

# INTERRIGHTS BULLETIN

A Review of the International Centre for the Legal Protection of Human Rights

ISSN 0268-3709 2006 Volume 15 No 3

## Contents

■ Positive Obligations of States and the Protection of Human Rights	101
<i>Silvia Borelli</i>	
■ Towards Global Responsibility for Human Rights Protection	104
<i>Helen Duffy</i>	
■ Adjudicating the Positive Duties Imposed by Economic, Social and Cultural Rights	109
<i>Sandra Liebenberg</i>	
■ Positive Obligations to Ensure Equality	114
<i>Bob Hepple</i>	
■ The African Charter on Human and Peoples' Rights and Positive Obligations	117
<i>Alain Didier Olingo</i>	
■ Positive Obligations in the Inter-American Human Rights System	120
<i>Tara J Melish and Ana Aliveriti</i>	
■ Positive Obligations from Strasbourg – Where do the Boundaries Lie?	123
<i>Philip Leach</i>	
■ Implementing Judgments on the Positive Obligations of States	139
<i>Geoff Budtender</i>	
■ An International Right to Environment: a New Generation?	141
<i>Alice Palmer</i>	
■ Preventing Slavery: Positive Obligations under the ECHR after <i>Siliadin v France</i>	143
<i>Cesare Pitea</i>	
■ The <i>Kadi</i> and <i>Yusuf</i> Cases before the Court of First Instance - <i>Jus Cogens</i> and Review of Security Council Resolutions	145
<i>Simon Oleson</i>	
■ Small Steps: Prosecuting the Recruitment of Child Soldiers – the Case of <i>Sam Hinga Norman</i>	148
<i>Noah Novogradsky and Mathew Goldstein</i>	
■ UN Human Rights Committee Decision in <i>Karen Llantoy v Peru</i>	151
<i>Pardis Kebrini</i>	
■ Prohibition on Racial Discrimination in Access to Nationality: Case of the <i>Girls Yean and Bosico v The Dominican Republic</i>	153
<i>Francisco Quintana</i>	
■ <i>Leyla Sahin</i> : Out of Scale Proportionality?154	
<i>Basak Cali</i>	
■ Violence against Women: Private Actors and the Obligation of Due Diligence	156
<i>Andrew Byrnes and Maria Graterol</i>	
■ Reform of UN Human Rights Treaty Bodies: Summary of Recent International Discussions	158
<i>Linda Pisciotto</i>	
Book Reviews	160

## International Law Reports

See pages 127 – 138

# Positive Obligations of States and the Protection of Human Rights

The recognition of a duty incumbent upon states 'to take action' is, at base, the common denominator of all understandings of the notion of 'positive obligations'. In the specific context of international human rights law, the notion is one which has been frequently invoked both by treaty-monitoring bodies and in the academic literature; however, the term apparently bears differing meanings for different writers, depending on the context and the obligation under discussion. A number of different uses can accordingly be discerned, which to some extent overlap and interact.

In the past, the concept was used to emphasise the differences between economic, social and cultural rights and civil and political rights. For instance, it has been asserted that the obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR) are 'positive' obligations in that on their face they require states to take action, in contradistinction to the obligations arising under the International Covenant on Civil and Political Rights (ICCPR), which are said to contain essentially 'negative' obligations, or duties of abstention. However, this clear-cut distinction has been abandoned for some time, and it is now generally recognised that the effective realisation and implementation of both categories of rights may require action by the state.<sup>2</sup> Although the distinction between, on the one hand the 'positive' obligations in relation to economic, social and cultural rights, and on the other the 'negative' obligations in relation to civil and political rights may be valid to a certain extent, it is clear that

some civil and political rights on their face equally imply obligations on the state to take positive action and that, as noted by the UN Human Rights Committee in relation to the ICCPR, the legal obligation to respect and ensure civil and political rights 'is both negative and positive in nature'.<sup>3</sup> Conversely, some economic, social and cultural rights, in addition to requiring positive action, clearly also impose obligations on the state to abstain from actively denying the rights in question.<sup>4</sup>

With the demise of the use of the positive/negative distinction between civil and political and economic, social and cultural rights, the widest current use of the notion of positive obligations denotes those human rights obligations imposing upon the state a duty to take some positive action in order to ensure the effective enjoyment of the right protected. On this understanding of the term, an extremely large number of human rights norms entail a positive obligation for the states bound by them.

# UN Human Rights Committee Decision in *K.L. v Peru*

Pardiss Kebriyai

In October 2005, the UN Human Rights Committee (the Committee) handed down its ruling in the case of *K.L. v Peru*,<sup>1</sup> a landmark decision in international human rights law and a major victory for advocates of reproductive rights. In considering an individual complaint submitted under the Optional Protocol to the International Covenant on Civil and Political Rights (the Covenant), the Committee held the government of Peru to have breached its obligations under the Covenant by denying access to a therapeutic abortion permitted by its own domestic law. It ordered the state to provide the complainant with an effective remedy, including compensation, and take steps to prevent the future occurrence of similar violations. The decision is the Committee's first on abortion as well as the first by an international or regional human rights body to hold a state accountable for failing to ensure access to legal abortion services.

Peruvian organisations Estudio para la Defensa de los Derechos de la Mujer (DEMUS), the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), and the Center for Reproductive Rights submitted the complaint to the Committee in 2002 on behalf of the then 17 year-old K.L., who had become pregnant with an anencephalic foetus. Anencephaly is a foetal anomaly characterised by the absence of major portions of the brain; such foetuses are either stillborn or die soon after birth. Although doctors diagnosed K.L.'s pregnancy as posing risks to her life and health and recommended its termination, state hospital authorities ultimately denied K.L.'s request for an abortion. While abortion is a crime in most circumstances in Peru, it is permissible to save the woman's life or protect her health, although there are no regulations or policies that implement or further interpret the law. K.L. was forced to continue her pregnancy to term and gave birth to an anencephalic girl, whom she had to breastfeed during the four days the baby survived. K.L. was subsequently diagnosed with severe depression requiring psychiatric treatment.

Arguing that state authorities denied her access to a therapeutic abortion to which she was legally entitled and caused serious harm to her mental health, K.L. claimed violations of the following Covenant rights: respect for and guarantee of rights (Article 2); equality and nondiscrimination (Article 3); life (Article 6); freedom from torture and

cruel, inhuman or degrading treatment (Article 7); privacy (Article 17); special measures of protection for minors (Article 24); and equal protection of the law (Article 26). She also argued for a waiver of the exhaustion of domestic remedies requirement for admissibility of her complaint, pointing to the absence in Peru of an administrative remedy to obtain a therapeutic abortion or timely judicial remedies providing for the enforcement of a woman's right to an abortion within the limited period during which the procedure can take place. In addition, she claimed that financial constraints prevented her from obtaining legal advice. Recalling its jurisprudence establishing that 'a remedy that had no chance of being successful did not count as such and did not need to be exhausted',<sup>2</sup> the Committee proceeded to make the following findings on the merits:

## Freedom from Torture and Cruel, Inhuman or Degrading Treatment (Article 7)

The Committee reasoned that K.L.'s depression and emotional distress 'could have been foreseen, since a hospital doctor diagnosed anencephaly in the foetus, yet the hospital director refused termination'.<sup>3</sup> It concluded that 'the omission on the part of the State in not enabling [K.L.] to benefit from a therapeutic abortion was ... the cause of the suffering she experienced'<sup>4</sup> and violated Article 7, which 'relates not only to physical pain but also to mental

suffering'.<sup>5</sup> The Committee underscored the importance of the article's protection for minors in particular.

### Analysis:

- The Committee found the state liable for denying K.L.'s access to an abortion given that she needed to avoid serious harm to her mental health – harm associated with being forced to continue a pregnancy involving foetal anencephaly. It follows that a state's obligations to respect and ensure the right set out in Article 7 require it to guarantee a woman's access to abortion in cases where pregnancy threatens her physical or mental health, including because of severe foetal impairment. Such access in the case of minors is particularly important. For Peru, compliance with these findings means interpreting the general health exception in its abortion law broadly to protect the woman's physical and mental health; the implications are similar for other states parties to the Covenant with equivalent exceptions.
- While K.L. was denied access to a legal abortion, the Committee's finding of an Article 7 violation did not depend on the lawfulness of the procedure. The language of this part of the decision is neutral; the state is liable for 'not enabling [K.L.] to benefit from a therapeutic abortion',<sup>6</sup> not necessarily a legal one. Thus, in the context of Article 7, both the legal and practical inaccessibility of a therapeutic abortion could constitute violations.
- The Committee accepted K.L.'s claims of mental suffering both during pregnancy and after delivery, as well as the impact of such harm on her development and future mental health. These findings show the Committee's recognition of the continuing nature and long-term implications of the harm experienced by K.L.
- Medical and scientific evidence played an instrumental role in substantiating the harms K.L. alleged. In its findings, the Committee relied heavily on medical evaluations and expert statements submitted by petitioners to prove both the risks posed by K.L.'s pregnancy and the harm that she had suffered.

The Committee found that the circumstances of K.L.'s case satisfied the conditions for a lawful abortion in Peru, reasoning that 'a public-sector doctor told [K.L.] that she could either continue with the pregnancy or terminate it in accordance with domestic legislation ...'.<sup>7</sup> Having determined that K.L. had a legal right to have an abortion, the Committee found that the state's refusal to give effect to her decision was 'not justified' and violated Article 17.<sup>8</sup>

**Analysis:**

- In the context of Article 17, a state permitting abortion in prescribed circumstances must ensure that the textual guarantee in its national laws is an effective right in practice. In this case, the state should not only have refrained from interfering with K.L.'s decision to have a legal abortion, but also taken positive measures to enable the exercise of her right and ensure her access to services.

**Right to Special Measures of Protection for Minors (Article 24)**

Recognising K.L.'s 'special vulnerability ... as a minor girl',<sup>9</sup> the Committee held the state liable for failing to take special measures to protect K.L.'s health and well-being. Specifically, the state should have provided both during and after her pregnancy 'the medical and psychological support necessary in the specific circumstances of her case'.<sup>10</sup>

**Analysis:**

- The Committee's finding of an Article 24 violation recognises the unique barriers and susceptibility to rights violations that adolescents experience in accessing abortion and other reproductive health services, and the special duty of states to ensure their access to such services and protect their rights and well-being. This builds on the Committee's previous recommendations calling upon states to take necessary measures to guarantee access to reproductive health services for adolescents with unwanted pregnancies when the law permits.<sup>11</sup>
- The Committee's recognition of K.L.'s 'special vulnerability ... as a minor girl'<sup>12</sup> shows its understanding of sex and gender as factors that can

particularly in the area of reproductive health. In developing special measures to ensure minors' access to reproductive health services, states should take account of sex and gender differences and tailor their responses accordingly.

**Obligation to Respect and Ensure Rights (Article 2)**

The Committee found the state responsible under Article 2 in relation to Articles 7, 17 and 24 of the Covenant for violating K.L.'s right to an adequate legal remedy. In its previous jurisprudence, the Committee has interpreted Article 2 as imposing a positive obligation on states to provide 'accessible and effective' remedies allowing victims to vindicate their rights.<sup>13</sup> It has also recognised that remedies should be appropriately adapted to account for the special vulnerability of certain groups, including children in particular.<sup>14</sup>

**Analysis:**

- Whether a legal remedy can be considered effective depends on the circumstances of the case. In the abortion context, the timeliness of relief is a key factor in assessing its effectiveness. In this case, the Committee's finding of an Article 2 violation depended in part on the lack of a judicial remedy in Peru that would have allowed K.L. to obtain an abortion within the limited period imposed by the circumstances of her case.
- The Committee's finding of state responsibility also rested on the absence of any administrative procedure that would have allowed K.L. to obtain an abortion. Thus, a state's failure to establish such procedures for example, procedures providing for an appeal or review of a doctor's refusal to perform a legal abortion – can violate its positive obligations under Article 2.
- The accessibility of a remedy, also required by Article 2, depends in part on whether it is economically within reach. In this case, K.L.'s right to an adequate legal remedy was violated in part because financial constraints prevented her from accessing legal assistance.

for Reproductive Rights are currently working with the Ministry of Health in Peru to help implement the decision, including by providing input on a draft abortion regulation in line with the Committee's findings.

**Pardiss Kebriaei is the Legal Adviser for International Litigation at the Center for Reproductive Rights, New York.**

1 *K.L. v Peru*, Comm. No. 1153/2003, 24 October 2005, UN Doc. CCPR/C/85/D/1153/2003 (2005), available at <[http://www.unhcr.ch/hbs/doc.nsf/\(Symbol\)/97ec3750+cb08578c12570c8005880d3?Opendocument](http://www.unhcr.ch/hbs/doc.nsf/(Symbol)/97ec3750+cb08578c12570c8005880d3?Opendocument)>.

2 *Ibid.* para. 5.2.

3 *Ibid.* para. 6.3.

4 *Ibid.*

5 *Ibid.*

6 *Ibid.* emphasis added.

7 *Ibid.* para. 6.4.

8 *Ibid.*

9 *Ibid.* para. 6.5.

10 *Ibid.*

11 *Concluding Observations of the Human Rights Committee: Ecuador*, 18 August 1998, UN Doc. CCPR/C/79/Add.92, para. 11; *Concluding Observations of the Human Rights Committee: Argentina*, 3 November 2000, UN Doc. CCPR/CO/70/ARG, para. 14.

12 Emphasis added.

13 Human Rights Committee, *General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 15.

14 *Ibid.*