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Committee on Economic, Social and Cultural Rights

Communication No. 2/2014

Views adopted by the Committee at its fifty-fifth session (1-19 June 2015)

<i>Subject:</i>	Lack of effective access to the courts to protect the right to adequate housing
<i>Substantive issues:</i>	Measures to achieve the full realization of the rights of the Covenant; right to adequate housing
<i>Procedural issues:</i>	Jurisdiction <i>ratione temporis</i> of the Committee
<i>Articles of the Covenant:</i>	2, paragraph 1; 11, paragraph 1
<i>Article of the Optional Protocol:</i>	3, paragraph 2 (b)



Annex

Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-fifth session)

concerning

Communication No. 2/2014

Submitted by: I.D.G. (represented by counsel, Fernando Ron and Fernando Morales)

Alleged victim: The author

State party: Spain

Date of communication: 28 January 2014 (initial submission)

The Committee on Economic, Social and Cultural Rights, established pursuant to Economic and Social Council resolution 1985/17,

Meeting on 17 June 2015,

Having concluded its consideration of communication No. 2/2014, submitted to the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,

Adopts the following:

Views under article 9, paragraph 1, of the Optional Protocol

1. The author of the communication is Ms. I.D.G., a Spanish national born on 28 June 1965. The author claims to be a victim of a violation of her rights under articles 11 and 2, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights by the State party.¹ The author is represented by counsel.

1.2 In the present Views, the Committee first summarizes the information and the arguments submitted by the parties, then considers the admissibility and merits of the communication and, lastly, states its conclusions and recommendations.

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

The facts as submitted by the author

2.1 The author lives in Madrid. On 15 June 2007, she purchased a property to live in, using most of her savings and taking a mortgage loan from a bank. According to the author the property has an appraisal value for auction of €742,890.68.

¹ The Optional Protocol entered into force for the State party on 5 May 2013.

2.2 As a result of the serious economic crisis in the State party and her own personal circumstances,² the author missed several mortgage repayments, totalling around €11,000. She claims that the bank (the lending institution) was not prepared to negotiate.

2.3 The lending institution called in the full amount of the loan and launched a special mortgage enforcement procedure in trial court No. 31 in Madrid (the Court), with a view to auctioning off the property. On 21 June 2012, the Court admitted the enforcement application in the amounts of €381,153.66 (principal), €5,725.80 (ordinary interest) and €856.77 (default interest).

2.4 By order of the Court, on 6, 27 and 28 September 2012 the Madrid Courts Central Notification and Enforcement Service attempted to notify the author of the application and of the Court's decision to admit the application, at the address of the mortgaged property, as given by the author on the loan contract. However, the server of notice could not find the author. After the third attempt, the server noted: "No one answers or opens the door, despite numerous calls to the party's designated residence." He added: "Checked that one of the letter boxes bore the debtor's name, went into the building and rang the doorbell but no one answered. Caretaker says he has not been working there long but the person is on the list of residents and he does not know her as he is only there until 6 p.m."³ A final attempt to notify the author was made at 9.24 p.m. on 4 October 2012, again without success. The author claims that she was not at home when notice was being served.

2.5 On 30 October 2012, the Court decided to post the notification on the Court notice board, in order to complete the process of notification of the application and the decision to admit the application. The author claims that there was no public announcement of the posting of notice, it was not announced in any official organ, and it was not published in the Official Gazette. She states that the Court, on not finding her in her usual residence, should have notified her by leaving the notice with the caretaker, who was in the building when attempts were made to serve the notice on 6 and 28 September 2012, or a neighbour. Consequently the Court failed to notify her of the start of the mortgage enforcement procedure, such as to enable her to mount a defence.

2.6 On 11 February 2013 the Court ordered arrangements to be made to auction the mortgaged property. On 1 and 21 March 2013 the Madrid Courts Central Notification and Enforcement Service attempted to serve notice of the auction of the property at the address of the mortgaged property, without success. After his second attempt, the agent noted: "Message left to collect notice from the office by 5 April 2013."⁴ In the end the author picked up the notice by proxy on 4 April 2013. The author claims that it was only then that she was apprised of the mortgage enforcement proceedings and the auction of her home.

2.7 On 10 or 11 April 2013 the author filed a motion for reconsideration against the Court's auction order of 11 February 2013. She sought annulment of that decision and of the entire mortgage enforcement procedure back to before the original notification, given that she had not been notified of the suit at the addresses known to the lending institution, including the home of a relative and her place of work, in violation of the right to a defence and to effective legal protection, *inter alia*. The author claims that, under articles 156 and 164 of the Civil Procedure Act, and according to the case law of

² In evidence the author submits her statements of income (for natural persons) for financial years 2011 and 2012, showing total reckonable income as €4,406 and €22,741.86 respectively.

³ Copies of the records of service of the Madrid Courts Central Notification and Enforcement Service for 6, 27 and 28 September 2012, provided by the author, bear out her claims.

⁴ Copies of the records of service of the Madrid Courts Central Notification and Enforcement Service for 1 and 21 March 2013, provided by the author, bear out her claims.

the Constitutional Court and the Supreme Court, notification by public posting of notice can be used only after exhausting all measures to serve notice in person and to try to locate the defendant at other addresses.

2.8 On 23 April 2013 the Court dismissed the author's motion for reconsideration. In its ruling, the Court stated that a court order for payment had to be served at the address agreed by the parties, i.e., the first address given or one given later in accordance with article 683 of the Civil Procedure Act. According to the Court, amended article 686, paragraph 3, of the Act permits the Court to proceed directly with posting of notice as a special step in the preliminaries to mortgage enforcement proceedings, with no need to serve the order to pay again at the defendant's workplace or any other address. In the author's case the Court pointed out that the Madrid Courts Central Notification and Enforcement Service had made three valid attempts to notify her, including two attempts in the evenings, as suggested by the building caretaker. In addition the Court stated that it had no jurisdiction to annul the auction order of 11 February 2013, under articles 5 and 562, paragraph 2, of the Civil Procedure Act and article 455 of the Organic Act on the Judiciary.

2.9 On 23 May 2013, the author filed an appeal in *amparo* with the Constitutional Court, claiming that the Court's decision to dismiss her motion for reconsideration violated her rights to a defence and to effective judicial protection under articles 24 and 25 of the Constitution of the State party; and that it failed to apply the case law of the Constitutional Court. The author maintained that the Court failed to notify her of the mortgage enforcement proceedings or of the decision to admit the proceedings, and did not transmit any other communication before the auction order, and that it failed to exhaust all available means of serving notice in person, in accordance with articles 155, 156 and 683 of the Civil Procedure Act.

2.10 On 16 October 2013 the Constitutional Court dismissed the author's appeal on grounds of "manifest absence of violation of any fundamental right covered by *amparo*", in accordance with articles 44, paragraph 1, and 50, paragraph 1 (a), of the Organic Act on the Constitutional Court.

The complaint

3.1 The author claims that the State party violated her right to adequate housing under article 11, paragraph 1, of the Covenant.

3.2 She points out that her case has arisen in a situation of serious social crisis in the State party, with more than 400,000 evictions and foreclosures from 2007 up to the time she submitted her communication to the Committee.

3.3 The author argues that the rights she enjoys under the Covenant mean that courts must ensure that notice is effectively served. Yet in her case, after the failed attempts to serve notice in person at her home, the Court proceeded directly to the posting of notice without making use of other forms or methods of serving notice as established in the Civil Procedure Act. As a result of the Court's lack of diligence, she was not notified of the mortgage enforcement proceedings brought by the lending institution or of the decision to admit the proceedings, and received no other communication prior to the auction order. The author argues that in practice the failure to notify her prevented her from mounting a legal response to the suit and protecting her right to housing in court, since she became aware of the existence of the proceedings only when the Court ordered the auction of her home. As a result of the lack of effective and timely judicial protection, the author claims that she is now in a position of vulnerability, uncertainty and anxiety, a situation that has seriously affected her health.

3.4 According to the author, the lack of effective access to the courts of the State party prevented her from challenging in court the unfair nature of the terms of the

contract⁵ or, for example, the way the lending institution calculated the interest she was required to pay.

3.5 The author argues that the legislation regulating mortgage enforcement proceedings does not adequately protect people's right to mount a proper legal defence of their homes. People affected by these proceedings are in many cases unaware that their creditors have filed a lawsuit until they are dispossessed or evicted. What is more, the State party's procedural law precludes the court in cases of this kind from taking precautionary measures to ensure that its final decision is fully effective, for example where the terms of the contract are unfair. In this regard, referring to article 2, paragraph 1, of the Covenant, the author argues that the State party has not taken adequate legislative measures to achieve the full realization of the right to housing and to guarantee that right under article 11, paragraph 1, of the Covenant.

3.6 As reparation the author asks the Committee to require the State party to roll back the judicial mortgage enforcement proceedings to the time of the initial notification, in order to effectively guarantee her right to housing and allow her to defend that right in the ordinary courts; in the alternative, the author seeks an award of €250,000 as compensation for non-material damage. She also asks that the State party adopt appropriate legislative measures to guarantee the rights established in the Covenant.

State party's observations on admissibility and the merits

4.1 On 13 October 2014 the State party submitted its observations on admissibility and the merits of the communication. As to the facts of the communication, the State party argues that, in her claim to the Committee, the author maintains that the dwelling in question is her primary residence. However, in her motion to the Court of 10 April 2013, she argued that the Court should have served notice not only at her residence at the mortgaged property, as established by the author herself in the public instrument of credit, but in another family home or, failing that, at her workplace address, which she says were also known to the lending institution.

4.2 The State party points out that in the 21 June 2012 decision to admit the mortgage enforcement proceedings, the Court informed the debtor that she could challenge mortgage enforcement on the grounds set forth in article 695 of the Civil Procedure Act. This procedure does not prevent the debtor subject to enforcement from using ordinary court procedures to resolve issues relating to the defence of their rights and interests. It adds that the Constitutional Court has found that the mortgage enforcement procedure, and more specifically articles 695 and 698 of the Civil Procedure Act, do not affect the right to effective judicial protection as regards the equality of the parties and the right to decent and adequate housing, since the ruling handed down in this procedure does not produce effects of *res judicata* and the ordinary procedure is always available.⁶

4.3 The State party states that the Court's decision was served at the address given by the author in the public instrument drawing up the loan with mortgage security. According to articles 682, 683 and 686 of the Civil Procedure Act, the payment demand — the first step in the mortgage enforcement procedure — and subsequent notifications, shall be served at a residence freely specified by the mortgagor. Thus the demands and notifications are not served at an address chosen arbitrarily by the creditor or the court. Such a system is essential if the process is to work at all; it

⁵ The author refers to the Court of Justice of the European Union (First Chamber) ruling of 14 March 2013 in case C-415/11, *Mohamed Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)*.

⁶ The State party refers to Constitutional Court decision No. 112/2011 of 19 July 2011.

would not be feasible to make the creditor responsible for verifying the debtor's place of residence.

4.4 According to the State party, it was only after several attempts to notify the author that the Court decided to serve notice of the mortgage enforcement proceedings by posting notice publicly, in accordance with article 686, paragraph 3, of the Civil Procedure Act. Posting notice of proceedings is consistent with the obligations deriving from the right to effective judicial protection. Once notice had been served by posting the notification of enforcement proceedings, in accordance with article 691 of the Civil Procedure Act, an auction of the mortgaged property was announced in the court order of 11 February 2013, which was finally collected by the author's agent on 4 April 2013 after two unsuccessful attempts to notify her at the address she had given.

4.5 The State party points out that the author filed only a motion for reconsideration of the 11 February 2013 court order calling for the mortgaged property to be auctioned, a remedy of a kind that will serve to challenge the legality of an act but not to get the act set aside for violation of fundamental rights. It goes on to state that the author did not apply to have the order annulled, which is the correct procedure to use when seeking to have procedural acts affecting fundamental rights set aside, and that explains why, later, the Constitutional Court was unable to consider whether notification by the posting of notice had violated any fundamental right and could therefore be annulled by the court.

4.6 The State party points out that the subject of the communication, the issue in respect of which the author exhausted domestic remedies, is the alleged failure to give proper notice of the mortgage enforcement process; and that it cannot be extended to other issues or circumstances related to that process or to mortgage enforcement.

4.7 The State party advises that, as at the date of submission of its observations, there had been no eviction from the mortgaged property, and no enforcement or auction, and that the author was living in the property; also that the author had petitioned the Court for suspension of the auction procedure, citing the invalidity of certain clauses in the mortgage loan contract. On 4 October 2013, the Court partially accepted this petition, finding clause 6 of the contract ("default interest") invalid.

4.8 With the aim of ensuring the effectiveness of the right established in article 11, paragraph 1, of the Covenant, the State party promulgated Act No. 1/2013 of 14 May, on measures to strengthen protection for mortgage holders, debt restructuring and social rents; and Royal Decree-Law No. 27/2012 of 15 November, on urgent measures to strengthen protection for mortgage holders. Moreover the State party is of the view that the mortgage enforcement procedure regulated by the Civil Procedure Act strictly meets the obligations arising from the right to effective judicial protection. In particular, it stresses that it is up to the debtor to specify an address for notification; that this address can be changed at any time by the debtor; that the procedure provides for several attempts to be made to serve notice in person and only exceptionally, where this is not possible, for notice to be served by public posting of the notification; that it is possible to move at any time into ordinary proceedings so that debtors can raise any questions in relation to the defence of their rights and interests; that it allows for a stay of proceedings to seek to have unfair clauses in mortgage contracts declared invalid; and that at any point in the process a party may apply to have an act annulled if they consider that the right to effective judicial protection has been violated in the course of the enforcement.

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

5.1 In a communication of 10 December 2014, the author submitted her comments on the observations of the State party. The author denies that she owns another property or lives elsewhere and provides documents to show that the mortgaged property is her normal residence.⁷ She points out that although the State party has access to various public registers and archives, such as the civil register, the tax office and the registers kept by each municipality, it questions these facts without adducing any evidence or providing documentation. She states that she is divorced, has no children and lives alone in the mortgaged property and that, when she referred in her motion for reconsideration to the possibility of notice being served at the home of a family member, she was referring to her mother's home, the address of which was known to the lending institution.

5.2 The author points out that her communication concerning a violation of article 11, paragraph 1, of the Covenant, arose out of the failure to notify her of the mortgage enforcement proceedings in respect of her property, or of the Court's decision to admit the enforcement application, which prevented her from defending her right to housing in the courts.

5.3 According to the author, article 686, paragraph 3, of the Civil Procedure Act allows notification by posting of notice only when it has proved impossible to notify the debtor. Moreover, according to the State party's procedural rules and the Constitutional Court's case law, notification by posting of notice is in general done only when all possible means of serving notice in person have been exhausted, and notification has at least been left in the person's letter box.⁸

5.4 The author draws attention to the difference in the way the Court acted when giving notice of the auction of the mortgaged property, inasmuch as, after two unsuccessful attempts to serve notice in person, she was left an advice that enabled her to take effective cognizance of the auction order.

5.5 The author argues that the remedies she initiated with the Court were appropriate and permitted the Court to consider the violation of her fundamental rights caused by the posting of notice and to provide redress. She further claims that, according to the case law of the Constitutional Court, her interlocutory challenge to the Court order on the auction, referred to by the State party, was not a necessary remedy that needed to be exhausted before submitting her appeal in *amparo* to the Constitutional Court.⁹

5.6 In the author's view, the State party's references to the amendments to the legal order in order to provide better protection for mortgage holders are neither applicable nor relevant to the present case.

Third-party submissions

6.1. Under article 8, paragraph 3, of the Optional Protocol, subject to the rules governing the consideration of communications and to authorization by the Committee, third parties may submit documentation relevant to the case under consideration. This documentation must be transmitted to the parties. On 4 February

⁷ The author provides a certificate of residence issued by the city of Madrid dated 14 November 2014, and copies of her receipts for the Madrid property tax 2014 and the Madrid waste-collection tax 2014, issued by the Madrid tax office and which give the address of the mortgaged property as the author's place of residence.

⁸ The author refers to the fourth legal argument in Constitutional Court judgement No. 59/2014 of 5 May 2014.

⁹ The author refers to Constitutional Court judgement No. 216/2013 of 19 December 2013.

2015, the Working Group on Communications, acting on behalf of the Committee, admitted a submission from the International Network for Economic, Social and Cultural Rights (ESCR-Net)¹⁰ under article 8 of the Optional Protocol and rule 14 of the Committee's provisional rules of procedure under the Optional Protocol. On 26 February 2015 the Committee transmitted the ESCR-Net submission of 24 February 2015 to the State party and the author and asked for their observations and comments.

6.2 The submitting party points out that there is a serious and widespread risk to housing in the State party in the context of an economic recession and high unemployment, and that between 2008 and 2010 some 400,000 mortgages were enforced.¹¹ The submitting party also states that the Court of Justice of the European Union had found that Spanish law provided "incomplete and insufficient" protection to borrowers, especially when the mortgaged property was the family home.¹² In the submitting party's view, the legislative measures taken by the State party, such as Royal Decree-Law No. 6/2012 and Act No. 4/2013, are insufficient to resolve the social crisis caused by mortgage foreclosures, since the Spanish legal framework continues to favour financial institutions over the interests of the persons concerned.

6.3 The submitter says that, in order to uphold the rights of the Covenant, eviction may take place only in exceptional circumstances; after having weighed up all the possible alternatives — including other ways of paying the debt — in consultation with the community or individual concerned; giving all due process guarantees, such as an effective remedy and an adequate and reasonable period of notice; and ensuring that the eviction will not leave the person concerned with no home or at risk of other human rights violations.¹³

6.4 The State party should provide the greatest possible security, including adequate judicial oversight. In this regard, the submitter argues that judicial oversight of the mortgage enforcement process is essential, and that it is up to creditors who are seeking to foreclose on mortgages to show the court why the sale of a person's home might be justifiable, taking account of all the circumstances in each case.¹⁴ The court

¹⁰ The members of ESCR-Net involved in the preparation of the third-party submission were the Center for Economic and Social Rights, the Global Initiative for Economic, Social and Cultural Rights and the Socio-Economic Rights Institute of South Africa.

¹¹ It points out that this figure is an estimate based on partial data published by the Spanish judiciary; and it refers to the following sources: General Council of the Judiciary, "Estimación del incremento de carga de los órganos judiciales atribuible a la crisis económica" (Estimated increase in courts' workload as a result of the economic crisis), *Boletín información estadística* (Statistical bulletin), September 2012 (No. 31); and General Council of the Judiciary, "Ejecuciones Hipotecarias presentadas al Tribunal Superior de Justicia: Impacto de la crisis en los órganos del poder judicial" (Mortgage enforcement applications filed with the High Court: the impact of the crisis on the courts), Madrid (2013), cited in: Observatori DESC y Plataforma de los afectados por la hipoteca, *Emergencia habitacional en el Estado español: La crisis de las ejecuciones hipotecarias y los desalojos desde una perspectiva de derechos humanos* (Housing emergency in the Spanish State: the foreclosure and eviction crisis from a human rights perspective) (2013), p. 12, note 17.

¹² The submitting party refers to the case law of the Court of Justice of the European Union in *Mohamed Aziz v. Catalunyacaixa* (see note 5), paras. 60-61.

¹³ The submitting party refers to European Court of Human Rights case law in *Connors v. United Kingdom*, No. 66746/01, para. 81, 2004-I; *Winterstein and others v. France*, No. 27013/07, para. 76, 2013; *McCann v. United Kingdom*, No. 19009/04, para. 53, 2008; *Stankova v. Slovakia*, No. 7205/02, para. 60, 2007-IV; and *Yordanova and others v. Bulgaria*, No. 25446/06, para. 133, 2012; Constitutional Court of South Africa case law in *Gundwana v. Steko Development CC and others*, 2011 (3) SA 608 (CC); and Pretoria High Court (South Africa) case law in *First Rand Bank v. Folscher*, 2011 (4) SA 314 (GNP), para. 40. It also refers to the conclusions adopted in 2011 by the European Committee of Social Rights in *Andorra* (2011/def/AND/31/2/EN); *Portugal* (2011/def/PRT/31/2/EN); *Romania* (2011/def/ROU/16/EN); and *Ukraine* (2011/def/UKR/31/2/FR).

¹⁴ The submitter points out, for example, that, under article 26, paragraph 3, of the South African Constitution, South African courts are required to exercise judicial oversight over bank

should consider not only the legality of the eviction under national law but also substantive arguments about proportionality and the need for the measure.¹⁵

6.5 The State party, according to the submitter, should provide adequate and reasonable notice to all affected persons prior to the scheduled date of eviction.¹⁶ With regard to delivery of notice, the South African courts have recognized that, where borrowers fail to defend themselves against execution proceedings or to negotiate terms of notification before a dispute, strict judicial oversight must be ensured, in particular over whether notice was effectively delivered.¹⁷

Author's comments on the third-party submission

7. By letter dated 12 March 2015 the author submitted her comments on the third-party submission. The author argues that the right to receive prior notice in cases of eviction is one of the judicial guarantees that must be applied. She repeats her claim that her right to judicial protection was violated and that as a result she had no opportunity to appear in the proceedings and properly assert her right to housing in the courts, owing to the failure to notify her of the lending institution's mortgage enforcement application or of the Court's decision to admit the application.

State party's observations on the third-party submission

8.1 On 19 March 2015, the State party submitted its observations on the third-party submission. It argues that the author has had all remedies at her disposal and has enjoyed all procedural guarantees.

8.2 The State party argues that Act No. 1/2013 and Royal Decree No. 27/2012, on protection for mortgagors, contain a protection scheme providing a remarkable set of guarantees, one of which allows the former owner to stay in the property for two years after eviction, as a tenant, with the option of getting help with the rent payments. The State party repeats its view that the mortgage enforcement procedure regulated by the Civil Procedure Act strictly meets the obligations arising from the right to effective judicial protection.

8.3 The State party points out that the author continues to use her home and that there is no violation of her rights. It also reports that, by a court order dated 25 April 2013, the foreclosure procedure was suspended in order to consider whether the clause in the mortgage contract setting the late interest and the legal interest was fair.

8.4 The State party contends that the notifications related to the foreclosure procedure were served at the address specified by the author; that the Court made repeated efforts to notify her; that, after the attempt at serving notice on 28 September 2012, the server had added a note stating: "Checked that one of the letter boxes bore the debtor's name, went into the building and rang the doorbell but no one answered.

enforcements and special enforcements in respect of residential housing, and refers to the Constitutional Court ruling in *Gundwana* (note 13 above), para. 41. It also refers to *Folscher* (note 13 above), para. 41, in which the Pretoria High Court drew up a non-exhaustive list of 19 factors for the court to consider in deciding whether or not to order mortgage enforcement, in order to ensure security of tenure, including whether the debtor was in any way notified before action was taken.

¹⁵ The submitter refers to European Court of Human Rights case law in *Orlic v. Croatia*, No. 48833/07, para. 65, 2011, and *Winterstein and others v. France* (note 13 above), para. 82.

¹⁶ The submitter refers to the case law of the Constitutional Court of South Africa in *Kubyana v. Standard Bank of South Africa Ltd*, 2014 (3) SA 56 (CC); and in *Sebola and another v. Standard Bank of South Africa Ltd and another*, 2012 (5) SA 142 (CC), paras. 75 and 77.

¹⁷ The submitter refers to *ABSA Bank Ltd v. Lekuku* (32700/2013) [2014] ZAGPJHC 244 (14 October 2014) (*Lekuku*), para. 39, and *Master of the High Court Northern Gauteng High Court, Pretoria, v. Motale NO and others*, 2012 (3) SA 325 (SCA), paras. 11 and 12.

Caretaker says he has not been working there long but the person lives here”,¹⁸ which implies, therefore, that the author purposely refused to receive the notifications of the mortgage enforcement procedure.

B. Committee’s consideration of admissibility and the merits

Consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 9 of its provisional rules of procedure under the Optional Protocol, whether the case is admissible pursuant to the Optional Protocol. The Committee shall consider a communication unless it fails to meet the admissibility criteria established in the Optional Protocol.

9.2 In the light of all the documentation made available to it by the parties under article 8, paragraph 1, of the Optional Protocol, the Committee notes that the same matter has not been and is not being examined under another procedure of international investigation or settlement. Consequently, the Committee finds that there is no obstacle to the admissibility of the communication under article 3, paragraph 2 (c), of the Optional Protocol.

9.3 Under article 3, paragraph 2 (b), of the Optional Protocol, the Committee may not consider alleged violations of the Covenant that occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those alleged violations continue after the entry into force of the Optional Protocol. In the present case, the Committee notes that some of the facts that gave rise to the violations alleged by the author had taken place before 5 May 2013, the date of entry into force of the Protocol for the State party. However, the decision of the Constitutional Court denying the author’s application for *amparo* was taken on 16 October 2013. That process was an opportunity for the Constitutional Court to consider the alleged violations of the author’s fundamental rights in relation to the present case, since the subject of the appeal was a consideration not of purely formal points or errors of law but of possible violations of the author’s fundamental rights in relation to the complaint contained in the present communication, which means that the possibility of a violation of the author’s rights existed at that time. Therefore, the Committee considers that it is competent *ratione temporis* to consider the present communication.¹⁹

9.4 The Committee notes that the State party has not submitted objections under article 3, paragraph 1, of the Optional Protocol, on exhaustion of domestic remedies. Although the State party informed the Committee that the author later submitted a document to the Court pursuant to article 695, paragraph 3, of the Civil Procedure Act, which made it possible to suspend the foreclosure procedure while a potentially unfair clause in the loan agreement was looked at, it never asked the Committee to find the communication inadmissible for failure to exhaust domestic remedies.

9.5 The Committee considers that, if a State party argues for inadmissibility on this ground, it should do so clearly from the outset, saying which remedies should have been exhausted, and showing that they are appropriate and effective, which did not happen in this case. Accordingly, it is the Committee’s understanding that, with regard to the author’s claims, domestic remedies were exhausted with the Constitutional Court decision of 5 May 2013.

¹⁸ State party’s emphasis. The Committee notes that the State party has not provided any documentation to support this assertion or expressly contested the authenticity of the copies of the notifications served by the Madrid Courts Central Notification and Enforcement Service (see notes 3 and 4 above).

¹⁹ See Committee on the Rights of Persons with Disabilities, communication No. 5/2011, *Jungelin v. Sweden*, Views adopted on 2 October 2014, para. 7.6.

9.6 The author submitted a communication to the Committee on 28 January 2014, within the time limit set in article 3, paragraph 2 (a), of the Optional Protocol.

9.7 The Committee finds that the communication in this case meets the requirements of admissibility under article 3, in particular under article 3, paragraph 2 (e), of the Optional Protocol. It is a communication that raises the possibility of a violation of the author's right to housing by reason of possibly inadequate notice of mortgage enforcement proceedings, which, it is claimed, prevented a proper defence in those proceedings, and the Committee therefore considers that the communication is sufficiently substantiated for consideration on the merits.

Consideration of the merits

Facts and legal issues

10.1 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.

10.2 The author claims that, after she had missed several mortgage repayments on her normal place of residence, in 2012 the lending institution took mortgage enforcement proceedings against her, but that she did not receive adequate notice and accordingly became aware of the proceedings only after the auction of her home was ordered. Consequently, she believes that she did not in practice have access to effective and timely judicial protection, which prevented her from mounting a judicial response to the proceedings and protecting her right to housing in the courts, with the result that she now finds herself in a position of vulnerability, uncertainty and anxiety.

10.3 The State party argues that in her motion for reconsideration the author referred to another family home, which means that the dwelling in question was not her usual residence; that the Court served notice of the decision to admit the mortgage enforcement application in accordance with the law, at the address the author herself had given in the mortgage loan instrument; that only after several unsuccessful attempts to serve notice in person did the Court order notification to be served by publicly posting the notice in accordance with article 686, paragraph 3, of the Civil Procedure Act; and that the public posting of a notice of proceedings meets the requirements of the right to effective judicial protection. Moreover, the State argues that, when notice was being served on 28 September 2012, the author deliberately refused to receive the notification of the application and the Court's decision to admit the application (see para. 8.4). Lastly the State party has informed the Committee that there has in any case been no eviction, enforcement or auction of the mortgaged property as the author lodged an ordinary appeal that resulted in suspension of enforcement, and accordingly continues to live in the dwelling, and her rights have not been violated.

10.4 As regards the nature of the mortgaged property referred to in the present communication, the Committee takes note of the author's explanations that when she mentioned another family residence in the mortgage enforcement proceeding, she was referring to the home of a member of her family (see para. 5.1), that she lives in the residence in question and that she does not own another residence. The documentation provided by the author (see note 7 above), which has not been contested by the State party, bears out her claims. None of the documentation submitted to the Committee indicates that the property in question is not the author's usual place of residence or that she owns another home. Consequently, in the light of the documentation contained in the file and the information provided by the parties, the Committee views the property in question as the author's usual place of residence.

10.5 As regards the author's absence on 28 September 2012, when an attempt was made to serve notice of the lending institution's application and the Court's decision to admit the application, the Committee observes that neither the copy of the record of service of the Madrid Courts Central Notification and Enforcement Service of 28 September 2012, provided by the author, nor any other document, shows that she was present in her usual place of residence and that she had deliberately refused to receive the notice ordered by the Court (see para. 2.4 and notes 3 and 18 above).

10.6 In the light of the Committee's conclusion on the facts relevant to the case, the main legal problem posed by this communication is whether the author's right to housing, established in article 11, paragraph 1, of the Covenant, was violated by the State party as a consequence of a mortgage enforcement process in which, according to the author, she was not properly notified of the application, thus preventing her from defending her rights under the Covenant. To answer that question, the Committee will first recall certain important components of the right to housing, in particular those relating to the legal protection of that right, and then go on to consider the facts of the case.

The right to housing and legal protection of that right

11.1 The human right to adequate housing is a fundamental right central to the enjoyment of all economic, social and cultural rights²⁰ and is inextricably linked to other human rights, including those set forth in the International Covenant on Civil and Political Rights.²¹ The right to housing should be ensured to all persons irrespective of income or access to economic resources,²² and States parties shall take whatever measures are necessary to achieve the full realization of this right.²³ Many component elements of the right to adequate housing are closely bound up with the provision of domestic legal remedies to ensure the effective enjoyment of the right.²⁴

11.2 The Committee also recalls that all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats²⁵ and that instances of forced eviction are prima facie incompatible with the requirements of the International Covenant on Economic, Social and Cultural Rights and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.²⁶ The Committee considers that States parties should ensure that procedures in the context of forced evictions, or that might affect security of tenure and possibly result in eviction, apply the procedural protections that will guarantee, among other things, a real opportunity for consultation with those affected and adequate and reasonable notice for all affected persons prior to the scheduled date of eviction.²⁷

11.3 In addition, the Committee recalls that article 2 of the Covenant imposes various obligations which are of immediate effect.²⁸ Therefore, in accordance with article 2, paragraph 1, of the Covenant, States parties must take measures to ensure the enjoyment of the rights established in the Covenant "by all appropriate means,

²⁰ See the Committee's general comment No. 4 (1992), on the right to adequate housing (art. 11, para. 1, of the Covenant), para. 1.

²¹ Ibid., paras. 7 and 9.

²² Ibid., para. 7.

²³ Ibid., para. 12.

²⁴ Ibid., para. 17.

²⁵ Ibid. para. 8 (a).

²⁶ Ibid., para. 18, and the Committee's general comment No. 7 (1997), on the right to adequate housing (art. 11, para. 1, of the Covenant): Forced evictions, para. 1.

²⁷ See the Committee's general comment No. 7, para. 15.

²⁸ See the Committee's general comment No. 3 (1991), on the nature of States parties' obligations (art. 2, para. 1, of the Covenant), para. 1.

including particularly the adoption of legislative measures". This requirement includes the adoption of measures that ensure access to effective judicial remedies for the protection of the rights recognized in the Covenant, since, as the Committee noted in its general comment No. 9, there cannot be a right without a remedy to protect it.²⁹

11.4 Therefore, by virtue of the obligation contained in article 2, paragraph 1, of the Covenant, States parties must ensure that the persons whose right to adequate housing may be affected by, say, forced evictions or mortgage enforcements have access to an effective and appropriate judicial remedy.³⁰

Adequate notice in a mortgage enforcement procedure that may affect the right to housing

12.1 The Committee recalls that, according to its general comment No. 7, appropriate procedural protection and due process are essential aspects of all human rights but are especially pertinent in relation to a matter such as forced evictions; and that the procedural protections include provision by the State party of adequate and reasonable notice for all affected persons prior to the scheduled date of eviction and legal aid for their defence.³¹ In the Committee's view such protection is equally applicable and appropriate in other similar situations, such as mortgage foreclosure proceedings, which can seriously affect the right to housing.

12.2 The Committee considers that, in compliance with the aforementioned obligations, the authorities should take all reasonable measures and make every effort to ensure that the serving of notice of the most important acts and orders in an administrative or judicial procedure is conducted properly and effectively so that the persons affected have the opportunity to participate in the proceedings in defence of their rights.

12.3 Notification by public posting of notice can be an appropriate means of serving judicial notice consistent with the right to effective judicial protection. However, the Committee considers that its use in cases that might involve a violation of human rights such as the right to adequate housing, which require judicial oversight, should be a measure of last resort, particularly when applied to acts that set a procedure in motion. Its use must be strictly limited to situations in which all means of serving notice in person have been exhausted; and must ensure sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can be a party to them.

12.4 Thus, insufficient notice of an application for mortgage enforcement, such as to prevent the person defending their rights in that procedure, represents a violation of the right to housing, and the Committee will now discuss whether the notice given in the present case was inadequate or not.

Analysis of the case

13.1 The Committee's task in considering a communication is not to verify whether or not the domestic judicial and administrative procedures were carried out in accordance with domestic law. Its task is simply to consider whether the facts of the communication constitute a violation by the State party of the economic, social and cultural rights contained in the Covenant. The Committee considers that it is in the first place for the courts of States parties to evaluate the facts and the evidence in each particular case, and the application of domestic law, and that these aspects are only

²⁹ See the Committee's general comment No. 9 (1998), on the domestic application of the Covenant, para. 2.

³⁰ See the Committee's general comments Nos. 3, para. 5; 7, paras. 9, 11 and 15; and 9, para. 2.

³¹ See the Committee's general comment No. 7, para. 15.

relevant if it can be shown that such evaluation or application was clearly arbitrary or amounted to a denial of justice that entailed the violation of a right recognized in the Covenant.

13.2 According to the documentation from the procedure, on 21 June 2012 the Court admitted the application for a procedure to enforce the mortgage on the author's residence. However, the author only took cognizance of this procedure on 4 April 2013, when she received notification of the order to auction her home, having been unable to defend herself during the enforcement procedure. In September and October 2012 four attempts were made to serve the Court's decision to admit the application, but to no avail as the author was not at her home — the address of which had been given by her for the purpose of notification. The notifying agent confirmed that the building had a letter box bearing her name; and on at least two occasions the caretaker was in the building. These facts were noted in the records of the Madrid Courts Central Notification and Enforcement Service (see note 3 above) and therefore were or should have been known to the Court. On 30 October 2012, to complete the process of notification of the decision to admit the application, the Court decided to publicly post the notification on the Court notice board, but this did not come to the author's attention in time.

13.3 In the present case, the Committee acknowledges the repeated efforts of the Court to personally notify the author of the decision to admit the procedure to enforce the mortgage on her home. However, the Committee considers that the State party has not shown that the Court exhausted all available means to serve notice in person — it does not, for example, explain why the Court did not notify the author by means of a note or advice left in her letter box or any of the other means of notification provided for in the Civil Procedure Act, such as leaving the notice with the caretaker or the nearest neighbour — merely stating that after its attempts had failed it ordered notification by public posting of notice in accordance with the law. Nor has the State adduced any solid support for its assertion that on one occasion the author hid so as to avoid receiving the notification. Thus the Committee considers that, even if it were to find that the notification by public posting of notice had been carried out in accordance with the Civil Procedure Act, the fact remains that such notice in respect of a foreclosure application needs to be adequate, in accordance with the standards of the Covenant applicable to the right to housing, as established in paragraphs 11.1 to 12.4 above, and that those standards were not met in the present case, which means the notice was inadequate.

13.4 Such an irregularity in the notice procedure might not imply a violation of the right to housing if it had no significant impact on the author's right to defend her full enjoyment of her home, for example because she had some other appropriate procedural mechanism by which to defend her rights and interests. And that indeed seems to be the State party's position when it suggests — albeit with no real backing — that the author's loss of any chance to take part in the enforcement procedure has no serious consequences, because in any case the debtor's rights of defence in foreclosure are legally very limited and they actually have access to an ordinary procedure whereby they can mount unlimited challenges to recovery of the mortgage loan. It also argues that, as the author submitted an application under article 695, paragraph 3, of the Civil Procedure Act challenging the validity of certain clauses of the mortgage contract and even managed to get the enforcement process and auction suspended, as a result of a recent judgement of the Court of Justice of the European Union, then those regular remedies even make it possible to have the enforcement process and the auction of the mortgaged property suspended.

13.5 Given the specificity of the problem of inadequate notice posed by the author, the Committee is not required, in the context of this communication, to consider

whether or not the State party's internal rules governing mortgage enforcement procedures and the possible auctioning of mortgaged properties, which may be dwellings, are generally consistent with the right to housing. So in the present case the Committee will confine itself to considering whether the inadequate notice given to the author — as already established — did or did not significantly affect her right to a defence, such as to entail a violation of the right to housing.

13.6 According to the Civil Procedure Act in force at the material time, the debtor in a mortgage enforcement procedure can oppose the auction only on very limited grounds, such as that the mortgage guarantee or the obligation has been extinguished. They cannot, in this procedure, challenge unfair terms, for example. On the other hand, the ordinary process allows the debtor to freely mount wide-ranging challenges to the loan. It could then be argued that failure to appear in the enforcement procedure might not be particularly serious, since the debtor would in any case have access to the regular procedure to defend her rights. But for that argument to stand it would be necessary for the ordinary procedure to permit suspension of the enforcement process and of the auction of the property, since otherwise, a defence through the regular procedure would not suffice to guarantee the right to housing, because the person would not be able to stop the sale of their home and would only be able to obtain compensation or restitution of the property at a later stage, assuming that were even possible. The Committee notes that the inadequate notice to the author occurred on 30 October 2012, when the Court publicly posted notification. The judgement of the Court of Justice of the European Union referred to by the State party must be No. C-415/11, *Mohamed Aziz v. Catalunyacaixa*, which is dated 14 March 2013, several months after that inadequate notice, and, as stated in that judgement, it is clear that, until that moment, ordinary proceedings would not have been able to suspend the enforcement procedure. The author was thus deprived of the possibility of defending herself during the enforcement process and of stopping the auction, and when the inadequate notice materialized, even the regular procedure could not be deemed a potentially adequate alternative because it gave no possibility of suspending the enforcement process.

13.7 The Committee therefore considers that the inadequate notice constituted at that moment a violation of the right to housing, one that was not subsequently remedied by the State party as the author was denied both reconsideration of the decision to order an auction and *amparo* as sought in the Constitutional Court.

C. Conclusion and recommendations

14. Taking into consideration all the information provided, the Committee considers that the facts before it reveal that the Court did not take all reasonable measures to adequately notify the author of the lending institution's application for mortgage enforcement (see para. 13.3 above), in order to ensure that the author was informed of the start of the procedure; and, as a consequence, the Court prevented the author from mounting a proper defence, in court, of her right to housing.

15. The Committee, acting pursuant to article 9, paragraph 1, of the Optional Protocol to the Covenant, is of the view that, by failing to fulfil its obligation to provide the author with an effective remedy, the State party violated her rights under article 11, paragraph 1, of the Covenant, read in conjunction with article 2, paragraph 1. In the light of the Views in the present communication, the Committee makes the following recommendations to the State party.

Recommendations in respect of the author

16. The State party has an obligation to provide the author with an effective remedy, in particular: (a) to ensure that the auction of the author's property does not proceed

unless she has due procedural protection and due process, in accordance with the provisions of the Covenant and taking into account the Committee's general comments Nos. 4 and 7; and (b) to reimburse the author for the legal costs incurred in the processing of this communication.

General recommendations

17. The Committee considers that, in principle, 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. Taking note of the measures carried out by the State party, including Royal Decree-Law No. 27/2012 and Act No. 1/2013, as a consequence of the Court of Justice of the European Union ruling of 14 March 2013, the Committee is of the view that the State party should ensure that its legislation and the enforcement thereof are in compliance with the obligations established under the Covenant.³² In particular, the State has the obligation to:

(a) Ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans;

(b) Adopt appropriate legislative or administrative measures to ensure that notification by public posting of notice in mortgage enforcement procedures is strictly limited to situations in which all means of serving notice in person have been exhausted; and that it ensures sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can attend;

(c) Adopt appropriate legislative measures to ensure that the mortgage enforcement procedure and the procedural rules contain appropriate requirements (see paras. 12.1-12.4 and 13.3-13.4 above) and procedures to be followed before going ahead with auction of a dwelling, or with eviction, in accordance with the Covenant and taking into account the Committee's general comment No. 7.

18. In accordance with article 9, paragraph 2, of the Optional Protocol and rule 18, paragraph 1, of the provisional 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.

³² See, for example, the Committee's concluding observations on the fifth periodic report of Spain (E/C.12/ESP/CO/5), paras. 21 and 22.