

Accountability and Impunity: Investigations Into Sterilization Without Informed Consent in the Czech Republic and Slovakia



A Report Prepared by the Staff of the
Commission on Security and Cooperation in Europe
Washington: 2006

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Accountability and Impunity: Investigations into Sterilization without Informed Consent in The Czech Republic and Slovakia

I.	Summary	1
II.	Background on Sterilization in Czechoslovakia	1
III.	The Czech Public Defender of Rights' Report.....	3
	Legal Framework for Sterilizations.....	3
	Communist Policies toward Roma.....	4
	History of Eugenics Movement in Czechoslovakia.....	4
	Past Investigations	4
	Investigations in Sweden and Switzerland	4
	Recommendations.....	5
	Public Reaction	5
IV.	Slovakia's Investigation	5
	Context of Allegations	5
	Summary of the Slovak Government's Conclusions	7
	Shortcomings in the Slovak Government's Investigation and Response	8
	<i>Failure to Examine Full Time Period of Alleged Wrongdoing</i>	8
	<i>Investigation of Wrongdoing Narrowly Limited to Crime of Genocide</i>	8
	<i>Conflict of Interest</i>	9
	<i>Threats to Intimidate Accusers</i>	10
	<i>Access to Medical Records Blocked</i>	11
	<i>Failure to Determine If Consent Was Informed</i>	12
	<i>Illegal Sterilizations Dismissed as Mere "Procedural Shortcomings"</i>	13
	Legal Changes to Sterilization Regime.....	14
V.	Conclusions	17

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I. Summary

On December 23, 2005, the Czech Public Defender of Rights¹ issued a report² confirming that some Romani women had been sterilized without informed consent. His report constitutes an unflinching examination of several highly sensitive issues: the relationship between patients and doctors in the Czech Republic, the eugenics movement in Czechoslovakia,³ communist-era policies toward the Romani minority, and the question of whether the post-communist Czech Government brought a definitive end to the communist-era policy of targeting Romani women for sterilization.

This report stands in stark contrast with Slovakia's flawed investigation (completed in October 2003) of the same issue, which was marred by numerous shortcomings and insufficient follow up. That inquiry prompted changes to the legal framework for sterilization in Slovakia which should help safeguard against the possibility that anyone will be sterilized without informed consent in the future. However, the Slovak Government's investigation dismissed sterilizations without informed consent as merely "procedural shortcomings." Moreover, the Slovak Government's failure to acknowledge that wrongful sterilizations did, in fact, occur, contributes to the chasm of mistrust that divides Slovakia's Romani and non-Romani citizens. Non-Roma have been misled by their government to believe that Roma falsely made accusations of egregious wrongs, and government institutions established to defend human rights have utterly failed to protect the rights of Roma.

II. Background on Sterilization in Czechoslovakia

In 1978, then-Charter 77 spokesmen Vaclav Havel and Ladislav Hejdanek issued a document on the "Situation of Gypsies in Czechoslovakia." Remarkably, they placed the situation of Roma in

1. The Czech Public Defender of Rights (sometimes called "Ombudsman") is an independent authority elected by the Czech Chamber of Deputies. He or she is tasked with resolving individual complaints against state administration or, on his or her own initiative, identifying inefficiencies, malpractice or violations of the law. The current Czech Public Defender of Rights (elected in 2000) is Otakar Motejl who served as Minister of Justice from 1998-2000.

2. PUBLIC DEFENDER OF RIGHTS, FINAL STATEMENT OF THE PUBLIC DEFENDER OF RIGHTS IN THE MATTER OF STERILISATIONS PERFORMED IN CONTRAVENTION OF THE LAW AND PROPOSED REMEDIAL MEASURES (2005) [hereinafter PUBLIC DEFENDER'S FINAL STATEMENT], available on the Czech Public Defender's website, <<http://www.ochrance.cz/en/index.php>>.

3. During the 20th century, the eugenics movement was embraced in many countries, including the United States. For additional information on how the eugenics movement in Germany contributed to the formulation of genocidal policies, see the U.S. Holocaust Memorial Museum's exhibit on *Deadly Medicine: Creating the Master Race*, <<http://www.ushmm.org/museum/exhibit/online/deadlymedicine/>>.

Czechoslovakia squarely in a human rights paradigm – decades before others would do so. While addressing a variety of problems faced by Roma, including racism, discrimination, and forced assimilation, they gave particular attention to the state policy designed to reduce the birthrate of Roma: “The question of sterilization is very important. [. . .] In some areas the sterilization is carried out as a planned administrative program and the success of employees is judged by the number of Gypsy women an employee has been able to talk into sterilization. [. . .] In this way, sterilization is becoming one of the instruments of the majority aimed at preventing childbirth in a particular ethnic minority.”⁴

Further, the authors issued this stark warning: “The goal of the government to eliminate this minority must, of necessity, lead to further increased repression. If the constant failures of this policy will not lead to re-evaluation of the whole concept of how to integrate, the Czechoslovak institutions will soon have to answer charges that they are committing genocide . . .”⁵ The Genocide Convention outlaws “acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, such as [. . .] (e) *Imposing measures intended to prevent births within the group.*”⁶ (Emphasis added.)

In the late 1980s, dissidents Zbynek Andrs and Ruben Pellar conducted additional research into the state’s sterilization practices, concluding that Romani women were still being coerced to undergo sterilization procedures, often by officials who threatened to withhold social welfare payments if the Romani women did not agree to the procedure.⁷ Helsinki Watch (now known as Human Rights Watch) also reported on this practice in a 1992 publication on Roma in Czechoslovakia.⁸

Generally speaking, however, most observers assumed that this communist-era practice ended when the communists were removed from power (or, at least, removed from the most visible positions of power).⁹ In both the Czech Republic and Slovakia, after 1990 most doctors continued to practice medicine at public facilities under the auspices of their respective Ministries of Health.

4. COMMISSION ON SECURITY AND COOPERATION IN EUROPE, HUMAN RIGHTS IN CZECHOSLOVAKIA: THE DOCUMENTS OF CHARTER 77, 1977-1982 [hereinafter CHARTER 77] 168 (1982) (Situation of the Gypsies in Czechoslovakia, Document No. 23). Charter 77 was Czechoslovakia’s leading dissident movement during the communist period.

5. *Id.* at 169.

6. Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter Genocide Convention], *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277, article II. Czechoslovakia signed the Convention on Dec. 28, 1949 and ratified it on Dec. 21, 1950. The Czech Republic succeeded to the Convention on February 22, 1993. Slovakia succeeded on May 28, 1993.

7. EUROPEAN ROMA RIGHTS CENTER, ERRC CONCERNS: COERCIVE STERILIZATION OF ROMANI WOMEN IN SLOVAKIA, (Jan. 30, 2003), [hereinafter ERRC CONCERNS] available at <www.errc.org>.

8. HUMAN RIGHTS WATCH, STRUGGLING FOR ETHNIC IDENTITY 19-35 (1992).

9. *Id.* at 32: “As far as we could tell, Romany women are no longer being targeted by the Czechoslovak government for sterilization, but prejudice among some government and health officials remains.”

III. The Czech Public Defender of Rights' Report

During 2003 and 2004, non-governmental organizations voiced concern that sterilizations without informed consent had continued into the post-communist period in the Czech Republic. A formal investigation was initiated in September 2004, when ten Romani women, aided by several non-governmental organizations (IQ Roma Service, the League of Human Rights, Life Together, and the European Roma Rights Center), brought complaints to the Public Defender of Rights regarding their sterilizations. The government deferred questions on this matter pending the formal inquiry by the Public Defender of Rights.

Eventually, the Public Defender of Rights examined more than 87 cases.

On December 23, 2005, the Public Defender of Rights issued a "Final Statement of the Public Defender of Rights in the Matter of Sterilizations Performed in Contravention of the Law and Proposed Legal Remedies." An English version of this statement was released on March 13, 2006. The report concludes:

The Public Defender of Rights believes that the problem of sexual sterilization carried out in the Czech Republic, either with improper motivation or illegally, exists, and that Czech society stands before the task of coming to terms with this fact.¹⁰

[. . .]

From a legal perspective, the unlawful nature of the sterilizations lies in the fact that consent, that was without error and fully free in the human rights sense, was not given to the interventions. This conclusion applies to all cases without exception. *It is therefore common both to cases taking place before 1990 and after.* [Emphasis added.]¹¹

The report consists of several parts, all notable in their own right.

Legal Framework for Sterilizations

First, the report describes the legal framework for sterilizations in the Czech Republic. This section is particularly striking because the legal analysis differs significantly from Slovakia's analysis of what is, in effect, a common legal framework (stemming from the two countries' prior common statehood; see discussion of Slovakia below). In particular, the Public Defender of Rights makes clear that "information is *conditio sine qua non* of the patient's decision" to consent. In other words, if a patient's consent was not informed, the medical procedure was not performed legally.

10. PUBLIC DEFENDER'S FINAL STATEMENT, *supra* note 2 at section 1 (Introduction).

11. PUBLIC DEFENDER'S FINAL STATEMENT, *supra* note 2 at section 6 (Summary).

Communist Policies toward Roma

Breaking from popular ignorance of communist policies toward Roma, and contrary to an emerging revisionist narrative about the allegedly “positive” treatment of Roma during the communist period, the report sheds light on the harmful, prejudicial and ultimately counter-productive nature of communist-era policies. The report illustrates that, contrary to their stated intent, communist policies toward Roma contributed to the marginalization of Romani communities and the debasement of Romani culture.

History of Eugenics Movement in Czechoslovakia

The report discusses the history of the eugenics movement in Czechoslovakia, and notes that communist-era policies toward the sterilization of Roma were not based on consideration of the best interests of the patient, but – consistent with the theories of the eugenics movement – explicitly directed at building a so-called “healthy population.”

Past Investigations

The report outlines previous reports by the Charter 77 movement and other non-governmental actors on the coercive or wrongful sterilization of Romani women. Prompted by these independent researchers, the Czechoslovak General Prosecutor’s office opened an inquiry in 1990 into possible breaches of the law. That inquiry concluded without finding any legal violations. Dissatisfied with this investigation, Ruben Pellar pressed the Government Office for the Documentation and Investigation of the Crimes of Communism to open an investigation into the same issue in 1997. In 2000, that office terminated its investigation (which apparently relied largely on the work of the General Prosecutor), asserting that it had found no crimes.

Investigations in Sweden and Switzerland

During the 20th century, a number of European countries, as well as 33 of the 50 United States, established state-run sterilization programs, heavily influenced by the concepts of the eugenics movement. The Public Defender of Rights examined¹² the recent efforts of two countries, Sweden and Switzerland, to evaluate their past experiences with these programs.

According to the Public Defender of Rights’ report, the Swedish sterilization program operated between 1935 and 1975. This program became the subject of public debate in the late 1990s, and the Swedish Government established a special commission to investigate, which concluded its work in 2000. The commission confirmed that sterilizations without consent had occurred, and the government subsequently instituted a reparations program for victims.

Government-initiated sterilizations took place in Switzerland from the 1920s into the 1980s. Switzerland’s investigation also confirmed that sterilizations without consent had occurred, but this investigation – undertaken by the Parliament – did not result in a reparations program for victims.

12. PUBLIC DEFENDER’S FINAL STATEMENT, *supra* note 2, section 5 (Digression – Eugenically-Oriented Social Systems).

Recommendations

The Public Defender of Rights made the following recommendations to the Czech Government:

- change Czech domestic law to better anchor the principle of informed consent;
- implement supplementary measures through the Ministry of Health to ensure a change of culture with regard to informed consent in the medical community, as well as among patients; and
- adopt a simplified procedure to compensate victims in those cases where social workers were involved in implementing the coercive sterilization policy.

Public Reaction

There has been relatively little press coverage of the sterilization issue or the Public Defender of Rights' report. A few papers (e.g., *PRAVO* and *RESPECKT*), however, published articles sympathetic to the victims. *HOSPODARSKE NOVINY* named Helena Ferencikova one of its "Courageous Personalities of 2005." Ms. Ferencikova is a member of the "Group of Women Harmed by Sterilization." In 2005, a Czech court recognized that she had been wrongfully sterilized.

IV. Slovakia's Investigation

Context of Allegations

Although it was generally assumed that the practice of targeting Roma for sterilization had ended with the fall of the communist regime in Czechoslovakia, a disturbing discourse about Romani birthrates continued to blight Slovakia's political landscape throughout the 1990s, persisting even after the end of the Meciar regime in 1998. For example:

- In September 1993, then-Prime Minister Vladimir Meciar made a speech in Spisska Nova Ves – a town with a significant Roma community – in which he drew attention to the high birthrate among Roma. Speaking of the Roma, Meciar stated that "if we do not deal with them now, in time they will deal with us. It's necessary to understand them as a problematic group which rises in numbers."¹³
- In October 1995, then-Health Minister Lubomir Javorsky stated at a party rally in Kosice that "the government will do everything to ensure that more white children than Romani children are born."¹⁴
- In the 1997 Canadian documentary "Gypsies of Svinia," a Slovak medical practitioner openly advocated the sterilization of Roma.¹⁵
- In April 2000, *The New York Times* quoted Deputy Mayor of Rudnany, Ladislav Sabo, as saying "[w]hat we need is a Chinese fertility program" for Roma.¹⁶

13. The text of the Prime Minister's remarks was confirmed with the Embassy of Slovakia in Washington, DC, in 1993.

14. *Slovak Roma Uneasy about Health Minister's Statements*, OPEN MEDIA RESEARCH INSTITUTE DAILY DIGEST, Oct. 31, 1995. *Minister Seeks to Regulate Romanies' Birthrate*, Bratislava *NARODNA OBRODA* in Slovak (Oct. 28, 1995); translation by Open Source Center (formerly the Foreign Broadcast Information Service), Oct. 28, 1995.

15. ERRRC CONCERNS, *supra* note 7.

16. Steven Erlanger, *The Gypsies of Slovakia: Despised and Despairing*, N.Y. Times, April 3, 2000. According to *The Times*, Sabo maintained a handwritten chart showing the ethnic make-up of his town.

- In February 2006, Jan Slota, the head of the Slovak National Party, stated that if his party joined the government after the June elections, he would seek to control the birth rate of “unadapted” Roma.¹⁷

In 2001, the issue of sterilization received heightened attention when the Open Society Institute issued a report on Slovakia, *On the Margins* (one of a series examining Romani access to public services in various Central European countries).¹⁸ The report outlined the communist-era sterilization program, described the disturbing public comments regarding Romani birthrates that surfaced and resurfaced throughout the 1990s, and concluded that there were post-1990 sterilizations which may have been performed without informed consent and therefore warranted investigation. The report also quoted an October 2000 national strategy paper for sustainable development prepared for the Ministry of Health as stating, i.a.: “If we do not succeed in integrating the Romani population and *modify their reproduction[,] the percentage of nonqualified and handicapped persons in the population will increase.*”¹⁹ (Emphasis added.)

Although the discussion of sterilization formed only a very small part of the *On the Margins* report, it became a singular focus of the press attention this publication received in Slovakia and was broadly met with visceral rejection. Reflecting the combustibility of these accusations, in late 2001 Romani activist Alexander Patkolo was threatened with the criminal charge of “spreading alarming information” for even suggesting that Romani women had been sterilized without informed consent.²⁰ To say that the 2001 *On the Margins* report was met with broad hostility would be an understatement. To say that it received any serious consideration by the government would just be wrong.

In fact, while government officials in 2001 were flatly denying that any wrongful sterilizations of Romani women could have possibly taken place in recent years, then-opposition MP Robert Fico (whose party is named “Direction,” or *Smer* in Slovak) was running his 2002 parliamentary campaign on a pledge to “actively effect the irresponsible growth of the Roman[i] population.”²¹ No other public leaders in Slovakia – from any political party, religious group, or civic organization – publicly criticized him for these remarks or took issue with this goal.

17. *Slovak nationalist party wants to control Gypsies' birth rate*, Bratislava RADIO SLOVENSKO in Slovak (1400 GMT Feb. 23, 2006), Text of report by Slovak radio by Open Source Center, Feb. 23, 2006.

18. INA ZOON, ON THE MARGINS—SLOVAKIA 62-70 (2001).

19. *Id.*, at 67, quoting MINISTRY OF HEALTH OF THE SLOVAK REPUBLIC POSITION PAPER ON THE WORKING DRAFT OF THE DOCUMENT NATIONAL STRATEGY OF SUSTAINABLE DEVELOPMENT IN THE SR (Oct. 16, 2000).

20. *Sterilization row deepens*, Slovak Spectator, Dec. 3, 2001; *Slovakia: Accusation of forced sterilization of Roma women proved false*, Bratislava TASR in English (Nov. 22, 2001); transcribed text by Open Source Center, Nov. 22, 2001.

21. *Slovak populist plans to stem Roma population growth*, Prague CTK in English (June 15, 2002); transcribed text by Open Source Center, June 15, 2002. See also *Fico Wants to Lower Slovak Roma's Birthrate*, Radio Free Europe/Radio Liberty Newline, June 17, 2002.

In 2003, this volatile issue erupted again when a lengthy, non-governmental report devoted entirely to the subject of sterilizations was published.²² Based on 230 in-depth interviews with Romani women in 40 different settlements in Slovakia, the authors identified approximately 140 cases of Romani women whom they concluded were sterilized without informed consent – 30 during the communist period and 110 since 1990. Independently, the European Roma Rights Center also undertook field investigations in 2002 and concluded that reports of coerced sterilization were well-founded.²³

As in 2001, these accusations were met with immediate denials by Slovak Government officials and threats to bring criminal charges against those making them. As the spokesman for the Minister for Human Rights and National Minorities warned: “If we confirm this information [the sterilization allegations], we will expand our charges to the report’s authors, that they knew about a crime for a year and did not report it to a prosecutor. And if we prove it is not true, they will be charged with spreading false information and damaging the good name of Slovakia.”²⁴ In other words, the ministry theoretically responsible for human rights was sending a clear and unequivocal message: if you come forward to claim that you were wrongfully sterilized, then – on one charge or another – you will be prosecuted.

This time, however, the 2003 report was simply too detailed to be dismissed out of hand. Moreover, the non-governmental reports were viewed credibly by a widening circle of international bodies,²⁵ which urged the Slovak Government to conduct a thorough and impartial investigation into these allegations.

Unfortunately, the governmental investigations that followed met neither criteria. By October 2003, it was all over except the shouting.

Summary of the Slovak Government’s Conclusions

The Slovak Government tasked the Ministries of Health and Interior²⁶ with investigating

22. CENTER FOR REPRODUCTIVE RIGHTS AND *PORADNA PRE OBCIANSKE A LUDSKE PRAVA*, IN CONSULTATION WITH INA ZOON, *BODY AND SOUL: FORCED STERILIZATION AND OTHER ASSAULTS ON ROMA REPRODUCTIVE FREEDOM IN SLOVAKIA* (2003).

23. ERRC CONCERNS, *supra* note 7.

24. Quoted in Peter S. Green, *Gypsies in Slovakia Complain of Sterilizations*, N.Y. Times, Feb. 28, 2003.

25. Among those who raised concern regarding this issue in 2003 were European Union Commissioner Gunter Verheugen, European Union Parliamentary Rapporteur for Slovakia J.M. Wiersma, and the UN Human Rights Committee. In early May 2003, national MPs from Ireland, Spain, and Austria visited Slovakia to examine this issue. In addition, at the invitation of Minister Pal Csaky, Christine McCafferty, the Vice-Chair of the Council of Europe’s Parliamentary Assembly Committee for Social Affairs, Health and Family, visited Slovakia to examine this issue.

26. In addition to undertaking its own investigation into the circumstances under which sterilizations had been performed, the Ministry of Health provided the Ministry of Interior with medical analysis that was self-serving and, more to the point, incorrect. In particular, the Ministry of Health advised the Ministry of Interior that it might be necessary to perform a sterilization procedure on an emergency basis (and without a patient’s consent) in order to save a patient’s life. The Ministry of Interior appears to have relied on this erroneous advice when it examined

whether the crime of genocide had occurred. Based on these investigations, the government concluded that 1) the crime of genocide had not occurred; 2) sterilizations performed on Romani women were in compliance with the law as it existed at that time the sterilizations were performed; 3) certain problems identified during the course of the investigation (i.e., sterilizations that were actually not in compliance with the law as it existed at the time) could be dismissed as merely “procedural shortcomings;” and nevertheless, 4) changes should be made to Slovakia’s legislation relating to sterilization.

Shortcomings in the Slovak Government’s Investigation and Response

Failure to Examine Full Time Period of Alleged Wrongdoing

As the Czech Public Defender of Rights noted, “[a]lthough Slovakia is now independent, it formed a single state entity with the Czech Republic until 1993 and the baseline that formed the approach to Roma, before as well as after 1989, was essentially analogous.”²⁷ An examination of the communist-era policies toward Roma in Czechoslovakia shows that, among a community of professionals (medical specialists and social workers), sterilization was an acceptable means of modifying the Romani population. Not surprisingly, the 2003 *Body and Soul* report had specifically alleged that some wrongful sterilizations occurred in Slovakia before 1990.

The Slovak Government, however, chose to limit its investigation to the period beginning in 1993. Presumably, this date was chosen because it marks the separation of Czechoslovakia into two independent states. (In general, Slovakia has been more reluctant than some of its neighboring countries to examine crimes of the communist period.)

The decision to look at a limited timeframe is particularly ironic given that the government limited its criminal investigation to the question of genocide (see below); many countries have no statute of limitations for the crime of genocide.

Investigation of Wrongdoing Narrowly Limited to Crime of Genocide

Slovak Government statements have been inconsistent and sometimes vague in their description of the scope of the 2003 investigations. However, it appears that the investigations of the sterilization allegations were limited to an examination of whether the crime of genocide had occurred.²⁸ As noted by Alvaro Gil-Robles, the Council of Europe’s Commissioner for Human Rights (COE Commissioner),

some cases where the required procedures for sterilization were not followed but the sterilizations were excused as “emergency” procedures.

Changes to the law governing sterilizations introduced by the Slovak Government now require a 30-day waiting period before any sterilization can be performed, implicitly rejecting the notion that sterilizations can be “life-saving” procedures. Similarly, the Czech Public Defender of Rights concluded that “sterilization is not an instantly life-saving intervention.” PUBLIC DEFENDER’S FINAL STATEMENT, *supra* note 2, section 3.2 (Case Reports).

27. PUBLIC DEFENDER’S FINAL STATEMENT, *supra* note 2, para. 4.2.3 (Social Workers’ Practice in Work in the Romani Community).

28. “A criminal investigation into the practice of forced and coerced sterilization began on January 31, 2003, almost immediately after the launch of *Body and Soul*. The Slovak Government’s Office for Human Rights and Minorities initiated the investigation by filing a criminal complaint that alleged the crime of bodily harm. The complaint was later changed to investigate the crime of genocide under Slovakia’s Criminal Code.” THE CENTER FOR

In January 2003, the Government Office of Human Rights and Minorities filed a complaint with the General Prosecutor's office, asking for an investigation into cases of possible "involuntary forced sterilizations of Roma women," which would amount to criminal counts of bodily harm. The crime was later re-qualified by the investigators as genocide.²⁹

Given that non-governmental organizations, beginning with Charter 77, had voiced the concern that the sterilization practices might rise to the level of genocide, it was not unreasonable for investigators to consider this crime in the scope of their work. However, genocide would certainly be the most serious crime that could be investigated and the one that would be most difficult to substantiate, particularly because of the requirement to prove the intent of the perpetrators.³⁰ In addition, focusing on a crime that is collective in nature also had the effect of shifting attention away from the impact that malfeasance had on specific individuals.

Moreover, by limiting the scope of the investigation to the crime of genocide alone, and excluding from consideration crimes such as bodily harm or even torts such as medical malpractice or negligence, the investigation was further shaped in a way to lead to a specific outcome – one that would find no wrong doing.

Conflict of Interest

The majority of sterilizations were reportedly performed in public hospitals by medical doctors who are public employees. Accordingly, a Ministry of Health investigation that exonerates itself lacks credibility.

Although it was emphasized that the Ministry of Interior investigative team was headed by women, no Roma – not even the Slovak Government Plenipotentiary for Romani Affairs – were included in the investigative team. There were no government watchdogs, such as an inspector general, ombudsman, or independent commission involved in the investigation, nor did the government include any outside experts from other countries or international organizations.

REPRODUCTIVE RIGHTS AND *PORADNA PRE OBCIANSKE A LUDSKE PRAVA*, THE SLOVAK GOVERNMENT'S RESPONSE TO REPRODUCTIVE RIGHTS VIOLATIONS AGAINST ROMANI WOMEN: ANALYSIS AND RECOMMENDATIONS 3 (May 2003) [hereinafter SLOVAK GOVERNMENT'S RESPONSE].

See also SLOVAK GOVERNMENT, REPORT ON THE COURSE AND PROGRESS OF THE SUSPICION OF THE ALLEGED FORCED STERILIZATION OF ROMANI WOMEN IN THE SLOVAK REPUBLIC AND ON ACTION AND MEASURES TAKEN" (October 2003) [hereinafter SLOVAK GOVERNMENT REPORT] which states "[o]n 31 January 2003 the investigator of the Regional Office of the Slovak Police Force Judicial Police in Kosice commenced criminal prosecution for the criminal act of genocide according to § 259 sec. 1 letter b) of the Criminal Code."

29. Commissioner for Human Rights, Recommendation of the Commissioner for Human Rights Concerning Certain Aspects of Law and Practice Relating to Sterilization of Women in the Slovak Republic, Oct. 17, 2003, CommDH(2003)12, 7, para. 22 [hereinafter Recommendation of the Commissioner].

30. Genocide may be committed by rulers, public officials or private individuals. Genocide Convention, *supra* note 6, Article IV. The acts which constitute genocide, including imposing measures intended to prevent births within a group, must be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." *Id.*, article II.

In effect, the government failed to address the inherent conflict of interest that exists when a government investigates the alleged wrongdoing of its own agents.

Threats to Intimidate Accusers

Human rights activists who investigated and reported on cases of possible wrongful sterilization were threatened with the criminal charge of “spreading alarming information.”³¹ This effort to intimidate human rights defenders prompted Ambeyi Ligabo, UN Commission on Human Rights’ Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and Hina Jilani, Special Representative of the UN Secretary-General for Human Rights Defenders, to write to the Slovak Government urging respect for the freedom of expression for the authors of the sterilization report.³² The COE Commissioner likewise stated that he was “of the firm opinion that no criminal proceedings should be brought against the authors.”³³

Police investigators also threatened possible victims with the criminal charge of “spreading false alarm” during the course of interrogations supposedly conducted to obtain their testimony regarding sterilizations.³⁴

In addition, some Roma were minors at the time they were sterilized, and their sterilizations were performed at the time they were giving birth. Police reportedly let it be known in Romani communities that if such women came forward and asserted they had been sterilized without informed consent, statutory rape charges would be brought against the fathers of their children. This was perceived by non-governmental organizations as yet another means of discouraging victims from coming forward.³⁵

Notwithstanding international criticism of these threats against human rights advocates and possible victims, the Prosecutor General refused to retract the threats and eventually conceded only that the crime of spreading alarming information “probably” had not occurred.³⁶ The threats to bring criminal charges against those who might allege they were sterilized without

31. *Sterilization row deepens*, Slovak Spectator, Dec. 3, 2001; *Slovakia: Accusation of forced sterilization of Roma women proved false*, Bratislava TASR in English (Nov. 22, 2001); transcribed text by Open Source Center, Nov. 22, 2001.

32. Letter dated April 11, 2003, referred to in SLOVAK GOVERNMENT REPORT, *supra* note 28. (This report is notable for its frank and detailed list of the numerous international bodies or persons who took up issues related to the sterilization allegations with the Slovak Government.)

33. Recommendation of the Commissioner, *supra* note 29 at 8.

34. *Roma women in Slovakia reportedly intimidated*, Bratislava TASR in English, Feb. 10, 2003; transcribed by Open Source Center, Feb. 10, 2003; Recommendation of the Commissioner, *supra* note 29 at 7.

35. SLOVAK GOVERNMENT’S RESPONSE, *supra* note 28 at 7-8.

36. *Authors of Study on Forced Sterilizations in Slovakia Not to Face Prosecution*, Bratislava Sme in Slovak (June 5, 2003); translation by Open Source Center, June 5, 2003.

informed consent or who reported such allegations cannot be reconciled with the investigation's stated goal of getting at the truth.

Access to Medical Records Blocked

In some cases, Romani women and their attorneys have been denied access to their medical files.³⁷ In one case, a hospital refused to comply with two court decrees ordering the hospital to provide access to records, giving rise to a suit against Slovakia now pending before the European Court of Human Rights in Strasbourg.

The summary of this case, *K.H. et al v. Slovakia*, as published in December 2005 by the Registrar of the European Court of Human Rights, is as follows:

The applicants are eight women of Romani ethnic origin who were treated at gynaecological and obstetrics departments in two hospitals during their pregnancies and deliveries. Despite continuous attempts to conceive none of the applicants has become pregnant since their last stay at hospital when they delivered via caesarean section. The applicants suspect that they may have become infertile due to sterilization performed on them during their caesarean delivery in the hospitals concerned. With a view to understanding the reasons for their infertility and possible treatment, they attempted to gain access to their medical records in the respective hospitals. However, the applicants' authorized representative was not allowed to consult or photocopy the medical records. The applicants unsuccessfully complained to the health authorities about the denial of access to their medical files, and subsequently instituted civil proceedings against the hospitals, claiming that the medical records be released and that they be allowed to photocopy them. The courts allowed the applicants to consult their medical records and make hand-written excerpts thereof, but maintained that the applicants were not entitled to make photocopies of their medical files. The applicants complained to the Constitutional Court, alleging that by preventing them from photocopying the files they had been placed at a disadvantage vis-à-vis the State in the preparation of their civil claim for compensation against the medical institutions concerned or the State authorities liable for their actions. They held that this represented a breach of the principle of equality of arms under Article 6(1) of the Convention. They also complained that the denial of full

37. A decree (M/0399/2003) issued by the Slovak Ministry of Health on January 28, 2003, appears to give patients the right to access their medical files. It is not clear whether the failure of Slovak hospitals to comply with that decree signals a shortcoming in the decree itself, a lack of political will on the part of the Slovak Government to ensure that the decree is respected, or a desire on the part of the Slovak Government to have the decree respected but, in effect, an inability of the Slovak Government to ensure that the rule of law is respected.

Patients have had some difficulty in obtaining access to medical records in the Czech Republic, as well. See Kristina Alda, *Waiting for answers, Patients fight for the right to see their medical records*, Prague Post, May 17, 2006. Non-governmental organizations have called for improved patient access to their own medical records, consistent with court decisions, and the Public Defender of Rights has supported draft legislation that would clearly rebut the interpretation of law sometimes used to deny patients' copies of their medical records. See LEAGUE OF HUMAN RIGHTS (BRNO) AND MENTAL DISABILITY ADVOCACY CENTER (BUDAPEST), RIGHT TO ACCESS HEALTH DOCUMENT UPHOLD BY CZECH COURT, April 27, 2006, <http://www.llp.cz/subdomains/en/index.php?option=com_content&task=view&id=96&Itemid=59>.

access to their files was a breach of their private and family lives as well as discriminatory. The Constitutional Court rejected the complaint. Following the entry into force of new legislation one of the applicants was given full access to her files and discovered that she had been sterilized when undergoing a caesarean section. Other applicants were subsequently also given full access to their records. However, four applicants have not yet been able to access their medical records under the new legislation.³⁸

One may wonder how much taxpayer money has already been spent by the Slovak Government in its legal effort to deny these women the right to photocopy their own medical records. (If the plaintiffs prevail in their case before the European Court of Human Rights in Strasbourg, Slovakia might be required to pay damages to the plaintiffs.) As it now stands, incriminating evidence from those files may have been altered, tampered with, or destroyed.

Failure to Determine If Consent Was Informed

The most serious shortcoming in the Slovak Government's investigation was its refusal to examine whether consent for sterilization procedures had been given freely, knowingly, and without duress. Indeed, in presenting its conclusions in 2003, the Slovak Government made the remarkable assertion that Slovak law did not require consent for medical procedures to be informed. Instead, Slovak investigators assumed that the existence of a signed consent form was sufficient evidence that the law had been observed.

While a signed consent form may constitute *prima facie* evidence of consent, it does not conclusively demonstrate that consent was informed. The Oxford Companion of the Law defines consent as, i.a.,

An act of the human will in acquiescing in a mental judgment or deciding to implement it. Consent always implies freedom of judgment, deliberation and freely given acquiescence in what is considered desirable. There is free consent only if the person is not blinded by anger or is intoxicated, or ignorant *or deceived, subject to duress or overreached.* [Emphasis added.]³⁹

Similarly, Black's Law Dictionary defines consent as:

. . . voluntary agreement by a person in the possession and exercise of sufficient mental capacity to make an intelligent choice to do something proposed by another. It supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers. Consent is implied in every agreement. *It is an act unclouded by fraud, duress, or sometimes even mistake.* [Emphasis added.]⁴⁰

38. *K.H. et al v. Slovakia* (No. 32881/04) (communicated).

39. David M. Walker, *THE OXFORD COMPANION TO THE LAW* 273 (1980).

40. *BLACK'S LAW DICTIONARY* 305 (6th ed. 1990).

By proceeding on the theory that consent did not have to be informed, Slovak investigators excluded any consideration of whether consent was given voluntarily or knowingly. Slovak investigators also ignored Slovakia's obligation under the European Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine (hereafter *Convention on Human Rights and Biomedicine*). That Convention states, in article 5,

An intervention in the health field may only be carried out after the person concerned has given free and *informed* consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. [Emphasis added.]⁴¹

In fact, a key argument advanced by non-governmental groups was that some consent forms were signed by Romani women who could not read or understand the forms; who were in advanced stages of labor; who were under sedation for surgery; or who signed the forms because they were given incorrect medical information regarding the necessity of sterilization. In such cases, *informed* consent was not obtained.

Significantly, the Czech Public Defender of Rights' legal interpretation of the applicable law differs from the Slovak Government's interpretation of what is, in essence, a common set of laws (both deriving from the period of Czechoslovak statehood). As stated above, the Czech Public Defender of Rights' report states unequivocally that "information is *conditio sine qua non* of the patient's decision" to consent. The Public Defender of Rights' report also takes into consideration the legal norms embodied in the Convention on Human Rights and Biomedicine.

While the Slovak Government maintained in 2003 that, as of that time, Slovak domestic law did not require consent for any medical procedures to be informed, it implicitly recognized that this was an untenable position for society as a whole and inconsistent with international legal obligations Slovakia had undertaken, particularly the Convention on Human Rights and Biomedicine. Accordingly, changes to Slovak law made after 2003 now explicitly require that consent for sterilizations be informed.

Illegal Sterilizations Dismissed as Mere "Procedural Shortcomings"

The victims of wrongful sterilizations in Slovakia roughly fall into two categories. The first category includes those sterilizations performed where "consent" was given, but where the consent was not, in the legal sense of the word, "informed" (e.g., was not given freely, was given under duress or while impaired by medication, was given pursuant to incorrect information by medical personnel, etc.). The Slovak Government dispatched these cases by simply arguing that Slovak law did not require consent to be informed. By far, probably the largest number of victims falls into this category.

41. Convention for the protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine, CETS No. 164, opened for signature April 4, 1997. Slovakia signed the Convention on April 4, 1999 and ratified it on Dec. 1, 1999. The Czech Republic signed the Convention on June 24, 1998 and ratified it on June 22, 2001.

The second category of cases are those where no consent of any kind was obtained, rendering the sterilization illegal even under the Slovak Government's highly unorthodox interpretation of the legal concept of consent. However, following the conclusion the Slovak Government's investigation, Slovak officials have generally denied that "illegal" sterilizations were performed, acknowledging only that there were "procedural shortcomings" in the manner in which some sterilizations were performed.⁴²

In fact, a careful examination of the government's own reports released in 2003 confirms that 1) some Romani minors were sterilized without parental consent as required by Slovak law (which would, in fact, render them illegal); and 2) other women were sterilized without consent based on the mistaken theory that the sterilizations performed at the time of their caesareans were necessary to save their lives. (Changes introduced since 2003 recognize that sterilization is never a life-saving measure, and therefore, sterilizations may not be performed as a putative "emergency" procedure during a caesarean.)

In addition, the "Report of the Course and Progress of the Suspicion of the Alleged Sterilization of Romani women in the Slovak Republic and on the Action and Measures Taken" (October 2003)⁴³ specifically refers to six cases of sterilized minors that warrant further investigation. As far as can be determined from the public record, the government has not undertaken any further investigation on behalf of these six individuals. Moreover, it has failed to carry through with any legal action on behalf of those cases where it was determined minors were sterilized in violation of the then-existing law, or otherwise provide any remedy to these victims.

Legal Changes to Sterilization Regime

On October 21, 2004, changes were made to Slovakia's legal framework relating to health care; those changes entered into force on January 1, 2005.⁴⁴ The most important elements of those changes were:

- *Informed* consent is required for medical treatment; it is defined, and limited exceptions are elaborated.
- Individuals and their legal representatives are guaranteed access to their medical files.
- There must be a 30-day waiting period between the time informed consent is given for a sterilization procedure and the time the sterilization is performed. Sterilization requires a written request for the procedure to be performed.

Slovak Government Reaction to International Criticism

As noted above, there was considerable international attention given to the non-governmental reports on sterilization practices in Slovakia. Perhaps the most notable reflection of this concern

42. See, for example, SLOVAK GOVERNMENT REPORT, *supra* note 28, which states, "During an extended investigation into some sterilizations of women, however, shortcomings of a procedural nature were ascertained."

43. REPORT OF THE SLOVAK GOVERNMENT, *supra* note 28.

44. On Health Care, Services Related to the Provision of Health Care and on Amendments of some Acts, Collection of Laws No. 576/2004, adopted Oct. 21, 2004, entered into force Jan. 1, 2005.

was the report of the COE Commissioner devoted exclusively to this subject, issued on October 17, 2003. In it, he concluded, *inter alia*,

In the light of the specific circumstances set out in this report, the Commissioner recommends that the Government of the Slovak Republic accept clearly its objective responsibility for failing to ensure that no sterilisations were performed without free and informed consent, as required by international human rights instruments. The Government of the Slovak Republic ought, consequently, undertake to offer a speedy, fair, efficient and just redress.⁴⁵

Since the conclusion of the Slovak Government's investigation in late October 2003, international monitoring bodies have remained concerned about the Slovak Government's deficient response. For example, in 2004, the U.N. Committee on the Elimination of Racial Discrimination stated, "The Committee is concerned about reports of cases of sterilization of Roma women without their full and informed consent. [. . .] The Committee strongly recommends that the State party take all necessary measures to put an end to this regrettable practice, including the speedy adoption of the above-mentioned draft law on health care. The State party should also ensure that just and effective remedies, including compensation and apology, are granted to the victims."⁴⁶ In a 2005 report on Slovakia, the COE Commissioner "note[d] with regret that the Slovak authorities have not yet established an independent commission to provide compensation or an apology to the victims."⁴⁷

The Slovak Government's response to international bodies could charitably be described as disingenuous.

For example, on September 21, 2004, the European Roma Rights Center used a confidential complaint procedure to submit information to the U.N. Committee on the Elimination of Discrimination against Women regarding 29 sterilization cases. On August 1, 2005, the committee declined to conduct a special investigation into the matter, in light of legal changes made by the Slovak Government, which came into effect on January 1st of that year. That decision was confidentially communicated to the European Roma Rights Center and the Slovak Government.

45. Recommendation of the Commissioner, *supra* note 29, at 12, para. 53(4).

46. Concluding observations of the Committee on the Elimination of Racial Discrimination on Slovakia, CERD/C/65/CO/7, Dec. 10, 2004. The law mentioned by the Committee was, in fact, adopted and entered into force on Jan. 1, 2005.

47. Commissioner for Human Rights, Follow-up Report on the Slovak Republic (2001-2005), March 29, 2006, CommDH(2006)5 at para. 37 (Assessment of the progress made in implementing the recommendations of the Council of Europe Commissioner for Human Rights). The sterilization issue was also raised by the European Union Parliament in a resolution on the situation of the Roma adopted April 25, 2005: "The European Parliament . . . Calls on Member States and candidate countries to take steps to ensure equal access to health care and social security services for all, to end all discriminatory practices, in particular the segregation of Roma in maternity wards, and to prevent the practice of non-consensual sterilisation of Romani women."

The Slovak General Prosecutor's office subsequently issued a statement about the decision which proved to be inaccurate in two key points.⁴⁸ First, while the statement asserted that illegal sterilizations "never happened in Slovakia," the government's own investigation concluded some Romani girls had been sterilized without any consent (let alone informed consent), in violation of then-existing Slovak law. Second, the government's statement indicated that the U.N. committee also agreed that illegal sterilizations had not happened in Slovakia.

Once such a misleading characterization of the confidential complaint procedure was made by the Slovak Government, the European Roma Rights Center felt compelled to release clarifying portions of the U.N. committee's communication:

In a communication of 1 August 2005, the [U.N. committee] declined to conduct an Article 8 inquiry into the matter, primarily as a result of the entry into force, on 1 January 2005, of a new Act on Healthcare, including provisions to ensure "ethical medical practice as well as access to a patient's file".

The [U.N. committee's] communication states, however, that while it would not at present conduct an inquiry into the matter, under the Article 8 procedure, "it remains concerned that there may have been individual cases of sterilisation of Roma women without consent or with consent obtained by coercion and that, within this context, the issues of responsibility and redress *have so far not been sufficiently addressed.*" The Committee further advised the Slovak government "to pursue an appropriate consideration of these questions." [Emphasis added.]⁴⁹

In fact, the Slovak Government's 2005 written statement to the U.N. committee, submitted in response to the 2004 European Roma Rights Center complaint, was replete with overstatements, sweeping denials, and misrepresentative assertions.

For example, the Slovak Government's submission stated that the Slovak Government's investigation "did not prove that the criminal act of genocide *or other criminal acts* were committed" (emphasis added). In reality, the Slovak Government's investigation only considered the crime of genocide and failed to investigate whether lesser criminal or civil law violations occurred. Even within the confines of this limited investigation, the government's report identified several cases of Romani girls sterilized in violation of the law as it existed.

The Slovak Government's submission to the committee also stated that "[t]here does not exist, and *has never existed*, a government-led policy encouraging sterilizations of groups of the population or leading to tolerance of such illegal acts" (emphasis added). This statement fails to

48. This statement was published on website of the Slovak General Prosecutor's Office at <http://www.genpro.gov.sk/index/go.php?id=38&prm1=53>. See also *No illegal sterilization of Roma in Slovakia – prosecution*, Bratislava TA3 Television in Slovak (Sept. 29, 2005); translated by Open Source Center, Sept. 29, 2005.

49. EUROPEAN ROMA RIGHTS CENTER, SLOVAK OFFICIALS RELEASE FALSE AND MISLEADING INFORMATION CONCERNING COERCIVE STERILISATION (Oct. 4, 2005) (press release), <<http://www.errc.org/cikk.php?cikk=2399&archiv=1>>.

acknowledge the existence of a state policy targeting Roma for sterilization during the communist period (as reported by Charter 77⁵⁰ and by the Czech Public Defender of Rights). In fact, officials at the highest levels of the Slovak Government – the Prime Minister⁵¹ and Minister of Health – had expressed concern about the birthrate of Roma, with the former Minister of Health personally pledging that “the government will do everything to ensure that more white children than Romani children are born.”⁵² And, as noted in the *On the Margins* report,⁵³ as recently as 2000 a draft Ministry of Health document called for “modifying” the Romani birthrate.

The Slovak Government’s submission to the committee further attempts to justify some sterilizations performed without consent as emergency medical procedures, quoting provisions of the European Convention on Biomedicine which permit emergency procedures to be performed without consent. However, the Slovak Government has implicitly recognized that sterilizations are never a “life-saving” procedure when it adopted legal changes which effectively prohibit performing sterilization as an “emergency” procedure by requiring a 30-day delay between a caesarean and any sterilization procedure.

Perhaps the most disturbing assertion in the Slovak Government’s submission is the claim that “medical interventions [i.e., sterilizations] had no influence on the reproductive ability of the Roma ethnic minority.” It is difficult to know exactly what was meant by this statement or how the Slovak Government could conclude that sterilization does not affect one’s reproductive ability. It may be that the Slovak Government dismisses the *individual* rights of Romani women as long as the birthrate of Roma as an ethnic group is increasing.

V. Conclusions

The idea that it was permissible under Slovak law for doctors and other medical professionals to lie, coerce, or mislead their patients into undergoing sterilization procedures – indeed, the idea that consent need not be knowing and voluntary (that is, informed) for *any* medical procedure – was a startling proposition, to say the least, when offered by the Slovak Government in 2003. On the one hand, the Slovak Government’s legal analysis may have accurately reflected the weak state of patients’ rights in Slovakia at that time. Alternatively, it is also possible that the government tailored its legal analysis to achieve a specific outcome: one that would enable government investigators merely to look for a signed consent form, without having to investigate the circumstances under which that signature was obtained.

And what about those cases where medical professionals failed even to obtain the requisite signed piece of paper, a violation of Slovak law even according to the Slovak Government’s

50. CHARTER 77, *supra* note 4.

51. Prime Minister’s remarks, *supra* note 13.

52. *Slovak Roma Uneasy about Health Minister’s Statements*, OPEN MEDIA RESEARCH INSTITUTE DAILY DIGEST, Oct. 31, 1995. *Minister Seeks to Regulate Romanies’ Birthrate*, Bratislava *NARODNA OBRODA* in Slovak (Oct. 28, 1995); translation by Open Source Center (formerly the Foreign Broadcast Information Service), Oct. 28, 1995.

53. Zoon, *supra* note 17.

narrow legal view? Slovak Government officials have faithfully hewn to the euphemism “procedural shortcomings” to describe these illegal sterilizations. The government has failed to follow up on the observation included in its own report, that further investigation is needed to determine if there were additional cases of minors sterilized without the consent of their guardians. The government also failed to take legal action against doctors or other medical professionals involved in confirmed cases of minors sterilized without the consent of their guardians.

In contrast, the Czech Public Defender of Rights concluded that “the unlawful nature of the sterilizations lies in the fact that consent, that was without error and fully free in the human rights sense, was not given to the interventions.” In other words, it was the lack of *informed* consent that rendered illegal the sterilizations he examined.

Having reached that conclusion, the Czech Public Defender of Rights sets forth tasks for both the government and for the public. For the government, he recommends specific actions designed to prevent such violations in the future, improve health care, and provide compensation to victims. Czech society as a whole, he says, faces the task of coming to terms with the fact that wrongful and illegal sterilizations occurred. The Public Defender of Rights’ own report, and the response of papers like *Respekt*, suggests that Czech society may already be rising to that challenge.

To its credit, the Slovak Government has adopted legal changes to protect patients’ rights and ensure that medical procedures cannot be performed without a patient’s *informed* consent. But, at no time has the Slovak Government acknowledged that sterilizing people without their informed consent was wrong, even if (and it is a very big if) the practice did not violate Slovak domestic law before 2005.

In short, the Slovak Government has failed to demonstrate any compassion for women and girls who were sterilized without their consent and deprived of the opportunity to bear children again. By treating their claims as lies, the government has effectively treated these victims as liars, and compounded their original injury with this indignity. If the Slovak Government is to counter the endemic prejudice faced by its most marginalized minority, it must acknowledge the fact – and state it publicly – that wrongful sterilizations of Romani women did occur.

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