



Economic and Social Council

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Committee on Economic, Social and Cultural Rights

Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 70/2018*, **

<i>Communication submitted by:</i>	Sara Vázquez Guerreiro (represented by Plataforma de Afectados por la Hipoteca de Leganés)
<i>Alleged victims:</i>	The author, D.S.V. and Y.S.V.
<i>State party:</i>	Spain
<i>Date of communication:</i>	22 October 2018 (initial submission)
<i>Date of adoption of Views:</i>	9 October 2023
<i>Subject matter:</i>	Eviction of a family from a dwelling occupied without legal title
<i>Procedural issues:</i>	Manifest lack of substantiation; abuse of rights; exhaustion of domestic remedies
<i>Substantive issue:</i>	Right to adequate housing
<i>Articles of the Covenant:</i>	3, 10 (3) and 11 (1)
<i>Articles of the Optional Protocol:</i>	2 and 5

1.1 The author of the communication is Sara Vázquez Guerreiro, a national of Spain born on 3 May 1990. She submits the communication on her behalf and on behalf of her minor children, D.S.V. and Y.S.V., born on 20 December 2009 and 27 July 2017, respectively. The author claims that eviction from the dwelling she and her children currently occupy would violate her and her children's rights under article 11 of the Covenant. The Optional Protocol entered into force for the State party on 5 May 2013. The author is represented by Plataforma de Afectados por la Hipoteca de Leganés.

1.2 On 26 October 2018, the Committee, acting through its Working Group on Communications, registered the communication and asked the State party to take interim measures consisting of suspending the eviction of the author and her children while the communication was being considered or providing them with alternative housing suited to

* Adopted by the Committee at its seventy-fourth session (25 September–13 October 2023).

** The following members of the Committee participated in the examination of the communication: Aslan Abashidze, Mohamed Ezzeldin Abdel-Moneim, Nadir Adilov, Mohammed Amarti, Asraf Ally Caunhye, Laura-Maria Crăciunean-Tatu, Peters Sunday Omologbe Emuze, Santiago Manuel Fiorio Vaesken, Ludovic Hennebel, Joo-Young Lee, Karla Vanessa Lemus de Vázquez, Lydia Carmelita Ravenberg, Julieta Rossi, Preeti Saran, Shen Yongxiang and Michael Windfuhr. Pursuant to rule 23 of the rules of procedure under the Optional Protocol, Mikel Mancisidor de la Fuente did not participate in the examination of the communication.



their needs, in genuine consultation with the author, in a bid to avoid causing irreparable harm to her and her children.

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

Factual background¹

Before registration of the communication

2.1 The author claims that in 2014 she entered into a verbal agreement to rent an apartment from an individual and duly paid the monthly rent.

2.2 On 15 October 2015, the author applied to the Madrid social welfare services for low-cost housing and was put on a waiting list.

2.3 In July 2017, the author discovered that the individual to whom she had been paying rent neither owned the apartment nor had legal title to it and that the apartment in fact belonged to the Madrid Social Housing Institute, currently known as the Madrid Social Housing Agency.

2.4 On 21 December 2017, the Madrid Trial Court No. 1 convicted the author on one count of encroachment, a minor offence, fined her €180 and ordered her to give possession of the property back to its owner.² The Court held that the author had admitted that she knew that the house belonged to the Madrid Social Housing Institute and that she had moved into it without the Institute's permission. The Court also held that the author could not claim that she was in a state of necessity, since she had family members with whom she could live and savings that she had put into renovating the apartment.

2.5 The author, represented by a public defender, appealed against the verdict of 21 December 2017, contending that there had been an error in the assessment of the evidence, a failure to presume her innocent or give her the benefit of the doubt, a violation of her right to effective judicial protection and a wrongful failure to apply article 20 (5) of the Criminal Code, which states as follows:

Anyone who, to avoid causing harm to him- or herself or another person, has no choice other than to interfere with the legal interests of another person or act in breach of duty is not held criminally responsible, provided that: first, the harm caused is not greater than the harm to be avoided; second, the individual in question has not deliberately brought about the state of necessity; third, the individual in a state of necessity is not required, in view of his or her trade or position, to accept the consequences of the harm.

On 25 May 2018, the Provincial High Court of Madrid dismissed the appeal, finding that (a) the failure of the social welfare services to reply to the author's application for low-cost housing could not justify her commission of the offence of encroachment and that (b) the author could not reasonably claim a state of necessity, as her economic resources, in the form of the savings that she had used to renovate the apartment, and the unexhausted personal, family and social resources available to her meant that there was no situation of imminence or absolute urgency, issues about which the Court provides no specific information.

2.6 On 6 June 2018, the author asked, to no avail, whether it would be possible to negotiate an affordable rent for the apartment. On several occasions, she also asked the Madrid social welfare services to provide her with adequate alternative housing in the event that she was evicted.

¹ These facts have been reconstructed on the basis of the individual communication and the information subsequently provided by the parties in their observations and comments on the merits of the communication.

² In connection with the offence of encroachment, article 245 (2) of the Criminal Code states as follows: "Any person who, without due authorization, occupies another person's property, home or other building used other than as a place of residence or remains in it against the owner's wishes will be subject to a fine to be paid at an individualized periodic rate for three to six months."

2.7 On 19 July 2018, the Leganés Trial Court No. 8 ordered the author to pay the fine in monthly instalments of €18 each and to voluntarily vacate the apartment she was occupying within one month or be evicted on 28 September 2018. The author submitted several applications to the Court for the postponement of the eviction, but all were rejected.

2.8 On 13 September 2018, the author requested information on the status of her application for low-cost housing and was informed that it had lapsed.

2.9 On 28 September 2018, the Leganés Trial Court No. 8 suspended the eviction of the author and gave her another month to vacate the apartment – that is, until 28 October 2018 – or be forcibly evicted on an undetermined date thereafter. This eviction did not take place because there were too few police officers to deal with the neighbours and their reaction, because the author had an anxiety attack and because her younger child had bronchitis.

2.10 On 23 October 2018, the author requested a report on her situation from the social welfare services of the Leganés City Council.

2.11 The author worked on fixed-term contracts on several occasions, but at the time of registration of the communication she had been unemployed since June 2018 and had received €430.27 a month in unemployment benefits until December 2018.

After registration of the communication

2.12 On 26 October 2018, the Leganés Trial Court No. 8 ordered that the author and her children be evicted on 29 November 2018. On 26 November 2018, the author requested that the eviction be suspended until the last day of her children's school year. On 28 November 2018, the Court granted the author's request and suspended the eviction until 25 June 2019.

2.13 On 17 June 2019, the Court notified the author that the eviction was planned for 25 June 2019. On 21 June 2019, the author, on the strength of the Committee's request for the adoption of interim measures, again asked, unsuccessfully, for the eviction to be suspended.

2.14 On 25 June 2019, the author and her two children were evicted. After the eviction, they stayed for a few months in the author's sister's two-bedroom apartment, in which three adults and four children were living. The author and her children then had to move to a rural dwelling belonging to the author's parents in Calalberche, in the Province of Toledo, more than 50 km from the author's place of work, as well as from the home of the rest of the family and the places around which the children's lives revolved.

Complaint

3. In her initial submission, the author claims that evicting her and her children would be a violation of article 11 of the Covenant, as she does not have adequate alternative housing. The author claims that her income is insufficient to find housing on the private market and that she does not have a social network that can provide her with alternative accommodation. The author claims that, despite her situation of particular vulnerability, all her applications to the Community of Madrid for low-cost housing have been ignored.

State party's observations on admissibility and the merits

4.1 On 13 September 2019, the State party submitted its observations on the admissibility and merits of the communication.

4.2 First, the State party submits that the treaty bodies should not act as courts of further appeal and that their consideration of a communication should therefore be based on the proven facts and the domestic courts' assessment and description of the facts.³ In the present case, according to the decision of 21 December 2017 of the Leganés Trial Court No. 8 and that of 25 May 2018 of the Provincial High Court of Madrid, the author's possession of the apartment, which was unlawful, constituted the criminal offence of encroachment, and there was no exculpatory state of necessity.

³ Human Rights Committee, *J.H. v. Finland*, communication No. 300/1988.

4.3 The State party notes that housing and social assistance are the responsibility of the autonomous communities. It adds that Decree No. 52/2016 of 31 May 2016 of the Governing Council of the Community of Madrid provided for the creation of the emergency social housing stock and the regulation of the allocation of housing in the Community of Madrid. The Ministry of Transport, Housing and Infrastructure of the Community of Madrid is responsible for the allocation of housing owned by the Madrid Social Housing Agency. The ordinary procedure for the allocation of housing involves an objective assessment of circumstances of particular need that makes it possible to accept applications from persons who (a) are of legal age or emancipated minors, (b) have an income of no more than 3.5 times the amount used by the Government to determine eligibility for social welfare and other benefits (in 2018: €17.93 a day, €537.84 a month and €6,454.03 a year), (c) have not been allocated public housing in the previous 10 years unless it was given up for justifiable reasons, (d) are not full owners or holders of the real right of use or enjoyment of a home, except in the event of loss of housing following a divorce and gender-based violence, (e) have been registered or worked for 10 years in the Community of Madrid, except in the event of gender-based violence, (f) do not occupy a property without legal title or the consent of the owner. The Decree goes on to list the situations of particular need, which are as follows: (a) imminent eviction (provided that more than 30 per cent of the family unit's income goes towards rent), (b) gender-based violence or violence based on race, sexual orientation and identity, religion, beliefs or disability, (c) renting housing unfit for human habitation, (d) residing in substandard housing or temporary buildings, in spaces or buildings not intended for residential use, in hostels, shelters or supervised residences, penitentiary establishments, psychiatric facilities or similar establishments and being able to live independently, (e) living in a dwelling too small for the size of the family (less than 8 m² per member of the family unit and, in any case, less than 25 usable m²), (f) being a tenant in a dwelling for which the annual rent is equal to or greater than 30 per cent of the family income, (g) sharing a dwelling owned by another person with another family unit, unless the person sharing is single and he or she is sharing the dwelling with his or her forebears, and (h) living in an unstable situation with consent of the owner of the dwelling, unless the latter is a forebear of the occupant. Decree No. 52/2016 establishes the following scoring system: (a) economic circumstances (10 points up to 1.5 times the amount used by the Government to determine eligibility for social welfare and other benefits, 9 points from 1.5 to 2.5 times the amount and 8 points from 2.5 to 3.5 times the amount), (b) disability rating equal to or greater than 65 per cent (2 points and 1 more point for each other member), (c) dependency (1 point per dependant), (d) family responsibilities (1 point per descendant under 35 years of age or forebear over 65 years of age living with the family unit during the previous two years), (e) gender-based violence and similar situations (3 points), (f) time elapsed since submission of application (0.15 points for three years and 0.15 points for each extra year), (g) guardianship (1 point for successfully leaving guardianship) and (h) other social circumstances that worsen an applicant's situation (up to 4 points). The State party notes that housing is allocated according to actual availability and in accordance with the score obtained and an assessment of the economic, personal and social circumstances of the family units. It adds that the Decree, its requirements and the scoring system have been made widely known and that the author, who received legal and social advice from the social welfare services, was therefore familiar with them. The author's 2015 application for low-cost housing was included in the two-bedroom subcategory of housing to be allocated from the general quota.

4.4 The State party is of the view that the communication is inadmissible for manifest lack of substantiation and abuse of rights, as the author allowed her application for low-cost housing to lapse, acknowledged the encroachment and did not attempt to exhaust domestic remedies. The State party believes that the communication had no other purpose than to ensure that the author could stay in the apartment she was occupying.

4.5 In addition, the State party claims that the author has not exhausted all domestic remedies, as she has failed to (a) update her application for housing, causing it to lapse, (b) avail herself of domestic remedies, including urgent precautionary measures, to protect her rights and (c) petition the Constitutional Court for *amparo* in connection with her conviction on charges of encroachment.

4.6 The State party also submits that the eviction of the author from her home did not amount to a forced eviction within the meaning of general comments No. 4 (1991), on the

right to adequate housing, and No. 7 (1997), on forced evictions, as they do not cover the eviction of persons convicted of encroachment. The offence of encroachment is defined in article 245 of the Criminal Code, and interpretations of this definition can be found in the jurisprudence of the Supreme Court.⁴ In addition, encroachment involving a property that is not a dwelling is punishable under Spanish law only in the event of conduct that poses a substantial risk or danger to the interest protected under criminal law; a large number of precedents maintain, for example, that criminal charges of encroachment are disproportionate where the property occupied is abandoned or in poor repair.⁵ Similarly, it has been asserted in legal precedents that the commission of the offence requires that the occupation be continuous over time; three days has been found not long enough to conclude that the offence has been committed. Likewise, precedent has frequently supported exemptions granted on the grounds of the state of necessity and consequent social vulnerability of the perpetrator of the offence. To benefit from such an exculpatory circumstance, the perpetrator must have been in a precarious economic situation when the offence was committed and must have been experiencing serious difficulties as a result of the poverty at the root of the unlawful occupation. Furthermore, the precarious situation must have lasted for a considerable period of time, and the offender must have been unable to find alternative means of meeting his or her housing needs during this time. Under Spanish case law, a potential state of necessity may also justify the temporary occupation of another person's property but not the occupation of the property and residence therein for an extended period.

4.7 The State party submits that the present case does not involve tenure protected by article 11 of the Covenant and that the return of the property to its owner therefore does not constitute a forced eviction under article 11 of the Covenant or the Committee's case law. Paragraph 3 of general comment No. 7 (1997) states that the prohibition on forced evictions does not apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights. Furthermore, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this regard, in his basic principles and guidelines on development-generated evictions and displacement,⁶ does not refer to cases of squatting. In paragraph 8 (a) of its general comment No. 4 (1991), the Committee lists only lawful forms of tenure. "Tenure", it states, "takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property". According to the State party, general comment No. 7 (1997) assumes that occupation is lawful when, in paragraph 11, it states that, whereas some evictions may be justifiable, such as in the case of persistent non-payment of rent or of damage to rented property without any reasonable cause, it is incumbent upon the relevant authorities to ensure that they are carried out in a manner warranted by a law which is compatible with the Covenant and that all the legal recourses and remedies are available to those affected. The State party submits that, in the present case, the author's occupation was not one of the peaceful forms protected under article 11 of the Covenant. Any other consideration would be tantamount to legitimizing by way of the right to housing criminally unlawful conduct and a violation of the owner's property rights. The State party notes that evictions are justified in the event of persistent non-payment of rent or damage to the rented property without any reasonable cause – that is, the tenant must comply with his or her obligations, and the right to adequate housing cannot be used as a shield to protect the tenant from the consequences of his or her failure to comply with the law, in particular when such non-compliance involves criminal conduct upon taking possession of property. The Committee has previously stated that the conditions that must be satisfied in order to receive social services must be reasonable and very carefully designed and that they must be communicated in a transparent, timely and complete manner to the applicant.⁷ Decree No. 52/2016 contains a provision expressly denying access to emergency accommodation to

⁴ See Supreme Court judgment No. 800/2014 of 12 November 2014.

⁵ See Provincial High Court of Segovia ruling of 29 October 1998, Provincial High Court of Girona ruling of 5 February 1999 and Provincial High Court of Valencia ruling of 4 February 2000.

⁶ A/HRC/4/18, annex I.

⁷ *Ben Djazia et al. v. Spain* (E/C.12/61/D/5/2015), para. 17.2.

anyone found liable for encroachment; according to the State party, the author was aware of this provision when she submitted her application.

4.8 The State party concludes that the author's case does not amount to a forced eviction, that the due process of law required under the Covenant was followed and that the author and her family have received continuous assistance, to the extent of the public resources available, from the Spanish public authorities.

Comments from counsel for the author on the State party's observations on admissibility and the merits

5.1 On 13 March 2022, the author's representative submitted her comments on the admissibility and merits of the communication.

5.2 First, the author's representative states that, on 25 June 2019, the author and her two children, who had no alternative accommodation, were evicted in disregard of the request for interim measures. The author's representative states that the apartment in question, publicly owned, is still empty, evidence of a lack of genuine policies for affordable housing.

5.3 Second, the author's representative notes that she is not in close contact with the family and that, after the eviction, the author and her two children had to spend several months in the author's sister's apartment, a two-bedroom apartment in which three adults and four children were living. She states that the author and her two children had to move to a rural dwelling belonging to the author's parents in Calalberche, in the Province of Toledo, more than 50 km from the author's place of work and the rest of the family.

5.4 The author's representative concludes that evicting her was a violation of her right to adequate housing.

B. Committee's consideration of admissibility

6.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 10 (2) of its provisional rules of procedure under the Optional Protocol, whether or not the communication is admissible.

6.2 The Committee notes the State party's argument that the communication constitutes an abuse of rights because of the author's failure to take all the steps she should have when she applied to the Social Housing Agency for housing. The Committee notes, however, that the author's alleged failure to take all those steps does not, in itself, constitute an abuse of the right to submit a communication for the purposes of article 3 (2) (f) of the Optional Protocol.⁸ Moreover, the Committee notes that, according to the author, she applied for low-cost housing in October 2015 and that in September 2018 she requested an update on the status of her application, at which time she was notified that it had lapsed. The Committee notes the State party's argument that the author allowed her application to lapse. However, the Committee notes that, according to the State party, the requirements for access to low-cost housing in the Community of Madrid include not occupying a property without legal title or the consent of the owner. Since the author was squatting, her application for low-cost housing was bound to be unsuccessful.

6.3 The Committee cannot therefore conclude that the author's alleged lack of diligence constitutes an abuse of the right of submission of a communication. Accordingly, the Committee concludes that article 3 (2) (f) of the Optional Protocol does not constitute an obstacle to the admissibility of the communication.

6.4 Furthermore, the Committee notes that the State party argues that the author's failure to follow up with the administrative authorities between 2015 and 2018 on her application for low-cost housing also constitutes a failure to exhaust available domestic remedies. The author, for her part, claims to have exhausted domestic remedies, as she challenged the eviction order and applied for low-cost housing on several occasions. The Committee is of the view that, for the purposes of article 3 (1) of the Optional Protocol, "domestic remedies"

⁸ *Taghzouti Ezqouihel v. Spain* (E/C.12/69/D/56/2018), para. 6.3.

are all remedies available in direct relation to the events that initially gave rise to the alleged violation and that, *prima facie*, may be reasonably considered effective means of remedying the alleged violations of the Covenant.⁹ The Committee notes that the principal claim made by the author in her communication is that, because she had no alternative housing, evicting her was a violation of the Covenant. Therefore, the remedies that must be exhausted are, first and foremost, those directly related to the eviction, such as remedies aimed at preventing or delaying the eviction or serving to notify the courts of the lack of alternative housing.¹⁰ In this regard, the Committee notes that the author exhausted all the available remedies intended to prevent or delay the eviction, as she challenged the conviction of 21 December 2017 and requested the suspension of the eviction on repeated occasions, informing the authorities that she did not have alternative housing.

6.5 The Committee also notes the State party's argument that the author did not petition the Constitutional Court for *amparo* in connection with her conviction on charges of encroachment. However, the Committee observes that being granted *amparo* as a remedy for having been convicted of encroachment would not be an effective remedy for the alleged violation of the right to adequate housing.¹¹ The Committee therefore concludes that, with respect to the author's claim relating to the eviction, all available domestic remedies have been exhausted, as required under article 3 (1) of the Optional Protocol.

6.6 The Committee notes that the communication meets the other admissibility requirements under articles 2 and 3 of the Optional Protocol and, accordingly, declares the communication admissible and proceeds to its consideration on the merits.

C. Committee's consideration of the merits

Facts and legal issues

7.1 The Committee has considered the present communication, taking into account all the information provided to it, in accordance with the provisions of article 8 of the Optional Protocol.

7.2 The Committee will proceed to consider which facts it deems established and relevant to the complaint.

7.3 Since 2014, the author had been living with her two children, born in 2009 and 2017, in a building owned by what was formerly known as the Madrid Social Housing Institute (now the Madrid Social Housing Agency). Because the author was in a precarious economic situation and did not have a stable job, she received unemployment benefits on several occasions.

7.4 On 15 October 2015, the author applied to the Agency for public housing for reasons of particular necessity, in accordance with Decree No. 52/2016; her application was received, but for reasons unknown it later expired, and the author was not informed of the expiration.

7.5 On 21 December 2017, the Leganés Trial and Investigation Court No. 8 found the author guilty of encroachment for the purpose of illegally occupying a dwelling, a minor offence, fined her €180 and ordered her evicted from the property. The Court was of the view that the author had been occupying the property illegally since April 2017 and interpreted her claims regarding her unstable housing situation and her inability to obtain housing on the private market as evidence of her knowledge of the unlawfulness of the occupation. It was also of the view that the author's renovation of the apartment showed that she had the savings to obtain housing on her own, and that the author had family members with whom she could live, although it provided no specific information on this point.

7.6 The author lodged an appeal against the conviction with the Provincial High Court of Madrid, arguing that she had occupied the apartment because the authorities were taking too

⁹ *Hernández Cortés et al. v. Spain* (E/C.12/72/D/26/2018), para. 6.2, and *Moreno Romero et al. v. Spain* (E/C.12/69/D/48/2018), para. 8.2.

¹⁰ *Moreno Romero et al. v. Spain*, para. 8.2.

¹¹ *Martínez Fernández v. Spain* (E/C.12/64/D/19/2016), para. 6.3.

long to process her application for public housing. On 25 May 2018, the Court upheld the lower court's ruling, as it was of the view that the evidence of the minor offence of encroachment was not in dispute.¹² According to the Provincial High Court, there was no proof that there was a possible danger to the author and her children or that the author had exhausted the legal means of solving her housing problem. It also hypothesized, albeit without evidence, that the author's application for housing was rejected because she had the wherewithal to obtain housing on her own. At the same time, it posited the possibility that the occupation was the result of an unstable housing situation.

7.7 On 20 June 2018, the author, submitting supporting documentation a week later, applied to the Social Housing Agency for an exceptional low-cost housing rental arrangement. The author subsequently applied several times for low-cost housing and/or a suspension of the eviction.

7.8 On 19 July 2018, the Court stated that the eviction was to take place on 28 September.

7.9 On 28 September 2018, the first eviction attempt took place. Because one of the author's children had a case of bronchitis, however, and because of a lack of police officers, it was postponed for a month. After the additional month, a new eviction date, 29 November 2018, was set. On 28 November 2018, at the author's request, the eviction was again suspended, this time until 25 June 2019.

7.10 On 5 October 2018, the author requested a meeting with the councillor responsible for social welfare services before the Ministry of Transport, Housing and Infrastructure, and on 23 October she requested a meeting with the City Council of Leganés for a report on her vulnerability, reiterating her request for a meeting with the councillor.

7.11 On 25 June 2019, the author and her children were evicted even though the courts had not authorized a consultation on and review of housing alternatives or, in the final instance, ensured that the author had alternative accommodation. Nor did the proceedings foresee the right to be heard, directly or through legal representatives or an appropriate body, of the children of the family. In addition, the eviction took place despite the Committee's request for interim measures.

7.12 The author claims that evicting her and her children without alternative accommodation amounted to a violation of their right to adequate housing under article 11 (1) of the Covenant. The State party argues that it was not a forced eviction, that due process was followed and that assistance has been provided to the family to the maximum of the resources available to the State.

7.13 In the light of the Committee's determination of the relevant facts and the parties' submissions, the issue raised by the communication is the following: whether or not the court decision to evict the author and her children without making provision for a consultation on and review of housing alternatives or, in the final instance, ensuring that the author had alternative accommodation when the eviction was ordered and then took place is a violation of the right to adequate housing enshrined in article 11 (1) of the Covenant. The Committee must also determine whether, in view of the principle of the best interests of the child, the failure to ensure that the children could exercise their right to be heard or to take into account the disproportionate impact of eviction on a female head of household and her children in the eviction process is a violation of the right to adequate housing recognized in article 11 (1) of the Covenant read separately and in conjunction with article 3 (equal right of men and women to the enjoyment of economic, social and cultural rights) and article 10 (3) (special measures of protection and assistance on behalf of all children and young persons without any discrimination). To make this determination, the Committee will begin by returning to its

¹² The Provincial High Court noted that states of necessity obtain on the following five conditions: (a) that there is subjection, pressing and serious imminence of harm to oneself or others; (b) that there is a need to act to the detriment of another's legal interest or to shirk a duty in order to avert that danger; (c) that the harm or damage caused is no greater than the harm or damage to be averted; (d) that the person acting in a state of necessity did not deliberately put him- or herself in that state and (e) that this person, by reason of his or her position or trade, is not required to accept or bear the consequences of the pending or present harm.

jurisprudence on protection from forced eviction. It will then consider the eviction of the author and her children and address the issues raised in the communication.

Protection against forced eviction

8.1 The human right to adequate housing is a fundamental right central to the enjoyment of all economic, social, cultural and environmental and other civil and political rights.¹³ The right to housing should be ensured to all persons irrespective of income or access to economic resources,¹⁴ and States parties should take whatever measures are necessary to achieve the full realization of this right to the maximum of their available resources.¹⁵

8.2 Forced evictions are prima facie incompatible with the Covenant and can be justified only in the most exceptional circumstances.¹⁶ The relevant authorities must ensure that they are carried out in accordance with legislation that is compatible with the Covenant and in accordance with the general principles of reasonableness and the proportionality of the legitimate objective of the eviction to its consequences for the evicted persons.¹⁷ This obligation flows from the interpretation of the State party's obligations under article 2 (1) of the Covenant, read in conjunction with article 11, and in accordance with the requirements of article 4, which stipulates the conditions under which such limitations on the enjoyment of the rights under the Covenant are permitted.¹⁸

8.3 For an eviction to be justifiable, it must thus meet the following requirements. First, the limitation of the right to adequate housing must be determined by law. Second, it must promote general welfare in a democratic society. Third, it must be suited to the legitimate purpose cited. Fourth, the limitation must be necessary, in the sense that if various means of achieving the goal pursued could reasonably be expected to succeed, the one that interferes least with the right must be used. Lastly, the benefits of the limitation in promoting general welfare must outweigh the impact on the enjoyment of the right being limited. The more serious the impact on the right enshrined in the Covenant is, the greater is the scrutiny that must be given to the grounds invoked for such a limitation. The availability of adequate alternative housing, the personal circumstances of the occupants and their dependants and their cooperation with the authorities in seeking suitable solutions are crucial factors in such an analysis. Moreover, a distinction inevitably needs to be made between an eviction from properties belonging to individuals who need them as a home or to provide vital income and properties belonging to financial institutions or other entities.¹⁹

8.4 The assessment of the proportionality of the measure must be carried out by a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy. This authority must ascertain whether the eviction is compatible with the Covenant, including with regard to the elements of the proportionality test required by article 4 of the Covenant as described above.²⁰ Finding an eviction unreasonable at a specific moment in time does not necessarily mean that the occupants cannot be evicted. However, the principles of reasonableness and proportionality might make it necessary to stay or postpone the eviction order so as to avoid subjecting the evicted persons to destitution or violations of other rights enshrined in the Covenant. An eviction order may also depend on other factors, such as an obligation for the administrative authorities to step in to help the occupants with a view to mitigating the consequences of the eviction.²¹

¹³ General comment No. 4 (1991), para. 1.

¹⁴ *Ibid.*, para. 7.

¹⁵ *Ibid.*, para. 12.

¹⁶ *Ibid.*, para. 18, and general comment No. 7 (1997), para. 1.

¹⁷ *Ben Djaia et al. v. Spain*, para. 13.4.

¹⁸ *Gómez-Limón Pardo v. Spain* (E/C.12/67/D/52/2018), para. 9.4.

¹⁹ *López Albán v. Spain* (E/C.12/66/D/37/2018), para. 11.5.

²⁰ *Ibid.*, 11.6.

²¹ *Ibid.*, para. 11.5.

8.5 In addition, there must not be alternative measures or measures that involve less interference with the right to housing, and the persons concerned must not remain in or be exposed to a situation constituting a violation of other Covenant or human rights.²²

8.6 The following procedural safeguards should also be in place during eviction proceedings: (a) an opportunity for genuine consultation on alternative accommodation with those affected, and, if a lack of resources means that there are no viable alternatives, a requirement for the administrative authorities to present the available options with a view to ensuring that the eviction will not leave anyone homeless; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) provision, in reasonable time, of information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to all affected persons; (d) especially where groups of people are involved, the presence of government officials or their representatives during an eviction; (e) proper identification of all persons carrying out the eviction; (f) no execution of eviction orders in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies to challenge the eviction; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.²³

8.7 States parties have an obligation to consider all alternatives to eviction, never to proceed to an eviction if doing so will leave anyone homeless and to ensure that those affected are adequately consulted.

8.8 Forced eviction as a punitive measure is also inconsistent with the norms of the Covenant.²⁴ In this regard, the Committee notes that public policies or legislative measures that criminalize individuals or groups of individuals on the basis of their housing situation may be discriminatory and contrary to the right to adequate housing and to other obligations of States parties to the Covenant, particularly when they affect groups in vulnerable situations.²⁵ The criminalization of a social issue, such as homelessness, is a disproportionate response by the State that does not serve the intended purpose. Criminal law has to be a tool of last resort. The State must seek to respond in other, less harmful ways to the housing shortage and the limited opportunities afforded low-income people to gain access to decent housing, which is often the underlying reason for the offence of encroachment. The Committee is of the view that States parties should ensure that they make available effective and adequate means of challenging forced evictions and the criminalization of persons without access to adequate housing or living in illegal settlements.²⁶

8.9 The Committee also wishes to point out that women, children, youth, older persons, Indigenous Peoples, ethnic and other minorities and other individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all these groups are especially vulnerable given the extent of statutory and other forms of discrimination that often apply in relation to access to property or accommodation, as well as their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.²⁷ Many women experience intersectional forms of discrimination due to the combination of gender and such factors as race, colour, language, religion, political and other opinion, national or social origin, property, birth, or other status, such as age, ethnicity, disability and marital, refugee or migrant status, resulting in compounded disadvantage.²⁸

8.10 The Committee has thus taken special note of the factors that have a negative impact on the equal enjoyment by women and men of economic, social and cultural rights in many of its general comments, including those relating to the right to adequate housing.²⁹ The Committee reiterates that it is incumbent upon States parties to consider whether the application of ostensibly gender-neutral laws, policies and programmes has a negative and

²² *Ben Djazia et al. v. Spain*, para. 15.1.

²³ Committee's general comment No. 7 (1997), para. 15.

²⁴ *Ibid.*

²⁵ *A/HRC/49/48*, para. 47.

²⁶ *A/HRC/40/61*, paras. 41 and 42.

²⁷ General comment No. 7 (1997), para. 10, and general comment No. 26 (2022), para. 13.

²⁸ General comment No. 16 (2005), para. 5.

²⁹ General comment No. 4 (1991), para. 6, and general comment No. 7 (1997), para. 10.

more burdensome impact on the ability of women to enjoy their human rights without discrimination.³⁰ They must also take steps to ensure that, in practice, men and women enjoy their economic, social and cultural rights on a basis of equality; consequently, their public policies and legislation must take account of the economic, social and cultural inequalities experienced in practice by women.³¹

Duty of States to provide alternative housing to persons if necessary

9.1 Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.³² The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by private individuals such as the owner of the property.³³ In the event that a person is evicted from his or her home without the State party's granting or guaranteeing alternative accommodation, the State party must demonstrate that it has considered the specific circumstances of the case and that, despite having taken all reasonable measures, to the maximum of its available resources, it has been unable to uphold the right to housing of the person concerned.³⁴ The information provided by the State party should enable the Committee to consider the reasonableness of the measures taken in accordance with article 8 (4) of the Optional Protocol.³⁵

9.2 States parties may choose a variety of policies for this purpose.³⁶ Any steps taken, however, should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.³⁷

9.3 Alternative housing must be adequate. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context.³⁸ They include legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; a location in a wholesome and healthy setting that allows access to public and social services (education, employment, health care and transport); and cultural adequacy, enabling expressions of cultural identity and diversity.³⁹

Analysis of the proportionality of the author's eviction

10.1 The Committee notes that the point of contention is, first, whether the authorities considered the proportionality of the objective of the eviction to its consequences for the persons evicted, including weighing the benefits of the measure – in this case, protecting the right to property of the State agency that owns the apartment – against its possible consequences for the rights of the evicted persons.⁴⁰

10.2 As mentioned in paragraph 8.3, the Committee has drawn up a list of circumstances that must be assessed when analysing the proportionality of an eviction: (a) the availability of adequate alternative housing; (b) the personal circumstances of the occupants and their dependants; (c) the cooperation of the occupants with the authorities in seeking suitable solutions; and (d) the distinction between properties belonging to individuals who need them

³⁰ General comment No. 16 (2005), para. 18.

³¹ *Trujillo Calero v. Ecuador* (E/C.12/63/D/10/2015), para. 13.3.

³² General comment No. 7 (1997), para. 16.

³³ *Ben Djazia et al. v. Spain*, para. 15.2.

³⁴ *Ibid.*, para. 15.5.

³⁵ *Ibid.* See also statement by the Committee: An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant (E/C.12/2007/1).

³⁶ E/C.12/2007/1, paras. 2 and 3.

³⁷ General comment No. 3 (1990), para. 2.

³⁸ General comment No. 4 (1991), para. 8.

³⁹ *Ibid.*

⁴⁰ *López Albán et al. v. Spain*, para. 11.5.

as a home or to provide vital income and properties belonging to banks, financial institutions or other entities.⁴¹

10.3 The Committee notes that, in its ruling, the Leganés Trial and Investigation Court No. 8 held that the author's renovation of the apartment showed that she had sufficient savings to obtain housing on her own, that the author had relatives with whom she could live and that, as a consequence, the unstable housing situation she claimed to be in did not constitute a state of necessity. Although the Provincial High Court acknowledged the possibility that the occupation was the result of such a situation, it reached the same conclusion on the exculpatory circumstance put forward as a defence.

10.4 The Committee notes that, according to the author's comments on the State party's observations, the apartment in question, which belonged to the Madrid Social Housing Agency, was left unoccupied after the eviction.

10.5 The Committee notes that the State party's judicial authorities examined the author's socioeconomic situation only as it related to an exculpatory state of necessity. It points out in this regard that this examination does not replace a specific and autonomous analysis (or make up for the public authorities' failure to undertake such an analysis) of the proportionality of the eviction that takes into account the particular circumstances in which the alleged victims find themselves.

10.6 The Committee is of the view that, in the light of the specific circumstances of the present case, proper consideration of the proportionality of the eviction would have involved taking into account the socioeconomic vulnerability of the author and her children, the best interests of the children, the particular effects of the eviction on the author, a single mother of two children without the wherewithal for adequate housing or other viable alternatives, the social purpose of the Social Housing Agency apartment that the author and her children lived in, the author's previous applications for low-cost housing, the availability of low-cost housing from the relevant administrative authorities and the existence of alternative means of resolving the problem. To assess the author's situation, the courts should have made arrangements for genuine and effective consultation with her and requested the administrative authorities to provide information on any low-cost housing available and on the author's socioeconomic situation. Similarly, the courts should have respected the children's right to be heard.⁴²

10.7 The Committee is therefore of the view that the failure to carry out a sufficiently comprehensive analysis of the proportionality of the eviction constituted a violation by the State party of the right to housing, enshrined in article 11 of the Covenant, of the author and her children.

Consultation with the author

11.1 The Committee notes that the State party claims that it has ensured that there is a genuine process of consulting the persons affected by eviction. This process existed insofar as the author had the opportunity to file appeals and request assistance from the social welfare services – there were also reasonable and sufficient notice periods.

11.2 The Committee also notes that the author applied several times to the judicial and administrative authorities for the suspension of the eviction and even requested a meeting with the social welfare services councillor at the Ministry of Transport, Housing and Infrastructure. The eviction was suspended twice, the first time because one of the author's children had a case of bronchitis and there were not enough police officers for the eviction and the second time to allow the author's children to finish the school year.

11.3 The Committee notes that there has been no genuine consultation with the persons concerned. Although the author applied to various administrative offices and contested the eviction orders in court, there is no evidence of a genuine and effective judicial consultation mechanism that would make it possible to consider alternatives to eviction.

⁴¹ *El Mourabit Ouazizizi et al. v. Spain* (E/C.12/72/D/133/2019).

⁴² *B.J. and P.J. v. Czechia* (CRC/C/93/D/139/2021), paras. 8.13 and 8.14.

Right to be heard, best interests of the child and disproportionate impact

12.1 The Committee also notes that, at the time of the eviction order, the author's children were 11 months old and 9 years old. The Committee therefore considers it necessary to point out that, as the best interests of the child or adolescent must be a primary consideration in all decisions affecting the child or adolescent, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or adolescent concerned.⁴³ The justification of a decision must show that this right has been explicitly taken into account.⁴⁴ States parties must ensure that, in all decisions affecting the interests of children and adolescents, their best interests are adequately and systematically assessed.⁴⁵ This obligation is especially important in the face of enforcement measures, such as forced evictions, that cause children disproportionate suffering.⁴⁶

12.2 Accordingly, the Committee notes that, although the eviction was suspended twice, taking into account the children's health and schooling, it cannot be concluded from the rulings of Trial Court No. 8 or the Provincial High Court that the judicial authorities considered the best interests of the author's children when ordering the eviction. The arguments made in those rulings do not show that the courts in question undertook a specific analysis of how an eviction could affect the author's children or what the best decision would be, considering that, pursuant to article 10 (3) of the Covenant, special measures of protection and assistance should be taken on their behalf.

12.3 The Committee also notes that, in view of the principle of progressive autonomy, the children should have been heard in the proceedings but were not. The courts also failed to take into account the author's situation as a female head of household with two children who was on a precarious economic footing and the disproportionate impact that the eviction would have on her and her children as a result of the discrimination faced by women, the lack of equal opportunities for access to adequate housing and to employment and the share, larger than that of men, of the caregiving burden that they bear.

Interim measures and eviction of the author

13.1 On 26 October 2018, the Working Group on Communications, acting on behalf of the Committee, requested the State party to suspend the eviction of the author and her children while the communication was being considered or, alternatively, to grant them adequate housing in genuine and effective consultation with the author. Later, on 26 November 2018, the Committee, in view of the imminence of the eviction, reiterated the request for interim measures.

13.2 The Committee notes that, according to its jurisprudence,⁴⁷ the adoption of interim measures pursuant to article 5 of the Optional Protocol⁴⁸ is vital to the Committee's fulfilment of the responsibility entrusted to it under the Optional Protocol, as the reason for the existence of interim measures is, inter alia, to preserve the integrity of the process, thereby ensuring the effectiveness of the mechanism for protecting Covenant rights when there is a risk of irreparable damage.⁴⁹ Failure to adopt such interim measures is incompatible with the obligation to respect in good faith the procedure of individual communication established

⁴³ Committee on the Rights of the Child, general comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, para. 6 (c).

⁴⁴ Ibid.

⁴⁵ Ibid., para. 6 (a).

⁴⁶ Ibid., general comment No. 21 (2017) on children in street situations, para. 50.

⁴⁷ *S.S.R. v. Spain* (E/C.12/66/D/51/2018), paras. 7.6 and 7.7.

⁴⁸ Committee against Torture, *Thirugnanasampanthar v. Australia* (CAT/C/61/D/614/2014), para. 6.1.

⁴⁹ See also, mutatis mutandis, European Court of Human Rights (Grand Chamber), *Mamatkulov and Askarov v. Turkey* (applications No. 46827/99 and No. 46951/99), judgment of 4 February 2005, para. 128 ("Contracting States undertake to refrain from any act or omission that may hinder the effective exercise of an individual applicant's right of application. A failure by a Contracting State to comply with interim measures is to be regarded as preventing the Court from effectively examining the applicant's complaint and as hindering the effective exercise of his or her right and, accordingly, as a violation of article 34 of the European Convention on Human Rights"); and Committee against Torture, *Thirugnanasampanthar v. Australia*, para. 6.1.

under the Optional Protocol.⁵⁰ It also interferes with the Committee's ability to provide an effective remedy to persons who claim to be victims of a violation of the Covenant.

13.3 The Committee notes that, on 25 June 2019, the author and her children were evicted despite the Committee's request for interim measures and without having been granted adequate alternative housing following genuine consultation with her.

13.4 As the State party did not explain why the interim measures could not be taken, the Committee is of the view that the State party violated, in the circumstances, article 5 of the Optional Protocol.

D. Conclusion and recommendations

14.1 On the basis of all the information provided and in the particular circumstances of the case, the Committee finds that the eviction of the author and her children without an assessment of proportionality by the judicial authorities, including consideration of the disproportionate impact that the eviction could have on the author and her family and the principle of the best interests of the child, and without a guarantee, as part of the procedure, of genuine and adequate consultation or the right of the child to be heard constituted a violation of their right to adequate housing.

14.2 The Committee, acting under article 9 (1) of the Optional Protocol, is of the view that the State party violated the right of the author and her children under article 11 (1) of the Covenant read separately and in conjunction with articles 3 and 10 (3). The Committee is also of the view that the State party violated article 5 of the Optional Protocol. In the light of the Views contained in the present communication, the Committee makes the following recommendations to the State party.

Recommendations in respect of the author and her children

15. The State party is under an obligation to provide the author and her children with an effective remedy, in particular by: (a) reassessing, if they are not currently in adequate housing, their state of necessity and their place on the waiting list, taking into account the length of time that their application for housing has been on file with the Community of Madrid, starting from the date on which they applied, with a view to providing them with public housing or taking another measure that would enable them to live in adequate housing, bearing in mind the criteria set out in the present Views; (b) providing the author and her children with financial compensation for the violations of their rights; and (c) reimbursing the author for the legal costs reasonably incurred in submitting this communication, at both the domestic and international levels.

General recommendations

16. The Committee considers that the remedies recommended in the context of individual communications may include guarantees of non-repetition and recalls that the State party has an obligation to prevent similar violations in the future. The State party should ensure that its legislation and the enforcement thereof are consistent with the obligations established under the Covenant. In particular, the State party has an obligation to:

(a) Ensure that its normative framework allows persons in respect of whom an eviction order is issued and who might consequently be at risk of destitution or of violation of their Covenant rights, including persons who are occupying a dwelling without legal title, to challenge the decision before a judicial or other impartial and independent authority with the power to order the cessation of the violation and to provide an effective remedy so that such authorities can examine the proportionality of the measure in the light of the criteria for limiting the rights enshrined in the Covenant under the terms of article 4; and to consider, where appropriate, the best interests of the child and the disproportionate impact of evictions

⁵⁰ Human Rights Committee, general comment No. 33 (2008), para. 19.

on women, especially those who are heads of households with minor children and on a precarious economic footing;

(b) Take the necessary measures to ensure that evictions affecting persons who lack the wherewithal to obtain alternative housing take place only within the framework of proceedings involving genuine and effective consultation with the persons concerned in which all available alternative housing (whether belonging to the State or made available by the relevant State agencies) is assessed and only after the State has taken all essential steps, to the maximum of its available resources, to ensure that evicted persons have alternative housing, especially in cases involving families, households headed by single parents – women in particular – older persons, children and/or other persons in vulnerable situations. If the group to be evicted includes children, the proceedings must guarantee their right to be heard;

(c) Adopt the measures necessary to put an end to the practice of automatically excluding from lists of applicants for housing all persons who find themselves occupying a dwelling without legal title because they are in a situation of necessity, so that all such persons have equal access to the social housing stock, removing any unreasonable condition that might exclude persons at risk of destitution;

(d) Take the necessary measures to solve the problems caused by the absence of a connection between court decisions, adopted in proceedings of any kind, that can result in an evicted person's being left without adequate accommodation and the efforts made by social service providers;

(e) Develop and implement, in coordination with the autonomous communities and to the maximum of its available resources, a comprehensive plan to guarantee the right to adequate housing for low-income persons, in keeping with the Committee's general comment No. 4 (1991). This plan should provide for the necessary resources, indicators, time frames and evaluation criteria to guarantee these individuals' right to housing in a reasonable, timely and measurable manner;

(f) Establish a protocol for complying with requests for interim measures made by the Committee and inform all relevant authorities of the need to grant such requests in order to ensure the integrity of the procedure.

17. In accordance with article 9 (2) of the Optional Protocol and rule 21 (1) of the rules of procedure under the Optional Protocol, the State party is requested to submit to the Committee, within a period of six months, a written response, including information on measures taken in follow-up to the Views and recommendations of the Committee. The State party is also requested to publish the Views of the Committee and to distribute them widely, in an accessible format, so that they reach all sectors of the population.
