

INTERNATIONAL
COMMISSION
OF JURISTS

INTERNATIONAL COMMISSION OF JURISTS: LEGAL OPINION

COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CASE OF L.C. V. PERU

I. INTRODUCTION

1. This legal opinion by the International Commission of Jurists (ICJ)¹ concerns the communication to the Committee on the Elimination of Discrimination against Women (hereinafter the Committee) under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW), in the case of L.C. v. Peru, by the *Center for Reproductive Rights* and the *Centro de Promocion y Defensa de los Derechos Sexuales y Reproductivos (PROMSEX)*.
2. This case concerns the nature and requirements of a State's international obligations under CEDAW to ensure women's equal enjoyment of their human rights. Among other violations the applicants allege the failure of Peru to comply with its obligations under Articles 1, 2, 3, 5 and 12 of CEDAW, and general international human rights law, to ensure the equal rights of women to health, personal integrity and freedom from cruel, inhuman and degrading treatment.
3. At the heart of the applicants' complaint is the allegation that Peru failed to ensure that a 13-year-old girl, who had suffered a severe spinal injury following a suicide attempt, was able to receive an abortion, thereby also preventing her from receiving timely medical treatment vital for the preservation of her health, including the possibility that she could regain her ability to walk. The applicants underline that the provision of an abortion to save a woman's life or health is legal under Peruvian domestic law. However they point to the State's failure to put in place effective administrative and judicial procedures to enable access to the procedure in such cases.
4. The ICJ underscores that a range of Peru's international human rights obligations are relevant to this matter. However, in the proceeding paragraphs the ICJ will address a particular correlative obligation: the duty of States to take proactive steps to guarantee the enjoyment of rights in practice and to ensure effective remedies are in

¹ The International Commission of Jurists is an international non-governmental organization, established in 1952 and headquartered in Geneva, Switzerland. It works to advance the rule of law and to ensure the implementation of international human rights law. In this context it endeavors to promote States' compliance with their international human rights legal obligations, to support efforts to combat impunity and ensure legal accountability for human rights violations, and to advance victims' access to remedies, including reparations.

place that allow individuals to vindicate those rights. The ICJ underlines that under international law remedies must be both procedural and substantive. This means that the State must provide access to a remedial forum, unencumbered by jurisdictional or other procedural barriers which would render the formal right illusory or ineffective, and that it must provide for appropriate reparation in the event that a violation is established. For the purposes of this legal opinion the ICJ concentrates on the procedural dimension of the right to remedy and uses the term effective remedies to denote that aspect.

5. In Part II below the ICJ will demonstrate that under CEDAW and general international law Peru is obliged to ensure women's effective enjoyment of their human rights, including through the adoption of regulatory, legislative and other measures necessary to give effect to those rights and by the establishment of effective remedial procedures through which individuals can vindicate their rights in practice. In Part III it will briefly outline in general terms what constitutes an effective remedy compliant with international law. In Part IV it will specifically address the contours of an effective remedy as it applies to women seeking abortions to which they are entitled under international human rights law and/or which are lawful under a State's domestic law. In Part V, in light of its foregoing analysis, the ICJ will consider the requirement of exhaustion of domestic remedies, under Article 4.1 of the Optional Protocol to CEDAW. In Part VI it will present a number of its conclusions regarding the particular situation of the applicant in the instant case.

II. STATES ARE OBLIGED UNDER CEDAW AND GENERAL INTERNATIONAL HUMAN RIGHTS LAW TO ENSURE ACCESS TO AN EFFECTIVE REMEDY TO VINDICATE RIGHTS

6. International human rights law not only obliges States to refrain from interfering in the exercise of human rights, but also obliges them to ensure the effective enjoyment of those rights. This means that States must take a number of positive steps, including the adoption of necessary regulatory, legislative and other measures designed to give effect to those rights and the establishment of effective remedial procedures by which individuals can vindicate their rights in practice.
7. The obligation to guarantee the effective enjoyment of rights is enshrined in international and regional human rights treaties,² including CEDAW.³ Its content and consequences, including the obligations it places on States with regard to the adoption of appropriate regulatory, legislative and other measures and the establishment of effective remedies have been outlined and underscored repeatedly in the jurisprudence of international and regional judicial and quasi-judicial bodies.

(a) CEDAW

8. On a number of occasions the Committee has addressed the scope of these obligations as they arise under Article 2 of CEDAW.
9. In its *General Recommendation No. 28*,⁴ the Committee first reminds States parties that proactive legislative, regulatory and practical measures to give effect to the rights of women under the Convention are required. It specifies that the Convention, "guarantees women the equal recognition, enjoyment and exercise of all human rights and fundamental freedoms in the political, economic, social, cultural, civil, domestic

² See e.g. Article 2(3), International Covenant on Civil and Political Rights; Article 25 American Convention on Human Rights; Article 13, European Convention for the Protection of Human Rights and Fundamental Freedoms.

³ Article 2, Convention on the Elimination of All Forms of Discrimination against Women.

⁴ CEDAW General Recommendation No. 28, Core Obligations of States Parties under Article 2.

or any other field, irrespective of their marital status, and on a basis of equality with men,”⁵ and underscores that Article 2 obliges States to, “address all aspects of their legal obligations under the Convention to respect, protect and fulfill,”⁶ the rights of women in this regard. It stresses that discrimination contrary to the Convention can occur where States fail to take “necessary legislative measures to ensure the full realization of women’s rights,”⁷ or fail to enforce relevant laws.⁸ It underlines that in complying with Article 2 “the types of measures that might be considered appropriate in this respect are not limited to constitutional or legislative measures. States parties should also adopt measures that ensure the practical realization of the elimination of discrimination against women and women’s equality with men.”⁹

10. The Committee then specifies that these obligations also entail a requirement that effective remedies be established. For example, it underlines that States must, “ensure that women are able to make complaints about violations of their rights under the Convention and to have access to effective remedies,”¹⁰ and must provide adequate support in order to, “ensure that the measures adopted make a real difference in women’s lives in practice.”¹¹ The Committee also affirms that in ensuring women are protected from violations of their rights under the Convention, the “protection shall be provided by competent tribunals and other public institutions”¹² and notes that effective implementation of the Convention requires State accountability to its citizens which in turn requires that “appropriate mechanisms and institutions must be put in place.”¹³
11. In its recent decision in *Vertido v. Philippines*, the Committee again confirmed the obligation on States under CEDAW to ensure effective remedies. There it underlined that although “the text of the Convention does not expressly provide for a right to a remedy ... such a right is implied in the Convention, in particular in article 2 (c).”¹⁴
12. Meanwhile, in its *General Recommendation No. 24*,¹⁵ the Committee has specifically addressed the content of States’ obligations to guarantee women’s equal right to health-care. There the Committee observed that, “the duty of States 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 fulfill 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 that ensures effective judicial action. Failure to do so will constitute a violation of article 12.”¹⁶

(b) General International Human Rights Law

13. Many other international and regional judicial and quasi-judicial authorities have also confirmed that the obligation to guarantee the effective enjoyment of rights necessitates the adoption of appropriate regulatory, legislative and other measures and the establishment of effective remedies. These obligations give effect to a

⁵ CEDAW General Recommendation No. 28, Para.4

⁶ CEDAW General Recommendation No. 28, Para. 9

⁷ CEDAW General Recommendation No. 28, Para.10

⁸ CEDAW General Recommendation No. 28, Para.10

⁹ CEDAW General Recommendation No. 28, Para.36

¹⁰ CEDAW General Recommendation No.28, Para. 36

¹¹ CEDAW General Recommendation No. 28, Para.36

¹² CEDAW General Recommendation No. 28, Para. 17

¹³ CEDAW, General Recommendation No.28, Para.40

¹⁴ *Vertido v. Philippines*, UN Doc CEDAW/C/46/D/18/2008, 16 July 2010, Para. 8.3

¹⁵ CEDAW, General Recommendation No. 24, Women and Health

¹⁶ CEDAW, General Comment No.24, Para.13

fundamental general principle of law, “*ubi jus ibi remedium*” - where there is a right there is a remedy.

14. This obligation is affirmed in Articles 2(b) and 2(c) of the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*,¹⁷ specifying that States must, “adopt appropriate and effective legislative and administrative procedures and other appropriate measures that provide fair, effective and prompt access to justice” and must make available “adequate, effective, prompt and appropriate remedies, including reparation.”
15. In its *General Comment No. 31*¹⁸ the Human Rights Committee has stated that under Article 2(3) of the ICCPR States’ obligations are “negative and positive in nature,”¹⁹ and they must, “adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations.”²⁰ It has also held that, “in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights.”²¹
16. Meanwhile in its *General Comment No. 28*, the Human Rights Committee has addressed these requirements in the particular context of women’s right to the equal enjoyment of their human rights, noting that, “States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant. The obligation to ensure to all individuals the rights recognized in the Covenant, established in articles 2 and 3 of the Covenant, requires that State parties take all necessary steps to enable every person to enjoy those rights...The State party must not only adopt measures of protection but also positive measures in all areas so as to achieve the effective and equal empowerment of women.”²²
17. Similarly the Committee on Economic, Social and Cultural Rights has affirmed that in respect of the rights enshrined in the ICESCR, “remedies must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.”²³
18. The Committee on the Rights of the Child has also addressed the scope of these obligations outlining that “for rights to have meaning, effective remedies must be available to redress violations. This requirement is implicit in the Convention and consistently referred to in the other six major international human rights treaties.”²⁴
19. The European Court of Human Rights has also developed a doctrine of positive obligations and outlined the contours of these obligations on States. It has specified that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,”²⁵ and has outlined that States’ obligations may include “both the provision of a regulatory framework of adjudicatory and enforcement machinery protecting individuals’ rights and the implementation, where appropriate, of specific measures”²⁶ and that “the Convention guarantees the

¹⁷ General Assembly resolution 60/147 of 16 December 2005. See also Article 3. Although several articles in these guidelines apply specifically to gross violations of international human rights law, Article 2(b) and (c) are not confined in scope to a certain class of violation.

¹⁸ HRC, General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant

¹⁹ HRC, General Comment No. 31, Para.6

²⁰ HRC, General Comment No. 31, Para.7

²¹ HRC, General Comment No. 31, Para. 15

²² HRC General Comment No.28, Article 3 ICCPR, Equal Enjoyment of Rights, Paras. 2-3.

²³ Committee on Economic, Social and Cultural Rights, General Comment No. 9, Para. 2

²⁴ General Comment No. 5, General measures of implementation of the Convention on the Rights of the Child, Para. 24

²⁵ *Airey v. Ireland*, Application No. 6289/73, Para.24; *Tysiac v. Poland*, Application No. 5410/03, 20 March 2007, Para. 113.

²⁶ *Tysiac v. Poland*, Application No. 5410/03, 20 March 2007, Para. 110

availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order.”²⁷

20. The European Court has related these requirements to the principle of the rule of law, which it has held, “presupposes that the rules of domestic law must provide a measure of legal protection against arbitrary interferences by public authorities.”²⁸

III. THE OBLIGATION TO PROVIDE AN EFFECTIVE REMEDY REQUIRES A REMEDY THAT IS NOT THEORETICAL OR ILLUSORY, IS ADEQUATE AND APPROPRIATE, IS PROMPT AND TIMELY.

21. In order to ensure compliance with international legal requirements remedies must not only formally exist, but also be effective. Thus a remedy must be accessible in practice and not theoretical or illusory; the forum and nature of a remedy must be responsive and appropriate to the circumstances and right in question; the remedy must be timely; the remedy must entail recourse to an independent and impartial authority that is empowered to make an enforceable decision. Supranational judicial and quasi-judicial bodies have repeatedly underlined these requirements.²⁹
22. In its *General Recommendation No. 28* the CEDAW Committee has explained that the obligation to provide effective remedies under the Convention requires States to “ensure that women have recourse to ... accessible and timely remedies ... to be determined in a fair hearing by a competent and independent court or tribunal where appropriate.”³⁰ Meanwhile in its decision in *Yildirim v. Austria*, the Committee noted that in order to be considered effective a remedy must be “likely to bring effective relief to a woman,”³¹ and specified that abstract constitutional remedies³² will not suffice in instances where fast and specific intervention is required to ensure meaningful rights protection.
23. The Committee on Economic, Social and Cultural Rights has stressed that judicial or administrative remedies should be “accessible ... timely and effective,”³³ and where an administrative remedy is afforded usually a right of judicial appeal will be necessary.³⁴
24. In its *General Comment No.31* the Human Rights Committee has affirmed that, “remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person ... [it] attaches importance to States Parties’ establishing appropriate judicial and administrative mechanisms for addressing claims.”³⁵
25. The European Court of Human Rights has held that a remedy must be “effective in practice as well as in law,”³⁶ and in order to be effective, remedies must relate to the breaches alleged and be available and sufficient. Moreover, the existence of such remedies must be sufficiently certain not only in theory but also in practice and the remedy must be available at the relevant time.³⁷

²⁷ Keenan v. United Kingdom, Application No. 27229/95, Para. 122

²⁸ Tysiac v. Poland, Application No. 5410/03, 20 March 2007, Para.112;

²⁹ For a general discussion see ICJ Practitioners Guide No. 2, The Right to a Remedy and to Reparation

³⁰ CEDAW General Comment No. 28, Para. 34

³¹ *Yildirim v. Austria*, Communication No. 6/2005, Para. 7.5

³² *Yildirim v. Austria*, Communication No. 6/2005, Para. 7.5

³³ CESCR, General Comment No.9, Para. 9

³⁴ CESCR, General Comment No.9, Para. 9

³⁵ Human Rights Committee, General Comment No. 31, Para. 15

³⁶ Keenan v. United Kingdom, Application No. 27229/95, Para. 122

³⁷ *Sejdovic v. Italy*, Application No. 56581/00, Paras 45 – 46

26. For its part, the Inter-American Court has specified that, "adequate domestic remedies are those which are suitable to address an infringement of a legal right."³⁸ It has also held that, "a remedy must also be effective -- that is, capable of producing the result for which it was designed."³⁹ In this context the Court has underlined that the mere existence of a remedy is irrelevant. Instead the key question is whether the remedy in question is adequate and effective.⁴⁰ As such a remedial procedure must be available which is appropriate to the particular situation and right in question. The Court has noted that general remedial options may not be suitable or pertinent to particular or specific sets of circumstances.⁴¹

IV. THE OBLIGATION TO PROVIDE AN EFFECTIVE REMEDY REQUIRES A SPEEDY, PREVENTIVE PROCEDURE TAILORED TO THE CIRCUMSTANCES AND CAPABLE OF ESTABLISHING AS A MATTER OF LAW A WOMAN'S ENTITLEMENT TO A LAWFUL ABORTION

27. In line with the analysis above, the obligation of States to provide an adequate and effective remedy gives rise to specific implications in respect of women seeking an abortion, to which they are entitled under international human rights law and/or which is legal under domestic law.

28. As will be outlined below both the Human Rights Committee and the European Court of Human Rights have affirmed that in this context the sum of the requirements outlined in Parts II and III above require States to put in place effective remedial procedures which enable women to determine in a timely manner, before an independent body, the legality of their request for an abortion and which give rise to an enforceable decision with a possibility of review by a judicial body. The remedy must be capable of offering a woman entitled to a legal abortion effective relief in the form of access to safe abortion and as such retrospective or ex-post facto remedies will be insufficient. Due to the particular circumstances and time exigencies at play in such instances, such remedies should take the form of specifically designed procedures with the possibility of judicial appeal. In such cases requiring women to have recourse to general constitutional remedies will almost always be inappropriate.

Remedy Tailored to the Special Circumstances

29. In its decision regarding the communication *K.N.L.H. v. Peru*⁴² the Human Rights Committee held that in denying the applicant access to an abortion, despite potential risks to her life and mental health, the State had violated the applicant's right to freedom from torture or cruel, inhuman or degrading treatment. The Committee also found that the State had failed to provide the applicant with an effective remedy to vindicate her rights.⁴³ In this regard the Committee paid particular attention to the applicant's allegation that there was 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."⁴⁴ Such reasoning is reflective of the importance placed by the Committee in its *General Comment No. 31*

³⁸ Velásquez Rodríguez v. Honduras, 21 July 1989, Para. 64

³⁹ Velásquez Rodríguez v. Honduras, 21 July 1989, Para. 66

⁴⁰ Ximenes-Lopes v. Brazil, Preliminary Objections, 30 November 2005, Para. 4

⁴¹ Velásquez Rodríguez v. Honduras, 21 July 1989, Para. 64 – 66

⁴² K.N.L.H v. Peru, Communication No. 1153/2003, 24 October 2005

⁴³ K.N.L.H v. Peru, Communication No. 1153/2003 Paras. 5.2 and 6.6

⁴⁴ K.N.L.H v. Peru, Communication No. 1153/2003 Para. 5.2

on remedies being appropriately “adapted so as to take account of the special vulnerability of certain categories of person.”⁴⁵

30. The European Court of Human Rights has underlined similar requirements in a number of cases, most recently in *Tysiac v. Poland*⁴⁶ and *A.B.C. v. Ireland*.⁴⁷ In the former case the Court addressed the situation of a woman who, faced with a significant loss of eyesight if she proceeded with a pregnancy, sought access to an abortion in Poland. In the latter case the Court considered the situation of a woman who was suffering from a rare form of cancer and was concerned that proceeding with a pregnancy would involve risks to her life. Although generally criminalised in both countries, abortion is lawful in Poland where a pregnancy poses a risk to a woman’s health or life, and in Ireland where a pregnancy poses a risk to a woman’s life. However at the time in question neither country had established procedures enabling women to determine whether or not the relevant exception applied in their circumstances and to secure an enforceable decision regarding their entitlement to the procedure. As a result, the applicant in *Tysiac v. Poland* carried the pregnancy to term and subsequently suffered severe loss of sight, while in *A.B.C. v. Ireland* she traveled abroad to undergo the procedure.
31. In both cases the Court found that the respondent States’ failures, “to provide an effective and accessible procedure allowing the...applicant to establish her entitlement to a lawful abortion,”⁴⁸ amounted to a breach of their obligations under the European Convention. In reaching this conclusion the Court considered in some detail what would amount to an effective and accessible procedure in the circumstances.

Remedy Must Lead to Enforceable Decision as a Matter of Law

32. The Court in both cases confirmed that State must establish a “framework whereby any difference of opinion between the woman and her doctor or between different doctors...could be examined and resolved through a decision which would establish as a matter of law whether a particular case presented a qualifying risk ... such that a lawful abortion might be performed.”⁴⁹

Medical Consultation/Opinion Insufficient

33. As a result the Court specified that a process of medical consultation between a woman and her doctor(s)/hospital(s) would not by itself constitute such an effective procedure, nor would a requirement that a woman obtain a certain number of medical opinions, not least as a result of the chilling effect on the medical profession arising from the general criminalization of abortion.⁵⁰

Constitutional Remedies Inappropriate

34. The Court also underlined that constitutional courts are not an effective or “appropriate fora for the primary determination as to whether a woman qualifies for an abortion which is lawfully available in State.”⁵¹ In this regard it stressed that it was not appropriate to require 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.”⁵² It also explained that it was “equally

⁴⁵ HRC General Comment No. 31, Para. 15

⁴⁶ *Tysiac v. Poland*, Application 5410/03, 20 March 2007

⁴⁷ *A, B and C v. Ireland*, Application 25579/05, 16 December 2010

⁴⁸ *A, B and C v. Ireland*, Paras. 246, 267-268; *Tysiac v. Poland*, Paras. 117, 124 -130

⁴⁹ *A, B and C v. Ireland*, Para. 253. See also, *Tysiac v. Poland*, Paras. 121-124

⁵⁰ *Tysiac v. Poland*, Paras. 116, 119-123; *A, B and C v. Ireland*, Paras. 253 – 255

⁵¹ *A, B and C v. Ireland*, Para. 258

⁵² *A, B and C v. Ireland*, Para. 258

inappropriate to require women to take on such complex constitutional proceedings,”⁵³ where the underlying legal right was not disputable.

Remedy Must be Timely and Preventive

35. The Court specified that in such cases “retrospective measures alone are not sufficient to provide appropriate protection,”⁵⁴ and that the time factor is of critical importance. It held that, “the procedures in place should therefore ensure that such decisions are timely so as to limit or prevent damage to a woman [...] which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfill such a function. In the Courts view, the absence of such preventive procedures in domestic law can be said to amount to the failure of the State to comply with its positive obligations.”⁵⁵ As such retrospective possibility of recourse to the civil or criminal law would not constitute an effective remedy.⁵⁶

V. IN THE ABSENCE OF AN EFFECTIVE REMEDY THERE IS NO OBLIGATION TO EXHAUST DOMESTIC REMEDIES AS PER ARTICLE 4.1 OF THE OPTIONAL PROTOCOL TO CEDAW

36. Article 4.1 of the Optional Protocol to CEDAW specifies that in order for the Committee to consider the merits of a complaint all available domestic remedies must have been exhausted. This provision reflects a general principle of international law, also reflected in many other international instruments which provide for the right of individual petition to an international body,⁵⁷ intended to allow national authorities an initial opportunity to prevent or put right an alleged wrong.⁵⁸
37. However it is implicit in this principle that applicants are only required to exhaust domestic remedies that are available and effective. Indeed this is explicitly provided for in Article 4.1 of the Optional Protocol to CEDAW, which specifies that exhaustion is required, “unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.” Thus if no effective domestic remedy in conformity with the requirements outlined in Parts II and III above, exists, there is no obligation of exhaustion. This has been confirmed time and again by judicial and quasi-judicial bodies.
38. For example, in *Yildirim v. Austria* CEDAW held that because of its view that certain domestic remedies were not “likely to bring effective relief in the case”⁵⁹ the requirement of exhaustion did not apply and the communication was therefore admissible.⁶⁰
39. The Human Rights Committee has underlined this requirement numerous times. For example it has specified that “in considering the admissibility of the communications, the Committee ... recalled that domestic remedies need not be exhausted if they objectively have no prospect of success,”⁶¹ and has held that because a domestic remedy “was not an available and effective remedy ... accordingly, the Committee

⁵³ *A, B and C v. Ireland*, Para. 259

⁵⁴ *Tysiac v. Poland*, Para. 127

⁵⁵ *Tysiac v. Poland*, Para. 118

⁵⁶ *Tysiac v. Poland* Paras. 125 – 127

⁵⁷ Article 41(1)(c), ICCPR; Articles 2 and 5(2)(b), Optional Protocol to the ICCPR; Article 46, American Convention on Human Rights; Article 35 (1), European Convention of Human Rights

⁵⁸ CEDAW, *Yildirim v. Austria*, Communication No. 6/2005, Para. 7.5; Human Rights Committee, *Angelo Celal, v. Greece*, Communication No. 1235/2003, Para. 6.3; ECtHR, *Selmouni v. France*, Application No. 25803/94, 1999, Para. 74

⁵⁹ *Yildirim v. Austria*, Communication No. 6/2005, Para. 7.5

⁶⁰ *Yildirim v. Austria*, Communication No. 6/2005, Para. 7.5

⁶¹ *Yves Cadoret and Hervé le Bihan v. France*, Communications Nos. 221/1987 and 323/1988, Para. 5.1

was not precluded from examining the merits.”⁶² This was the same approach taken by the Committee in the case of *K.N.L.H v. Peru*, discussed in Part IV above, where it found the case admissible, holding that applicant was not obliged to exhaust domestic remedies “which had no chance of being successful.”⁶³

40. Similarly the Inter-American Court has confirmed that, “adequate domestic remedies are those which are suitable to address an infringement of a legal right. A number of remedies exist in the legal system of every country, but not all are applicable in every circumstance. If a remedy is not adequate in a specific case, it obviously need not be exhausted. A norm is meant to have an effect and should not be interpreted in such a way as to negate its effect or lead to a result that is manifestly absurd or unreasonable.”⁶⁴
41. For its part the European Court has specified that, “the only remedies ... the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice.”⁶⁵
42. This issue of whether a domestic remedy is effective for the purposes of exhaustion often goes to the very substance of a complaint and is regularly joined to the merits of a case by supranational judicial and quasi-judicial bodies. This is especially the practice in respect of complaints where integral to the human rights violation alleged is the question of whether a State failed to comply with the obligation to establish effective remedial procedures by which the applicant could vindicate his or her rights.
43. Indeed this was the approach adopted by the European Court of Human Rights in *Tysiac v. Poland* and *A.B.C v. Ireland*, discussed in detail in Part IV above. In the latter case, the Court again noted in relation to admissibility requirements that “when proposed remedies have not been demonstrated to be effective applicants could not be required...to exhaust them.”⁶⁶ It specified that because a fundamental substantive issue in the applicant’s case concerned her allegation that she “had no effective procedure by which to establish her qualification for a lawful abortion,”⁶⁷ the question of the obligation on the applicant to exhaust remedies is “inextricably linked, and therefore should be joined, to the merits of her complaint.”⁶⁸
44. In both cases the Court then moved to consider merits of the case and assessed whether the concerned State had complied with its obligation to provide the applicants with an effective remedy by which to vindicate their rights. In this regard, for the reasons discussed above in Part IV above, it found a violation of the European Convention due to the lack of an “accessible and effective procedure by which the ... applicant could have established whether she qualified for a lawful abortion.”⁶⁹ In the same discussion and for the same reasons it dismissed the States’ preliminary objections and arguments that the applicants had failed to exhaust domestic remedies.⁷⁰

⁶² Randolph Barrett and Clyde Sutcliffe v. Jamaica, Communications Nos. 270/1988 and 271/1988, Para. 7.2

⁶³ *K.N.L.H v. Peru*, Communication No. 1153/2003 Para. 5.2. As noted above the Committee paid close attention to the applicant’s arguments that there was “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 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.”

⁶⁴ Velasquez Rodriguez 1989, para.64. See also, Inter-American Court of Human Rights, Advisory Opinion, Exceptions to the Exhaustion of Domestic Remedies, Para. 36, and Ximenes-Lopes v. Brazil, Preliminary Objections, 30 November 2005, Para. 4

⁶⁵ ECtHR, Selmouni v. France, Application No. 25803/94, 1999, Para. 75

⁶⁶ *A, B and C v. Ireland*, Para. 153.

⁶⁷ *A, B and C v. Ireland*, Para. 154

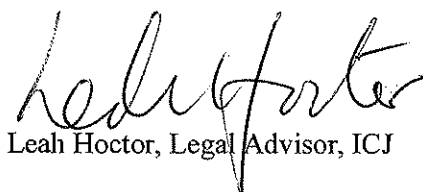
⁶⁸ *A, B and C v. Ireland*, Para. 155. See also, *Tysiac v. Poland*, Para. 61

⁶⁹ *A, B and C v. Ireland*, Para. 267. See also, *Tysiac v. Poland*, Paras. 124 -130

⁷⁰ *A, B and C v. Ireland*, Para. 267; *Tysiac v. Poland*, Paras. 129.

VI. CONCLUSIONS

45. In the ICJ's opinion, the laws, standards and jurisprudence described above indicate that the requirements of the rule of law and the obligation on States to ensure the enjoyment of rights in practice, necessitate that in situations where a woman may be entitled, under national and/or international law, to an abortion, a State is obliged to put in place an administrative procedure by which she can quickly and preventatively determine her eligibility.
46. The procedures put in place must entail a process that will give rise to an enforceable legal decision by an independent body, and which is subject to a right of judicial appeal. They must both enable a woman to test, and if necessary dispute, the views of relevant medical professionals, and enable a decision as to eligibility when there is a difference of opinion between medical professionals. Moreover the procedures must be tailored to the specific circumstances of such cases and generic legal procedures will not be sufficient. In particular the foregoing legal analysis indicates that requiring women to pursue generally applicable constitutional remedies, not suited to meaningfully consider highly specialized and technical information, as a mechanism of determining their eligibility for a legal abortion will contradict the requirements of international human rights law.
47. These considerations are central to analysis of obligations to exhaust domestic remedies (as required by Article 4.1 of the Optional Protocol to CEDAW). In the absence of such preventative administrative procedures the ICJ considers that there is no effective remedy available to women seeking to determine their eligibility for a legal abortion. The obligation to exhaust domestic remedies applies only to effective remedies. As a result it appears that international human rights law does not oblige women in such situations to exhaust generic legal procedures including generally applicable constitutional remedies.
48. There does not appear to have been a procedure available to the applicant in the instant case that would have allowed her to determine, in the manner required by general international law and CEDAW, her eligibility for a legal abortion. It does not appear that there was an administrative procedure available to the applicant, tailored to the particular circumstances of women in her situation, and which would have allowed her access to a preventive, independent, enforceable decision. As a result the ICJ concludes that there was no effective remedy compliant with international legal requirements available to the applicant. In light of the laws, standards and jurisprudence analysed above, the ICJ does not consider that the generic constitutional remedies applicable in Peru constituted effective remedies as required by international human rights law in circumstances such as those at issue in the present case.
49. As a result of its conclusion that there was no effective remedy available to the applicant in the instant case, the ICJ is of the view that there was no domestic remedy that she should have exhausted before making an application under the Optional Protocol to CEDAW. As a result the applicants complaint fulfills the requirements of admissibility as provided for by Article 4 of the Protocol.


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