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Views

Communication No. 1608/2007

<i>Submitted by:</i>	V.D.A. (represented by the organizations INSGENAR, CLADEM and ACDD)
<i>Alleged victim:</i>	L.M.R.
<i>State party:</i>	Argentina
<i>Date of communication:</i>	25 May 2007 (initial submission)
<i>Document reference:</i>	Special Rapporteur's rule 97 decision, transmitted to the State party on 5 October 2007 (not issued in document form)
<i>Date of adoption of Views:</i>	29 March 2011
<i>Subject matter:</i>	Medical and judicial authorities' refusal to authorize a termination of pregnancy
<i>Procedural issues:</i>	Insufficient substantiation
<i>Substantive issues:</i>	Right to life; right to non-discrimination; right not to be subjected to cruel, inhuman or degrading treatment or punishment; respect for private life; right to freedom of thought, conscience and religion
<i>Articles of the Covenant:</i>	2, 3, 7, 17 and 18
<i>Article of the Optional Protocol:</i>	2

On 29 March 2011 the Human Rights Committee adopted the annexed text as the Committee's Views under article 5, paragraph 4, of the Optional Protocol in respect of communication No. 1608/2007.

* Issued by decision of the Human Rights Committee.

Annex

Views of the Human Rights Committee under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights (101st session)

concerning

Communication No. 1608/2007**

Submitted by: V.D.A. (represented by the organizations INSGENAR, CLADEM and ACDD)

Alleged victim: L.M.R.

State party: Argentina

Date of communication: 25 May 2007 (initial submission)

The Human Rights Committee, established under article 28 of the International Covenant on Civil and Political Rights,

Meeting on 29 March 2011,

Having concluded its consideration of communication No. 1608/2007, submitted to the Human Rights Committee by V.D.A. under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

Views under article 5, paragraph 4, of the Optional Protocol

1. The author of the communication, 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

** The following members of the Committee participated in the examination of the present communication: Mr. Lazhari Bouzid, Ms. Christine Chanet, Mr. Cornelis Flinterman, Mr. Yuji Iwasawa, Ms. Helen Keller, Ms. Zonke Zanele Majodina, Ms. Iulia Motoc, Mr. Gerald L. Neuman, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Krister Thelin and Ms. Margo Waterval.

In accordance with article 90 of the Committee's rules of procedure, Mr. Fabian Omar Salvioli did not participate in the examination of the present communication.

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 Code,¹ hospital staff began the pre-surgical examinations necessary for the procedure. 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 proceed.² 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.

¹ This provision establishes the following: "Abortion performed by a licensed physician with the consent of the pregnant woman is not punishable: (1) 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."

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".

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.

2.8 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.

The complaint

3.1 The author maintains that, despite availing herself of a legal remedy that should have safeguarded her reproductive rights, L.M.R. was unable to obtain a legal abortion. She suffered discrimination in accessing reproductive health services and her reproductive autonomy, right to privacy and confidentiality and right to access a safe termination through the public health system were violated. Both the victim and her family suffered mental and psychological injury and their daily lives were disrupted. The psychological injury suffered by L.M.R. took the form of post-traumatic stress disorder, with predominantly phobic symptoms. Although it is difficult to distinguish between the effects of the rape and those attributable to the State's failure to guarantee access to a safe abortion, there are sufficient grounds to maintain that if the termination had been performed in due time and form its damaging consequences could have been minimized.

3.2 The author claims that both she and her elder daughter lost their jobs because, for three months, they had to make themselves available for the administrative formalities imposed on them by the judicial and medical systems and to provide round-the-clock care for L.M.R., who was very upset by the situation. They also had to cover the material costs of these formalities.

3.3 The author claims that it is not only mentally-impaired rape victims who have difficulty accessing legal abortions. There are many cases in which continuing a pregnancy puts the mother's life and/or health at risk. Although such circumstances also constitute grounds for a legal abortion in Argentina, it is almost impossible to find health-care practitioners willing to carry out the procedure. There are numerous case law precedents in this area. Both in cases of non-punishable abortion and other medical interventions referred to the courts, and in applications for surgical methods of contraception, it has been ruled that judicial authorization is not necessary and that doctors should not request it.

3.4 Because it lacked the mechanisms that would have enabled L.M.R. to obtain a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant.

3.5 The author also maintains that the impossibility of obtaining a termination of pregnancy constituted a violation of the right to equality and non-discrimination established under article 3 of the Covenant. The State's failure to exercise due diligence in safeguarding a legal right to a procedure required solely by women, coupled with the arbitrary action of the medical staff, resulted in discriminatory conduct that violated L.M.R.'s rights. The victim's status as a poor, disabled woman adds to the seriousness of the violation since it heightened the State's obligation to protect her rights and eradicate the cultural and religious prejudices that were undermining her well-being.

3.6 The author recalls the Committee's concluding observations to the State party's periodic report, which state that "traditional attitudes towards women continue to exercise a negative influence on their enjoyment of Covenant rights". Since abortion is an issue that affects women only and is shrouded in all kinds of prejudices in the collective imagination, the attitude of the judicial officers and the medical staff at San Martín Hospital, and the authorities' failure to enforce the law, were discriminatory, depriving L.M.R. of her right to a safe, lawful abortion. Social attitudes and prejudices, and pressure from fundamentalist groups, also prevented L.M.R. from enjoying her right to life, health and privacy, and her right not to be subjected to cruel, inhuman and degrading treatment, among others, on equal terms without discrimination, it being understood that for women these rights are sometimes of a different tenor than for men. Furthermore, the lack of hospital protocols to facilitate abortion in the two situations where it is permitted under Argentine law makes it more difficult for women finding themselves in these situations to exercise their right to a termination and gives the authorities leeway to apply the law in an arbitrary manner.

3.7 The author also maintains that the facts described constitute a violation of L.M.R.'s right to life. 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. As the Committee itself has stated, in the case of women respect for the right to life implies a State duty to adopt measures that preclude the need for illegal abortions that put women's life and health at risk. She observes that illegal abortion is a public-health issue that continues to cost thousands of women's lives in Argentina and is the primary cause of maternal mortality. She recalls that when the Committee considered Argentina's third periodic report it expressed concern that "the criminalization of abortion deters medical professionals from providing this procedure without judicial order, even when they are permitted to do so by law, inter alia when there are clear health risks for the mother or when pregnancy results from the rape of mentally disabled women. The Committee also expresses concern over discriminatory aspects of the laws and policies in force, which result in disproportionate resort to illegal, unsafe abortions by poor and rural women".³

3.8 The author maintains that forcing her daughter to continue with her pregnancy constituted cruel and degrading treatment and, consequently, a violation of her personal well-being under article 7 of the Covenant. The refusal to terminate the pregnancy inflicted many days of mental and physical anguish and suffering on L.M.R. and her family, forcing them to resort to an illegal abortion that endangered her life and health while enduring opprobrium from numerous sources. The pressure to continue the pregnancy and give the baby up for adoption exposed the family to some very painful dilemmas. For the author this amounted to cruel and degrading treatment. She felt that people dared to make such offers only because she was poor, and found this deeply humiliating.

3.9 The author also alleges that the facts described constitute a violation of article 17 of the Covenant. The State party not only interfered in a decision concerning L.M.R.'s legally protected reproductive rights but also interfered arbitrarily in her private life, taking a decision concerning her life and reproductive health on her behalf.

3.10 There was also a violation of article 18 of the Covenant. Catholic groups made direct, public and continual threats of various kinds and subjected the family to pressure and coercion without the authorities stepping in to protect L.M.R.'s rights. In objecting to the procedure on the grounds of collective or institutional conscience, the Gynaecology Department of San Martín Hospital also failed to respect the right to freedom of religion and belief. Conscientious objection is inadmissible under the regulatory framework

³ CCPR/CO/70/ARG, 3 November 2000, paragraph 14.

governing the duties of public servants and in application of the obligation to safeguard patients' right to life and health that is incumbent on all medical professionals. Under the prevailing law, the hospital should have referred the case to another department.

3.11 The author requests that the Committee: (a) establish the State's international responsibility; (b) order the State to give full reparation to L.M.R. and her family, including compensation for material and mental injury and measures to prevent repetition; (c) order the State to implement hospital protocols that would facilitate access to legal, safe abortion and the mechanisms necessary to give effect to this right; (d) review the domestic legal framework for abortion, which establishes criminal penalties for women who terminate an unwanted or involuntary pregnancy, and forces them to undergo illegal abortions which seriously endanger their life and overall health.

State party's observations on admissibility and merits

4.1 In a note verbale dated 9 January 2008, the State party indicated that the communication was inadmissible on the grounds of failure to exhaust domestic remedies. The communication seeks to submit a simple application for compensation to international jurisdiction, even though the judicial remedies sought at the domestic level to ensure access to abortion were resolved in L.M.R.'s favour. The judicial proceedings which culminated in the Supreme Court ruling authorizing a termination of pregnancy lasted 37 days, which is not an excessive period based on the criteria of reasonableness consensually accepted in international human rights law. Consequently, since the case had been resolved favourably for the applicant under domestic jurisdiction, the application for full reparation submitted by the author is not substantiated.

4.2 Notwithstanding the foregoing, the State party observes that the author's claims for injury and damages should first be submitted to domestic jurisdiction. The Code of Civil and Commercial Procedure in effect in Buenos Aires province provides a specific, pertinent and effective procedure for claiming compensation for alleged physical and mental suffering.

4.3 On 9 May 2008 the State party reiterated that the judiciary acted with due promptitude in the case in point, since it was resolved in less than four weeks, despite having been referred from the court of first instance to the Civil Court and then to the Supreme Court of Justice of Buenos Aires province during a holiday period when the courts were in recess. However, the various circumstances of the case, the way in which the public took up the cause and the assessments of the medical staff involved made it impossible to carry out a surgical procedure permitted under criminal law. The author's subsequent decision to resort to an unsafe abortion was a decision she made of her own accord, and cannot be considered a direct consequence of the State's action. The State party also notes that the advocate for persons without legal capacity was never informed.

4.4 Should it be found that the author is entitled to reparation for damage and injury, mechanisms for lodging such claims are available under domestic legislation. With regard to her request that the State party take steps to prevent repetition and implement hospital protocols to facilitate access to safe, legal abortion and mechanisms for exercising this right, on 29 January 2007, through Decree No. 304/2007, the Ministry of Health of Buenos Aires province approved a Provincial Health Programme for the Prevention of Domestic and Sexual Violence and for Victim Support, which contains a protocol for non-punishable abortion. Provincial criminal legislation and policy is restricted by the definitions of criminal offences established in Argentina's Criminal Code. It was for this reason that, within the limits of its jurisdiction, to prevent similar cases from arising in future the authorities of Buenos Aires province approved the aforementioned programme.

Author's comments on the State party's observations

5.1 The author responded to the State party's observations on 14 June 2008. In relation to admissibility, she reiterated her request that the Committee should establish the State's international responsibility for the violation of L.M.R.'s rights, on the grounds that the State did not fulfil its obligation to safeguard and respect her right to a legal remedy, her right to life, her right to equal treatment, her right not to be subjected to cruel, inhuman and degrading treatment, her right to privacy and her right to freedom of thought and conscience. Establishing this responsibility is the main aim of the communication, and is fundamental to the satisfaction of the author's other requests. The application for full reparation and all other requests are a necessary consequence of the violation of L.M.R.'s human rights committed by the State.

5.2 L.M.R. sought a legal and safe abortion. She petitioned all possible courts to obtain one but the medical procedure sought was not performed. Accordingly, all domestic remedies were exhausted with regard to the main contention of the communication, which is that the refusal of a legal abortion was a violation of her rights. The applications for reparation and compensation that were prompted by the violation of these rights, and which the State contends should first have been filed in Buenos Aires province, would have done nothing to help guarantee her right to a legal abortion. In fact, they would have been ineffectual in helping L.M.R. access the medical procedure sought.

5.3 L.M.R. won a ruling in her favour before the highest provincial court, which was the court of last resort. However, the ruling was not enforced because the staff in the State hospital who should have executed it refused to do so. L.M.R. did not have the option of appealing against a favourable ruling that the State refused to enforce, in continuing violation of her rights. The author therefore maintains that the communication is admissible.

5.4 With regard to the State party's observations on the merits, the author notes that the State party prides itself on the speed of the judicial process. It fails to mention, however, that the process was unnecessary and the fact that it took place at all constitutes a violation of L.M.R.'s rights. Recourse to judicial proceedings was not required under the Criminal Code and was discouraged by numerous prior court decisions. The State party does not explain whether the juvenile court judge who made the first-instance ruling was disciplined for failing to properly perform her duties as a public servant, a failing of which the hospital's employees and directors were also guilty.

5.5 The State party fails to recognize that it made no attempt to protect L.M.R. from press hounding, institutional harassment and the hospital inaction which ultimately prevented the termination of pregnancy from being carried out. The State party cites the "assessments of the medical staff" as justification. However, besides being arbitrary and subjective, these assessments were inaccurate in numerous respects. In one ultrasound report the length of the pregnancy was falsely recorded. In addition, a time limit for termination that has no legal basis was imposed. In acting this way, the health-care professionals showed contempt for the law and failed to exercise their duties as public servants. Despite constituting criminal offences, these failings were never subject to administrative or judicial investigation.

5.6 The fact that the author turned to the black market for an abortion that the State refused to perform was a direct consequence of the State's inaction and negligence. The author takes issue with the State party's observation that the advocate for persons without legal capacity was not informed. The State is effectively affirming that, in the midst of press persecution and relentless pressure from fundamentalist groups, she should have informed a judicial official of an illegal procedure performed under pressure of time in the face of inadequate resources and lack of access to effective justice.

5.7 The promulgation of the Ministerial Decree containing a protocol for non-punishable abortion in Buenos Aires province was subsequent to the case. Furthermore, although the protocol is a positive development, it remains a partial solution only. The State party must ensure that protocols are in place in every province and every jurisdiction under its control in order to prevent violations of this kind from recurring. It must also ensure that such protocols are underpinned by laws of the highest level within the provincial jurisdiction and not, as in the case in point, by a Ministerial Decree.

Additional observations by the State party

6.1 On 21 August 2008 the State party observed that it could be concluded from the Supreme Court ruling that the lower instance courts of Buenos Aires province had interfered unlawfully since judicial authorization is not required for a termination of pregnancy under article 86.2 of the Criminal Code. The consequences of this interference made an abortion impossible due to the advanced stage of the pregnancy. This would appear to indicate that the claimant is right in invoking a possible violation of article 2 of the Covenant.

6.2 However, the hospital decided not to perform the termination because the advanced stage of the pregnancy meant that the procedure was no longer considered a termination from the medical point of view but was effectively an induced birth. This decision does not merit admonition, as there was no breach of any rule. It does, however, highlight the lack of rules to specify and clarify the point in a pregnancy beyond which a termination ceases to be considered an abortion and becomes an induced birth.

6.3 The State party also observes that the State's unlawful interference, through the judiciary, in an issue that should have been resolved between the patient and her physician may be considered a violation of her right to privacy. Furthermore, forcing her to endure a pregnancy resulting from rape and undergo an illegal abortion may have been a contributing factor to the mental injury that the victim suffered, although it did not constitute torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

6.4 The victim's freedom of thought, conscience and religion was not violated by the State, because the activities of specific groups are unconnected to the actions of its officials. The authorities of the hospital to which L.M.R. was admitted did not refuse to perform the termination for reasons of conscience but because they believed that the advanced stage of the pregnancy meant they were being asked to perform a different procedure, i.e. an induced birth.

6.5 On the basis of the above, the State party indicates that it would be ready to consider the possibility of initiating an amicable settlement procedure in which the applications made by the author would be examined.

Additional comments by the author

7.1 On 6 February 2010 the author rejected the contention that the hospital had decided not to perform the termination of pregnancy because the advanced stage of the pregnancy meant that the procedure was no longer considered a termination from the medical point of view but was effectively an induced birth. She recalls that the reason for the advanced state of the pregnancy was the unnecessary recourse to judicial proceedings. It was the State party that caused the delay. In addition, the hospital falsely recorded the length of the pregnancy in an ultrasound report and imposed a time limit for termination for which there is no legal basis either at national or international level.

7.2 Besides disregarding case law precedents which militate against recourse to judicial proceedings in such cases (i.e. against judicial responsibility), health-care professionals

showed contempt for the law and failed to fulfil their duties as public servants. Despite constituting criminal offences, neither failing was subject to administrative or judicial investigation. The refusal to terminate the pregnancy was a tacit objection of institutional conscience on the part of the State hospital. The refusal was entirely arbitrary, because the Criminal Code sets no time limit beyond which the procedure cannot be performed. Furthermore, a precedent can be found in the case law of Buenos Aires Provincial Court, which last year gave authorization for a therapeutic termination to be performed in a State hospital in a pregnancy as advanced as L.M.R.'s.

7.3 The author does not accept the State party's contention that this is not a case of torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The State party gives no explanation to back up its position, which is contrary to the Committee's case law in the case of *K.N.L.H. v. Peru*.⁴

7.4 The author reiterates that the State party did not at any time take steps either to protect L.M.R. and her family or to prevent conservative groups within the Catholic Church from imposing their religious convictions on the victim, her family and the hospital staff, denying them the freedom to make their own decisions. For this reason, she disputes the assertion that freedom of thought, conscience and religion was not violated by the State since the acts in question were the acts of private individuals.

7.5 With regard to the possibility of an amicable settlement, the author informs the Committee that the parties met on three occasions between August and November 2008 to discuss reparation for the victim and her family and measures to prevent repetition. At the outset of the discussions, the State's representatives stated that restrictions imposed by the Public Prosecution Service of Buenos Aires province placed legal impediments on the payment of financial compensation. As a result, the parties failed to make progress on any aspect of the application for compensation. The only agreement reached was for a study grant of 5,000 pesos to be paid by the Ministry of Education of Buenos Aires at the end of 2008. Despite an undertaking that this grant would be payable annually, to date no further payment has been made.

7.6 There was a similar lack of progress on other aspects of the application, including the State's public acceptance of responsibility and the package of measures needed to prevent repetition. Aside from the adoption, in March 2009, of a comprehensive law to prevent, punish and eliminate violence against women, to date the only advance achieved in relation to the issues raised is an undertaking to address them.

7.7 The author reiterates her request to the Committee, dismisses the possibility of an amicable settlement and urges the Committee to issue its Views.

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.

⁴ Communication No. 1153/2003, *K.N.L.H. v. Peru*, Views adopted on 24 October 2005.

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 Covenant.⁵

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.

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 suffering.⁶

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 Covenant.⁷

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 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.

11. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide L.M.R. with avenues of redress that include adequate compensation. The State party is also under an obligation to take steps to prevent similar violations in the future.

12. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether or not there has been a violation of the Covenant and that, pursuant to article 2 of the Covenant, the State

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.

party has undertaken to guarantee to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant, the Committee wishes to receive from the State party, within 180 days, information about the measures adopted to give effect to the Committee's Views. The State party is also requested to publish the present Views.

[Adopted in English, French and Spanish, the Spanish text being the original version. Subsequently to be issued also in Arabic, Chinese and Russian as part of the Committee's annual report to the General Assembly.]
