultural life, and more importantly, seriously affects their hopes for the future and their ability to effectively enjoy their own culture²⁵⁵.”

217. Consequently, the Court declares that the State has not provided the basic services to protect the right to a decent life of a specific group of individuals in these conditions of special, real and immediate risk, and this constitutes a violation of Article 4(1) of the Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community.

2. *The deaths that have occurred in the Community*

218. The representatives asked that the State be declared internationally responsible for the death of several members of the Community. In contrast, the Commission indicated that it “lacked evidence to determine if each death described by the representatives [was] indirectly related to the Xákmok Kásek Community’s possibility of acceding to its ancestral territory.” The State objected that its international responsibility could not be declared and contested the representatives’ allegation.

[...]

232. The death of Remigia Ruíz, who died in 2005 at 38 years of age, and who was pregnant and did not receive medical attention, reveals many of the inherent characteristics of maternal mortality, such as: death during labor without adequate medical care, a situation of exclusion or extreme poverty, lack of access to adequate health services, and a lack of documentation on cause of death, among others.

255 Testimony of Marcelino López, *supra* note 63, folio 585.

256 United Nations, Committee on Economic, Social and Cultural Rights. General Comment No. 21, December 21, 2009, E/C.12/GC/21, para. 38.

233. In this regard, the Court underscores that extreme poverty and the lack of adequate medical care for pregnant women or women who have recently given birth result in high maternal mortality and morbidity²⁶⁹. Because of this, States must design appropriate health-care policies that permit assistance to be provided by personnel who are adequately trained to attend to births, policies to prevent maternal mortality with adequate pre-natal and post-partum care, and legal and administrative instruments for health-care policies that permit cases of maternal mortality to be documented adequately. All this is because pregnant women require special measures of protection.

234. Based on the above, the Court declares that the State violated the right established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the persons mentioned in this paragraph, because it failed to take the required positive measures, within its powers, that could reasonably be expected to prevent or to avoid the risk to the right to life. Consequently, the death of the following individuals can be attributed to the State: Sara Gonzáles López, who died from gastroenteritis and dehydration in July 2008, and did not receive medical attention; Yelsi Karina López Cabañas, who died of whooping cough in 2005, at the age of one, and did not receive medical attention; Remigia Ruiz, who died from complications while in labor in 2005, at 38 years of age, and did not receive medical attention; Aida Carolina Gonzáles, who died from anemia in June 2003, at eight months of age, and did not receive medical assistance; NN Ávalos or Ríos Torres, who died from tetanus in 1999, three days after birth, and did not receive medical care; Abundio Inter Dermott, who died from pneumonia in 2003, two months after birth, and did not receive medical care; NN Dermott Martínez, who died from enterocolitis in 2001, at eight months of age, and it is not known if he or she received medical care; NN García Dermott, who died from whooping cough in 2001, at one month of age, and did not receive medical care; Adalberto Gonzáles López, who died from pneumonia in 2000, aged one year and two months, and did not receive medical care; Roberto Roa Gonzáles, who died from tuberculosis in 2000, at 55 years of age, and did not receive medical care; NN Ávalos or Ríos Torres, who died from tetanus in 1998, nine days after birth, and did not receive medical care; NN Dermott Ruiz, who died at birth in 1996 and did not receive medical care, and NN Wilfrida Ojeda Chavez, who died of dehydration and enterocolitis in May 1994 and did not receive medical care.

269 Cf. Paul Hunt. Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of health, A/HRC/14/20/Add.2, April 15, 2010. A maternal death is the death of a woman while pregnant or within 42 days of termination of pregnancy, irrespective of the duration and the site of the pregnancy, from any cause related to or aggravated by the pregnancy or its management, but not from accidental or incidental causes. WHO, *International Statistical Classification of Diseases and Related Health Problems, Tenth Revision, vol. 2, Instruction Manual, 2nd ed. (Geneva, 2005)*, p. 141.

[...]

XIII. OPERATIVE PARAGRAPHS

337. Therefore,

THE COURT

[...]

DECLARES,

By seven votes to one, that:

3. The State violated the right to life, established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the members of the Xákmok Kásek Community, in the terms of paragraphs (...) 205 to 208 and 211 to 217 of this judgment.

By seven votes to one, that:

4. The State violated the right to life established in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Sara González López, Yelsi Karina López Cabañas, Remigia Ruiz, Aida Carolina Gonzáles, NN [Note: NN = no first name] Ávalos or Ríos Torres, Abundio Inter Dermott, NN Dermott Martínez, NN García Dermott, Adalberto Gonzáles López, Roberto Roa Gonzáles, NN Ávalos or Ríos Torres, NN Dermontt Ruiz and NN Wilfrida Ojeda, in the terms of paragraphs 231 to 234 of this judgment.

[...]

*Inter-American Court
of Human Rights*

Gelman v. Uruguay

Merits and Reparations

*Judgment of
February 24, 2011*



[...]

I. INTRODUCTION OF THE CASE AND THE PURPOSE OF THE CONTROVERSY

1. On January 21, 2010, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) presented, pursuant to Articles 51 and 61 of the Convention, an application against the Eastern Republic of Uruguay in relation to the case of Juan Gelman, María Claudia García de Gelman, and María Macarena Gelman García² (hereinafter “the case of Gelman”) v. Uruguay³. On March 9, 2007, the Commission adopted Admissibility Report No. 30/07, wherein it declared the admissibility of the case and on July 18, 2008, approved, under the terms of Article 50 of the Convention, the Report on the Merits No. 32/08⁴.

2 Also mentioned as María Macarena Tauriño Vivian, due to the facts of the case.

3 The Commission appointed as delegats Ms. Luz Patricia Mejía, Commissioner, and Mr. Santiago A. Canton, Executive Secretary; and as legal advisors Ms. Elizabeth Abi-Mershed, Deputy Executive Secretary, Christina Cerna and Lilly Ching, attorneys of the Executive Secretary.

4 In this report, the Commission concluded that the State is responsible for the violation of Articles 3, 4, 5, and 7, in relation to Article 1(1) of the American Convention, with Articles I.b, III, IV, and V of the Inter-American Convention on the Forced Disappearance of Persons and with Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Articles I, XVIII and XXVI of the American Declaration on the Rights and Duties of Man, to the detriment of María Claudia García; of Articles 1(1), 2, 8(1) and 25 of the American Convention, Articles I.b, III, IV, and V of the Inter-American Convention on Forced Disappearance of Persons and Articles 1, 6, 8, and 11 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the next of kin of María Claudia García; Articles 5(1) and 1(1) of the Convention to the detriment of Juan Gelman, his family and María Macarena Gelman; Articles 3, 11, 17, 18, 19, 20, and 1(1) of the American Convention, Article XII of the Inter-American Convention on Forced Disappearance of Persons and Articles VI, VII, and XVII of the American Declaration on the Rights and Duties of Man, to the detriment of Juan Gelman and his family and of María Macarena Gelman. In this report, the Commission made the following recommendations to the State: a) carry out a complete and impartial investigation in order to identify and punish those responsible for the human rights violations in the case; b) adopt the legislative or any measures necessary to revoke Law 15.848 or the Expiry Law of the State; c) create a domestic mechanism, with binding legal powers and authority over all the State bodies to supervise these recommendations; and d) order full reparation for the next of kin that includes compensation and symbolic acts that guarantee the non-repetition of the acts committed.

2. The facts alleged by the Commission relate to the enforced disappearance of María Claudia García Iruretagoyena de Gelman since late 1976, subsequent to her detention in Buenos Aires, Argentina, during the advanced stages of her pregnancy, to which it is presumed that she was then transported to Uruguay where she gave birth to her daughter, who was then given to an Uruguayan family; actions which the Commission notes were committed by Uruguayan and Argentine State agents in the context of “Operation Cóndor,” and, to date, the whereabouts of María Claudia García as well as the circumstances in which the disappearance took place remain unknown. Furthermore, the Commission alleged the suppression of identity and nationality of María Macarena Gelman García Iruretagoyena, daughter of María Claudia García de Gelman and Marcelo Gelman and the denial of justice, impunity, and in general, the suffering caused to Juan Gelman, his family, María Macarena Gelman, and the next of kin of María Claudia García, as a consequence of the failure to investigate the facts, prosecute, and punish those responsible under Law No. 15.848 or the Expiry Law (hereinafter “the Expiry Law”), promulgated in 1986 by the democratic government of Uruguay.

[...]

VI. MERITS

VI.1 THE RIGHT TO JURIDICAL PERSONALITY, TO LIFE, TO PERSONAL INTEGRITY AND TO PERSONAL LIBERTY OF MARÍA CLAUDIA GARCÍA IRURETAGOYENA DE GELMAN, IN RELATION TO THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS (AMERICAN CONVENTION AND INTER-AMERICAN CONVENTION ON THE FORCED DISAPPEARANCE OF PERSONS)

41. (...) The State did not make reference to these arguments, but it did acknowledge the human rights violations against Maria Claudia García in their entirety (...), reason for which in the following section the State’s arguments are not included.

A. Arguments and claims of the parties

[...]

43. The representatives argued that:

(...)

e) in relation to the alleged violation of Article 5 of the Convention, and in con-

sideration of the definition of the crime of torture established in Article 2 of the Inter-American Convention to Prevent and Punish Torture, as well as the definition of violence against women contained in Articles 1 and 2 of the Convention of Belém do Pará, the unlawful detention, solitary confinement, and suffering inflicted on María Claudia García are particularly serious given her vulnerability due to the advanced state of pregnancy, which “allow for the inference that María Claudia [García] was a victim of psychological torture during the time she was in detention.” Said facts constitute an “immediate” violation to her personal integrity due to the acts of torture;
(...).

[...]

D. The enforced disappearance of María Claudia García Iruretagoyena de Gelman

[...]

D. 2 Legal classification

91. In the manner that María Claudia was deprived of her liberty during the advanced stages of her pregnancy, kidnapped in Buenos Aires by Argentine forces and possibly Uruguayan authorities in a context of illegal detentions in clandestine centers (“Automotores Orletti” and SID) and subsequently transported to Montevideo under the “Operation Condor,” her deprivation of liberty was clearly illegal, in violation of Article 7(1) of the Convention, and can only be understood as the constitution of a complex violation of rights that is an enforced disappearance. It also constitutes a flagrant breach of the State’s obligation to keep persons deprived of liberty in officially recognized detention-centers, and to present them without delay before the competent judicial authority.

[...]

97. The state of pregnancy in which she was in when detained constituted a condition of particular vulnerability, reason for which—in her case—there was differential treatment. In turn, in Argentina she had been separated from her husband and later transported to Uruguay without knowing his fate, which in itself represented a cruel and inhumane act. Subsequently, she was retained in a clandestine center of detention and torture, SID, where her given differential treatment in regard to other detainees, seeing as she was separated from these, was not carried out in order to comply with the special

obligation to protect her, but rather in what regards her unlawful detention, her transfer to Uruguay, and her possible enforced disappearance, which was, the use of her body in order to give birth, and for her daughter to be breastfed, who was given to another family after being abducted and her identity substituted for another.(*infra paras.* 106 to 116). The facts of the case reveal a particular conception of women that threatens freedoms entailed in maternity, that which forms an essential part of the free development of the female personhood. The foregoing is even more serious if one considers, as indicated, that her case took place in a context of disappearances of pregnant women and illegal abductions of children in the framework of Operation Condor.

98. The mentioned acts committed against Maria Claudia García can be classified as one of the most serious and reprehensible forms of violence against women¹¹⁰, perpetrated against her by State officials from Argentina and Uruguay, which severely affected her personal integrity, were clearly based on her gender, and caused damage to her physical and psychological suffering, and contributed to her feelings of serious anguish, desperation, and fear she experienced by living with her daughter in a clandestine detention center, where one normally could hear the torture inflicted on the other prisoners in SID¹¹¹ and not knowing the fate of her daughter when they were separated¹¹², as well as being unable to foresee her final fate. All this constitutes an affectation of such magnitude that it should be qualified as the most serious form of violation of her psychological integrity.

110 *Cf.*, In this sense, Articles 1 and 2 of the Convention of Belem do Para. As has been noted previously by this tribunal, the Convention on the Elimination of Discrimination of all forms of Violence against Women has maintained the definition of discrimination against women to “include violence based on sex, that is, violence directed at a women [i] because hse is a women or[iii] because it affects her in a disproportionate form.” Moreover, it has also noted that “[t]he violence against women is a form of discrimination that severely impedes the enjoyment of rights and freedoms as to those of man.” *Cf.*, In this regard, *Case of González et al.s (“Campo Algodonero”), supra* note 79, para. 395; *Case of Fernández Ortega et al.. V. México. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 30, 2010 Series C No. 215, para. 129, and *Case of Rosendo Cantú et al. supra* note 9, para. 120.

111 Testimony of Sara Méndez. Rendered by Juan Gelman during the public hearing.

112 *Cf.*, *mutatis mutandi*, *Case of del Penal Miguel Castro Castro V. Perú. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C No. 160, para. 103.

99. This enforced disappearance constitutes, due to the nature of the injured rights, a violation of a *jus cogens* principle, especially serious because it occurred in the context of a systematic practice of “State-sponsored terrorism,” at an inter-state level¹¹³.

100. The preparation and execution of the arrest and subsequent disappearance of María Claudia García could not have been perpetrated without the knowledge or higher orders of the military, police, and intelligence headquarters at the time, or without the collaboration, acquiescence, or tolerance, manifested in various actions, carried out in a coordinated or concatenated manner, by members of the security forces and intelligence services (and even diplomats) of the States involved, wherein State agents not only grossly failed in the obligations to prevent and protect against violations of the rights of the alleged victims, enshrined in Articles 1(1) of the American Convention, but also used the official investiture and resources provided by the State to commit the violations.

101. In consideration of the preceding, in relation with the enforced disappearance that continues to this date, the Court finds that the State is responsible for the violation of the personal liberty, to the personal integrity, to the right to juridical personality, and to life of María Claudia García Iruetagoiena de Gelman, recognized in Articles 7(1); 5(1) and 5(2); 3 and 4(1), given the failure to comply with the obligation to respect and guarantee rights, established in Article 1(1) of the American Convention, in relation with Articles I and XI of the Inter-American Convention on the Forced Disappearance of Persons¹¹⁴.

[...]

113 As such, it may be classified as a crime against humanity.

114 In various cases, the Court has analyzed, or declared the violation, of the provisions mentioned in the Inter-American Convention on Forced Disappearance. In this regard, see the following cases: Case of Blanco Romero et al. V. Venezuela, arts. I, X and XI; Case of Heliodoro Portugal V. Panamá. arts. I and II; Case of Tiu Tojín V. Guatemala, art. I; Case of Ticona Estrada V. Bolivia, arts. I, III and XI; Case of Anzualdo Castro V. Perú, arts. I and II; Case of Radilla Pacheco V. México, arts. I and II; Case of Ibsen Cárdenas V. Bolivia, arts. I and XI; and Case of Chitay Nech et al. V. Guatemala.

VIII. OPERATIVE PARAGRAPHS

312. Therefore,

THE COURT, DECLARES,

unanimously, that:

2. The State is responsible for the enforced disappearance of María Claudia García Iruretagoyena de Gelman, wherein it violated her right to juridical personality, to life, to humane treatment [personal integrity], and to personal liberty, recognized in Articles 3, 4, 5, and 7, in relation to Article 1(1) of the American Convention on Human Rights and Articles I and XI of the Inter-American Convention on Forced Disappearance of Persons, in the terms of paragraphs 44 to 63 and 79 to 101 of the Judgment.

*Inter-American Commission
on Human Rights*

*Baby Boy v.
United States of America*

*Case 2141
Resolution 23/81
March 6, 1981*



SUMMARY OF THE CASE

1. On January 19, 1977, Christian B. White and Gary K. Potter, filed with the Inter-American Commission on Human Rights a petition against the United States of America and the Commonwealth of Massachusetts for the purposes established in the Statute and Regulations of the Commission. The petition is accompanied by a cover letter of the Catholics for Christian Political Action, signed by Gary Potter, President.

2. The pertinent parts of the petition are the following:

Name of the person whose human rights have been violated: "Baby Boy" (...).

Address: Boston City Hospital, Boston Massachusetts.

Description of the violation: Victim was killed by abortion process (hysterectomy), by Dr. Kenneth Edelin, M.D., in violation of the right to life granted by the American Declaration of the Rights and Duties of Man, as clarified by the definition and description of the American Convention on Human Rights (...).

Place and date of the violation: Boston City Hospital, Boston, Massachusetts, October 3, 1973, U.S. Supreme Court Building, Washington, D.C. January 22, 1973.

Local authority who took cognizance of the act and the date on which this occurred: District Attorney's Office, Boston, Massachusetts.

Judge or court which took cognizance of the act and the date on which this occurred: Superior Court of Boston, Massachusetts, Judge McGuire sitting, April 5-11, 1976._

Final decision of the authority (if any) that acted in the matter: The Supreme Judicial Court of Massachusetts, Boston, Massachusetts, acquitted Edelin on appeal, on December 17, 1976._

In the case of it not being possible to have recourse to a local authority, judge or court, explain the reasons for such impossibility: On a related point, no appeal to the Supreme Court of the United States is possible (...)._

[...]

The undersigned should indicate whether they wish their identity to be withheld: No withholding is necessary.

3. In the “Amplificatory Document” attached to the petition; the petitioners add, inter alia, the following information and arguments:

a) The victim in this case, a male child not yet come to the normal term of pregnancy, has from the beginning been identified by the Massachusetts authorities only as “Baby Boy”,

b) This violation of the following rights granted by the American Declaration of the Rights and Duties of Man, Chapter 1, Article I (“... right to life...”, Article II (“All persons are equal before the law... without distinction as to race, sex, language, creed, or any other factor,” here, age), Article VII (“All children have the right to special protection, care, and aid”) and Article XI (“Every person has the right to the preservation of his health...”) began on January 22, 1973, when the Supreme Court of the United States handed down its decisions in the cases of *Roe vs. Wade*, 410 U.S. 113¹ and *Doe vs. Bolton*, 410 U.S. 179.

c) The effect of the *Wade* and *Bolton* decisions, *supra*, in ending the legal protection of unborn children set the stage for the deprivation of “Baby Boy’s right to life. These decisions in and of themselves constitute a violation of his right to life, and the United States of America therefore stands accused of a violation of Chapter 1, Article I of the American Declaration of the Rights and Duties of Man.

The United States Government, through its Supreme Court, is guilty of that violation.

d) At trial, the jury found Dr. Edelin guilty of manslaughter, necessarily finding as fact that the child was such as to fit within a “protectable exception” (over six months past conception and/or alive outside the womb) to the Supreme Court of the United States’ rubric in the *Wade* and *Bolton* cases. On appeal, the Supreme Judicial Court of Massachusetts reversed (...).

e) This decision came down on December 17, 1976, and, by preventing Dr. Edelin from being punished for his acts, put the State of Massachusetts in the posture of violating “Baby Boy’s” right to life under the Declaration.

1 “410 U.S. 113” means United States Reports, vol. 410, p.113. This explanation is offered for the benefit of persons unfamiliar with United States systems of legal reporting and case citation.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

Whereas:

[...]

18. The first violation denounced in the petition concerns article I of the American Declaration of Rights and Duties of Man: "Every human being has the right to life...". The petitioners admitted that the Declaration does not respond "when life begins," "when a pregnancy product becomes a human being" or other such questions. However, they try to answer these fundamental questions with two different arguments:

a) The travaux préparatoires, the discussion of the draft Declaration during the IX International Conference of American States at Bogotá in 1948 and the final vote, demonstrate that the intention of the Conference was to protect the right to life "from the moment of conception."

b) The American Convention on Human Rights, promulgated to advance the Declaration's high purposes and to be read as a corollary document, gives a definition of the right to life in article 4.1: "This right shall be protected by law from the moment of conception."

19. A brief legislative history of the Declaration does not support the petitioner's argument, as may be concluded from the following information and documents:

a) Pursuant to Resolution XL of the Inter-American Conference on Problems of War and Peace (Mexico, 1945), the Inter-American Juridical Committee of Rio de Janeiro, formulated a preliminary draft of an International Declaration of the Rights and Duties of Man to be considered by the Ninth International Conference of American States (Bogotá, 1948). This preliminary draft was used by the Conference as a basis of discussion in conjunction with the draft of a similar Declaration prepared by the United Nations in December, 1947.

b) Article 1 - Right to Life - of the draft submitted by the Juridical Committee reads: "Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." (Novena Conferencia Internacional Americana - Actas y Documentos Vol. V Pág. 449).

c) A Working Group was organized to consider the observations and amendments introduced by the Delegates and to prepare an acceptable document. As a result of its work, the Group submitted to the Sixth Committee a new draft entitled American

Declaration of the Fundamental Rights and Duties of Man, article I of which reads: “Every human being has the right to life, liberty, security and integrity of this person.”

d) This completely new article I and some substantial changes introduced by the Working Group in other articles has been explained, in its Report of the Working Group to the Committee, as a compromise to resolve the problems raised by the Delegations of Argentina, Brazil, Cuba, United States of America, Mexico, Peru, Uruguay and Venezuela, mainly as consequence of the conflict existing between the laws of those States and the draft of the Juridical Committee. (Actas y Documentos Vol. 5 pages 474-484, 495-504, 513-515).

e) In connection with the right to life, the definition given in the Juridical Committee’s draft was incompatible with the laws governing the death penalty and abortion in the majority of the American States. In effect, the acceptance of this absolute concept--the right to life from the moment of conception--would imply the obligation to derogate the articles of the Penal Codes in force in 1948 in many countries because such articles excluded the penal sanction for the crime of abortion if performed in one or more of the following cases: A-when necessary to save the life of the modern; B-to interrupt the pregnancy of the victim of a rape; C-to protect the honor of an honest woman; D-to prevent the transmission to the fetus of a hereditary on contagious disease; E-for economic reasons (*angustia económica*).

f) In 1948, the American States that permitted abortion in one of such cases and, consequently, would be affected by the adoption of article I of the Juridical Committee, were; Argentina - article 86 n.1, 2 (cases A and B); Brasil - article n.I, II (A and B); Costa Rica - article 199 (A); Cuba - article 443 (A, B and D); Ecuador -article 423 n.I, 2 (A and B); Mexico (Distrito y Territorios Federales) - articles 333e 334 (A and B); Nicaragua - article 399 (frustrated attempt) (C); Paraguay - article 352 (A); Peru - article 163 (A-to save the life or health of the mother); Uruguay - article 328 n. 1-5 (A, B, C. and F - the abortion must be performed in the three first months from conception); Venezuela - article 435 (A); United States of America - see the State laws and precedents*; Puerto Rico S S 266, 267 (A) (*Códigos Penales Iberoamericanos - Luis Jiménez de Asua - Editorial Andrés Bello - Caracas, 1946 - volúmenes I y II*).

g) On April 22, 1948, the new article I of the Declaration prepared by the Working Group was approve by the Sixth Committee with a slight change in the wording of the Spanish text (there was no official English text at that stage) (Actas y Documentos) vol. V pages 510-516 and 578). Finally, the definitive text of the Declaration

* Daniel Callahan - Abortion: Law, Choice and Morality. William A.Nolen - The Baby in the Bottle - Cowarn, McCann & Geoghengan, Inc. -New York, 1978; 410 U.S. 113 provites a list of the articles of State’s Penal Codes and similar statutes on abortion in existence in a majority of states in 1973 (pages 118-119).

in Spanish, English, Portuguese and French was approved by the 7th plenary Session of the Conference on April 30, 1948, and the Final Act was signed May 2nd. The only difference in the final text is the elimination of the word “integrity” (Actas y Documentos vol. VI pages 297-298; vol. I pages 231, 234, 236, 260, 261).

h) Consequently, the defendant is correct in challenging the petitioners’ assumption that article 1 of the Declaration has incorporated the notion that the right of life exists from the moment of conception. Indeed, the conference faced this question but chose not to adopt language which would clearly have stated that principle.

20. The second argument of the petitioners, related to the possible use of the Convention as an element for the interpretation of the Declaration requires also a study of the motives that prevailed at the San José Diplomatic Conference with the adoption of the definition of the right to life.

21. The Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, held at Santiago, Chile in 1959, entrusted the Inter-American Council of Jurists with the preparation of a draft of the Convention on Human Rights contemplated by the American States since the Mexico Conference in 1945.

22. The draft, concluded by the Commission in about two weeks, developed the American Declaration of Bogotá, but has been influenced also by other sources, including the work in course at the United Nations. It consists of 88 articles, begin with a definition of the right to life (article 2), which reintroduced the concept that “This right shall be protected by law from the moment of conception.” (Inter-American Year-book, 1968 - Organization of American States, Washington, 1973 - pages 67, 237.)

23. The Second Special Conference of Inter-American States (Rio de Janeiro, 1965) considered the draft of the Council with two other drafts presented by the Governments of Chile and Uruguay, respectively, and asked the Council of the OAS, in cooperation with the IACHR, to prepare the draft of the Convention to be submitted to the diplomatic conference to be called for this purpose.

24. The Council of the OAS, considering the Opinion enacted by the IACHR on the draft convention prepared by the Council of Jurists, give a mandate to Convention to be submitted as working document to the San José conference (Yearbook, 1968, pages 73-93.)

25. To accommodate the views that insisted on the concept “from the moment of conception,” with the objection raised, since the Bogota Conference, based on the legisla-

tion of American States that permitted abortion, inter alia, to save the mother's life, and in case of rape, the IACHR, redrafting article 2 (Right to life), decided, by majority vote, to introduce the words "in general." This compromise was the origin of the new text of article 2 "1. Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception." (Yearbook, 1968, page 321.)

26. The rapporteur of the Opinion_{proposed}, at this second opportunity for discussion of the definition of the right of life, to delete the entire final phrase "...in general, from the moment of conception." He repeated the reasoning of his dissenting opinion in the Commission; based on the abortion laws in force in the majority of the American States, with an addition: "to avoid any possibility of conflict with article 6, paragraph 1, of the United Nations Covenant on Civil and Political Rights, which states this right in a general way only." (Yearbook, 1968 - page 97).

27. However, the majority of the Commission believed that, for reasons of principle, it was fundamental to state the provision on the protection of the right to life in the form recommended to the Council of the OAS in its Opinion (Part One). It was accordingly decided to keep the text of paragraph 1 without change. (Yearbook, 1968, page 97).

28. In the Diplomatic Conference that approved the American Convention, the Delegations of Brazil and the Dominican Republic introduced separate amendments to delete the final phrase of paragraph 1 of article 3 (Right to life) "in general, from the moment of conception". The United States delegation supported the Brazilian position. (Conferencia Especializada Interamericana sobre Derechos Humanos - ACTAS Y DOCUMENTOS - Washington 1978 (reprinted) - pages 57, 121 y 160.)

29. Conversely, the Delegation of Ecuador supported the deletion of the words "and in general". Finally, by majority vote, the Conference adopted the text of the draft submitted by the IACHR and approved by the Council of the OAS, which became the present text of article 4, paragraph 1, of the American Convention (ACTAS Y DOCUMENTOS - pages 160 and 481.)

30. In the light of this history, it is clear that the petitioners' interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase "in general, from the moment of conception" does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration. The legal implications of the

clause “in general, from the moment of conception” are substantially different from the shorter clause “from the moment of conception” as appears repeatedly in the petitioners’ briefs.

[...]

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

Resolves:

1. The decision of the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts and other facts stated in the petition do not constitute a violation of articles I, II, VII and XI of the American Declaration of Rights and Duties of Man.

*European Court
of Human Rights*

*Open Door and Dublin Well Woman
v. Ireland*

*Application N° 14234/88
and 14235/88*

*Judgment of
October 29, 1992*



[...]

THE FACTS

I. INTRODUCTION

The applicants

9. The applicants in this case are (a) *Open Door Counselling Ltd* (hereinafter referred to as Open Door), a company incorporated under Irish law, which was engaged, inter alia, in counselling pregnant women in Dublin and in other parts of Ireland; and (b) *Dublin Well Woman Centre Ltd* (hereinafter referred to as Dublin Well Woman), a company also incorporated under Irish law which provided similar services at two clinics in Dublin; (c) Bonnie Maher and Ann Downes, who worked as trained counsellors for Dublin Well Woman; (d) Mrs X, born in 1950 and Ms Maeve Geraghty, born in 1970, who join in the Dublin Well Woman application as women of child-bearing age. The applicants complained of an injunction imposed by the Irish courts on Open Door and Dublin Well Woman to restrain them from providing certain information to pregnant women concerning abortion facilities outside the jurisdiction of Ireland by way of non-directive counselling (...). Open Door and Dublin Well Woman are both non-profit-making organisations. Open Door ceased to operate in 1988 (...). Dublin Well Woman was established in 1977 and provides a broad range of services relating to counselling and marriage, family planning, procreation and health matters. The services offered by Dublin Well Woman relate to every aspect of women's health, ranging from smear tests to breast examinations, infertility, artificial insemination and the counselling of pregnant women.

[...]

III. ALLEGED VIOLATION OF ARTICLE 10

53. The applicants alleged that the Supreme Court injunction, restraining them from assisting pregnant women to travel abroad to obtain abortions, infringed the rights of the corporate applicants and the two counsellors to impart information, as well as the rights of Mrs X and Ms Geraghty to receive information. They confined their complaint to that part of the injunction which concerned the provision of information to pregnant women as opposed to the making of travel arrangements or referral to clinics (...). They invoked

Article 10 which provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers (...).
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

A. Was there an interference with the applicants' rights?

55. The Court notes that the Government accepted that the injunction interfered with the freedom of the corporate applicants to impart information. Having regard to the scope of the injunction which also restrains the "servants or agents" of the corporate applicants from assisting "pregnant women" (...), there can be no doubt that there was also an interference with the rights of the applicant counsellors to impart information and with the rights of Mrs X and Ms Geraghty to receive information in the event of being pregnant.

To determine whether such an interference entails a violation of Article 10, the Court must examine whether or not it was justified under Article 10 para. 2 by reason of being a restriction "prescribed by law" which was necessary in a democratic society on one or other of the grounds specified in Article 10 para. 2.

B. Was the restriction "prescribed by law"?

[...]

2. *Court's examination of the issue*

59. This question must be approached by considering not merely the wording of Article 40.3.3° in isolation but also the protection given under Irish law to the rights of the unborn in statute law and in case-law (...).

It is true that it is not a criminal offence to have an abortion outside Ireland and that the practice of non-directive counselling of pregnant women did not infringe the criminal law

as such. Moreover, on its face the language of Article 40.3.3° appears to enjoin only the State to protect the right to life of the unborn and suggests that regulatory legislation will be introduced at some future stage (...).

60. Taking into consideration the high threshold of protection of the unborn provided under Irish law generally and the manner in which the courts have interpreted their role as the guarantors of constitutional rights, the possibility that action might be taken against the corporate applicants must have been, with appropriate legal advice, reasonably foreseeable (See the *Sunday Times v. the United Kingdom* judgment of 26 April 1979, Series A no. 30, p. 31, para. 49). This conclusion is reinforced by the legal advice that was actually given to Dublin Well Woman that, in the light of Article 40.3.3°, an injunction could be sought against its counselling activities (...).

The restriction was accordingly “prescribed by law”.

C. Did the restriction have aims that were legitimate under Article 10 para. 2?

61. The Government submitted that the relevant provisions of Irish law are intended for the protection of the rights of others -in this instance the unborn-, for the protection of morals and, where appropriate, for the prevention of crime.

62. The applicants disagreed, contending *inter alia* that, in view of the use of the term “everyone” in Article 10 para. 1 and throughout the Convention, it would be illogical to interpret the “rights of others” in Article 10 para. 2 as encompassing the unborn.

63. The Court cannot accept that the restrictions at issue pursued the aim of the prevention of crime since, as noted above (paragraph 59), neither the provision of the information in question nor the obtaining of an abortion outside the jurisdiction involved any criminal offence. However, it is evident that the protection afforded under Irish law to the right to life of the unborn is based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion as expressed in the 1983 referendum (...). The restriction thus pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn is one aspect. It is not necessary in the light of this conclusion to decide whether the term “others” under Article 10 para. 2 extends to the unborn.

D. Was the restriction necessary in a democratic society?

[...]

1. Article 2

[...]

66. The Court observes at the outset that in the present case it is not called upon to examine whether a right to abortion is guaranteed under the Convention or whether the foetus is encompassed by the right to life as contained in Article 2. The applicants have not claimed that the Convention contains a right to abortion, as such, their complaint being limited to that part of the injunction which restricts their freedom to impart and receive information concerning abortion abroad (...).

Thus the only issue to be addressed is whether the restrictions on the freedom to impart and receive information contained in the relevant part of the injunction are necessary in a democratic society for the legitimate aim of the protection of morals as explained above (see paragraph 63). (...)

2. Proportionality

[...]

68. The Court cannot agree that the State's discretion in the field of the protection of morals is unfettered and unreviewable (see, *mutatis mutandis*, for a similar argument, the *Norris v. Ireland* judgment of 26 October 1988, Series A no. 142, p. 20, para. 45).

It acknowledges that the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals, and the State authorities are, in principle, in a better position than the international judge to give an opinion on the exact content of the requirements of morals as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (see, *inter alia*, the *Handyside v. the United Kingdom* judgment of 7 December 1976, Series A no. 24, p. 22, para. 48, and the *Müller and others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 22, para. 35).

However this power of appreciation is not unlimited. It is for the Court, in this field also, to supervise whether a restriction is compatible with the Convention.

69. As regards the application of the “proportionality” test, the logical consequence of the Government’s argument is that measures taken by the national authorities to protect the right to life of the unborn or to uphold the constitutional guarantee on the subject would be automatically justified under the Convention where infringement of a right of a lesser stature was alleged. It is, in principle, open to the national authorities to take such action as they consider necessary to respect the rule of law or to give effect to constitutional rights. However, they must do so in a manner which is compatible with their obligations under the Convention and subject to review by the Convention institutions. To accept the Government’s pleading on this point would amount to an abdication of the Court’s responsibility under Article 19 “to ensure the observance of the engagements undertaken by the High Contracting Parties ...”.

70. Accordingly, the Court must examine the question of “necessity” in the light of the principles developed in its case-law (see, *inter alia*, the *Observer and Guardian v. the United Kingdom* judgment of 26 November 1991, Series A no. 216, pp. 29-30, para. 59). It must determine whether there existed a pressing social need for the measures in question and, in particular, whether the restriction complained of was “proportionate to the legitimate aim pursued” (*ibid.*).

71. In this context, it is appropriate to recall that freedom of expression is also applicable to “information” or “ideas” that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society” (see, *inter alia*, the above-mentioned *Handyside* judgment, Series A no. 24, p. 23, para. 49).

72. While the relevant restriction, as observed by the Government, is limited to the provision of information, it is recalled that it is not a criminal offence under Irish law for a pregnant woman to travel abroad in order to have an abortion. Furthermore, the injunction limited the freedom to receive and impart information with respect to services which are lawful in other Convention countries and may be crucial to a woman’s health and well-being. Limitations on information concerning activities which, notwithstanding their moral implications, have been and continue to be tolerated by national authorities, call for careful scrutiny by the Convention institutions as to their conformity with the tenets of a democratic society.

73. The Court is first struck by the absolute nature of the Supreme Court injunction which imposed a “perpetual” restraint on the provision of information to pregnant women concerning abortion facilities abroad, regardless of age or state of health or their reasons for seeking counselling on the termination of pregnancy. The sweeping nature of this restriction has since been highlighted by the case of *The Attorney General v. X and others* and by the concession made by the Government at the oral hearing that the injunction no longer applied to women who, in the circumstances as defined in the Supreme Court’s judgment in that case, were now free to have an abortion in Ireland or abroad (...).

74. On that ground alone the restriction appears over broad and disproportionate. Moreover, this assessment is confirmed by other factors.

75. In the first place, it is to be noted that the corporate applicants were engaged in the counselling of pregnant women in the course of which counsellors neither advocated nor encouraged abortion, but confined themselves to an explanation of the available options (...). The decision as to whether or not to act on the information so provided was that of the woman concerned. There can be little doubt that following such counselling there were women who decided against a termination of pregnancy. Accordingly, the link between the provision of information and the destruction of unborn life is not as definite as contended. Such counselling had in fact been tolerated by the State authorities even after the passing of the Eighth Amendment in 1983 until the Supreme Court’s judgment in the present case. Furthermore, the information that was provided by the relevant applicants concerning abortion facilities abroad was not made available to the public at large.

76. It has not been seriously contested by the Government that information concerning abortion facilities abroad can be obtained from other sources in Ireland such as magazines and telephone directories (...) or by persons with contacts in Great Britain. Accordingly, information that the injunction sought to restrict was already available elsewhere although in a manner which was not supervised by qualified personnel and thus less protective of women’s health. Furthermore, the injunction appears to have been largely ineffective in protecting the right to life of the unborn since it did not prevent large numbers of Irish women from continuing to obtain abortions in Great Britain (...).

77. In addition, the available evidence, which has not been disputed by the Government, suggests that the injunction has created a risk to the health of those women who are now seeking abortions at a later stage in their pregnancy, due to lack of proper counselling, and who are not availing themselves of customary medical supervision after

the abortion has taken place (...). Moreover, the injunction may have had more adverse effects on women who were not sufficiently resourceful or had not the necessary level of education to have access to alternative sources of information (see paragraph 76 above). These are certainly legitimate factors to take into consideration in assessing the proportionality of the restriction.

3. Articles 17 and 60

78. The Government, invoking Articles 17 and 60 of the Convention, have submitted that Article 10 should not be interpreted in such a manner as to limit, destroy or derogate from the right to life of the unborn which enjoys special protection under Irish law.

79. Without calling into question under the Convention the regime of protection of unborn life that exists under Irish law, the Court recalls that the injunction did not prevent Irish women from having abortions abroad and that the information it sought to restrain was available from other sources (see paragraph 76 above). Accordingly, it is not the interpretation of Article 10 but the position in Ireland as regards the implementation of the law that makes possible the continuance of the current level of abortions obtained by Irish women abroad.

4. Conclusion

80. In the light of the above, the Court concludes that the restraint imposed on the applicants from receiving or imparting information was disproportionate to the aims pursued. Accordingly there has been a breach of Article 10.

[...]

FOR THESE REASONS, THE COURT

[...]

3. Holds by fifteen votes to eight that there has been a violation of Article 10 (art. 10);

[...].

*European Court
of Human Rights*

Tysic v. Poland

Application N 5410/03

*Judgment of
March 20, 2007*



[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

9. The applicant became pregnant in February 2000. She had previously had two children, both born by caesarean section. As the applicant was worried about the possible impact of the delivery on her health, she decided to consult her doctors. She was examined by three ophthalmologists (Dr M.S., Dr N. S.-B., Dr K.W.). It transpires from the documents submitted by the applicant that Dr M.S. recommended that the applicant have frequent health checks and avoid physical exertion. Dr N. S.-B. stated that the applicant should consider sterilisation after the birth. All of them concluded that, due to pathological changes in the applicant's retina, the pregnancy and delivery constituted a risk to her eyesight. However, they refused to issue a certificate for the pregnancy to be terminated, despite the applicant's requests, on the ground that the retina might detach itself as a result of pregnancy, but that it was not certain.

10. Subsequently, the applicant sought further medical advice. On 20 April 2000 Dr. O. R. G., a general practitioner (GP), issued a certificate stating that the third pregnancy constituted a threat to the applicant's health as there was a risk of rupture of the uterus, given her two previous deliveries by caesarean section. She further referred to the applicant's short sightedness and to significant pathological changes in her retina. These considerations, according to the GP, also required that the applicant should avoid physical strain which in any case would hardly be possible as at that time the applicant was raising two small children on her own. The applicant understood that on the basis of this certificate she would be able to terminate her pregnancy lawfully.

11. On 14 April 2000, in the second month of the pregnancy, the applicant's eyesight was examined. It was established that she needed glasses to correct her vision in both eyes by 24 dioptries.

12. Subsequently, the applicant contacted a state hospital, the Clinic of Gynaecology and Obstetrics in Warsaw, in the area to which she was assigned on the basis of her residence, with a view to obtaining the termination of her pregnancy. On 26 April 2000 she had an appointment with Dr R.D., head of the Gynaecology and Obstetrics Department of the Clinic.

13. Dr. R.D. examined the applicant visually and for a period of less than five minutes, but did not examine her ophthalmological records. Afterwards, he made a note on the back of the certificate issued by Dr O.R.G. that neither her short-sightedness nor her two previous deliveries by caesarean section constituted grounds for therapeutic termination of the pregnancy. He was of the view that, in these circumstances, the applicant should give birth by caesarean section. During the applicant's visit Dr R.D. consulted an endocrinologist, Dr B., whispering to her in the presence of the applicant. The endocrinologist co-signed the note written by Dr R.D., but did not talk to the applicant.

14. The applicant's examination was carried out in a room with the door open to the corridor, which, in the applicant's submission, did not provide a comfortable environment for a medical examination. At the end of the appointment Dr R.D. told the applicant that she could even have eight children if they were delivered by caesarean section.

15. As a result, the applicant's pregnancy was not terminated. The applicant delivered the child by caesarean section in November 2000.

16. After the delivery her eyesight deteriorated badly. On 2 January 2001, approximately six weeks after the delivery, she was taken to the Emergency Unit of the Ophthalmological Clinic in Warsaw. While doing a test of counting fingers, she was only able to see from a distance of three metres with her left eye and five metres with her right eye, whereas before the pregnancy she had been able to see objects from a distance of six metres. A reabsorbing vascular occlusion was found in her right eye and further degeneration of the retinal spot was established in the left eye.

17. According to a medical certificate issued on 14 March 2001 by an ophthalmologist, the deterioration of the applicant's eyesight had been caused by recent haemorrhages in the retina. As a result, the applicant is currently facing a risk of blindness. Dr M.S., the ophthalmologist who examined the applicant, suggested that she should be learning the Braille alphabet. She also informed the applicant that, as the changes to her retina were at a very advanced stage, there were no prospects of having them corrected by surgical intervention.

18. On 13 September 2001 the disability panel declared the applicant to be significantly disabled, while previously she had been recognised as suffering from a disability of medium severity. It further held that she needed constant care and assistance in her everyday life.

19. On 29 March 2001 the applicant lodged a criminal complaint against Dr R.D., alleging that he had prevented her from having her pregnancy terminated on medical grounds as recommended by the GP and permissible as one of the exceptions to a general ban on abortion. She complained that, following the pregnancy and delivery, she had sustained severe bodily harm by way of almost complete loss of her eyesight. She relied on Article 156 § 1 of the Criminal Code, which lays down the penalty for the offence of causing grievous bodily harm, and also submitted that, under the applicable provisions of social-insurance law, she was not entitled to a disability pension as she had not been working the requisite number of years before the disability developed because she had been raising her children.

[...]

29. In a final decision of 2 August 2002, not subject to a further appeal and numbering twenty-three lines, the District Court upheld the decision to discontinue the case. Having regard to the medical expert report, the court considered that the refusal to terminate the pregnancy had not had a bearing on the deterioration of the applicant's vision. Furthermore, the court found that the haemorrhage in the applicant's eyes had in any event been likely to occur, given the degree and nature of the applicant's condition. The court did not address the procedural complaint which the applicant had made in her appeal against the decision of the district prosecutor.

30. The applicant also attempted to bring disciplinary proceedings against Dr R.D. and Dr B. However, those proceedings were finally discontinued on 19 June 2002, the competent authorities of the Chamber of Physicians finding that there had been no professional negligence.

31. Currently, the applicant can see objects only from a distance of approximately 1.5 metres and is afraid of going blind. On 11 January 2001 the social welfare centre issued a certificate to the effect that the applicant was unable to take care of her children as she could not see from a distance of more than 1.5 metres. On 28 May 2001 a medical panel gave a decision certifying that she suffered from a significant disability. She is at present unemployed and in receipt of a monthly disability pension of PLN 560. She raises her three children alone.

[...]

THE LAW

II. THE MERITS OF THE CASE

[...]

B. Alleged violation of Article 8 of the Convention

67. The applicant complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to due respect for her private life and her physical and moral integrity had been violated both substantively, by failing to provide her with a legal therapeutic abortion, and as regards the State's positive obligations, by the absence of a comprehensive legal framework to guarantee her rights. Article 8 of the Convention insofar as relevant, reads as follows:

1. Everyone has the right to respect for his private life (...).
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of elath or morals, or for the protection of the rights and freedoms of others.

[...]

2. The Court's assessment

a. The scope of the case

103. The Court notes that in its decision on admissibility of 7 February 2006 it declared admissible the applicant's complaints Articles 3, 8, 13 and 8 read together with Article 14 of the Convention. Thus, the scope of the case before the Court is limited to the complaints which it has already declared admissible (see, among many authorities, Sokur v. Ukraine, no. 29439/02, § 25, 26 April 2005).

104. In this context, the Court observes that the applicable Polish law, the 1993 Act, while it prohibits abortion, provides for certain exceptions. In particular, under section 4 (a) 1 (1) of that Act, abortion is lawful where pregnancy poses a threat to the woman's life or health, certified by two medical certificates, irrespective of the stage reached in

pregnancy. Hence, it is not the Court's task in the present case to examine whether the Convention guarantees a right to have an abortion.

b. Applicability of Article 8 of the Convention

105. The Court first observes that it is not disputed between the parties that Article 8 is applicable to the circumstances of the case and that it relates to the applicant's right to respect for her private life.

106. The Court agrees. It first reiterates that legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur. Comm. HR, *Bruggeman and Scheuten v. Germany*, cited above [July 12 1977 Report, DR]).

107. The Court also reiterates that "private life" is a broad term, encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see, among many other authorities, *Pretty v. the United Kingdom*, § 61). Furthermore, while the Convention does not guarantee as such a right to any specific level of medical care, the Court has previously held that private life includes a person's physical and psychological integrity and that the State is also under a positive obligation to secure to its citizens their right to effective respect for this integrity (*Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Pentiacova and others v. Moldova* (dec.), no. 14462/03, ECHR 2005-(...); *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC], no. 42326/98, ECHR 2003 III; *mutatis mutandis*). The Court notes that in the case before it a particular combination of different aspects of private life is concerned. While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of Mothers to be.

108. The Court finally observes that the applicant submitted that the refusal of an abortion had also amounted to an interference with her rights guaranteed by Article 8. However, the Court is of the view that the circumstances of the applicant's case and in particular the nature of her complaint are more appropriately examined from the standpoint of the respondent State's above-mentioned positive obligations alone.

c. General principles

109. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see e.g. *Olsson v. Sweden* (No. 1), judgment of 24 March 1988, Series A no 130, § 67).

110. In addition, there may also be positive obligations inherent in an effective “respect” for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

111. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p.19, § 49; *Ró a ski v. Poland*, no. 55339/00, § 61, 18 May 2006).

112. The Court observes that the notion of “respect” is not clear cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion’s requirements will vary considerably from case to case. Nonetheless, for the assessment of positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see *Iatridis v. Greece* [GC], no. 31107/96, § 58, ECHR 1999 II; *Carbonara and Ventura v. Italy*, no. 24638/94, § 63, ECHR 2000-VI; and *Capital Bank AD v. Bulgaria*, no. 49429/99, §133, ECHR 2005...). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded

by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67 and, more recently, *Hasan and Chaush v. Bulgaria* [GC], no. 30985/96, § 84, ECHR 2000 XI).

113. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect to the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *Hatton and others v. the United Kingdom* [GC], no. 36022/97, § 99, ECHR 2003-VIII).

d. Compliance with Article 8 of the Convention

114. When examining the circumstances of the present case, the Court must have regard to its general context. It notes that the 1993 Act prohibits abortion in Poland, providing only for certain exceptions. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (...). According to the Polish Federation for Women and Family Planning, the fact that abortion was essentially a criminal offence deterred physicians from authorising an abortion, in particular in the absence of transparent and clearly defined procedures determining whether the legal conditions for a therapeutic abortion were met in an individual case.

115. The Court also notes that in its fifth periodical report to the ICCPR, Committee the Polish Government acknowledged, *inter alia*, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (...). This further highlights, in the Court's view, the importance of procedural safeguards regarding access to a therapeutic abortion as guaranteed by the 1993 Act.

116. A need for such safeguards becomes all the more relevant in a situation where a disagreement arises as to whether the preconditions for a legal abortion are satisfied in a given case, either between the pregnant woman and her doctors, or between the

doctors themselves. In the Court's view, in such situations the applicable legal provisions must, first and foremost, ensure clarity of the pregnant woman's legal position. The Court further notes that the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.

117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence (see, among other authorities, *Rotaru v. Romania* [GC], no. 28341/95, ECHR 2000 V, §§ 55-63). In ascertaining whether this condition has been satisfied, a comprehensive view must be taken of the applicable procedures (*AGOSI v. the United Kingdom*, judgment of 24 October 1986, Series A no. 108, p. 19, § 55; and *Jokela v. Finland*, no. 28856/95, § 45, ECHR 2002 IV, *mutatis mutandis*). In circumstances such as those in issue in the instant case such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

118. In this connection the Court observes that the very nature of the issues involved in decisions to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function. In the Court's view, the absence of such preventive procedures in the domestic law can be said to amount to the failure of the State to comply with its positive obligations under Article 8 of the Convention.

119. Against this general background the Court observes that it is not in dispute that the applicant suffered from severe myopia from 1977. Even before her pregnancy she had been officially certified as suffering from a disability of medium severity (...). Having regard to her condition, during her third pregnancy the applicant sought medical advice. The Court observes that a disagreement arose between her doctors as to how the pregnancy and delivery might affect her already fragile vision. The advice given by the two

ophthalmologists was inconclusive as to the possible impact of the pregnancy on the applicant's condition. The Court also notes that the GP issued a certificate that her pregnancy constituted a threat to her health, while a gynaecologist was of a contrary view. The Court stresses that it is not its function to question the doctors' clinical judgment as regards the seriousness of the applicant's condition (*Glass v. the United Kingdom*, no 61827/00, § 87, ECHR 2004 II, *mutatis mutandis*). Nor would it be appropriate to speculate, on the basis of the medical information submitted to it, on whether their conclusions as to whether her pregnancy could or could not lead to a deterioration of her eyesight in the future were correct. It is sufficient to note that the applicant feared that the pregnancy and delivery might further endanger her eyesight. In the light of the medical advice she obtained during the pregnancy and, significantly, the applicant's condition at that time, taken together with her medical history, the Court is of the view that her fears cannot be said to have been irrational.

120. The Court has examined how the legal framework regulating the availability of a therapeutic abortion in Polish law was applied to the applicant's case and how it addressed her concerns about the possible negative impact of pregnancy and delivery on her health.

121. The Court notes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (...). However, the Court observes that this Ordinance only stipulated the professional qualifications of doctors who could perform a legal abortion.

It also made it necessary for a woman seeking an abortion on health grounds to obtain a certificate from a physician "specialising in the field of medicine relevant to [her] condition".

The Court notes that the Ordinance provides for a relatively simple procedure for obtaining a lawful abortion based on medical considerations: two concurring opinions of specialists other than the doctor who would perform an abortion are sufficient. Such a procedure allows for taking relevant measures promptly and does not differ substantially from solutions adopted in certain other member States. However, the Ordinance does not distinguish between situations in which there is a full agreement between the pregnant woman and the doctors - where such a procedure is clearly practicable - and cases where a disagreement arises between the pregnant woman and her doctors, or between the doctors themselves. The Ordinance does not provide for any particular procedural framework to address and resolve such controversies. It only obliges a woman to obtain a certificate from a specialist, without specifying any steps that she could take if her opinion and that of the specialist diverged.

122. It is further noted that the Government referred also to Article 37 of the 1996 Medical Profession Act (...). This provision makes it possible for a doctor, in the event of any diagnostic or therapeutic doubts, or upon a patient's request, to obtain a second opinion of a colleague. However, the Court notes that this provision is addressed to members of the medical profession. It only specifies the conditions in which they could obtain a second opinion of a colleague on a diagnosis or on the treatment to be followed in an individual case. The Court emphasises that this provision does not create any procedural guarantee for a patient to obtain such an opinion or to contest it in the event of a disagreement. Nor does it specifically address the situation of a pregnant woman seeking a lawful abortion.

123. In this connection, the Court notes that in certain State Parties various procedural and institutional mechanisms have been put in place in connection with the implementation of legislation specifying the conditions governing access to a lawful abortion (...).

124. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms capable of determining whether the conditions for obtaining a lawful abortion had been met in her case. It created for the applicant a situation of prolonged uncertainty. As a result, the applicant suffered severe distress and anguish when contemplating the possible negative consequences of her pregnancy and upcoming delivery for her health.

125. The Court is further of the opinion that the provisions of the civil law on tort as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. It could only, and if the applicant had been successful, have resulted in the courts granting damages to cover the irreparable damage to her health which had come to light after the delivery.

126. The Court further notes that the applicant requested that criminal proceedings against Dr R.D. be instituted, alleging that he had exposed her to grievous bodily harm by his refusal to terminate her pregnancy. The Court first observes that for the purposes of criminal responsibility it was necessary to establish a direct causal link between the acts complained of – in the present case, the refusal of an abortion – and the serious deterioration of the applicant's health. Consequently, the examination of whether there was a causal link between the refusal of leave to have an abortion and the subsequent deterioration of the applicant's eyesight did not concern the question whether the pregnancy had constituted a "threat" to her health within the meaning of section 4 of the 1993

Act. Crucially, the examination of the circumstances of the case in the context of criminal investigations could not have prevented the damage to the applicant's health from arising. The same applies to disciplinary proceedings before the organs of the Chamber of Physicians.

127. The Court finds that such retrospective measures alone are not sufficient to provide appropriate protection for the physical integrity of individuals in such a vulnerable position as the applicant (*Storck v. Germany*, no. 61603/00, § 150, ECHR 2005...).

128. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal remedies which make it possible to establish liability on the part of medical staff, the Polish State complied with the positive obligations to safeguard the applicant's right to respect for her private life in the context of a controversy as to whether she was entitled to a therapeutic abortion.

129. The Court therefore dismisses the Government's preliminary objection and concludes that the authorities failed to comply with their positive obligations to secure to the applicant the effective respect for her private life.

130. The Court concludes that there has been a breach of Article 8 the Convention.

[...]

FOR THESE REASONS, THE COURT

[...]

3. Holds by six votes to one that there has been a violation of Article 8 of the Convention in that the State failed to comply with its positive obligations to secure to the applicant the effective respect for her private life;

[...]

*European Court
of Human Rights*

Evans v. The United Kingdom

Application N° 6339/05

*Judgment of
April 10, 2007*



[...]

PROCEDURE

1. The case originated in an application (no. 6339/05) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a British national, Ms Natalie Evans (“the applicant”), on 11 February 2005.

[...]

THE FACTS

THE CIRCUMSTANCES OF THE CASE

[...]

A. The IVF Treatment

13. On 12 July 2000 the applicant and her partner, J (born in November 1976), commenced treatment at the Bath Assisted Conception Clinic (“the clinic”). The applicant had been referred for treatment at the clinic five years earlier, when she was married, but had not pursued it because of the breakdown of her marriage.

14. On 10 October 2000 the applicant and J were informed, during an appointment at the clinic, that preliminary tests had revealed that the applicant had serious pre-cancerous tumours in both ovaries, and that her ovaries would have to be removed. They were told that because the tumours were growing slowly, it would be possible first to extract some eggs for *in vitro* fertilisation (“IVF”), but that this would have to be done quickly.

15. The consultation of 10 October 2000 lasted approximately an hour in total. A nurse explained that the applicant and J would each have to sign a form consenting to the IVF treatment and that, in accordance with the provisions of the Human Fertilisation and Embryology Act 1990 (“the 1990 Act”), it would be possible for either to withdraw his or her consent at any time before the embryos were implanted in the applicant’s uterus (see paragraph 37 below). The applicant asked the nurse whether it would be possible to freeze her unfertilised eggs, but was informed that this procedure, which had a much lower chance of success, was not performed at the clinic. At that point J reassured the

applicant that they were not going to split up, that she did not need to consider the freezing of her eggs, that she should not be negative and that he wanted to be the father of her child.

16. Thereafter, the couple entered into the necessary consents, by signing the forms required by the 1990 Act (...).

Immediately beneath the title to the form appeared the following words:

“NB – do not sign this form unless you have received information about these matters and have been offered counselling. You may vary the terms of this consent at any time except in relation to sperm or embryos which have already been used. Please insert numbers or tick boxes as appropriate.”

J ticked the boxes which recorded his consent to use his sperm to fertilise the applicant's eggs *in vitro* and the use of the embryos thus created for the treatment of himself and the applicant together. He further ticked the box headed “Storage”, opting for the storage of embryos developed *in vitro* from his sperm for the maximum period of 10 years and also opted for sperm and embryos to continue in storage should he die or become mentally incapacitated within that period. The applicant signed a form which, while referring to eggs rather than sperm, essentially replicated that signed by J. Like J, she ticked the boxes providing for the treatment of herself and for the treatment “of myself with a named partner.”

17. On 12 November 2001 the couple attended the clinic and eleven eggs were harvested and fertilised. Six embryos were created and consigned to storage. On 26 November the applicant underwent an operation to remove her ovaries. She was told that she should wait two years before attempting to implant any of the embryos in her uterus.

B. The High Court proceedings

18. In May 2002 the relationship broke down. The future of the embryos was discussed between the parties. On 4 July 2002 J wrote to the clinic to notify it of the separation and to state that the embryos should be destroyed.

19. The clinic notified the applicant of J's lack of consent to further use of the embryos and informing her that it was now under a legal obligation to destroy them, pursuant to paragraph 8(2) of Schedule 3 to the 1990 Act (...)

[...]

THE LAW

[...]

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION*

[...]

B. The Court's assessment

1. The nature of the rights at issue under Article 8

71. It is not disputed between the parties that Article 8 is applicable and that the case concerns the applicant's right to respect for her private life. The Grand Chamber agrees with the Chamber that "private life", which is a broad term encompassing, *inter alia*, aspects of an individual's physical and social identity including the right to personal autonomy, personal development and to establish and develop relationships with other human beings and the outside world (see *Pretty*, cited above, § 61), incorporates the right to respect for both the decisions to become and not to become a parent.

72. It must be noted, however, that the applicant does not complain that she is in any way prevented from becoming a mother in a social, legal, or even physical sense, since there is no rule of domestic law or practice to stop her from adopting a child or even giving birth to a child originally created *in vitro* from donated gametes. The applicant's complaint is, more precisely, that the consent provisions of the 1990 Act prevent her from using the embryos she and J created together, and thus, given her particular circumstances, from ever having a child to whom she is genetically related. The Grand Chamber considers that this more limited issue, concerning the right to respect for the decision to become a parent in the genetic sense, also falls within the scope of Article 8.

* ed. Article 8 establishes:

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

73. The dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover, each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J's refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent. In the difficult circumstances of this case, whatever solution the national authorities might adopt would result in the interests of one or the other parties to the IVF treatment being wholly frustrated (cf. *Odièvre*, cited above, § 44).

[...]

2. *Whether the case involves a positive obligation or an interference*

75. Although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition. The applicable principles are nonetheless similar. In particular, in both instances regard must be had to the fair balance which has to be struck between the competing interests; and in both contexts the State enjoys a certain margin of appreciation (*Odièvre*, cited above, § 40).

76. In the domestic proceedings, the parties and the judges treated the issue as one involving an interference by the State with the applicant's right to respect for her private life, because the relevant provisions of the 1990 Act prevented the clinic from treating her once J had informed it that he did not consent. The Grand Chamber, however, like the Chamber, considers that it is more appropriate to analyse the case as one concerning positive obligations, the principal issue, as in the *Odièvre* case cited above, being whether the legislative provisions as applied in the present case struck a fair balance between the competing public and private interests involved. In this regard, the Grand Chamber accepts the findings of the domestic courts that J had never consented to the applicant using the jointly created embryos alone - his consent being limited to undergoing "treatment together" with the applicant (...). The Court does not find it of importance to the determination of the Convention issue, whether in these circumstances J is to be regarded as having "refused" rather than "withdrawn" his consent to the implantation of the embryos, as the Government argue (...).

3. *The margin of appreciation*

77. A number of factors must be taken into account when determining the breadth of the margin of appreciation to be enjoyed by the State in any case under Article 8. Where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (see, for example, *X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, §§ 24 and 27; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45; *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI; cf. *Pretty*, cited above, § 71). Where, however, there is no consensus within the Member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*X., Y. and Z. v. the United Kingdom*, judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, § 44; *Frette v. France*, no. 36515/97, § 41, ECHR 2002-I; *Christine Goodwin*, cited above, § 85; see also, *mutatis mutandis, Vo*, cited above, § 82). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Odièvre*, §§ 44-49 and *Frette* § 42).

[...]

79. In addition, while the Court is mindful of the applicant's submission to treat the comparative law data with caution, it is at least clear, and the applicant does not contend otherwise, that there is no uniform European approach in this field. Certain States have enacted primary or secondary legislation to control the use of IVF treatment, whereas in others this is a matter left to medical practice and guidelines. While the United Kingdom is not alone in permitting storage of embryos and in providing both gamete providers with the power freely and effectively to withdraw consent up until the moment of implantation, different rules and practices are applied elsewhere in Europe. It cannot be said that there is any consensus as to the stage in IVF treatment when the gamete providers' consent becomes irrevocable (...).

80. While the applicant contends that her greater physical and emotional expenditure during the IVF process, and her subsequent infertility, entail that her Article 8 rights should take precedence over J's, it does not appear to the Court that there is any clear consensus on this point either. The Court of Appeal commented on the difficulty of comparing the effect on J of being forced to become the father of the applicant's child

and that on the applicant of being denied the chance to have genetically-related offspring (see paragraphs 25-26 above), and this difficulty is also reflected in the range of views expressed by the two panels of the Israeli Supreme Court in *Nachmani* and in the United States case-law (...).

81. In conclusion, therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the Member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one (...).

82. The Grand Chamber, like the Chamber, considers that the above margin must in principle extend both to the State's decision whether or not to enact legislation governing the use of IVF treatment and, once having intervened, to the detailed rules it lays down in order to achieve a balance between the competing public and private interests.

4. *Compliance with Article 8*

84. The fact that it is now technically possible to keep human embryos in frozen storage gives rise to an essential difference between IVF and fertilisation through sexual intercourse, namely the possibility of allowing a lapse of time, which may be substantial, to intervene between creation of the embryo and its implantation in the uterus. The Court considers that it is legitimate – and indeed desirable – for a State to set up a legal scheme which takes this possibility of delay into account. In the United Kingdom, the solution adopted in the 1990 Act was to permit storage of embryos for a maximum of five years. In 1996 this period was extended by secondary legislation to ten or more years where one of the gamete providers or the prospective mother is, or is likely to become, prematurely infertile, although storage can never continue after the woman being treated reaches the age of 55 (...).

85. These provisions are complemented by a requirement on the clinic providing the treatment to obtain a prior written consent from each gamete provider, specifying, *inter alia*, the type of treatment for which the embryo is to be used (Schedule 3, paragraph 2(1) to the 1990 Act), the maximum period of storage, and what is to be done with it in the event of the gamete provider's death or incapacity (Schedule 3, paragraph 2(2)). Moreover, paragraph 4 of Schedule 3 provides that "the terms of any consent un-

der this Schedule may from time to time be varied, and the consent may be withdrawn, by notice given by the person who gave the consent to the person keeping the gametes or embryo ...” up until the point that the embryo has been “used” (that is, implanted in the uterus; see paragraph 37 above). Other States, with different religious, social and political cultures, have adopted different solutions to the technical possibility of delay between fertilisation and implantation (...). For the reasons set out above (paragraphs 77-82), the decision as to the principles and policies to be applied in this sensitive field must primarily be for each State to determine.

[...]

88. That Schedule places a legal obligation on any clinic carrying out IVF treatment to explain the consent provisions to a person embarking on such treatment and to obtain his or her consent in writing (...). It is undisputed that this occurred in the present case, and that the applicant and J both signed the consent forms required by the law. While the pressing nature of the applicant’s medical condition required her to make a decision quickly and under extreme stress, she knew, when consenting to have all her eggs fertilised with J’s sperm, that these would be the last eggs available to her, that it would be some time before her cancer treatment was completed and any embryos could be implanted, and that, as a matter of law, J would be free to withdraw consent to implantation at any moment.

89. While the applicant criticised the national rules on consent for the fact that they could not be disapplied in any circumstances, the Court does not find that the absolute nature of the law is, in itself, necessarily inconsistent with Article 8 (see also the *Pretty* and *Odièvre* cases cited in paragraph 60 above). Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature’s decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, what the Court of Appeal described as “entirely incommensurable” interests (...). In the Court’s view, these general interests pursued by the legislation are legitimate and consistent with Article 8.

90. As regards the balance struck between the conflicting Article 8 rights of the parties to the IVF treatment, the Grand Chamber, in common with every other court which has examined this case, has great sympathy for the applicant, who clearly desires a genetically related child above all else. However, given the above considerations, including the lack of any European consensus on this point (see paragraph 79 above), it does not consider that the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J's right to respect for his decision not to have a genetically-related child with her.

91. The Court accepts that it would have been possible for Parliament to regulate the situation differently. However, as the Chamber observed, the central question under Article 8 is not whether different rules might have been adopted by the legislature, but whether, in striking the balance at the point at which it did, Parliament exceeded the margin of appreciation afforded to it under that Article.

92. The Grand Chamber considers that, given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of Article 8 of the Convention.

[...]

FOR THESE REASONS, THE COURT

[...]

2. Holds, by thirteen votes to four, that there has been no violation of Article 8 of the Convention;

[...]

*JOINT DISSENTING OPINION OF JUDGES TÜRMEŒ, TSATSA-
NIKOLOVSKA, SPIELMANN AND ZIEMELE*

[...]

5. We are unable to subscribe to the Court's decision that it is more appropriate to analyse the case as one concerning positive obligations.

6. We see the case as one of interference with the applicant's right to respect for the decision to become a genetically related parent. We can accept that the interference was prescribed by law and had a legitimate aim in terms of the protection of public order and morals and the rights of others. But was this interference necessary and proportionate in the special circumstances of the case? We consider that the applicant's right to decide to become a genetically related parent weighs heavier than that of J's decision not to become a parent in the present case. Our reasons are as follows:

i) The 1990 Act does not provide for the possibility of taking into consideration the very special medical condition affecting the applicant. We can agree with the majority that, in particular where an issue is of a morally and ethically delicate nature, a bright line rule may best serve the various – often conflicting – interests at stake. It has been said that “the advantage of a clear law is that it provides certainty.” But it has also been admitted that “its disadvantage is that if it is too clear – categorical – it provides too much certainty and no flexibility¹”. Therefore, given the particular circumstances of the case, the main problem lies in the absolute nature of the “bright line rule”.

(...)

7. Therefore, in our view the application of the 1990 Act in the applicant's circumstances is disproportionate. Because of its absolute nature, the legislation precludes the balancing of competing interests in this particular case. In fact, even though the majority accepts that a balance has to be struck between the conflicting Article 8 rights of the parties to the IVF treatment (paragraph 90), no balance is possible in the circumstances of the present case since the decision upholding J's choice not to become a parent involves an absolute and final elimination of the applicant's decision. Rendering empty or meaningless a decision of one of the two parties cannot be considered as balancing the interests. It is to be noted that the case is not about the possibility of adopting a child or hosting a donated embryo (see paragraph 72). Incidentally, J will still be able to take a decision to become a parent of his own child, whereas the applicant has had her last chance.

8. The applicant underwent surgery to remove her ovaries (26 November 2001). Therefore, the eggs that were extracted from her for IVF treatment were her last

1 See M.-B. Dembour, *Who Believes in Human Rights? Reflections on the European Convention*, Cambridge, Cambridge University Press, 2006, p. 93..

chance to have a genetically related child. J not only knew this fact very well, but also gave her an assurance that he wanted to be the father of her child. Without such an assurance, the applicant could have tried to seek other ways to have a child of her own. In paragraph 90 of the judgment, where the majority tries to strike a balance between the rights and interests of the applicant and of J, no weight is given to this “assurance” element, that is, to the fact that the applicant acted in good faith, relying on the assurance given to her by J. The decisive date was 12 November 2001: the date when the eggs were fertilized and six embryos created. From that moment on, J was no longer in control of his sperm. An embryo is a joint product of two people, which, when planted into the uterus, will turn into a baby. The act of destroying an embryo also involves destroying the applicant’s eggs. In this sense too, the British legislation has failed to strike the right balance.

9. The particular circumstances of the case lead us to believe that the applicant’s interests weigh more heavily than J’s interests and that the United Kingdom authorities’ failure to take this into account constitutes a violation of Article 8.

10. Once again, we would like to emphasize that we agree with the majority that the 1990 Act *per se* is not contrary to Article 8 and that the consent rule is important for IVF treatment. We agree that, looking at the relevant legislation of the other States, different approaches emerge and that the Court is justified in saying that there is no European consensus on the details of regulation of IVF treatment. As we have said, however, we see the instant case differently since its circumstances make us look beyond the mere question of consent in a contractual sense. The values involved and issues at stake as far as the applicant’s situation is concerned weigh heavily against the formal contractual approach taken in this case.

[...]

12. A sensitive case like this cannot be decided on a simplistic, mechanical basis, namely, that there is no consensus in Europe, therefore the Government have a wide margin of appreciation (...).

Certainly, States have a wide margin of appreciation when it comes to enacting legislation governing the use of IVF. However, that margin of appreciation should not prevent the Court from exercising its control, in particular in relation to the question whether a

fair balance between all competing interests has been struck at the domestic level². The Court should not use the margin of appreciation principle as a merely pragmatic substitute for a thought-out approach to the problem of proper scope of review³.

[...]

2 We would like to point out that in the recent judgment of *Associated Society of Locomotive Engineers & Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 46, 27 February 2007, the Court restated the role of this margin clearly: “Finally, in striking a fair balance between the competing interests, the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention (amongst many authorities, *Hatton and others v. the United Kingdom* [GC], no. 36022/97, § 98, ECHR 2003-VIII). However, since this is not an area of general policy, on which opinions within a democratic society may reasonably differ widely and in which the role of the domestic policy-maker should be given special weight (see e.g. *James and others v. the United Kingdom*, judgment of 21 February 1986, Series A no. 98, p. 32, § 46, where the Court found it natural that the margin of appreciation “available to the legislature in implementing social and economic policies should be a wide one”), the margin of appreciation will play only a limited role.”

The approach adopted in *ASLEF* takes into account the views of national parliaments to a “healthy” extent (in giving it special weight) when it comes to setting out a general policy to be contrasted with decisions on the basic rights of individuals (in the context of their individual applications) which, according to the above, would require a limited role for the margin of appreciation. In the *Evans* case the majority grants a wide margin of appreciation, relying heavily on general policy issues, and extends this wide margin of appreciation to the detailed rules the State lays down in order to achieve a balance between the competing public and private interests (see paragraphs 81-82 of the judgment and paragraph 4 *in fine* of our joint dissenting opinion). Just like most cases before this Court, the *Evans* case is not a case about general policy only; it is a case about important individual interests. In our view, the majority has placed excessive weight on such general policy issues forming merely the background to this case (see section 3 (The margin of appreciation), in particular paragraph 81) and has not undertaken a sufficient *ad hoc* balancing exercise in section 4 (Compliance with Article 8, paragraphs 83-92).

3 R. St. J. Macdonald, “The Margin of Appreciation”, in *The European System for the Protection of Human Rights*, (R. St. J. Macdonald et al. [eds.], 1993), 83, at pp. 84 and 124, quoted by E. Brems, “The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights”, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996, at p. 313. See also the critical appraisal of the “margin of appreciation” theory by M. R. Hutchinson, “The Margin of Appreciation Doctrine in the European Court of Human Rights”, *International and Comparative Law Quarterly*, 1996, 638-50.

14. Concerning Article 14 of the Convention we would like to say the following:

It could be that for the purposes of Article 14 the closest comparator is an infertile man, which was the example given by the trial judge, Wall J (paragraph 23). However, even this comparison does not illustrate the whole complexity of the instant case. It is recognised by those international institutions with a specific mandate to focus on the rights of women that it is justified and necessary to address “the health rights of women from the perspective of women’s needs and interests in view of distinctive features and factors which differ for women in comparison to men, such as: (a) biological factors ..., such as their ... reproductive function ... (CEDAW General Recommendation No. 24 (20th session, 1999))”. A woman is in a different situation as concerns the birth of a child, including where the legislation allows for artificial fertilisation methods. We believe therefore that the proper approach in the instant case was that adopted under Article 14 in the case *Thlimmenos v Greece*, recognising that different situations require different treatment⁴. We see the circumstances of the applicant in this light not least because of the excessive physical and emotional burden and effects⁵ caused by her condition, and it is on this basis that we voted for a violation of Article 14 in conjunction with Article 8.

4 *Thlimmenos v. Greece* [GC], no. 34369/97, ECHR 2000-IV.

5 C. Packer, “Defining and Delineating the Right to Reproductive Choice”, *Nordic Journal of International Law*, 1998, pp. 77–95, at p. 95.

*European Court
of Human Rights*

*Women on Waves and others
v. Portugal*

Application N° 31276/05

*Judgment of
February 3, 2009*



[...]

PROCEDURE

1. The case originated in an application (no. 31276/05) against the Republic of Portugal by which a foundation under Dutch law, Women on Waves, and two associations under Portuguese law, Clube Safo and Não te Prives, Grupo de Defesa dos Direitos Sexuais (“the applicants”), seized the Court on August 18, 2005 by virtue of article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”).

[...]

3. The applicants alleged, especially, that the prohibition of entry in the Portuguese territorial waters pronounced against the ship chartered by the first applicant breached their liberty of association and of expression.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

[...]

7. The three applicant associations have as a goal, amongst others, the promotion of the debate on reproductive rights. In this context, the second and third applicants invited the first applicant to Portugal to advocate in favor of the decriminalization of the voluntary interruption of pregnancy in that country. To this effect, the first applicant chartered a ship, the *Borndiep*, which left Amsterdam with destination to the Portuguese port of Figueira da Foz. Once arrived, the applicants’ goal was to organize, on board the *Borndiep*, meetings, seminars and practical workshops on the prevention of sexually transmissible diseases, family planning and the decriminalization of the voluntary interruption of pregnancy.

8. On August 27, 2004, while the *Borndiep* was approaching the Portuguese territorial waters, the Secretary of State to the Sea delivered a ministerial decree prohibiting the entry of the ship into the territorial waters (...)

9. This decision was immediately communicated to the captain of the *Borndiep* by fax. On the same day, a warship of the Portuguese marine positioned itself near the *Borndiep* to prevent it from entering the Portuguese territorial waters.

10. On September 1st 2004, the three applicants – along with a certain number of physical persons – placed before the administrative tribunal of Coimbra, a claim (*intimação*) aimed at the protection of their fundamental rights. (...) The applicants saw in the said prohibition a breach of their rights to freedom of expression, assembly and demonstration, as well as a violation of the principle of communitarian law of free movement of persons.

11. By a decision of the 6th of September 2004, the administrative tribunal rejected the request.

[...]

THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

20. The applicants allege that the prohibition of entry of the *Borndiep* in the Portuguese territorial waters breaches articles 10 and 11 of the Convention, worded as follows:

Article 10

- “1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority (...)
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society(...) for the prevention of disorder or crime, for the protection of health or morals (...)

Article 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society (...) for the prevention of disorder or crime, for the protection of health or morals (...)

[...]

B. On the merits

2. *The Court's Assessment*

a) On the applicable article in this case

28. The Court immediately notes that in this particular case, the question of freedom of expression is difficultly separable from that of freedom of assembly. Moreover, the parties submitted arguments under the angle of both articles. Indeed, the protection of personal opinions, guaranteed by article 10, counts within the objectives of freedom of peaceful assembly as enshrined by article 11 of the Convention (*Ezelin v. France*, judgment of 26 April 1991, , §37, series A n° 202). Taking into account the particular circumstances of the case, and notably the fact that the applicants' grievances pertain mostly to the denial of the right to inform the public on their position with regard to the voluntary interruption of pregnancy and women's rights in general, the Court considers more appropriate to examine the litigious situation under the angle of article 10 only.

b) On the observance of article 10 of the Convention

29. The Court immediately reminds the crucial importance of freedom of expression, which constitutes one of the prerequisites to the good functioning of democracy. It is also valuable and is particularly precious with regard to the communication of "ideas" or "information" which offend, shock or disturb the State or any fraction of the population. Such is required by pluralism, tolerance and the open-mindedness without which there is no "democratic society" (*Open Door y Dublin Well Woman v. Ireland*, 29 March 1992, § 71, series A n° 246-A).

30. The Court considers in the first place that there has been an interference with the applicants' rights under the Convention. Indeed, the prohibition of entry of the ship in the Portuguese territorial waters prevented the concerned ones to transmit information and hold the planned meetings and demonstrations – which were supposed to be held on board – in the way that they considered the most efficient. It is noteworthy to recall to this effect that article 10 equally protects the mode of diffusion of the ideas and opinions in question (*Thoma v. Luxemburg*, n° 38432/97, § 45, CEDH 2001-III).

31. It remains to be determined if such an interference was "in accordance with the law", inspired by one or many legitimate aims in the eyes of paragraph 2 of the articles in question and "necessary in a democratic society".

1. *“In accordance with the law”*

32. It is no controversy between the parties that the interference in this case was in accordance with the law, that is to say with article 19 – notably subparagraph g) of its paragraph 2 – and article 25 of the United Nations Convention on the Law of the Sea.

2. *Legitimate aims*

[...]

The Court accepts that the litigious interference was aimed towards the legitimate aims of the prevention of order and the protection of health, as invoked both by the Secretary of State to the Sea and by the administrative jurisdictions.

3. *“Necessary in a democratic society”*

[...]

39. In this respect, the Court recognizes in the first place that the applicants were not able to communicate their ideas and information in the way that the considered most adequate, by reason of the prohibition of entry of the *Borndiep* in the Portuguese territorial sea. [...]

The Court considers however that in certain situations, the method of diffusion of information and ideas that one wishes to communicate takes on such an importance that restrictions like the ones that were imposed in this case can affect in an essential way the substance of the ideas and information concerned. Such is notably the case when the concerned parties intend to carry out symbolic protest activities towards a legislation that they consider unjust or detrimental to the fundamental rights and freedoms. In this instance, not only was the content of the ideas defended by the applicants in question but also the fact that the activities chosen to communicate such ideas – like seminars and practical workshops for the prevention of sexually transmissible diseases, family planning and decriminalization of the voluntary interruption of pregnancy – would be held on board the ship in question, which took on a crucial importance for the applicants and corresponded to an activity carried out since a certain time by the first applicant in other European States.

[...]

41. Insofar as the Government alleged that the entry of the ship in question in the Portuguese territorial waters could have resulted in a infringement of the Portuguese legislation of the time on abortion, the Court does not in the facts of the case detect sufficiently serious signs which would permit to think that the applicants had the intention of deliberately violating such legislation.

[...]

In any case, the Court observes that the Portuguese authorities had, on this particular point, other means which would have breached the applicants' rights less than a total prohibition of entry against the ship: they could have, for example, seized the medicines in question. The Court reminds in this matter that the freedom to express opinion in the course of a peaceful assembly holds such an importance that it cannot suffer any limitation in the insofar as the concerned one does not commit himself, on this occasion, a reprehensible act (*Ezelin*, aforementioned § 53).

[...]

43. (...) In this case, the State definitely had means to achieve the legitimate aims of prevention of disorder and the protection of health other than the recourse to a total ban of entry of the *Borndiep* in its territorial waters, what is more by means of the dispatch of a warship against a civil ship. Such a radical measure inevitably produces a deterrent effect not only with regard to the applicants but also with regard to other persons wishing to communicate information and ideas contesting the established order (*Baczkowski and others v. Poland*, n° 1543/06, § 67, CEDH 2007-...). The interference in question did not respond to an "imperious social necessity" and cannot be seen as "necessary in a democratic society".

44. In light of what precedes, the interference in question reveals to be disproportioned to the objectives pursued. Therefore, there has been a violation of article 10 of the Convention.

[...]

FOR THESE REASONS, THE COURT UNANIMOUSLY

[...]

2. *Holds* that there has been a violation of article 10 of the Convention;

[...]

*European Court
of Human Rights*

K. H. and others v. Slovakia

Application N° 32881/04

*Judgment of
April 28, 2009*



[...]

PROCEDURE

26. The case originated in an application (no. 32881/04) against the Slovak Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by eight Slovak nationals, K.H., J.H., A.Č., J.Čo., J.Če., V.D., H.M. and V.Ž., on 30 August 2004. The President of the Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

[...]

3. The applicants alleged, in particular, that their rights under Articles 6 § 1, 8 and 13 of the Convention had been infringed as a result of the failure by the domestic authorities to make photocopies of their medical records available to them.

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicants are eight female Slovakian nationals of Roma ethnic origin.

A. Background to the case

7. The applicants were treated at gynaecological and obstetrics departments in two hospitals in eastern Slovakia during their pregnancies and deliveries. Despite continuing to attempt to conceive, none of the applicants has become pregnant since their last stay in hospital, when they delivered via caesarean section. The applicants suspected that the reason for their infertility might be that a sterilisation procedure was performed on them during their caesarean delivery by medical personnel in the hospitals concerned. Several applicants had been asked to sign documents prior to their delivery or on discharge from the hospital but they were not sure of the content of those documents.

8. The applicants, together with several other Roma women, granted powers of attorney to lawyers from the Centre for Civil and Human Rights, a non-governmental or-

ganisation based in Košice. The lawyers were authorised to review and photocopy the women's medical records in order to obtain a medical analysis of the reasons for their infertility and possible treatment. The applicants also authorised the lawyers to make photocopies of their complete medical records as potential evidence in future civil proceedings for damages, and to ensure that such documents and evidence were not destroyed or lost. The photocopies were to be made by the lawyers with a portable photocopier at the expense of the Centre for Civil and Human Rights.

9. The applicants attempted to obtain access to their medical records in the respective hospitals through their authorised representative in August and September 2002. The lawyer unsuccessfully asked the management of the hospitals to allow her to consult and photocopy the medical records of the persons who had authorised her to do so.

10. On 11 October 2002 representatives of the Ministry of Health expressed the view that section 16(6) of the Health Care Act 1994 did not permit a patient to authorise another person to consult his or her medical records. The above provision was to be interpreted in a restrictive manner and the term "legal representative" concerned exclusively the parents of an underage child or a guardian appointed to represent a person who had been deprived of legal capacity or whose legal capacity had been restricted.

B. Civil proceedings

11. The applicants sued the hospitals concerned. They claimed that the defendants should be ordered to release their medical records to their authorised legal representative and to allow them to obtain a photocopy of the documents included in the records.

1. Action against the J. A. Reiman University Hospital in Prešov

12. Six applicants brought an action against the J.A. Reiman University Hospital (*Fakultná nemocnica J. A. Reimana*) in Prešov ("the Prešov Hospital") on 13 January 2003.

13. On 18 June 2003 the Prešov District Court delivered a judgment ordering the hospital to permit the plaintiffs and their authorised representative to consult their medical records and to make handwritten excerpts thereof. The relevant part of the judgment became final on 15 August 2003 and enforceable on 19 August 2003.

14. With reference to section 16(6) of the Health Care Act 1994 the District Court dismissed the request to photocopy the medical documents. The court noted that the

records were owned by the medical institutions concerned and that such a restriction was justified with a view to preventing their abuse. It was not contrary to the plaintiffs' rights and freedoms guaranteed by the Convention. The applicants appealed against that part of the judgment.

15. On 17 February 2004 the Regional Court in Prešov upheld the first-instance decision, according to which the applicants were not entitled to make photocopies of their medical files. There was no indication that the applicants' right to have any future claim for damages determined in accordance with the requirements of Article 6 § 1 of the Convention had been jeopardised. In particular, under the relevant law the medical institutions were obliged to submit the required information to, *inter alia*, the courts, for example in the context of civil proceedings concerning a patient's claim for damages.

2. *Action against the Health Care Centre in Krompachy*

16. H.M. and V.Ž., the two remaining applicants, brought an identical action against the Health Care Centre (*Nemocnica s poliklinikou*) in Krompachy ("the Krompachy Hospital") on 13 January 2003.

[...]

19. On 24 March 2004 the Regional Court in Košice upheld the first-instance decision to reject the claim concerning the photocopying of the medical records.

C. **Constitutional proceedings**

1. *Complaint of 24 May 2004*

[...]

23. On 8 December 2004 the Constitutional Court (Third Chamber) rejected the complaint. It found no appearance of a violation of Article 6 § 1 of the Convention in the proceedings leading to the Regional Court's judgment of 17 February 2004. As to the alleged violation of Article 8 of the Convention, the Constitutional Court held that the Regional Court had correctly applied section 16(6) of the Health Care Act of 1994 and that a fair balance had been struck between the conflicting interests. Reference was made to the explanatory report to that Act. Furthermore, Article 8 of the Convention did not encompass a right to make photocopies of medical documents.

2. *Complaint of 25 June 2004*

24. On 25 June 2004 the remaining two applicants lodged a similar complaint under Article 127 of the Constitution alleging a violation of, *inter alia*, Articles 6 § 1 and 8 of the Convention as a result of the conduct of the representatives of the Krompachy Hospital and in the proceedings leading to the Košice Regional Court's judgment of 24 March 2004.

25. On 27 October 2004 the Constitutional Court (Second Chamber) rejected the complaint as being premature. The decision stated that the plaintiffs had lodged an appeal on points of law against the part of the Regional Court's judgment by which the first-instance decision to grant their claim for access to medical records had been overturned.

D. Subsequent developments

26. Subsequently seven applicants were able to access their files and to make photocopies thereof under the newly introduced Health Care Act 2004 (...) in circumstances which are set out in the decision on the admissibility of the present application.

27. As regards the eighth applicant, Ms J. H., the Prešov Hospital only provided her with a simple record of a surgical procedure indicating that surgery had been performed on her and that she had been sterilised during the procedure. On 22 May 2006 the Director of the Prešov Hospital informed the applicant that her complete medical file had not been located and that it was considered lost. On 31 May 2007 the Ministry of Health admitted that the Prešov Hospital had violated the Health Care Act 2004 in that it had failed to ensure the proper keeping of the medical file of Ms J. H.

[...]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

[...]

B. The Court's assessment

44. The complaint in issue concerns the exercise by the applicants of their right of effective access to information concerning their health and reproductive status. As such

it is linked to their private and family lives within the meaning of Article 8 (see, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], no. 32555/96, § 155, ECHR 2005-X, with further reference).

45. The Court reiterates that, in addition to the primarily negative undertakings in Article 8 of the Convention, there may be positive obligations inherent in effective respect for one's private life. In determining whether or not such a positive obligation exists, it will have regard to the fair balance that has to be struck between the general interest of the community and the competing interests of the individual concerned, the aims in the second paragraph of Article 8 being of a certain relevance (see, for example, *Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160).

[...]

47. Bearing in mind that the exercise of the right under Article 8 to respect for one's private and family life must be practical and effective (see, for example, *Phinikaridou v. Cyprus*, no. 23890/02, § 64, ECHR 2007-... (extracts), with further reference), the Court takes the view that such positive obligations should extend, in particular in cases like the present one where personal data are concerned, to the making available to the data subject of copies of his or her data files.

48. It can be accepted that it is for the file holder to determine the arrangements for copying personal data files and whether the cost thereof should be borne by the data subject. However, the Court does not consider that data subjects should be obliged to specifically justify a request to be provided with a copy of their personal data files. It is rather for the authorities to show that there are compelling reasons for refusing this facility.

49. The applicants in the present case obtained judicial orders permitting them to consult their medical records in their entirety, but they were not allowed to make copies of them under the Health Care Act 1994. The point to be determined by the Court is whether in that respect the authorities of the respondent State complied with their positive obligation and, in particular, whether the reasons invoked for such a refusal were sufficiently compelling to outweigh the Article 8 right of the applicants to obtain copies of their medical records.

[...]

52. The national courts mainly justified the prohibition on making copies of medical records by the need to protect the relevant information from abuse. The Government relied

on the Contracting States' margin of appreciation in similar matters and considered that the Slovak authorities had complied with their obligations under Article 8 by allowing the applicants or their representatives to study all the records and to make handwritten excerpts thereof.

53. The arguments put forward by the domestic courts and the Government are not sufficiently compelling, with due regard to the aims set out in the second paragraph of Article 8, to outweigh the applicants' right to obtain copies of their medical records.

54. In particular, the Court does not see how the applicants, who had in any event been given access to the entirety of their medical files, could abuse information concerning their own persons by making photocopies of the relevant documents.

55. As to the argument relating to possible abuse of the information by third persons, the Court has previously found that protection of medical data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention and that respecting the confidentiality of health data is a vital principle in the legal systems of all the Contracting Parties to the Convention (see *I. v. Finland*, no. 20511/03, § 38, 17 July 2008).

[...]

57. The fact that the Health Care Act 2004 repealed the relevant provision of the Health Care Act 1994 and explicitly provides for the possibility for patients or persons authorised by them to make copies of medical records is in line with the above conclusion. That legislative change, although welcomed, cannot affect the position in the case under consideration.

58. There has therefore been a failure to fulfil the positive obligation to ensure effective respect for the applicants' private and family lives in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

59. The applicants complained that their right of access to a court had been violated as a result of the refusal to provide them with copies of their medical records. They relied on Article 6 § 1 of the Convention, which in its relevant part provides:

"In the determination of his civil rights and obligations (...) everyone is entitled to a (...) hearing (...) by [a] ... tribunal (...)"

60. The applicants argued that they had been barred from having effective access to their medical records and from securing the evidence included in those records by means of photocopies. Having copies of the files was important for later civil litigation concerning any possible claims for damages on their part and for compliance with the burden of proof, which would be incumbent on the applicants as plaintiffs.

[...]

65. The Court accepts the applicants' argument that they had been in a state of uncertainty as regards their health and reproductive status following their treatment in the two hospitals concerned and that obtaining the relevant evidence, in particular in the form of photocopies, was essential for an assessment of the position in their cases from the perspective of effectively seeking redress before the courts in respect of any shortcomings in their medical treatment.

66. The protection of a person's rights under Article 6 requires, in the Court's view, that the guarantees of that provision should extend to a situation where, like the applicants in the present case, a person has, in principle, a civil claim but considers that the evidential situation resulting from the legal provisions in force prevents him or her from effectively seeking redress before a court or renders the seeking of such judicial protection difficult without appropriate justification.

67. It is true that the statutory bar at the material time on the making available of copies of the records did not entirely bar the applicants from bringing a civil action on the basis of information obtained in the course of the consultation of their files. However, the Court considers that section 16(6) of the Health Care Act 1994 imposed a disproportionate limitation on their ability to present their cases to a court in an effective manner. It is relevant in this respect that the applicants considered the original form of the records, which could not be reproduced manually and which, in accordance with the above-cited provision, could not be made available to either the applicants or the courts (compare and contrast in this connection the *McGinley and Egan* case (cited above, § 90)), decisive for the determination of their cases.

68. When examining the facts of the case under Article 8 of the Convention the Court has found no sufficiently strong justification for preventing the applicants from obtaining copies of their medical records. For similar reasons, that restriction cannot be considered compatible with an effective exercise by the applicants of their right of access to a court.

69. There has therefore been a violation of Article 6 § 1 of the Convention.

[...]

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
2. *Holds* by a majority that there has been a violation of Article 6 § 1 of the Convention;

[...].

*European Court
of Human Rights*

A, B and C v. Ireland

Application N° 25579/05

*Judgment of
Decembre 16, 2010*



[...]

PROCEDURE

1. The case originated in an application (no. 25579/05) against Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Irish nationals, Ms A and Ms B, and by a Lithuanian national, Ms C, (“the applicants”), on 15 July 2005. The President of the Chamber acceded to the applicants’ request not to have their names disclosed (Rule 47 § 3 of the Rules of Court).

[...]

3. The first two applicants principally complained under Article 8 about, *inter alia*, the prohibition of abortion for health and well-being reasons in Ireland and the third applicant’s main complaint concerned the same Article and the alleged failure to implement the constitutional right to an abortion in Ireland in the case of a risk to the life of the woman.

[...]

THE FACTS

11. The applicants reside in Ireland and are women over 18 years of age.

[...]

I. THE CIRCUMSTANCES OF THE CASE

A. The first applicant (A)

13. On 28 February 2005 the first applicant travelled to England for an abortion as she believed that she was not entitled to an abortion in Ireland. She was 9½ weeks pregnant.

14. She had become pregnant unintentionally, believing her partner to be infertile. At the time she was unmarried, unemployed and living in poverty. She had four young children. The youngest was disabled and all children were in foster care as a result of problems she had experienced as an alcoholic. She had a history of depression during

her first four pregnancies, and was battling depression at the time of her fifth pregnancy. During the year preceding her fifth pregnancy, she had remained sober and had been in constant contact with social workers with a view to regaining custody of her children. She considered that a further child at that moment of her life (with its attendant risk of post-natal depression and to her sobriety) would jeopardise her health and the successful reunification of her family. She decided to travel to England to have an abortion.

15. Delaying the abortion for three weeks, the first applicant borrowed the minimum amount of money for treatment in a private clinic and travel from a money lender (650 euros, "EUR") at a high interest rate. She felt she had to travel to England alone and in secrecy, without alerting the social workers and without missing a contact visit with her children.

16. She travelled back to Ireland by plane the day after the abortion for her contact visit with her youngest child. While she had initially submitted that she was afraid to seek medical advice on return to Ireland, she subsequently clarified that, on the train returning from Dublin she began to bleed profusely, and an ambulance met the train. At a nearby hospital she underwent a dilation and curettage. She claims she experienced pain, nausea and bleeding for weeks thereafter but did not seek further medical advice.

17. Following the introduction of the present application, the first applicant became pregnant again and gave birth to her fifth child. She is struggling with depression, has custody of three of her children and two (including the disabled child) remain in care. She maintained that an abortion was the correct decision for her in 2005.

B. The second applicant (B)

18. On 17 January 2005 the second applicant travelled to England for an abortion believing that she was not entitled to an abortion in Ireland. She was 7 weeks pregnant.

19. The second applicant became pregnant unintentionally. She had taken the "morning-after pill" and was advised by two different doctors that there was a substantial risk of an ectopic pregnancy (a condition which cannot be diagnosed until 6-10 weeks of pregnancy). She was certain of her decision to travel to England for an abortion since she could not care for a child on her own at that time of her life. She waited several weeks until the counselling centre in Dublin opened after Christmas. She had difficulty meeting the costs of the travel and, not having a credit card, used a friend's credit card to book the flights. She accepted that, by the time she travelled to England, it had been confirmed that it was not an ectopic pregnancy.

20. Once in England she did not list anyone as her next of kin or give an Irish address so as to be sure her family would not learn of the abortion. She travelled alone and stayed in London the night before the procedure to avoid missing her appointment as well as the night of the procedure, as she would have arrived back in Dublin too late for public transport and the medication rendered her unfit to drive home from Dublin airport. The clinic advised her to inform Irish doctors that she had had a miscarriage.

21. On her return to Ireland she started passing blood clots and two weeks later, being unsure of the legality of having travelled for an abortion, sought follow-up care in a clinic in Dublin affiliated to the English clinic.

C. The third applicant (C)

22. On 3 March 2005 the third applicant had an abortion in England believing that she could not establish her right to an abortion in Ireland. She was in her first trimester of pregnancy at the time.

23. Prior to that, she had been treated for 3 years with chemotherapy for a rare form of cancer. She had asked her doctor before the treatment about the implications of her illness as regards her desire to have children and was advised that it was not possible to predict the effect of pregnancy on her cancer and that, if she did become pregnant, it would be dangerous for the foetus if she were to have chemotherapy during the first trimester.

24. The cancer went into remission and the applicant unintentionally became pregnant. She was unaware of this fact when she underwent a series of tests for cancer, contra-indicated during pregnancy. When she discovered she was pregnant, the first applicant consulted her General Practitioner ("GP") as well as several medical consultants. She alleged that, as a result of the chilling effect of the Irish legal framework, she received insufficient information as to the impact of the pregnancy on her health and life and of her prior tests for cancer on the foetus.

25. She therefore researched the risks on the internet. Given the uncertainty about the risks involved, the third applicant travelled to England for an abortion. She maintained that she wanted a medical abortion (drugs to induce a miscarriage) as her pregnancy was at an early stage but that she could not find a clinic which would provide this treatment as she was a non-resident and because of the need for follow-up. She therefore alleged she had to wait a further 8 weeks until a surgical abortion was possible.

26. On returning to Ireland after the abortion, the third applicant suffered complications of an incomplete abortion, including prolonged bleeding and infection. She alleges that doctors provided inadequate medical care. She consulted her own GP several months after the abortion and her GP made no reference to the fact that she was visibly no longer pregnant.

[...]

THE LAW

113. The first two applicants complained under Articles 3, 8, 13 and 14 of the Convention about the prohibition of abortion in Ireland on health and well-being grounds.

The third applicant complained under Articles 2, 3, 8, 13 and 14 of the Convention* about the absence of legislative implementation of Article 40.3.3 of the Constitution which she argued meant that she had no appropriate means of establishing her right to a lawful abortion in Ireland on the grounds of a risk to her life.

I. ADMISSIBILITY

A. The relevant facts and scope of the case

[...]

3. The Court's assessment

[...]

125. Accordingly, the Court finds that the first applicant travelled for an abortion for reasons of health and well-being, the second applicant for well-being reasons and the third applicant as she mainly feared her pregnancy constituted a risk to her life. While the Government's use of the term "social reasons" is noted, the Court has considered it useful to distinguish between health (physical and mental) and other well-being reasons to describe why the applicants choose to obtain abortions.

* ed. These articles establish the right to life, the prohibition of torture, the right to respect for private and family life, the right to an effective remedy and the prohibition of discrimination, respectively.

[...]

B. Exhaustion of domestic remedies

[...]

3. The Court's assessment

[...]

a) The first and second applicants

[...]

147. (...)The Supreme Court then clarified, in the seminal *X* case, that the proper test for a lawful abortion in Ireland was as follows: if it was established as a matter of probability that there was “a real and substantial risk to the life, *as distinct from the health*, of the mother” (emphasis added) which could only be avoided by the termination of the pregnancy, a termination of a pregnancy was permissible in Ireland. The Supreme Court went on to accept that an established threat of suicide constituted a qualifying “real and substantial risk” to the life of the woman. Subsequent amendments to the Constitution did not extend the grounds for a lawful abortion in Ireland. None of the domestic case law subsequent to the *X* case, opened by the parties to this Court, concerned the right to an abortion in Ireland for reasons of health and well-being nor could they be considered to indicate any potential in this argument: the cases of “*C*” and of *D(A Minor)* concerned a suicide risk and a minor’s right to travel abroad for an abortion, respectively; and the case of *MR v. TR* concerned the question of whether the constitutional notion of “unborn” included an embryo fertilised extra-uterine.

[...]

152. For these reasons, the Court considers that it has not been demonstrated that the first and second applicants had an effective domestic remedy available to them as regards their complaint about a lack of abortion in Ireland for reasons of health and/or well-being. The Court is not, therefore, required to address the parties’ additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

[...]

b) The third applicant

154. The third applicant feared her pregnancy constituted a risk to her life and complained under Article 8 about the lack of legislation implementing the constitutional right to an abortion in the case of such a risk. She argued that she therefore had no effective procedure by which to establish her qualification for a lawful abortion in Ireland and that she should not be required to litigate to do so.

155. In those circumstances, the Court considers that the question of the need for the third applicant to exhaust judicial remedies is inextricably linked, and therefore should be joined, to the merits of her complaint under Article 8 of the Convention (*Tysic v. Poland*, no. 5410/03 (dec.) 7 February 2006).

[...]

E. The Court’s conclusion on the admissibility of the applications

166. Accordingly, no ground having been established for declaring inadmissible the applicants’ complaints under Article 8 or the associated complaints under Articles 13 and 14 of the Convention, the Court declares these complaints admissible and the remainder of the application inadmissible.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

167. The first and second applicants complained under Article 8 about the restrictions on lawful abortion in Ireland which meant that they could not obtain an abortion for health and/or well-being reasons in Ireland and the third applicant complained under the same Article about the absence of any legislative implementation of Article 40.3.3 of the Constitution.

[...]

E. The Court’s assessment

1. Whether Article 8 applied to the applicants’ complaints

212. The Court recalls that the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which encompasses, *inter alia*, the right to personal

autonomy and personal development (see *Pretty v. the United Kingdom*, cited above, § 61). It concerns subjects such as gender identification, sexual orientation and sexual life (for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36), a person's physical and psychological integrity (*Tysiāc v. Poland* judgment, cited above, § 107) as well as decisions both to have and not to have a child or to become genetic parents (*Evans v. the United Kingdom* [GC], cited above, § 71).

213. The Court has also previously found, citing with approval the case-law of the former Commission, that legislation regulating the interruption of pregnancy touches upon the sphere of the private life of the woman, the Court emphasising that Article 8 cannot be interpreted as meaning that pregnancy and its termination pertain uniquely to the woman's private life as, whenever a woman is pregnant, her private life becomes closely connected with the developing foetus. The woman's right to respect for her private life must be weighed against other competing rights and freedoms invoked including those of the unborn child (*Tysiāc v. Poland* judgment, cited above, § 106; and *Vo v. France* (...), cited above, §§ 76, 80 and 82).

214. While Article 8 cannot, accordingly, be interpreted as conferring a right to abortion, the Court finds that the prohibition in Ireland of abortion where sought for reasons of health and/or well-being about which the first and second applicants complained, and the third applicant's alleged inability to establish her qualification for a lawful abortion in Ireland, come within the scope of their right to respect for their private lives and accordingly Article 8. The difference in the substantive complaints of the first and second applicants, on the one hand, and that of the third applicant on the other, requires separate determination of the question whether there has been a breach of Article 8 of the Convention.

[...]

2. *The first and second applicants*

a) *Positive or negative obligations under Article 8 of the Convention?*

216. While there are positive obligations inherent in effective respect for private life (see paragraphs 244-246 below), the Court considers it appropriate to analyse the first and second applicants' complaints as concerning negative obligations, their core argument

being that the prohibition in Ireland of abortion where sought for health and/or well-being reasons disproportionately restricted their right to respect for their private lives. The Court has previously noted, citing with approval the case-law of the former Commission in *Bruggemann and Scheuten v. Germany*, that not every regulation of the termination of pregnancy constitutes an interference with the right to respect for the private life of the mother (*Vo v. France* (...), cited above, § 76). Nevertheless, having regard to the broad concept of private life within the meaning of Article 8 including the right to personal autonomy and to physical and psychological integrity (see paragraphs 212-214 above), the Court finds that the prohibition of the termination of the first and second applicants' pregnancies sought for reasons of health and/or well being amounted to an interference with their right to respect for their private lives. The essential question which must be determined is whether the prohibition is an unjustified interference with their rights under Article 8 of the Convention.

[...]

218. To determine whether this interference entailed a violation of Article 8, the Court must examine whether or not it was justified under the second paragraph of that Article namely, whether the interference was "in accordance with the law" and "necessary in a democratic society" for one of the "legitimate aims" specified in Article 8 of the Convention.

b) Was the interference "in accordance with the law"?

[...]

220. The Court recalls that an impugned interference must have some basis in domestic law, which law must be adequately accessible and be formulated with sufficient precision to enable the citizen to regulate his conduct, he or she being able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (for example, *Silver and others v. the United Kingdom*, 25 March 1983, §§ 86-88, Series A no. 61).

221. The Court considers that the domestic legal provisions constituting the interference were clearly accessible. Having regard to paragraphs 147-149 above, the Court also considers that it was clearly foreseeable that the first and second applicants were not entitled to an abortion in Ireland for health and/or well-being reasons.

c) *Did the interference pursue a legitimate aim?*

[...]

226. In light of the above, the Court does not consider that the limited opinion polls on which the first and second applicants relied (...) are sufficiently indicative of a change in the views of the Irish people, concerning the grounds for lawful abortion in Ireland, as to displace the State's opinion to the Court on the exact content of the requirements of morals in Ireland (*Handyside v. the United Kingdom* judgment and further references cited at 221 above). Accordingly, the Court finds that the impugned restrictions in the present case, albeit different from those at issue in the *Open Door* case, were based on profound moral values concerning the nature of life which were reflected in the stance of the majority of the Irish people against abortion during the 1983 referendum and which have not been demonstrated to have relevantly changed since then.

227. The Court concludes that the impugned restriction therefore pursued the legitimate aim of the protection of morals of which the protection in Ireland of the right to life of the unborn was one aspect.

228. The Court does not therefore consider it necessary to determine whether these are moral views stemming from religious or other beliefs or whether the term "others" in Article 8 § 2 extends to the unborn (*Open Door*, cited above, § 63; and *Vo v. France* [GC] (...), § 85). The first and second applicants' submissions to the effect that the abortion restrictions in pursuance of that aim are ineffective and their reliance on the moral viewpoint of international bodies fall to be examined below under the necessity of the interference (*Open Door*, (...) § 76).

d) *Was the interference "necessary in a democratic society"?*

229. In this respect, the Court must examine whether there existed a pressing social need for the measure in question and, in particular, whether the interference was proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests in respect of which the State enjoys a margin of appreciation (*Open Door*, § 70; *Odièvre v. France* [GC], no. 42326/98, § 40, ECHR 2003-III; and *Evans v. the United Kingdom* [GC], § 75).

230. Accordingly, and as underlined at paragraph 213 above, in the present cases the Court must examine whether the prohibition of abortion in Ireland for health and/or well-

being reasons struck a fair balance between, on the one hand, the first and second applicants' right to respect for their private lives under Article 8 and, on the other, profound moral values of the Irish people as to the nature of life and consequently as to the need to protect the life of the unborn.

[...]

233. There can be no doubt as to the acute sensitivity of the moral and ethical issues raised by the question of abortion or as to the importance of the public interest at stake. A broad margin of appreciation is, therefore, in principle to be accorded to the Irish State in determining the question whether a fair balance was struck between the protection of that public interest, notably the protection accorded under Irish law to the right to life of the unborn, and the conflicting rights of the first and second applicants to respect for their private lives under Article 8 of the Convention.

234. However, the question remains whether this wide margin of appreciation is narrowed by the existence of a relevant consensus.

The existence of a consensus has long played a role in the development and evolution of Convention protections beginning with *Tyrer v. the United Kingdom* (25 April 1978, § 31, Series A no. 26), the Convention being considered a "living instrument" to be interpreted in the light of present-day conditions. Consensus has therefore been invoked to justify a dynamic interpretation of the Convention (*Marckx v. Belgium*, judgment of 13 June 1979, Series A no. 31, § 41; *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, § 60; *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A no. 161, § 102; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 50, ECHR 2003-I and *Christine Goodwin v. the United Kingdom* [GC], cited above, § 85).

235. In the present case, and contrary to the Government's submission, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion on broader grounds than accorded under Irish law. In particular, the Court notes that the first and second applicants could have obtained an abortion on request (according to certain criteria including gestational limits) in some 30 such States. The first applicant could have obtained an abortion justified on health and well-being grounds in approximately 40 Contracting States and the second applicant could have obtained an abortion justified on well-being grounds in some 35 Contracting States. Only 3 States have more restrictive access to abortion services than in Ireland namely, a prohibition on abortion regardless of the risk to the

woman's life. Certain States have in recent years extended the grounds on which abortion can be obtained (...). Ireland is the only State which allows abortion solely where there is a risk to the life (including self-destruction) of the expectant mother. Given this consensus amongst a substantial majority of the Contracting States, it is not necessary to look further to international trends and views which the first two applicants and certain of the third parties argued also leaned in favour of broader access to abortion.

236. However, the Court does not consider that this consensus decisively narrows the broad margin of appreciation of the State.

237. Of central importance is the finding in the above-cited *Vo* case, referred to above, that the question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life, so that it was impossible to answer the question whether the unborn was a person to be protected for the purposes of Article 2. Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected (see the review of the Convention case law at paragraphs 75-80 in the above-cited *Vo v. France* [GC] judgment), the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. It follows that, even if it appears from the national laws referred to that most Contracting Parties may in their legislation have resolved those conflicting rights and interests in favour of greater legal access to abortion, this consensus cannot be a decisive factor in the Court's examination of whether the impugned prohibition on abortion in Ireland for health and well-being reasons struck a fair balance between the conflicting rights and interests, notwithstanding an evolutive interpretation of the Convention (*Tyrer v. the United Kingdom*, § 31; and *Vo v. France* [GC], § 82, (...)).

238. It is indeed the case that this margin of appreciation is not unlimited. The prohibition impugned by the first and second applicants must be compatible with a State's Convention obligations and, given the Court's responsibility under Article 19 of the Convention, the Court must supervise whether the interference constitutes a proportionate balancing of the competing interests involved (*Open Door*, § 68). A prohibition of abortion to protect unborn life is not therefore automatically justified under the Convention on the basis of unqualified deference to the protection of pre-natal life or on the basis that the expectant mother's right to respect for her private life is of a lesser stature. Nor is the regulation of abortion rights solely a matter for the Contracting States, as the Government maintained relying on certain international declarations (...). However, and as explained above, the Court must decide on the compatibility with Article 8 of the Convention of the Irish State's

prohibition of abortion on health and well-being grounds on the basis of the above-described fair balance test to which a broad margin of appreciation is applicable.

239. From the lengthy, complex and sensitive debate in Ireland (...) as regards the content of its abortion laws, a choice has emerged. Irish law prohibits abortion in Ireland for health and well-being reasons but allows women, in the first and second applicants' position who wish to have an abortion for those reasons (...), the option of lawfully travelling to another State to do so.

On the one hand, the Thirteenth and Fourteenth Amendments to the Constitution removed any legal impediment to adult women travelling abroad for an abortion and to obtaining information in Ireland in that respect. Legislative measures were then adopted to ensure the provision of information and counselling about, *inter alia*, the options available including abortions services abroad, and to ensure any necessary medical treatment before, and more particularly after, an abortion. The importance of the role of doctors in providing information on all options available, including abortion abroad, and their obligation to provide all appropriate medical care, notably post-abortion, is emphasised in CPA work and documents and in professional medical guidelines (...). The Court has found that the first two applicants did not demonstrate that they lacked relevant information or necessary medical care as regards their abortions (...).

On the other hand, it is true that the process of travelling abroad for an abortion was psychologically and physically arduous for the first and second applicants, additionally so for the first applicant given her impoverished circumstances (...). While this may not have amounted to treatment falling within the scope of Article 3 of the Convention (paragraph 164 above), the Court does not underestimate the serious impact of the impugned restriction on the first and second applicants. It may even be the case, as the first two applicants argued, that the impugned prohibition on abortion is to a large extent ineffective in protecting the unborn in the sense that a substantial number of women take the option open to them in law of travelling abroad for an abortion not available in Ireland: it is not possible to be more conclusive, given the disputed nature of the relevant statistics provided to the Court (...).

[...]

241. Accordingly, having regard to the right to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland, the Court does not consider that the prohibition in Ireland of abortion for health and well-being reasons, based as it is on the profound moral views of the Irish people as to the nature of life (paragraphs

222-227 above) and as to the consequent protection to be accorded to the right to life of the unborn, exceeds the margin of appreciation accorded in that respect to the Irish State. In such circumstances, the Court finds that the impugned prohibition in Ireland struck a fair balance between the right of the first and second applicants to respect for their private lives and the rights invoked on behalf of the unborn.

e) The Court's conclusion as regards the first and second applicants

242. It concludes that there has been no violation of Article 8 of the Convention as regards the first and second applicants.

3. *The third applicant*

[...]

a) Does her complaint fall to be examined under the positive or negative obligations of Article 8 of the Convention?

[...]

245. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (*Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands* (dec.) no. 27677/02, 8 July 2003; *Pentiacova and others v. Moldova* (dec.), no. 14462/03, ECHR 2005-...; *Nitecki v. Poland* (dec.), no. 65653/01, 21 March 2002; *Odièvre v. France* [GC], (...), § 42). In addition, these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life (*Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32; *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, § 162, ECHR 2005-X) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures in an abortion context (*Tysiāc v. Poland* judgment, (...), § 110).

246. Accordingly, the Court considers that the third applicant's complaint falls to be analysed under the positive aspect of Article 8. In particular, the question to be determined by the Court is whether there is a positive obligation on the State to provide an effective

and accessible procedure allowing the third applicant to establish her entitlement to a lawful abortion in Ireland and thereby affording due respect to her interests safeguarded by Article 8 of the Convention.

b) General principles applicable to assessing a State's positive obligations

247. The principles applicable to assessing a State's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of Article 8 being of a certain relevance (*Gaskin v. the United Kingdom*, 7 July 1989, § 42, Series A no. 160; and *Roche v. the United Kingdom* [GC], (...), § 157).

248. The notion of "respect" is not clear cut especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case (*Christine Goodwin v. the United Kingdom* [GC], cited above, § 72).

Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States. Some factors concern the applicant: the importance of the interest at stake and whether "fundamental values" or "essential aspects" of private life are in issue (*X and Y v. the Netherlands*, 26 March 1985, § 27, Series A no. 91; and *Gaskin v. the United Kingdom*, 7 July 1989, § 49, Series A no. 160); and the impact on an applicant of a discordance between the social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (*B. v. France*, 25 March 1992, § 63, Series A no. 232-C; and *Christine Goodwin v. the United Kingdom* [GC], cited above, §§ 77-78). Some factors concern the position of the State: whether the alleged obligation is narrow and defined or broad and indeterminate (*Botta v. Italy*, 24 February 1998, § 35, *Reports of Judgments and Decisions* 1998-I); and the extent of any burden the obligation would impose on the State (*Rees v. the United Kingdom*, 17 October 1986, §§ 43-44, Series A no. 106; *Christine Goodwin v. the United Kingdom* [GC], (...), §§ 86-88).

249. As in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 49). While a broad margin of appreciation is accorded to the State as to the decision about the circumstances in which an abortion will be permitted in a State (paragraphs 231-238 above), once that decision is taken the legal framework devised for

this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention” (*S.H. and others v. Austria*, no. 57813/00, § 74, 1 April 2010).

c) Application of the general principles to the third applicant's case

250. The third applicant had a rare form of cancer. When she discovered she was pregnant she feared for her life as she believed that her pregnancy increased the risk of her cancer returning and that she would not obtain treatment for that cancer in Ireland while pregnant (see paragraph 125 above). The Court considers that the establishment of any such relevant risk to her life caused by her pregnancy clearly concerned fundamental values and essential aspects of her right to respect for her private life (*X and Y v. the Netherlands*, 26 March 1985, (...), § 27 and paragraph 248 above). Contrary to the Government's submissions, it is not necessary for the applicant to further substantiate the alleged medical risk, her complaint concerning as it did the absence of any effective domestic procedure for establishing that risk.

[...]

252. In the first place, the Court has examined the only non-judicial means on which the Government relied namely, the ordinary medical consultation process between a woman and her doctor.

253. However, the Court has a number of concerns as to the effectiveness of this consultation procedure as a means of establishing the third applicant's qualification for a lawful abortion in Ireland.

It is first noted that the ground upon which a woman can seek a lawful abortion in Ireland is expressed in broad terms: Article 40.3.3, as interpreted by the Supreme Court in the *X* case, provides that an abortion is available in Ireland if it is established as a matter of probability that there is a real and substantial risk to the life, as distinct from the health, of the mother, including a risk of self harm, which can only be avoided by a termination of the pregnancy (the *X* case, cited at paragraphs 39-44 above). While a constitutional provision of this scope is not unusual, no criteria or procedures have been subsequently laid down in Irish law, whether in legislation, case law or otherwise, by which that risk is to be measured or determined, leading to uncertainty as to its precise application. Indeed, while this constitutional provision (as interpreted by the

Supreme Court in the X case) qualified sections 58 and 59 of the earlier 1861 Act (see paragraph 145 above), those sections have never been amended so that, on their face, they remain in force with their absolute prohibition on abortion and associated serious criminal offences thereby contributing to the lack of certainty for a woman seeking a lawful abortion in Ireland.

Moreover, whether or not the broad right to a lawful abortion in Ireland for which Article 40.3.3 provides could be clarified by Irish professional medical guidelines as suggested by the Government (and see the High Court judgment in *MR v. TR and others*, at paragraph 97 above), the guidelines do not in any event provide any relevant precision as to the criteria by which a doctor is to assess that risk. The Court cannot accept the Government's argument that the oral submissions to the Committee on the Constitution, and still less obstetric guidelines on ectopic pregnancies from another State, could constitute relevant clarification of Irish law. In any event, the three conditions noted in those oral submissions as accepted conditions requiring medical intervention to save a woman's life (pre-eclampsia, cancer of the cervix and ectopic pregnancies) were not pertinent to the third applicant's case.

Furthermore, there is no framework whereby any difference of opinion between the woman and her doctor or between different doctors consulted, or whereby an understandable hesitancy on the part of a woman or doctor, could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk to a woman's life such that a lawful abortion might be performed.

254. Against this background of substantial uncertainty, the Court considers it evident that the criminal provisions of the 1861 Act would constitute a significant chilling factor for both women and doctors in the medical consultation process, regardless of whether or not prosecutions have in fact been pursued under that Act. Both the third applicant and any doctor ran a risk of a serious criminal conviction and imprisonment in the event that a decision taken in medical consultation, that the woman was entitled to an abortion in Ireland given the risk to her life, was later found not to accord with Article 40.3.3 of the Constitution. Doctors also risked professional disciplinary proceedings and serious sanctions. The Government have not indicated whether disciplinary action has ever been taken against a doctor in this regard. The Review Group Report 1996, the Green Paper 1999 and the Fifth Progress Report on Abortion 2000 each expressed concerns about the lack of legal protection for medical personnel. As to the Government's reliance on the C case, doctors consulted by women such as the third applicant were not in the same legal situation as those in the C case who were providing opinions as regards a rape victim who was a suicide risk, a situation falling clearly within the ambit of the X case.

255. Accordingly, and referring also to McCarthy J.'s judgment in the *X* case (...), the Court does not consider that the normal process of medical consultation could be considered an effective means of determining whether an abortion may be lawfully performed in Ireland on the ground of a risk to life.

[...]

258. The Court does not consider that the constitutional courts are the appropriate *fora* for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in a State. In particular, this process would amount to requiring the constitutional courts to set down on a case by case basis the legal criteria by which the relevant risk to a woman's life would be measured and, further, to resolve through evidence, largely of a medical nature, whether a woman had established that qualifying risk. However, the constitutional courts themselves have underlined that this should not be their role. Contrary to the Government's submission, McCarthy J. in the *X* case clearly referred to prior judicial expressions of regret that Article 40.3.3 had not been implemented by legislation and went on to state that, while the want of that legislation would not inhibit the courts from exercising their functions, it was reasonable to find that, when enacting that Amendment, the people were entitled to believe that legislation would be introduced so as to regulate the manner in which the right to life of the unborn and the right to life of the mother could be reconciled. In the view of McCarthy J., the failure to legislate was no longer just unfortunate, but it was "inexcusable" (...). The High Court in the "*C*" case (...) referred to the same issue more succinctly, finding that it would be wrong to turn the High Court into a "licensing authority" for abortions.

259. In addition, it would be equally inappropriate to require women to take on such complex constitutional proceedings when their underlying constitutional right to an abortion in the case of a qualifying risk to life was not disputable (the Green Paper 1999, (...)). The *D v. Ireland* decision is distinguishable for the reasons set out at paragraph 148 above and, notably, because *D*'s constitutional right to an abortion in Ireland in the case of a fatal foetal abnormality was an open question.

260. Furthermore, it is not clear how the courts would enforce a mandatory order requiring doctors to carry out an abortion. The Government's statistical material provided in response to the Court's question (...) concerned public acute hospitals and ectopic pregnancies only and thereby revealed a lack of knowledge on the part of the State as to, *inter alia*, who carries out lawful abortions in Ireland and where. It is also not clear on what basis a declaration of unconstitutionality of the provisions of the 1861 Act could have been made since those

provisions have been already qualified by Article 40.3.3 and since the third applicant did not seek a right to abortion extending beyond the parameters of that Article.

261. Thirdly, the Court's findings as regards the 2003 Act outlined at paragraph 150 above are equally applicable to the third applicant. In addition, since her complaint does not concern a lack of information but rather the lack of a decision-making process, it is not necessary to examine whether she had any remedy to exhaust in this regard, in particular, in respect of the 1995 Act.

[...]

263. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which allowed the third applicant to establish her right to a lawful abortion in Ireland. The Court is not, therefore, required to address the parties' additional submissions concerning the timing, speed, costs and confidentiality of such domestic proceedings.

264. The Court considers that the uncertainty generated by the lack of legislative implementation of Article 40.3.3, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Ireland on grounds of a relevant risk to a woman's life and the reality of its practical implementation (*Christine Goodwin v. the United Kingdom* [GC], (...) at §§ 77-78; and *S. H. and others v. Austria*, (...), at § 74. See also the Commissioner for Human Rights, paragraph 110 above).

[...]

d) The Court's conclusion as regards the third applicant

267. In such circumstances, the Court rejects the Government's argument that the third applicant failed to exhaust domestic remedies. It also concludes that the authorities failed to comply with their positive obligation to secure to the third applicant effective respect for her private life by reason of the absence of any implementing legislative or regulatory regime providing an accessible and effective procedure by which the third applicant could have established whether she qualified for a lawful abortion in Ireland in accordance with Article 40.3.3 of the Constitution.

268. Accordingly, the Court finds that there has been a violation of Article 8 of the Convention.

[...]

FOR THESE REASON, THE COURTS

[...]

4. *Holds* by eleven votes to six that there has been no violation of Article 8 of the Convention, or of Article 13 taken in conjunction with Article 8, as regards the first and second applicants;

5. *Holds* unanimously that there has been a violation of Article 8 of the Convention, and that no separate issue arises under Article 13 taken in conjunction with Article 8, as regards the third applicant;

[...]

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, FURA, HIRVELĀ, MALINVERNI AND POALELUNGI

[...]

2. Let us make clear, from the outset, that the Court was not called upon in this case to answer the difficult question of “when life begins”. This was not the issue before the Court, and undoubtedly the Court is not well equipped to deal effectively with it. The issue before the Court was whether, regardless of when life begins – before birth or not – the right to life of the foetus can be balanced against the right to life of the mother, or her right to personal autonomy and development, and possibly found to weigh less than the latter rights or interests. And the answer seems to be clear: there is an undeniably strong consensus among European States – and we will come back to this below – to the effect that, regardless of the answer to be given to the scientific, religious or philosophical question of the beginning of life, the right to life of the mother, and, in most countries’ legislation, her well-being and health, are considered more valuable than the right to life of the foetus.

This seems to us a reasonable stance for European legislation and practice to take, given that the values protected – the rights of the foetus and the rights of a living person –

are, by their nature, unequal: on the one hand there are the rights of a person already participating, in an active manner, in social interaction, and on the other hand there are the rights of a foetus within the mother's body, whose life has not been definitively determined as long as the process leading to the birth is not yet complete, and whose participation in social interaction has not even started. In Convention terms, it can also be argued that the rights enshrined in that text are mainly designed to protect individuals against State acts or omissions while the former participate actively in the normal everyday life of a democratic society.

Consequently, we believe that the majority erred when it inappropriately conflated in paragraph 237 of the judgment the question of the beginning of life (and as a consequence the right to life), and the States' margin of appreciation in this regard, with the margin of appreciation that States have in weighing the right to life of the foetus against the right to life of the mother or her right to health and well-being.

3. When we come to the proportionality test which the Court should properly apply in the circumstances of the case, there are two elements which should be taken into consideration and which weigh heavily in determining whether the interference with the private life of the two applicants was justified: the first is the existence of a European consensus in favour of allowing abortion; the second is the sanctions provided for by Irish law in cases of abortions performed for health or well-being reasons in breach of the prohibition on abortion in the territory of Ireland.

[...]

6. Yet in the case before us a European consensus (and, indeed, a strong one) exists. We believe that this will be one of the rare times in the Court's case-law that Strasbourg considers that such consensus does not narrow the broad margin of appreciation of the State concerned; the argument used is that the fact that the applicants had the right "to lawfully travel abroad for an abortion with access to appropriate information and medical care in Ireland" suffices to justify the prohibition of abortion in the country for health and well-being reasons, "based as it is on the profound moral views of the Irish people as to the nature of life" (paragraph 241 *in limine*).

7. We strongly disagree with this finding. Quite apart from the fact, as we have emphasised above, that such an approach shifts the focus of this case away from the core issue, which is the balancing of the right to life of the foetus against the right to health and well-being of the mother, and not the question of when life begins or the margin

of appreciation afforded to States on the latter issue, the majority bases its reasoning on two disputable premises: first, that the fact that Irish law allows abortion for those who can travel abroad suffices to satisfy the requirements of the Convention concerning applicants' right to respect for their private life; and, second, that the fact that the Irish people have profound moral views as to the nature of life impacts on the European consensus and overrides it, allowing the State to enjoy a wide margin of appreciation.

8. On the first premise, the Court's argument seems to be circular. The applicants' complaints concern their inability to have an abortion in their country of residence and they consider, rightly, that travelling abroad to have an abortion is a process which is not only financially costly but also entails a number of practical difficulties well illustrated in their observations. Hence, the position taken by the Court on the matter does not truly address the real issue of unjustified interference in the applicants' private life as a result of the prohibition of abortion in Ireland.

9. As to the second premise, it is the first time that the Court has disregarded the existence of a European consensus on the basis of "profound moral views". Even assuming that these profound moral views are still well embedded in the conscience of the majority of Irish people, to consider that this can override the European consensus, which tends in a completely different direction, is a real and dangerous new departure in the Court's case-law. A case-law which to date has not distinguished between moral and other beliefs when determining the margin of appreciation which can be afforded to States in situations where a European consensus is at hand.

[...]

11. From the foregoing analysis it is clear that in the circumstances of the case there has been a violation of Article 8 with regard to the first two applicants.

*European Court
of Human Rights*

R. R. v. Poland

Application N° 27617/04

*Judgment of
May 26, 2011*



[...]

PROCEDURE

1. The case originated in an application (no. 27617/04) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Polish national, Ms R.R. (“the applicant”), on 30 July 2004. The President of the Chamber acceded to the applicant’s request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

[...]

3. The applicant alleged that the circumstances of her case had given rise to violations of Article 8 of the Convention. She also invoked Article 3 of the Convention. The applicant further complained under its Article 13 that she did not have an effective remedy at her disposal.

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1973.

7. Early in December 2001 the applicant visited Dr S.B. in a hospital in T., in the region covered by the then Małopolska Regional Medical Insurance Fund (replaced later by the countrywide National Health Fund). Having performed an ultrasound scan, Dr S.B. estimated that the applicant was in the 6th or 7th week of pregnancy.

8. On 2 January 2002, in the 11th week of her pregnancy, the applicant – who was at that time 29 years old, was married and had two children – was registered as a pregnant patient in her local clinic.

9. On 23 January and 20 February 2002 ultrasound scans were performed, in the 14th and 18th weeks of the applicant’s pregnancy. On the latter date Dr S.B. estimated that it could not be ruled out that the foetus was affected with some malformation and informed the applicant thereof. The applicant told him that she wished to have an abortion if the suspicion proved true.

[...]

28. Genetic test (amniocentesis) was performed there on 26 March 2002, in the 23rd week of pregnancy, and the applicant was told that she had to wait two weeks for the results.

[...]

30. The applicant was discharged from the Łódź hospital on 28 March 2002. Before the results were available, on 29 March 2002 the applicant, increasingly desperate as by then she was very afraid that the foetus was suffering from severe genetic abnormalities, reported to the T. hospital, where she submitted a written request for an abortion. Dr G.S. told her that he could not take such a decision himself. He had to speak with the consultant.

31. By a letter of 29 March 2002 the applicant requested the hospital in T. to terminate the pregnancy, referring to the provisions of the 1993 Act. She requested that in case of a negative reply it should be made in writing "as soon as possible".

32. On 3 April 2002 the applicant went to that hospital again and was told that the consultant could not see her because he was ill. The visit was rescheduled for 10 April 2002. On the same day she wrote a letter of complaint to the director of the T. hospital, submitting that she had not received adequate treatment and that she felt that the doctors were intentionally postponing all decisions in her case so that she would be unable to obtain an abortion within the time-limit provided for by law.

33. On 9 April 2002 she again requested doctors at the T. hospital to carry out an abortion. She referred to the results of the genetic tests which she had received on that date. The certificate, established by Professor K.Sz., confirmed that the karyotype indicated the presence of Turner syndrome. The certificate further read:

"A chromosomal aberration and an ultrasound image were established, indicating the presence of congenital defects which can have a serious impact on the child's normal development. Further handling of the case under the provisions of the 1993 law on termination of pregnancy can be envisaged. A relevant decision should be taken with due regard to the parents' opinion".

The doctors in the T. hospital refused to carry out an abortion, Dr G.S. telling her that it was too late by then as the foetus was able at that stage to survive outside the mother's body.

[...]

37. On 11 July 2002 the applicant gave birth to a baby girl affected with Turner syndrome.

38. On 31 July 2002 the applicant requested the prosecuting authorities to institute criminal proceedings against the persons involved in handling her case. She alleged serious failure on the part of the doctors, acting as public agents, to safeguard her interests protected by law, on account of their failure to perform timely prenatal examinations. As a result, the applicant had been denied information on the foetus' condition and, consequently, divested of the possibility to decide for herself whether or not she wished to terminate her pregnancy in the conditions provided for by law, and she had been forced to continue it.

[...]

41. The applicant appealed, complaining, *inter alia*, that the prosecuting authorities had failed to address the critical issue of whether, in the circumstances of the case, genetic tests should have been carried out in order to obtain a diagnosis of the foetus' condition. Instead the investigation had focused on whether or not the applicant had a right to an abortion under the applicable law.

42. Ultimately, on 2 February 2004, the competent court upheld the decision of the prosecuting authorities. The court held that doctors employed in public hospitals did not have the quality of "public servants", which in the circumstances of the case was a necessary element for the commission of the criminal offence of breach of duty by a public servant.

43. On 11 May 2004 the applicant filed a civil lawsuit with the Kraków Regional Court against doctors S.B., G.S. and K.R. and against the Krakow and T. hospitals. She argued that the doctors dealing with her case had unreasonably procrastinated in their decision on her access to genetic tests and had thereby failed to provide her with reliable and timely information about the foetus' condition. They had also failed to establish the foetus' condition in time for her to make an informed decision as to whether or not to terminate the pregnancy. As a result of an unjustified delay in obtaining relevant information she had been divested of the possibility of exercising an autonomous choice as to her parenthood.

The applicant further argued that the laws in force authorised abortion in specific situations. However, that right had been denied her as a result of difficulties in obtaining timely access to genetic tests and the lengthy delay before she had ultimately obtained such access.

(...)

The applicant argued that the circumstances in which the determination of her access to genetic testing had been decided had breached her personal rights and dignity and had deeply humiliated her. No regard had been had to her views and feelings.

She also claimed compensation from Dr S.B. for hostile and disparaging statements about her character and conduct which he had made in a press interview about her case. He had disclosed to the public details about her and the foetus' health covered by medical secret and told the journalist that the applicant and her husband were bad and irresponsible parents.

[...]

46. On 19 October 2005 the Kraków Regional Court awarded the applicant PLN 10,000 against S.B., finding that in a press interview published in November 2003 he had disclosed information relating to the applicant's health and private life in connection with her pregnancy. He had also made disrespectful and hurtful comments about the applicant's conduct and personality.

47. The court dismissed the remaining claims which she had lodged against doctors G.S. and K.R. and against the hospitals. (...)

48. On 12 December 2005 the applicant appealed. She submitted that (...)In her case doctors S.B., K.R. and G.S. had been of the view that genetic tests were relevant to establishing the foetus' condition, but had not given her the necessary referral. (...)The doctors had tried to shift the responsibility for the way in which her case had been handled to the applicant, despite the obvious fact that the fundamental responsibility for the proper handling of a medical case lay with them as health professionals. The doctors had also been well aware, as shown by the evidence which they had given, that the applicant had been desperate, in reaction to information that the foetus might be affected with a genetic disorder.

49. The applicant submitted that the doctors' conduct had breached the law, in particular section 2 (a) of the 1993 Act in so far as it imposed on the authorities an obligation to ensure unimpeded access to prenatal information and testing, in particular in cases of increased risk or suspicion of a genetic disorder or development problem, or of an incurable life-threatening ailment. The applicant had therefore had such a right, clearly provided for by the applicable law, but the defendants had made it impossible for her to enjoy that right.

50. On 28 July 2006 the Kraków Court of Appeal dismissed the applicant's appeal and upheld the first-instance judgment, endorsing the conclusions of the lower court.

51. On 11 July 2008 the Supreme Court allowed her cassation appeal (...)

The Supreme Court observed that the applicant's claim was two-pronged: it was based firstly on the failure to refer her for genetic testing and, secondly, on the breach of her right to take an informed decision which resulted from this failure.

[...]

54. The Supreme Court considered that there were therefore good reasons to accept that the doctors dealing with the applicant's case had breached her personal rights within the meaning of Article 24 of the Civil Code and her patient's rights guaranteed by the Medical Institutions Act. They had been aware that only genetic testing was capable of determining the foetus' genetic situation, but had still refused a referral; instead they had sent her for various tests carried out in a hospital setting which were not relevant to such a diagnosis.

Moreover, the lower courts had erred in their finding that the applicant had not suffered non-pecuniary damage as a result of the doctors' acts. Such damage had been caused by the distress, anxiety and humiliation she had suffered as a result of the manner in which her case had been handled.

55. (...)The lower courts had erred in that they had found that there was no adequate causal link between the doctors conduct in the applicant s case and the fact that she had not had access to legal abortion. In this respect the court noted that there had been enough time between the 18th week of the pregnancy, when the suspicions had arisen, and the 22nd, when the time-limit for legal abortion had expired, to carry out genetic testing. When the tests had finally been carried out, the applicant had received the results two weeks later. The tests should therefore have been carried out immediately after the suspicions had arisen, but instead, as a result of procrastination on the part of doctors S.B., G.S. and K.R., they had ultimately been conducted much later.

[...]

57. Hence, the judgment had to be quashed and the case remitted for re-examination in its entirety.

58. On 30 October 2008 the Kraków Court of Appeal gave a judgment.(...)

[...]

61. (...) The defendants had been aware that time was of the essence in the availability of legal abortion, but had failed to accelerate their decision-taking. The hospitals were liable for the negligent acts of their employees in so far as it was their duty to provide the applicant with full information about any genetic disorder of the foetus and how it might affect its development and to do so in time for her to prepare herself for the prospect of giving birth to a child with a genetic disorder.

[...]

63. Having regard to the defendants' failure to respect the applicant's rights, the court awarded the applicant PLN 5,000 against T. Hospital of St. Lazarus and PLN 10,000 against Kraków University Hospital, and dismissed the remainder of her appeal.

[...]

THE LAW

90. The applicant complained that the facts of the case had given rise to a breach of Article 3 of the Convention which, insofar as relevant, reads as follows:

"No one shall be subjected to ... inhuman or degrading treatment... "

91. The applicant further complained that the facts of the case had given rise to a breach of Article 8 of the Convention. Her right to respect for her private life and her psychological and moral integrity had been violated by the authorities' failure to provide her with access to genetic tests in the context of her uncertainty as to whether the foetus was affected with a genetic disorder and also by the absence of a comprehensive legal framework to guarantee her rights.

Article 8 of the Convention, insofar as relevant, reads as follows:

- "1. Everyone has the right to respect for his private ... life ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

[...]

II. THE MERITS

[...]

A. Third parties' submissions

1. *Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, the office of the United Nations High Commissioner for Human Rights*

122. Because the decision to continue or terminate a pregnancy had a profound effect on a woman's private life, including her physical and moral integrity, any interference with this decision must be analysed in light of the woman's right to privacy. This was true regardless of whether the interference directly affected the woman's access to legal abortion or affected it indirectly, by denying her the prerequisite healthcare she needed in order to make a decision regarding continuation or termination of the pregnancy. Numerous international conventions broadly recognised a woman's right to the highest attainable standard of health, including access to appropriate reproductive care. Privacy was particularly important in the case of sexual and reproductive healthcare, which must be provided in a manner consistent with women's rights to personal autonomy.

123. Access to prenatal genetic examinations touched upon reproductive health-related aspects of the right to privacy. Access to information was particularly important in the context of health, as individuals cannot make meaningful healthcare decisions without access to health-related information. Accurate knowledge of an individual's health status was necessary to enable that individual to understand her health care options and protect her bodily integrity by deciding which health care treatment she would avail herself of.

124. This right to information applied with regard to a woman's own reproductive status, knowledge of which was particularly important if women were to be empowered to preserve their bodily integrity by making reproductive health care decisions. Pregnant women might need access to prenatal examinations in order to obtain accurate information about their own health and the health of their foetus, particularly where there were

other indications of genetic malformation. Genetic examinations were often the most reliable method for detecting foetal genetic defects.

125. States must allow individuals to make health care decisions in an active and informed manner. Genetic examinations were one important source of information on foetal health. Obstructing access to examinations necessary to make reproductive decisions interfered with women's reproductive health care decision-making. Without information about whether a foetus was healthy or severely malformed, a woman could not make crucial decisions regarding prenatal treatment or whether to carry the foetus to term. When a country permitted abortion in cases of foetal genetic defect, women must have access to prenatal genetic examinations in order to exercise their right to a legal abortion.

126. One way in which States interfered with a woman's right to decide on a legal abortion was to make such abortions unavailable in practice. The Human Rights Committee had expressed concern regarding States that professed to grant women access to legal abortion but allowed practices to continue that interfered with actual access to abortion services.

127. Where a State allowed providers to conscientiously object to providing health services, it must ensure that it had other adequate procedures in place to safeguard women's ability to effectively exercise their rights under Article 8 of the Convention, including the right to an abortion where legal and the right to information regarding their health status.

[...]

B. Alleged violation of Article 3 of the Convention

[...]

2. The Court's assessment

a) General principles

148. According to the Court's well-established case-law, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see, among many other authorities, *Price v. the*

United Kingdom, no. 33394/96, § 24, ECHR 2001-VII; *Kupczak v. Poland*, no. 2627/09, § 58, 25 January 2011; *Jalloh v. Germany* [GC], no. 54810/00, § ..., ECHR 2006-IX).

149. Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita, Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV).

150. Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (see, among many other authorities, *Iwa czuk v. Poland*, no. 25196/94, § 51, 15 November 2001; *Wiktorko v. Poland*, no. 14612/02, § 45, 31 March 2009).

151. Although the purpose of such treatment is a factor to be taken into account, in particular whether it was intended to humiliate or debase the victim, the absence of any such purpose does not inevitably lead to a finding that there has been no violation of Article 3. For example, the Court has found violations of that provision in many cases where the authorities dealt with requests to provide information of crucial importance for the applicants, for example about the whereabouts and fate of their missing relatives, disclosing a callous disregard for their vulnerability and distress (see, among many other authorities, *Kukayev v. Russia*, no. 29361/02, §§ 102-106; 15 November 2007; *Takhayeva and others v. Russia*, no. 23286/04, §§ 102-104, 18 September 2008).

152. Moreover, it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 3 by reason of their failure to provide appropriate medical treatment (see, for example, *Powell v. the United Kingdom* (dec.), no. 45305/99, ECHR 2000-V).

b) Application of the principles to the circumstances of the case

153. Turning to the circumstances of the present case, the Court observes that the results of the ultrasound scan carried out in the 18th week of the applicant’s pregnancy confirmed the likelihood that the foetus was affected with an unidentified malformation (see paragraph 9 above). Following that scan the applicant feared that the foetus was affected with a genetic disorder and that, in the light of the results of subsequent scans her fears cannot be said to have been without foundation. She tried, repeatedly and with perseverance, through numerous visits to doctors and through her written requests and complaints, to obtain access to genetic tests which would have provided her with infor-

mation confirming or dispelling her fears; to no avail. For weeks she was made to believe that she would undergo the necessary tests. She was repeatedly sent to various doctors, clinics and hospitals far from her home and even hospitalised for several days for no clear clinical purpose (see paragraph 20 above). The Court finds that the determination of whether the applicant should have access to genetic testing, recommended by doctors in light of the findings of the second ultrasound scan, was marred by procrastination, confusion and lack of proper counselling and information given to the applicant.

Ultimately, it was only by following the advice given by Professor K.Sz., the only doctor who was sympathetic to her plight, that the applicant obtained admission to a hospital in Łódź by means of subterfuge. She reported to that hospital as an emergency patient and finally had the tests conducted in the 23rd week of her pregnancy, on 26 March 2002. The applicant obtained the results on 9 April 2002, two weeks later.

[...]

156. In this connection, the Court cannot but note that the 1993 Act determining the conditions permitting termination of pregnancy expressly and unequivocally provides, and provided at the relevant time, for the State's obligation to ensure unimpeded access to prenatal information and testing. Section 2 (a) of this Act imposed such an obligation on the State and local administration in particular in cases of suspicion of genetic disorder or development problems. This obligation covered all cases in which such suspicion arose in respect of a pregnancy, with no distinction whatsoever being drawn in the Act based on the severity of the suspected ailment (see paragraph 66 above).

157. The Court further observes that the Medical Profession Act clearly provides and provided at the material time for a general obligation for doctors to give patients comprehensible information about their condition, the diagnosis, the proposed and possible diagnostic and therapeutic methods, the foreseeable consequences of a decision to have recourse to them or not, the possible results of the therapy and about the prognosis (see paragraph 74 above). Likewise, the Medical Institutions Act, applicable at the material time, provided for patients' right to obtain comprehensive information on their health (see paragraph 72 above). Hence, there was an array of unequivocal legal provisions in force at the relevant time specifying the State's positive obligations towards pregnant women regarding their access to information about their health and that of the foetus.

[...]

159. The Court notes that the applicant was in a situation of great vulnerability. Like any other pregnant woman in her situation, she was deeply distressed by information that the foetus could be affected with some malformation. It was therefore natural that she wanted to obtain as much information as possible so as to find out whether the initial diagnosis was correct, and if so, what was the exact nature of the ailment. She also wanted to find out about the options available to her. As a result of the procrastination of the health professionals as described above, she had to endure weeks of painful uncertainty concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She suffered acute anguish through having to think about how she and her family would be able to ensure the child's welfare, happiness and appropriate long-term medical care. Her concerns were not properly acknowledged and addressed by the health professionals dealing with her case. The Court emphasises that six weeks elapsed between 20 February 2002 when the first ultrasound scan gave rise, for the first time, to a suspicion regarding the foetus' condition and 9 April 2002 when the applicant finally obtained the information she was seeking, confirmed by way of genetic testing. No regard was had to the temporal aspect of the applicant's predicament. She obtained the results of the tests when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have recourse to legal abortion as the time limit provided for by section 4 (a) paragraph 2 had already expired.

160. The Court is further of the view that the applicant's suffering, both before the results of the tests became known and after that date, could be said to have been aggravated by the fact that the diagnostic services which she had requested early on were at all times available and that she was entitled as a matter of domestic law to avail herself of them.

It is a matter of great regret that the applicant was so shabbily treated by the doctors dealing with her case. The Court can only agree with the Polish Supreme Court's view that the applicant had been humiliated (see paragraph 54 above).

161. The Court is of the view that the applicant's suffering reached the minimum threshold of severity under Article 3 of the Convention.

[...]

C. Alleged violation of Article 8 of the Convention

[...]

3. The Court's assessment

a) Applicability of Article 8 of the Convention

[...]

180. The Court reiterates that "private life" is a broad concept, encompassing, *inter alia*, the right to personal autonomy and personal development (see, among many other authorities, *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I). The Court has held that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III). The notion of private life concerns subjects such as gender identification, sexual orientation and sexual life (*Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions* 1997-I, p. 131, § 36) a person's physical and psychological integrity (*Tysiąg v. Poland*, cited above, § 107, ECHR 2007-IV). The Court has also held that the notion of private life applies to decisions both to have or not to have a child or to become parents (*Evans v. the United Kingdom* [GC], no. 6339/05, § 71, ECHR 2007-IV).

181. The Court has previously found, citing with approval the case-law of the former Commission, that the decision of a pregnant woman to continue her pregnancy or not belongs to the sphere of private life and autonomy. Consequently, also legislation regulating the interruption of pregnancy touches upon the sphere of private life, since whenever a woman is pregnant her private life becomes closely connected with the developing foetus (Eur.Comm. HR, *Bruggeman and Scheuten v. Germany*, cited above; *Boso v. Italy* (dec.), no. 50490/99, ECHR 2002-VII; *Vo v. France* [GC], no. 53924/00, § 76, ECHR 2004-VIII; *Tysiąg*, cited above, §§ 106-107; *A, B and C v. Ireland* [GC], no. 25579/05, § 212, 16 December 2010). It is also clear from an examination of these cases that the issue has always been determined by weighing up various, and sometimes conflicting, rights or freedoms claimed by a mother or a father in relation to one another or *vis-à-vis* the foetus (*Vo v. France*, cited above, § 82).

182. The Court concludes that Article 8 of the Convention is applicable to the circumstances of the case.

b) General principles

183. The essential object of Article 8 is to protect the individual against arbitrary interference by public authorities. Any interference under the first paragraph of Article 8 must be justified in terms of the second paragraph, namely as being “in accordance with the law” and “necessary in a democratic society” for one or more of the legitimate aims listed therein. According to settled case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to one of the legitimate aims pursued by the authorities (see, among other authorities, *Olsson v. Sweden (No. 1)*, judgment of 24 March 1988, Series A no. 130, § 67).

184. In addition, there may also be positive obligations inherent in effective “respect” for private life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of relations between individuals, including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures (see, among other authorities, *X and Y v. the Netherlands*, judgment of 26 March 1985, Series A no. 91, p. 11, § 23).

185. The Court has previously found States to be under a positive obligation to secure to its citizens their right to effective respect for their physical and psychological integrity (*Glass v. the United Kingdom*, no. 61827/00, §§ 74-83, ECHR 2004-II; *Sentges v. the Netherlands (dec.)* no. 27677/02, 8 July 2003; *Pentiacova and others v. Moldova (dec.)*, no. 14462/03, ECHR 2005-...; *Nitecki v. Poland (dec.)*, no. 65653/01, 21 March 2002; *Odièvre v. France [GC]*, cited above, § 42). In addition, these obligations may involve the adoption of measures, including the provision of an effective and accessible means of protecting the right to respect for private life (*Airey v. Ireland*, 9 October 1979, § 33, Series A no. 32, *McGinley and Egan v. the United Kingdom*, 9 June 1998, § 101, *Reports of Judgments and Decisions* 1998-III; and *Roche v. the United Kingdom [GC]*, no. 32555/96, § 162, ECHR 2005-X) including both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures in the context of abortion (*Tysiąg v. Poland*, cited above, § 110; *A, B and C v. Ireland [GC]*, cited above, § 245).

186. The Court has already held that the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a “living instrument which must be interpreted in the light of present-day conditions” (see, among many other authorities, *E.B. v. France* [GC], no. 43546/02, § 92, ECHR 2008-...). The reasons for that conclusion are that the issue of such protection has not been resolved within the majority of the Contracting States themselves and that there is no European consensus on the scientific and legal definition of the beginning of life (*Vo v. France*, cited above, § 82). However, the Court considers that there is indeed a consensus amongst a substantial majority of the Contracting States of the Council of Europe towards allowing abortion and that most Contracting Parties have in their legislation resolved the conflicting rights of the foetus and the mother in favour of greater access to abortion (see (*A, B and C v. Ireland* [GC], cited above, 16 December 2010, §§ 235 and 237).

Since the rights claimed on behalf of the foetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State’s protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother. In the absence of such common approach regarding the beginning of life, the examination of national legal solutions as applied to the circumstances of individual cases is of particular importance also for the assessment of whether a fair balance between individual rights and the public interest has been maintained (see also, for such an approach, *A, B, and C* cited above, § 214).

187. Moreover, as in the negative obligation context, the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, § 49). While a broad margin of appreciation is accorded to the State as regards the circumstances in which an abortion will be permitted in a State, once that decision is taken the legal framework devised for this purpose should be “shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention” (*A, B and C v. Ireland* [GC], cited above, § 249).

188. The Court notes the applicant’s submission that the failure to allow her timely access to prenatal genetic tests had amounted to an interference with her rights guaranteed by Article 8. Furthermore, the Court has found that prohibition of the termination of pregnancies sought for reasons of health and /or well-being amounted to an interference

with the applicants' right to respect for their private lives (see *A., B., and C. v. Ireland*, cited above, § 216).

However, in the present case the Court is confronted with a particular combination of a general right of access to information about one's health with the right to decide on the continuation of pregnancy. Compliance with the State's positive obligation to secure to their citizens their right to effective respect for their physical and psychological integrity may necessitate, in turn, the adoption of regulations concerning access to information about an individual's health (*Guerra and others v. Italy*, 19 February 1998, § 60, Reports 1998-I; *Roche v. the United Kingdom* [GC], no. 32555/96, § 155, ECHR 2005-X; *K.H. and others v. Slovakia*, no. 32881/04, §§ 50-56, ECHR 2009-... (extracts)). Hence, and since the nature of the right to decide on the continuation of pregnancy is not absolute, the Court is of the view that the circumstances of the present case are more appropriately examined from the standpoint of the respondent State's positive obligations arising under this provision of the Convention (see, *mutatis mutandis*, *Tysiāc v. Poland*, cited above, § 108).

189. The boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both the negative and positive contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see, among other authorities, *Keegan v. Ireland*, judgment of 26 May 1994, Series A no. 290, p. 19, § 49; and *Ró a ski v. Poland*, no. 55339/00, § 61, 18 May 2006). While the State regulations on abortion relate to the traditional balancing of privacy and the public interest, they must – in case of a therapeutic abortion – be also assessed against the positive obligations of the State to secure the physical integrity of mothers-to-be (see *Tysiāc v. Poland*, cited above, § 107).

190. The notion of "respect" is not clear-cut, especially as far as those positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Nonetheless, in assessing the positive obligations of the State it must be borne in mind that the rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention (see, e.g., *Armonien v. Lithuania*, no. 36919/02, § 38, 25 November 2008; *Zehnalová and Zehnal v. the Czech Republic* (dec.), no. 38621/97, ECHR 2002-V). Compliance with requirements imposed by the rule of law presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities with the rights

safeguarded by the Convention (see *Malone v. the United Kingdom*, judgment of 2 August 1984, Series A no. 82, p. 32, § 67; *Segerstedt-Wiberg and others v. Sweden*, no. 62332/00, § 76, ECHR 2006-VII).

191. Finally, the Court reiterates that in the assessment of the present case it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective (see *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, p. 12-13, § 24). Whilst Article 8 contains no explicit procedural requirements, it is important for the effective enjoyment of the rights guaranteed by this provision that the relevant decision-making process is fair and such as to afford due respect for the interests safeguarded by it. What has to be determined is whether, having regard to the particular circumstances of the case and notably the nature of the decisions to be taken, an individual has been involved in the decision-making process, seen as a whole, to a degree sufficient to provide her or him with the requisite protection of their interests (see, *mutatis mutandis*, *W. v. the United Kingdom*, judgment of 8 July 1987, Series A no. 121, pp. 28-29, §§ 62 and 64). The Court has already held that in the context of access to abortion a relevant procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body or person should also issue written grounds for its decision (see *Tysiāc v. Poland*, cited above, § 117).

c) Compliance with Article 8 of the Convention

192. When examining the circumstances of the present case, the Court cannot overlook its general national context. It notes that the 1993 Act specifies situations in which abortion is allowed. A doctor who terminates a pregnancy in breach of the conditions specified in that Act is guilty of a criminal offence punishable by up to three years' imprisonment (see paragraph 70 above).

193. The Court has already found that the legal restrictions on abortion in Poland, taken together with the risk of their incurring criminal responsibility under Article 156 § 1 of the Criminal Code, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case (see *Tysiāc v. Poland*, no. 5410/03, § 116, ECHR 2007-IV). It further notes that in the circumstances of the present case this was borne out also by the fact that the T. hospital's lawyer was asked to give an opinion on steps to be taken with a view to ensuring that the conditions of the 1993 Act as to the availability of abortion were respected. The Court is of the view that provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this chilling effect.

194. The Court further notes that in its fifth periodical report to the ICCPR Committee, relevant for the assessment of the circumstances obtaining at the relevant time, the Polish Government acknowledged, *inter alia*, that there had been deficiencies in the manner in which the 1993 Act had been applied in practice (see paragraph 84 above). It further notes the concern expressed by the Committee on the Elimination of Discrimination against Women as regards access by women in Poland to reproductive health services and to lawful abortion (see paragraph 86 above).

195. The Court notes that in its judgment in the case *Tysic v. Poland*, referred to above, it highlighted the importance of procedural safeguards in the context of the implementation of the 1993 Act in situations where a pregnant woman had objective grounds for fearing that pregnancy and delivery would have a serious negative impact on her health. In that case the Court held that Polish law did not contain any effective procedural mechanisms capable of determining whether the conditions existed for obtaining a lawful abortion on the grounds of danger to the mother's health which the pregnancy might present, or of addressing the mother's legitimate fears (see *Tysic v. Poland*, cited above,  119 – 124, ECHR 2007-IV).

196. The Court discerns certain differences between the issues concerned in the *Tysic v. Poland* case and those to be examined in the context of the present case, where the applicant persistently but unsuccessfully sought access to prenatal genetic testing. It was not access to abortion as such which was primarily in issue, but essentially timely access to a medical diagnostic service that would, in turn, make it possible to determine whether the conditions for lawful abortion obtained in the applicant's situation or not. Hence, the starting point for the Court's analysis is the question of an individual's access to information about her or his health.

197. The right of access to such information falling within the ambit of the notion of private life can be said to comprise, in the Court's view, on the one hand, a right to obtain available information on one's condition. The Court further considers that during pregnancy the foetus' condition and health constitute an element of the pregnant woman's health (see Eur. Comm. HR, *Bruggeman and Schouten v. Germany*, cited above,  59, *mutatis mutandis*). The effective exercise of this right is often decisive for the possibility of exercising personal autonomy, also covered by Article 8 of the Convention (*Pretty v. the United Kingdom*, cited above,  61, ECHR 2002-III) by deciding, on the basis of such information, on the future course of events relevant for the individual's quality of life (e.g. by refusing consent to medical treatment or by requesting a given form of treatment).

The significance of timely access to information concerning one's condition applies with particular force to situations where rapid developments in the individual's condition occur and his or her capacity to take relevant decisions is thereby reduced. In the same vein, in the context of pregnancy, the effective access to relevant information on the mother's and foetus' health, where legislation allows for abortion in certain situations, is directly relevant for the exercise of personal autonomy.

198. In the present case the essential problem was precisely that of access to medical procedures, enabling the applicant to acquire full information about the foetus' health.

While the Convention does not guarantee as such a right to free medical care or to specific medical services, in a number of cases the Court has held that Article 8 is relevant to complaints about insufficient availability of health care services (*Nitecki v. Poland* (dec.), cited above; *Pentiacova and others v. Moldova* (dec.), cited above). The present case differs from cases where the applicants complained about denial of or difficulties in obtaining access to certain health services for reasons of insufficient funding or availability. The Court has already found that it has not been argued, let alone shown, that there were any objective reasons why the genetic tests were not carried out immediately after the suspicions as to the foetus' condition had arisen but only after a lengthy delay (...). The difficulties the applicant experienced seem to have been caused, in part, by reticence on the part of certain doctors involved to issue a referral, and also by a certain organisational and administrative confusion in the health system at the material time as to the procedure applicable in cases of patients seeking services available outside their particular region of the then Medical Insurance Fund and the modalities of reimbursement between the regions of costs incurred in connection with such services.

199. The Court emphasises the relevance of the information which the applicant sought to obtain by way of genetic testing to the decision concerning continuation of her pregnancy. The 1993 Act allows for an abortion to be carried out before the foetus is capable of surviving outside the mother's body if prenatal tests or other medical findings indicate a high risk that the foetus will be severely and irreversibly damaged or suffer from an incurable life-threatening ailment. Hence, access to full and reliable information on the foetus' health is not only important for the comfort of the pregnant woman but also a necessary prerequisite for a legally permitted possibility to have an abortion to arise.

200. In this context, the Court reiterates its finding made in the case of *Tysic v. Poland* that once the State, acting within the limits of the margin of appreciation, referred to above, adopts statutory regulations allowing abortion in some situations, it must not

structure its legal framework in a way which would limit real possibilities to obtain it. In particular, the State is under a positive obligation to create a procedural framework enabling a pregnant woman to exercise her right of access to lawful abortion (*Tysi c v. Poland*, no. 5410/03, §§ 116 - 124, ECHR 2007-IV). In other words, if the domestic law allows for abortion in cases of foetal malformation, there must be an adequate legal and procedural framework to guarantee that relevant, full and reliable information on the foetus' health is available to pregnant women.

201. In the present case, the Court reiterates that six weeks elapsed from the date when the first concerns arose regarding the foetus' health until their confirmation by way of genetic tests (see also paragraph 152 above).

202. The Court stresses that it is not its function to question doctors' clinical judgment (see *Glass v. the United Kingdom*, cited above). It is therefore not for the Court to embark on any attempt to determine the severity of the condition with which the doctors suspected that the foetus was affected, or whether that suspected condition could have been regarded as entitling the applicant to a legal abortion available under the provisions of section 4 (a) of that Act. In the Court's view this is wholly irrelevant for the assessment of the case at hand, given that the legal obligation to secure access to pre-natal genetic testing arose under the provisions of the 1993 Act regardless of the nature and severity of the suspected condition (...).

203. The Court observes that the nature of the issues involved in a woman's decision to terminate a pregnancy is such that the time factor is of critical importance. The procedures in place should therefore ensure that such decisions are taken in good time. The Court is of the view that there was ample time between week 18 of the pregnancy, when the suspicions first arose, and week 22, the stage of pregnancy at which it is generally accepted that the foetus is capable of surviving outside the mother's body and regarded as time-limit for legal abortion, to carry out genetic testing. The Court notes that the Supreme Court criticised the conduct of the medical professionals who had been involved in the applicant's case and the procrastination shown in deciding whether to give the applicant a referral for genetic tests. Such a critical assessment on the part of the highest domestic judicial authority is certainly, in the Court's view, of relevance for the overall assessment of the circumstances of the case.

204. As a result, the applicant was unable to obtain a diagnosis of the foetus' condition, established with the requisite certainty, by genetic tests within the time-limit for abortion to remain a lawful option for her.

205. In so far as the Government argued that in the present case access to genetic testing was closely linked, to the point of being identical, with access to abortion (...), the Court observes that prenatal genetic tests serve various purposes and they should not be identified with encouraging pregnant women to seek an abortion. Firstly, they can simply dispel the suspicion that the foetus was affected with some malformation; secondly, a woman carrying the foetus concerned can well choose to carry the pregnancy to term and have the baby; thirdly, in some cases (although not in the present one), prenatal diagnosis of an ailment makes it possible to embark on prenatal treatment; fourthly, even in the event of a negative diagnosis, it gives the woman and her family time to prepare for the birth of a baby affected with an ailment, in terms of counselling and coping with the stress occasioned by such a diagnosis. Furthermore, the Court emphasises that the 1993 Act clearly provides for a possibility of abortion in cases of certain malformations. It is not in dispute that some of these malformations could only be detected by way of prenatal genetic tests. Therefore the Government's argument has failed to convince the Court.

206. In so far as the Government referred in their submissions to the right of physicians to refuse certain services on grounds of conscience and referred to Article 9 of the Convention, the Court reiterates that the word "practice" used in Article 9 § 1 does not denote each and every act or form of behaviour motivated or inspired by a religion or a belief (see *Pichon and Sajous v. France* (dec.), no. 49853/99, ECHR 2001-X). For the Court, States are obliged to organise the health services system in such a way as to ensure that an effective exercise of the freedom of conscience of health professionals in the professional context does not prevent patients from obtaining access to services to which they are entitled under the applicable legislation.

207. The Court further observes that the Government referred to the Ordinance of the Minister of Health of 22 January 1997 (see paragraph 68 above), arguing that it provided for a procedure governing decisions on access to abortion. However, the Court has already held that this Ordinance did not provide for any procedural framework to address and resolve controversies between the pregnant woman and her doctors or between the doctors themselves as to the availability of lawful abortion in an individual case (see *Tysiąg v. Poland*, cited above, § 121).

208. The Court concludes that it has not been demonstrated that Polish law as applied to the applicant's case contained any effective mechanisms which would have enabled the applicant to seek access to a diagnostic service, decisive for the possibility of exercising her right to take an informed decision as to whether to seek an abortion or not.

209. In so far as the Government relied on the instruments of civil law as capable of addressing the applicant's situation, the Court has already held, in the context of the case of *Tysiāc v. Poland*, cited above, that the provisions of the civil law as applied by the Polish courts did not afford the applicant a procedural instrument by which she could have fully vindicated her right to respect for her private life. The civil law remedy was solely of a retroactive and compensatory character. The Court was of the view that such retrospective measures alone were not sufficient to provide appropriate protection of personal rights of a pregnant woman in the context of a controversy concerning the determination of access to lawful abortion and emphasised the vulnerability of the woman's position in such circumstances (see *Tysiāc v. Poland*, no. 5410/03, § 125, ECHR 2007-IV). Given the retrospective nature of compensatory civil law, the Court fails to see any grounds on which to reach a different conclusion in the present case.

It therefore considers that it had not been demonstrated that Polish law contained any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to take, in the light of their results, an informed decision as to whether to seek an abortion or not.

210. Consequently, the Court considers that neither the medical consultation nor litigation options relied on by the Government constituted effective and accessible procedures which would have allowed the applicant to establish her right to a lawful abortion in Poland. The uncertainty generated by the lack of legislative implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act, and more particularly by the lack of effective and accessible procedures to establish a right to an abortion under that provision, has resulted in a striking discordance between the theoretical right to a lawful abortion in Poland on grounds referred to in this provision and the reality of its practical implementation (*Christine Goodwin v. the United Kingdom* [GC], cited above, at §§ 77-78; and *S. H. and others v. Austria*, cited above, at § 74, *mutatis mutandis*; *A, B and C v. Ireland* [GC], no. 25579/05, §§ 263-264, 16 December 2010).

211. Having regard to the circumstances of the case as a whole, it cannot therefore be said that, by putting in place legal procedures which make it possible to vindicate her rights, the Polish State complied with its positive obligations to safeguard the applicant's right to respect for her private life in the context of controversy over whether she should have had access to, firstly, prenatal genetic tests and subsequently, an abortion, had the applicant chosen this option for her.

212. The Court therefore dismisses the Government's preliminary objection concerning civil litigation as an effective remedy. Furthermore, the Court, having regard to the circumstances of the case seen as a whole, has already found insufficient the award made by the domestic courts in the civil proceedings for the violations alleged by the applicant (...). Accordingly, it dismisses also the Government's preliminary objection that the applicant had lost her status of a victim of a breach of Article 8 of the Convention.

213. The Court reiterates that effective implementation of Article 4 (a) 1.2 of the 1993 Family Planning Act would necessitate ensuring to pregnant women access to diagnostic services which would make it possible for them to establish or dispel a suspicion that the foetus may be affected with ailments. The Court has already found that in the present case it has not been established that such services were unavailable. Moreover, an effective implementation of the provisions of the 1993 Act cannot, in the Court's view, be considered to impose a significant burden on the Polish State since it would amount to rendering operational a right to abortion already accorded in that Act in certain narrowly defined circumstances, including in certain cases of foetal malformation (*A, B and C v. Ireland* [GC], cited above, § 261, *mutatis mutandis*). While it is not for this Court to indicate the most appropriate means for the State to comply with its positive obligations (*Airey v. Ireland* judgment, § 26; cited above), the Court notes that the legislation in many Contracting States has specified the conditions governing effective access to a lawful abortion and put in place various implementing procedural and institutional procedures (*Tysi c v. Poland* judgment, § 123).

214. The Court concludes that the authorities failed to comply with their positive obligations to secure to the applicant effective respect for her private life and that there has therefore been a breach of Article 8 of the Convention.

[...]

FOR THESE REASON, THE COURTS

[...]

2. *Holds* by six votes to one that there has been a violation of Article 3 of the Convention;
3. *Holds* by six votes to one that there has been a violation of Article 8 of the Convention;

[...].

*Committee on the
Elimination of Discrimination
against Women*

A. S. v. Hungary

Communication N° 4/2004

*Views adopted
on 14 August 2006*



[...]

VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL PROTOCOL

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

The facts as presented by the author

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

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

"Having knowledge of the death of the embryo inside my womb I firmly request my sterilization [a Latin term unknown to the author was used]. I do not intend to give birth again; neither do I wish to become pregnant."

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

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

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

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

2.6 On 22 November 2002, the Fehérgyarmat Town Court rejected the author's claim, despite a finding of some negligence on the part of the doctors, who had failed to comply with certain legal provisions, namely, the failure to inform the author's partner of the operation and its possible consequences as well as to obtain the birth certificates of the author's live children. The Court reasoned that the medical conditions for sterilization prevailed in the author's case and that she had been informed about her sterilization and given all relevant information in a way in which she could understand it. The Court also found that the author had given her consent accordingly. The Court further viewed as a "partial extenuating circumstance towards the defendant's negligence the fact that, with the author's consent, the doctors performed the sterilization with special dispatch simultaneously with the Caesarean section".

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

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

[...]

ISSUES AND PROCEEDINGS BEFORE THE COMMITTEE

[...]

Consideration of the merits

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

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

States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women:

(...)

h) Access to specific educational information to help to ensure the health and well being of families, including information and advice on family planning.

With respect to the claim that the State party violated article 10 (h) of the Convention by failing to provide information and advice on family planning, the Committee recalls its general recommendation No. 21 on equality in marriage and family relations, which recognizes in the context of “coercive practices which have serious consequences for women, such as forced ... sterilization” that informed decision-making about safe and reliable contraceptive measures depends upon a woman having “information about contraceptive measures and their use, and guaranteed access to sex education and family planning services”. The Committee notes the State party’s arguments that the author was given correct and appropriate information at the time of the operation, during prenatal care and during her three previous pregnancies as well as its argument that, according to the decision of the lower court, the author had been in a condition in which she was able to understand the information provided. On the other hand, the Committee notes the author’s reference to the judgment of the appellate court, which found that the author had not been provided with detailed information about the sterilization, including the risks involved and the consequences of the surgery, alternative procedures or contraceptive methods. The Committee considers that the author has a right protected by article 10 (h) of the Convention to specific information on sterilization and alternative procedures for family planning in order to guard against such an intervention being carried out without her having made a fully informed choice. Furthermore, the Committee notes the description given of the author’s state of health on arrival at the hospital and observes that any counselling that she received must have been given under stressful and most inappropriate conditions. Considering all these factors, the Committee finds a failure of the State party, through the hospital personnel, to provide appropriate information and advice on family planning, which constitutes a violation of the author’s right under article 10 (h) of the Convention.

11.3 Article 12 of the Convention reads:

1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to healthcare services, including those related to family planning.
2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connexion with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.

With regard to the question of whether the State party violated the author’s rights under article 12 of the Convention by performing the sterilization surgery without obtaining her informed consent, the Committee takes note of the author’s description of the 17 minute

timespan from her admission to the hospital up to the completion of two medical procedures. Medical records revealed that the author was in a very poor state of health upon arrival at the hospital; she was feeling dizzy, was bleeding more heavily than average and was in a state of shock. During those 17 minutes, she was prepared for surgery, signed the statements of consent for the caesarean section, the sterilization, a blood transfusion and anaesthesia and underwent two medical procedures, namely, the caesarean section to remove the remains of the dead foetus and the sterilization. The Committee further takes note of the author's claim that she did not understand the Latin term for sterilization that was used on the barely legible consent note that had been handwritten by the doctor attending to her, which she signed. The Committee also takes note of the averment of the State party to the effect that, during those 17 minutes, the author was given all appropriate information in a way in which she was able to understand it. The Committee finds that it is not plausible that during that period of time hospital personnel provided the author with thorough enough counseling and information about sterilization, as well as alternatives, risks and benefits, to ensure that the author could make a well-considered and voluntary decision to be sterilized. The Committee also takes note of the unchallenged fact that the author enquired of the doctor when it would be safe to conceive again, clearly indicating that she was unaware of the consequences of sterilization. According to article 12 of the Convention, States parties shall "ensure to women appropriate services in connexion with pregnancy, confinement, and the post-natal period". The Committee explained in its general recommendation No. 24 on women and health that "[A]cceptable services are those that are delivered in a way that ensures

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

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

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

(...)

e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;

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

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

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

II. General:

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

*Committee on the
Elimination of Discrimination
against Women*

*Alyne da Silva Pimentel Teixeira
(deceased) v. Brazil*

Communication N° 17/20048

*Views adopted
on 25 July 2006*



[...]

VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL PROTOCOL

1. The author of the Communications, dated 30 November 2007, is Maria de Lourdes da Silva Pimentel, mother of Alyne da Silva Pimentel Teixeira (deceased), acting in her own name and on behalf of the family of the deceased. They are represented by the Center for Reproductive Rights and Advocacia Cidadã pelos Direitos Humanos¹. They claim that Alyne da Silva Pimentel Teixeira is a victim of a violation by the State party of her right to life and health under articles 2 and 12 of the Convention on the Elimination of All Forms of Discrimination against Women.

[...]

The Convention and its Optional Protocol entered into force for the State party on 2 March 1984 and 28 September 2002, respectively.

The Facts as presented by the author

2.1 Alyne da Silva Pimentel Teixeira, a Brazilian national of African descent, was born on 29 September 1974. She was married and had a daughter, A.S.P., who was born on 2 November 1997.

2.2 On 11 November 2002, Ms. da Silva Pimentel Teixeira went to the Casa de Saúde Nossa Senhora da Glória de Belford Roxo (the health centre) suffering from severe nausea and abdominal pain. She was in her sixth month of pregnancy at the time. The attending obstetrician-gynaecologist prescribed anti-nausea medication, vitamin B12 and a local medication for vaginal infection, scheduled routine blood and urine test for 13 November 2002 as a precautionary measure and sent Ms. da Silva Pimentel Teixeira home. She began to take the prescribed medications immediately.

1. The Committee received amicus curiae briefs from the Latin American and Caribbean Committee for the Defence of Women's Rights, the Internacional Commission of Jurists and Amnesty International, providing general information with regard to the right to the health and maternal mortality in Brazil and drawing attention to the international obligations of States.

2.3 Between 11 and 13 November 2002, Ms. da Silva Pimentel Teixeira's condition worsened considerably and on 13 November 2002, she went to the health centre together with her mother in order to see if the obstetrician-gynaecologist could see her before her scheduled blood and urine analysis. The obstetrician-gynaecologist examined her and admitted her at 8.25 a.m. to the health centre.

2.4 Another doctor examined Ms. da Silva Pimentel Teixeira in the maternity ward and could not detect a foetal heartbeat. By 11 a.m., an ultrasound had confirmed this.

2.5 The doctors at the health centre informed Ms. da Silva Pimentel Teixeira that she needed to be given medication to induce the delivery of the stillborn foetus and began to induce labour at about 2 p.m. By 7.55 p.m., Ms. da Silva Pimentel Teixeira had delivered the stillborn, 27-week-old foetus. She became disoriented immediately afterwards.

2.6 On 14 November 2002, some 14 hours after the delivery, Ms. da Silva Pimentel Teixeira underwent curettage surgery to remove parts of the placenta and after-birth, after which her condition continued to worsen (severe haemorrhaging, vomiting blood, low blood pressure, prolonged disorientation and overwhelming physical weakness, inability to ingest food). Her mother and husband did not visit the health centre that day because they relied on assurances given by phone that Ms. da Silva Pimentel Teixeira was well.

2.7 The author submits that on 15 November 2002, Ms. da Silva Pimentel Teixeira became more disoriented, her blood pressure remained low, she continued to vomit, had difficulty breathing and she continued haemorrhaging. Staff of the health centre performed an abdominal puncture but found no blood. Ms. da Silva Pimentel Teixeira received oxygen, Cimetidina, Mannitol, Decadron and antibiotics. The doctors explained to her mother that her symptoms were consistent with those of a woman who had never received prenatal care and that she needed a blood transfusion; at that point she called Ms. da Silva Pimentel Teixeira's husband, who then went to the health centre. At 1.30 p.m. staff asked Ms. da Silva Pimentel Teixeira's mother for the prenatal medical records because they could not locate any at the health centre.

2.8 The doctors at the health centre contacted both public and private hospitals with superior facilities in order to transfer Ms. da Silva Pimentel Teixeira. Only the municipal Hospital Geral de Nova Iguaçu had available space but refused to use its only ambulance to transport her at that hour. Her mother and husband were unable to secure a private ambulance and Ms. da Silva Pimentel Teixeira waited in critical condition for eight hours,

with manifested clinical symptoms of coma for the last two hours, to be transported by ambulance to the hospital.

2.9 When Ms. da Silva Pimentel Teixeira arrived at the hospital with two doctors and her husband at 9.45 p.m. on 15 November 2002, she was hypothermic, has acute respiratory distress and presented a clinical picture compatible with disseminated intravascular coagulation. Her blood pressure dropped to zero and she had to be resuscitated. The hospital placed her in makeshift area in the emergency room hallway because there were no available beds.

2.10 The medical attendants did not bring her medical records to the hospital. Instead, they provided the treating physician with a brief oral account of her symptoms.

2.11 On 16 November 2002, Ms. da Silva Pimentel Teixeira's mother visited her. She was pale and had blood on her mouth and on her clothes. The hospital staff sent Ms. da Silva Pimentel Teixeira's mother to the health centre to retrieve her medical records. At the centre, she was questioned as to why she wanted the records and made to wait for them.

2.12 Ms. da Silva Pimentel Teixeira died at 7 p.m. on 16 November 2002. An autopsy found the official cause of death to be digestive haemorrhage. According to the doctors, this resulted from the delivery of the stillborn foetus.

2.13 On 17 November 2002, at the request of the hospital, Ms. da Silva Pimentel Teixeira's mother again went to the health centre to retrieve her daughter's medical documents. The doctors at the health centre told her that the foetus had been dead in the womb for several days and that this had caused the death.

2.14 On 11 February 2003, Ms. da Silva Pimentel Teixeira's husband² filed a claim against the health-care system for material and moral damages.

[...]

2. The case file has contradictory information as to who exactly filed the civil claim on 11 February 2003. In some places it mentions the mother of the deceased while in other places it mentions her husband.

Issues and proceedings before the Committee

Consideration of admissibility

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

6.2 While noting the State party's argument that the civil claim of the family of the deceased was still pending and that a judgment was expected in July 2008, the Committee considers that the State has not provided adequate and convincing explanations of some of the issues raised by the author, namely the delay in the appointment of medical expert(s) and delay in the trial and judgments, which remain pending up to now. The Committee also notes the lack of a comprehensive explanation why the two applications of *tutela antecipada* presented on 11 February 2003 and 16 September 2003 were rejected. The Committee is of the opinion that the aforementioned delays cannot be attributed to the complexity of the case or the number of defendants and concludes that the eight-year delay that has elapsed since the claim was filed, despite the statement of the State party that it would be decided in July 2008, constitutes an unreasonably prolonged delay within the meaning of article 4, paragraph 1, of the Optional Protocol.

6.3 The Committee considers that the author's allegations relating to the violations of articles 2 and 12 of the Convention have been sufficiently substantiated for purposes of admissibility. All other admissibility criteria having been met, the Committee declares the communications admissible and proceeds to its examination on the merits.

Consideration of the merits

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

7.2 The author claims that Ms. da Silva Pimentel Teixeira's death constitutes a violation of her right to life and health, under articles 2 and 12, in conjunction with article 1, of the Convention, as the State party did not ensure appropriate medical treatment in connection with pregnancy and did not ensure appropriate medical treatment in connection with pregnancy and did not provide timely emergency obstetric care, hence infringing

the right to non-discrimination based on gender, race and socio-economic background. In order to review these allegations the Committee first has to consider whether the death was “maternal”. It will then consider whether the obligations under article 12, paragraph 2, of the Convention, according to which State parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, have been met in this case. Only after these considerations will the Committee review the other alleged violations of the Convention.

7.3 Although the State party argued that Ms. da Silva Pimentel Teixeira’s death was non-maternal and that probable cause of her death was digestive haemorrhage, the Committee notes that the sequence of events described by the author and not contested by the State party, as well as expert opinion provided by the author, indicate that her death was indeed linked to obstetric complications related to pregnancy. Her complaints of severe nausea and abdominal pain during her sixth month of pregnancy were ignored by the health centre, which failed to perform an urgent blood and urine tests to ascertain whether the foetus had died. The tests were done two days later, which led to a deterioration of Ms. da Silva Pimentel Teixeira’s condition. The Committee recalls its general recommendation No. 24, in which it states that it is the duty of State parties to ensure women’s right to safe motherhood and emergency obstetric services, and to allocate to these services the maximum extent of available resources²¹. It also states that measures to eliminate discrimination against women are considered to be inappropriate in a health-care system which lacks services to prevent, detect and treat illnesses specific to women²². In the light of these observations, the Committee also rejects the argument of the State party that the communications did not contain a causal link between Ms. da Silva Pimentel Teixeira’s gender and the possible medical errors committed, but that the claims concerned a lack of access to medical care related to pregnancy. The Committee therefore is of the view that the death of Ms. da Silva Pimentel Teixeira must be regarded as maternal.

7.4 The Committee also notes the author’s allegation concerning the poor quality of the health services provided to her daughter, which not only included the failure to perform a blood and urine test, but also the fact that the curettage surgery was only carried out 14 hours after labour was induced in order to remove the afterbirth and placenta, which had not been fully expelled during the process of delivery and could have caused the haem-

21. Para. 27 NOTA 21

22. Para. 11 NOTA 22

orrhaging and ultimately death. The surgery was done in the health center, which was not adequately equipped, and her transfer to the municipal hospital took eight hours, as the hospital refused to provide its only ambulance to transport her, and her family was not able to secure a private ambulance. It also notes that her transfer to the municipal hospital without her clinical history and information on her medical background was ineffective, as she was left largely unattended in a makeshift area in the hallway of the hospital for 21 hours until she died. The State party did not deny the inappropriateness of the service nor refute any of these facts. Instead it admitted that Ms. da Silva Pimentel Teixeira's vulnerable condition required individualized medical treatment, which was not forthcoming due to a potential failure in the medical assistance provided by a private health institution, caused by professional negligence, inadequate infrastructure and lack of professional preparedness. The Committee therefore concludes that Ms. da Silva Pimentel Teixeira has not been ensured appropriate services in connection with her pregnancy.

7.5 The State party argued that the inappropriateness of the service is not imputable to it, but to the private health-care institution. It stated that the allegations revealed a number of poor medical practices attributable to a private institution that led to Ms. da Silva Pimentel Teixeira's death. It acknowledged shortcomings in the system used to contract private health services and, by extension, the inspection and control thereof. The Committee therefore notes that the State is directly responsible for the action of private institutions when it outsources its medical services, and that furthermore, the State always maintains the duty to regulate and monitor private health-care institutions. In line with article 2(e) of the Convention, the State party has a due diligence obligation to take measures to ensure that the activities of private actors in regard to health policies and practices are appropriate. In this particular case, the State party's responsibility is strongly anchored in the Brazilian Constitution (articles 196-200) which affirms the right to health as a general human right. The Committee therefore concludes that the State party has failed to fulfil its obligations under article 12, paragraph 2, of the Convention.

7.6 The Committee notes that the author claims that the lack of access to quality medical care during delivery is a systematic problem in Brazil, especially with regard to the way human resources are managed in the Brazilian health system. The Committee also takes note of the argument of the State party that specific medical care was not denied because of an absence of public policies and measures within the State party, as there are a number of policies in place to address the specific needs of women. The Committee refers to its general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention and notes that the policies of the State

party must be action- and result- oriented as well as adequately funded²³. Furthermore, the policy must ensure that there are strong and focused bodies within the executive branch to implement such policies. The lack of appropriate maternal health services in the State party that clearly fails to meet the specific, distinctive health needs and interests of women not only constitutes a violation of article 12, paragraph 2, of the Convention, but also discrimination against women under article 12, paragraph 1, and article 2 of the Convention. Furthermore, the lack of appropriate maternal health services has a differential impact on the right to life of women.

7.7 The Committee notes the author's claim that Ms. da Silva Pimentel Teixeira suffered from multiple discrimination, being a woman of African descent and on the basis of her socio-economic background. In this regard, the Committee recalls its concluding observations on Brazil, adopted on 15 August 2007, where it noted the existence of de facto discrimination against women, especially women from the most vulnerable sectors of society such as women of African descent. It also noted that such discrimination was exacerbated by regional, economic and social disparities. The Committee also recalls its general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention, recognizing that discrimination against women based on sex and gender is inextricably linked to other factors that affect women, such as race, ethnicity, religion or belief, health, status, age, class, cast, and sexual orientation and gender identity. The Committee notes that the State party did not rule out that discrimination might have contributed to some extent, but not decisively, to the death of the author's daughter. The State party also acknowledged that the convergence or association of the different elements described by the author may have contributed to the failure to provide necessary and emergency care to her daughter, resulting in her death. In such circumstances, the Committee concludes that Ms. da Silva Pimentel Teixeira was discriminated against, not only on the basis of her sex, but also on the basis of her status as a woman of African descent and her socio-economic background.

7.8 With regard to the author's claim under articles 12 and 2 (c) of the Convention that the State party failed to put into place a system to ensure effective judicial protection and to provide adequate judicial remedies, the Committee notes that no proceedings have been initiated in order to establish the responsibility of those in charge of providing medical care to Ms. da Silva Pimentel Teixeira. Furthermore, the civil action, which was filed in February 2003 by the family of the deceased is still pending, despite the contention of the State party that judgement was expected in July 2008. In addition, the two requests

for *tutela antecipada*, a judicial mechanism which could have been used to avoid unwarranted delays in the judicial decision, were denied. In such circumstances, the Committee considers that the State party failed to comply with its obligation to ensure effective judicial action and protection.

7.9 The Committee recognizes the moral damage caused to the author by the death of her daughter, as well as the moral and material damage suffered by the daughter of the deceased who has been abandoned by her father and lives with the author in precarious conditions.

Recommendations

8. Acting under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, and in light of all the above considerations, the Committee is of the view that the State party violated its obligations under article 12 (in relation to access to health), article 2 (c) (in relation to access to justice), and article 2 (e) (in relation to the State party's due diligence obligation to regulate the activities of private health service providers), in conjunction with article 1, of the Convention, read together with general recommendations Nos. 24 and 28, and makes the following recommendations to the States party:

1. Concerning the author and the family of Ms. da Silva Pimentel Teixeira:

Provide appropriate reparation, including adequate financial compensation, to the author and to the daughter of Ms. da Silva Pimentel Teixeira commensurate with the gravity of the violations against her;

2. General:

(a) Ensure women's right to safe motherhood and affordable access for all women to adequate emergency obstetric care, in line with general recommendation No. 24 (1999) on women and health;

(b) Provide adequate professional training for health workers, especially on women's reproductive health rights, including quality medical treatment during pregnancy and delivery, as well as timely emergency obstetric care;

(c) Ensure access to effective remedies in cases where women's reproductive health rights have been violated and provide training for the judiciary and for law enforcement personnel;

(d) Ensure that private health care facilities comply with relevant national and International standards on reproductive health care;

(e) Ensure that adequate sanctions are imposed on health professionals who violate women's reproductive health rights; and

(f) Reduce preventable maternal deaths through the implementation of the National Pact for the Reduction of Maternal Mortality at state and municipal levels, including by establishing maternal mortality committees where they still do not exist, in line with the recommendations in its concluding observations for Brazil, adopted on 15 August 2007 (CEDAW/BRA/CO/6)

[...]

*Committee on the
Elimination of Discrimination
against Women*

L.C. v. Peru

Communication N° 22/2009

*Views adopted
on 17 October 2011*



[...]

VIEWS UNDER ARTICLE 7, PARAGRAPH 3, OF THE OPTIONAL PROTOCOL

1. The author of the communication, dated 18 June 2009, is T. P.F. She is submitting the communication on behalf of her daughter, L. C., a Peruvian citizen born 2 April 1993. The author claims that her daughter has been a victim of violation by Peru of articles 1, 2 (c) and (f), 3, 5, 12 and 16 (e) of the Convention on the Elimination of All Forms of Discrimination against Women. The author and her daughter are represented by the Centre for Reproductive Rights and the Centre for the Promotion and Protection of Sexual and Reproductive Rights². The Convention entered into force in Peru on 13 October 1982 and the Optional Protocol on 10 July 2001.

The facts as presented by the author

2.1 L. C. lives in Ventanilla District, Callao Province. In 2006, when she was 13 years old, she began to be sexually abused by J. C. R., a man about 34 years old. As a result, she became pregnant and, in a state of depression, attempted suicide on 31 March 2007 by jumping from a building. She was taken to Daniel Alcides Carrion public hospital, where she was diagnosed with “vertebromedullar cervical trauma, cervical luxation and complete medullar section”, with “a risk of permanent disability” and “risk of deterioration of cutaneous integrity resulting from physical immobility”.

2.2 The damage to the spinal column, in addition to other medical problems, caused paraplegia of the lower and upper limbs requiring emergency surgery. The head of the Neurosurgery Department recommended surgery in order to prevent the injuries she suffered from worsening and leaving her disabled. As a result, the intervention was scheduled for 12 April 2007.

2.3 On 4 April the hospital performed a psychological evaluation of L. C., in the course of which she revealed that the sexual abuse she had suffered and her fear of being pregnant were the causes of her suicide attempt. The following day a gynaecological exami-

2. The Committee received an amicus brief from the International Commission of Jurists on the access to an effective remedy, as well as comments from the Health Equity and Law Clinic of the Faculty of Law, University of Toronto, on the concept of multiple discrimination.

nation was performed, confirming the pregnancy. The daily status reports on the health of L. C. from 2 to 12 April 2007 recorded the risk both of developing infections and of failing to avoid deterioration of her skin owing to the condition of total paralysis and deterioration of her physical mobility.

2.4 On the scheduled day of the surgery, the author was informed that it had been postponed and that the doctor wished to meet with her the following day, 13 April 2007. At that meeting, the author was informed that the surgery had been postponed because of L. C.'s pregnancy. The author also notes that L. C. was diagnosed with moderate anxiety-depression syndrome, for which she was given no treatment as it was contraindicated during pregnancy.

2.5 On 18 April 2007, the author, after consulting with her daughter, requested the hospital officials to carry out a legal termination of the pregnancy in accordance with article 119 of the Penal Code³. In her request the author referred to the conversation she had on 13 April 2007 with the Head of the Neurosurgical Department in which he informed her that he could not operate L.C. due to her pregnancy. She alleged that the pregnancy seriously and permanently endangered the life, physical and psychological health and personal integrity of L.C. and the spinal surgery could not be performed if the pregnancy continued⁴.

2.6 Given the excessive delay by the hospital authorities in responding to the request, the author sought the assistance of the non-governmental organization "Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos (PROMOSEX) (Centre for the Promotion and Protection of Sexual and Reproductive Rights) which, on 15 May 2007, brought the case to the attention of the office of the Deputy Defender for Women's Rights in the Public Defender's Office. On 30 May 2007, 42 days after having submitted the request for a therapeutic abortion, the medical board of the hospital denied the request because it considered that the life of the patient was not in danger.

2.7 The Deputy Defender requested a medical report from the High-Level Commission on Reproductive Health of the Medical College of Peru. After giving a description of the injuries that the girl had sustained the Commission, in a report dated 7 May 2007

3 This provision states that "abortion shall not be punishable if performed by a doctor with the consent of the pregnant woman or her legal representative, if any, when it is the only way to save the life of the mother or to avoid serious and permanent harm to her health".

4. Copy of the request is contained in the file. CEDAW/C/50/D/22/2009.

indicated, inter alia, that due to L.C.'s age and neurological lesion a risk of complications during the delivery was to be expected. It concluded: "There are sufficient reasons to state that, if the pregnancy continues, there is grave risk to the girl's physical and mental health; a therapeutic abortion, if requested by the subject, would therefore be justified".

2.8 On 7 June 2007, when L. C. was 16 weeks pregnant, the author submitted an appeal for a reconsideration of its opinion regarding the termination of the pregnancy to the hospital medical board, attaching the report of the Medical College and stressing the serious and immediate risk to both the physical and mental health of the minor, the sole requirements established under the Penal Code to allow the legal termination of pregnancy.

2.9 On 16 June 2007, L. C. miscarried spontaneously. On 27 June 2007, the Director of the hospital responded to the request for reconsideration of the decision to terminate the pregnancy submitted by the author, stating that "it was not subject to appeal since those were decisions taken by the various specialists who had evaluated the minor".

2.10 On 11 July 2007, L. C. was operated on for her spinal injuries, almost three and one half months after it had been decided that surgery was necessary. On 31 July 2007 she was discharged from the hospital. The relevant medical report noted that L. C. required intensive physical therapy and rehabilitation at the National Physical Medicine and Rehabilitation Institute. However, that therapy did not start until 10 December 2007. Four months went by after the operation before the physical rehabilitation and psychological or psychiatric help she required began.

2.11 L. C. remained in the National Rehabilitation Institute for two months, but had to abandon her treatment for lack of means. Currently she is paralyzed from the neck down and has regained only partial movement in her hands. She depends on a wheelchair to get around and on others to meet all her needs. She has a catheter which must be changed five times a day under totally sterile conditions, which prevents her from attending school. The author states that the family's situation is disastrous. She cannot work because L. C. requires constant care, and the cost of the medicines and equipment she requires places a heavy burden on the family budget. The brothers of L. C. had to leave school in order to begin working.

2.12 According to the author, no administrative recourse exists in the State party to request the legal termination of a pregnancy. Nor is there a protocol for care that indicates the procedure for requesting a legal abortion or ensuring the availability of this medical service, resources that would be appropriate in demanding the right and guaranteeing access to an essential medical service required only by women.

2.13 The previous Peruvian Health Code established as a requirement in order to perform a therapeutic abortion that it must be performed by a doctor and be supported by two other doctors. However, the General Health Act currently in force (Act No. 26842 of 9 July 1997) repealed that standard and created a legal vacuum since it does not include any regulations on access to the medical procedure of therapeutic abortion. Since that time, the practice has been subject to the discretion of the officials on duty.

2.14 According to the author, there is no appropriate judicial mechanism allowing access to the courts to request termination of a pregnancy for therapeutic reasons, nor to provide full redress for a violation of this type. No remedy exists that operates with sufficient speed and effectiveness so that a woman can demand from the authorities the guarantee of her right to a legal abortion within the limited time period that circumstances require.

2.15 The remedy of amparo under the Constitution does not meet the necessary time frame to ensure effective action. Under the norms governing this proceeding, it takes somewhere between 62 and 102 days to reach a final decision, after all prior remedies have been exhausted. Furthermore, application for this remedy is subject to the exhaustion of all prior remedies, in this case the hospital's refusal to perform the abortion. In the case of L. C., that period exceeded the time period within which she could effectively enjoy that right without risking even more harm to her life and health. When the first refusal to perform the abortion was received she was already 16 weeks pregnant and, had the appeal been heard, she would have been 20 weeks pregnant by that time. There would have been no sense in applying for amparo after that point, since by the time that a final and enforceable decision would have been likely to be taken L. C. would have been more than 28 weeks pregnant.

Furthermore, although the norms establish a procedure that in theory should take somewhere between 62 and 102 days, in reality, amparo proceedings generally take years to resolve. In this regard, the author recalls the decision of the Human Rights Committee in the case of K.N.L.H. v. Peru, also concerning the refusal to perform a therapeutic abortion on a woman pregnant with an anencephalic foetus, where the Committee did not consider the amparo proceeding to be an effective remedy that must be exhausted⁵.

[...]

5. See Communication No. 1153/2003, K.N.L.H.v. Peru, Views of 24 October 2005, para. 5.2.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 The Committee considered the admissibility of the communication, in accordance with articles 64 and 66 of its rules of procedure. In accordance with article 4, paragraph 2, of the Optional Protocol, the Committee was satisfied that the same matter has not been nor is being examined under another procedure of international investigation or settlement

8.2 The State party maintains that the communication should be considered inadmissible, in accordance with article 4, paragraph 1, of the Optional Protocol, on the grounds of failure to exhaust domestic remedies. It noted in particular that the author had not applied for amparo and expressed disagreement with her view that the time necessary to obtain a decision under that remedy was not in keeping with the need to act with the greatest possible speed required by the situation of L. C. It stated that the case could have been decided at first instance; that in this days following it; and that there are exceptions to the requirement of exhaustion of previous remedies, for example in the event of irreparable harm. The State party also notes that the author could have initiated judicial proceedings to request compensation for damages and harm.

8.3 In response to those arguments, the author states that in the State party there is no administrative or judicial procedure that would have allowed L. C. to enjoy her right to receive the urgent medical care that her condition required. Concerning the application for amparo, there are various procedural problems that undermine the desired speed of this proceeding, for instance, the lack of legal deadlines for the judge to accept the application or to hold the oral hearing; that the system of service of legal documents is defective in the State party; and that there are no precedents of similar cases that were resolved promptly using this recourse. She also states that when L. C. obtained a response from the hospital refusing the termination of pregnancy, 56 days had already gone by since the suicide attempt and that an additional wait to obtain a judicial decision obliging the hospital to perform the termination of pregnancy would have had the result of worsening her clinical condition. The author also rejects the idea that civil action could be considered an adequate remedy.

8.4 The Committee considers that, given the seriousness of L. C. 's condition, the avenues pursued by the author, that is, the proceedings before the hospital authorities, were the appropriate ones under domestic law. The Committee observes the following undisputed facts: that L.C. was hospitalized on 31 March 2007; that surgery was recom-

mended by the Head of the Neurosurgical Department and scheduled to take place on 12 April 2007; that on the scheduled date the operation was cancelled; that on 13 April 2007, the author was informed by the Head of the Neurosurgical Department that L.C. could not be operated on account of her pregnancy; and that on 18 April 2007, the author addressed a written request to the medical authorities requesting the termination of the pregnancy. The medical board of the hospital decided on the request only on 30 May 2007. On 7 June 2007, based on the report of the Medical College of Peru dated 7 May 2007 stating that there was a grave risk to L.C.'s health if the pregnancy continued, the author submitted to the hospital authorities an appeal for reconsideration of their decision. This request was decided only on 27 June 2007, after L.C. miscarried on 16 June 2007. The decision indicated that it was not subject to appeal. The Committee considers that this procedure was too long and unsatisfactory. Furthermore, the Committee does not find it reasonable to require that, in addition to the lengthy procedure before the medical authorities the author should have gone to court to initiate a proceeding of an unpredictable duration. The unpredictability can be seen not only in the vagueness of the law itself regarding the deadlines established for amparo, but also by the fact that its speed cannot be demonstrated based on judicial precedent, as evident from the information provided by the parties (...). The Committee considers that no appropriate legal procedure was available to the victim which would have allowed her access to a preventive, independent and enforceable decision. Consequently, the Committee concludes that the exception to the exhaustion of domestic remedies provided in article 4, paragraph 1, of the Optional Protocol, regarding the improbability that amparo would offer effective relief to the victim, is applicable in this case. In a similar manner, the Committee considers that civil action for compensation for damages and harm is also not a recourse that would offer the author an effective remedy, since in no case would it have been able to prevent or redress the irreparable harm to the health of L. C.

8.5 There being no other obstacles to admissibility, the Committee finds the communication admissible and shall proceed to consider it on the merits.

Consideration on the merits

8.6 The Committee has considered the present communication in the light of all the information made available by the parties, in accordance with article 7, paragraph 1, of the Optional Protocol

8.7 The Committee recalls that L.C. became pregnant at the age of 13 years as a result of repeated sexual abuse and thereafter attempted suicide in the State party, where abor-

tion on the grounds of rape or sexual abuse is not legally available. The Committee must decide if the refusal by the hospital to perform a therapeutic abortion on L. C. as provided under article 119 of the Penal Code, and if the delayed scheduling of her operation on the spine gave rise to a violation of her rights under the Convention. The author invokes in particular articles 1, 2 (c) and (f), 3, 5, 12 and 16, paragraph 1(e) of the Convention.

8.8 The Committee takes note of the State party's observation that the reason for the delay in the spinal surgery was not the pregnancy, but the existence of an infection in the area where the surgical incision should be made, as can be seen from the evaluation reports issued by the three meetings of the medical board, the first of which was held on 24 April 2007. However, the Committee also notes the author's assertion that the operation was initially scheduled for 12 April 2007, that the following day she was informed that the reason for the postponement was prevention of harm to the foetus and that the presence of an infection was noted for the first time only on 23 April 2007. The Committee considers that the State party has not disproved the author's allegations, therefore it starts from the assumption that there is a direct relationship between the withdrawal of the surgery, whose necessity cannot be questioned, and L. C.'s pregnancy.

8.9 The Committee will consider whether the facts, as established, constitute a violation of the rights of L. C. under articles 1, 2 (c) and (f), 3, 5, 12 and 16, paragraph 1(e) of the Convention.

8.10 The author alleges that the facts constitute a violation of article 12 because the continuation of the pregnancy represented a threat to the physical and mental health of L. C. She also alleges a violation of article 5 because timely access to necessary medical treatment was made conditional on carrying to term an unwanted pregnancy, which fulfils the stereotype of placing L. C.'s reproductive function above her right to health, life and a life of dignity. Article 16, paragraph 1(e) was also allegedly violated because she was deprived of her right to decide on the desired number of children.

8.11 The Committee recalls the obligation of the State party under article 12, to take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning. It also recalls its general recommendation No. 24, which, as an authoritative interpretation tool in relation to article 12, states that "it is discriminatory for a State party to refuse to legally provide for the performance of certain reproductive health services for women" (para. 11). The recommendation also states that: "the duty of State parties to ensure, on a basis of equality

between men and women, access to health-care services, information and education implies an obligation to respect, protect and fulfil women's rights to health care. States parties have the responsibility to ensure that legislation and executive action and policy comply with these three obligations. They must also put in place a system which ensures effective judicial action. Failure to do so will constitute a violation of article 12." (para. 13).

8.12 The Committee observes that the day after her admission to the hospital L. C. was diagnosed as risking permanent disability and a deterioration of cutaneous integrity due to physical immobility. Accordingly, the doctors scheduled surgery on her spine for 12 April 2007. On that date the author was informed by the hospital authorities that the surgery would be postponed, and the next day she was informed orally that the reason was potential harm to the foetus. Up to 12 April 2007, the hospital did not report that L.C. was suffering from infection, nor any other circumstance that would have prevented the surgery. Over the following days, the medical condition of L. C. worsened and her cutaneous integrity, mobility and anxiety state deteriorated, until the presence of an ulcer with infected skin was noted in the medical report of 23 April 2007. From the information contained in the file it is unquestionable that the surgery was necessary; that it should have been performed as early as possible as demonstrated by the fact that initially it had been scheduled for a few days after L. C.'s admission to the hospital; that after 12 April 2007 complications arose in L. C.'s medical condition that caused postponement of the operation, which was not done until 11 July 2007; and that the doctors considered the pregnancy to be "high risk, leading to elevated maternal morbidity".

8.13 The Committee notes that the Peruvian Health Act No. 26842 of 9 July 1997 repealed the procedure for therapeutic abortion and created a legal vacuum, since it does not provide for any procedure to request the therapeutic abortion allowed under article 119 of the Penal Code.

8.14 The Committee further notes that the reports of the medical board provided by the State party did not discuss the possible effects that the continuation of the pregnancy would have on the physical and mental health of the patient, despite the fact that, on the dates on which they were issued, the author's request for a therapeutic abortion under article 119 of the Penal Code was pending. Under this provision, therapeutic abortion is allowed to avoid serious and permanent harm to the health of the mother. Furthermore, the refusal to terminate the pregnancy by the doctors at the hospital contrasted with the opinion of the Medical College, which, on 7 May 2007, concluded that there were sufficient reasons to state that continuing the pregnancy would put the girl's physical

and mental health at serious risk, and therefore a therapeutic abortion was justified. The Committee further notes that the medical board of the hospital denied the termination of pregnancy because it considered that the life of L.C. was not in danger, but did not address the damage to her health, including her mental health, a right which is protected under the Peruvian Constitution.

8.15 In view of the foregoing, the Committee considers that, owing to her condition as a pregnant woman, L. C. did not have access to an effective and accessible procedure allowing her to establish her entitlement to the medical services that her physical and mental condition required. Those services included both the spinal surgery and the therapeutic abortion. This is even more serious considering that she was a minor and a victim of sexual abuse, as a result of which she attempted suicide. The suicide attempt is a demonstration of the amount of mental suffering she had experienced. The Committee therefore considers that the facts as described constitute a violation of the rights of L. C. under article 12 of the Convention. The Committee also considers that the facts reveal a violation of article 5 of the Convention, as the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother. Having reached this conclusion, the Committee does not consider it necessary to rule on the possible violation of article 16, paragraph 1 (e) of the Convention.

8.16 With regard to the allegations concerning the possible violation of articles 2 (c) and (f), the Committee recalls its jurisprudence, under which, although it recognizes that the Convention does not expressly refer to the right to a remedy, it considers that this right is implicit, in particular in article 2 (c), whereby States parties undertake to “establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination¹²”. Furthermore, under article 2(f), and in conjunction with article 3, the State party is obliged to take all appropriate measures, including legislation, to modify or abolish existing laws which constitute discrimination against women. The Committee observes that the hospital medical board delayed taking a decision on the request for an abortion submitted by the author for 42 days and the hospital director waited 20 days longer to respond to the request for reconsideration. Furthermore, as indicated earlier, the remedy of amparo did not constitute an effective legal remedy to protect the author’s right to appropriate medical care. The Committee also notes the author’s allegations concerning the absence of laws and regulations in the

State party governing access to therapeutic abortion, resulting in a situation where each hospital determines arbitrarily, *inter alia*, what requirements are necessary, the procedure to be followed, the time frame for a decision and the importance to be placed on the views of the mother. These allegations have not been disproved by the State party.

8.17 The Committee considers that, since the State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals that must perform it. It is essential for this legal framework to include a mechanism for rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant mother, that her opinion be taken into account, that the decision be well-founded and that there is a right to appeal¹³. In the present case the Committee considers that L. C. could not benefit from a procedure for requesting a therapeutic abortion that met these criteria. In the light of the information contained in the file, the Committee believes, in particular, that the delay by the hospital authorities in deciding on the request had detrimental effects on her physical and mental health. Consequently, the Committee considers that an effective remedy was not available to L. C. and that the facts described give rise to a violation of article 2 (c) and (f) of the Convention.

8.18 The Committee notes that the failure of the State party to protect women's reproductive rights and establish legislation to recognize abortion on the grounds of sexual abuse and rape are facts that contributed to L.C.'s situation. The Committee also notes that the State party bears responsibility for the failure to recognize the risk of permanent disability of L.C. coupled with her pregnancy as a serious physical and mental health risk, and to provide her with appropriate medical services, namely a timely spinal surgery and a therapeutic abortion allowed in such cases under the Penal Code. L.C. has suffered considerable physical and mental pain Her family has also suffered both moral and material damages. After she miscarried on 16th June 2007, she had the spinal surgery on 11th July 2007, almost three and a half months after the Head of the Neurosurgery Department had recommended emergency surgery. Although the medical reports noted that she needed intensive physical therapy and rehabilitation after the surgery, L.C. was only provided with the necessary physical rehabilitation and psychological/psychiatric help, several months after the surgery, namely as from 10 December 2007. After spending two months in the National Rehabilitation Institute, due to lack of financial means, L.C. had to abandon the treatment.

13 Along those lines, see the judgment of the European Court of Human Rights in the case *Tysiac v. Poland*, paras. 116 to 118.

The Committee notes that L.C, a young girl of 16 (at the time of submission of the communication) is paralyzed from the neck down save for some partial movement in her hands. She is in a wheelchair and needs constant care. She cannot pursue her education and her family is also living in precarious conditions. Her mother (the author) who has to provide L.C. with constant care, cannot work. The cost of medicines and equipment required by L.C. has also placed a heavy undue financial burden on the family.

9. Acting under the provisions of article 7, paragraph 3, of the Optional Protocol, the Committee considers that the State party has not complied with its obligations and has therefore violated the rights of L. C. established in articles 2 (c) and (f), 3, 5 and 12, together with article 1 of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning L. C.: provide reparation that include adequate compensation for material and moral damages and measures of rehabilitation, commensurate with the gravity of the violation of her rights and the condition of her health, in order to ensure that she enjoys the best possible quality of life;

(b) General:

(i) Review its laws with a view to establish a mechanism for effective access to therapeutic abortion under conditions that protect women's physical and mental health and prevent further occurrences in the future of violations similar to the ones in the present case;

(ii) Take measures to ensure that the relevant provisions of the Convention and the Committee's general recommendation No. 24 with regard to reproductive rights are known and observed in all health-care facilities. Such measures should include education and training programmes to encourage health providers to change their attitudes and behaviour in relation to adolescent women seeking reproductive health services and respond to specific health needs related to sexual violence. They should also include guidelines or protocols to ensure health services are available and accessible in public facilities.

(iii) The State party should also review its legislation with a view to decriminalizing abortion when the pregnancy results from rape or sexual abuse;

(iv) The Committee reiterates the recommendation it made to the State party during the consideration of its sixth periodic report (CEDAW/C/PER/CO/6, para. 25), urging it to review its restrictive interpretation of therapeutic abortion in line with the Committee's general recommendation No. 24 and the Beijing Declaration and Platform for Action.

Human Rights Committee

K.L. v. Peru

Communication N° 1153/2003

*Views adopted
on 24 October 2005*



VIEWS UNDER ARTICLE 5 PARAGRAPH 4 OF THE OPTIONAL PROTOCOL

1. The author of the communication is K.L., born in 1984, who claims to be a victim of a violation by Peru of articles 2, 3, 6, 7, 17, 24 and 26 of the International Covenant on Civil and Political Rights. She is represented by the organizations DEMUS, CLADEM and Center for Reproductive Law and Policy. The Optional Protocol entered into force for Peru on 3 October 1980.

Factual background

2.1 The author became pregnant in March 2001, when she was aged 17. On 27 June 2001 she was given a scan at the Archbishop Loayza National Hospital in Lima, part of the Ministry of Health. The scan showed that she was carrying an anencephalic foetus.

2.2 On 3 July 2001, Dr. Ygor Pérez Solf, a gynaecologist and obstetrician in the Archbishop Loayza National Hospital in Lima, informed the author of the foetal abnormality and the risks to her life if the pregnancy continued. Dr. Pérez said that she had two options: to continue the pregnancy or to terminate it. He advised termination by means of uterine curettage. The author decided to terminate the pregnancy, and the necessary clinical studies were carried out, confirming the foetal abnormality.

2.3 On 19 July 2001, when the author reported to the hospital together with her mother for admission preparatory to the operation, Dr. Pérez informed her that she needed to obtain written authorization from the hospital director. Since she was under age, her mother requested the authorization. On 24 July 2001, Dr. Maximiliano Cárdenas Díaz, the hospital director, replied in writing that the termination could not be carried out as to do so would be unlawful, since under article 120 of the Criminal Code, abortion was punishable by a prison term of no more than three months when it was likely that at birth the child would suffer serious physical or mental defects, while under article 119, therapeutic abortion was permitted only when termination of the pregnancy was the only way of saving the life of the pregnant woman or avoiding serious and permanent damage to her health.

2.4 On 16 August 2001, Ms. Amanda Gayoso, a social worker and member of the Peruvian association of social workers, carried out an assessment of the case and concluded that medical intervention to terminate the pregnancy was advisable "since its continuation would only prolong the distress and emotional instability of [K.L.] and her family". However, no intervention took place owing to the refusal of the Health Ministry medical personnel.

2.5 On 20 August 2001, Dr. Marta B. Rondón, a psychiatrist and member of the Peruvian Medical Association, drew up a psychiatric report on the author, concluding that “the so-called principle of the welfare of the unborn child has caused serious harm to the mother, since she has unnecessarily been made to carry to term a pregnancy whose fatal outcome was known in advance, and this has substantially contributed to triggering the symptoms of depression, with its severe impact on the development of an adolescent and the patient’s future mental health”.

2.6 On 13 January 2002, three weeks late with respect to the anticipated date of birth, the author gave birth to an anencephalic baby girl, who survived for four days, during which the mother had to breastfeed her. Following her daughter’s death, the author fell into a state of deep depression. This was diagnosed by the psychiatrist Marta B. Rondón. The author also states that she suffered from an inflammation of the vulva which required medical treatment.

2.7 The author has submitted to the Committee a statement made by Dr. Annibal Faúdes and Dr. Luis Távora, who are specialists from the association called Center for Reproductive Rights, and who on 17 January 2003 studied the author’s clinical dossier and stated that anencephaly is a condition which is fatal to the foetus in all cases. Death immediately follows birth in most cases. It also endangers the mother’s life. In their opinion, in refusing to terminate the pregnancy, the medical personnel took a decision which was prejudicial to the author.

2.8 Regarding the exhaustion of domestic remedies, the author claims that this requirement is waived when judicial remedies available domestically are ineffective in the case in question, and she points out that the Committee has laid down on several occasions that the author has no obligation to exhaust a remedy which would prove ineffective. She adds that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. She also states that her financial circumstances and those of her family prevented her from obtaining legal advice.

2.9 The author states that the complaint is not being considered under any other procedure of international settlement.

[...]

Issues and proceedings before the Committee

Consideration of admissibility

5.1 In accordance with rule 93 of the rules of procedure, before examining the claims made in a communication, the Human Rights Committee must decide whether the communication is admissible under the Optional Protocol to the Covenant.

5.2 The Committee notes that, according to the author, the same matter has not been submitted under any other procedure of international investigation. The Committee also takes note of her arguments to the effect that in Peru there is no administrative remedy which would enable a pregnancy to be terminated on therapeutic grounds, nor any judicial remedy functioning with the speed and efficiency required to enable a woman to require the authorities to guarantee her right to a lawful abortion within the limited period, by virtue of the special circumstances obtaining in such cases. The Committee recalls its jurisprudence to the effect that a remedy which had no chance of being successful could not count as such and did not need to be exhausted for the purposes of the Optional Protocol⁴. In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

5.3 The Committee considers that the author's claims of alleged violations of articles 3 and 26 of the Covenant have not been properly substantiated, since the author has not placed before the Committee any evidence relating to the events which might confirm any type of discrimination under the article in question. Consequently, the part of the complaint referring to articles 3 and 26 is declared inadmissible under article 2 of the Optional Protocol.

5.4 The Committee notes that the author has claimed a violation of article 2 of the Covenant. The Committee recalls its constant jurisprudence to the effect that article 2 of the Covenant, which lays down general obligations for States, is accessory in nature and cannot be invoked in isolation by individuals under the Optional Protocol⁵. Consequently, the complaint under article 2 will be analysed together with the author's other allegations.

4. In the absence of a reply from the State party, due weight must be given to the author's allegations. Consequently, the Committee considers that the requirements of article 5, paragraph 2 (a) and (b), have been met.

5. See Communication No. 802/1998, *Andrew Rogerson v. Australia*; Views adopted on 3 April 2002, para. 7.9

5.5 Concerning the allegations relating to articles 6, 7, 17 and 24 of the Covenant, the Committee considers that they are adequately substantiated for purposes of admissibility, and that they appear to raise issues in connection with those provisions. Consequently, it turns to consideration of the substance of the complaint.

Consideration of the merits

6.1 The Human Rights Committee has considered the present complaint in the light of all the information received, in accordance with article 5, paragraph 1, of the Optional Protocol.

6.2 The Committee notes that the author attached a doctor's statement confirming that her pregnancy exposed her to a life-threatening risk. She also suffered severe psychological consequences exacerbated by her status as a minor, as the psychiatric report of 20 August 2001 confirmed. The Committee notes that the State party has not provided any evidence to challenge the above. It notes that the authorities were aware of the risk to the author's life, since a gynaecologist and obstetrician in the same hospital had advised her to terminate the pregnancy, with the operation to be carried out in the same hospital. The subsequent refusal of the competent medical authorities to provide the service may have endangered the author's life. The author states that no effective remedy was available to her to oppose that decision. In the absence of any information from the State party, due weight must be given to the author's claims.

6.3 The author also claims that, owing to the refusal of the medical authorities to carry out the therapeutic abortion, she had to endure the distress of seeing her daughter's marked deformities and knowing that she would die very soon. This was an experience which added further pain and distress to that which she had already borne during the period when she was obliged to continue with the pregnancy. The author attaches a psychiatric certificate dated 20 August 2001, which confirms the state of deep depression into which she fell and the severe consequences this caused, taking her age into account. The Committee notes that this situation could have been foreseen, since a hospital doctor had diagnosed anencephaly in the foetus, yet the hospital director refused termination. The omission on the part of the State in not enabling the author to benefit from a therapeutic abortion was, in the Committee's view, the cause of the suffering she experienced. The Committee has pointed out in its General Comment No. 20 that the right set out in article 7 of the Covenant relates not only to physical pain but also to mental suffering, and that the protection is particularly important in the

case of minors⁶. In the absence of any information from the State party in this regard, due weight must be given to the author's complaints. Consequently, the Committee considers that the facts before it reveal a violation of article 7 of the Covenant. In the light of this finding the Committee does not consider it necessary in the circumstances to make a finding on article 6 of the Covenant.

6.4 The author states that the State party, denying her the opportunity to secure medical intervention to terminate the pregnancy, interfered arbitrarily in her private life. The Committee notes that a public-sector doctor told the author that she could either continue with the pregnancy or terminate it in accordance with domestic legislation allowing abortions in cases of risk to the life of the mother. In the absence of any information from the State party, due weight must be given to the author's claim that at the time of this information, the conditions for a lawful abortion as set out in the law were present. In the circumstances of the case, the refusal to act in accordance with the author's decision to terminate her pregnancy was not justified and amounted to a violation of article 17 of the Covenant.

6.5 The author claims a violation of article 24 of the Covenant, since she did not receive from the State party the special care she needed as a minor. The Committee notes the special vulnerability of the author as a minor girl. It further notes that, in the absence of any information from the State party, due weight must be given to the author's claim that she did not receive, during and after her pregnancy, the medical and psychological support necessary in the specific circumstances of her case. Consequently, the Committee considers that the facts before it reveal a violation of article 24 of the Covenant.

6.6 The author claims to have been a victim of violation of articles 2 of the Covenant on the grounds that she lacked an adequate legal remedy. In the absence of information from the State party, the Committee considers that due weight must be given to the author's claims as regards lack of an adequate legal remedy and consequently concludes that the facts before it also reveal a violation of article 2 in conjunction with articles 7, 17 and 24.

7. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the Covenant, is of the view that the facts before it disclose a violation of articles 2, 7, 17 and 24 of the Covenant.

[...]

6. Human Rights Committee, General Comment No. 20: Prohibition of torture and other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992 (HRI/GEN/1/Rev.7, paras. 2 and 5).

APPENDIX

DISSENTING OPINION BY COMMITTEE MEMBER HIPÓLITO SOLARI-YRIGOYEN

My dissenting opinion on this communication - the majority not considering that article 6 of the Covenant was violated - is based on the following grounds:

Consideration of the merits

The Committee notes that when the author was a minor, she and her mother were informed by the obstetric gynaecologist at Lima National Hospital, whom they had consulted because of the author's pregnancy, that the foetus suffered from anencephaly which would inevitably cause its death at birth. The doctor told the author that she had two options: (1) continue the pregnancy, which would endanger her own life; or (2) terminate the pregnancy by a therapeutic abortion. He recommended the second option. Given this conclusive advice from the specialist who had told her of the risks to her life if the pregnancy continued, the author decided to follow his professional advice and accepted the second option. As a result, all the clinical tests needed to confirm the doctor's statements about the risks to the mother's life of continuing the pregnancy and the inevitable death of the foetus at birth were performed.

The author substantiated with medical and psychological certificates all her claims about the fatal risk she ran if the pregnancy continued. In spite of the risk, the director of the public hospital would not authorize the therapeutic abortion which the law of the State party allowed, arguing that it would not be a therapeutic abortion but rather a voluntary and unfounded abortion punishable under the Criminal Code. The hospital director did not supply any legal ruling in support of his pronouncements outside his professional field or challenging the medical attestations to the serious risk to the mother's life. Furthermore, the Committee may note that the State party has not submitted any evidence contradicting the statements and evidence supplied by the author. Refusing a therapeutic abortion not only endangered the author's life but had grave consequences which the author has also substantiated to the Committee by means of valid supporting documents.

It is not only taking a person's life that violates article of the Covenant but also placing a person's life in grave danger, as in this case. Consequently, I consider that the facts in the present case reveal a violation of article 6 of the Covenant.

[Signed]: Hipólito Solari-Yrigoyen.

Human Rights Committee

L.M.R v. Argentina

Communication N° 1608/2007

*Views adopted
on 29 March 2011*



VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL

1. The author of the communication, dated 25 May 2007, is V.D.A., an Argentine national, who submits this communication on behalf of her daughter, L.M.R., born on 4 May 1987. She claims that her daughter was the victim of violations by Argentina of articles 2, 3, 6, 7, 17 and 18 of the Covenant. The Optional Protocol entered into force for the State party on 8 November 1986. The author is represented by counsel.

The facts as submitted by the author

2.1 L.M.R. is a young woman living in Guernica, Buenos Aires province, who has a permanent mental impairment. She lives with her mother, V.D.A, attends a special school and receives neurological care. She has been diagnosed as having a mental age of between 8 and 10 years.

2.2 In June 2006 the author took her daughter to Guernica Hospital because she said that she was feeling unwell. At the hospital she was found to be pregnant and the author requested a termination. The hospital staff refused to perform the procedure and referred the patient to San Martín Hospital in La Plata, which is a public hospital. They also informed her that she needed to file a complaint with the police. On 24 June 2006 a complaint was filed against an uncle of L.M.R. who was suspected of having raped her. The author claims that Guernica Hospital had the resources necessary to perform the procedure, without needing to refer the case elsewhere, and that its refusal forced the family to travel 100 kilometres to the provincial capital and to incur the related costs and inconvenience.

2.3 L.M.R. was approximately fourteen and a half weeks pregnant on her arrival at San Martín Hospital. She was admitted on 4 July 2006 and the hospital authorities requested an urgent meeting with the Bioethics Committee to solicit its opinion. Since this was a case of non-punishable abortion pursuant to article 86, paragraph 2 of the Criminal Code¹, hospital staff began the pre-surgical examinations necessary for the procedure.

1 This provision establishes the following: "Abortion performed by a licensed physician with the consent of the pregnant woman is not punishable: (a) if performed to avoid endangering the mother's life or health and if this danger cannot be prevented by other means; and (2) if the pregnancy results from the rape or indecent assault of a woman with a mental disability. In such cases, the consent of her legal representative must be obtained for the termination."

The aforementioned provision gives female rape victims with a mental disability the right to terminate a pregnancy but does not set deadlines and does not specify the type of medical procedure to be used. In addition, it establishes no requirement for judicial authorization of any form. The only requirements are that the disability should be diagnosed, that the victim's legal representative should give consent and that the termination should be performed by a licensed physician.

2.4 The hospital was issued with an injunction on all procedures and judicial proceedings were initiated to prevent the abortion. The juvenile court judge ruled that a termination should be prohibited because she did not find it acceptable to repair a wrongful assault (sexual abuse) "with another wrongful assault against a new innocent victim, i.e. the unborn child".

2.5 The decision was confirmed on appeal by the Civil Court, which instructed the juvenile court judge to perform regular checks on L.M.R., accompanied by her mother, regarding the progress of her pregnancy and to monitor the health of the girl and her unborn child directly, on an ongoing basis, through the intermediary of the Under-secretariat for Children.

2.6 The decision was contested before the Supreme Court of Justice of Buenos Aires province, which overturned the contested decision on 31 July 2006 and ruled that the termination could proceed². Consequently, the Court informed San Martín Hospital that the surgical procedure its staff were to perform was legal and did not require judicial authorization. This ruling was issued almost a month and a half after the rape was reported and the termination of pregnancy was requested.

2.7 Despite the ruling, San Martín Hospital and the family came under enormous pressure from various sources opposed to the termination and the hospital refused to perform the procedure on the grounds that the pregnancy was too advanced (between 20 and 22 weeks). With help from women's organizations a new scan was performed in a private clinic on 10 August, revealing that the victim was 20.4 weeks pregnant.

2 The Court ruled that: "(a) judicial authorization is not required for application of article 86.2 of the Criminal Code; (b) since the present case is not punishable under national legislation (...) no order prohibiting the surgical termination of the young girl's pregnancy can be issued (...), provided that the decision to perform the procedure has been taken by medical professionals in accordance with best medical practice".

CCPR/C/101/D/1608/2007

2.8 With support from women's organizations, the family contacted various health centres and hospitals both in and outside the province, but none of them would agree to carry out a termination. However, the family managed to arrange an illegal termination on 26 August 2006.

2.9 Press reports indicate that both the Rector of the Catholic University and the spokesperson of the Corporation of Catholic Lawyers contributed to the pressure exerted on the family and the doctors. Threatening letters sent to the hospital were even made public without any authority taking action.

[...]

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Human Rights Committee must decide, in accordance with rule 93 of its rules of procedure, whether the communication is admissible under the Optional Protocol to the Covenant.

8.2 As required under article 5, paragraph 2 (a), of the Optional Protocol, the Committee has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.

8.3 The Committee observes that, although the State party initially contended that the communication was inadmissible on the grounds of failure to exhaust domestic remedies, in subsequent correspondence it agreed with the author that the injunction issued by the lower courts of Buenos Aires province in the case of L.M.R. constituted unlawful interference under article 86.2 of the Criminal Code. It also agreed with the author that several articles of the Covenant had been violated. Consequently, the Committee considers that there are no obstacles to consideration of the merits of the communication under article 5, paragraph 2 (b) of the Optional Protocol.

8.4 The Committee takes note of the author's claims that, because it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for a violation of article 2 of the Covenant. The Committee recalls that, according to its established case law, article 2 of the Covenant constitutes a general undertaking on the part of the State and cannot be invoked in isolation by

individuals under the Optional Protocol. Consequently, the complaint under article 2 will be considered together with the claims made by the author under other articles of the Covenant⁵.

8.5 The Committee also notes the author's claim that the impossibility of obtaining an abortion constituted a violation of the right to equality and non-discrimination established under article 3 of the Covenant. In her opinion, the State's failure to exercise due diligence in safeguarding a legal right to a procedure required solely by women resulted in discriminatory treatment of L.M.R. The Committee considers this allegation to be closely related to those made under other articles of the Covenant, and that they should therefore be considered together.

8.6 The Committee notes the author's claim that the facts described constitute a violation of L.M.R.'s right to life in that the State failed to adopt the measures and act with the due diligence necessary to ensure that L.M.R. could obtain a safe abortion and prevent the need for an unlawful, unsafe abortion. The Committee observes, however, that there is nothing in the case file to indicate that L.M.R.'s life was exposed to particular danger because of the nature of her pregnancy or the circumstances in which the termination was performed. Consequently, the Committee considers that this complaint is not substantiated and is therefore inadmissible under article 2 of the Optional Protocol.

8.7 The author maintains that her daughter was subject to a violation of article 18 as a result of State inaction in the face of pressure and threats from Catholic groups and the hospital doctors' conscientious objection. The State party denies that this article has been violated, on the grounds that the activities of specific groups are unconnected to the actions of its officials, and that the hospital's refusal to perform the procedure was guided by medical considerations. In the circumstances, the Committee considers that the author has not adequately substantiated her complaint for purposes of admissibility and that the complaint must therefore be declared inadmissible under article 2 of the Optional Protocol.

8.8 Concerning the allegations relating to articles 7 and 17 of the Covenant, the Committee considers that they were adequately substantiated for purposes of admissibility.

8.9 In the light of the above, the Committee declares the communication admissible insofar as it raises issues under articles 2, 3, 7 and 17 of the Covenant.

5 Communication No. 1153/2003, K.N.L.H. v. Peru, op. cit., paragraph 5.4. CCPR/C/101/D/1608/2007 GE.11-42528 11.

Consideration of the merits

9.1 The Human Rights Committee has considered the present communication in the light of all information made available to it by the parties, as provided in article 5, paragraph 1, of the Optional Protocol.

9.2 The Committee takes note of the author's allegation that forcing her daughter to continue her pregnancy, even though she should have enjoyed protection under article 86.2 of the Criminal Code, constituted cruel and inhuman treatment. The State party asserts that, while forcing her to endure a pregnancy resulting from rape and undergo an illegal abortion could have been a contributing factor to the mental injury that the victim suffered, it did not constitute torture. The Committee considers that the State party's omission, in failing to guarantee L.M.R.'s right to a termination of pregnancy, as provided under article 86.2 of the Criminal Code, when her family so requested, caused L.M.R. physical and mental suffering constituting a violation of article 7 of the Covenant that was made especially serious by the victim's status as a young girl with a disability. In this connection the Committee recalls its general comment No. 20 in which it states that the right protected in article 7 of the Covenant relates not only to acts that cause physical pain but also to acts that cause mental suffering⁶.

9.3 The Committee takes note of the author's allegation that the facts described constituted arbitrary interference in L.M.R.'s private life. It also notes the State party's acknowledgement that the State's unlawful interference, through the judiciary, in an issue that should have been resolved between the patient and her physician could be considered a violation of her right to privacy. In the circumstances, the Committee considers that the facts reveal a violation of article 17, paragraph 1 of the Covenant⁷.

9.4 The Committee takes note of the author's allegations to the effect that, because it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant. The Committee observes that the judicial remedies sought at the domestic level to guarantee access to a termination of pregnancy were resolved favourably for L.M.R. by the Supreme Court ruling. However, to achieve this result, the author had to

6 General comment No. 20: Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment (art. 7), 10 March 1992, paragraph 5. See also *K.N.L.H. v. Peru*, op. cit., paragraph 6.3.

7 *K.N.L.H. v. Peru*, op. cit., paragraph 6.4.

appear before three separate courts, during which period the pregnancy was prolonged by several weeks, with attendant consequences for L.M.R.'s health that ultimately led the author to resort to illegal abortion. For these reasons, the Committee considers that the author did not have access to an effective remedy and the facts described constitute a violation of article 2, paragraph 3 in relation to articles 3, 7 and 17 of the Covenant.

10. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the information before it reveals a violation of article 7, article 17 and article 2, paragraph 3 in relation to articles 3, 7 and 17 of the Covenant.

[...].

Annex

*Committee on the
Elimination of Discrimination
against Women (CEDAW/UN)*

General Recommendation N° 24

*Adopted on 20th session
1999*



*GENERAL RECOMMENDATION N° 24 COMMITTEE ON THE
ELIMINATION OF DISCRIMINATION AGAINST WOMEN
(CEDAW/UN)*.*

Article 12: Women and health

1. The Committee on the Elimination of Discrimination against Women, affirming that access to health care, including reproductive health is a basic right under the Convention on the Elimination of Discrimination against Women, determined at its 20th session, pursuant to article 21, to elaborate a general recommendation on article 12 of the Convention.

[...]

8. Article 12:

"1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation."

States parties are encouraged to address the issue of women's health throughout the woman's lifespan. For the purposes of this general recommendation, therefore, women includes girls and adolescents. This general recommendation will set out the Committee's analysis of the key elements of article 12.

Key elements

Article 12 (1)

[...]

11. Measures to eliminate discrimination against women are considered to be inappropriate if a health care system lacks services to prevent, detect and treat illnesses specific to women. It is discriminatory for a State party to refuse to legally provide for the perfor-

mance of certain reproductive health services for women. For instance, if health service providers refuse to perform such services based on conscientious objection, measures should be introduced to ensure that women are referred to alternative health providers.

12. States parties should report on their understanding of how policies and measures on health care address the health rights of women from the perspective of women's needs and interests and how it addresses distinctive features and factors which differ for women in comparison to men, such as:

- (a) Biological factors which differ for women in comparison with men, such as their menstrual cycle and their reproductive function and menopause. Another example is the higher risk of exposure to sexually transmitted diseases which women face;
- (b) Socio-economic factors that vary for women in general and some groups of women in particular. For example, unequal power relationships between women and men in the home and workplace may negatively affect women's nutrition and health. They may also be exposed to different forms of violence which can affect their health. Girl children and adolescent girls are often vulnerable to sexual abuse by older men and family members, placing them at risk of physical and psychological harm and unwanted and early pregnancy. Some cultural or traditional practices such as female genital mutilation also carry a high risk of death and disability;
- (c) Psychosocial factors which vary between women and men include depression in general and post-partum depression in particular as well as other psychological conditions, such as those that lead to eating disorders such as anorexia and bulimia;
- (d) While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.

[...]

14. The obligation to respect rights requires States parties to refrain from obstructing action taken by women in pursuit of their health goals (...). For example, States parties should not restrict women's access to health services or to the clinics that provide those services on the ground that women do not have the authorization of husbands, partners, parents or health authorities, because they are unmarried¹ or because they are women.

1 <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#25>.

Other barriers to women's access to appropriate health care include laws that criminalize medical procedures only needed by women and that punish women who undergo those procedures.

[...]

18. The issues of HIV/AIDS and other sexually transmitted disease are central to the rights of women and adolescent girls to sexual health. Adolescent girls and women in many countries lack adequate access to information and services necessary to ensure sexual health. As a consequence of unequal power relations based on gender, women and adolescent girls are often unable to refuse sex or insist on safe and responsible sex practices. Harmful traditional practices, such as female genital mutilation, polygamy, as well as marital rape, may also expose girls and women to the risk of contracting HIV/AIDS and other sexually transmitted diseases. Women in prostitution are also particularly vulnerable to these diseases. States parties should ensure, without prejudice and discrimination, the right to sexual health information, education and services for all women and girls, including those who have been trafficked, including those who have been trafficked, even if they are not legally resident in the country. In particular, States parties should ensure the rights of female and male adolescents to sexual and reproductive health education by properly trained personnel in specially designed programmes that respect their rights to privacy and confidentiality.

[...]

20. Women have the right to be fully informed, by properly trained personnel, of their options in agreeing to treatment or research, including likely benefits and potential adverse effects of proposed procedures and available alternatives.

[...]

22. States parties should also report on measures taken to ensure access to quality health care services, for example, by making them acceptable to women. Acceptable services are those which are delivered in a way that ensures that a woman gives her fully informed consent, respects her dignity, guarantees her confidentiality and is sensitive to her needs and perspectives. States parties should not permit forms of coercion, such as non-consensual sterilization, mandatory testing for sexually transmitted diseases or mandatory pregnancy testing as a condition of employment that violate women's rights to informed consent and dignity.

23. In their reports, States parties should state what measures they have taken to ensure timely access to the range of services which are related to family planning, in particular, and to sexual and reproductive health in general. Particular attention should be paid to the health education of adolescents, including information and counselling on all methods of family planning².

[...]

Other relevant articles in the Convention

28. When reporting on measures taken to comply with article 12, States parties are urged to recognize its interconnection with other articles in the Convention that have a bearing on women's health. Those articles include article 5 (b), which requires States parties to ensure that family education includes a proper understanding of maternity as a social function; article 10, which requires States parties to ensure equal access to education, thus enabling women to access health care more readily and reducing female students' drop-out rates, which are often due to premature pregnancy; article 10(h) which provides that States parties provide to women and girls specific educational information to help ensure the well-being of families, including information and advice on family planning; article 11, which is concerned, in part, with the protection of women's health and safety in working conditions, including the safeguarding of the reproductive function, special protection from harmful types of work during pregnancy and with the provision of paid maternity leave; article 14 (2) (b), which requires States parties to ensure access for rural women to adequate health care facilities, including information, counselling and services in family planning, and (h), which obliges States parties to take all appropriate measures to ensure adequate living conditions, particularly housing, sanitation, electricity and water supply, transport and communications, all of which are critical for the prevention of disease and the promotion of good health care; and article 16 (1) (e), which requires States parties to ensure that women have the same rights as men to decide freely and responsibly on the number and spacing of their children and to have access to information, education and means to enable them to exercise these rights. Article 16 (2) also proscribes the betrothal and marriage of children, an important factor in preventing the physical and emotional harm which arise from early childbirth.

2 <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#26>.

Recommendations for government action

29. States parties should implement a comprehensive national strategy to promote women's health throughout their lifespan. This will include interventions aimed at both the prevention and treatment of diseases and conditions affecting women, as well as responding to violence against women, and will ensure universal access for all women to a full range of high-quality and affordable health care, including sexual and reproductive health services.

[...]

31. States parties should also, in particular:

(...)

b) Ensure the removal of all barriers to women's access to health services, education and information, including in the area of sexual and reproductive health, and, in particular, allocate resources for programmes directed at adolescents for the prevention and treatment of sexually transmitted diseases, including HIV/AIDS;

c) Prioritize the prevention of unwanted pregnancy through family planning and sex education and reduce maternal mortality rates through safe motherhood services and prenatal assistance. When possible, legislation criminalizing abortion could be amended to remove punitive provisions imposed on women who undergo abortion; (...)

e) Require all health services to be consistent with the human rights of women, including the rights to autonomy, privacy, confidentiality, informed consent and choice;

(...).

Annex

*Committee on Economic,
Social and Cultural Rights
(CESCR/UN)*

General Recommendation N° 14

*Adopted on
11 May 2000*



*SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE
INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND
CULTURAL RIGHTS.*

GENERAL COMMENT NO. 14 (2000)

The right to the highest attainable standard of health (article 12 of the International Covenant on Economic, Social and Cultural Rights)

1. Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity. The realization of the right to health may be pursued through numerous, complementary approaches, such as the formulation of health policies, or the implementation of health programmes developed by the World Health Organization (WHO), or the adoption of specific legal instruments. Moreover, the right to health includes certain components which are legally enforceable¹.

2. The human right to health is recognized in numerous international instruments. Article 25.1 of the Universal Declaration of Human Rights affirms: "Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services". The International Covenant on Economic, Social and Cultural Rights provides the most comprehensive article on the right to health in international human rights law. In accordance with article 12.1 of the Covenant, States parties recognize "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health", while article 12.2 enumerates, by way of illustration, a number of "steps to be taken by the States parties ... to achieve the full realization of this right". Additionally, the right to health is recognized, inter alia, in article 5 (e) (iv) of the International

Convention on the Elimination of All Forms of Racial Discrimination of 1965, in articles 11.1 (f) and 12 of the Convention on the Elimination of All Forms of Discrimination against Women of 1979 and in article 24 of the Convention on the Rights of the Child of 1989. Several regional human rights instruments also recognize the right to health, such as the European Social Charter of 1961 as revised (art. 11), the African Charter on Human and Peoples' Rights of 1981 (art. 16) and the Additional Protocol to the Ameri-

1 For example, the principle of non-discrimination in relation to health facilities, goods and services is legally enforceable in numerous national jurisdictions.

can Convention on Human Rights in the Area of Economic, Social and Cultural Rights of 1988 (art. 10). Similarly, the right to health has been proclaimed by the Commission on Human Rights², as well as in the Vienna Declaration and Programme of Action of 1993 and other international instruments³.

3. The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health.

4. In drafting article 12 of the Covenant, the Third Committee of the United Nations General Assembly did not adopt the definition of health contained in the preamble to the Constitution of WHO, which conceptualizes health as “a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity”. However, the reference in article 12.1 of the Covenant to “the highest attainable standard of physical and mental health” is not confined to the right to health care. On the contrary, the drafting history and the Express wording of article 12.2 acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.

5. The Committee is aware that, for millions of people throughout the world, the full enjoyment of the right to health still remains a distant goal. Moreover, in many cases, especially for those living in poverty, this goal is becoming increasingly remote. The Committee recognizes the formidable structural and other obstacles resulting from international and other factors beyond the control of States that impede the full realization of article 12 in many States parties.

2 In its resolution 1989/11.

3 The Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care adopted by the United Nations General Assembly in 1991 (resolution 46/119) and the Committee's General Comment No. 5 on persons with disabilities apply to persons with mental illness; the Programme of Action of the International Conference on Population and Development held at Cairo in 1994, as well as the Declaration and Programme for Action of the Fourth World Conference on Women held in Beijing in 1995 contain definitions of reproductive health and women's health, respectively.

6. With a view to assisting States parties' implementation of the Covenant and the fulfilment of their reporting obligations, this General Comment focuses on the normative content of article 12 (Part I), States parties' obligations (Part II), violations (Part III) and implementation at the national level (Part IV), while the obligations of actors other than States parties are addressed in Part V. The General Comment is based on the Committee's experience in examining States parties' reports over many years.

I. Normative content of article 12

[...]

8. The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.

[...]

11. The Committee interprets the right to health, as defined in article 12.1, as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health. A further important aspect is the participation of the population in all health-related decision-making at the community, national and International.

[...]

Article 12.2 (a). The right to maternal, child and reproductive health

14. "The provision for the reduction of the stillbirth rate and of infant mortality and for the healthy development of the child" (art. 12.2 (a))¹ may be understood as requir-

10 According to WHO, the stillbirth rate is no longer commonly used, infant and under-five mortality rates being measured instead.

ing measures to improve child and maternal health, sexual and reproductive health services, including access to family planning, pre- and post-natal care¹¹, emergency obstetric services and access to information, as well as to resources necessary to act on that information¹².

[...]

Article 12. Special topics of broad application

[...]

Gender perspective

20. The Committee recommends that States integrate a gender perspective in their health-related policies, planning, programmes and research in order to promote better health for both women and men. A gender-based approach recognizes that biological and socio-cultural factors play a significant role in influencing the health of men and women. The disaggregation of health and socio-economic data according to sex is essential for identifying and remedying inequalities in health.

Women and the right to health

21. To eliminate discrimination against women, there is a need to develop and implement a comprehensive national strategy for promoting women's right to health throughout their life span. Such a strategy should include interventions aimed at the prevention and treatment of diseases affecting women, as well as policies to provide access to a full range of high quality and affordable health care, including sexual and reproductive ser-

11 Prenatal denotes existing or occurring before birth; perinatal refers to the period shortly before and after birth (in medical statistics the period begins with the completion of 28 weeks of gestation and is variously defined as ending one to four weeks after birth); neonatal, by contrast, covers the period pertaining to the first four weeks after birth; while post-natal denotes occurrence after birth. In this General Comment, the more generic terms pre- and post-natal are exclusively employed.

12 Reproductive health means that women and men have the freedom to decide if and when to reproduce and the right to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice as well as the right of access to appropriate health-care services that will, for example, enable women to go safely through pregnancy and childbirth.

vices. A major goal should be reducing women's health risks, particularly lowering rates of maternal mortality and protecting women from domestic violence. The realization of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health. It is also important to undertake preventive, promotive and remedial action to shield women from the impact of harmful traditional cultural practices and norms that deny them their full reproductive rights.

Children and adolescents

[...]

23. States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make. The realization of the right to health of adolescents is dependent on the development of youth-friendly health care, which respects confidentiality and privacy and includes appropriate sexual and reproductive health services.

[...]

II. States Parties' obligations

[...]

Specific legal obligations

34. In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers, illegal immigrants, to preventive, curative and palliative health services; abstaining from enforcing discriminatory practices as a State policy; and abstaining from imposing discriminatory practices relating to women's health status and needs. Furthermore, obligations to respect include a State's obligation to refrain from prohibiting or impeding traditional preventive care, healing practices and medicines, from marketing unsafe drugs and from applying coercive medical treatments, unless on an exceptional basis for the treatment of mental illness or the prevention and control of communicable diseases. Such exceptional cases should be subject to specific and restrictive conditions, respecting best practices and applicable international standards, includ-

ing the Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Health Care²⁴. In addition, States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health, from censoring, withholding or intentionally misrepresenting health-related information, including sexual education and information, as well as from preventing people's participation in health-related matters. States should also refrain from unlawfully polluting air, water and soil, e.g. through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health, and from limiting access to health services as a punitive measure, e.g. during armed conflicts in violation of international humanitarian law.

[...]

36. The obligation to fulfil requires States parties, inter alia, to give sufficient recognition to the right to health in the national political and legal systems, preferably by way of legislative implementation, and to adopt a national health policy with a detailed plan for realizing the right to health. States must ensure provision of health care, including immunization programmes against the major infectious diseases, and ensure equal access for all to the underlying determinants of health, such as nutritiously safe food and potable drinking water, basic sanitation and adequate housing and living conditions. Public health infrastructures should provide for sexual and reproductive health services, including safe motherhood, particularly in rural areas. States have to ensure the appropriate training of doctors and other medical personnel, the provision of a sufficient number of hospitals, clinics and other health-related facilities, and promotion and support of the establishment of institutions providing counselling and mental health services, with due regard to equitable distribution throughout the country. Further obligations include the provision of a public, private or mixed health insurance system which is affordable for all, the promotion of medical research and health education, as well as information campaigns, in particular with respect to HIV/AIDS, sexual and reproductive health, traditional practices, domestic violence, the abuse of alcohol and the use of cigarettes, drugs and other harmful substances. States are also required to adopt measures against environmental and occupational health hazards and against any other threat as demonstrated by epidemiological data. For this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline. Furthermore, States parties are required

24 General Assembly resolution 46/119 (1991).

to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services²⁵.

[...]

Core obligations

44. The Committee also confirms that the following are obligations of comparable priority:

- a) To ensure reproductive, maternal (pre-natal as well as post-natal) and child health care;
- b) To provide immunization against the major infectious diseases occurring in the community;
- c) To take measures to prevent, treat and control epidemic and endemic diseases;
- d) To provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them;
- e) To provide appropriate training for health personnel, including education on health and human rights.

[...]

III. Violations

[...]

25 Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions. See ILO Occupational Safety and Health Convention, 1981 (No. 155) and Occupational Health Services Convention, 1985 (No. 161).

Violations of the obligation to fulfil

5.2 Violations of the obligation to fulfil occur through the failure of States parties to take all necessary steps to ensure the realization of the right to health. Examples include the failure to adopt or implement a national health policy designed to ensure the right to health for everyone; insufficient expenditure or misallocation of public resources which results in the non-enjoyment of the right to health by individuals or groups, particularly the vulnerable or marginalized; the failure to monitor the realization of the right to health at the national level, for example by identifying right to health indicators and benchmarks; the failure to take measures to reduce the inequitable distribution of health facilities, goods and services; the failure to adopt a gender-sensitive approach to health; and the failure to reduce infant and maternal mortality rates.

[...].

Annex

*Inter-American Commission
on Human Rights*

*Paulina del Carmen Ramírez Jacinto
v. México*

Petition 161-02

*Report N° 21/07
Friendly Settlement
on March 9, 2007*



GOVERNMENT OF THE STATE OF BAJA CALIFORNIA
PUBLIC ACKNOWLEDGMENT OF RESPONSIBILITY
PAULINA RAMIREZ JACINTO
P-161/02

In compliance with the Friendly Settlement Agreement concluded with the Inter-American Commission on Human Rights regarding the case of Paulina del Carmen Ramírez Jacinto, the Government of the State of Baja California states that:

The events leading up to this matter occurred in the city of Mexicali, Baja California, on July 31, 1999, when the crimes of statutory rape and aggravated robbery were committed against the 13-year-old minor Paulina Ramírez Jacinto (born on September 1, 1985).

Just a few hours later on the same day, the juvenile's mother went to the Office of the Public Prosecutor to report the rape of her underage daughter, Paulina.

On September 3, 1999, the minor's mother appeared before the agency that deals with sex crimes to report that Paulina was pregnant as a result of the rape and requested authorization for the legal interruption of pregnancy.

On September 20, 1999, the Office of the Public Prosecutor of the State of Baja California issued the results of Preliminary Investigation 00249/99/10, authorizing the pregnancy to be interrupted.

Subsequently, that order was forwarded to the state's health services area. However, it was not possible to end the pregnancy because the public health institution she was referred to denied her medical care and the physicians did not give the family objective information on the risks of performing an abortion.

In view of the physicians' refusal to perform an abortion, on October 15, 1999, the minor's representative, i.e., her mother, exercising her parental rights under Articles 410 and 411, and other related articles of the State Civil Code, stated expressly to the ministerial authority that, given the risk to her daughter, she did not want an abortion to be performed on the minor.

On October 25, 1999, the complaint was filed with the Office for Human Rights and Citizen Protection of the State of Baja California (PDHPCBC), when there was still time under law for the pregnancy to be interrupted. On October 29, 1999, the 90-day gestation period established under Article 136 of the State Criminal Code, during which an abortion can be performed without risk, came to an end.

On March 3, 2000, the PDHPCBC issued recommendation 2/2000, establishing that the government was obliged to compensate Paulina and her mother, María Elena Jacinto, for moral damages, since it had denied them the right to interrupt the pregnancy, which had been caused by a rape.

On April 13, 2000, Paulina's son, Isaac de Jesús Ramírez Jacinto, was born.

On July 14, 2001, in criminal case 514/99 Paulina's attacker was sentenced to 16 years in prison and 340 fine-days, for the crimes of statutory rape and aggravated robbery.

In view of the foregoing, an investigation was initiated to determine administrative responsibility on the part of the state officials concerned.

On August 13, 2001, the Office of the Public Prosecutor decided not to pursue criminal proceedings in Preliminary Investigation 488/99/104 because of a lack of evidence demonstrating illicit conduct by the civil servants for the offenses of abuse of authority, collusion between civil servants, improper handling of documents, breach of confidentiality, and torture.

On February 7, 2002, a ruling was handed down in the appeal filed against the decision not to pursue criminal proceedings, establishing, among other things, that further steps must be taken to gather additional evidence to determine whether sufficient grounds exist to bring criminal action against the civil servants involved. To date, the evidence has not been gathered nor has the matter been resolved.

Finally, on March 8, 2002, at the request of Paulina del Carmen Ramírez Jacinto, her case was filed with the Inter-American Commission on Human Rights and classified as petition P-161-02. At the Commission's urging, a friendly settlement agreement was worked out between the petitioners and the Government of Mexico.

As part of the agreement, the Government of the State of Baja California is making this public statement, acknowledging that the absence of an appropriate body of regulations

concerning abortion resulted in the violation of Paulina del Carmen Ramírez Jacinto's human rights.

Accordingly, it is established and fully recognized that, at the time her human rights were violated, the State of Baja California did not have an appropriate body of regulations to deal with the incident that occurred and that this prevented her from availing herself of the right she was demanding. It should also be made clear that this practice is not state policy in Baja California.

This statement also seeks to prevent the recurrence of this type of situation and demonstrates the strong determination of the Government of Baja California to respect the individual and social guarantees enshrined in the constitution, as well as the human rights embodied in international treaties and conventions signed by our country. It confirms its commitment to continue working steadfastly for the complete eradication of activities and practices that undermine human rights. Likewise, the state government will continue seeking to implement legal and administrative reforms giving citizens greater certainty and legal security in their day-to-day interactions with authority.

Issued and signed in the city of Mexicali, Baja California, on February 3, 2005.

GOVERNMENT OF THE STATE OF BAJA CALIFORNIA.

SUMMARIES OF JURISPRUDENCE
Health and Reproductive Rights

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