



# Convention on the Rights of the Child

Distr.: General  
7 March 2025  
English  
Original: French

## Committee on the Rights of the Child

### Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, in respect of communication No. 153/2021\* \*\* \*\*\*

<i>Communication submitted by:</i>	A.M. and E.P. (represented by counsel, Benedikt Schneider)
<i>Alleged victims:</i>	The authors
<i>State Party:</i>	Switzerland
<i>Date of communication:</i>	20 July 2021 (initial submission)
<i>Date of adoption of Views:</i>	27 January 2025
<i>Subject matter:</i>	Children's right to visit and contact their mother in detention; terms of detention
<i>Procedural issues:</i>	Exhaustion of domestic remedies; manifestly ill-founded submission; victim status
<i>Substantive issues:</i>	Best interests of the child; right of the child to be heard in any judicial and administrative proceedings affecting the child; prolonged separation of children from a parent in detention who is their primary caregiver; discrimination
<i>Articles of the Convention:</i>	2, 3, 9 and 12
<i>Articles of the Optional Protocol:</i>	7 (d), (e), (f) and (h)

1.1 The authors of the communication are A.M., born on 30 January 2007, and E.P., born on 26 September 2013, both nationals of Switzerland. They claim that their rights under articles 2, 3, 9 and 12 of the Convention would be violated if the State Party continued to separate them from their mother, A.P.W., who is detained. The authors request that the

\* Adopted by the Committee at its ninety-eighth session (13–31 January 2025).

\*\* The following members of the Committee participated in the examination of the communication: Suzanne Aho, Aïssatou Alassane Sidikou, Thuwayba Al Barwani, Hynd Ayoubi Idrissi, Mary Beloff, Rinchen Chopel, Rosaria Correa, Bragi Gudbrandsson, Sopia Kiladze, Benyam Dawit Mezmur, Otani Mikiko, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova, Benoit Van Keirsbilck and Ratou Zara.

Pursuant to rule 8 (1) (a) of the Committee's rules of procedure under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Philip Jaffé did not participate in the examination of the communication.

\*\*\* A joint (dissenting) opinion by Bragi Gudbrandsson, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova and Benoit Van Keirsbilck is annexed to the present Views.



Committee grant them interim measures, in particular that their mother's sentence of imprisonment be commuted to semi-detention closer to them or to monitoring by means of electronic tagging. The authors are represented by counsel. The Optional Protocol entered into force for the State Party on 24 July 2017.

1.2 On 27 July 2021, in accordance with article 6 of the Optional Protocol, the Working Group on Communications, acting on behalf of the Committee, requested the State Party to take the necessary measures to enable A.M. and E.P. to visit their imprisoned mother regularly, taking into account their status as minors and their wishes and interests.<sup>1</sup>

1.3 On 13 August 2021, the State Party informed the Committee that, after spending a brief period in the secure enforcement regime at the Grosshof correctional facility in Lucerne, A.P.W. had been transferred to an open enforcement regime at the Hindelbank facility. Under national law, all women prisoners are entitled to outings after serving 2 months of their prison sentence, and to release on temporary licence after serving one sixth of their sentence.<sup>2</sup> Thus, since 16 April 2021, A.P.W. has been entitled to outings and release on temporary licence. The sentence enforcement system at the Hindelbank facility provides for an inmate's transfer to external accommodation as the final stage of the open enforcement regime. This becomes possible no earlier than 18 months before the person has served two thirds of his or her sentence (15 July 2023, in the present case), at which point parole may be granted. Once half the sentence has been served, the person may be transferred to a day release employment programme. The person works outside the prison and lives in a supervised environment overseen by the Hindelbank facility. This option has been available to A.P.W. since 15 October 2022. The possibility of parole will be considered on 15 July 2023.

1.4 The State Party points out that the Hindelbank facility specializes in the enforcement of sentences and measures for women. Many of the women held there are mothers, and the facility allows generous contact between them and their children. In its submission, the State Party explains the general rules governing visits and contact, the options being visits to the establishment, telephone calls, mail, release on temporary licence and outings. A.P.W. is being held in an open enforcement regime and has so far used almost all her outings and leave to see the authors. As soon as she can be transferred to external accommodation, she will be able to host the authors for weekend visits. As the external accommodation unit is currently being renovated, it will not be possible to transfer her before February or March 2022. The authors visited their mother in the Hindelbank facility on 2 April 2021 and 12 May 2021. Distance and timing (the authors are available on Wednesday afternoons) have been difficult to coordinate and are the reason why other visits have not taken place. A.P.W. has one slot on Mondays, Thursdays, Fridays and Saturdays, two slots on Tuesdays and Wednesdays and, from time to time, three 20-minute slots on Sundays for telephone calls. She uses these time slots to call the authors, and also receives regular calls from them.

1.5 Since 16 April 2021, A.P.W. has been entitled to release on temporary licence. The cantonal authorities had suspended release on temporary licence until 29 April 2021 owing to the health crisis. The first outing, which lasted five hours, took place in May 2021. To date, A.P.W. has been granted three 5-hour outings and two 32-hour periods of release on temporary licence. She spent two of the three outings and both periods of release with the authors.

1.6 The enforcement authority allowed A.P.W. to postpone serving her sentence by nearly a year, to enable her to arrange for the optimal care of the authors. As she was not cooperating, however, it had been necessary to put in place an emergency solution. A.M. lives at a boarding school and spends weekends either at the boarding school or with a friend of her mother's or with her father. E.P. was initially taken in by a foster family. Since August 2021, he has lived with his maternal aunt in the canton of Valais. The children's guardian has stated before the competent authority that a good solution has been found for each of the children. They can talk to their mother by phone every day and see her in the setting described above. Visits are arranged between A.P.W. and her sister or a friend. The current possibilities for

---

<sup>1</sup> This arrangement should not give rise to an additional burden for either A.M.'s boarding school or E.P.'s foster family.

<sup>2</sup> In accordance with the directive of 19 November 2012 of the Concordat Conference of the Northwestern and Central Switzerland Concordat on the enforcement of sentences and measures.

contact and the care arrangements for the authors ensure that their relationship with their mother is maintained, while respecting their best interests. Thus, in the opinion of the State Party, additional measures are neither necessary nor appropriate.

### **Factual background**

2.1 On 3 July 2014, the Criminal Court of the canton of Lucerne found A.P.W. guilty of repeated infringements of article 19 (2) of the Federal Act on Narcotics and Psychotropic Substances of 3 October 1951 and handed down a custodial sentence of 5 years and 6 months. A.P.W. was also convicted of money-laundering for a second time, for which she received a suspended sentence of 60 day fines of 30 Swiss francs (SwF) each. A.P.W. appealed this decision to the Lucerne Cantonal Court, which upheld the guilty verdicts but reduced the sentence to a 3-year term of imprisonment, including 12 months' imprisonment unsuspended and 24 months' imprisonment suspended, with a probation period of 3 years and a suspended fine of 50 day fines of SwF 80 each. On 12 July 2017, on appeal by the Office of the Public Prosecutor, the Federal Court referred the case back to the Cantonal Court for a new decision on the sentence. On 21 November 2017, the Lucerne Cantonal Court handed down a custodial sentence of 4 years and 6 months, less 138 days spent in pretrial detention, with 50 day fines of SwF 30 each, suspended for three years.

2.2 By a decision of 26 February 2019, the start of the custodial sentence was set for 25 March 2019. A.P.W. appealed this decision to the Department of Justice and Security of the canton of Lucerne on 19 March 2019. On 15 May 2019, the Department rejected the appeal and set the start of the sentence for 9 July 2019. On 5 June 2019, A.P.W. appealed to the Lucerne Cantonal Court, which dismissed the appeal on 14 November 2019 and set the start of the sentence for 28 January 2020. A.P.W. appealed this decision to the Federal Supreme Court. On 24 January 2020, the Federal Supreme Court granted suspensive effect to the appeal. On 17 August 2020, it rejected her appeal. In this decision, the Federal Supreme Court held that the plaintiff had caused her own separation from her children and that neither she nor the children were entitled to alternative judicial enforcement. The children have not brought proceedings on their own behalf. Furthermore, the children are not directly affected by the decision, since they themselves will not be imprisoned. On 2 September 2020, the Enforcement and Probation Service of the canton of Lucerne set the start of the sentence for 22 September 2020.

2.3 A.P.W. filed appeals with the Department of Justice and Security of the Canton of Lucerne on behalf of the authors, complaining of the disproportionately short time between the date of the judgment and its enforcement, and the violation of the children's best interests, the rights of the child and the rights of the family, owing to the separation and the terms of her detention. She also stated that E.P.'s father had died and that A.M. would be undergoing a serious operation in October 2020. By a decision of 14 October 2020 handed down by the Department of Justice and Security of the canton of Lucerne, these appeals were rejected and A.P.W.'s detention was set for 1 December 2020. The suspensive effect of any appeal was withdrawn. By an order dated 16 November 2020, the Lucerne Cantonal Court rejected a request to restore suspensive effect. An appeal against that decision was rejected by the Federal Supreme Court in its ruling of 26 November 2020.

2.4 On 1 December 2020, A.P.W. began serving her sentence at Grosshof prison. A.M. was placed in a boarding school and E.P. in a foster home. Only a few visits to their mother were able to be organized. Visits took place behind glass, with little or no physical contact owing to the coronavirus disease (COVID-19) pandemic.

2.5 On 12 March 2021, the Federal Supreme Court ruled that the authors were not the recipients of the enforcement order and were not directly or immediately concerned by it; they therefore had no right of appeal because they had no status as a party. Indeed, the children would be only indirectly affected by their mother's imprisonment and would only have the status of third parties. The only issue was the timing of the sentence, not the children's best interests. Nor were the children entitled to the appointment of a legal representative, as out-of-home placement was a secondary consequence of their mother's sentence.

2.6 A.M. suffers from a hereditary muscular disease with progressive scoliosis and occasionally urinates in bed. E.P. suffers from a sleep disorder. When their mother began serving her prison sentence, the children, who are particularly in need of protection, were placed with other people. Theoretically, Hindelbank prison, where their mother is being held, allows around four hours of visits per month. The prison is about two hours away by car or public transport, and the authors are not allowed to make visits unaccompanied. The primary caregiver's care function has thus been completely interrupted, an interruption that has been imposed without regard for the child's well-being, even though other forms of enforcement of the sentence could be used.

### **Complaint**

3.1 The authors claim that the administration, the Lucerne Cantonal Court and the Federal Supreme Court denied them their procedural rights and failed to take into account their best interests in the enforcement of their mother's prison sentence, and also failed to provide them with an opportunity to be heard.

3.2 The authors submit that the contested enforcement decisions violate their rights under: (a) article 12 of the Convention, in that they were not heard, they were not notified of the decision, they were not able independently to represent their rights in the proceedings, they were not afforded procedural rights and no payment was made for legal costs; (b) articles 3 and 9 of the Convention, in that their best interests were disproportionately violated by their placement with a third party, separated from each other (this applies to both the order and the act of separation); and (c) article 2 of the Convention, in that the children were separated from their mother through no fault of their own and without necessity, and therefore suffer a significant developmental delay compared to other children.

3.3 In its decisions of 17 August 2020 and 12 March 2021, the Court is said to have violated the authors' rights in the criminal proceedings, since they were not treated as subjects of law, were not heard and were not able to exercise their procedural rights. Neither their rights nor their interests were taken into account and included in court decisions.

3.4 The authors note that, as children, they are seriously and directly affected by the enforcement order issued against their mother. They add that children should be heard as a matter of urgency before such a decision is taken and should be included in the proceedings as a separate legal entity. The best interests of the child are upheld if the sentence is served near to where the children live, making regular visits possible, and if the sentence is served by means of an electronic tag or in semi-detention. In this context, it is irrelevant whether a national legal basis exists or not. The absence of a legal basis is not the fault of the child concerned. The best interests of the child as a general legal principle are also upheld in international instruments that have been ratified and therefore have constitutional status. It is contrary to a child's best interests to be completely separated from his or her parents.

3.5 The authors ask the Committee to take steps to ensure that the State Party upholds their best interests as children and their rights in this case and takes account of them in the federal decision. They also ask it to ensure that the rights of the child are effectively respected in similar cases involving the detention of parents of minors, including by genuine inclusion in the process and safeguarding of the best interests of the child in sentence enforcement. They further ask it to award appropriate compensation to the parties. Neither A.P.W. nor the authors have any assets or income.

### **State Party's observations on admissibility and the merits**

4.1 On 28 March 2022, the State Party submitted a factual update. It notes that A.P.W. has been detained in execution of her custodial sentence since 1 December 2020. On 4 December 2020, she lodged an application with the European Court of Human Rights, claiming a violation of rights under article 6 (1) on the right to a fair trial and article 8 on the right to respect for private and family life of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). On 11 February 2021, the Court found that the evidence before it did not disclose any appearance of a violation of the rights and freedoms set out in the Convention and that the application was inadmissible. On 7 December 2020, the Lucerne Cantonal Court dismissed A.P.W.'s

appeal. The appeal against this ruling, lodged with the Federal Supreme Court, was rejected by the latter on 12 March 2021.

4.2 The State Party maintains that A.P.W.'s custodial sentence was imposed by a decision of 21 November 2017 and that the authors failed to submit a communication to the Committee on the matter within the time limit set out in article 7 (h) of the Optional Protocol. Therefore, the sentencing cannot be the subject of the present proceedings.

4.3 The State Party also points out that the authors' communication relates to decisions that became final with the Federal Supreme Court's rulings of 17 August 2020 and 12 March 2021. These decisions concern the sentence enforcement order, that is to say the date on which the sentence was to begin and the facility in which it was to be served. The domestic proceedings did not cover the terms of the enforcement, in particular visiting rights and leaves of absence. Should the authors wish to contest them, they have separate domestic legal means at their disposal for this purpose. Similarly, decisions concerning the placement of the authors come within the jurisdiction of the child and adult protection authority and are not the subject of the present proceedings. Authors should avail themselves of the domestic remedies available if they intend to contest them. These elements go beyond the scope of the dispute and cannot be examined by the Committee in the present case.

4.4 According to the European Court of Human Rights, persons claiming to be victims must be able to show that they were directly affected by the measure complained of.<sup>3</sup> While the Court admits certain exceptions concerning the right to life or the prohibition of torture, such exceptions are in principle excluded with regard to the other articles of the European Convention on Human Rights. Thus, in a case concerning the deportation from Switzerland of a father who had been convicted of drug offences, the Court found that neither the wife nor the children of the complainant were threatened with deportation, that they were not parties to the domestic proceedings and that their arguments before the Court were entirely consistent with those of their father or husband. The Court held that the complainant's wife and children, who were minors, did not have standing to file, on behalf of the complainant, a complaint relating to the right to respect for private and family life that they were invoking. It found that their claims were incompatible *ratione personae* with the European Convention on Human Rights. The present case concerns the enforcement of A.P.W.'s custodial sentence. The authors were not parties to either the criminal proceedings or the first set of domestic proceedings concerning the enforcement of the sentence. In the second set of domestic proceedings concerning the enforcement of the sentence, the Federal Supreme Court noted that the authors were not recipients of the enforcement order and were not directly affected by it. As they were not parties to the proceedings, they did not have standing to appeal. Accordingly, the present communication should be declared inadmissible as it is incompatible *ratione personae* with the Convention on the Rights of the Child.

4.5 With regard to the exhaustion of domestic remedies, the State Party asserts that the authors' care, as arranged for by the child and adult protection authority, and the conditions for authorized visits to the Hindelbank prison were not the subject of the domestic proceedings, which related solely to the enforcement of A.P.W.'s sentence, that is to say the date and place of her detention. The authors have not exhausted domestic remedies regarding their complaint.

4.6 As regards the alleged violation of article 2 of the Convention, the authors do not explain how the contested decisions are discriminatory and incompatible with the safeguards set out in this provision. The complaint must be declared inadmissible under article 7 (f) of the Optional Protocol.

4.7 The State Party states that the authors were not parties to the domestic proceedings. Insofar as they were indirectly affected by decisions, their interests were represented by their mother. The mother has repeatedly raised the issue of their interests, and they have been duly taken into account by all the authorities involved. The authors' interests were identical to those of their mother. The authors do not claim that there was a conflict of interest or the risk of a conflict of interest between their views and those of A.P.W. The authors do not allege

<sup>3</sup> European Court of Human Rights, *İlhan v. Turkey*, application No. 22277/93, Judgment, 27 June 2000, para. 52.

that their mother did not properly represent their interests. They do not indicate what additional evidence they might have presented, nor to what extent their hearing might have affected the establishment of the facts or the proceedings. The State Party states that, for several years prior to the start of her custodial sentence, A.P.W. had experienced difficulties in providing care for the authors and required the support of the child and adult protection authority. The authority had appointed a guardian for the children, who was involved in the proceedings before the Enforcement and Probation Service. The start of the custodial sentence was postponed by nine months so that the best possible care could be arranged for the authors. Holding hearings for children can adversely affect them and may not necessarily be in their best interests if, as in this case, their interests are known and a hearing is not likely to provide clarifications relevant to the issues raised by the case. The State Party is satisfied that the authors' interests were adequately and sufficiently represented by their mother and that there was no violation of article 12 of the Convention.

4.8 The Committee has already stated that its role is not to interpret national laws or to assess the facts of the case and the evidence in place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the best interests of the child were a primary consideration in that assessment.<sup>4</sup> In assessing and determining the best interests of the child, account must be taken of the child's views, having regard to his or her age and maturity, the child's identity, including his or her ethnic, cultural, religious and linguistic background, the preservation of the family environment and the maintenance of relations, the child's protection and safety, the child's situation of vulnerability, the child's state of health and the child's education.<sup>5</sup> In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.<sup>6</sup> Separation may be necessary if a parent is detained. Under article 9 (3) of the Convention, States parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4.9 The State Party has provided details of A.P.W.'s criminal activities, noting the large quantities involved and the extensive scale of operations. The Lucerne Cantonal Court took into account the fact that A.P.W. had acted for purely financial reasons. Without being addicted to drugs herself, she had endangered a large number of people. The Court was of the view that the gravity of the acts corresponded, in the abstract and in application of the scale developed by the Federal Supreme Court, to a custodial sentence of 6 years. This sentence was reduced to 4 years and 6 months, in particular to take account of the fact that the enforcement of the sentence would lead to a separation between A.P.W. and the authors.

4.10 Custodial sentences must be enforced qualitatively and quantitatively; this applies to all convicted persons, regardless of the circumstances. The constitutional principle of equality before the law also applies to the enforcement of sentences.<sup>7</sup> Semi-detention and electronic monitoring can be authorized only in the case of custodial sentences not exceeding 12 months, provided other conditions are also met.<sup>8</sup> Community service is possible only in the case of custodial sentences of no more than 6 months.<sup>9</sup> A departure from the rules governing the enforcement of custodial sentences in favour of an inmate may be permitted if the inmate's state of health so requires; in the event of pregnancy, childbirth and for the time immediately after childbirth; or to enable a mother and infant to be accommodated together, provided this is also in the interests of the child.<sup>10</sup> A child can be considered an infant within the meaning of this provision until around 3 years of age. In this case, the length of the sentence imposed did not allow for an alternative to detention. Given the authors' age, the conditions for an exemption under article 80 (1) of the Criminal Code were not met. In view

<sup>4</sup> *C.E. v. Belgium* (CRC/C/79/D/12/2017), para. 8.4.

<sup>5</sup> Committee on the Rights of the Child, general comment No. 14 (2013), para. 52 ff.

<sup>6</sup> *Ibid.*, para. 82.

<sup>7</sup> Federal Supreme Court, decision of 17 August 2020, legal ground No. 3.2.1.

<sup>8</sup> Criminal Code, art. 77b (1) and art. 79b (1) (a).

<sup>9</sup> *Ibid.*, art. 79a (1) (a).

<sup>10</sup> *Ibid.*, art. 80 (1).

of the seriousness of the offences committed by A.P.W. and the heavy penalty imposed on her, it was of substantial public interest that the sentence be served. In accordance with the principle of proportionality, inmates' rights may be restricted only to the extent required by the deprivation of liberty and the proper functioning of the facility in which they are held. Inmates have the right to receive visits and maintain relations with the outside world, and contacts with their loved ones must be facilitated. Release on temporary licence must also be granted within the appropriate framework. The State Party notes that the Committee's recommendations do not call for States to waive the enforcement of custodial sentences in all cases where the convicted person has dependent children. The separation of the authors from A.P.W. was necessary within the meaning of article 9 (1) of the Convention.

4.11 As soon as the Cantonal Court's ruling of 21 November 2017 came into force, A.P.W. knew that she would have to serve her sentence. On 17 May 2018, the Enforcement and Probation Service met with her to discuss her family situation and the possibilities of finding a home for the authors for the duration of her sentence. A.P.W. wished for them to be placed with a foster family rather than in an institution. On 6 July 2018, the guardian informed the Service that it was important that arrangements should be found for the children that were appropriate for their situation and age and that they were on a waiting list to be placed with a suitable foster family, which would probably be available by the end of March or April 2019. The Service postponed the start of the sentence for nine months, so that the best possible care could be arranged for the authors. On 19 February 2019, the guardian informed the Enforcement and Probation Service that it had not been possible to arrange for the authors' placement in foster care because A.P.W. had not attended the scheduled interviews. The guardian had contacted the child and adult protection authority and an emergency placement of the children had been agreed in case A.P.W. was forced to serve her sentence. According to the guardian, the risk of absconding could not be ruled out entirely. The Enforcement and Probation Service decided not to postpone the start of the sentence any further. On 26 February 2019, it set 25 March 2019 as the start date. While custodial sentences must in principle be carried out immediately, the competent authority took into account the best interests of the authors by granting a nine-month postponement of their mother's sentence. It took into consideration A.P.W.'s family situation and gave her the time she needed to make foster care arrangements. Its decision was motivated by the authors' best interests. On 14 October 2020, the Department of Justice and Security took into account the fact that A.M. was to undergo back surgery and set the start of the enforcement of the sentence for 1 December 2020, so that A.P.W. could be present during her daughter's hospital stay and give her support. That decision was also taken with the authors' best interests in mind.

4.12 A.P.W. is being held in Hindelbank prison, in the canton of Bern. The journey from Lucerne, where the authors live, to Hindelbank takes around an hour and a half by car or public transport. There are only two women's prisons: Hindelbank and Lonay, in the canton of Vaud. Grosshof prison in Lucerne is recognized as a secure correctional facility for men. It has a women's section but, because of the services and work opportunities available, women can be held there only for sentences of up to 24 months. The sentence must be served progressively so that the detained person may be resocialized. However, Grosshof prison does not allow for all the stages in the progressive enforcement of sentences. Given the length of the sentence, it was not possible for A.P.W. to serve it in a prison located closer to the authors.

4.13 The custodial sentence is carried out in the form of day release employment if the inmate has served part of his or her sentence, generally at least half, and if there is no reason to fear that he or she will abscond or commit further offences. In the case of day release employment, the inmate works outside the facility and spends leisure and rest time in the facility. Work outside the facility may also include housework and caring for children. If the inmate demonstrates good behaviour in day release employment, the remainder of the sentence is served through day release employment and external accommodation. The inmate remains under the supervision of the enforcement authority. After serving half of her sentence, A.P.W. could benefit from day release employment, be transferred to a location near to the authors and take care of them. Electronic tagging may be ordered in lieu of day release

employment and external accommodation for a period of between 3 to 12 months.<sup>11</sup> If an inmate has served two thirds of his or her sentence, provided this amounts to at least three months, he or she is released on parole by the competent authority if this is justified by the inmate's conduct while in custody and it is not expected that he or she will commit further felonies or misdemeanours.<sup>12</sup> The enforcement of A.P.W.'s sentence does not imply that she will be separated from the authors for the entire duration of the sentence. The child's best interests were taken into account to the fullest extent possible in the contested decisions, particularly as the start of the sentence was postponed for several months to allow for optimal care arrangements, and then again so that A.P.W. could be present for A.M.'s operation and recovery. This case concerns only the decision to enforce the custodial sentence. Neither the decisions concerning care for the children, nor the contact between A.P.W. and the authors are the subject of the proceedings. If the authors' care was not arranged entirely in accordance with A.P.W.'s wishes, it was because she refused to cooperate with the guardian, believing that her lawyer could prevent her sentence from being enforced. The State Party points out that a guardian had been appointed for the authors several years before the enforcement of the sentence because A.P.W. had been unable to manage their care alone. A.M.'s behavioural problems led the guardian to secure appropriate care for her. Even before A.P.W. began serving her sentence, A.M. lived at a specialized school, where she benefited from clear structure and special support. This arrangement has been maintained while A.P.W. serves her sentence. A.M. spends weekends at the boarding school, with a friend of A.P.W. or with her father. When she has to see a doctor, her father takes her. E.P. has been living with A.P.W.'s sister since August 2021 and attends public elementary school. He has adapted well and shows no signs of abnormal behaviour. An optimal arrangement was found that meets their needs and respects their best interests. Regular contact between the authors is also ensured. Contrary to the authors' assertions, the Hindelbank facility allows children under the age of 16 years to visit, without visiting quotas, to ensure the maintenance of a mother's relationship with her children and to enable them to have regular contact. The authors may call A.P.W. every day.

4.14 The start of A.P.W.'s sentence was scheduled in such a way that she could be present during A.M.'s stay in hospital and during the weeks of her recovery. Since her operation, A.M. has been in good physical health. With regard to the death of E.P.'s father, it is clear from the file that A.P.W. claimed, during the first appeal proceedings, that contact with the authors' respective fathers was not working at all and that E.P.'s father had left Switzerland for the Dominican Republic. The authorities were of the view that, while his father's death must certainly have had a serious effect on E.P., it did not justify further postponement of the start of the sentence. Lastly, the cantonal court reduced A.P.W.'s sentence to take account of the fact that the enforcement of the sentence would lead to a separation between A.P.W. and the authors. In view of the authorities' efforts to take the authors' best interests into account at all times, the State Party argues that there was no violation of articles 3 and 9 of the Convention. The authors' complaint under article 2 of the Convention is ill-founded for the same reasons.

#### **Authors' comments on the State Party's observations**

5.1 In their comments of 18 August 2022, the authors argue that the failure to grant visiting rights and release on temporary licence, semi-detention and the use of an electronic tag are the subject of the proceedings insofar as it has been asserted that their separation from their mother was proportionate and that their rights were upheld in the enforcement of the sentence. The circumstances and facility in which she is serving her sentence, the location of the facility and the distance between it and the children's places of residence are essential to the question of proportionality and protection of the children's well-being. The facility plays a key role in determining the terms of sentence enforcement, contact with the children and their well-being. The State Party has the option of setting up a special, proportionate institution that safeguards children's rights, and the law provides a solution through article 80 (2) of the Criminal Code.

<sup>11</sup> *Ibid.*, art. 79b (1) (b).

<sup>12</sup> *Ibid.*, art. 86.

5.2 The authors submit that the State Party's observations concerning their status as victims are contradictory. On the one hand, the State Party states that the mother represented the children's interests, while on the other hand the children were not parties to either the criminal proceedings or the initial domestic proceedings concerning sentence enforcement. The authors' rights have not been sufficiently taken into consideration. In the event of separation between children and their parents by the State, the children affected are, or should always be, parties to the proceedings. Although the authors were not part of the initial proceedings, they criticize the fact that they were not included in accordance with the rights of the child. The authors were parties to the proceedings concerning the date and choice of the facility, the consequences for them of being separated from their mother, and the possibilities of contact and visits.

5.3 The authors argue that the facility, date and location determine the terms of enforcement of the sentence and, above all, the effective exercise of visiting rights, the introduction of flexible measures, day release employment and the use of electronic tagging. They had no other domestic remedies in respect of the consequences of the decision on the date and the location of the facility. Family displacement was a direct consequence of the choice of the facility, including its location and the date chosen for sentence enforcement. The facility chosen meant that alternative care arrangements had to be made for the authors and, because of the distance and the constraints, which were compounded by the COVID-19 pandemic, very few visits actually took place. It has been proved that the authors are at a disadvantage compared to other children owing to the separation from their mother. They argue that they have been discriminated against, in violation of article 2 of the Convention, because E.P. no longer has a father and A.M. suffers from health problems.

5.4 This communication concerns the date, location and type of facility that together determine the manner, contacts and terms of incarceration, and therefore the relationship and contacts that the authors can maintain with their mother.

5.5 The authors claim that, as a result of the terms and location of the penal institution, alternative care arrangements had to be made for them, visits could take place only very rarely, and contact with their mother was sometimes interrupted for weeks on end, even though it would have been conceivable and feasible to serve the sentence without placement outside the home while safeguarding the children's well-being by means of semi-detention or electronic tagging. Because of the distance (an hour and a half away by car) and the restrictions related to the COVID-19 pandemic, visits were infrequent and difficult. For the first few days after the separation, A.P.W. was subjected to a form of isolation, with no contact whatsoever with the authors. Later, contacts by telephone were difficult – in particular emotionally for the authors – and very costly for the family. A.P.W. had to pay telephone charges of around SwF 200 a month, while earning SwF 350 a month. Without the help of the grandparents, such contact would not even have been possible. The authors maintain that separation was unnecessary, that other forms of enforcement of the sentence existed and that the place of enforcement chosen hindered contact and visits. With regard to the start of the sentence, the authors assert that a nine-month deferment was not sufficient to protect their rights, especially as it was already known that A.M. would need an operation. This was taken into account only after a complaint was filed and only because the proceedings took so long in the end. Regarding the choice of the prison, the authors note that a travel time of one and a half hours means that each author and their respective supervisors have to allow for at least four hours for a visit. Because of this distance, visits are rare. The children cannot be blamed for the fact that there is no prison nearby, and other forms of enforcement of sentences are not allowed.

5.6 As for the duration of the detention, the authors confirm that their mother is now in the phase of her sentence during which day release employment is authorized. However, because of the distance between the prison and the workplace, located in central Switzerland, there are delays and difficulties; the external internship was approved only when her employer created a post in Bern. It is not possible for the family to live together, and the authors remain in the care of third parties. Semi-detention or a more flexible form of deprivation of liberty will be possible as from November 2022. For lack of planning, the earliest the family could be reunited is early 2023. This unnecessary two-month delay in

family reunification demonstrates the fact that the rights of the child are not a priority, and that the authors' best interests are only a secondary consideration.

#### **State Party's additional observations**

6. In its additional submissions of 7 July 2023, the State Party submitted that, with regard to the available legal means to contest the terms of her detention, the visiting rights afforded to her and the decisions concerning her semi-detention and the use of an electronic tag, insofar as these aspects had not been determined in a decision subject to appeal, the authors' mother could have requested such a decision on the basis of article 49 of the Act of 23 May 1989 on administrative procedure and jurisdiction of the canton of Bern, and subsequently contested any negative decision, including by raising issues related to the Convention. The possibility of appealing against the terms of detention is also clear from the documents attached by the authors to their comments of 18 August 2022. For example, the general decision of 3 January 2022 concerning the temporary restrictions imposed by the Hindelbank facility to protect inmates in the context of the COVID-19 pandemic indicates the means of appeal. Likewise, it is clear from the letter from the Enforcement and Probation Service of the canton of Lucerne, dated 21 June 2022, that the competent authorities decide to grant placement in external accommodation and day release employment in the form of electronic tagging in a decision subject to appeal. With regard to the measures taken in respect of the authors by the child and adult protection authority, the right to appeal against the decisions in question is enshrined in article 314 (1), read jointly with article 450 (1), of the Swiss Civil Code. Thus, the terms of the sentence enforcement, in particular the visiting rights and release on temporary licence, and the measures adopted by the child and adult protection authority, were not the subject, even indirectly, of the decisions challenged by the authors in the present case. The authors' claims in this respect thus go beyond the scope of the present dispute and cannot be examined by the Committee. The State Party concludes that the authors have not exhausted domestic remedies with regard to their claims concerning the terms of their mother's detention, the release on temporary licence granted and the measures adopted by the child and adult protection authority.

#### **Authors' additional comments on the State Party's observations**

7. In their comments of 24 July 2023, the authors refer to a study of children whose parents are in prison in which they took part.

#### **Issues and proceedings before the Committee**

##### *Consideration of admissibility*

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

8.2 The Committee notes that, in a decision dated 11 February 2021, the European Court of Human Rights declared the application lodged by A.P.W. inadmissible because the evidence before it did not disclose any appearance of a violation of the rights and freedoms set out in the European Convention on Human Rights. In view of the fact that this complaint concerned A.P.W. and not the authors, the Committee considers that the same matter is not at issue within the meaning of article 7 (d) of the Optional Protocol and that this article therefore does not preclude the admissibility of the present communication.

8.3 The Committee takes note of the State Party's argument that A.P.W.'s custodial sentence was imposed by a final judgment on 21 November 2017, whereas the authors referred their communication to the Committee on 20 July 2021, that is, almost four years later, significantly exceeding the one-year time limit after the exhaustion of domestic remedies provided for in article 7 (h) of the Optional Protocol, and that the authors have not demonstrated that it was not possible to submit the communication within that time limit. The Committee observes, however, that the authors' claims do not relate to the imposition of A.P.W.'s sentence but to its enforcement. Accordingly, the Committee considers that it is not precluded by article 7 (h) of the Optional Protocol from examining the present communication.

8.4 The Committee also takes note of the State Party's argument that domestic remedies have not been exhausted in respect of the claims concerning the authors' care arrangements and the arrangements for contact between them and their mother, including visiting rights and release on temporary licence.

8.5 The Committee recalls that authors must make use of all judicial or administrative avenues that may offer them a reasonable prospect of redress. The Committee is of the view that domestic remedies need not be exhausted if, objectively, they have no prospect of success, for example in cases where the claim would inevitably be dismissed under applicable national laws or where established jurisprudence of the highest domestic courts would preclude a positive result. Nevertheless, the Committee notes that mere doubts or assumptions about the success or effectiveness of remedies do not absolve authors from exhausting them.

8.6 In the present case, the Committee notes that the authors' claims relate to the Federal Supreme Court's decisions of 17 August 2020 and 12 March 2021, which concern the enforcement of the sentence handed down, namely the date on which it was to begin and the facility in which the sentence was to be served. It also notes the State Party's argument that the authors have made no attempt to lodge appeals relating to the terms of the sentence enforcement or their care arrangements and have not offered any justification that such appeals would be unlikely to succeed. However, the Committee observes that the authors' complaint does not concern their placement, but the modes of enforcement of their mother's sentence. The Committee therefore concludes that the available domestic remedies have not been exhausted and declares this part of the communication admissible under article 7 (e) of the Optional Protocol.

8.7 The Committee notes the authors' claims under article 2 of the Convention, insofar as the authors were allegedly separated from their mother through no fault of their own and without necessity and therefore suffer from a significant developmental delay compared to other children. However, the Committee notes that the authors make these claims in general terms and do not explain how the contested decisions are discriminatory. Therefore, it declares these claims manifestly ill-founded and inadmissible under article 7 (f) of the Optional Protocol.

8.8 The Committee takes note of the authors' claims under article 12 of the Convention, insofar as they were not notified of the decision, were not able to assert their rights independently during the proceedings, were not granted any procedural rights, and were not reimbursed for legal costs. However, the Committee notes that the authors were not parties to the domestic criminal proceedings and therefore had no procedural rights. Therefore, it considers that these claims are manifestly ill-founded and declares them inadmissible under article 7 (f) of the Optional Protocol.

8.9 However, the Committee considers that the authors have sufficiently substantiated, for purposes of admissibility, the remainder of their claims under articles 3, 9 and 12 of the Convention relating to the fact that they were not heard in the decisions concerning the enforcement order and that their best interests were not taken into account as a primary consideration in the enforcement of their mother's prison sentence, which adversely affects their right not to be separated from her under article 9 of the Convention. The Committee therefore declares this part of the communication admissible and proceeds with its consideration on the merits.

#### *Consideration of the merits*

9.1 The Committee has considered the present communication in the light of all the information made available to it by the parties, in accordance with article 10 (1) of the Optional Protocol.

9.2 The Committee takes note of the authors' claim that the State Party violated their rights under articles 3, 9 and 12 of the Convention, as they were not heard by the domestic authorities and that their best interests were not duly assessed in the proceedings for the enforcement of their mother's criminal sentence.

9.3 The Committee considers that, even if the authors were not parties to the domestic criminal proceedings against their mother, these proceedings, including the enforcement of the criminal sentence imposed on her, were a matter concerning them within the meaning of

articles 3 (1) and 12 (2) of the Convention, since such proceedings would determine the extent to which they could maintain contact with their primary caregiver. The Committee must therefore determine whether, in the proceedings relating to the enforcement of the criminal sentence imposed on the mother, the domestic authorities have taken into account the authors' best interests and heard them, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law, as required by articles 3 (1) and 12 (2) of the Convention.

9.4 The Committee notes that a guardian had been appointed for the authors several years before A.P.W. served her sentence, and that the guardian had been tasked with ensuring that the children were placed in alternative care appropriate to their situation and age. It also notes that, following consultations between the Prison and Probation Service and the children's guardian, the date of enforcement of the mother's sentence was postponed several times, for a total of nine months, in order to take account of the children's specific situation. In this regard, the Department of Justice and Security took into account the fact that A.M. had to undergo back surgery and ultimately set the start of the sentence's enforcement for 1 December 2020, so that A.P.W. could be present during her hospital stay, a decision that was based on the court's consideration of the authors' best interests. The Committee further notes the State Party's argument that the Prison and Probation Service also held a meeting with the mother about the family situation and the possibility of placing the authors in an alternative care facility for the duration of the sentence. The Committee takes note of the State Party's argument that, in the present case, there was no conflict of interest between the authors and their mother regarding the enforcement of her sentence in a way that would allow them to maintain contact. It therefore concludes that the authors were able to be heard indirectly by both their mother and their guardian, whose role made it possible to assess their situation and interests separately. The Committee notes that the Enforcement and Probation Service postponed the start of the sentence by nine months so that the authors could receive optimal care.

9.5 With regard to the choice of prison, the Committee notes the authors' claim that their mother's placement was far from their home and that this did not respect their best interests. The Committee recalls that it is for the national authorities to examine the facts and evidence and to interpret and enforce domestic law, unless their assessment has been clearly arbitrary or amounts to a denial of justice. It is therefore not for the Committee to interpret domestic law or to assess the facts of the case and the evidence in place of the national authorities but to ensure that their assessment was not arbitrary or tantamount to a denial of justice and that the children's best interests were a primary consideration in that assessment. However, in the present case, the Committee notes that the State Party has ensured that A.P.W.'s sentence is served in a progressive manner that promotes her social reintegration and that, after serving half of her sentence, A.P.W. can benefit from a work release scheme, be transferred close to the authors and take care of them. It also observes that only two penal institutions in the State Party are for women, as Grosshof prison does not allow for all stages of the progressive enforcement of sentences. In this regard, it also notes the State Party's argument that, given the length of her sentence, it was not possible for A.P.W. to serve it in a prison closer to the authors.

9.6 The Committee takes note of the authors' assertion that visits were rare and insufficient. However, it also takes note of the State Party's assertion that regular contact was maintained between the authors and A.P.W., contrary to what the authors claim. It notes in particular that Hindelbank prison allows visits for children under 16 outside of the visiting quotas and that the authors were able to call A.P.W. every day.

9.7 In light of the above, and on the basis of the information in the file, the Committee cannot conclude that the State Party failed to give sufficient consideration to the children's best interests and to hear them in the proceedings for the enforcement of their mother's criminal sentence, or that it failed to take the appropriate measures to ensure the authors' contact with their imprisoned mother.

10. The Committee, acting under article 10 (5) of the Optional Protocol, is of the view that the facts before it do not disclose a violation of articles 3, 9 or 12 of the Convention.

**Annex**

[Original: English]

**Joint opinion of Committee members Bragi Gudbrandsson, Luis Ernesto Pedernera Reyna, Ann Skelton, Velina Todorova and Benoit Van Keirsbilck (dissenting)**

1. In writing this partially dissenting joint opinion, we recognize that the State party's law and practice include measures that allow for the consideration of the impact of sentencing on children, and that various efforts were made that focused on the children's best interests, as detailed in paragraph 9.4 of the Views. The present joint opinion focuses on certain decisions made by the Federal Supreme Court, which indicate a misunderstanding of the obligations of courts in the application of articles 3 and 12 of the Convention in the context of the enforcement of the sentences of children's primary caregivers.

2. On admissibility, we respectfully disagree with the Committee majority regarding its finding, in paragraph 8.8 of the Views, that the authors' complaint under article 12 of the Convention was inadmissible as they were not parties in the domestic criminal proceedings and therefore had no procedural rights. In fact, the claim under article 12, as set out in paragraph 3.2 of the Views, is focused on the contested decisions on enforcement. Proceedings relating to the enforcement of sentences are administrative rather than criminal proceedings. It is our view that, even in criminal proceedings, at the time of sentencing, it is good practice to ensure that the sentencing court is aware of the child's views and wishes, which may be heard through a representative. However, this case is focused not on the sentencing process, but on the execution of the sentence. While it is true that the children were not separate parties, this fact does not mean that they had no procedural rights. We are of the view, for reasons articulated below, that article 12 does give children the right to be heard in judicial or administrative proceedings affecting them, including on decisions relating to the enforcement of sentences. Accordingly, we would have found the full claim under article 12 to be admissible.

3. On the merits, we also respectfully disagree with the Committee majority regarding the claims under articles 3 and 12. In this regard, we focus on the decision of the Federal Supreme Court, of 17 August 2020, to dismiss the appeal regarding the starting date of the sentence. As explained in paragraph 2.2 of the Views, the Federal Supreme Court had found that A.P.W. had brought about her separation from her children and that neither she nor the children were entitled to alternative arrangements. Furthermore, the Court had observed that the children would not be directly affected by the ruling, since they themselves would not be imprisoned. We consider this to be a misreading of the rights of the child under articles 3 and 12 of the Convention. In a similar decision, of 12 March 2021, the Federal Supreme Court had ruled that the only issue had been the timing of the sentence, not the best interests of the children.

4. The Federal Supreme Court's opinion that the mother had caused the separation is incorrect when considered on the basis of a child rights-based assessment of the matter. A court decision to sentence a primary caregiver to imprisonment arises from prosecution proceedings. As such proceedings are an action initiated by a State party, they trigger certain obligations under the Convention.

5. The Convention starts from the premise that children are rights holders separate from their parents. It is therefore contrary to the spirit of the Convention to suggest that the rights of children are negated by the misdeeds of their parents.

6. Article 3 (1) provides that in all actions concerning children, including those undertaken by courts of law and administrative authorities, the best interests of the child must be a primary consideration. It is therefore necessary to consider whether decisions relating to the enforcement of the sentence of a primary caregiver are actions that "concern" children. We have no doubt that they are, and we understand that the Committee majority shares this

opinion, as set out in paragraph 9.3 of the Views. However, in this case, the majority found that the State party had discharged its responsibilities adequately, and therefore that there had been no violation.

7. We disagree, owing to the reasoning of the Federal Supreme Court that we have outlined in paragraph 3 of the present joint opinion. While we acknowledge that it is generally for the national authorities to examine the facts and evidence and to interpret and apply national law, it is the task of the Committee to verify that the authorities' assessment was not arbitrary and did not amount to a denial of justice, and to ensure that the best interests of the children were a primary consideration in that assessment. The Federal Supreme Court clearly stated that the matter was purely about timing, and not about the best interests of the children. In our view, this is a misreading of article 3 (1), under which the best interests of the child must be a primary consideration in all actions concerning children. The imprisonment of a primary caregiver is an action initiated by the State that separates children from the person who cares for them on a daily basis, and decisions regarding the execution of the sentence flow from that action. Of course, a court must weigh the various competing interests, and may come to a decision that the best interests of the child are outweighed in a particular set of circumstances. However, a court cannot from the outset decide that the child's rights are extinguished by the caregiver's criminal behaviour. Where the State's actions remove the child's primary caregiver, or even when they merely threaten to do so, the State has an obligation to ensure that the best interests of the child are considered.

8. Article 12 of the Convention requires that States parties assure to children the right to express their own views in all matters affecting them. It is clear to us – and indeed to the Committee majority, as indicated in paragraph 9.3 of the Views – that the removal of a child's primary caregiver is a matter that affects that child. In determining the best interests of the children, and in understanding the impact that the imprisonment will have on the children, it is essential to hear their views. In this case, the children were capable of forming their own views. Under article 12 (2), children may be provided the opportunity to be heard either directly or through a representative. We see no evidence that the Federal Supreme Court, in the decisions referred to in paragraph 3 of the present joint opinion, considered the views of the children either directly or through a representative.

9. In the light of the above, we would have found violations of articles 3 and 12 of the Convention.

---