



Convention on the Elimination of All Forms of Discrimination against Women

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Committee on the Elimination of Discrimination against Women

Decision adopted by the Committee under article 4 (1) of the Optional Protocol, concerning communication No. 128/2018^{*,**}

<i>Communication submitted by:</i>	K.S. (represented by counsel, Ireneusz C. Kaminski)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Poland
<i>Date of communication:</i>	11 April 2017 (initial submission)
<i>References:</i>	Transmitted to the State party on 4 April 2018 (not issued in document form)
<i>Date of adoption of decision:</i>	6 July 2020
<i>Subject matter:</i>	State party's failure to act with due diligence to protect author from domestic violence
<i>Procedural issue:</i>	Exhaustion of domestic remedies; same matter has not been and is not being examined under another procedure of international investigation or settlement
<i>Articles of the Convention:</i>	2 (a), (c)–(f), 3, 5 (a) and 16
<i>Article of the Optional Protocol:</i>	4 (1) and (2) (a)

* Adopted by the Committee at its seventy-sixth session (29 June–9 July 2020).

** The following members of the Committee participated in the examination of the present communication: Gladys Acosta Vargas, Hiroko Akizuki, Tamader Al-Rammah, Nicole Ameline, Gunnar Bergby, Marion Bethel, Louiza Chalal, Esther Eghobamien-Mshelia, Naéla Mohamed Gabr, Hilary Gbedemah, Nahla Haidar, Dalia Leinarte, Rosario G. Manalo, Lia Nadaraia, Aruna Devi Narain, Ana Peláez Narváez, Bandana Rana, Rhoda Reddock, Elgun Safarov, Wenyan Song, Genoveva Tisheva and Franceline Toé-Bouda.



Background

1. The author of the communication is K.S., a Polish national born in 1944. She claims to be a victim of a violation, by Poland, of her rights under articles 2 (a), (c)–(f), 3, 5 (a) and 16 of the Convention. The Optional Protocol to the Convention entered into force for the State party on 22 March 2004. The author is represented by counsel, Ireneusz C. Kaminski.

Facts as submitted by the author

2.1 On 27 March 1989, the author married E.S. They each had children from their previous marriage and lived in the author's house together. The author's husband helped in the running of her business. He subsequently started abusing alcohol and became aggressive and violent with the author and her daughters.¹

2.2 On 14 July 2005, the Circuit Court of Warsaw ordered a divorce between the author and her husband, attributing fault exclusively to the husband. The author's husband appealed this decision. On 21 April 2006, the Appellate Court of Warsaw upheld the divorce. The Appellate Court highlighted the husband's history of alcohol abuse and outlined some instances of domestic violence that he had committed.

Criminal proceedings against the author's husband, including unsuccessful notifications of crime made by the author

2.3 On 26 December 2003, while under the influence of alcohol, the husband threatened the author and her daughters. They were forced into one of the author's daughters' bedrooms with the husband on the other side of the door. The author could not call the police at the time because she had to wait until her husband's anger subsided, but she filed a notification of a crime with the police the next day. On 7 January 2004, the author's husband withdrew Zł 200,000 from the author's investment fund without informing her. He subsequently told the author that he would only return the money if she withdrew her notification of the crime. The author withdrew her notification and, on 30 January 2004, the District Prosecutor's Office in Piaseczno discontinued the proceedings.

2.4 On 15 March 2004, the author submitted another notification claiming that her husband had threatened her and her daughters and that he had stolen Zł 204,783. During the police interview, the author explained that she had withdrawn her previous notification of the crime owing to her husband's threats. On 5 April 2004, the District Police in Piaseczno refused to initiate proceedings, stating that the author had insufficiently substantiated her allegations of threats.

2.5 On 4 and 13 January 2005,² the author submitted another complaint to the District Prosecutor's Office in Piaseczno claiming that her husband was an alcohol abuser who had repeatedly threatened her and her daughters' lives and threatened to burn down the house. She also claimed that he mistreated her mentally and physically by preventing her from using the hot water, heating and the telephone. On 7 February 2005, the author was interviewed, during which she stated that she was concerned about her safety. She also mentioned to the police that she never requested a medical certificate after she was physically abused by her husband because she was ashamed

¹ For example, in the decision of the Appellate Court of Warsaw dated 21 April 2006 (translated), it was stated that in 1993, the author was choked by her husband while on a camping trip. The same year, her husband shouted at the author's daughter while grabbing her head. In addition, in March 1995, the author claims that her husband threatened her and her daughters' lives with a knife and hit the author and her eldest daughter. The police were called and her husband was taken to a sobering-up centre.

² The author does not explain why this notification was submitted on two separate occasions.

of being a victim of domestic violence. On 8 February 2005, the District Prosecutor's Office of Piaseczno initiated criminal proceedings.

2.6 Although the author's daughters confirmed her allegations during an interview on 3 March 2005, the District Police discontinued the proceedings on 19 May 2005 owing to a lack of evidence. The author appealed this decision, and on 12 July 2005 the Prosecutor's Office in Warsaw quashed the decision of the District Police.

2.7 On 19 August 2005, the author submitted another notification of a crime claiming that her husband had threatened her life and had stated that he would burn down the house. The author was interviewed on 7 September 2005 and confirmed the facts of her initial notification. On 30 September 2005, the author's husband was charged with the misappropriation of Zł 250,000 from his joint bank account with the author in violation of articles 284 (1) and 294 (1) of the Criminal Code, and with mistreatment for threatening and abusing the author between 1 March 2003 and 7 September 2005 in violation of article 207 (1) of the Criminal Code. The author requested that the hearing be expedited since she was still living with her husband and felt threatened by his conduct.

2.8 On 7 March 2006, the author again requested the initiation of criminal proceedings against her husband for physical violence committed in June 2005, threats to her life in February and August 2005 and general abuse that made it difficult for her to live normally. During the police interview, she claimed that her husband had pointed to an axe and stated that he would chop off her and her daughters' heads. In addition, she claimed that he also intentionally damaged her car. On 26 April 2006, the District Police discontinued the investigation owing to a lack of objective witnesses, despite statements made by the author's daughters. This decision was upheld by the District Prosecutor's Office on 28 April 2006 and by the District Court of Warsaw-Mokotów on 25 October 2006.

2.9 On 8 March 2006, the District Court of Warsaw ordered an examination by two psychiatric experts to determine the husband's fitness for trial. On 13 April 2006, the experts concluded that a longer period of clinical observation was necessary to make an informed decision. On 19 April 2006, the District Court ordered the husband's placement in a psychiatric hospital for six weeks.

2.10 On 4 May 2006, before the author's husband was committed to the psychiatric hospital, a fire broke out in their shared house and the husband died. The police found a suicide letter left by him blaming the author and her daughters for his "torments". On 30 May 2008, the criminal investigation into this matter was discontinued and the District Prosecutor's Office held that no evidence pointed to any third-party involvement in the fire.

2.11 According to the author, in sum the violent behaviour of her husband was recognized by the authorities on the following instances: (a) the Regional Court of Warsaw, on 14 July 2005, recognized that her husband had committed acts of physical and verbal violence against her and her daughters for the entire duration of the marriage; (b) an indictment issued on 30 September 2005 accused her husband of being abusive between 1 March 2003 and 7 September 2005; and (c) the District Prosecutor's act of discontinuing the investigation into the fire on 30 May 2008 indicates that the domestic authorities believe the author's husband started the fire, which was subsequently affirmed by the Regional Court of Warsaw on 7 May 2010.

Civil action against the State party

2.12 On 20 June 2007, the author filed a tortious action against the State party claiming compensation for the value of the house (Zł 595,170) and non-pecuniary damages (Zł 50,000). The author alleged that the authorities had failed to provide her

with adequate protection against her husband's violent behaviour even though they were aware of it.

2.13 On 7 May 2010, the Regional Court of Warsaw dismissed the complaint, finding that the author had failed to prove the illegality of the State party's actions. Although it found that the police erred in their decisions to discontinue the proceedings on 19 May 2005 and 26 April 2006, the Court held that the author had failed to establish a causal link between the police's unlawful conduct and the fire.

2.14 The author filed an appeal against this decision to the Appellate Court of Warsaw but it was dismissed on 5 May 2011. The Appellate Court upheld the Regional Court's findings except for the assertion that the author's husband had started the fire – which was impossible, as he was already dead when the fire began. The Appellate Court found that the author's appeal was unsubstantiated and that she had not suffered any moral damage.

2.15 On 26 October 2011, a few days before the deadline for filing a cassation appeal, the author was notified by her attorney that he would not lodge an appeal for her. He claimed that, in his opinion, the appeal would be held inadmissible because, according to the Code of Civil Procedure, during a cassation appeal issues related to the admissibility of evidence or to facts could not be examined.³ The author further notes that, according to the binding attorney's code of ethics in Poland at the time, an attorney was precluded from filing an appeal if this would have clearly breached the regulatory requirements for such appeals. She submits that this in turn makes the attorney's decision the final one when deciding whether an appeal can and should be filed – especially when an attorney's assistance is legally required.⁴

2.16 On 26 March 2012, the author applied to the European Court of Human Rights, but her case was declared inadmissible on 30 August 2016.⁵ The Court found that the application was submitted too late and rejected it in accordance with articles 35 (1) and (4) of the European Convention on Human Rights.

Complaint

3.1 The author claims that the State party's authorities failed to effectively protect her against her husband, breaching articles 2 (a) and (c)–(f), read in conjunction with article 3, of the Convention. Specifically, they failed to arrest or separate the author's husband from her⁶ and failed to promptly try him in court.⁷ She claims that the authorities had been aware of the violence she had suffered since 10 March 2004, at the latest, when she filed her second notification of a crime. Furthermore, the author notes that the violent behaviour of her husband was recognized by domestic

³ The author states that the lawyer wrote to her and provided her with an extensive explanation as to why he thought the cassation appeal would be found inadmissible. However, she does not provide a copy of the letter with her communication.

⁴ According to article 871 (1) of the Code of Civil Procedure.

⁵ The author was notified on 22 September 2016.

⁶ The author compares the situation to the cases of *Vienna Intervention Centre against Domestic Violence and Association for Women's Access to Justice on behalf of Goeckce et al. v. Austria* (CEDAW/C/39/D/5/2005) and *Vienna Intervention Centre against Domestic Violence and Association for Women's Access to Justice on behalf of Akbak et al. v. Austria* (CEDAW/C/39/D/6/2005). The Committee found that Austria had breached the Convention by failing to arrest the perpetrator of domestic violence despite strong evidence against him. In paragraph 12.1.5 of *Vienna Intervention Centre against Domestic Violence and Association for Women's Access to Justice on behalf of Akbak et al. v. Austria*, the Committee held that "the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity".

⁷ The author refers to the instances in which the State party discontinued proceedings against her husband and the inefficiency of the court when dealing with her husband's criminal conviction.

authorities on several instances. Despite this awareness, the authorities failed to act with due diligence to prevent violations of rights or investigate and punish acts of violence.⁸

3.2 The author submits that article 2 (e), read in conjunction with article 1, of the Convention was violated when the authorities failed to recognize their responsibility to protect her. She submits that this is demonstrated by their failure to provide her with civil compensation despite recognizing the illegality of some of the police's actions on 7 May 2010.

3.3 The author submits that articles 2 (d) and (e), read in conjunction with articles 2 (f), 5 (a) and 16, of the Convention were breached owing to the State party's failure to take effective measures to eliminate gender-based stereotypes that negatively affect the protection of female domestic violence victims. The author claims that this systemic problem contributed to the discriminatory attitude of authorities towards her and to their inability to effectively protect her from her husband.

State party's observations on admissibility

4.1 On 4 June 2018, the State party observed that the communication was inadmissible for failure to exhaust domestic remedies.

4.2 The State party notes first that the author did not file a cassation appeal before the Supreme Court against the judgment of the Court of Appeal. In addition, the author did not bring an action against the insurance company for the destruction of her house. The author's house was insured against accidents, including fire. The insurance company paid the author compensation in the amount of Zl 106,634, which constituted 50 per cent of the estimated value. The remainder of the compensation would be paid out after completion of the property division proceedings owing to the author's divorce. The State party notes that if the author disagrees with the compensation paid to her she may bring a civil claim against the insurer under articles 23 and 24 of the Civil Code. The State party also argues that, during the domestic proceedings, the author did not raise any allegations of discrimination based on sex. If the author felt that she was a victim of discrimination, she could have brought an action before the domestic courts under the Civil Code. However, she did not avail herself of this redress.

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

5.1 On 20 July 2018, the author submitted her comments on the State party's observations. She notes the State party's claim that she failed to exhaust domestic remedies by not filing a cassation appeal with the Supreme Court against the judgment of the Court of Appeal. She notes that in the court proceedings she was represented by a legal aid lawyer of her choice. A copy of the Court of Appeal judgment was served to that lawyer on 26 August 2011. On 5 October 2011, she asked her lawyer if he would lodge a cassation appeal in her case. The lawyer responded on 26 October 2011 that there were no grounds on which to lodge a cassation appeal. This response was given on the last day of the two-month time limit to lodge the cassation appeal. The author argues that the State party has not provided any explanation as to how she could manage to lodge a cassation appeal once the deadline for appeal expired. She also notes that, in its observations on the admissibility and merits of her complaint before the European Court of Human Rights, dated 17 June 2015 and submitted within the framework of the proceedings, the State party took the opposite view on the possibility of lodging a cassation appeal, compared with its observations before the

⁸ *V.K. v. Bulgaria* (CEDAW/C/49/D/20/2008), para. 9.3.

Committee, holding that “a cassation complaint in the applicant’s case would have concerned a final and enforceable judgment, thus it constituted an extraordinary remedy of appeal. The Supreme Court should not be treated as a third instance and a cassation complaint constitutes an exception rather than a rule. Under Polish law its application is restricted to exceptional cases and has only a supplementary character in relation to the two instance proceedings”. The Government then concluded that “the applicant was not obliged to lodge a cassation appeal to the Supreme Court. The applicant’s case was examined by two instance courts”.⁹ The author believes that an applicant is not obliged to lodge a cassation appeal where the legal aid lawyer has informed a client that there were no prospects of success at the Supreme Court.

5.2 The author also notes the State party’s claim that she should have brought legal action against the insurer for damages resulting from the destruction of the house by the fire set by her ex-husband. She argues that such a claim would be directed against a specific private law agent and would not address the omissions and deficiencies on the part of the relevant State agencies.

5.3 The author further notes the State party’s claim that she should have brought a claim of discrimination. She indicates that she instituted legal action against the State under article 417 of the Civil Code. In these proceedings, the courts noted some deficiencies and irregularities in the State authorities’ actions and omissions; however, they found that there was no causal link between those actions and omissions and the fact that the applicant’s husband had set fire to the house. Accordingly, her claim was dismissed. She submits that this remedy is therefore ineffective or redundant in view of the results of the proceedings she has already undertaken. She also notes that discrimination is part and parcel of gender-based violence. Therefore, it is redundant or, in legal terms, excessively formalistic, to require that victims of gender-based violence expressly invoke discrimination in their legal pleadings. She submits that in her legal action, instituted as a victim of gender-based domestic violence against the State for liability in tort, as well as in her legal pleadings submitted therein, she implicitly raised discrimination resulting from the lack of due protection, and has therefore exhausted all available domestic remedies.

State party’s observations on the merits

6.1 On 24 November 2018, the State party submitted its observations on the merits, reiterating its earlier observation that the communication is inadmissible.

6.2 The alleged violations of the Convention took place from 2004 to 2006. The State party has since established a comprehensive legal framework to ensure the broadest possible protections for women against domestic violence. Several amendments were introduced in criminal and family law and in social policies. However, the State party is aware that until the entry into force of the Law on Combating Domestic Violence of 2005, there had been no legal acts of this rank in its legal system to address domestic violence.

6.3 The State party maintains that at the material time, the conduct of in-home “Blue Cards” interventions in cases of domestic violence was regulated by Order No. 21 of the Police Commander in Chief of 31 December 2002.¹⁰ However, if there was no in-home intervention and a victim of domestic violence personally reported the violence at a police station, the “A Card” form did not have to be completed. The obligation to cooperate with State agencies, local government bodies and civil society organizations rested only with the neighbourhood police officer assigned to the case.

⁹ European Court of Human Rights, *Skrzek v. Poland* (application No. 20026/12), observations on admissibility and the merits submitted by the Government of Poland, 17 June 2015.

¹⁰ Official Journal of the National Police Headquarters, No. 14, item 111.

In the past 15 years, the Blue Cards procedure has been modified to cover all actions undertaken and implemented by representatives of social welfare units, commune committees working on alcohol-related problems, police and education and health-care staff in cases of reasonable grounds to suspect domestic violence.

6.4 The Law on Combating Domestic Violence, which entered into force on 21 November 2005 and was amended in 2010, is the first primary legislative act that comprehensively regulates the issues related to the prevention of domestic violence. The State party provides a detailed description of the scope of the Law, the definitions of domestic violence and family members, the regulation of the system of prevention, the responsibilities and tasks of the central government bodies and local government units and the support provided to persons affected by domestic violence. Following the entry into force on 1 August 2010 of the Law's amendment, a victim of domestic violence may demand that a court order the perpetrator to leave the shared residence. In addition, the new article 275 (a) of the Code of Criminal Procedure enables preventive measures consisting of ordering the accused of a violent offence committed against a member of the household to leave the residence shared with the aggrieved party.

6.5 The State party also points to the amendment of the Police Act of 6 April 1990, which adds article 15 (a), pursuant to which a police officer may detain perpetrators of domestic violence who pose a direct threat to the life and health of a victim.

6.6 The Regulation of the Council of Ministers of 13 September 2011 on the Blue Cards procedure and the Blue Cards forms in force since 18 October 2011¹¹ determines the scope of the activities of all five entities involved in the procedure. The State party explains in detail the steps and interventions by the police officers within the framework of this procedure.

6.7 The operationalization of the activities under the Law on Combating Domestic Violence was included in the National Programmes for the Prevention of Domestic Violence for the periods 2006–2016 and 2014–2020.

6.8 At the material time, general provisions protecting victims of domestic violence were in place, in particular under chapter XXVI of the Criminal Code on offences against the family and guardianship. Moreover, according to article 58 (2) of the Family and Guardianship Code in force at the material time, within the divorce proceedings, in exceptional cases, where the grossly reprehensible conduct of a spouse makes cohabitation impossible, the court may order an eviction on the motion of the other spouse. The State party stresses that the divorce case files indicate that the author did not demand the eviction of her husband from the shared household. In the divorce judgment of 21 April 2006, the court did not rule on such a request. If such a request had been made the court would have been obliged to rule on it. The State party notes that a professional attorney represented the author during the divorce proceedings.

6.9 The State party affirms that its current legislation provides an effective normative framework to protect against domestic violence and that even at the material time of the events a general legal framework aimed at protecting victims of domestic violence existed. Thus, the State party submits that it has not violated articles 2 (a)–(c) and (e), read in conjunction with article 1, of the Convention.

6.10 With respect to the alleged breaches of the author's rights under article 2 (a), (c), (e) and (f) and article 3, read in conjunction with article 1, of the Convention, the State party submits that the authorities have acted according to the law. Even if there were failures on the part of the police in the scope of application of Order No. 21 of

¹¹ Journal of Laws of 2011, No. 209, item 1245.

the Police Commander in Chief of 31 December 2002, the effects of this omission were not related to the pecuniary damage (the stolen money, the fire in the house) and were not a source of non-pecuniary damage. In this respect, the State party shares the view of the Regional Court of Warsaw and the Court of Appeal of Warsaw with regard to the grounds of their judgments of 7 May 2010 and 5 May 2011. Within the civil proceeding, the author filed an action for compensation from the State Treasury (Zl 595,170 as damages and Zl 50,000 as a redress for illegal acts of State bodies).

6.11 The domestic courts duly analysed the circumstances and established that there was no adequate causal link between the negligence of the police, the Prosecutor's Office and the District Court in their duties and the losses incurred. The author did not prove that the District Court's conduct of proceedings was illegal. The first hearing of 8 March 2006 complied with the requirement of acting without unreasonable delay. Based on the expert opinion of two psychiatrists, the author's husband was directed for a psychiatric observation on 19 April 2006, pursuant to article 203 of the Code of Criminal Procedure, with the purpose of establishing whether he had the capacity to bear criminal liability for the acts committed. This decision could be appealed and the District Court could not enforce it prior to it becoming final. The author's husband did not hinder the proceedings, and appeared at both hearings and submitted to the psychiatric evaluation. The District Court stated that during the criminal proceedings there was no reasonable concern he would have fulfilled his threats.

6.12 The courts, however, found that the acts of the police at the station and the District Prosecutor in Piaseczno were partially substantiated. The author and her daughters withdrew their motion for prosecution and the District Prosecutor's Office discontinued the proceedings, which went unchallenged by the author. Moreover, the courts observed that in the notice of 15 March 2004 on the commission of a crime, the author did not request initiation of proceedings against her husband for criminal threats, but for the theft of funds. Therefore, neither the police nor the prosecutor had the basis to initiate proceedings against him for acts under article 190 (1) of the Criminal Code. As to the author's allegation that the police failed to apply the Blue Cards procedure, the State party underlines that the courts broadened the interpretation of Order No. 21. The courts extended the obligation of the police officers stemming from the Order beyond its literal meaning, interpreting that the Order should have applied to the author's circumstances with the aim of assuring the safety of the victim of domestic violence in cases in which there is no in-home police intervention.

6.13 The decision to discontinue the investigation of 19 May 2005, confirmed by the District Prosecutor on 23 May 2005, did not have a permanent negative effect on the author, as the District Prosecutor of Warsaw quashed it on 12 July 2005 and the author's husband was indicted for several crimes. The courts concluded that the fire could not be deemed as a typical effect of the omissions by the law enforcement authorities. The incident was of an extraordinary nature and could not have been expected in the regular order of occurrences. Even if the proceedings against the author's husband for mistreatment and misappropriation were initially discontinued, the appeal she submitted proved to be justified and effective to the effect that the discontinuance decision, assessed as incorrect, was quashed.

6.14 In order to protect the procedural rights of the accused, and based on the evidence from psychiatric experts, the author's husband was admitted for psychiatric observation. The court hearing record of 8 March 2005 establishes that only then did the author disclose that her husband suffered from paranoid schizophrenia. As confirmed by the Regional Court of Warsaw, during the proceeding before the first instance court, no grounds warranted applying a preventive measure to the author's husband, such as detention on remand, as he fulfilled his procedural duties and did

not hinder criminal proceedings in any way. The Court could not establish with full certainty that the author's husband had set fire on the house as, according to the results of his autopsy, he was no longer alive at the moment when the fire was set. Therefore, the State party submits that there were no violations of the author's rights under the above-mentioned articles of the Convention.

6.15 As to the author's allegations that the State party has breached her rights under articles 2 (d), (e) and (f), 5 (a) and 16 of the Convention, owing to the failure to undertake effective measures to eliminate gender-based stereotypes which negatively affect the protection of rights of female victims of domestic violence, the State party maintains that it attaches great importance to measures aimed at eliminating any negative stereotypes of all groups protected by law by providing support and patronage to projects implemented by non-governmental organizations. The State party also enumerates the international legal instruments that it has ratified, including the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

6.16 The police take action to ensure a thorough professional preparation with regard to preventing domestic violence. The obligatory basic vocational training for all police officers covers human rights. In November 2013, the issue of domestic violence was added to the basic and to the managerial training curricula for the police. The National Programme for Equal Treatment for 2013–2016 included goals and priorities on countering domestic violence and ensuring the protection of victims. A handbook for police officers who intervene in domestic violence cases, risk assessment tools and procedures were prepared and implemented in December 2013 following countrywide training for the police (35,000 police officers trained). In 2013 and 2014, the State Agency for the Prevention of Alcohol-Related Problems organized training sessions on the issue of alcohol-related domestic and sexual violence. During the period 2013–2015, the Government Plenipotentiary for Equal Treatment carried out a project on the rights of sexual crime victims. The State party also conducted various initiatives through the Ministry of Family, Labour and Social Policy in 2014–2015.

6.17 The State party submits that the author's claim for compensation for the destruction of the house is unfounded, as the damage incurred was not the result of the alleged violations of the Convention, nor was it the result of State authorities' actions or omissions. Moreover, the author's demand that she be paid the entire value of the house is unjustified, as she cannot be regarded as the sole owner. The house was jointly owned by her and her husband in equal shares. According to the State party's legislation regarding the termination of joint property, joint co-ownership is transformed into co-ownership in fractional parts, to which the provisions concerning the joint inherited property apply. The final divorce judgment can serve as the basis for entry in the land and mortgage register of joint ownership in fractional parts for the benefit of the former spouses. In the case of division of joint property, the author would have only received half of its value, or she would have to pay her husband a sum equal to the value of his shares.

6.18 There are no grounds for consideration that the author would have the exclusive right to the house, as she would not have been sole owner of the house even if it had not been destroyed. Because her husband, E.S., died, his children would, by law, become his heirs. As from the case files it does not appear that he left a will, the provisions of statutory succession would apply. The children and spouse inherit in equal shares, with the spouse share not less than one fourth of the entire estate. The divorce of the author from E.S. became final on 21 April 2006; E.S. died on 4 May 2006. The author was no longer his wife and could not, by law, inherit. His two children would most probably be his heirs. Therefore, the author is not entitled to claim compensation corresponding to the entire value of the house.

6.19 The State party further notes that the author's claim is exorbitant, taking into account the estimated value of the burned property provided by the insurance company. The author contests the value estimation and addresses the remainder of her claim to the State party. In this regard, the State party submits that she did not bring an action against the insurer for damages resulting from the destruction of the house. The house was insured, including against fire, for an amount of Zl 507,000. The insurance company paid to the author compensation of Zl 106,634.45 which constitutes 50 per cent of the estimated value, while the remainder of the compensation would be paid after the completion of the property division proceedings. The author did not raise other claims in this regard, although she had the right to bring an action against the insurance company in civil court. The State party maintains that the author is requesting the Committee to grant her compensation that she should have pursued through domestic proceedings. Furthermore, she did not prove the amount of damage and, in order to obtain the right to the entire joint property, she would have been obliged to submit a court ruling on the division of the joint property, the division of the inheritance and the annulment of joint ownership, in which the parties would be the heirs of E.S. The State party submits that the author did not undertake such steps.

6.20 The State party reiterates its stance that the communication should be considered inadmissible for non-exhaustion of domestic remedies under article 4 (1) of the Optional Protocol and inadmissible as manifestly ill-founded under article 4 (2) (c) of the Optional Protocol.

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

7.1 On 7 April 2019, the author submitted her comments on the State party's observations on the merits.

7.2 She claims that although significant progress has been made, the State party has failed to adopt effective measures to eliminate gender-based stereotypes, which negatively impact the rights of female victims of domestic violence.

7.3 The State party violated her rights under article 2 (a)–(c) and (e), read in conjunction with article 1, of the Convention, owing to a lack of access to effective legal remedies for protection against domestic violence. She informed the police several times that she had been a victim of domestic violence. On 27 December 2003, she informed the police that her then husband had attacked and threatened her. On 15 March 2004, she told the police that he had stolen her money and threatened her and her daughters. On 18 August 2005, she reported her husband's threats to kill her and to burn down their home. The police either refused to initiate an investigation or discontinued the investigation as a result of legal technicalities. Their lack of response exemplifies a stereotyped perception of equality, one in which the author's husband had the upper hand despite his abusive behaviour. The police authorities minimized the author's experiences as a victim of domestic violence, which left her vulnerable.¹²

7.4 The author's husband was finally indicted after a series of events that occurred in 2004. However, the investigation was initially discontinued by the police for lack of evidence. The author appealed this decision. In December 2005, she had to urge the court to set a date for her then husband's criminal hearing. This hearing occurred on 8 March 2006 and her husband was subsequently required to undergo a psychiatric evaluation.

7.5 The author emphasizes that at the material time, the State party lacked a legal framework to provide effective legal protection against domestic violence. The Law

¹² The author refers to *González Carreño v. Spain* (CEDAW/C/58/D/47/2012), para. 9.4.

on Combating Domestic Violence entered into force on 21 November 2005. The Law provided for the first legal definition of domestic violence.

7.6 There were no legal provisions that imposed an obligation on the police to initiate a Blue Cards investigation if they encountered domestic violence in a context other than an in-home intervention. Reports filed by victims of domestic violence after the fact did not involve the Blue Cards procedure in any way.

7.7 The State party did not take the proper preventative measures to protect the author from domestic violence. Her husband's violent behaviour culminated in him burning down their shared home on 4 May 2006. The Optional Protocol came into force for Poland on 22 March 2004. Therefore, the Committee is competent to consider the present communication almost in its entirety. Some of the factual matters occurred prior to the Optional Protocol's entry into force; however, the Committee may consider said facts to the extent that they contextualize the events occurring after 22 March 2004.¹³

7.8 The author challenges the State party's argument that she should have applied for the eviction of her husband under article 58 (2) of the Family and Guardianship Code.¹⁴ She submits that this mechanism is ineffective. The article provides for the possibility for the court, in exceptional circumstances, to order the eviction of the other spouse from the shared home. The author notes that this eviction order is a part of the divorce proceedings. It is not considered a separate legal order nor is it immediately enforceable – it is only enforceable once a divorce is final. Furthermore, the eviction pursuant to article 58 (2) is only temporary. The court decides in a separate proceeding how the property is to be divided between the two parties.

7.9 An amendment to the Law on Combating Domestic Violence entered into force on 1 August 2010, which provided for new eviction mechanisms for victims of domestic violence. The provision allows either the prosecutor or the court to order the eviction of an individual from a shared residence who has committed domestic violence. The amendment included another provision for the eviction of an individual who has committed domestic violence outside of the context of criminal proceedings. Neither the criminal law mechanism nor the civil law mechanism was available to the author at the time of the aforementioned events.

7.10 The author submits that the State party violated her rights under article 2 (a), (c)–(f) and article 3, read in conjunction with article 1, of the Convention by failing to effectively protect her against her husband. At the material time, the law lacked measures to effectively implement the State party's obligations under the Convention. The legal provisions to evict family members who commit domestic violence did not come into force until 1 August 2010.

7.11 The author submits that the State party violated her rights under article 2 (d) and (e), taken in conjunction with article 2 (f), article 5 (a) and article 16, read in conjunction with article 1, of the Convention. The State party violated her rights by failing to implement effective measures to eliminate gender-based stereotypes that negatively impact the rights of female victims of domestic violence. The author highlights the fact that numerous deficiencies still exist regarding access to effective protection for female victims of domestic violence.

7.12 Domestic violence within the State party is prevalent. Research indicates that 19 per cent of women in Poland have experienced physical or sexual abuse from a

¹³ Ibid, para. 8.4.

¹⁴ Also noted is that the other eviction mechanism under the Civil Code was not coterminous with divorce proceedings until 12 June 2008. Therefore, this other mechanism was not available to the author.

current or former partner or other individuals.¹⁵ Furthermore, 37 per cent of women have experienced psychological abuse at the hands of a current or former partner.¹⁶

7.13 There is an ongoing debate concerning the State party's adoption and ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). In 2016, the Ministry of Justice drafted a preliminary application to withdraw from the Istanbul Convention, which had only been ratified in 2015. The State party's legislature attempted to pass legislation to further increase protections for victims of domestic violence; however, the legislation was not passed. Furthermore, the city of Zakopane has declined for years to implement a domestic violence prevention programme and to appoint an interdisciplinary task force as required under the Law on Combating Domestic Violence. The city has even challenged the constitutionality of the Law, but no hearing date has been set.

7.14 Domestic law does not specifically criminalize domestic violence. Criminal abuse as defined under article 207 of the Criminal Code does not satisfy all of the elements of domestic violence and does not include other crimes that have implications of domestic violence. Legal literature notes that criminal abuse as described in article 207 does not constitute an effective tool to prevent domestic violence because its scope is too narrow.¹⁷ Not all acts of domestic violence satisfy the elements of the crime of criminal abuse.

7.15 The author asks for the following remedies: (a) to be provided with pecuniary damages in conformity with the outcome of the relevant domestic proceedings and non-pecuniary damages commensurate with the violations of her rights; (b) that the State party refrain from withdrawing from the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention); (c) that the State party ensure that the legislation to prevent domestic violence is fully implemented nationwide; (d) that the State party take appropriate measures to avoid the recurrence of similar violations in the future; (e) that the State party review and amend the relevant domestic legislation, including the Criminal Code, by criminalizing domestic violence and the regime related to precautionary measures (article 275 (a) of the Code of Criminal Procedure and article 11 (a) of the Law on Combating Domestic Violence); (f) that the State party strengthen the application of the existing legal framework to ensure that the competent authorities exercise due diligence and respond in an appropriate and timely manner to instances of domestic violence; (g) that the State party participate in campaigns to raise awareness of the issue and introduce a zero-tolerance policy towards both violence against women and domestic violence; (h) that the State party prosecute perpetrators of domestic violence to convey the message that domestic violence is condemned by society at large and to ensure that both criminal and civil remedies are used in cases where a perpetrator of domestic violence poses a severe threat to a victim; (i) that the State party ensure that due consideration is given to the safety of women, emphasizing that the rights of the perpetrator do not supersede women's rights to life and physical and mental integrity; and (j) that the State party combat negative gender-based stereotypes and ideas that foster intersectional discrimination against women.

¹⁵ European Union Agency for Fundamental Rights, *Violence against women: an EU-wide survey – Main results* (Luxembourg, Publications Office of the European Union, 2014), p. 28.

¹⁶ *Ibid.*, pp. 73–74.

¹⁷ M. Płatek, "Legal protection against violence committed against women and domestic violence", in *Preventing Violence against Women, Including Older Women and Women with Disabilities – Analysis and Recommendations*, S. Trociuk, ed., (Warsaw, Office of the Commissioner for Human Rights, 2013), pp. 22 and 24.

Issues and proceedings before the Committee

8.1 In accordance with rule 64 of its rules of procedure, the Committee must decide whether the communication is admissible under the Optional Protocol to the Convention. Pursuant to rule 66 of its rules of procedure, the Committee may decide to examine the admissibility of the communication separately from the merits. Pursuant to rule 72 (4), it is to do so before considering the merits of the communication.

8.2 The Committee notes that the author brought an application before the European Court of Human Rights. The application, however, was found inadmissible because it was submitted too late and therefore was not examined on the merits by the Court. The Committee, therefore, is satisfied that the same matter has not been and is not being examined under another procedure of international investigation or settlement and does not consider itself to be precluded from considering the matter under article 4 (2) (a) of the Optional Protocol.

8.3 The Committee recalls that, under article 4 (1) of the Optional Protocol, it is precluded from considering a communication unless it has ascertained that all available domestic remedies have been exhausted or that the application of such remedies is unreasonably prolonged or unlikely to bring effective relief.¹⁸ The Committee recalls its jurisprudence to the effect that authors must avail themselves of all available domestic remedies and must have raised in substance at the domestic level the claim before the Committee, so as to provide the domestic authorities and/or courts with an opportunity to address the claim.¹⁹

8.4 In this regard, the Committee notes the State party's assertion that the author has not exhausted all available domestic remedies, because: (a) she did not file a cassation appeal before the Supreme Court against the judgment of the Court of Appeal; (b) she did not bring an action against the insurance company; and (c) she did not raise any allegations of discrimination based on sex during the domestic proceedings. The Committee takes note of the author's arguments that in 2007, she initiated a tortious action against the State party claiming compensation for the value of the house and non-pecuniary damages for the State party's alleged failure to provide her with adequate protection against her husband's violent behaviour, and that this claim was dismissed by the domestic courts; and that she was represented by counsel and she did not file a cassation appeal, as her lawyer decided that it would not have prospects of success whereas, under the code of ethics for attorneys, an attorney was precluded from appealing if the regulatory requirements for appeal were breached. With regard to the second remedy, the Committee takes note of the author's argument that it does not address her complaint before the Committee. However, the Committee further notes the State party's argument that if the author disagreed with the compensation paid to her she could have lodged a civil claim against the insurance company under the Civil Code.

8.5 The Committee further takes note of the State party's submission that during the domestic proceedings the author did not raise any allegations of discrimination on the basis of sex and gender-based stereotypes that negatively affected her, and that if she felt that she was a victim of discrimination, she could have brought an action before the domestic courts under the Civil Code, yet she did not avail herself of this redress. The Committee observes that the claims the author raises before it under the

¹⁸ *E.S. and S.C. v. United Republic of Tanzania* (CEDAW/C/60/D/48/2013), para. 6.3, *L.R. v. Republic of Moldova* (CEDAW/C/66/D/58/2013), para. 12.2, and *Polish Society of Anti-Discrimination Law v. Poland* (CEDAW/C/73/D/136/2018), para. 6.4.

¹⁹ *N. v. Netherlands* (CEDAW/C/57/D/39/2012), para. 6.3, and *Polish Society of Anti-Discrimination Law v. Poland* (CEDAW/C/73/D/136/2018), para. 6.4.

Convention have not been raised at the domestic level so the national courts did not have the opportunity to address them and, if confirmed, to remedy them. In the absence of any other information or explanation of pertinence on file, the Committee considers that the author did not exhaust all the available domestic remedies and that the communication is inadmissible under article 4 (1) of the Optional Protocol.

9. The Committee therefore decides:

- (a) That the communication is inadmissible under article 4 (1) of the Optional Protocol;
 - (b) That the present decision shall be communicated to the State party and to the author.
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