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Convention on the Rights of the Child

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Committee on the Rights of the Child

Decision adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 91/2019*, **

Communication submitted by:	K.P.C.
Alleged victims:	J.R.P., Ni.R.P. and Ne.R.P. (daughter and sons of the author)
State party:	Chile
Date of communication:	28 November 2018 (initial submission)
Date of adoption of decision:	8 May 2023
Subject matter:	Priority of recovery of a bank loan over maintenance arrears
Procedural issue:	Exhaustion of domestic remedies
Substantive issues:	Rights of the child; parental responsibilities
Article of the Convention:	27 (4)
Article of the Optional Protocol:	7 (e)

1.1 The author of the communication is K.P.C., a national of Chile born on 2 February 1978. She submits the communication on behalf of her daughter, J.R.P., and her two sons, Ni.R.P. and Ne.R.P., all nationals of Chile, born on 23 July 1998, 31 August 2004 and 19 March 2012, respectively. The author claims that the State party has violated the rights of J.R.P., Ni.R.P. and Ne.R.P. under article 27 (4) of the Convention. The Optional Protocol entered into force for the State party on 1 December 2015.

1.2 On 15 April 2021, pursuant to article 6 of the Optional Protocol, the working group on communications, acting on behalf of the Committee, decided to reject the State party's request that the admissibility of the communication be considered separately from the merits.

Facts as submitted by the author

2.1 The author was married to J.R., with whom she had J.R.P., Ni.R.P. and Ne.R.P. On an unspecified date, the author brought a claim of domestic violence against J.R. before Copiapó Family Court and separated from him de facto. On 27 February 2014, the author

* Adopted by the Committee at its ninety-third session (8–26 May 2023).

** The following members of the Committee participated in the consideration of the communication: Suzanne Aho, Aïssatou Alassane Moulaye, Hynd Ayoubi Idrissi, Rinchen Chophel, Bragi Gudbrandsson, Philip Jaffé, Sopio Kiladze, Faith Marshall-Harris, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

and J.R. reached an agreement whereby the latter pledged to pay maintenance for J.R.P., Ni.R.P. and Ne.R.P. consisting of: (a) 200,000 Chilean pesos (Ch$) (approximately US$ 350 at the time), readjustable according to the consumer price index; (b) the mortgage on the property where the children were living with the author; and (c) the electricity, water and gas bills for the property.

2.2 The author claims that J.R. did not comply with any of the three conditions. In view of this situation, the bank that had granted the mortgage sought payment from J.R. As the mortgage was not paid, the property in question was auctioned and sold to a third party. Of the sum obtained for the property at auction, a balance in J.R.'s favour remained. The bank concerned sought to recover this balance to settle another claim that it had against J.R. On behalf of J.R.P., Ni.R.P. and Ne.R.P., the author filed a third-party ancillary claim as a priority creditor for the outstanding maintenance.

2.3 On 28 April 2017, Court of First Instance No. 4 of Copiapó decided to reject the author's claim and order that the sum left over from the auction of the property be used to cover the second debt owed to the bank. The Court ruled that the bank's second claim against J.R. also related to a mortgage and that maintenance arrears had no priority under the applicable civil law. The author appealed against this decision before the Copiapó Court of Appeal, claiming that it violated article 27 of the Convention and article 5 of the State party's Constitution, under which the Convention has constitutional status. On 13 June 2017, the First Chamber of the Copiapó Court of Appeal rejected the author's appeal, upholding the decision of the court of first instance.

2.4 Following the rejection of her appeal, the author submitted an appeal in cassation to the Supreme Court, claiming that the decision handed down by the court of first instance was based on the Civil Code but failed to take into account the State party's obligations under article 27 (4) of the Convention. She argued that a systematic interpretation of the State party's laws shows that the right to maintenance, being a fundamental right, must take precedence over any other rule established in law, contrary to the decision of the court of first instance. On 18 October 2017, the Supreme Court found the appeal in cassation to be inadmissible on the grounds that the author had failed to comply with the indispensable requirement to identify the error of law in the decision handed down by the court of first instance. The author filed an application for reconsideration, which was dismissed by the Supreme Court on 29 November 2017.

Complaint

3.1 The author argues that the decision of the national courts to prioritize the payment of the outstanding mortgage debt owed to the creditor bank over the payment of the outstanding maintenance debt owed by J.R. to J.R.P., Ni.R.P. and Ne.R.P. is contrary to article 27 (4) of the Convention. She argues that outstanding maintenance is not just any debt but one that stems from a fundamental right. The fact that the rules on the priority of claims do not explicitly refer to persons to whom maintenance is owed cannot deprive such persons of protection under national law. Such an interpretation would disregard the fact that the right to recovery of maintenance is protected by article 27 (4) of the Convention. The author maintains that she has pursued all available domestic remedies and that no other remedy is available.

3.2 Should the Committee conclude that the right to maintenance is not adequately protected by the State party's national law, the author requests the Committee to call on the State party to amend its civil law governing the order of priority of claims to give preference to the recovery of maintenance claims. She also requests that the State party be called on to compensate J.R.P., Ni.R.P. and Ne.R.P. in the amount of Ch$ 20,000,000 (approximately US$ 304,500 at the time).

State party's observations on admissibility

4.1 In its observations on admissibility of 11 September 2019, the State party requests the Committee to find the communication inadmissible, as the author: (a) failed to exhaust the available domestic remedies, as required by article (7) (e) of the Optional Protocol; and (b) seeks to have the Committee reconsider decisions adopted by national courts under

national law, in violation of the fourth instance doctrine, which prohibits the Committee from acting as a court of fourth instance.

4.2 With regard to the failure to exhaust domestic remedies, the State party argues that the author deprived the national courts of the opportunity to assess and possibly remedy the harm reported to the Committee. First, it argues that the Supreme Court did not reject the author's appeal on substantive grounds but because she had omitted an essential requirement of the appeal. According to article 772 of the Code of Civil Procedure, this requirement is to identify the error or errors of law in the judgment under appeal. However, the author referred only to alleged misinterpretations of article 5 of the State party's Constitution and article 27 (4) of the Convention, without referring to the relevant articles of the Code of Civil Procedure governing the intervention of third parties in enforcement proceedings. Thus, for reasons attributable solely to the author's negligence, the Supreme Court was unable to assess the merits of her application.

4.3 Second, the State party submits that the author is claiming that the interpretation of national law by the national courts produced a result that is unconstitutional in the present case. In view of this situation, the author should have brought, during the main proceedings, an action of unconstitutionality before the Constitutional Court under article 93 (6) of the Constitution. In this action, the author should have requested that any legal provisions allowing for the dismissal of a third-party claim as a priority creditor be set aside. It claims that this action, which may be brought at any stage of the proceedings, suspends the main proceedings and would have enabled the author to obtain a ruling on the merits of the issue at stake. The State party adds that it did not do anything to prevent, either de facto or de jure, the initiation of an action of unconstitutionality before the Constitutional Court or the proper filing of the appeal in cassation with the Supreme Court (see para. 4.2).

4.4 With regard to the second ground of inadmissibility, the State party argues that it is not for the Committee to assess whether the national courts have correctly interpreted national law or properly weighed the evidence presented.[1] It adds that the Committee may only exceptionally consider the communication if the interpretation of national law was clearly arbitrary or amounted to a denial of justice.[2] The State party maintains that the communication is not based on the violation of certain international obligations but on the alleged misinterpretation of the applicable law by the national courts. This is evident from the fact that the author's claims are all based on the allegation that the scope of article 5 (2) of the Constitution was misinterpreted. The State party points out that the most persuasive evidence for this view is the fact that the author reproduces in full, and in exactly the same terms, the arguments put forward in the appeal before the Supreme Court, in which she alleged that a rule having constitutional status had been misinterpreted. It adds that the appeal before the Supreme Court was reasonably found to be inadmissible insofar as it lacked elements that were essential for its examination. For this reason, the finding of inadmissibility cannot be considered to have been clearly arbitrary. The State party argues that this dismissal did not amount to a denial of justice either, since it was the author's negligence that prevented the Constitutional Court and the Supreme Court from hearing her claim. It stresses that the author claims neither that due process was violated in any way nor that any factual or legal impediment prevented her from exercising her right to take action. The State party concludes that a State cannot be held responsible under international law simply because an individual is dissatisfied with the outcome of national proceedings.

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

5.1 In her comments on the State party's observations on admissibility, dated 11 February 2021, the author argues that it is clear that she pursued every remedy, within the time available, to defend the rights of her children. She stresses that she filed an appeal in cassation with the Supreme Court, which is the final remedy that a party may seek against a judgment handed down by a court of appeal in civil matters. She adds that she also filed an application

[1] *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *A.B.H. and M.B.H. v. Costa Rica* (CRC/C/74/D/5/2016), para. 4.3; and *Y and Z v. Finland* (CRC/C/81/D/6/2016), para. 9.8.

[2] *U.A.I. v. Spain* (CRC/C/73/D/2/2015), para. 4.2; *A.B.H. and M.B.H. v. Costa Rica* (CRC/C/74/D/5/2016), para. 4.3; and *Y and Z v. Finland* (CRC/C/81/D/6/2016), para. 9.8.

for reconsideration against the decision of the Supreme Court, which was also dismissed. According to the author, the Supreme Court stated that it could not remedy the void resulting from the failure to substantiate the appeal in cassation that had been filed. However, the Supreme Court should have applied the Convention as an instrument that takes precedence over the State party's national laws, as requested in the appeals filed.

5.2 With regard to the State party's argument concerning the fourth instance doctrine, the author states that her communication is not based on dissatisfaction with the national judiciary's interpretation but on the need to apply article 27 (4) of the Convention. She stresses that, contrary to the claims made by the national courts, there is no void in national law that prevents a judge from recognizing that a child's right to maintenance should be prioritized, given that the State party is responsible for securing the recovery of such payments. She states that the obligation to pay maintenance owed to one's children should be classified as a priority claim that takes precedence even over the obligation to pay legal costs, and not as a subordinate claim, as it was deemed to be in her case.

State party's observations on the merits

6.1 In its observations on the merits of the communication, dated 15 October 2021, the State party argues that the author failed to establish: (a) that the State party has committed an internationally wrongful act, or (b) that article 27 (4) of the Convention has been violated.

6.2 With regard to the first point, the State party maintains that affected parties must make use of the appropriate and effective domestic mechanisms in order to redress alleged violations.[3] Only after these have proven to be ineffective or inadequate may the State party's international responsibility be invoked. Since domestic remedies have not been exhausted, it is not possible to establish the existence of an internationally wrongful act attributable to the State party.

6.3 With regard to the second point, the State party claims that article 27 of the Convention imposes a positive obligation on States parties to amend their national law to ensure the payment of maintenance. However, it does not identify the mechanism whereby this right is to be enforced. The State party claims that the author's argument rests solely on the allegation that maintenance obligations are not considered a priority claim under national law. It adds that, in the author's view, this automatically entails a violation of article 27 of the Convention.

6.4 First, the State party argues that neither the author's original communication nor her comments contain any information on the status of the outstanding maintenance as at the date of both submissions. Therefore, there is no record of the status of the debt at the present time or of any action taken before a family court during this period, which, if a debt exists, would be the appropriate channel through which to file a claim. Second, the author fails to mention the other mechanisms in the national legal system that serve to enforce the payment of maintenance and are appropriate and effective mechanisms for securing its recovery in accordance with article 27 of the Convention. The State party provides an overview of the existing law on maintenance, which establishes the appropriate mechanisms to ensure that it is paid.[4] The State party mentions the following coercive measures for ensuring the payment of maintenance: arrest,[5] the legal exception under which divorce can be denied on the grounds of non-payment of maintenance,[6] an action of enforcement of maintenance obligations,[7] and a subsidiary claim against the grandparents of persons entitled to receive maintenance.[8] The State party also mentions other ancillary measures, such as the suspension of the driving licence of the maintenance debtor and the courts' power to authorize children to leave the country without that individual's permission.[9] The State party thus argues that the author has

[3] Committee on the Rights of the Child, general comment No. 5 (2003), para. 24.
[4] Civil Code, arts. 321 ff.; Act No. 14.908 on Family Abandonment and Maintenance Payments; and the Family Courts Act (No. 19.968), arts. 8 and 54-2.
[5] Act No. 19.968, art. 14.
[6] Civil Marriage Act (No. 19.947), art. 55.
[7] Act No. 14.908 and the Code of Civil Procedure.
[8] Act No. 14.908, art. 3; and Civil Code, art. 232.
[9] Act No. 14.908, arts. 16 and 19.

failed not only to demonstrate the existence of any currently outstanding maintenance but also to show that she has made use of any of the available mechanisms for recovering such arrears. In view of this situation, it argues that there is no basis for finding a violation of article 27 of the Convention.

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

7.1 In her comments on the State party's observations on the merits, dated 3 January 2022, the author argues that an internationally wrongful act did occur insofar as the State party failed in its obligation to secure the recovery of maintenance, to the detriment of the interests of J.R.P., Ni.R.P. and Ne.R.P. She adds that she cannot be said to have failed to pursue all domestic remedies, since it was the Supreme Court that rejected the appeal in cassation without considering the substance of the issue, thus resulting in a denial of justice.

7.2 As for the claim of a violation of article 27 (4) of the Convention, the author states that it was her action before the family courts that enabled her to secure, in civil proceedings, the sum left over from the auction of her home. When the family courts confirmed the existence of the debt, the author was able to file a third-party claim as a priority creditor. However, after the author had pursued every remedy available under Chilean law, the Supreme Court decided to apply the order of priority of payment established in national law instead of the Convention. The author argues that, although the State party cites various regulations on the protection of the right to recovery of maintenance, to date, no amendments have been made to the Civil Code provisions under which no priority is granted to the payment of children's and adolescents' maintenance. She reiterates that this led to the manifest failure of the State party to comply with its obligation to secure the recovery of maintenance for J.R.P., Ni.R.P. and Ne.R.P., insofar as the national courts prioritized national law over the implementation of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 20 of its rules of procedure under the Optional Protocol, whether the communication is admissible under the Optional Protocol.

8.2 The Committee notes the State party's argument that the author deprived the national courts of the opportunity to assess and remedy the alleged harm reported to the Committee (see para. 4.2). In particular, the Committee notes the State party's argument that the Supreme Court was unable to assess the merits of the author's application because she failed to meet the essential requirement that she substantiate her appeal. The Committee also notes the State party's argument that the author also deprived the Constitutional Court of the opportunity to assess the merits of her application, since she did not initiate an action of unconstitutionality (see para. 4.3).

8.3 The Committee recalls that the purpose of the rule on the exhaustion of domestic remedies is to allow national authorities to rule on authors' claims.[10] The Committee also recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress.[11] The Committee considers that domestic remedies need not be exhausted if they objectively have no prospect of success, for example in cases where under applicable domestic laws the claim would inevitably be dismissed or where established jurisprudence of the highest domestic tribunals would preclude a positive result.[12] The Committee considers that, where allegations that the exhaustion-of-domestic-remedies

[10] *E.H. et al. v. Belgium* (CRC/C/89/D/55/2018), para. 12.2; and *A.M.K. and S.K. v. Belgium* (CRC/C/89/D/73/2019), para. 9.3.

[11] *D.C. v. Germany* (CRC/C/83/D/60/2018), para. 6.5; *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), para. 10.17; and *W.W. and S.W. v. Ireland* (CRC/C/91/D/94/2019), para. 11.4.

[12] *D.C. v. Germany* (CRC/C/83/D/60/2018), para. 6.5; *Sacchi et al. v. Argentina* (CRC/C/88/D/104/2019), para. 10.17; and *W.W. and S.W. v. Ireland* (CRC/C/91/D/94/2019), para. 11.4.

rule has been satisfied appear prima facie to have been substantiated, the State party should indicate the specific remedies that the authors failed to pursue and that would be available and effective to address the violations alleged before the Committee.[13]

8.4 In the present case, the Committee notes the author's claim that the State party should give priority to the payment of the outstanding maintenance owed to J.R.P., Ni.R.P. and Ne.R.P. over the payment of other debts, as failure to do so would amount to a violation of article 27 (4) of the Convention (see para. 5.2). The Committee notes the State party's argument that an action of unconstitutionality would have allowed the author to request that the legal provisions governing the priority of claims be set aside. The State party has also pointed out that such an action could have been initiated by the author at any stage of the proceedings and would have suspended the main proceedings (see para. 4.3). The Committee notes that the author has not responded to the State party's arguments concerning an action of unconstitutionality and has not claimed that this remedy would have been unreasonably prolonged or ineffective in redressing the violations alleged before the Committee.[14]

8.5 The Committee also notes the State party's argument that the dismissal of the appeal in cassation before the Supreme Court was attributable to the author's negligence in omitting an essential requirement of such an appeal, namely to identify the error of law in the judgment under appeal (see paras. 4.2–4.4). The Committee notes that the author has neither properly refuted this argument nor claimed that there was any impediment to the proper submission of the appeal in cassation to the Supreme Court.

8.6 In the light of the foregoing, the Committee considers that the author has not exhausted all available domestic remedies, as required by article 7 (e) of the Optional Protocol.

9. The Committee therefore decides:

(a) That the communication is inadmissible under article 7 (e) of the Optional Protocol;

(b) That the present decision shall be transmitted to the author of the communication and, for information, to the State party.

[13] *L.H.A.N. v. Finland* (CRC/C/85/D/98/2019), para. 7.3; and *D.K.N. v. Spain* (CRC/C/80/D/15/2017), para. 11.4.

[14] *K.S. and M.S. v. Switzerland* (CRC/C/89/D/74/2019), para. 6.5; and *N.B. v. Georgia* (CRC/C/90/D/84/2019), para. 6.7.