United Nations

force for the State party on 22 August 1991 and 22 August 2002, respectively.

The facts as presented by the author

2.1 The author worked as a part-time salaried employee (a temporary employment agency worker) as well as together with her husband as a co-working spouse in his enterprise. She gave birth to a child and took maternity leave as from 17 January 1999.

2.2 The author was insured under the Sickness Benefits Act (Ziektewet – "ZW") for her salaried employment and, in accordance with article 29a of this Act, received benefits to compensate for her loss of income from her salaried employment during her maternity leave over a period of 16 weeks.

2.3 The author was also insured u

2.7 The author lodged an appeal against the decision of 4 June 2002, which she subsequently withdrew after the decision of the Central Appeals Tribunal (Centrale Raad van Beroep), which heard the appeal regarding benefits for her maternity leave in 1999, was rendered on 25 April 2003.

The complaint

3.1 The author complains that she is a victim of a violation by the State party of article 11, paragraph 2 (b) of the Convention on the Elimination

3.6 As to the admissibility of the communication, the author maintains that all domestic remedies have been exhausted in that she ultimately brought proceedings before the highest administrative court against the refusal to award benefits under the WAZ. She informs the Committee that she withdrew her appeal in connection with her second pregnancy after she lost her final appeal in connection with her first pregnancy.

3.7 The author also states that she has not submitted the communication to any other international body and thus, the requirement for admissibility in article 4, paragraph 2 (a) has been fulfilled. The author points out that, on several occasions, in its comments on the report of the Netherlands to the Committee of Experts, the Netherlands Trade Union Confederation FNV has claimed that section 59 (4) of the WAZ is contrary to article 12 (2) of the European Social Charter. It has reportedly also brought the issue to the attention of the International Labour Organization (ILO) in its comments on the report of the Netherlands under ILO Convention 103 on Maternity Protection. Nonetheless, the author maintains that both procedures differ from the individual right of complaint and that neither the European Social Charter nor ILO Convention 103 contain provisions identical to article 11 of the Convention on the Elimination of All Forms of Discrimination against Women. She also refers to case law on admissibility in individual complaints procedures of other international investigation

benefits was to be withheld. These decisions were taken before 22 August 2002, the date that the Optional Protocol entered into force for the State party. Ergo, the communication should be declared inadmissible *ratione temporis*. A different view would misconstrue the substance of the Optional Protocol by recognizing a general rather than an individual right of complaint.

6.2 The State party recalls that lodging an application for review in social security cases does not suspend legal proceedings in the Netherlands. Only the final judgment of a court can change (with retroactive effect) the earlier decisions of the bodies that implement social security legislation.

6.3 In addressing the author's contention that section 59 (4) of the WAZ is incompatible with article 11, paragraph 2 (b) of the Convention, which, the author believes, imposes an obligation to ensure full compensation of loss of income ensuing from childbirth in all cases and constitutes direct sex discrimination, the State party observes that the word "pay" is used in general to refer to a salary and not to income from business profits. This gives rise to whether the word "pay" in article 11, paragraph 2 (b) of the Convention should include the frequently fluctuating income arising from self-employment. The State party views its composite system of maternity benefits as adequately fulfilling the terms of article 11, paragraph 2 (b) of the Convention.

6.4 Initially, maternity leave and maternity benefits were regulated exclusively in the ZW, an insurance scheme that provided compulsory coverage for both male and female employees. Self-employed women or women working in their husbands' businesses could voluntarily take out insurance under the scheme. In 1992, a study revealed that only a small proportion of these women took out insurance – either because they were

6.7 The State party shares the views expressed by the Central Appeals Tribunal (Centrale Raad van Beroep) as to whether the so-called "anti-accumulation clause" constitutes sex discrimination. It maintains that entitlement to maternity benefits

with the other requirements of the article. Paragraph 1 provides that local remedies must be exhausted before a communication can be submitted. Viewed together with article 4, paragraph 2 (e), this means that "facts" must be understood to mean the date of the court decision of the highest instance (i.e. 25 April 2003). The correctness of the facts cannot be assumed until such a final decision is reached.

7.2 Furthermore, the complaint concerns the period of the second maternity leave from 8 May to 28 August 2002, during which the author received benefits based on the decision of 4 June 2002 decision - that is to say that the "facts" (the period for which a benefit is received) continued after the entry into force of the Optional Protocol for the State party.

admissibility of the complaint as regards the second period that the complainant should have exhausted the entire appeal proceedings once more". The State party points out that this claim was not made in the author's initial submission to the Committee. The only reference therein to the second period of pregnancy and maternity leave in 2002 was made to support the claim that the alleged violation continued after the Optional Protocol entered into force in the Netherlands. It should not be inferred from the fact that the State party did not explicitly address the question of whether the author had exhausted domestic remedies regarding the decision on the benefits payable to her for the period of her maternity leave in 2002 that the State party believes that this condition for admissibility has been met regarding that period. Regarding article 4, paragraph 1 of the Optional Protocol, the State party believes that the Committee cannot take the communication into consideration, inasmuch as it must be assumed to apply to the benefit for the period of leave in 2002, on account of non-exhaustion of domestic remedies.

8.2 The State party reiterates that it considers the communication in any event to be inadmissible because the relevant facts took place before the date that the Optional Protocol entered into force for the Netherlands. It also wishes to emphasize that the Optional Protocol created an individual right of complaint that follows from article 2. In order to determine whether a person is a victim of a violation by a State, it is necessary to identify an act, legal or otherwise, by the State that can be defined as a violation, for instance a decision by the State on the application of a particular rule of law. In the State party's view, the right of complaint does not stretch to facts that a complainant considers to be discriminatory in general unless the complainant has been affected personally.

8.3 Concerning the merits of the author's claims, the State party wishes to clarify that it raised previously– but did not answer - the obvious question relating to the meaning of the word "pay" in article 11, paragraph 2 (b) of the Convention. The State party disagrees with the author's interpretation that the provision prescribes full compensation for loss of income resulting from pregnancy and childbirth. It views the provision as a general norm that imposes on States an obligation to make arrangements that enable women to provide for themselves in the period of pregnancy and childbirth and to resume work after childbirth without any adverse effects on their career. The way in which the obligation is fulfilled is left to States to determine. States may opt between arrangements based on continued payment of salary and arrangements creating a comparable social provision. That this must involve full compensation for loss of income cannot automatically be inferred.

8.4 The State party makes a comparison between paragraph 2 (b) of article 11 of the Convention and EC directive 92/85 of 19 October 1992 concerning the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, which provides for a payment to, and/or entitlement to an adequate allowance. While the State party

finds it implausible that the European legislature envisaged a wholly different norm than the Convention's norm, it describes the EC directive as being more clearly formulated in that the term "adequate allowance" is defined.

8.5 The State party elaborates further about the reasoning behind section 59 (4) – the so-called "anti-accumulation clause" – of WAZ. Under this Act a self-employed woman would be entitled to a benefit of up to 100 per cent of the statutory minimum wage. Those who worked as a salaried employee as well would be entitled to a benefit under both this Act and the ZW. If the latter exceeded 100 per cent of the statutory minimum wage the WAZ benefit would not be paid and if the ZW entitlement was lower than 100 per cent of the statutory minimum wage, the WAZ benefit could be paid as long as the two together would not exceed 100 per cent of the minimum wage. At the same time, the higher a woman's income would be from salaried employment – the greater the likelihood that her WAZ benefit would not be paid and the lower her contribution payable to the WAZ scheme would be.

8.6 As for the author's contention that the so-called "anti-accumulation clause" constitutes direct discrimination, the State party reiterates that the entitlement is exclusively given to women and is specifically designed to give women an advantage in relation to men. It is, therefore, impossible to see how it can lead to more unfavourable treatment of women in relation to men – considering that men cannot make any use whatsoever of the clause.

Issues and proceedings before the Committee

Consideration of admissibility

9.1 In accordance with rule 64 of its rules of procedure, the Committee shall decide whether the communication is admissible or inadmissible under the Optional Protocol to the Convention. Pursuant to rule 72, paragraph 4, of its rules of procedure, it shall do so before considering the merits of the communication.

9.2 The Committee has ascertained that the matter has not already been or is being examined under another procedure of international investigation or settlement.

9.3 With respect to article 4, paragraph 1 of the Optional Protocol, the Committee notes that the State party has not disputed that the author has exhausted all available domestic remedies concerning benefits for her first maternity leave in 1999. The issue is not as straightforward regarding the author's 2002 maternity leave benefits. The Committee is informed by the author in her initial submission, that she withdrew her appeal in connection with her second maternity leave after she lost her final appeal in connection with her first maternity leave. She did not explain her reasons. In its latest observations, the State party objected to the admissibility of the author's claim relating to the latter maternity leave on grounds of her failure to exhaust all available domestic

remedies without explaining why. The Committee notes that in earlier observations in which the State party challenged the admissibility *ratione temporis* (see below) of the communication and in doing so referred to the decisions taken denying benefits under the WAZ system vis-à-vis both periods of maternity leave, it did not mention the issue of exhaustion of remedies. In the absence of particulars from either the State party or the author on which to assess whether the author should have continued her appeal or whether these proceedings were unlikely to bring relief, the Committee considers that, on the face of it and in light of the unambiguous wording of the decision rendered on 25 April 2003 by the Central Appeals Tribunal (Centrale Raad van Beroep), the highest administrative court in social security cases, proceedings regarding the author's 2002 maternity leave benefits were unlikely to bring relief. The Committee therefore holds that it is not precluded by article 4, paragraph 1 of the Optional Protocol from considering the communication as regards claims relating to both periods of the author's maternity leave.

9.4 In accordance with article 4, paragraph 2 (e), the Committee shall declare a communication inadmissible where the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State party concerned unless those facts continued after that date. The Committee notes that the State party disputed the author's contention that article 4, paragraph 2 (e) posed no impediment to admissibility of the communication. The State party put forward that the pertinent dates for the Committee to consider in this regard were 19 February 1999 and 4 June 2002 - both dates being prior to the entry into force of the Protocol for the Netherlands. These dates were the dates on which decisions were taken to deny the author – the first time to fully deny her benefits under the WAZ in relation to her first maternity leave and the second time to partially deny her benefits under the WAZ in relation to her second maternity leave. The author, for her part, in her initial submission argued that 25 April 2003, i.e. after-0.001s.ir5(a)-55.9(5)TJ-14.ially

9.6 The Committee has no reason to find the communication inadmissible on any other grounds and thus finds the communication insofar as it concerns the author's later maternity leave in 2002 admissible.

Consideration of the merits

10.1 The Committee has considered the present communication in light of all the information made available to it by the author and by the State party, as provided in article 7, paragraph 1, of the Optional Protocol.

10.2 The question before the Committee is to determine whether the concrete application of section 59 (4) of the WAZ vis-à-vis the author insofar as it concerns the author's later maternity leave in 2002 constituted a violation of her rights under article 11, paragraph 2(b) of the Convention because it resulted in her receiving less benefits than she would have received had the provision not been in operation and had she been able to claim benefits as an employee and as a co-working spouse independently of each other.

The aim of article 11, paragraph 2, is to address discrimination against women working in gainful employment outside the home on grounds of pregnancy and childbirth. The Committee considers that the author has not shown that the application of the 59 (4) of the WAZ was discriminatory towards her as a woman on the grounds laid down in article 11, paragraph 2 of the Convention, namely of marriage or maternity. The Committee is of the view that the grounds for the alleged differential treatment had to do with the fact that she was a salaried employee and worked as a co-working spouse in her husband's enterprise at the same time.

Article 11, paragraph 2 (b), obliges States parties in such cases to introduce maternity leave with pay or comparable social benefits without loss of former employment, seniority or social allowances. The Committee notes that article 11, paragraph 2 (b), does not use the term "full" pay, nor does it use "full compensation for loss of income" resulting from pregnancy and childbirth. In other words, the Convention leaves to States parties a certain margin of discretion to devise a system of maternity leave benefits to fulfil Convention requirements. The Committee notes that the State party's legislation provides that self-employed women and co-working spouses as well as salaried women are entitled to paid maternity leave – albeit under different insurance schemes. Entitlements under both schemes may be claimed simultaneously and awarded as long as the two together do not exceed a specified maximum amount. In such cases, contributions to the scheme covering self-employed women and co-working spouses are adjusted with income from their salaried employment. It is within the State party's margin of discretion to determine the appropriate maternity benefits within the meaning of article 11, paragraph 2 (b) of the Convention for all employed women, with separate rules for self-employed women that take into account fluctuating income and related contributions. It is also within the State party's margin of discretion to

apply those rules in combination to women who are partly self-employed and partly salaried workers. In light of the foregoing, the Committee concludes that the application of section 59 (4) of the WAZ did not result in any discriminatory treatment of the author and does not constitute a violation of her rights under article 11, paragraph 2 (b), of the Convention.

10.3 Acting under article 7, paragraph 3 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against