



Convention on the Rights of Persons with Disabilities

Advanced unedited version

Distr.: general
13 March 2018

Original: English

Committee on the Rights of Persons with Disabilities

Views adopted by the Committee under article 5 of the Optional Protocol, concerning communication No. 26/2014^{*, **}

<i>Communication submitted by:</i>	Simon Bacher (represented by Viktoria Bacher, his twin sister and legal tutor)
<i>Alleged victims:</i>	Simon Bacher
<i>State party:</i>	Austria
<i>Date of communication:</i>	8 February 2014 (initial submission)
<i>Document references:</i>	Special Rapporteur's rule 64 and 70 decision, transmitted to the State party on 19 March 2015 (not issued in document form)
<i>Date of adoption of views:</i>	16 February 2018
<i>Subject matter:</i>	Responsibility of State party's authorities to promote the accessibility of a person with disability in the context of a private dispute between neighbours
<i>Procedural issues:</i>	Competence <i>ratione temporis</i> ; exhaustion of domestic remedies; competence <i>ratione materiae</i>
<i>Substantive issues:</i>	Accessibility; reasonable accommodation; general obligations of States parties under the Convention
<i>Articles of the Convention:</i>	3, 9, 14, 19, 25, 26 and 28
<i>Articles of the Optional Protocol:</i>	2 (c), (d) and (f)

* Adopted by the Committee at its nineteenth session (14 February – 9 March 2018).

** The following members of the Committee participated in the examination of the communication: Ahmad Al Saif, Danlami Umaru Basharu, Munthian Buntan, Imed Eddine Chaker, Theresia Degener, Samuel Njuguna Kabue, Hyung Shik Kim, Stig Langvad, Robert George Martin, Martin Babu Mwesigwa, Coomaravel Pyaneandee, Valery Nikitich Rukhledev, and Damjan Tatić.



1.1 The author of the Communication is Ms. Viktoria Bacher. She submits the complaint on behalf of her brother, Mr. Simon Bacher, an Austrian national, born on 1 January 1990, in her quality of legal guardian.¹ The author claims that Austria has violated Simon Bacher's rights under articles 3, 9, 14, 19, 25, 26 and 28 of the Committee on the Rights of Persons with Disabilities. Austria acceded to the Optional Protocol to the Convention on 26 September 2008.

1.2 On 17 April 2015, the Committee acting through its rapporteur on new communications decided to examine the admissibility of the communication together with the merits.

A. Summary of the information and arguments submitted by the parties

The facts as presented by the author

2.1 Simon Bacher was born with Down syndrome. He has cerebral palsy, needs a wheelchair for his daily life, and has autistic spectrum. He also has a chronic pulmonary condition and immunodeficiency requiring regular medical assistance for which he regularly visits the University Hospital in Innsbruck.

2.2 Simon Bacher lives with his family in the town of Vomp in a house that they bought in 1983. This house and the two neighbouring weekend houses are only accessible by a path. When the parents of Simon Bacher bought the house, the Mayor told them that it was his legal duty to make sure that their home and the two neighbouring weekend houses would get an emergency access to prevent any risk in case of fire for example. However, the Mayor changed and nothing has never been done in that regard. The parents of Simon Bacher placed wooden steps, filled with gravel, to break the 18% gradient of the path. However, the family house remains only accessible through a the path, which is 35 meters long and 1.20 to 1.50 meters large. When it rains, snows or hails, the path becomes particularly dangerous for Simon Bacher and the persons who help him. As he grew, his parents became unable to carry him and decided to protect the path from bad weather with a roof. A planning permission was granted by the local authority to build such a roof, with the agreement of the immediate neighbours following a site meeting on 2 May 2001. Nonetheless, the weekend house neighbours (Mr. R and his uncle) were not invited to the meeting as under the law, only neighbours living within 15 meters of the place of the construction had to be consulted. In compliance with the licence granted by the Vomp municipality and with the financial support of the Tyrol government through a grant, the roof was built between November and December 2001.

2.3 Mr. R sued the author's parents before the Schwaz District Court on the grounds that the roof reduced the width of the path from 1.5 to 1.25 metres and its height, thereby violating his right of way. On 17 July 2002, the Court decided in favour of Mr. R and ordered the demolition of the roof.

2.4 The case gained media attention: two TV programmes were dedicated to the situation of Simon Bacher and his family in 2003 and 2004. His parents lodged an appeal before the Innsbruck Regional Court, claiming that the sole purpose of the roof was the safety of Simon Bacher, and requesting to take into account his disability and personal circumstances. In 2003, the Mayor was informed about the availability of an alternative path that had been closed and could serve to access Mr. R's weekend house, thereby resolving the problems faced by Simon Bacher to access his home. However, the same year,² a businessman purchased an extra plot to build a wall and a fence to block the entrance to his property, and the path of reference was closed. On 2 April 2003,³ the Innsbruck Court upheld the previous decision and set the value of the claim at from 4,000 Euros, thereby preventing any appeal to a higher court. The destruction of the roof was supposed to take place in December 2003. On

¹ See decision of the Schwaz District Court of 4 April 2012.

² No specific date is provided.

³ The author mentions always the date of receipt of the court decisions in his complaint.

the day planned for the removal of the roof,⁴ a court official, the neighbour's lawyer and a firm of builders arrived to the property. Nonetheless, because of an intervention of five members of Peoples First Organisation⁵ who had arrived to support Simon Bacher and his family, the builders refused to demolish the roof. On 2 April 2004, a firm of builders arrived unannounced to the path and, in the absence of any court official, they removed the roof. The family called the police and the Mayor, but nobody came.

2.5 Thanks to the media attention given to the case, a lawyer offered his assistance free of charge to the family and they submitted a complaint against the removal of the roof in the absence of a court official, and against the trespassing of their property by the workers. In their complaint, Simon Bacher's family insisted on the risks that he faces as a person with disability following the removal of the roof. On 16 July 2004, the Schwaz District Court held that Simon Bacher's family was "committed to accept the dismantling of the roof",⁶ making no reference to the safety allegations and the specific needs of Simon Bacher. On 1 October 2004, Simon Bacher's parents appealed that decision. On 22 April 2005, the Court rejected the appeal and ordered the Bacher family to pay the full cost of the demolition of the roof, without making reference to the allegations as to the way the destruction was carried out, or as to the consequences of this destruction for Simon Bacher.

2.6 In July 2004, three months after the removal of the roof, a hailstorm further damaged the path. The Tyrol government granted aid for the repair work, but because of the previous Innsbruck Court's decision, Mr. R had to be consulted before any reparation could be done on the path. He refused the aid offered by the government. As a result, the path that was in a very bad state could not be repaired. In October 2006, Simon Bacher's mother broke her arm helping him come down the deteriorated path.

2.7 In the meantime, Simon Bacher started undergoing Cystic Fibrosis treatment as an outpatient, which increased his need to use the path. His parents tried to solve the situation through new initiatives: they contacted the Ministry of Justice on 21 August 2003, which replied that they could not scrutinize the court's judgment; they tried to negotiate privately with the neighbour, who refused all contact. They requested the support of the NGO Peoples First. The District lawyers specialized on disability issues worked with the Red Cross to find a solution after the 2 April 2003 decision of the Innsbruck Court. The Red Cross and the District lawyers suggested a collapsible roof, but the local government replied that such roof could also give rise to a legal complaint and rejected the option. Late 2006, the neighbour tried to sell his plot at the value of a building land (100.000 Euros). On 11 January 2008, the businessman offered to buy the neighbour's plot, but the price he offered was deemed too low by Mr. R and his uncle. Shortly after, the businessman died in an accident and all negotiations related to the purchase of the land were interrupted.

2.8 In June 2008, the Chair of the Tyrol Green Party contacted the land regulations department, which arranged a meeting with the Mayor on 29 July 2008. The Mayor did not attend. The Chair contacted the Tyrol Land Projects department and suggested to buy the plot of Mr. R to build an edifice for a social project. But they were soon informed that the plot was non-building land. The Red Cross then suggested building a road to improve the alternative path, which required buying a 2-metre wide section of the businessman's land. On 13 October 2008, the offer was refused by the businessman's heir. The Governor of Tyrol was contacted by the family, but he did not respond. On 18 November 2009, the family contacted the Governor again, and they were informed that Mr. R was not interested in finding a solution, and that there was no hope for another hearing. They therefore stopped all contact. Mr. R. verbally threatened to sue the family for "professional damage" if they pursued any kind of action related to the original path.

2.9 Between 2011 and 2012, the Disability Ombudsman was contacted and attempted to mediate with the Mayor of Vomp, who suggested that Simon Bacher should be placed in a home or that the whole family should move away. Two more TV programmes were aired with the participation of the Minister of Justice and the Ombudsman. In the 2012 programme,

⁴ No precise date is provided by the authors.

⁵ No further information is provided on this organisation.

⁶ Unofficial translation provided by the author.

an email sent by the Mayor was read aloud, which stated again that Simon Bacher should go to a home for persons with disabilities, or that the family should move away.

2.10 The family refuses that Simon Bacher be institutionalized. As regards the suggestion that the family should move house, the author submits that this place provides Simon Bacher with a familiar environment, and with the stability that he needs as a person with autistic spectrum. Additionally, the family home is close to the Day Centre that Simon Bacher attends, and to the University Clinic where he receives his weekly treatments. She adds that Tyrol is a very expensive area and that the family could not afford moving to an equivalent place because their house has been highly devalued following the destruction of the path, and the resulting lack of safe access to the building.

2.11 In November 2009, Simon Bacher's family obtained free assistance from a lawyer thanks to their insurance company. The lawyer opened a case against the neighbours requesting a financial contribution to the repair of the path arguing that, had the roof been maintained, the path would not have been damaged, and Simon Bacher could have used it safely. They further submitted that, as no agreement was found and no remedies remained available with regard to the roof, the servitude holders should contribute to the maintenance of the path. On 9 February 2012, the Schwaz Court decided against the family, on the grounds that the neighbours barely used the path and are therefore not responsible for its maintenance. The decision was not appealed by Simon Bacher's family because they had understood that no further appeal was possible, and they had already lost 30,000 Euros and were in debt. In May 2014, Simon Bacher's family contacted the Mayor of Vomp, because the neighbour had started using the path very often. The Mayor refused to take any action and suggested to contact the judge of the Schwaz Court. On 28 May 2014, the judge replied that the matter of the case "had nothing to do with the rights of persons with disability"⁷ and that it was the family's use of the path that damaged it.

The complaint

3.1 The author claims that the State's overall failure to consider Simon Bacher's situation and to understand the "paradigm shift created by the human rights-centred approach in the Convention"⁸ constitutes a violation of his rights under articles 3, 9, 14, 19, 25, 26 and 28 of the CRPD.

3.2 She submits that the removal of the roof occurred prior to the entry into force of the Convention and the Optional Protocol, but argues that the violation of her brother's rights is continued because of the decisions adopted by State party's authorities after the entry into force of the Convention.

3.3 Regarding article 3, the author claims that her brother's right to be treated with respect and dignity and his right to participation and inclusion have been systematically ignored. Regarding article 9, she claims that her brother's right to accessibility has been violated by the Austrian courts because their decisions have prevented his family to take the measures that were necessary to protect the path and to enable Simon Bacher to use it safely to carry out his daily activities. In particular, she argues that the 2012 decision was adopted following the reasoning of the previous decisions, without taking into account Simon Bacher's disability. The author claims that her brother's rights to liberty and security under article 14 have been violated because the unsafe state of the path prevents him from leaving his house in bad weather conditions.

3.4 The author further claims that her brother's right to live independently has been affected by the lack of access to his home, which reduces his personal and independent mobility in violation of article 19 of the Convention. The author also submits that Simon Bacher's right to access to health services under article 25 has been violated because the unsafe conditions of the path and resulting lack of accessibility of the main road have prevented him from attending his treatments at the Innsbruck Hospital in bad weather

⁷ See original of the letter of the judge dated 28 May 2014: "Es ging hier um Kosten, mit den Rechten eines behinderten Menschen, insbesondere betreffend die Benutzung des Weges, hat bzw. hatte dies nichts zu tun."

⁸ The Author references Austria's 2013 Country Review before the CRPD.

conditions. For the same reasons, her brother's right to rehabilitation has been repeatedly violated, in violation of article 26 of the Convention.

3.5 Regarding article 28, the author claims that the lack of safe access to their home and the great costs of the unfruitful proceedings have violated her brother's right to adequate standard of living.

State party's observations on the admissibility

4.1 On 18 February 2015, the State party transmitted its observations on admissibility. It considers the communication inadmissible because the facts occurred prior to the entry into force of the Optional Protocol, domestic remedies have not been exhausted, and the rights guaranteed by the Convention were not invoked during domestic proceedings.

4.2 The State party submits that the Optional Protocol came into force on 26 October 2008 and that the construction of the roof and all pertinent proceedings took place before. It therefore considers that the communication should be declared inadmissible pursuant to article 2, paragraph (f), of the Optional Protocol.

4.3 The State party further submits that the author did not exhaust domestic remedies: even though the Innsbruck Regional Court in its appellate judgment of 2 April 2003 held that the ordinary further appeal was inadmissible, the Austrian Code of Civil Procedure (*Zivilprozessordnung – ZPO*) provides that a party may file a request with the appellate court to amend its verdict and declare an ordinary further appeal admissible. Even if the appellate body holds that the ordinary further appeal is inadmissible, the domestic remedies are only deemed to be exhausted if the request has been filed. The State party further maintains that the Innsbruck Regional Court did not amend the amount in dispute, which was assessed at 4,360.37€ in both instances.

4.4 Moreover, Simon Bacher's parents had the possibility to appeal the judgment of the Schwaz District Court of 8 July 2004. They did not explain why they did not do so.

4.5 The State party further submits that the author's parents did not appeal the decision of the Schwaz District Court of 9 February 2012 and considers that the author's submission that "no appeal is possible" and that the family has lost faith in the Austrian legal system relates to the risk of costs and doubts about its effectiveness. The complaint does not allege that there was a risk of excessive procedural duration, or that no effective redress could have been expected. The State party further notes that Simon Bacher's family did not contact the insurance company for the payment of costs, and that they did not apply to have access to legal aid. The State party further submits that no violation of the Convention has been alleged before domestic authorities.⁹

The author's comments on the State party's observations

5.1 On 31 March 2015, the author submitted her comments on State party's observations. She reiterates that even if the removal of the roof occurred prior the entry into force of the Optional protocol, the violation of her brother's rights continues through the decisions of the judicial and administrative authorities as they focus their decisions on property rights, without even taking into account his rights as a person with disability.

5.2 The author also reiterates that the roof was only built after the permission was granted by the mayor of Vomp. The family sought legal advice from the local government lawyer and a practicing lawyer, who both assured that in case of legal action by the servitude holders, the judge had to accept the necessary safety maintenance on a particularly deteriorated path, especially to attend the needs of Simon Bacher.

5.3. With regard to the State party's argument as to the failure to exhaust domestic remedies, the author submits that the lawyers consulted said that no effective remedies were available, as reflected by 13 years of unsuccessful attempts to seek her brother's rights. She also argues that the authorities would go on basing their decisions only on the contractually granted servitude, without taking into account Simon Bacher's safety and needs as a person

⁹ The State party refers to the CRPD, *S.C. v. Brazil*, Communication no. 10/2013, para 6.5.

with disability. After the decision of the Innsbruck Regional Court of 2 April 2003, the lawyer of the family maintained that, as the verdict was final, an appeal was not possible, and that they would not be able to get legal aid to appeal. The family also sought advice from a Public Prosecutor, a local government lawyer, the Tyrolean Law Society and the Federal Ministry of Justice, and all confirmed that no further remedies exist.

5.4 Regarding the allegation of the State party that Simon Bacher's family did not appeal the decision of the Schwaz District Court of 8 July 2004, the author submits that they have attempted to seek the correct legal advice throughout Austria, but that all the experts consulted¹⁰ advised them not to do so. They further submit that the judicial authorities clearly did not demonstrate any kind of interest for and attention to her brother's disability, and that further appeals would have been financially burdensome.¹¹

5.5 As regards the State party's argument that Simon Bacher's family did not appeal the judgment of 9 February 2012, the author submits that they had contacted the insurance company who told them that there was no reason to reactivate the case because it had been dismissed. The author further challenges the statement of the court that the family had severely damaged the path as they would drive on it with a caterpillar and a motor bike: caterpillar is a wrong description of their garden crawler and they only had an old moped, not a motorbike. The author submits that the path was damaged because of its exposition to bad weather that could have been avoided by the roof. She further underlines the contradictions of the neighbour's position: in the 2002 proceeding, he first said that he needed to use the path on a regular basis, while at the 2012 court hearing, he stated that he had not used the path in winter for the last 15 years.

5.6 Regarding the argument of the State party that no reference was made to a violation of the Convention's rights before the domestic courts, the author submits that her brother's disability was mentioned at all court hearings, and was witnessed by several experts who took part to the proceedings. The consequences of the lack of protection of the path on his capacity to move from and to the family home have been at the core of all the legal proceedings carried out.

State party's observations on the merits and further observations on admissibility

6.1 On 21 July 2015, the State party submitted further observations on the admissibility and merits of the complaint. It argues that the communication is based on civil proceedings with regard to the pedestrian and vehicular right of way (easement) granted to the owner of a neighbouring property (the entitled party) on the property owned by the Simon Bacher's father (the obliged party). This right was established by contract between the legal predecessors of the current owners in the years 1953 and 1955. Simon Bacher's father had a wooden roof structure built to cover the only existing private access path leading from the municipal road to his house. In this way, Simon Bacher's father wished to enable him to access the house more easily, especially in the winter months. Subsequently, the owner of a neighbouring property in his capacity as an entitled party filled a complaint arguing that the wooden structure covering the path made it impossible for him to exercise his contractually granted right to use the path with a vehicle. In addition, the courts were to issue a ruling on the question of the obligation to maintain the path. After reviewing the case carefully and conducting a hearing, the courts concluded that the wooden structure did violate the easement granted to the owner of the neighbouring property and had to be removed.

6.2 The courts established that it would be possible to choose a different wooden structure to adhere to the agreed easement. However, as Simon Bacher's father refused to comply with the court order to have the roof removed, the owner of the neighbouring property was allowed to remove the wooden structure, and Simon Bacher's father was required to reimburse him for the costs of this removal. The State party submits that Simon Bacher was never a party to these proceedings.

¹⁰ Government Handicap speaker, government handicap lawyer, a judge from the Innsbruck law court, etc.

¹¹ The two Court hearings cost 5,688€.

6.3 As to the subject matter of the complaint, the State party reiterates the arguments developed in its observations on the admissibility of the case. It further notes that neither a conciliation procedure, nor a judicial procedure pursuant to the Austrian Federal Act on the Equal Treatment of Persons with Disabilities was carried out.

6.4 Regarding the author's allegations under articles 3, 9, 14, 19, 23, 15, 26, 27 and 28 of the Convention, the State party refers to its domestic legislation. It submits that article 2 of the Austrian Federal Constitution includes a comprehensive general prohibition of discrimination. Article 7, paragraph 1, explicitly stipulates that "no person [...] may be placed at a disadvantage due to his/her disability", and that the "Republic (federal government, provincial governments and municipalities) is committed to ensuring the equal treatment of persons with and without disabilities in all areas of everyday life". Any disability based discrimination is thus expressly prohibited.

6.5 Among the measures taken to implement the constitutional prohibition of discrimination is the Austrian Federal Law on the Equal Treatment of Persons with Disabilities (BGStG) which entered into force on 1 January 2006. This law prohibits discrimination against persons with disabilities in private legal relationships in everyday life, which includes access to and provision of goods and services available to the public and also extends to the area of federal administration (§2 BGStG). Pursuant to §4, paragraph 1 BGStG, no person may be directly or indirectly discriminated against on the basis of a disability. Protection against discrimination also extends to persons who have a close relationship to persons with disabilities. In particular, this applies to cases where they are subject to discrimination or harassment due to the disability of the person with which they have a close relationship ("discrimination by association"). Violations of the prohibition of discrimination can give rise to damage claims (§9 BGStG). Such claims can arise in cases where the elimination of discrimination can be reasonably expected and could be effected without disproportionate burdens. However, to be admissible, such claim must be preceded by an attempt of conciliation proceedings before the relevant service department in the Austrian Federal Ministry of Social Affairs.¹² Finally, §8 BGStG stipulates that the federal government has a special obligation to avoid discrimination in its areas of activity as well as to take suitable and necessary measures to make its services and offers accessible to persons with disability.

6.6 Under Austrian law, an easement is a limited right in rem to use property belonging to another party (§§ 472 ss., Austrian General Civil Code – ABGB). This right is usually acquired by contract and by entry in the property register and grant the entitled party an absolute legal position. The party is protected against interferences with this legal position by any party. When referring to a pedestrian or vehicular right of way, the purpose is to enable the use of a property belonging to another party by the owner of the "entitled" property. The nature and scope of easements are determined by agreement. Contractual amendments, for example in cases where special personal needs exist, can be agreed upon between the parties. Unilateral amendments are not permitted. The obliged party must not take any measures which severely impair or endanger the entitled party's exercise of the easement, and must not exercise his/her rights in a way that creates an additional burden for the obliged party. However, the entitled party can change the way in which the easement is exercised, for example in order to adapt to ongoing technical progress. Pursuant to § 483 ABGB, the expense of maintaining a property for which an easement has been granted is generally to be borne by the entitled party. However, if the property is also used by the obliged party, he/she is required to cover an appropriate portion of the expense. In case of several entitled parties, all users must make a contribution to the necessary expense, commensurate to their share of use of the property. This share is to be measured in quantitative and qualitative terms.

6.7 As to the merits of the case, the State party considers that the author's allegations are not substantiated, and that the complaint does not show why an alternative solution which

¹² See §14 BGStG.

was considered possible in the conclusions of the Austrian courts would not be reasonable.¹³ Moreover, the communication does not explain why it would not have been reasonable to ensure suitable maintenance of the path in order to ensure that Simon Bacher (and his family) could access the family home in poor weather conditions without covering the path.

6.8 The State party also submits that it has always been striving to help Simon Bacher and his family, as demonstrated by its financial contribution to the construction of the wooden structure, indicating that it is reasonable to assume that the State would have helped to maintain the private path belonging to Simon Bacher's father in an appropriate condition. It however underlines that subsidies do not permit per se any conclusion as to the civil or administrative lawfulness of the subsidised project. It is for the contractor to obtain all required permits and authorisations. The State party refers to the Committee's jurisprudence in *H.M. v Sweden*,¹⁴ according to which a building permit merely defines technical and similar building requirements but does not permit the contractor to build on third party's plots of land or to affect or prevent the use of existing easements. It considers that this is another reason why the communication should be held inadmissible.

6.9 The State party further argues that the issues raised by the author do not fall within the scope of the Convention. The communication is based on civil proceedings on the pedestrian and vehicular right of way granted to the owner of a neighbouring property with regard to a property belonging to the author's father. This right of way intended to enable the neighbour to access his property and the path in question is his only way of access. The easement represents an "absolute" right and obliges the author's father. Nonetheless, the roof structure chosen to cover the path made it impossible for the owner of the neighbouring property to exercise his right of way, since the path was effectively narrowed from a width of 1.5 meters agreed in 1955 to 1.25 meter, and hence no longer allowed access for a construction vehicle required for the maintenance of the house on the neighbouring plot. This easement is established under private law, which does not interfere with the private autonomy of individuals requiring special protection.

6.10 The State party submits that, in such context, it does not have a general positive obligation to protect specific groups of persons in the core area of civil rights and obligations, and that restrictions can only be imposed if they are provided for by law, required in accordance with a legitimate public interest, and not disproportionate. A right in rem can only be withdrawn completely (namely expropriation) if the need arising from the public interest cannot be met in any other way. The obligations arising from articles 1 and 9 (1) of the Convention do not give rise to an obligation to guarantee that the interests of a person with disability *per se* justify an interference with property rights. In the present case, the obligations of the State party could extend only to private legal relationships in which entities offer facilities and services which are available to the public. They do not extend to purely private matters. In line with this interpretation, the prohibition of discrimination against persons with disabilities stipulated in the Austrian Federal Act on the Equal Treatment of Persons with Disabilities is only applicable to private legal relationships in everyday life to the extent that they involve access to and provision of goods and services available to the public. The facts underlying the present communication therefore do not fall within the scope of the Convention.

6.11 As to the author's argument that the decisions of the Austrian courts caused a disadvantage to her brother on grounds of disability, the State party refers to the Committee's jurisprudence recalling that a requirement or measure that is neutral can also lead to discrimination if a disproportionate number of persons with disabilities are affected by it.¹⁵ It recalls that States parties also violate the prohibition of discrimination by failing to grant different treatment to persons whose situation differs significantly without objective and

¹³ See the judgment on 4C 805/01 y 17, page 10: "[...] would it be possible to maintain a width of 1.50 meter by choosing a different supportive construction...", and the judgment relating to Judgment on 4 R 493/02g, page 10, third paragraph and page 23: "[...] such a hindrance will naturally not exist if a customary exercise of the rights under the easement is ensured".

¹⁴ See Communication 3/2011, *H.M. v. Sweden*, 19 April 2012, para. 7.4.

¹⁵ See communication *S.C. v. Brazil*, adopted on 2 October 2014, para. 6.4.

reasonable justification,¹⁶ and that consequently, not every case of unequal treatment amounts to discrimination. The State party further refers to the Committee's jurisprudence under which States parties enjoy a certain margin of appreciation as to the assessment of the reasonableness and proportionality of accommodation measures.¹⁷

6.12 In view thereof, the State party argues that when assessing proportionality, it is necessary to consider whether or not the application of the relevant legal provisions generally creates substantially greater disadvantages for a protected group or merely creates individual disadvantages in particular cases only. In the present case, restricting the easement of a third party would in any case have to be qualified as a disproportionate and undue burden. After a careful review of all information available to them, the Austrian courts came to the conclusion that the roof structure chosen by the obliged party interfered with the easement granted to the entitled party. However, they held that not every structure covering the path would represent such an interference. Therefore, the parties' interests could have been reconciled by choosing an alternative structure to cover the path. The State party concludes that the courts examined the arguments of both parties conscientiously and objectively, and that there is no indication of arbitrariness or denial of justice in this context.

6.13 As to the author's claim under article 3 of the Convention, the State party recalls that it governs general principles, but not individual rights. Regarding the submitted allegations under article 14, the State party argues that this disposition governs the right to liberty and security and therefore does not apply in this case, because Simon Bacher was not deprived of his liberty.

6.14 As regards the author's claim under article 19, the State party argues that it does not come into question because the communication does not refer to services or community support. The author's right to home and family under article 23 and the rights related to health under articles 25 and 27 of the Convention were not the subject of the Austrian court proceedings, which were initiated to clarify a legal relationship between the Simon Bacher's father and a third party.

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

7.1 The author notes with satisfaction that the State party recognizes the extent of her brother's disability, and that the only access to their family home is the footpath. However, the State party failed to take into account the special needs of her brother. She further argues that the original width of the path never permitted an access by a car, describing in details the characteristics of the path and the procedures that the family went through since 2002. She argues that the "roof construction" did not restrict any movement, but was an improvement of a deteriorated path access.

7.2 The author further submits that at the court hearing of 2002, the judge mentioned Simon Bacher but considered that the wooden poles/roof supports reducing the width of the path had to be removed within three months.¹⁸ She also informs that the building of the roof was not undertaken blindly by the family: it was done after analysing all available alternatives, and they had a building permit. Simon Bacher's father had sought legal advice from the local government's lawyer, and from a practising lawyer who all advised that, should the neighbour oppose the construction, the Judge had to accept necessary safety maintenance on a particularly deteriorated path. The author further recalls that following a thorough inspection of the place, the local government had provided a grant to the family on safety reasons for two-thirds of the cost of the roof. The local authorities did not anticipate any problems, and the lawyers considered that a negative decision from the neighbour would violate Simon Bacher's human rights.

7.3 As regards the State party's arguments that these rights were not claimed before domestic courts, the author recalls that Simon Bacher's disabilities and needs were

¹⁶ See Communication 3/2011, H.M. v. Sweden, op.cit., para. 8.3.

¹⁷ See Communications 5/2011, Jungelin v. Sweden, adopted on 14 November 2014, para. 10(5); 3/2011, H.M. v. Sweden, op.cit., paras. 8.5 and 8.8; X v. Argentina, adopted on 18 June 2014, para. 8.5; General Comment No. 2, paras. 25 and 31(b).

¹⁸ See decision of 15 July 2002.

thoroughly described in all the hearings and summons in 2002, 2003, 2004, 2010 and 2012. In this connection, the author refers to a statement made by the legal aid lawyer in the Court Hearing of 2002 according to which "the 12 year old son is severally impaired with his mobility, and is holder of a wheelchair permit. He was born with Down Syndrome and suffers from a lung disorder and is clarified chronic sick....due to his age, it is now impossible in winter with snow and ice to get Simon to the road [...]. The need to create a roof over the pathway access is to protect from snow and weather elements. [The neighbour's] request to remove the roof is immoral, vexatious and is against humanity". The roof was built in compliance with the planning permission and the local government granted 13,000 Euros towards the building costs of 20,000 Euros to attend Simon Bacher's needs. All these statements and evidence were ignored by the Judge in his ruling.

7.4 The author further refers to the Court hearing of 2 April 2003, where the judge requested Mr. R to explain why he contested the height of the construction. The neighbour replied that he had to carry building material to his "building plot", including a ladder upright, and that he needed to use a digger. Simon Bacher's father produced photographic evidence that this digger could still manoeuvre under the roof.¹⁹ The author describes the elements taken into account by the Court, alleging that wrong information had been provided by the neighbour, in violation of Simon Bacher's rights. After the hearing, Simon Bacher's family was informed by their lawyer that no further remedies was available, as the verdict was "Rechtskräftig" (final and absolute decision). They were also advised that no legal aid would be granted. On 18 August 2003, Simon Bacher's mother and a social worker from the local government went to the Public Prosecutor for advice. He said that no further remedy was available. Simon Bacher's family then consulted the local government's lawyer and other three lawyers, who all confirmed this advice.

7.5 On 2 April 2004, the lawyer who had proposed to assist the family free of charge submitted a Writ alleging that the roof had been removed illegally. A court hearing took place on 1 July 2004. A summons was issued stating that "Mrs Bacher has three children, one of whom is severally disabled and their only access to their home is like a toboggan run in winter and in summer a riverbed". On 22 April 2005, the Court rejected this complaint and Simon Bacher's family had to pay the cost of the removal of the roof (approximately 4,000 Euros). The court did not show any interest for the safety of Simon Bacher and the neighbour's lawyer only replied that the family could purchase his client's plot of land. The Judge dismissed the case on the grounds that "Mrs Bacher had to accept the roof was gone."

7.6 Regarding the State party's argument that the family could have appealed this decision, the author reiterates that they were advised that no effective remedy was available and that the family had no money left. Simon Bacher's parents sought support from different organizations of persons with disability, but all said that they could not do anything because the verdict was final.

7.7 The author argues that the Tyrolean local government had a key role in the development of their case. Many properties had been affected by the July 2004 hailstorm. Subsequently, the local government sanctioned a grant of 50% of the repairwork, estimated at some 9,500 Euros. However, due to Mr. R's actions regarding the roof, the local government considered that they had to request his authorization before repairing the path. The neighbour's lawyer replied that Simon Bacher's family should purchase the allotment plot from his client. Consequently, all assistance from the local government was cancelled.

7.8 As to the argument of the State party that the parties' interests could have been reconciled by choosing an alternative structure to cover the path, the author highlights that none of the alternatives proposed was accepted by Mr. R. The Red Cross approached him asking for the price of his plot. He replied that it was 100,000 Euros, an inflated price for an allotment plot. Many meetings took place between the Red Cross and legal professionals such as the two Federal Disability lawyers, and local government officials. Correspondence was exchanged, but to no avail. In this context, the mayor of the city suggested in letters he sent to a TV programme and to the Federal disability lawyer that Simon Bacher could go to a specialized home, or that the family could move away. He further stated in an article in the

¹⁹ Copy of the photos is provided.

Tiroler Tageszeitung that he had been involved with the case, but that no legal remedy was available. In 2009, the local government replied to Simon Bacher's family, saying that they had tried to consult the neighbour, but that he had replied that he could see no solution and that he refused to have a meeting. The local government therefore decided to close the case. New intents of negotiation were carried out by a lawyer for the Swarovski Concern, with the support of the Red Cross, but no solution was found. From the storm of July 2004 to November 2010, none of the consulted professionals and State representatives suggested any of the remedies referred to by the State party.

7.9 As regards the hearings of 2010 and 2011, the author submits that in 2007, Simon Bacher's parents were informed that under the Austrian General Civil law, all holders of a Servitude must contribute to maintenance. At the end of 2009, they received the agreement from their insurance that they could sue the holders of servitude on the path. Correspondence was exchanged between the Red Cross and the Servitude lawyers. The Red Cross pointed out that the rebuilding of the roof would avoid the servitude holders to pay the expensive maintenance they have to provide during winter to clear the snow and ice. A meeting was requested but was declined. A summons was therefore issued, making reference to Simon Bacher's disability, and his specific needs for a safe access. Two court hearings took place. The claims were dismissed on the grounds that the Servitude Holders had stated that they had never used the path in winter in the past 15 years, contrary to what they had said in 2002 when requesting the removal of the roof.

7.10 As to the court's argument that the family Bacher had damaged the path themselves using a "caterpillar", the author argues that they only used a crawler of 60 cm by 1, 2 metres. The family never had a motorbike, but only a light moped that has not been used for years. Photographic evidence was produced in court, demonstrating that the damage was caused by the 2004 hailstorm. Nonetheless, Simon Bacher's family had to repair the whole path in compliance with the 2010 decision. As no steps could be built because of Mr. R's position, the snow and ice still prevent Simon Bacher from moving safely in winter. Three professional witness were consulted, who all concluded that the only safe option was to cover the path again with a roof. Their testimony was presented to the court, but they were not referred to in the adopted decision. The author argues that none of the adopted decisions took into account Simon Bacher's rights, and they let the family assume all the costs and pressure that has resulted from the situation.

7.11 Regarding the State party's argument that Simon Bacher's family failed to exhaust domestic remedies, the author reiterates that they were not informed by the lawyers they consulted about the possibility to exhaust those remedies.

7.12 The author notes that according to the State party, "only in the course of the proceedings regarding the action for removing the roof construction did Simon's father refer to his son's disability". Simon Bacher was mentioned at all times of the procedures, including by three professional witnesses. In the last court hearing, questions were raised on the way Simon gets to the Day Care Centre and to any place to carry out his daily activities. His "Handicap Pass" was produced as an important piece of evidence to explain why the roof would have been necessary. However, no adequate assessment of the reasonable accommodation proposed (i.e. the construction of the roof on the path) was made, and all the decisions taken by the courts seem to support the position expressed by the neighbour's lawyer in the 2002 hearing that "the question of the regrettable disability of the Defendant's son is not relevant in law".

B. Committee's consideration of admissibility

8.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with article 2 of the Optional Protocol and rule 65 of the Committee's rules of procedure, whether the case is admissible under the Optional Protocol.

8.2 The Committee has ascertained, as required under article 2 (c) of the Optional Protocol, that the same matter has not already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

8.3 The Committee notes the State party's submission that the complaint should be held inadmissible pursuant to article 2, paragraph (f), of the Optional Protocol because the facts referred to occurred before the entry into force of the Optional Protocol in the State party. The Committee also takes note of the author's claim that the facts that are subject to her communication continued after the entry into force of the Convention and the Optional Protocol in respect to the State party, in so far as it refers to decisions or official statements of State party's authorities adopted from 2009 to 2014.

8.4 The Committee recalls that in compliance with article 2 (f) of the Optional Protocol, the Committee cannot deal with events occurred prior to the entry into force of the Convention for the concerned State party, "unless those facts continued after that date". The Committee notes that the appellate judgment of the Innsbruck Regional Court of 2 April 2003, and the judgment of the Schwaz District Court of 8 July 2004 were adopted before the entry into force of the Convention in the State party. However, it also notes that these decisions were referred to by the author as part of the context in which the 9 February 2012 judgement of the Schwaz District court was adopted, and in which the judge of the Schwaz court sent his reply dated 28 May 2014 to the new request for support from the family of Simon Bacher.

8.5 The Committee notes that even though the decision of 9 February 2012 mainly addressed the request of the Bacher family for their neighbours' financial support to maintain the path, the disability of Simon Bacher was referred to. Furthermore, the Committee considers that this complaint was submitted as an ultimate option after having exhausted all domestic remedies related to the roof and the intrinsically linked issue of the accessibility of the path, and after seeing that no agreement could be found with the concerned neighbours. The Committee therefore considers that the 2012 judgment and the 2014 official reply must be read in the context of the accessibility issue that is at the core of all the procedures initiated by the Bacher family and can therefore not be disassociated from the decisions of the Innsbruck Regional court of 2003, and of the Schwarz District court of 2004 rejecting the claims of the family of Simon Bacher. The 2003 and 2004 decisions therefore constitute facts which the Committee is requested to take into account as part of the context of the author's complaint.

8.6 In that regard, the Committee finally notes that in its decision of 2012, the Schwarz District court did not merely examine formal aspects or errors of law in the previous decisions. Rather, it examined again the family's claim for the contribution of their neighbours to the costs they faced to make the path accessible. Accordingly, the Committee considers that it is not precluded *ratione temporis* to examine the present communication as some of the facts submitted to it took place after the entry into force of the Convention and the Optional Protocol for the State party.²⁰

8.7 The Committee also notes the State party's argument that the family of Simon Bacher failed to exhaust domestic remedies. In that regard, the Committee notes that according to the State party, Simon Bacher's parents could have appealed the 2003 appellate judgement of the Innsbruck Regional Court "even if the appellate body [had] hold that ordinary further appeal is inadmissible" under section 461 of the Austrian code of civil procedure (ZPO). Under this disposition, a party may file a request to appellate a court to amend its verdict and declare an ordinary further appeal admissible through an ordinary further appeal, or if the subject matter of the proceedings exceeds 30,000 Euros, by an extraordinary further appeal. However, the Committee also notes that the appellate judgement of 2 April 2003 indicates that the adopted decision could not be revised ("Die Revision ist nicht zulässig (§ 502 Abs 1 ZPO)"), and that the lawyers and authorities consulted by the Bacher family at that time all confirmed that the decision of the Innsbruck Regional Court was final ("rechtskräftig"). The Committee further notes that the Code of civil procedure sets up clear conditions under which such an appeal could be submitted, which do not seem to correspond to the case under review. Additionally, the State party does not provide any argument that would enable it to conclude that such an appeal would have had any chance of success. The Committee therefore

²⁰ See CRPD, communication No. 5/2011, *Jungelin v. Sweden*, Views adopted on 2 October 2014, para. 7.6

concludes that the appeal referred to by the State party constitutes an extraordinary remedy which does not have to be exhausted for the purposes admissibility.²¹

8.8 The Committee also notes the State party's argument that Simon Bacher's parents had the possibility to appeal the judgment of the Schwaz District Court of 8 July 2004, and the decision of the Schwaz District Court of 9 February 2012. The Committee also notes the author's argument that they did not do so because none of the legal experts they consulted told them that they should have appealed the 2004 decision, and it was clear that the judicial authorities had not demonstrated any kind of interest for and attention to her brother's disability. The Committee also notes that the family sought legal advice with lawyers from different parts of the country who all considered that an appeal would be ineffective, including as regards the February 2012 judgement. Additionally, the State party does not provide any argument that would enable the Committee to conclude to the contrary, or to consider that the suggested remedies would have any chance of success after more than 10 years of judicial proceedings during which the special needs of Simon Bacher as a person with disability were not considered relevant. The Committee recalls that under article 2(d), only remedies with a reasonable chance of success need to be exhausted. Accordingly, the Committee considers that it is not precluded from examining the present communication for the non-exhaustion of domestic remedies.

8.9 As regards the State party's submission that the family of Simon Bacher did not allege any violation of the Convention before domestic authorities, the Committee notes that since the initial complaint of the neighbours requesting the destruction of the roof in 2002, the issue before the courts was always linked to the question of the accessibility of the family home, including for Simon Bacher as a child with disabilities. In particular, the Committee notes that the 2012 proceedings that were initiated by the family of Simon Bacher to request that the servitude holders contribute to the maintenance of the path so that it is accessible. The Committee considers that since this issue was before the domestic authorities, it is not prevented from examining the author's allegations under article 9 of the Convention.

8.10 With regard to the author's other allegation, however, the Committee notes that the information provided does not reflect that the family of Simon Bacher raised these issues before the domestic authorities.²² In that connection, it notes that to bring his/her claims before the Committee, the author must have raised them in substance at the domestic level,²³ so as to give domestic authorities and/or courts an opportunity to deal with such claims.²⁴ The Committee therefore finds the author's allegations linked to the liberty and security of Simon Bacher (article 14); his possibility to live independently and to be included in the community (article 19); his health (article 25); his right to habilitation and rehabilitation (article 26) and to adequate standard of living (article 28) inadmissible under article 2(d) of the Optional Protocol.

8.11 As regards the author's allegations under article 3 of the Convention, the Committee recalls that, in view of its general character, this article does not in principle give rise to free-standing claims and can only be invoked in conjunction with other substantive rights guaranteed under the Convention.²⁵

8.12 The Committee therefore declares the communication admissible, insofar as it appears to raise issues under article 9, read alone and in conjunction with article 3 of the Convention, and proceeds with its consideration of the merits.

²¹ See for example CCPR, communication No. 1873/2009, *Alekseev v. Russian Federation*, Views adopted on 25 October 2013, para. 8.4.

²² See Communication 7/2012, *Noble v. Australia*, Views adopted on 2 September 2016, para 7.8.

²³ See for example CEDAW, communication No. 8/2005, *Kayhan v. Turkey*, decision of 27 January 2007, para. 7.7.

²⁴ See for example CEDAW, *N.S.F. v. United Kingdom of Great Britain and Northern Ireland*, decision of inadmissibility adopted on 30 May 2007, para. 7.3.

²⁵ See communication No.11/2013, *Beasley v Australia*, Views adopted on 1 April 2016, para. 7.5.

Consideration of the merits

9.1 The Committee has considered the present communication in the light of all the information that it has received, in accordance with article 5 of the Optional Protocol and rule 73 (1) of the Committee's rules of procedure.

9.2 As argued by the State party, the pedestrian and vehicular right of way (easement) granted to the neighbours of the Bacher's family gave rise to a dispute between individuals (the entitled party and the obliged party), which was not directly initiated by the authorities. In that regard, the Committee notes the State party's argument that the obligations of the State party could extend only to private legal relationships in which entities offer facilities and services which are available or offered to the public, and that they do not extend to "purely private matters". However, the Committee also recalls that this type of dispute is governed by the legal order of the State party, which, in any event, bears the ultimate responsibility to ensure that the rights under the Convention are respected, including the right for a person with disability to access to his/her home, but also to access to community life and to public services such as education and health. Accordingly, although disputes resulting from the construction of a roof on a path are between two individuals, the State party has an obligation to, *inter alia*, guarantee that the decisions adopted by its authorities do not infringe the rights of the Convention.

9.3 States parties do not only have the obligation to respect Convention rights, and, it follows, to refrain from infringing them, but they also have the obligation to protect them by adopting measures to prevent the direct or indirect interference of individuals in the enjoyment of these rights. Thus, although the Convention primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Convention extends to relations between individuals. In this connection, the Committee also recalls that under article 4 (1) e, of the Convention, "States Parties undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability. To this end, States Parties undertake: (e) to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise". A property right issue linked to the exercise of a contract between individuals and the conflict arising from it therefore has to be interpreted through the Convention. Accordingly, when the courts of the State party intervened to resolve the conflict between the parties, they were bound by the Convention. The State party's argument that the communication deals with a dispute that is exclusively between individuals and therefore does not fall under the Convention therefore does not stand.²⁶

9.4 The Committee recalls that "accessibility is a precondition for persons with disabilities to live independently and participate fully and equally in society"²⁷. In compliance with article 9 of the Convention, States parties shall take appropriate measures to ensure to persons with disabilities access, on an equal basis with others, to the physical environment, to transportation, and to other facilities and services open or provided to the public, both in urban and in rural areas. These measures shall include the identification and elimination of obstacles and barriers to accessibility.

9.5 The Committee further recalls that, in compliance with article 2 of the Convention, reasonable accommodation may have to be adopted as "necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden [...] to ensure to persons with disabilities the enjoyment or exercise of all human rights and fundamental freedoms on an equal basis with others", including their right to accessibility²⁸

9.6 In that context, "the focus is no longer on legal personality and the public or private nature of those who own buildings, transport infrastructure, vehicles, information and communication, and services. [...] Persons with disabilities should have equal access to all

²⁶ See CESCR, Communication 5/2015, Mohamed Ben Djazia and Naouel Bellili, Views adopted on 20 June 2017, para.14.2.

²⁷ See General Comment No. 2, "Article 9: accessibility", para. 1.

²⁸ *Ibid.*, paras. 25 and 26

goods, products and services that are open or provided to the public in a manner that ensures their effective and equal access and respects their dignity.”²⁹

9.7 The Committee recalls that, when assessing the reasonableness and proportionality of accommodation measures, State parties enjoy a certain margin of appreciation. It further considers that it is generally for the courts of States parties to the Convention to evaluate facts and evidence in a particular case, unless it is found that the evaluation was clearly arbitrary or amounted to a denial of justice.³⁰ In the present case, the role of the Committee is to assess whether the decisions adopted by the courts of the State party have enabled the respect of the rights of Simon Bacher under article 9, read alone and in conjunction with article 3 of the Convention.

9.8 The Committee notes the State party’s argument that it has always been striving to help Simon Bacher and his family, as demonstrated by its financial contribution to the construction of the wooden structure (see para. 6.8). The Committee also notes that according to the State party (i) the easement at stake in the case under review represents an “absolute” right which obliges the author’s father; (ii) in such context the State party does not have a general positive obligation to protect specific groups of persons in the core area of civil rights and obligations; (iii) restrictions can only be imposed if they are provided for by law, required in accordance with a legitimate public interest, and not disproportionate; (iv) the obligations arising from article 9 (1) of the Convention do not give rise to an obligation to guarantee that the interests of a person with disability *per se* justify an interference with property rights; and (v) the parties’ interests could have been reconciled by choosing an alternative structure to cover the path. In that regard, the Committee notes that the destruction of the roof on the path leading to the house of the Bacher family does not only limit Simon Bacher’s access to his home: it has also limited his access to social activities, and to the public services that he needs for his daily life, such as education, health institutions, and public services at large. It also notes the author’s argument that Mr. R did not accept any of the alternatives proposed to cover the path, and that when assessing the situation, the courts did not consider that it was relevant to take into account Simon Bacher’s situation.

9.9 In this context, the Committee notes that the decision of the Schwaz court dated 9 February 2012 adopts the same line as the previous decisions of the courts of the State party in that case: it does not make a thorough analysis of the special needs of Simon Bacher, while they had been clearly referred to by his parents, as in all previous court hearings and summons. State party’s authorities have rather considered that the subject matter of the judicial proceedings “had nothing to do with the rights of persons with disability”,³¹ and focused on the resolution of the property right issue at stake. The multidimensional consequences of the decisions adopted by State party’s authorities on the accessibility rights of Simon Bacher were therefore ignored, leaving on his family the whole responsibility to find ways to enable his access to his home and to the external public services that he needs for his daily life. The Committee therefore considers that the decision of the Schwaz court of 9 February 2012, read in the context of the previous judicial decisions adopted by the courts of the State party in the case, constitutes a denial of justice for Simon Bacher, in violation of article 9, read alone and in conjunction with article 3 of the Convention.

C. Conclusion and recommendations

10. The Committee, acting under article 5 of the Optional Protocol, is of the view that the State party has failed to fulfil its obligations under article 9, read alone and in conjunction with article 3 of the Convention. The Committee therefore makes the following recommendations to the State party:

(a) Concerning Simon Bacher, the State party is under an obligation to provide him with an effective remedy, in particular:

²⁹ *Ibid.*, para. 13.

³⁰ See Communication 5/11, Marie-Louise Jungelin v. Sweden, decision adopted on 2 October 2014, para. 10.5

³¹ See letter of the judge of Schwaz Court dated 28 May 2014.

(i) To facilitate a solution to the conflict related to the use of the path which is the unique way of access to the Bacher family's home, taking into account the special needs of Simon Bacher as a person with disability and the criteria established in these Views;

(ii) To award Simon Bacher financial compensation for the violations suffered; and

(iii) To reimburse the author for the legal costs reasonably incurred in domestic proceedings and in the processing of this communication.

(b) The State party is also under an obligation to take measures to prevent similar violations in the future. In this perspective, the State party shall:

(i) Ensure continuous capacity-building of the local authorities and courts responsible for monitoring implementation of accessibility standards;

(ii) Develop an effective monitoring framework and set up efficient monitoring bodies with adequate capacity and appropriate mandates to make sure that accessibility plans, strategies and standardization are implemented and enforced;

(iii) Translate the Views of the Committee to the official language of the State party, to publish them and to distribute them widely, in an accessible format, so that they reach all sectors of the population.

11. In accordance with article 5 of the Optional Protocol and rule 75 of the Committee's rules of procedure, the State party should submit a written response to the Committee in six months' time that includes information on all actions taken in the light of the Views and recommendations of the Committee.

Annex

Individual Opinion of Committee member Damjan Tatic (dissenting view)

1. I am not persuaded by the Committee's treatment of admissibility *rationae temporis* of the author's allegations of violations of the Convention. The Committee notes that the Appellate judgment of the Innsbruck Regional Court of 2 April 2003, and the judgment of the Schwaz District Court of 8 July 2004 were adopted **before** the entry into force of the Convention in the State party. It also notes that these decisions were referred to by the author as part of the context in which the 9 February 2012 judgement of the Schwaz District court was adopted. However, the 2012 judgment **only** related to the claim for payment that the family of Simon Bacher presented to request the neighbours who have a servitude over the path.
2. The 2012 judgement was therefore not linked with the issue of accessibility, and it cannot be considered as a continuation or reaffirmation of the decisions adopted before the entry into force of the Convention in the State party. Accordingly, I am of the view that the author's allegations of violations of the Convention are inadmissible *rationae temporis*.
