



# 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. 4/2014\*, \*\*

<i>Communication submitted by:</i>	Imelda Merino Sierra and Juan Luis Merino Sierra (represented by counsel, Antonia Barba García)
<i>Alleged victims:</i>	The authors and their mother, Dominica Sierra Pablo (deceased)
<i>State party:</i>	Spain
<i>Date of communication:</i>	13 May 2014 (date sent through the postal service in the State party)
<i>Date of adoption of Views:</i>	29 September 2016
<i>Subject matter:</i>	Non-consensual medical treatment; inappropriate and untimely medical care provided by third parties
<i>Procedural issues:</i>	Submission of the communication within one year after the exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to the enjoyment of the highest attainable standard of physical and mental health; access to adequate medical service and medical attention
<i>Articles of the Covenant:</i>	12 (1) and (2) (d)
<i>Articles of the Optional Protocol:</i>	3 (2) (a)

\* Adopted by the Committee at its fifty-ninth session (19 September to 7 October 2016).

\*\* Pursuant to rule 5 (1) (c) of the provisional rules of procedure under the Optional Protocol, Committee member Mr. Mikel Mancisidor de la Fuente did not take part in the examination of this communication.

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1.1 The authors of the communication are Ms. Imelda Merino Sierra and Mr. Juan Luis Merino Sierra, Spanish nationals born on 29 September 1976 and 21 March 1978, respectively. The authors claim that their mother, Ms. Dominica Sierra Pablo (deceased), and they themselves are victims of a violation by the State party of their rights under article 12 (1) and (2) (d) of the Covenant. The authors are represented by counsel. The Optional Protocol entered into force for the State party on 5 May 2013.

1.2 On 6 July 2015, the Committee, acting through its Working Group on Communications, decided that the admissibility of the communication should be considered separately from its merits.

1.3 In the present Views, the Committee first summarizes the information and the arguments submitted by the parties. It then goes on to consider the admissibility of the communication and, lastly, draws its conclusions.

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

### **The facts as submitted by the authors**

2.1 On 11 December 2007, the authors' mother was admitted to Hospital X with severe abdominal pain. On 24 December 2007, she was discharged after her condition had improved, having been diagnosed with acute pancreatitis (resolved) and peripancreatic and para-aortic adenopathies (under study). However, on 26 December she was readmitted to hospital because her abdominal pain had returned. The authors claim that the attending physician merely ordered laboratory and other supplementary tests and prescribed palliative care which failed to keep the pain under control.

2.2 On 24 January 2008, the authors' mother was transferred to Málaga University Teaching Hospital, where she was diagnosed with carcinoma of the pancreas. The authors claim that, because of the delay between the appearance of the carcinoma and the definitive diagnosis, their mother was unable to undergo surgery and received only painkillers and palliative radiotherapy.

2.3 The authors state that their father, M.M.V., died on 10 June 2008 as a result of the stress brought on by their mother's illness. Subsequently, the authors' mother died on 11 October 2008. On 27 October 2008, owing to these events, Ms. Merino Sierra was diagnosed with depression.

2.4 On 2 December 2008, the authors filed a lawsuit against the hospital and the attending physician for medical negligence and lack of informed consent regarding the treatment and medical tests administered to their mother. They asked for compensation in the amount of €300,000 and the payment of legal costs. In their suit, the authors alleged medical malpractice on the grounds that the attending physician had failed to carry out medical examinations. They further claimed that the physician had not prepared a medical history — as was legally required — or documented their mother's informed consent to the treatment and the examinations administered. According to the authors, the care provided was not suitable for treating the pathology/disease that their mother presented or for controlling the pain that she was suffering.

2.5 On 12 February 2010, the Torremolinos Court of First Instance No. 1 dismissed the suit and ordered the authors to pay the costs of the proceedings. The Court examined the claims and the evidence submitted by the parties, including expert medical reports and the hospital's clinical records. The Court found that, even though it had not been established that the patient had given her informed consent for the portion of the medical procedure of 8 January 2008 that involved a biopsy and even though the attending physician should have performed a second biopsy, those omissions were not sufficient to constitute medical

negligence. Similarly, it could not be concluded that the delay in carrying out the second biopsy was the cause of the inoperable nature of the tumour and the subsequent death of the authors' mother.

2.6 By an application lodged on 6 April 2010, the authors appealed against the ruling before the Málaga Provincial Court. The authors questioned the assessment of the evidence made by the Court of First Instance and claimed that it had departed from the criteria established by the State party's courts with respect to patients' informed consent and that, in any case, the attending physician had acted negligently.

2.7 On 20 July 2011, the Málaga Provincial Court dismissed the appeal and upheld the lower court's ruling. The Provincial Court found, among other things, that it had not been established that the attending physician had exceeded the scope of his authority or had been negligent with respect to the treatment and care provided to the authors' mother.

2.8 The authors filed an appeal against that decision before the Supreme Court; the appeal was declared inadmissible on 6 November 2012.

2.9 The authors subsequently filed an application for *amparo* with the Constitutional Court against the ruling of the Málaga Provincial Court. On 6 March 2013, the Constitutional Court found the application inadmissible on the grounds that the authors had failed to duly exhaust the available judicial remedies, since they had not requested an annulment of the proceedings, as provided for in article 241 (1) of the Organic Act on the Judiciary. The authors state that they were notified of this decision on 12 March 2013.

2.10 On 27 August 2013, the authors filed a complaint with the European Court of Human Rights and claimed that their rights under articles 6 (1) (Right to a fair trial) and 8 (1) (Right to respect for private and family life) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) had been violated. On 14 November 2013, the European Court rejected the application on the grounds that it failed to meet the admissibility criteria set forth in articles 34 and 35 of the European Convention on Human Rights. On 14 February 2014, the authors submitted a communication to the Human Rights Committee in which they alleged violations of their rights under article 7 (prohibition on subjecting anyone without his or her free consent to medical or scientific experimentation) and article 17 (1) (prohibition on subjecting anyone to arbitrary or unlawful interference with his or her private or family life) of the International Covenant on Civil and Political Rights. However, on 3 March 2014, the secretariat of the Human Rights Committee informed the authors that their communication could not be processed because it did not provide sufficient details on their case or on the manner in which their rights under the International Covenant on Civil and Political Rights had been violated and that the Human Rights Committee was not in a position to review the national courts' evaluation of the facts and evidence presented to them.

2.11 The authors claim that they have exhausted all domestic remedies. They go on to state that requesting an annulment of the proceedings, as provided for in article 241 (1) of the Organic Act on the Judiciary, and to which reference is made in the ruling of the Constitutional Court, is a remedy for correcting defects of form or contradictions of the judgment that prejudiced a complainant's defence; however, it is not an appropriate remedy for seeking protection of rights under the Covenant. Therefore, a request for an annulment of the proceedings is not an effective remedy that must be exhausted. Furthermore, on 19 December 2013, the Constitutional Court itself ruled differently in another case, concluding that it was not necessary to request an annulment of proceedings where there was evidence that "the judiciary has had the opportunity to rule on the basic rights subsequently invoked before the Constitutional Court. [...] To require otherwise would involve taking a formalistic approach that would ultimately make it impossible to bring cases before the

Constitutional Court and would thus undermine the rationale behind the subsidiary nature of requests for the annulment of proceedings.”

2.12 The authors add that the Committee is competent *ratione temporis* to consider the communication, as the material facts that gave rise to the violation of rights under the Covenant had effects that continued after the entry into force of the Optional Protocol for Spain. In that regard, the authors point out that they continue to suffer psychological harm as a result of the loss of their mother, who did not receive appropriate medical treatment. Moreover, the fact that the courts have ordered them to pay legal costs has resulted in their being subjected to debt collection procedures, the garnishment of their wages and the seizure of assets to cover those costs.

2.13 In connection with the requirement established in article 3 (2) (a) of the Optional Protocol, the authors point out that there was no procedural inactivity on their part after domestic remedies had been exhausted. Following the ruling of the Constitutional Court on 6 March 2013, they appealed to international courts, in particular the European Court of Human Rights (see para. 2.10 above) since, at the time, the Committee was not competent to consider individual communications on violations of rights under the Covenant by Spain. The communication was not submitted to the Committee earlier because the authors’ application before the European Court of Human Rights was pending until 14 November 2013, at which time the Court rejected it as inadmissible without having considered it on the merits.

### **The complaint**

3.1 The authors claim that the State party violated their mother’s rights under article 12 (1) and (2) (d) of the Covenant and that they themselves are also victims of these violations, since they have suffered psychological and material harm.

3.2 The authors allege that their mother was the victim of medical negligence by the attending physician and the hospital because she was subjected to medical examinations without her informed consent and that she did not receive appropriate, timely treatment for her illness or for controlling her severe pain. Their mother was the object of inhuman treatment, and the alleged negligence reduced her chances of survival considerably. In this context, the State party violated its obligation to protect their mother’s right to the enjoyment of the highest attainable standard of physical and mental health and to prevent third parties from interfering with the enjoyment of that right. In particular, the courts of the State party arbitrarily dismissed their suit for medical negligence against the attending physician and the hospital, even though, during the proceedings, the courts themselves found that their mother’s written informed consent had not been obtained with respect to a portion of the medical procedure performed on 8 January 2008 (the percutaneous biopsy) and that the attending physician should have performed a second biopsy, which was subsequently performed in another hospital.

3.3 The events described above caused the authors serious physical and psychological harm. Furthermore, the refusal to award compensation for the harm caused to their mother’s health and the obligation to pay the legal costs imposed by the courts have caused them psychological and financial harm which was continuing at the time of the submission of the communication to the Committee.

### **State party’s observations on admissibility**

4.1 On 4 September 2015, the State party submitted its observations on the admissibility of the communication, requesting the Committee to declare the communication inadmissible on the grounds that domestic remedies had not been exhausted; the communication was not submitted within one year after the exhaustion of domestic

remedies; the events that were the subject of the communication had occurred prior to the entry into force of the Optional Protocol for the State party; the matter had been submitted to another procedure of international investigation or settlement; and it was manifestly ill-founded and constituted an abuse of the right to submit a communication pursuant to article 3 (1) and (2) (a) (b) (c) (e) and (f) of the Optional Protocol.

4.2 The authors acknowledge that they submitted their communication after the time limit of one year following the exhaustion of domestic remedies established in article 3 (2) (a) of the Optional Protocol. The State party maintains that the submission of an application to other international bodies, such as the European Court of Human Rights, does not constitute grounds for or entail an interruption in the calculation of that time limit; nor does the fact that the Optional Protocol had not yet entered into force when the Constitutional Court declared the application for *amparo* inadmissible entail any such interruption. Therefore, since the communication was submitted to the Committee on 13 May 2014, it should be declared inadmissible.

4.3 The alleged violations of rights under the Covenant are based on events that took place in 2007 and 2008 (lack of informed consent and delayed medical treatment of the authors' mother). The authors claim that the impact of those events was ongoing as of 5 May 2013, when the Optional Protocol entered into force for Spain. Nevertheless, the exception to the general rule established in article 3 (2) (b) of the Optional Protocol refers to events — not the effects of such events — that have continued after that date. The State party maintains that, in the present case, the events dealt with in the communication did not continue after the entry into force of the Optional Protocol. Nor is it possible to claim that the effects of those events have been ongoing because the authors are still suffering psychological harm occasioned by the death of their mother or because they must cover the payment of the legal costs related to the proceedings.

4.4 The State party maintains that the communication is also inadmissible under article 3 (2) (c) of the Optional Protocol owing to the fact that the matter was submitted to the European Court of Human Rights, which declared the application inadmissible on 14 November 2013. Subsequently, the same matter was submitted to the Human Rights Committee (see para. 2.10 above).

4.5 The authors have not exhausted all domestic remedies. The State party points out that the Constitutional Court found the application inadmissible on the grounds that the authors had failed to duly exhaust the available judicial remedies, since they had not requested an annulment of the proceedings, as provided for in article 241 (1) of the Organic Act on the Judiciary. The ruling of the Constitutional Court of 19 December 2013 that was cited by the authors is not applicable to their case, since a request for an annulment of the proceedings was considered unnecessary given that there was a previous Supreme Court ruling on the merits of the case. In the authors' case, the Supreme Court did not have the opportunity to rule on the allegations of violations of health rights since the appeal was simply declared inadmissible.

4.6 The communication is manifestly ill-founded and constitutes an abuse of the right to submit a communication pursuant to article 3 (2) (e) and (f) of the Optional Protocol. The authors filed a lawsuit for medical malpractice on the grounds that their mother was subjected to inhumane pain and that the diagnosis of the illness from which she suffered was delayed, and they requested compensation for the alleged damages. The State party maintains that, after examining all the evidence, its judicial authorities found that there had been no medical malpractice and they dismissed the suit. The authors' disagreement with these judicial findings is not sufficient grounds for alleging that the State party violated its obligations under the Covenant.

**The complainant's comments on the State party's observations on admissibility and merits**

5.1 On 1 April 2016, the authors responded to the State party's observations on admissibility. The authors reiterate their allegations and point out that no other international body has examined the merits of the matter that is the subject of the communication, in particular with regard to the right to health. Therefore, their communication meets the admissibility requirement established in article 3 (2) (c) of the Optional Protocol. Furthermore, the communication was submitted to the Committee within a reasonable time period.

5.2 As for the requirement to exhaust all domestic remedies, the authors point out that they filed an appeal against the decision of the Málaga Provincial Court before the Supreme Court. Therefore, the Supreme Court had the opportunity to rule on the merits of their allegations. Nevertheless, the Court found that the authors were seeking a reappraisal of the facts of the case and declared their appeal inadmissible. In such circumstances, a request for an annulment of the proceedings would have been ineffective and unnecessary.

5.3 Regarding the requirement established in article 3 (2) (b) of the Optional Protocol, the authors claim that they saw their mother suffer and experience severe pain and were not provided with the necessary information or diagnosis; they further claim that the non-material harm suffered by them and their mother did not end with her death but has continued over time. They reiterate that, as a result of the legal proceedings they initiated in relation to these events, they have been subjected to court-ordered seizures of assets.

5.4 Lastly, the authors submit that their communication does not constitute an abuse of the right to submit a communication and that the harm caused by this instance of medical malpractice did not end on the date on which that malpractice occurred.

**B. Committee's consideration of admissibility**

6.1 Before considering any claim contained in a communication, the Committee on Economic, Social and Cultural Rights must decide, in accordance with rule 9 of its provisional rules of procedure under the Optional Protocol, whether the communication is or is not admissible under the Optional Protocol.

6.2 The Committee takes note of the State party's submission that the communication is inadmissible under article 3 (2) (c) of the Optional Protocol because the matter was previously submitted to the European Court of Human Rights and the Human Rights Committee. The Committee also takes note of the authors' submission that the European Court of Human Rights and the Human Rights Committee did not consider the merits of the matter referred to in the present communication.

6.3 The Committee notes that, on 14 November 2013, the European Court of Human Rights, sitting in a single-judge formation, declared the application inadmissible on the grounds that it failed to meet the admissibility criteria set forth in articles 34 and 35 of the European Convention on Human Rights. The Committee also observes that the communication submitted by the authors to the Human Rights Committee was not considered by that Committee, since, on 3 March 2014, the secretariat of the Human Rights Committee informed the authors that their communication could not be processed because it did not provide sufficient information.

6.4 In accordance with article 3 (2) (c) of the Optional Protocol, the Committee must declare a communication inadmissible if it refers to a matter that has been or is being examined under another procedure of international investigation or settlement. The Committee considers that the examination of an application by the European Court of

Human Rights constitutes an examination under such a procedure. Consequently, the Committee must determine if the ruling of that Court of 14 November 2013 constitutes an examination of the matter under the terms of article 3 (2) (c) of the Optional Protocol. In that respect, the Committee considers that a complaint has been examined by another procedure of international investigation or settlement if the examination by that procedure: (i) related to the same matter, i.e., related to the same parties, the same events and the same substantive rights; and (ii) went beyond the examination of the purely formal criteria of admissibility<sup>1</sup> and involved a sufficient consideration of the merits.<sup>2</sup>

6.5 The Committee notes that the decision of the European Court of Human Rights of 14 November 2013 is worded in general terms and does not provide specific reasons for its finding of inadmissibility.<sup>3</sup> Given these circumstances, the Committee considers that the decision of inadmissibility of the European Court of Human Rights did not constitute an examination under the terms of article 3 (2) (c) of the Optional Protocol. Therefore, the Committee finds that the communication meets the admissibility criterion established in article 3 (2) (c) of the Optional Protocol.

6.6 The Committee takes note of the State party's submission that the Committee is not competent *ratione temporis* to consider the present communication on the grounds that the events that gave rise to the alleged violations occurred prior to 5 May 2013, the date on which the Optional Protocol entered into force for Spain and that neither the events that are the subject of the communication nor their effects continued after that date. The Committee also takes note of the authors' claims that the material facts that gave rise to violations under the Covenant have had ongoing effects that continued after the entry into force of the Optional Protocol, since the non-material harm caused to them and to their mother did not cease when their mother died, but instead continued. Furthermore, the authors are faced with debt collection procedures and wage garnishments to cover the costs of the proceedings that were ordered as a result of the legal action initiated by them in relation to these events.

6.7 The Committee recalls that the Optional Protocol entered into force for the State party on 5 May 2013 and that, in accordance with article 3 (2) (b) of the Optional Protocol, the Committee must declare a communication inadmissible when the facts that are the subject of the communication occurred prior to the entry into force of the Optional Protocol for the State party concerned unless those facts continued after that date. As noted by the International Law Commission:

An act does not have a continuing character merely because its effects or consequences extend in time. It must be the wrongful act as such which continues. In many cases of internationally wrongful acts, their consequences may be prolonged. The pain and suffering caused by earlier acts of torture or the economic effects of the expropriation of property continue even though the torture has ceased or title to the property has passed. Such consequences are the subject of the secondary obligations of reparation, including restitution ... The prolongation of

<sup>1</sup> See, for example, Human Rights Committee, communication No. 944/2000, *Mahabir v. Austria*, decision of inadmissibility of 26 October 2004, paras. 8.3 and 8.4, and communication No. 998/2001, *Althammer et al. v. Austria*, Views adopted on 8 August 2003, para. 8.4. See also Committee against Torture, communication No. 247/2004, *A.A. v. Azerbaijan*, decision adopted on 25 November 2005, para. 6.8; communication No. 479/2011, *E.E. v. Russian Federation*, decision adopted on 24 May 2013, para. 8.4; and communication No. 642/2014, *M.T. v. Sweden*, decision adopted on 7 August 2015, paras. 8.3-8.5.

<sup>2</sup> See, for example, Human Rights Committee, communication No. 1945/2010, *Achabal v. Spain*, Views adopted on 27 March 2013, para. 7.3.

<sup>3</sup> See, for example, Human Rights Committee, communication No. 2474/2014, *X v. Norway*, Views adopted on 5 November 2015, para. 6.2.

such effects will be relevant, for example, in determining the amount of compensation payable. They do not, however, entail that the breach itself is a continuing one.<sup>4</sup>

By the same token, the Committee considers that a fact that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time. In the present case, the Committee notes that the events that gave rise to the alleged violations — medical negligence owing to the lack of informed consent for medical tests and failure to provide appropriate and timely medical treatment — occurred in 2007 and 2008; that all the relevant judicial decisions taken by the national authorities were handed down between 2010 and 2013; and that the most recent of those was the decision of inadmissibility of the application for *amparo* handed down by the Constitutional Court on 6 March 2013, that is, before the entry into force of the Optional Protocol for the State party. The information contained in the communication does not point to the occurrence of any events that have continued subsequent to the entry into force of the Optional Protocol that could, in themselves, be considered to constitute a violation of the Covenant.<sup>5</sup> Consequently, the Committee considers that it is precluded *ratione temporis* from examining the present communication and that the communication is inadmissible under article 3 (2) (b) of the Optional Protocol.

### C. Conclusion

7. Taking into consideration all the information provided, the Committee, acting pursuant to the Optional Protocol to the Covenant, is of the view that the communication is inadmissible.

8. The Committee therefore decides:

(a) That the communication is inadmissible under article 3 (1) of the Optional Protocol;

(b) That, pursuant to article 9 (1) of the Optional Protocol, this decision is to be transmitted to the State party and to the authors of the communication.

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<sup>4</sup> *Yearbook of the International Law Commission 2001*, vol. II (part two), Draft articles on responsibility of States for internationally wrongful acts, p. 60, paragraph 6 of the commentary on article 14 (Extension in time of the breach of an international obligation).

<sup>5</sup> See communication No. 6/2015, *V.T.F. and A.F.L. v. Spain*, decision of inadmissibility of 24 September 2015, para. 4.3; and communication No. 13/2016, *E.C.P. and others v. Spain*, decision of inadmissibility of 20 June 2016, para. 4.3.