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Ninety-third session
7-25 July 2008

VIEWS

Communication No. 1482/2006

Submitted by:	M. G. (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	26 May 2006 (initial submission)
Document references:	Special Rapporteur's rule 97 decision, transmitted to the State party on 18 July 2006 (not issued in document form)
Date of adoption of Views:	23 July 2008

* Made public by decision of the Human Rights Committee.

Subject matter: Court order for a medical assessment of complainant's capacity to take part in certain legal proceedings

Substantive issues: Right not to be subjected to cruel, inhuman or degrading treatment or punishment – Right not to be subjected to arbitrary or unlawful interference with one's privacy – Right to a fair and public hearing by an independent and impartial tribunal

Procedural issues: Level of substantiation of claim

Articles of the Covenant: 7; 14, paragraph 1; 17

Articles of the Optional Protocol: 2

On 23 July 2008, the Human Rights Committee adopted the annexed text as the Committee's Views, under article 5, paragraph 4, of the Optional Protocol in respect of communication No.1482/2006.

[ANNEX]

ANNEX

VIEWS OF THE HUMAN RIGHTS COMMITTEE UNDER
ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL
TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Ninety-third session

concerning

Communication No. 1482/2006[*]

Submitted by:	M. G. (not represented by counsel)
Alleged victim:	The author
State party:	Germany
Date of communication:	26 May 2006 (initial submission)

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

Meeting on 23 July 2008,

Having concluded its consideration of communication No. 1482/2006, submitted to the Human Rights Committee on behalf of M.G., under the Optional Protocol to the International Covenant on Civil and Political Rights,

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

Adopts the following:

VIEWS UNDER ARTICLE 5, PARAGRAPH 4, OF THE OPTIONAL PROTOCOL

1.1 The author of the communication is Ms. M. G., a German national, born on 28 January 1963. She claims to be a victim of violations by Germany[1] of articles 7, 17 and 14, paragraph 1,

[*] The following members of the Committee participated in the examination of the present communication: Mr. Prafullachandra Natwarlal Bhagwati, Ms. Christine Chanet, Mr. Maurice Glèlè Ahanhanzo, Mr. Yuji Iwasawa, Mr. Edwin Johnson, Mr. Ahmed Tawfik Khalil, Mr. Rajsoomer Lallah, Ms. Zonke Zanele Majodina, Ms. Iulia Antoanella Motoc, Mr. Michael O'Flaherty, Ms. Elisabeth Palm, Mr. José Luis Pérez Sanchez-Cerro, Mr. Rafael Rivas Posada, Sir Nigel Rodley, Mr. Ivan Shearer and Ms. Ruth Wedgwood.

Two individual opinions signed by Committee members Mr. Ivan Shearer and Ms. Ruth Wedgwood are attached to the present decision.

of the Covenant. The author is currently residing in Paraguay. She was represented by counsel, Mr. Alexander H. E. Morawa, until 15 May 2008, when counsel informed the Committee that he no longer represented the author in the proceedings before the Committee.

1.2 On 18 July 2006, the Secretariat informed the author that the Committee, through its Special Rapporteur on New Communications, had decided not to issue a request for interim measures under rule 92 of the Committee's rules of procedure.

Factual background

2.1 The author's parents divorced in 1981. Subsequently, numerous legal proceedings involving family law and civil matters were initiated by and litigated between the author's father, his relatives, and the author.

2.2 In July 2004, three members of the author's family, including her father, filed lawsuits in the Ellwangen Regional Court, asking for an order compelling her to cease and desist making certain statements, as well as for pecuniary damages. On 7 November 2005, the Ellwangen Regional Court, without hearing or seeing the author in person, ordered a medical examination of the author to assess whether she was capable of taking part in the legal proceedings. The Court appointed Professor R. H., a psychiatrist at the Berlin Charité University Hospital, "to undertake all the examinations he deems necessary to assess the physical and mental state of health of the [author]."

2.3 In its order of 7 November 2005, the Court reasoned that the behaviour of the author in the proceedings including her many very voluminous submissions to the court raised doubts as to her capacity to take part in the proceedings, particularly for the following reasons: (1) That, in her submissions, the author had indicated that the legal proceedings she was involved in required her to work up to 20 hours per day for preparing briefs and other documents, and that this had negatively affected, as attested by medical certificates, her health and her life as a whole; despite these negative effects and regardless of the fact that she was represented by counsel she continued to make frequent and voluminous submission without sufficient cause; (2) that the fact that the author had copied her submissions to the Berlin Senator for Justice, the presiding judges of the Berlin Regional Court, the Stuttgart Higher Regional Court and of the Federal Court, the President of the Federal Constitutional Court, and to the European Court of Human Rights indicated that she was under stress and overestimated the importance of the proceedings; and (3) that the author appealed every single decision that she considered disadvantageous also where no comprehensible reasons justifying such appeals were apparent.

2.4 On 22 November 2005, the author filed a complaint against the order of the Ellwangen Regional Court with the Federal Constitutional Court and requested interim protection. The author was not represented by a lawyer in these proceedings. The Court rejected the complaint on 21 December 2005, without stating reasons.

2.5 On 2 December 2005, the author, now legally represented, challenged the order of the Ellwangen Regional Court in a counter statement, claiming that there were no objective reasons

[1] The Covenant and the Optional Protocol to the Covenant entered into force for Germany on 23 March 1976 and 25 November 1993 respectively.

for ordering a medical examination and challenging the absence of an oral hearing prior to issuing the order. She explained that she was involved in numerous lawsuits against members of her father's family. As she had not been represented by a lawyer during part of the proceedings, she could not be blamed for writing lengthier and more frequent letters to explain the context of her lawsuits. She was entitled to present her case as fully as possible and to contact higher courts and international bodies. That she had availed herself of remedies should not lead to such far-reaching consequences as an involuntary medical examination. On 8 December 2005, the Ellwangen Regional Court affirmed its order. It had not been required to hear the author prior to ordering the medical examination, as her procedural conduct and her submissions gave rise to sufficient doubts about her capacity to take part in the proceedings.

2.6 On 2 December 2005, the author challenged the judges of the Ellwangen Regional Court, who had ordered her medical examination without objective reasons and without a prior oral hearing, for bias. On 16 January 2006, the Court, composed of different judges, rejected the challenge, considering that the decision that an oral hearing of the author, who was domiciled in Berlin, was unnecessary in the light of the voluminous case file, did not amount to bias.

2.7 On 22 March 2006, the Stuttgart Higher Regional Court rejected the author's challenge of the judges of the Ellwangen Regional Court, as the author's conduct justified the decision to order an expert opinion. The Court noted that she had pursued her interests with "noticeable vigor" and that her written submissions contained abusive language. The absence of an oral hearing prior to ordering the examination did not violate the author's right to a fair trial, since the Court was required to hear her only before making its final determination on her capacity to take part in the proceedings.

2.8 On 6 April 2006, the author filed a complaint against the decisions of the Stuttgart Higher Regional Court and the Ellwangen Regional Court with the Federal Constitutional Court, in which she also challenged the absence of an early oral hearing. The Court rejected the complaint on 27 April 2006, without giving reasons.

Complaint

3.1 The author claims that the decision ordering her medical examination amounts to degrading treatment and unduly interferes with her right to privacy, in violation of articles 7 and 17 of the Covenant; the absence of an oral hearing prior to issuing the order violated her right to a fair trial under article 14, paragraph 1, of the Covenant.

3.2 The author recalls that the purpose of article 7 of the Covenant is to protect the integrity and dignity of the individual from acts that cause physical pain or mental suffering.[2] Invoking the jurisprudence of the European Court of Human Rights,[3] she argues that treatment is considered 'degrading' if it causes feelings of fear, anguish and inferiority capable of humiliating or debasing the victim. An order to be examined against one's will offends the victim's dignity

[2] General Comment No. 20 (1992): *Prohibition of torture or cruel, inhuman or degrading treatment or punishment (Article 7)*, at paras. 2 and 5.

[3] European Court of Human Rights, *Kudla v. Poland*, judgement of 26 October 2000, Reports 2000-XI, at para. 92; *Tyrer v. United Kingdom*, judgment of 5 April 1978, Series A, No. 26, at para. 30; *Soering v. United Kingdom*, judgement of 7 July 1989, Series A, No. 161, at para. 100.

and privacy and places a person, who has never be subjected to a psychiatric assessment, in a "particularly vulnerable position."[4]

3.3 On article 17, the author submits that an involuntary medical examination of one's physical and mental state of health constitutes interference with a person's privacy or integrity. According to the European Court of Human Rights, "[t]he preservation of mental stability is […] an indispensable precondition to effective enjoyment of the right to respect for private life."[5] A compulsory medical examination or treatment is only permissible if it is "a therapeutic necessity."[6]

3.4 The author emphasizes that only in exceptional circumstances and for compelling reasons may a person be subjected to medical or psychiatric examinations or treatment without his or her explicit consent. As for the standard of proof, the European Court of Human Rights held that the necessity of such interference in the public interest must be "convincingly shown to exist."[7]

3.5 For the author, the reasons given by the Ellwangen Regional Court as to the necessity of a medical examination were not compelling: (1) While it was true that she was extremely burdened with the workload related to her lawsuits, the fact that she attended to them with such energy was understandable given the financial and other implications of that litigation. Although the typing required for maintaining her case files had caused her dizziness, neck pain and eyesight problems, these *physical* health problems did not justify presuming that she also suffered from *mental* defects. The real reason for the order was probably that the Court itself was burdened by the litigation between her and her family members. The Court had sufficient means at its disposal to streamline, channel, or otherwise restrict the motions and briefs it receives and includes in its case file. Subjecting her to a compulsory medical examination was an excessive and unjustifiable measure under article 14, paragraph 1, of the Covenant. (2) The reason why she had copied her submissions to various higher courts while her case was still pending was not that she was "stressed". Rather, she wanted to accelerate proceedings and prepare the submission of a complaint to international human rights bodies. The European Court of Human Rights had repeatedly stated that "actual or potential applicants" must not be subjected to pressure designed to discourage them from submitting an application. (3) She was entitled to appeal any unfavourable decision. Even if her extensive use of such appeals may be perceived as an obstacle to the administration of justice, this did not justify subjecting her to a medical examination.

3.6 Subsidiarily, the author argues that the adverse effects of a medical examination on her dignity and her physical and mental integrity exceeded the purpose of such an examination by far.

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[4] Inter-American Commission on Human Rights, Case 11427, *Victor Rosario Congo v. Ecuador*, Report 29/99 of 9 March 1999, at para. 54.
[5] European Court of Human Rights, *Bensaid v. United Kingdom*, judgment of 6 February 2001, at para. 47.
[6] European Court of Human Rights, *Herczegfalvy v. Austria*, judgment of 24 September 1992, Series A, No. 244, at para. 82.
[7] *Ibid.*

3.7 The author submits that the right to an oral hearing is an essential element of the due process guarantees in article 14, paragraph 1,[8] especially when a far-reaching order such as involuntary medical examination is concerned, or when there is an imminent threat to the physical and moral well-being of the victim.[9] She concludes that the refusal of the Ellwangen Regional Court to hear or see her in person prior to ordering her medical examination, as well as the decisions of the Stuttgart Higher Regional Court and the Federal Constitutional Court affirming this decision, violated her right to a fair trial under article 14, paragraph 1.

3.8 The author submits that the same matter is not being, and has not been, examined under another procedure of international investigation or settlement, and that she has exhausted all available domestic remedies.

3.9 The author argues that the implementation of the order of a medical assessment of her capacity to take part in the proceedings would constitute an irreversible measure within the meaning of the Committee's jurisprudence.[10] She recalls that interim measures of protection may be ordered in the context of alleged torture or cruel, inhuman or degrading treatment or punishment within the meaning of article 7 of the Covenant, but also in case of threatened breaches of the right to privacy,[11] and requests the Committee to ask the State party not to subject her to any non-consensual medical or psychiatric examination, or the threat thereof, before the Committee has considered her case.

Additional information from the author

4.1 On 2 June 2006, the author clarified her request for interim measures, reiterating that she has never undergone any psychiatric examination or treatment. In a medical report dated 15 November 2005, her family doctor confirmed that she has been his patient since 1986 and that "[t]here are no indications that suggest any psychiatric illness or any psychopathological irregularity. […] her thought processes are entirely organized and well structured."

4.2 The author clarified that the medical examination ordered by the Ellwangen Regional Court was still pending, but that it would be scheduled shortly, as the Stuttgart Higher Regional Court had dismissed her appeal on 24 May 2006. The Court had held that "an order to take a certain step in the process of taking of evidence to determine the capacity to take part in legal proceedings cannot be reviewed." An appeal could only be filed after the examination has taken place in order to review the court's assessment of the expert opinion.

4.3 The author feared the examination because of the unlimited scope of discretion granted to the expert in the court order.

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[8] Human Rights Committee, Communication No. 1015/2001, *Perterer v. Austria*, Views adopted on 20 July 2004, at para. 9.3.
[9] General Comment No. 20 (1992), at para. 14.
[10] Communication No. 1086/2002, *Weiss v. Austria*, Views adopted on 3 April 2003, at para. 7.2.
[11] European Court of Human Rights, Application No. 46827/99 and 46951/99, *Mamatkuliv and Askarov v. Turkey*, judgment of 4 February 2005, at para. 104.

4.4 The author submits that Section 56 (1) the German Code of Civil Procedure provides for an *ex officio* review of the capacity to take part in legal proceedings. Section 144 (1) authorizes the courts to appoint experts for that purpose. Under Section 402, the rules governing the testimony of witnesses also apply to the enforcement of an order for an expert to assess evidence. The refusal to submit to an order for examination by a court-appointed expert entails several sanctions: The person refusing to comply with the order must reimburse any costs caused by such refusal, pay a fine, and will be arrested if he or she is cannot pay the fine (Section 390 (1)). Upon request by a party, the court must order the arrest of a person who repeatedly refuses to obey an order (Section 390 (2)). Under Section 390 (b), such arrest is governed by the provisions on the enforcement of civil judgments. An arrest warrant will be issued in case of failure to comply with a court order; the person concerned will be arrested by a bailiff (Section 909). The arrest may be ordered for the duration of the court proceedings, but not for longer than six months at a time. The statutes of the federal States provide for compulsory examination and placement measures in case of (presumed) mental disability. The author concludes that she is at a risk of being arrested and forcibly transferred to a psychiatric institution for her examination.

4.5 The author distinguishes between the health effects that she has already sustained as a result of the court order and the possible effects of the pending medical examination on her health. Several medical reports confirmed that she suffers from health problems which are typically caused by anxiety and stress due to extraordinary life circumstances. She claims that her symptoms were caused or at least aggravated by the court order. While the effects of the medical examination on her health could not be predicted with certainty, it was sufficiently documented that her health situation would be aggravated and that she would be in imminent danger of physical collapse. These effects reach the level of "mental suffering"[12] covered by article 7, and unduly interfered with her privacy protected in article 17 of the Covenant.

State party's observations on admissibility

5.1 On 15 August 2006, the State party challenged the admissibility of the communication, arguing that it constitutes abuse of the right of submission of communications and that it is inadmissible *ratione materiae* under article 3 of the Optional Protocol.

5.2 The State party submits that the author failed to inform the Committee that the order of the Ellwangen Regional Court to determine her capacity to take part in legal proceedings only concerned the proceedings against members of her father's family. While the Court had doubts whether she was able to act rationally in relation to these lawsuits, it explicitly stated that there were no such doubts concerning her legal capacity in any other respect. This automatically limited the scope of an expert medical examination of her physical and mental state of health in compliance with the order.

5.3 For the State party, the author attempts to create the erroneous impression that she could be deprived of her liberty for a prolonged time, since the jurisprudence cited by her refers to cases concerning the treatment of patients in compulsory detention in psychiatric institutions. However, the author's commitment to a psychiatric institution, which would be subject to stringent procedural safeguards such as an explicit judicial order, was never an issue. The Court

[12] General Comment No. 20 (1992), at para. 5.

had merely ordered an expert opinion on her capacity to participate in certain legal proceedings. This expert could easily accomplish the task by means of an interview and by reference to the case files.

5.4 The State party rejects the author's assertion that the true reason for the order was the burden that the author's correspondence placed on the Ellwangen Regional Court. The Court provided a full explanation for its doubts about the author's capacity to take part in the proceedings against her family members. Her letters to the court contained serious insults and even threats to the life and health of judges.

5.5 The State party considers that the judicial order of a medical examination, issued in accordance with the law, which serves a legitimate purpose (the proper functioning of the legal system) and is not arbitrary or otherwise disproportionate, does not raise issues under articles 7 and 17 of the Covenant. The author was wrong in assuming that medical examinations against one's will are only permissible in "the overriding interest in preserving that person's mental state of health." Other legitimate purposes also existed. The order of the Ellwangen Regional Court was necessary and justified to protect the proper functioning of the judiciary. It also aimed at preserving the author's mental state of health; the Court was obliged to ascertain at every stage of the proceedings that the parties are able to act rationally in pursuing their rights. The order was proportionate given the minimal interference with the author's rights. Expert opinions on a person's capacity to take part in legal proceedings were frequent in all legal systems.

5.6 Lastly, the State party argues that by ordering an expert opinion to establish whether the author is mentally able to cope with the proceedings, the Court exercised a protective function. Rather than violating article 14, paragraph 1, the order was aimed at securing the preconditions of a fair trial.

Additional information from the author

6.1 On 19 September 2006, the author's counsel informed the Committee that her husband had received a letter dated 1 September 2006 from the Election Office ("Wahlamt") of the District Authority of Berlin Steglitz-Zehlendorf, advising her that she had been removed from the register of voters following a notification dated 18 August 2006 from the Berlin Citizens and Public Order Department ("Landesamt für Bürger- und Ordnungsangelegenheiten") that she had been removed from the register of residents with effect from 4 May 2006. In the letter of 1 September 2006, the author was informed that her address had been marked as "unknown" and that "[i]t cannot be ascertained by the Election Office who initiated the removal from the register of residents, nor for what reasons." The letter adds that "a clarification of your registration as a resident can be obtained at any time at any Citizens Office ["Bürgeramt"] in Berlin." However, on 14 September 2006, the author's husband was told by the Citizens Office of Berlin-Mitte, where he tried to have her removal from the register of residents reversed, that nothing could be done about it removal, since a non-disclosure order had been issued concerning the author's address at her request.

6.2 The author's counsel, without however claiming a violation of Article 25 of the Covenant, submits that she had been travelling abroad during the past two months in order to recover from her health problems and that her temporary absence does not justify the removal from the register of residents.

State party's observations on the merits

7.1 On 16 January 2007, the State party made observations on the merits and considered the author's claims to be "manifestly ill-founded." It submits that the relevant provisions of the German Code of Civil Procedure are in conformity with the Covenant: Section 52 provides that anyone capable of entering into contracts also has the capacity to take part in civil proceedings. There are several grounds for lack of such capacity, including under-age and permanent mental illness. Moreover, a person may lack the capacity to take part in specific proceedings when these proceedings are rooted in disputes which are connected to personal problems of the parties which go beyond the scope of the legal matter at issue. In such cases, if the party concerned does not already have a guardian or other legal representative, the court must appoint a special representative. While it is generally presumed that the parties to civil proceedings have the necessary legal capacity, the court must, in cases of doubt, ascertain whether such capacity exists (Section 56). These provisions seek to protect persons unable to follow the proceedings and in no way violate the right to be recognized as a person before the law, as they merely set out the conditions and restrictions on the exercise of civil rights. Far from excluding a party from the proceedings, they ensure that the person concerned is represented by someone.

7.2 The State party argues that nothing in the decision of the Ellwangen Regional Court compelled the author to submit to a psychiatric examination. While Sections 402 *et seq.* of the Code of Civil Procedure provided that experts, similar to witnesses, may be compelled to provide evidence, such compulsory measures did not apply to persons who were the object of an expert opinion. The only provision authorizing civil courts to specifically order a party to submit to an expert examination is Section 144 (1) of the Code of Civil Procedure. There was no reference to Section 144 in the decision of the Ellwangen Regional Court, nor was the author "ordered to undergo" or "to make herself available" for such an examination. The Court merely ordered "that the defendant's capacity to take part in legal proceedings is to be clarified by seeking a written expert opinion." Even if the Court had made an explicit order under Section 144 (1), the author could not have been compelled to submit to the examination, given the jurisprudence that "[a] party to the proceedings cannot be compelled to undergo an examination as to his or her mental state, except in proceedings for legal incapacitation under Sections 654, 656."

7.3 The State party submits that the only consequence of a refusal by the author to submit to an examination would be that the expert opinion may be prepared on the basis of the files, as well as the expert's impression of the author's conduct in court, and that the Court would be free to interpret her action in its assessment of her legal capacity to take part in the proceedings. The consequences of a court finding that the author lacks capacity to take part in the relevant proceedings would be that the case against her would be inadmissible, unless a special representative (normally a lawyer at the seat of the Court) is appointed by the Court on the plaintiff's request. In that case, the Court would have to inform the author about any procedural developments and serve any documents on her. The State party concludes that the author's allegations concerning a compulsory medical examination of her physical and mental state of health are without basis, since there is no possibility of her being forced to submit to such an examination.

7.4 The State party argues that the author's claim under article 14, paragraph 1, is based on the erroneous assumption that the Ellwangen Regional Court had ordered her to submit to an involuntary medical examination of her physical and mental state of health without having heard her in person, whereas the Court never issued such a far-reaching order. While the Court would be required to evaluate the expert opinion in a hearing, providing the author with an opportunity to make submissions and challenge the opinion, this stage has not been reached in the proceedings.

Additional information and author's comments

8.1 On 10 February 2007, the author informed the Committee that, on 6 December 2006, the Ellwangen Regional Court had sent a letter to Professor R. H. of the Charité Hospital in Berlin, instructing him to prepare an expert opinion on her physical and mental state of health, summon her to the hospital, and allow the opposing party to attend the examination. By fax of 29 December 2006 sent to the Ellwangen Regional Court, she objected to the letter. The letter had been copied to the opposing party but not to her, and she had only received it by coincidence. On 4 January 2007, Professor R. H. informed the Court that his practice was to prepare expert opinions together with an assistant and that he would ask another colleague to prepare a psychological expert opinion, if necessary. These services would be charged extra, even though the various opinions would be incorporated into the main expert opinion. He would keep the Court informed about the dates of the examination and whether the author had complied with the summons. On 8 January 2007, the Court rejected the author's objection, as it had not been submitted by a lawyer and because the law did not provide for complaints against decisions to appoint an expert. In a letter dated 13 January 2007, Professor R. H. suggested three possible dates for the examination. On 20 January 2007, the author's husband replied that she could not come to the hospital on any of the suggested days, since she was travelling in South America and could not be reached. He requested that the appointments be cancelled.

8.2 On 26 April 2007, the author commented on the State party's observations and denies an abuse of the right of submission on her part. She argues that she has neither submitted "entirely unsupported […] allegations",[13] nor shown gross disregard for the Committee, e.g. by deliberately changing essential facts. Her allegation that the scope of the medical examination was left entirely to the discretion of the expert was not "wrong and misleading", but was corroborated by the absence of any limitations in the court order and by the fact that, in his letter of 13 January 2007, Professor R. H. had summoned her for a thorough examination and asked her to "prepare herself for further examination appointments […] which may have to be arranged." Rather than "insinuating" that she would be deprived of her liberty "for a prolonged time", she feared that her physical liberty would be restricted during a non-voluntary examination. Even without that element, her rights to dignity and privacy would be infringed.

8.3 On the merits, the author argues that, in practice, it does not make a difference whether a court order to submit to a medical examination is directly addressed to the individual concerned or whether it is directed at a third person who is to subject the individual to said examination.

[13] The author refers to the Committee's jurisprudence in *J. J. C. v. Canada*, A/47/40, Supplement, at p. 381 and *M. A. B., W. A. T. and J.-A. Y. T. v. Canada*, A/49/40, Supplement, at p. 368.

The distinction made by the State party as to the addressee of the order was artificial, since the Ellwangen Regional Court had instructed the expert to "undertake all the examinations he deems necessary […]." Based on this authority, the expert summoned her to the medical examination of her physical and mental state of health. Professor R. H. acted as an agent of the State party. Both the general mandate of court-appointed experts, who often determine the outcome of a case, as well as the scope of power given to R. H., grants him broad discretion, without providing for "the legal safeguards against arbitrary application" of the expert's mandate required by article 17 of the Covenant.[14]

8.4 The author disagrees that her refusal to submit to the examination would not lead to any significant negative consequences. Having to choose between the options of either submitting to the examination, or refusing to do so and letting the expert decide on the basis of the case file, with the risk of being found mentally incapacitated *in absentia*, amounted to coercion. The contention of the State party that the appointed expert could easily accomplish his task by means of an interview and by reference to the case file was refuted by R. H.'s summons for a thorough examination.

8.5 While acknowledging that an *ex officio* review under Section 56 of the Code of Civil Procedure of the capacity to take part in legal proceedings may serve the protection of persons who are potentially unable to follow the proceedings and to conduct their case, the author reiterates that none of the reasons given by the court would suffice, either alone or cumulatively, as a justification for ordering her medical examination. The State party's argument that she submitted "confused" or insulting or threatening statements casting doubt on her "ability to act rationally in the context of these proceedings" is an *ex post facto* attempt to explain why the Ellwangen Regional Court ordered the examination.

8.6 The author submits that subjecting her to an involuntary medical examination was a disproportionate measure given the social stigma attached to being found mentally incapacitated, albeit in the limited context of a single trial. In the absence of any compelling reasons for the court order, the order was arbitrary and unlawful under article 17.

8.7 With regard to her claim under article 7, the author submits that having to choose between obeying expert's summons or, alternatively, having her capacity to take part in the proceedings examined *in absentia*, resulted in "feelings of fear, anguish and inferiority capable of humiliating and debasing [her]."[15]

8.8 She argues that the interference with her rights to privacy and dignity had such far-reaching effects on the underlying civil case, that article 14, paragraph 1, would have required an oral hearing prior to ordering the examination, especially since the broad scope of discretion granted to the expert compromised her position to assert her rights. The fact that there would be a main hearing before deciding on her capacity to take part in the proceedings could not cure the

[14] Communication No. 27/1978, *Pinkney v. Canada*, Views adopted on 29 October 1981, at para. 34.
[15] European Court of Human Rights, *Kudla v. Poland*, judgment of 26 October 2000, Reports 2000-XI, at para. 92.

absence of a hearing at an early stage where she still could assert her right not to be subjected to an examination.

8.9 Also under article 14, paragraph 1, the author submits that her right to an impartial tribunal has been violated. While ordering an expert opinion on her capacity to take part in the proceedings without having heard or seen her, the Ellwangen Regional Court did not order a similar expert opinion with regard to the other parties to the proceedings, despite the fact that her father had threatened her and her siblings' life, resulting in the termination of his visiting rights. The author provides documents which, in her opinion, constitute *prima facie* evidence questioning her father's capacity to take part in the proceedings. By ordering an examination of only her mental state, the Ellwangen Regional Court had acted in a way that showed bias against her and promoted the interests of one of the parties.

8.10 On 28 April 2008, the author submitted copies of the expert opinion dated 6 December 2007 prepared by Professor R. H. and his assistant Dr. S. R. on the basis of the case file and other documents, concluding that the author should be considered to be incapable of taking part in the legal proceedings initiated by her father and other family members against her.

8.11 On 6 May 2008, the author submitted a copy of her summons for an oral hearing scheduled for 8 May 2008 at the Ellwangen Regional Court.

8.12 On 21 May 2008, the author informed the Committee that she had challenged the judges of the Ellwangen Regional Court to whom her case had been reassigned, for bias.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 Before considering any claims contained in a communication, the Human Rights Committee must, in accordance with article 93 of its rules of procedure, decide whether or not it is admissible under the Optional Protocol to the Covenant.

9.2 With regard to the author's claim under article 7, the Committee recalls that this article seeks to protect both the dignity and the physical and mental integrity of the individual.[16] The assessment of what constitutes inhuman or degrading treatment within the meaning of article 7 depends on all the circumstances of the case, including the duration and manner of the treatment, its physical or mental effects, as well as the sex, age and mental health of the victim.[17] The object of the treatment may also be relevant. The Committee has taken note of the author's arguments concerning the possible effects of a medical examination on her physical and mental health. The Committee notes that the author has been invited to submit to an expert examination for the purposes of judicial proceedings, in respect of which her mental condition is a pertinent factor. It considers that the author has failed to substantiate, for purposes of admissibility, that such an invitation by itself raises issues under article 7 or that the undoubted suffering imposed on her by

[16] General Comment No. 20 (1992), para. 2..
[17] Communication No. 265/1987, *Vuolanne v. Finland*, Views adopted on 7 April 1989, at para. 9.2.

the decision so to invite her is of a nature to fall within the scope of article 7. It follows that this part of the communication is inadmissible under article 2 of the Optional Protocol.

9.3 With regard to the author's claim that her right under article 14, paragraph 1, to an impartial tribunal was violated, since the Ellwangen Regional Court ordered only her, but not her father, to submit to a medical examination, despite *prima facie* evidence that her father lacked capacity to take part in the proceedings, the Committee notes that the order of the Court was issued in response to an application by the author for legal aid, i.e. regarding exclusively her own position in the proceedings and not that of her father. The Committee considers that the author has not sufficiently substantiated this claim, for purposes of admissibility and declares this part of the communication inadmissible under article 2 of the Optional Protocol.

9.4 As regards the author's claims under article 17 of the Covenant, as well as the alleged violation of her right to an oral hearing under article 14, paragraph 1, the Committee has ascertained, and the State party has not challenged, that the author exhausted domestic remedies. The Committee also considers that the author has substantiated those claims, for purposes of admissibility, and concludes that this part of the communication is admissible under articles 2 and 5, paragraph 2 (b), of the Optional Protocol.

Consideration of the merits

10.1 As regards the author's claim under article 17 of the Covenant, the Committee observes that to subject a person to an order to undergo medical treatment or examination without the consent or against the will of that person constitutes an interference with privacy, and may amount to an unlawful attack on his or her honour and reputation.[18] The issue before the Committee is therefore whether the interference with the author's privacy was arbitrary or unlawful, or whether the order of the Ellwangen Regional Court constituted an unlawful attack against her honour or reputation. For an interference to be permissible under article 17, it must cumulatively meet several conditions, i.e. it must be provided for by law, be in accordance with the provisions, aims and objectives of the Covenant, and be reasonable in the particular circumstances of the case.[19]

10.2 The Committee recalls that the order of the Ellwangen Regional Court to examine the author's capacity to take part in the proceedings was based on Section 56 of the German Code of Civil Procedure. It notes the reasons given by the Ellwangen Regional Court for ordering a medical examination of the author, i.e. her excessive written submissions and appeals and all the work she had put into the case affecting her health, as well as the State party's argument that the order served the legitimate purpose of protecting the 'proper functioning of the judiciary' and the author's mental state of health. However, the Committee observes that the order of the Ellwangen Regional Court had the effect of requiring the author to undergo a medical examination of her physical and mental state of health, or alternatively Professor R. H. would prepare the expert opinion solely on the basis of the existing case file. It considers that to issue

[18] *Cf.* Communication No. 242/1987, *Tshisekedi wa Mulumba v. Zaire*, Views adopted on 2 November 1989, at paras. 12.7 and 13.

[19] See Communication No. 903/1999, *Van Hulst v. The Netherlands*, Views adopted on 1 November 2004, at para. 7.3.

such an order without having heard or seen the author in person and to base this decision merely on her procedural conduct and written court submissions was not reasonable in the particular circumstances of the case. The Committee therefore finds that the interference with the author's privacy and her honour and reputation was disproportionate to the end sought and therefore 'arbitrary', and concludes that her rights under article 17, in conjunction with article 14, paragraph 1, of the Covenant have been violated.

11. The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of the author's rights under article 17, in conjunction with article 14, paragraph 1, of the Covenant.

12. In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy including compensation. The State party is also under an obligation to prevent similar violations in the future.

13. Bearing in mind that, by becoming a party to the Optional Protocol, the State party has recognized the competence of the Committee to determine whether there has been a violation of the Covenant or not and that, pursuant to article 2 of the Covenant, the State party has undertaken to ensure to all individuals within its territory or subject to its jurisdiction the rights recognized in the Covenant and to provide an effective and enforceable remedy in case a violation has been established, the Committee wishes to receive from the State party, within 180 days, information about the measures taken to give effect to the Committee's Views. The State party is also requested to publish the Committee's Views.

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

APPENDIX

Individual opinion of Committee member Mr. Ivan Shearer (dissenting)

I regret that I am unable to join the majority of my colleagues in finding a violation in the present case. I cannot regard the action of the Ellwangen Regional Court in ordering an examination of the author prior to the oral hearing of the case to be unreasonable in all the circumstances. There was a justifiable apprehension by the Court that the author might not be capable of acting in her own best interests. It seems to me only reasonable that the author's state of health should have been examined, and reported on, before the oral proceedings began. The report would not have been conclusive: the Court was competent to decide that the author was fully competent to proceed with her action. On the other hand, were it to have been, as the author wished, that these matters be determined only at the oral hearing stage, without a prior examination and report, much valuable court hearing time might be lost if the Court was then forced to delay the proceedings by reason of a finding at that stage that the author was not competent to act on her own behalf.

[*signed*] Mr. Ivan Shearer

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

Individual Opinion of Committee member Ms. Ruth Wedgwood (dissenting)

Though the pleadings in this case are not a model of clarity, it appears that a German Regional Court, located in the town of Ellwangen, in the state of Baden-Wurttemberg, Germany, concluded that it had a legal responsibility to examine whether the author, described here as "M.G.", was competent to defend herself in a civil lawsuit brought by three family members against her. The suit asked for damages and injunctive relief against the author. Under German law, if the author was not competent to protect her own interests, a legal representative could be appointed for her.

The pleadings before the Committee do not make clear whether this representative would be tasked simply to act as an attorney in the regional court proceedings (instead of perhaps permitting M.G. to defend the case *pro se*, without an attorney), or instead to act more broadly as a legal guardian to advise or decide what was in the author's best interests in the case.

But in either event, there were rather evident grounds for apprehension on the part of the Ellwangen Regional Court concerning the capacity of the author to defend herself in a civil suit. A letter sent by the author to the presiding judge of the Ellwangen District Court, for example, contains highly abusive and threatening language directed at the presiding judge. This letter might afford any reasonable judge concern about the capacity of the author to function as her own attorney and indeed, as guardian of her own interests, as well as the appropriate procedures for carrying out an orderly trial.

The question now put to the Committee by the author is whether the State Party has violated the Covenant because the Regional Court attempted to engage an expert to give an opinion on the author's "physical and psychological state of health," before affording the author an oral hearing at which she could dispute the necessity for doing so. The expert assessment has never been carried out, not least, because the author left the country and went travelling in South America at the time of the proposed dates.

But in any event, the examination was not mandatory. Rather, if the author preferred not to have an examination, the court was willing to base a preliminary evaluation of her capacity to proceed in light of the pleadings contained in the case file. It is thus hard to see what basis remains for the author's claim that the request by the court to cooperate in a psychological examination constituted an unlawful invasion of her privacy or arbitrary attack on her honour or reputation, actionable under Article 17 of the International Covenant on Civil and Political Rights.

A court has an independent right and responsibility to protect the integrity of its proceedings, and to assure that the litigants before it have competent representation. The author does not dispute that she was also assured of a full hearing before the court before there was to be any final and dispositive determination of her competence to act on her own behalf. There is nothing in the case that suggests the court was acting for any other reason than its interest in orderly and just proceedings. Against the background of the abusive written filings noted above, it would seem tendentious to require a judge to gather additional "personal impressions" of a litigant, before even seeking a psychological examination that itself was a voluntary choice for the author. Hence, I cannot join in the finding of a violation by the State Party in this case.

[*signed*] Ms. Ruth Wedgwood

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