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**Committee on the Elimination of Discrimination
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Fiftieth session
3 – 21 October 2011

Views

Communication No. 22/2009

Submitted by: T. P. F. (represented by the Centre for Reproductive Rights and the Centre for the Promotion and Protection of Sexual and Reproductive Rights)

Alleged victim: L. C.

State party: Peru

Date of the communication: 18 June 2009 (initial communication)

References: Transmitted to the State party on 20 July 2009 (not issued in document form)

Date of adoption decision: 17 October 2011

Annex

Views of the Committee on the Elimination of Discrimination against Women under article 7, paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women

At its fiftieth session concerning

Communication No. 22/2009, L. C. v. Peru¹

Submitted by: T. P. F. (represented by the Centre for Reproductive Rights and the Centre for the Promotion and Protection of Sexual and Reproductive Rights)

Alleged victim: L. C.

State party: Peru

Date of the communication: 18 June 2009 (initial communication)

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The Committee on the Elimination of Discrimination against Women, established under article 17 of the Convention on the Elimination of All Forms of Discrimination against Women,

Meeting on 17 October 2011

Adopts the following:

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 Rights.² The Convention entered into force in Peru on 13 October 1982 and the Optional Protocol on 10 July 2001.

¹* The following members of the Committee participated in the adoption of the present communication:

Ms. Ayse Feride Acar, Ms. Magalys Arocha Dominguez, Ms. Violet Tsisiga Awori, Ms. Barbara Evelyn Bailey, Ms. Olinda Bareiro-Bobadilla Ms. Meriem Belmihoub-Zerdani, Mr. Niklas Bruun, Ms. Naela Mohamed Gabr, Ms. Ruth Halperin-Kaddari, Ms. Yoko Hayashi, Ms. Ismat Jahan, Ms. Soledad Murillo de la Vega, Ms. Violeta Neubauer, Ms. Silvia Pimentel, Ms. Maria Helena Lopes de Jesus Pires, Ms. Victoria Popescu, Ms. Zohra Rasekh, Ms. Patricia Schulz and Ms. Dubravka Šimonović and Ms. Zou Xiaogiao.

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.

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 examination 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 Code.³ 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 continued.⁴

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 Promocion y Defense 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

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.

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 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 not 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 exhausted.⁵

The complaint

3.1 The author states that the refusal by the doctors at the hospital to perform the therapeutic abortion violated the rights of L. C. to health, a life of dignity and to be free from discrimination in access to such care. L. C. was deprived of the possibility of walking again by the unjustified withdrawal of a surgical intervention that was totally necessary. The failure of the health system in the State party to ensure access to essential services for women, such as abortion, compromises its obligations under the Convention. The State party has not met its obligations by failing to provide a legal medical service required only by women, and on which the victim's physical and mental health depended. This violation was aggravated by the fact that L. C. was a minor; in that respect the State had a double duty to protect her. Nor had the State party provided adequate and effective guarantees in its legislation to protect those rights.

3.2 The author maintains that the facts described constitute a violation of articles 1, 2, 3, 5, 12 and 16, paragraph 1 (e) of the Convention, as well as General Recommendation No. 24.

3.3 With respect to article 5, the author states that placing conditions on timely access to a medical treatment on which the exercise of the right to health, life and a

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

life of dignity depended by continuing an unwanted pregnancy resulted in discriminatory treatment based on the stereotype of imposing the reproductive function on L. C., above her welfare. As for article 12, the author claims that since L. C.'s pregnancy constituted a threat to her physical and mental health, therapeutic abortion was appropriate and necessary. The medical needs of L. C. and the due protection of her right of access to both physical and mental health without discrimination were totally ignored by those whose duty it was to guarantee those rights. The author also claims that the refusal to provide the legal health service of termination of pregnancy violates the right to decide the number and spacing of children provided in article 16 (e). Furthermore, the lack of administrative and judicial mechanisms protecting women from discrimination in providing legal termination of pregnancy violates articles 2 (c), 5 and 12 of the Convention and general recommendation No. 24. Also, the failure by the State to adopt legislative, administrative and judicial measures that protect, guarantee and ensure the right of access to health under conditions of equality in the context of therapeutic abortion violates articles 2 (f), 3, 5, 12 and 16 (e) of the Convention. The absence of such measures resulted in absolute discretion, allowing health professionals to deny timely medical services to L. C. in a disproportionate and illegal manner.

3.4 According to the author, the facts as described also violate other fundamental rights, such as the right to life, dignity and freedom from cruel, inhuman and degrading treatment in the context of access to medical services without discrimination. She states that the interference of the doctors in L. C.'s decision to terminate her pregnancy shattered her life prospects. The process of requesting an abortion constituted a discretionary and arbitrary barrier to access to a legal service that had irreparable consequences for her life and health and in turn constituted suffering equivalent to torture. Forcing her to continue the pregnancy also constituted cruel and inhuman treatment and therefore a violation of her right to physical, psychological and moral integrity. Furthermore, the harm is of continuing duration, since it has repercussions in the form of her daily situation of disability, dependency and paralysis.

3.5 According to the author, the foregoing violations are aggravated by the fact that L. C. was a minor. The health-care professionals did not provide the special attention required by her status as an adolescent female, and furthermore, of limited economic resources.

3.6 The author requested that the Committee declare the violation of the author's rights under the Convention and request the State party to adopt measures of reparation, satisfaction and guarantees of non- repetition. The Committee should also urge the State party to adopt and implement legislative, administrative and judicial measures necessary to protect women's right to sexual and reproductive health without discrimination.

State party's observations on admissibility

4.1 By a submission of 18 September 2009 the State party maintains that the communication should be considered inadmissible under article 4, paragraph 1, of the Optional Protocol on the grounds of failure to exhaust all available domestic remedies.

4.2 The State party notes that the alleged victim could have filed a petition for *amparo* with the Constitutional Court. The author's questioning of the effectiveness

of that recourse is based on a prediction of future success, since she argues that the time frame for receiving a final decision varies between 62 and 102 days (according to the calculations she makes *motu proprio*, based on the rules of procedure of the Code of Constitutional Procedure). However, the author does not take into account that, although there are a first and second instances before the case can be submitted to the Constitutional Court, if the case is decided in those instances in favour of the applicant, that decision is final. Consequently, an application for amparo can be finalized by a ruling of the judge of first instance. Furthermore, in accordance with article 53 of the Code of Constitutional Procedure, the decision must be issued at the same hearing, or in exceptional cases, within not more than five days after the hearing has been completed. If a decision is appealed, the decision on the appeal must be issued within five days after the case is heard.

4.3 The State party also invokes article 46 of the Code of Constitutional Procedure, under which exceptions are made to the exhaustion of remedies before petitioning for amparo. Such exceptions are made when the exhaustion of remedies might render the harm irreparable, if there are no regulations governing prior remedies, or if the application has been initiated unnecessarily by the victim. Article 45 furthermore states that, in the event of doubt concerning the exhaustion of prior remedies, preference is given to the application for amparo.

4.4 Finally, the State party notes that, with regard to the implementation of article 1969 of the Civil Code, the author could have filed court proceedings to request compensation for damages and harm because the alleged victim did not receive timely medical treatment.

Author's comments on the State party's observations on admissibility

5.1 In her comments of 1 February 2010 the author referred to international jurisprudence in the area of exhaustion of domestic remedies and maintains that, in accordance with that jurisprudence, the effectiveness of a remedy rests on whether it can be adapted to the situation of vulnerability of the victim, the circumstances of a particular case and the objective to be attained according to the right violated.

5.2 In accordance with its regulations under article 53 of the Code of Constitutional Procedure, proceedings for the remedy of amparo should not exceed 10 working days from the acceptance of the request. However, there are various procedural problems that undermine the desired speed of this proceeding. First, the Code does not establish a deadline for the judge to accept the request. As a result, that time period is dependent on the subjective importance the judge attaches to the case, in addition to his caseload. Second, at the time the events took place, the existing system for service of documents was to designate a private individual or institution to carry out the personal delivery of any judicial order. This system turned out to be highly problematic, which led the State to adopt a reform programme beginning in 2008 to expedite service. This led to some progress but in general the problem persists. Third, article 53 provides for the possibility of holding an oral hearing, but does not establish a deadline for requesting such a hearing, nor for the judge to grant it, nor does it allow the judge to call a hearing on his own initiative.

5.3 According to the author, between May 2003 and August 2008, only six petitions for amparo concerning the protection of the right to health were reviewed by the Constitutional Court. The case that took the least amount of time to settle at

first instance took two months and 16 days and the longest one year. Based on these precedents, a minimum of two months could be expected in order to obtain a decision at first instance. When L. C. finally received a response from the hospital refusing the termination of the pregnancy, 56 days had already gone by since her suicide attempt. Waiting another 60 to 90 days to obtain a court decision requiring the hospital to perform the termination of pregnancy and the subsequent spinal operation would only have worsened her clinical status and would have had no effect whatever on preventing or repairing the harm already experienced. After L. C. miscarried (16 June 2007), the hospital did not schedule the surgery until almost a month later (11 July 2007). By then the violation of the right to have the operation had ceased but the damage was already irreversible. Therefore, it made even less sense to initiate a petition for amparo, since the request would have rightly been declared to be without merit. The author concludes that the remedy of amparo consequently is not an effective remedy in this type of case.

5.4 The author also notes that the prior methods used in the present case, the internal administrative proceedings within the hospital and the complaint to the Women's Rights Defender, also did not constitute an appropriate mechanism, since under the regulations they were not administrative proceedings intended, as part of due process, to address requests for legal termination of pregnancy.

5.5 In the case *K.N.L.H. v. Peru*⁶, the Human Rights Committee had requested the State party to take measures to ensure that the situation was not repeated. According to the author, part of those measures should include both the issuance of guidelines for legal termination of pregnancy in circumstances established under the law and the establishment of an effective judicial remedy in the event that those guidelines are not followed in a satisfactory manner. The Committee on the Elimination of Discrimination against Women, in its 2007 concluding observations addressed to Peru, expressed its concern at the lack of measures to implement the recommendations made by the Human Rights Committee in that case. Those measures still do not exist.

5.6 The author also cites the decision of the European Court of Human Rights of 20 March 2007, in *Tysiac v. Poland*⁷. The Court determined that there had been a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in arriving at the decision concerning a therapeutic abortion and noted that, once the legislature had decided to allow abortion, it must not structure its legal framework in such a way as to limit the use of that possibility. The Court added that disputes should be settled by an independent body, respecting guarantees of the right to be heard, and it should issue prompt and written grounds for its decision, since the time factor is crucial.

5.7 In Peru there is no administrative or judicial procedure that would have guaranteed the right of L. C. to be heard, allowing her to express her will and establish whether or not she wanted to terminate her pregnancy, the right to obtain a swift and objective response and the possibility of access to a judicial remedy that would guarantee enforcement of the duty to provide the medical services she needed.

⁶ Communication No. 1153/2003, *K.N.L.H. v. Peru*, Views adopted on 24 October 2005.

⁷ *Tysiac v. Poland*, (application No. 5410/03), judgment of 20 March 2007.

5.8 With respect to civil action to seek compensation for damages mentioned by the State, it cannot be considered a sufficient remedy, since the damage suffered by L. C. to her health cannot be repaired. Furthermore, it is retroactive in nature, since L. C. was unable to attain the objective of the termination of her pregnancy and the spinal surgery.

State party's observations on the merits

6.1 On 20 January 2010, the State party submitted observations on the merits of the communication in which it maintained that, in the present case, none of the alleged violations of the Convention had taken place.

6.2 The State party recalled that in the Peruvian legal system abortion is criminalized. As the only exception, it is not punishable in the event that the conditions established in article 119 of the Penal Code for therapeutic abortion are present.

6.3 The State party considers that article 1 of the Convention simply contains the definition of discrimination, but not a right in itself. Articles 2, 3, 5, 12 and 16 are invoked inasmuch as the State would not have guaranteed timely access without discrimination to health-care services in the form of a legal termination of pregnancy and spinal surgery in order to achieve the due rehabilitation of L. C.

6.4 From the documents made available by the Ministry of Health, it can be inferred that, on her admission to the hospital on 31 March 2007, L. C. received immediate medical attention and various medical examinations were performed on her, including psychiatric and neuropsychological examinations. The gravity of her condition was directly related to her own action (the suicide attempt), and not to the possible physiological effects that the pregnancy could have had on her.

6.5 L. C. arrived at the hospital with paraplegia from the fall she suffered, therefore it is inaccurate to state that her condition necessarily worsened because the abortion was not performed. What is more, according to the medical authorities, L. C. could not undergo the spinal operation until the wound adjoining the surgical incision site had improved.

6.6 The situation of L. C. was evaluated on three occasions by the hospital medical board (24 April, 7 May and 19 May 2007); there was no disinterest or lack of treatment.⁸ On those occasions psychiatric and neuropsychological evaluations were recommended and the neurosurgeon believed that the surgery should be done when the occipito-cervical wound had improved, as that was the area where the surgical incision would be made.

6.7 At the third meeting of the medical board, held on 19 May 2007, the following was stated: "The operation required by the patient is not an emergency, it is elective ... The luxofracture C6 and C7 cannot undergo the planned surgical stabilization because there continues to be an infection in the area bordering the area

⁸ The State party attached copies of the reports of the medical board. According to the first, of 24 April 2007, the doctors' views regarding the pregnancy were that "because of the patient's diagnosis, age, invasive nursing procedures, immobility in bed, it is considered high-risk, leading to elevated maternal morbidity, which could diminish with appropriate multidisciplinary medical management". The report also noted that there was no guarantee that the baby would not be affected by the spinal surgery.

of the surgical incision ... The Department of Obstetrics and Gynaecology maintains that, despite this being a high-risk pregnancy, the current condition of the patient is stabilizing in the neurological aspects and favourable in the psychological aspects ... In line with the laws in effect, the majority of us believe that the termination of pregnancy should not be performed". This decision was communicated to L. C.'s mother, who had requested the termination of pregnancy. She submitted an appeal, to which the response was the same. Therefore, she did have the possibility of appealing to the competent authorities to act on her request, independent of the fact that the result was not what she had hoped.

6.8 With respect to the right to decide the number and spacing of children, it should be evaluated based on existing family planning methods and programmes offered by the State. In the present case, however, the author attempts to link this right to therapeutic abortion, which the State party does not accept. Abortion is illegal as a general rule and is permitted only as an exception in cases of therapeutic abortion, and it is necessary to take domestic laws into account. It is not for the pregnant woman unilaterally to determine that the conditions for a therapeutic abortion have been met, but for the doctors. That is effectively what occurred in this case; they considered that the pregnancy did not represent a risk to L. C. and therefore deduced that her condition would have neither improved nor worsened if the abortion had been performed. As far as legal abortion is concerned, in reaching a decision that did not depend exclusively on the wishes of the pregnant woman, it is not possible, strictly speaking, to refer to the violation of a "right", as there is no link to reproductive freedom. Likewise, it would not be possible to link the fact that access to a therapeutic abortion was denied to the alleged existence of a certain stereotype against women.

6.9 According to the Technical Team of the General Directorate for the Promotion of Health of the Ministry of Health, in the present case it is important to consider the family environment, the risks to which L. C. had been exposed since the age of 11 (the age at which the sexual abuse began) and the way in which it gravely harmed her physical and mental health. These elements are a starting point for new initiatives for intervention with at-risk populations.

6.10 The Ministry of Health has models for comprehensive care for child abuse at the national level that offer care for children and families affected by violence, including sexual violence. If the family had sought help in a timely way that would have allowed treatment to be provided that would in some measure have helped to develop and reinforce the girl's social skills and emotional competence as protective factors against sexual and other forms of abuse, as well as diminishing the negative effects of the violence experienced and providing therapeutic monitoring of suicidal thoughts.

6.11 The State party mentions various programmes developed by the Ministry of Health to combat gender violence. Finally, with respect to the alleged violation of general recommendation No. 24, the State party notes that it is not possible, as part of proceedings on individual communications, to rule on the direct violation or non-compliance with the general recommendations issued by the Committee.

Author's comments on the State party's observations on the merits

7.1 In her comments of 15 April 2010, the author rejected the observations of the State party that appeared to place the responsibility on L. C. and her family for not

having sought help that would have provided treatment for the sexual abuse she was subjected to. The author did not hold the State responsible for the sexual abuse nor for the injury to L. C. as a result of her suicide attempt. Furthermore, those comments also carried a risk of gender discrimination.

7.2 In the view of the author, expecting a girl to have overcome her emotional trauma and sought assistance is a double victimization. It is cruel to create in a minor the idea that she was guilty for acts that were totally beyond her control, such as being sexually abused and consequently suffering a mental imbalance that worsened when she learned that she was pregnant. It further reveals a discriminatory attitude that responds to the gender stereotype tending to blame women who have been victims of violence for its consequences.

Reasons for the denial of the spinal surgery

7.3 The author recalls that L. C. was hospitalized on 31 March 2007. The following day she was given the diagnosis of “risk of permanent disability”, as well as risk of deterioration of her skin due to physical immobility. As a result, surgery was scheduled for 12 April 2007. On 5 April 2007 her pregnancy was discovered, as well as the danger of miscarriage. The daily reports on her condition, from 2 to 11 April 2007, constantly reported the existing risk both of developing infections and of compromising the integrity of her skin due to her total paralysis, as well as the deterioration in her physical mobility.⁹ Up to 12 April, the date on which the operation should have taken place, the hospital did not report that L. C. was suffering from any type of infection, nor any other circumstance that would have prevented it. Also on 12 April the author was informed that the operation was postponed and the following day she was informed that the reason was the pregnancy. In the condition report of 12 April it was clearly stated that the only reason for the postponement was prevention of harm to the foetus. Over the following five days the reports on her condition noted that there was no longer just a risk, but a deterioration in her cutaneous integrity and mobility, as well as her anxiety state. On the days following 18 April 2007, the date on which the author had requested the termination of pregnancy, the medical reports continued to note the same symptoms. Finally, on 23 April, a note on the presence of an ulcer with infected skin in the occipital area appeared in her medical report.

7.4 Given the facts described, the author rejects the State’s contention that it was the skin infection that caused the postponement of the surgery. She also rejects the statement that the surgery was not urgent but rather elective. Immediate surgery of this type offers the patient better chances of recovery. The doctors were aware of this, but only addressed it on 23 May, when the hospital issued a report recognizing that the operation was “essential in order to be able to begin rehabilitation therapy and to avoid compounding the problems and to avoid infections from prolonged hospitalization”.¹⁰ The infections would not have occurred if the surgery and recovery had been done in time. Therefore, it has been demonstrated that L. C. was deprived of the medical services she required with the utmost speed.

⁹ Copies of these reports are on file. The report of 11 April 2007 indicates a “deterioration of the cutaneous integrity” whereas the one of 12 April 2007 indicates an “alteration of the cutaneous integrity”.

¹⁰ A copy of this report is contained in the file.

Denial of the therapeutic abortion as a necessary medical service in order to avoid serious and permanent harm

7.5 The possibility that the medical intervention might harm the foetus was placed above L. C.'s prospects for rehabilitation. This was confirmed by the express reason contained in the medical register which order the cancellation of the surgery and in the reports of the medical boards where what was to be discussed was whether forcing her to continue the pregnancy could bring about serious and permanent damage to the health of L. C. The first meeting of the board recommended postponement until the second trimester of gestation, when there would be less risk to the foetus, despite the recognition that the pregnancy would be high-risk.

7.6 The mental health of L. C. was completely overlooked in the evaluation concerning whether a therapeutic abortion was warranted. None of the medical evaluations concerning her mental health explored the consequences that would result from forcing L. C. to bring her pregnancy to term and become a mother. On 16 May 2007 a psychological evaluation took place. Only a brief paragraph in that report makes reference to the mental distress that the pregnancy caused L. C., stating that "when the topic of the pregnancy came up, she became unstable, rejected her pregnancy arguing that she could not raise a child because she was aware of her disability and that her mom was older and could not take care of her child". The report, rather than exploring whether there would be grave and permanent mental harm to L. C. if she were forced to continue the pregnancy, simply prescribed relaxation techniques and "reprogramming of healthier thoughts and beliefs". Similar conclusions can be obtained from the report of the third meeting of the medical board. The author recalls that mental health is an essential part of the right to health, as the Peruvian Constitutional Court itself has recognized. She insists that L. C. had the right to a therapeutic abortion on the grounds of the grave and permanent harm to her mental health that would have resulted from forcing her to bring to term a pregnancy that had resulted from a rape and destabilized her to the point of attempting suicide.

Legal consequences of denying the provision of essential health services

7.7 L. C. was a victim of exclusions and restrictions in access to health services based on a gender stereotype that understands the exercise of a woman's reproductive capacity as a duty rather than a right. By failing to comply with the legal duty to provide health services to L. C. (including reproductive health services), and having done so for discriminatory reasons arising from her status as a woman, considering her reproductive capacity of greater importance than her human rights, the State party violated articles 1 and 12 of the Convention.

7.8 The author recalls the decision of the Human Rights Committee in the case *K. L. v. Peru* in which it concluded that there had been a violation of article 7 of the International Covenant on Civil and Political Rights.

Lack of an effective remedy to demand that legal termination of pregnancy be provided

7.9 The hospital director, who convened ex officio the first meeting of the medical board, asked it to say that the continuation of the pregnancy would not cause grave and permanent harm to the health of L. C., unless: (a) the spinal surgery could be performed without compromising the life of the child; (b) if the pregnancy of a

patient with this medical diagnosis endangered the life of the mother; and (c) if the child, under these conditions, could be born with serious or permanent defects. Nevertheless, from the author's request and article 119 of the Penal Code it is clear that the request for an abortion was related to the serious and permanent harm involved in continuing the pregnancy. The questions, however, focused the discussion on harm to the foetus, which ensured an opinion that was practically a foregone conclusion and did not find a need to perform a therapeutic abortion. No one mentioned the effect that continuing to postpone the surgery would have on L. C.'s prospects for recovery, nor the harm to her mental health. Only the third meeting of the medical board, held on 19 May 2007, was convened for the purpose of determining whether, given the medical condition of L. C., the termination of pregnancy was warranted. However, it was not made explicit that this request should be evaluated in the light of the harm to her physical and mental health that the indefinite postponement of the surgery and the imposition of motherhood would have on the girl. Finally, despite not having discussed the causes for which the therapeutic abortion was requested, the board determined that the termination of pregnancy would not be performed. The author was only informed of this decision 11 days later, that is, 42 days after her request.

7.10 The author reiterates her arguments with respect to the lack of effective judicial and administrative remedies in addressing requests for termination of pregnancy in the State party. This is relevant not only as a ground for admissibility in the present case, but also as grounds for the violation of articles 2 (c) and (f), 3 and 5 of the Convention.

7.11 In Peru there is no legislation or regulation on access to therapeutic abortion, with the result that each hospital determines arbitrarily what requirements are necessary, under what procedures cases requesting it will be decided, the time limits for making the decision and the level of importance placed on the views of the pregnant woman regarding the risks to her health that she is prepared to assume. The author recalls the Committee's general recommendation No. 24, which states that refusal by a State party to ensure the provision of certain reproductive health services to women under legal conditions is discriminatory, and when it occurs the State is obliged to establish a system that guarantees effective judicial measures.

7.12 The lack of legislative and administrative measures regulating access to therapeutic abortion condemns women to legal insecurity in so far as protection of their rights is completely at the mercy of gender prejudices and stereotypes, as occurred in the present case. The sociocultural pattern based on a stereotypical function of a woman and her reproductive capacity guided the medical decision on which the physical and mental integrity of L. C. depended, subjecting her to discrimination by placing her on an unequal footing with men with respect to the enjoyment of her human rights. The State's omissions and negligence in regulating access to therapeutic abortion created the conditions allowing agents of the State to discriminate against L. C. and prevented her access to the medical treatment she required, which also constitutes a violation of articles 1 and 12 of the Convention.

Disregard for the right to decide and control reproductive capacity in cases of therapeutic abortion

7.13 The views and wishes of the woman regarding the continuation of the pregnancy are fundamental, since even though the medical diagnosis is what

provides the technical elements to know whether the pregnancy is in any way incompatible with the health of the pregnant woman, the determination of the gravity of the harm that its continuation could cause has a subjective component that cannot be ignored, and represents the personal level of risk to her health that the woman is prepared to assume. Furthermore, as in any other instance in which the State intervenes in a personal decision, such intervention should be legal and regulated in such a way that, following due process, the person affected has the right to be heard. The contrary situation constitutes a violation of the right of protection from arbitrary interventions in decisions that, in general, are based in the intimacy and autonomy of each human being.

7.14 In the present case, there was illegal and irrational interference in the decision of L. C. to terminate her pregnancy. The lack of regulation surrounding access to therapeutic abortion subjected L. C. to arbitrary action by agents of the State, which constituted a violation of her right to decide freely and responsibly the number of children she wished to have. Such interference therefore is a violation of the State party's obligations under article 16, paragraph 1 (e), of the Convention.

Relevance of the general recommendations issued by the Committee

7.15 The general recommendations issued by the Committee constitute the authorized interpretation of the Convention and the obligations it imposes on States, and are thus the best tool available to guide them in compliance with it. It is thus natural that, when a communication is submitted regarding violations of the obligations of States parties under the Convention, the standards of compliance used to evaluate the conduct of a State include not only the text of the Convention, but also the developments thereof made by the Committee responsible for its monitoring. For this reason, therefore, the author refers to the general recommendations, since they constitute a criterion for evaluation of compliance of States with the Convention, in this case Peru.

7.16 Based on the foregoing, the author requests the Committee to declare that there has been a violation of the articles of the Convention referred to; that measures to guarantee redress, satisfaction and non-repetition be established; that the State be urged to adopt and implement the necessary legislative, administrative and judicial measures to guarantee the obligation to ensure the right to sexual and reproductive health of women without discrimination; and to hold the agents of the State responsible as appropriate.

7.17 On 31 March 2011, the author transmitted to the Committee a legal opinion prepared by the International Commission of Jurists, a non-governmental organization. It addressed topics relating to the obligations of States parties under the Convention and international human rights law in general to provide an effective remedy and redress, in particular regarding the enjoyment by women, under equal conditions, of the right to life, health and not to be subjected to cruel, inhuman or degrading treatment or punishment. The opinion recalled the jurisprudence of the European Court of Human Rights in the cases *Tysiack v. Poland* and *A. B. and C. v. Ireland*, where the Court concluded that States should establish an effective and accessible procedure permitting access by women to legal abortion. In the absence of such a procedure, the Commission, in its opinion, concluded that the objection of failure to exhaust domestic remedies could not be raised against the author in the present case.

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 type of proceeding the decision can be issued at the same hearing or, exceptionally, within the five 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 recommended 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.¹¹ 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 abortion 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.

¹¹ See paragraph 5.3 above.

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 discrimination".¹² 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

¹² See Communication No. 18/2008, *Vertido v. Philippines*, Views of 16 July 2010, para. 8.3.

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 appeal.¹³ 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. 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

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

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.

10 In accordance with article 7, paragraph 4, of the Optional Protocol, the State party shall give due consideration to the views of the Committee, together with its recommendations, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the views and recommendations of the Committee. The State party shall also publish the views and recommendations of the Committee, keeping the anonymity of the author and the victim, and circulate them widely in order to reach all the relevant sectors of the population.