

Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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v
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THIRD PARTY INTERVENTION

Submitted by:
The International Network for Economic, Social and
Cultural Rights (ESCR-Net)
In accordance with Rule 14(1) of the Provisional Rules
of Procedure of the Optional Protocol to the
International Covenant on Economic, Social and
Cultural Rights



International Network for Economic, Social & Cultural Rights
Red Internacional para los Derechos Económicos, Sociales y Culturales
Réseau international pour les droits économiques, sociaux et culturels
الشبكة العالمية للحقوق الاقتصادية و الاجتماعية و الثقافية

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INTEREST OF THE INTERVENER

1. This third party intervention is submitted by the International Network for Economic, Social and Cultural Rights (ESCR-Net) pursuant to leave granted by the Working Group on Communications of the Committee on Economic, Social and Cultural Rights, by letter dated 5 April 2016 (G/SO CESCR ESP(4), CE/GT/mbe 5/2015), in accordance with Rule 14(1) of the Provisional Rules of Procedure of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.
2. ESCR-Net is the largest global network of organizations, academics and advocates devoted to the realization of human rights with a particular focus on economic and social rights. ESCR-Net is made up of over 270 organizational and individual members in 70 countries, working collectively to engage with UN treaty monitoring bodies as well as regional human rights mechanisms and processes, for the purpose of facilitating the enjoyment of economic, social and cultural rights. ESCR-Net has submitted *amicus* briefs, and supported its members to submit *amicus* briefs, in a number of national jurisdictions over the past few years. Since 2006, ESCR-Net has held consultative status with the United Nations Economic and Social Council.¹
3. The members of ESCR-Net’s Strategic Litigation Working Group which led in the drafting of this third party intervention were:
 - (1) Amnesty International (AI, United Kingdom): AI is a worldwide movement of more than 7 million people working for the respect, protection and fulfilment of internationally recognized human rights. The movement has members and supporters in more than 150 countries and territories and it bases its work on international human rights instruments adopted by the United Nations and regional bodies.
 - (2) Centro de Estudios Legales y Sociales (CELS, Argentina): CELS has been working since 1979 “to promote and protect human rights, and to strengthen the democratic system in Argentina.”
 - (3) The Center for Economic and Social Rights (CESR, United States): CESR was founded in 1993 and it seeks to “uphold the universal human rights of every human being to education, health, food, water, housing, work, and other economic, social and cultural rights essential to human dignity.” It has supported work of civil society organizations before UN bodies with a focus on ESCR, among a range of other projects.
 - (4) Dullah Omar Institute (South Africa): The Institute was created in 1990 to fight apartheid and it has focused its work on children’s rights, women’s rights and economic and social rights, among others.
 - (5) The Global Initiative for Economic, Social and Cultural Rights (GI-ESCR, United States): GI-ESCR was founded in 2010 with the mission to “advance the realization of economic, social and cultural rights throughout the world, tackling the endemic problem of global poverty through a human rights lens”. It has given support to litigation and directly litigated specific ESCR cases, including before the Human Rights Committee.
 - (6) Observatori DESC (Spain): Observatori DESC was created in 1998 and it has focused its work on the right to housing and the right to food in Spain.
 - (7) Social Rights Advocacy Center (SRAC, Canada): SRAC was founded in 2002 to provide research into social rights, legal advocacy and representation to disadvantaged individuals and groups in the area of social rights”.
 - (8) Ana Lucia Maya Aguirre is Professor of Law at Jorge Tadeo Lozano University, Bogota, Colombia, as well as a lawyer.
 - (9) Jackie Dugard is an Associate Professor of Law at Witwatersrand University, Johannesburg, South Africa.

¹ ESCR-Net received ECOSOC accreditation through and with the support of our fiscal sponsor, The Tides Center (a US-based organization that provides fiscal sponsorship to over 200 US-based organizations).

INTRODUCTION

1. This case raises critical questions in relation to the Respondent State's obligations under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant). In particular, this brief aims to assist the Committee on Economic, Social and Cultural Rights (CESCR or Committee) in its consideration of this complaint by setting out the relevant international and comparative legal principles and standards in relation to the protect and fulfil aspects of the right to housing, in the context of forced eviction of private tenants and in relation to the development of adequate, longer-term social housing policy and practice. In so doing it also provides some information about the current housing situation in Spain.

I. STATES PARTIES MUST PROTECT THE RIGHT TO HOUSING FOR ALL PERSONS IN THEIR JURISDICTION, INCLUDING TENANTS UNDER PRIVATE RENTAL ARRANGEMENTS

2. The respondent State contends that "*the situation described is not a case of forced evictions conducted by the State or public institutions, but, instead, a case of eviction due to the expiration of lease contract requested by an individual against another individual, without the State being involved at all, except for the engagement by the judiciary as mediator given the disagreement between the parties involved, i.e. landlord and tenant.*"²
3. However, States parties must protect everyone's right to housing irrespective of tenure type, including tenants in private rental arrangements, and they must ensure adequacy of housing through – among other measures – security of tenure and the limit of evictions to exceptional circumstances. In cases where evictions that will lead to homelessness cannot be avoided, appropriate protective measures, such as the provision of alternative housing, must be adopted to prevent homelessness and other human rights violations.

A. Forced eviction is prohibited and evictions can only be justified in exceptional circumstances

4. Forced evictions are "prima facie incompatible with the requirements of the Covenant".³ CESCR has defined forced eviction "*as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.*"⁴ This definition extends protections beyond the context of violent evictions or development-induced displacements.
5. Further, CESCR has clarified that "[t]he prohibition on forced evictions does not, however, 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."⁵ For evictions to be justified under the Covenant, they must (on a reading of CESCR's General Comments No. 4 and No. 7 together): (1) only be carried out in *exceptional circumstances*; (2) after *all feasible alternatives* to eviction that address the exceptional circumstance are explored *in consultation with the affected community*; and (3) after due process protections are afforded to the individual, group or community, including "provision of legal remedies". There are two exceptions to this general rule: first, evictions should never be carried out in a discriminatory manner; second, evictions should never render someone homeless or vulnerable to other human rights violations.⁶

² Government submission to this case, dated 10 Sept. 2015, p. 6 (translated from Spanish by the intervener).

³ CESCR, *General Comment No. 4. The right to adequate housing (art. 11 (1) of the Covenant)*, contained in UN Doc. E/1992/23, para. 18; CESCR, *General Comment No. 7. The right to adequate housing (art. 11 (1) of the Covenant): Forced evictions*, contained in UN Doc. E/1998/22, annex IV, para. 1.

⁴ CESCR, *General Comment No. 7*, para. 3.

⁵ CESCR, *General Comment No. 7*, para. 3 (emphasis added).

⁶ Human Rights Council, *Report of 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 context*, UN Doc. A/HRC/31/54 (30 December 2015), para. 49(c), which confirms that "[t]he prohibition of evictions leading to homelessness is immediate, absolute and is not subject to available resources."

B. States parties must protect against forced eviction and other human rights violations in connection with all tenure types

6. Article 11 of ICESCR applies to all tenure types, including rental agreements between tenants and private landlords, and CESCR has confirmed that “[n]otwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”⁷ Similarly, OHCHR and UN Habitat confirm that “[r]egardless of the type of tenure...everyone has a right to be protected against forced eviction.”⁸ The Special Rapporteur on the right to adequate housing and on the right to non-discrimination in this context (Special Rapporteur on the right to housing) has stressed that “th[e] evolution, from a narrow focus on property rights towards a more expansive recognition of diverse forms of tenure and rights – while still uneven and incomplete – is significant... [S]ecurity of tenure should be clearly articulated and grounded in the international human rights framework and expressed in a variety of tenure forms.”⁹
7. Other jurisdictions have also recognized the right to housing for all tenure types. For example, the South African Constitutional Court (SACC) confirmed that the right of access to adequate housing enshrined in the South African Constitution has horizontal application between private parties.¹⁰ The Court found that the right to housing does not only bind the State but also binds and impacts on private individuals by affirming that although “the main burden of fulfilling [the right of access to adequate housing] falls upon the state”, the obligations created in terms of this right extend to private parties in two ways.¹¹ First, the right of access to adequate housing “imports an inhibitory duty not to impede or impair access to housing” on private parties.¹² This may mean that the unfettered rights and interests of private parties may be partially limited or constrained in certain instances where the exercise of these rights may result in the infringement of another party’s right to housing.¹³ Second, the Court recognized that the means through which the State attempts to fulfil its human rights obligations to ensure increased access to adequate housing may affect private relationships.¹⁴

C. States parties must take appropriate measures to guarantee tenants’ right to housing, including protecting against forced eviction, and implementing adequate longer-term housing policy and practice

8. States parties must adopt a national housing strategy, encompassing immediate, short-term and long-term legislation or other regulatory measures, to prevent and address violations of the rights of housing for all persons, including private tenants. Among other things, this will involve measures in relation to legal security of tenure, affordability and accessibility, among other aspects of the right to housing.¹⁵
9. With respect to the prevention of, and feasible alternatives to forced evictions, States parties should consider, among other options, subsidies to ensure affordable rent, rent control legislation, and the provision of alternative housing. Indeed, the recent Concluding Observations on Canada provide insight into the

⁷ CESCR, *General Comment No. 4*, para. 8.

⁸ OHCHR and UN Habitat, Fact Sheet No. 21 (Rev. 1), p.5.

⁹ Above no. 6, para. 99.

¹⁰ South African Constitutional Court, *Maphango and Others v. Aengus Lifestyle Properties (Pty) Ltd*, case CCT57/11, paras. 31-34. For a broader discussion of this issue and other examples, see: Aoife Nolan, ‘Holding non-state actors to account for constitutional economic and social rights violations: Experiences and lessons from South Africa and Ireland’ (2014) 12(1) *Int J Constitutional Law* 61.

¹¹ *Ibid Maphango*, para. 31.

¹² *Ibid*, para. 32.

¹³ *Ibid*, para. 33.

¹⁴ *Ibid*, para. 34.

¹⁵ CESCR, *General Comment No. 4*, para. 8.

scope of the prohibition on forced eviction, specifically in connection with “evictions related to rental arrears”, with CESCR recommending, *inter alia*, that the State party:¹⁶

(a) Progressively increase federal and provincial resources allocated to housing, and reinforce the housing subsidy within the social assistance benefit so as to be commensurate to living costs; (b) Take effective measures to substantially increase the availability of social and affordable housing units; (c) Regulate rental arrangements with a view to ensuring that tenants enjoy the right to affordable and decent housing and are not vulnerable to forced evictions and homelessness; and (d) Ensure that its legislation on forced evictions is compatible with international norms, particularly with respect to its obligation to ensure that no persons find themselves homeless or victims of other human rights violations due to evictions, and that compensation or alternative accommodation is provided to victims.

10. In assessing the reasonableness of the steps taken by the Respondent State in accordance with its obligations under the Covenant, comparative assessments from other jurisdictions provide useful guidance. For example, the reasonableness standard adopted in the Optional Protocols to both ICESCR and the Convention on the Rights of the Child (CRC) is closely connected to the reasonableness standard developed in South African jurisprudence. Among other elements, the SACC has established that a critical component of the reasonableness standard is that a government’s housing policy or program should be “*sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements*”.¹⁷ If a policy “*exclude[s] a significant segment of society*” or fails to respond to “*the needs of the most desperate*” it would be unreasonable.¹⁸ The reasonableness standard therefore requires that a State’s housing program and/or policy provide(s) alternative accommodation or shelter to those in the most desperate of need including evictees rendered homeless as a result on an eviction.¹⁹
11. On this basis, the SACC has developed, as a principle of law, that the right to housing obliges the government to provide temporary alternative accommodation to evictees who are rendered homeless as a result of an eviction until such evictees are able to access permanent accommodation. Key cases are described below.
 - a. This principle was expanded to protect occupiers (some of whom had previously been lawful tenants) in the SACC “Blue Moonlight” case, where the Court heard an eviction application brought by a private landlord.²⁰ The Court stated that the State had the same responsibility towards evictees who could be rendered homeless as a result of an eviction regardless of whether such evictees were evicted from State land or by private parties. The Court declared the State’s housing policy “unreasonable” to the extent that it failed to provide alternative accommodation to those evicted from private property, noting that “[t]o the extent that eviction may result in homelessness, it is of little relevance whether removal from one’s home is at the instance of the City or a private property owner”.²¹
 - b. A subsequent decision reaffirmed this principle, holding that: first, that the State has a duty to provide alternative accommodation to evictees who risk being rendered homeless as a result of an eviction even if these evictees had only occupied the property for a short period before the eviction; and second, alternative accommodation should be confirmed before an eviction takes place, to ensure homelessness does not ensue in the interim.²² To ensure the latter, the Court also required a linkage between the date of eviction and the date upon which the municipality should provide alternative

¹⁶ CESCR, *Concluding Observations: Canada*, UN Doc. E/CN.12/CAN/CO/6 (4 March 2016), para. 40.

¹⁷ South African Constitutional Court, *The Government of the Republic of South Africa and Others v. Grootboom and Others*, Case CCT 11/00, para. 56.

¹⁸ *Ibid.*, paras. 43-44.

¹⁹ *Ibid.*, para. 52.

²⁰ South African Constitutional Court, *City of Johannesburg Metropolitan Municipality v. Blue Moonlight Properties 39 (Pty) Ltd and Another*, Case CCT 37/11 (“Blue Moonlight” case).

²¹ *Ibid.*, para. 95.

²² South African Constitutional Court, *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v. Golden Thread Ltd and Others*. Case CCT 25/11, para. 16; South African Constitutional Court, *Occupiers of Skurweplaas 353 JR v. PPC Aggregate Quarries (Pty) Ltd and Others*, Case CCT 26/11 (“Occupiers of Skurweplaas” case), para. 14.

accommodation.²³ This meant that the evictees could remain on the property until the State provided alternative accommodation.

- c. South African jurisprudence has set out some broad legal requirements for the provision of alternative accommodation, such as the requirement that the location be as close as reasonably possible to the property from which the evictees were evicted.²⁴ Also, both the SACC and the Supreme Court of Appeal have indicated that the State must have regard to the proximity of the alternative accommodation to schools, public amenities and the evictees' places of employment or access to employment opportunities.²⁵ The Supreme Court of Appeal has also held that the alternative accommodation provided to evictees should entail a measure of tenure security.²⁶
12. The Argentinean administrative court case "Villa la Dulce"²⁷ regarding alternative housing is similarly relevant, with court action forcing the Buenos Aires government to adopt measures to cope with collective housing problems. The "Villa" was created in 2000 when several families occupied a private, unoccupied land in Buenos Aires and constructed very basic houses to live in. One year later, 180 families were forcibly evicted, with 86 of these families subsequently living on the streets. In 2003, the Court ratified an agreement, negotiated with attention to international human rights standards on housing, between the families and the government in which the families were given the opportunity to purchase a house in compliance with the standards – as specified by CESCR – of habitability, accessibility and affordability, with access to a special line of credit and the payment by families of no more than 20 per cent of their actual monthly income. By 2009, all the families had moved into their new houses, which had been built by the government of the city of Buenos Aires as a result of the court ratified agreement.
13. In Spain itself, the adoption of protective policies relating to housing appears inconsistent across provinces. In the present case, the Author notes that neither the regional or Madrid governments had developed nor been able to provide adequate alternative housing.²⁸ In terms of available protective measures, the Author references a one-month benefit to cover a low cost rental arrangement and the payment of a minimum income (*renta mínima de inserción*), of approximately €500.²⁹ By contrast, there are provinces (*comunidades autónomas*) in Spain, such as Catalunya, where protective measures have been taken to prevent evictions as well as address issues of lack of rental payment.³⁰ For example, regional Law 24/2015 (Catalunya) provides for urgent measures to address housing emergencies, establishing that governments should guarantee alternative housing for those who are at risk of "residential exclusion" (*exclusión residencial*) and who are in the process of being evicted.
14. Generally, it will be incumbent on States parties to demonstrate whether the available short-term and long-term measures are adequate, taking into account private rental market costs³¹ and the impact on vulnerable groups, among other things.

²³ "Occupiers of Skurweplaas" case, *ibid.*, para. 13; "Blue Moonlight" case, above no. 20.

²⁴ "Blue Moonlight" case, above no. 20, para. 104(c)(iv).

²⁵ South African Constitutional Court, *Residents of Joe Slovo Community, Western Cape v. Thubelisha Homes and Others*, Case CCT 22/08, paras. 241,249, 254-258; South African Supreme Court of Appeal, *City of Johannesburg v. Rand Properties (Pty) Ltd* Case No. 253/06, para. 44.

²⁶ South African Supreme Court of Appeal, *Baartman and Others v. Port Elizabeth Municipality*, Case No. 464/2002, para. 18.

²⁷ Juzgado Contencioso Administrativo de la Ciudad de Buenos Aires No 5, Secretaría No 9, *Agüero, Aurelio Edivigio and others v. the City of Buenos Aires* (File No 4437/0) ("Villa la Dulce" case).

²⁸ Communication submitted by the plaintiff, February 20, 2015, p. 7.

²⁹ *Ibid.*, p. 3.

³⁰ Generalitat de Catalunya. Prestacions per al pagament del lloguer. Any 2016, available at: <http://web.gencat.cat/es/tramits/tramits-temes/Prestacions-permanents-per-al-pagament-del-lloguer?category=74aba454-a82c-11e3-a972-000c29052e2c&evoluuTramit=1>.

³¹ Madrid is one of the five regions with a comparatively higher cost of living, see: National Statistics Institute (INE), *Consumer Price Index* (March 2016), at http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176802&menu=ultiDatos&idp=1254735976607#.

D. States parties must guarantee special protection to vulnerable groups, including children

15. CESCR has reiterated the State obligation to protect vulnerable groups³² even in times of economic recession. In relation to Spain in particular, the Committee has previously expressed concern:³³

...that the levels of effective protection for the rights enshrined in the Covenant have been reduced as a result of the austerity measures adopted...which disproportionately curtail the enjoyment of their rights by disadvantaged and marginalized individuals and groups, especially the poor, women, children, persons with disabilities, unemployed adults and young persons, older persons, gypsies, migrants and asylum seekers...
16. The Committee recommended that:³⁴

...the State party ensure that all the austerity measures adopted reflect the minimum core content of all the Covenant rights and that it take all appropriate measures to protect that core content under any circumstances, especially for disadvantaged and marginalized individuals and groups. In that regard, the Committee recommend[ed] that the State party compile disaggregated statistical information with a view to identifying the individuals and groups affected and that it increase the effectiveness of its efforts to protect their economic, social and cultural rights. The Committee also [drew] the State party's attention to its open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis.
17. In considering whether measures by States parties are "adequate" or "reasonable", the Committee may take into account, inter alia, "*whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.*"³⁵
18. The right to housing of children is guaranteed under Article 11 of ICESCR, and Articles 16(1) and 27(3) of the CRC.³⁶ Vulnerable and marginalized groups such as women and children are likely to be disproportionately affected by forced eviction.³⁷
19. It is a fundamental principle of law, and an underlying principle of the CRC, that the best interests of the child should be considered in all actions affecting it.³⁸ The Committee on Rights of the Child has explained that "in all actions" implies actions by public or private actors,³⁹ and that "concerning" means all measures that may directly or indirectly affect the well-being of the child.⁴⁰ Thus, any (in)action, in the short or long term, that may jeopardize the right to health or housing of a child will be covered.

II. STATES PARTIES MUST TAKE ALL APPROPRIATE MEASURES TO FULFIL THE RIGHT TO HOUSING, TO THE MAXIMUM OF THEIR AVAILABLE RESOURCES

20. CESCR has confirmed that:⁴¹

³² See, for instance: CESCR, *General Comment No. 20. Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the ICECSR)*, UN Doc. E/C.12/GC/20 (2 July 2009).

³³ CESCR, *Concluding observations: Spain*, UN Doc. E/C.12/ESP/CO/5 (6 June 2012), para. 8.

³⁴ *Ibid.*

³⁵ CESCR, *An Evaluation of the Obligation to Take Steps to the Maximum Availability of Resources under the Optional Protocol to the Covenant*, Statement, UN Doc. E/C.12/2007/1 (10 May 2007) ("CESCR Statement"), para. 8.

³⁶ For a discussion of the European Court of Human Rights approach to vulnerability, see: Lourdes Peroni and Alexandra Timmer, 'Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law' (2013) 11(4) *Int J Constitutional Law* 1056; and Yussef Al Tamimi, 'The protection of vulnerable groups and individuals by the European Court of Human Rights' (May 2015), at: <http://njb.nl/Uploads/2015/9/Thesis-The-protection-of-vulnerable-groups-and-individuals-by-the-European-Court-of-Human-Rights.pdf>.

³⁷ CESCR, *General Comment No. 7*.

³⁸ CRC, Article 3(1).

³⁹ 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 (art. 3, para. 1)*, UN Doc. CRC/C/GC/14, para. 14.

⁴⁰ *Ibid.*, para. 19.

⁴¹ CESCR, *General Comment No. 7*, para. 16 (emphasis added).

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. 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.

21. The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights affirm that a State is in violation of the Covenant if it fails to dedicate the maximum of its available resources to such measures towards the full realization of the Covenant.⁴² “Appropriate measures” should be “deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights”,⁴³ and encompass not just legislative measures, but administrative, financial, educational and social measures.⁴⁴
22. Accordingly, as States parties develop and implement the necessary range of measures to respond to the needs of their populations – whether to provide adequate alternative housing to prevent homelessness specifically, or in relation to broader housing policy and practice – they must ensure that such measures are taken to the maximum of their available resources. Among other things, this obligation requires – including in times of economic downturn – consideration of budgetary and taxation measures, and international cooperation requests, as set out below.

A. States parties should ensure that budgetary measures taken to address economic downturn are proportionate and reasonable

23. CESCR has stated that policies enacted to deal with economic downturn must be temporary; necessary and proportionate; non-discriminatory, taking all possible measures, including tax measures, to mitigate the growth of inequality; and must ensure the minimum core content of the right is protected at all times.⁴⁵ The Special Rapporteur on housing has similarly called on States to circumvent the adverse impacts of economic crises on the housing sector, by increasing their expenditure on housing.⁴⁶
24. The case documents indicate that a tiny fraction of requests for social housing were approved annually (260 out of 8,000 requests) and that the public entities responsible for urban planning and public housing in Madrid sold significant amounts of social housing stock in 2013.⁴⁷ The following information, which focuses on how social housing has been affected by austerity measures in Spain, is relevant to a consideration of whether such measures meet the criteria set out in the above paragraph:⁴⁸

The supply of social rental housing was less than 2 per cent of housing stock in Spain in 2012, the lowest in the European Union and woefully insufficient to meet the growing need for housing support amid the financial crisis.⁴⁹ The housing cost overburden rate (percentage of population living in households where total housing costs represent more than 40 per cent of disposable income) for persons living in poverty rose from 64 per cent in 2007 to 73 per cent in 2013.⁵⁰ At the same time, Spain has had a large stock of vacant homes, which could have been converted into social housing. In 2011, there were 3.44 million empty homes in Spain, while in the autonomous community of Madrid

⁴² International Commission of Jurists, *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1997), para. 15(e).

⁴³ CESCR Statement, above no. 37, para. 8.

⁴⁴ CESCR, *General Comment No. 3. The nature of state parties' obligations*, UN Doc. E/1991/23 (1991), para. 7.

⁴⁵ CESCR, *Open Letter issued to all State Parties in relation to the protection of the Covenant rights in the context of economic and financial crisis*, UN Doc. CESCR/48th/SP/MAB/SW (16 May 2012).

⁴⁶ *Special Rapporteur on Adequate Housing, Raquel Rolnik, Report to the General Assembly*, UN Doc. A/67/286 (10 August 2012), para. 71.

⁴⁷ Response submitted by the Spanish government on this case, April 21, 2015, p. 7.

⁴⁸ See also: Amnesty International Spain, *Evicted Rights. Right to housing and mortgage evictions in Spain* (2015), at <https://doc.es.amnesty.org/cgi-bin/ai/BRSCGI.exe/EUR4170015-27160%20Evicted%20Rights?CMD=VEROBJ&MLKOB=34293751010>.

⁴⁹ Center for Economic and Social Rights (CESR), *Visualizing Rights Fact Sheet No. 12 - Spain* (2012), Figure 9 (citing CECODHAS Housing Europe's Observatory), at: <http://cesr.org/downloads/FACT%20SHEET%20SPAIN.pdf>.

⁵⁰ CESR, *Visualizing Rights Fact Sheet No. 14 - Spain* (2014), Figure 12 (citing Eurostat data), at: http://cesr.org/downloads/FACTSHEET_Spain_2015_web.pdf.

almost 10 per cent of homes (more than 263,000) remained empty.⁵¹ In its periodic review of Spain in 2012, CESCR recommended “that the State party work in coordination with the autonomous communities to invest more resources in increasing the social housing stock in order to meet demand”.⁵²

In 2013, three UN Special Procedures mandate holders raised their concerns with the Spanish government, stating that “the right to adequate housing has allegedly been dramatically undermined by the government’s austerity program, with those living in poverty experiencing particularly severe impacts, despite the fact that there are many physically available empty dwellings in Spain”.⁵³ In order to effectively realize the right to adequate housing for all, public authorities should fairly balance individual property rights with the social function of property. In particular, they should promote access to secure and well-located housing for the urban poor through initiatives such as: conducting audits of vacant housing and building; adopting measures to combat speculation and underutilization of private housing; and regulating the housing finance market and financial institutions.⁵⁴

Despite the increasing demand for social housing, however, the national budget for housing was cut by more than 50 per cent between 2008 and 2013.⁵⁵ With regard to the general budget for the province (*comunidad autónoma*) of Madrid, a decrease in the financial allocation to the *Instituto de Vivienda Pública de Madrid* (IVIMA, currently designated as “*Agencia de Vivienda Social de la Comunidad de Madrid*”) can be identified since 2013. In 2013, the Institute’s general budget was €270.908.658,⁵⁶ in 2014, €255.347.880,⁵⁷ in 2015, €240.784.918,⁵⁸ and in 2016, €242.829.877:⁵⁹ a decrease of almost 11 per cent. Moreover, the budget for housing and the promotion of residential construction in the autonomous community of Madrid was cut by more than half, decreasing from €86.25 per person in 2008 to €31.76 in 2013.⁶⁰ In response to cuts, IVIMA sold 2,935 units of social housing stock (out of 20,600) and the *Empresa Municipal de Vivienda y Suelo* (EMVS) sold 1,860 units (out of 4,700) in 2013,⁶¹ which is more than a third of its housing stock.

⁵¹ INE, *Population and Housing Censuses 2011: Buildings and dwellings. Provisional data* (2013), at: http://www.ine.es/en/prensa/np775_en.pdf.

⁵² CESCR, *Concluding observations: Spain*, above no. 35, para. 21.

⁵³ Mandates of 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 context; the Special Rapporteur on extreme poverty and human rights; and the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, *Allegation letter to the Spanish Government* (15 November 2013), at <https://spdb.ohchr.org/hrdb/24th/public - AL Spain 15.11.13 %285.2013%29.pdf>.

⁵⁴ Human Rights Council, Special Rapporteur on adequate housing, Raquel Rolnik (UN), Guiding principles on security of tenure for the urban poor, A/HRC/25/54, 2013, para. 4, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/191/86/PDF/G1319186.pdf?OpenElement>. The social function of private property is also enshrined in Article 33 of the Spanish Constitution, and the Constitutional Court has made clear that the social function is an integral part of the right itself, insofar as both individual utility and social function define indivisibly the core content of the right to property, see Constitutional Court, Judgment 37/1987, (26 March 1987).

⁵⁵ Eurostat, “Tables by Benefits, Housing function” at: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=spr_exp_fho&lang=en

⁵⁶ *BOCM*, LEY7/2012, (26 December 2012), de Presupuestos Generales de la Comunidad de Madrid para el año 2013 (General Budget for the Community of Madrid for the year of 2013), 2012, p.8.

⁵⁷ *BOE*, Ley 5/2013, de 23 de diciembre, de Presupuestos Generales de la Comunidad de Madrid para el año 2014 (General Budget for the Community of Madrid for the year of 2014), 2014, Sec. I. p. 26593.

⁵⁸ *BOCM*, LEY 3/2014, de 22 de diciembre, de Presupuestos Generales de la Comunidad de Madrid para el año 2015 (General Budget for the Community of Madrid for the year of 2015), 2014, p.16.

⁵⁹ *BOCM*, LEY6/2015, de 23 de diciembre, de Presupuestos Generales de la Comunidad de Madrid para el año 2016 (General Budget for the Community of Madrid for the year of 2016), 2015, p.13.

⁶⁰ Fundación Civio, *Donde van mis impuestos?*, at <http://dondevanmisimpuestos.es/>.

⁶¹ Amnesty International Spain, above no. 48.

25. Issues of budget allocation for the protection of the right to housing were tackled in the Argentinean case “Villa La Dulce”, mentioned above. Those families requested that a permanent housing solution be achieved, and a temporary solution provided, until the resolution of the case. The judge ordered the freezing of 500,000 pesos from the budget of the city government and ordered the temporary relocation of the families to hotels that met with the criteria of habitability.⁶² In South Africa, the SACC “Blue Moonlight” decision established that not budgeting for the obligation to provide emergency shelter (or alternative accommodation) for evictees rendered homeless by a private eviction fell short of the State’s obligations. The Court stated that a court's “*determination of the reasonableness of measures within available resources cannot be restricted by budgetary or other decisions that may well be based on a mistaken understanding of constitutional or statutory obligations*”.⁶³

B. States should adopt all possible measures, including tax measures, to ensure that disadvantaged groups are not disproportionately affected

26. Even during times of severe resource constraints, States parties must show that every effort has been made to use all available resources, including resources that could potentially be collected through taxation.⁶⁴ For reference, outlined below are recent approaches to tax policies as adopted by Spain:

As has been raised by various civil society organizations, as well as regional and international human rights mechanisms, the necessity of budgetary cuts to social housing is questionable in light of Spain’s poor efforts to generate resources, including through progressive and nondiscriminatory taxation.⁶⁵ Tax reforms that were implemented in Spain were regressive and failed to boost public revenue to the levels needed. The Spanish government’s principle tool to boost revenue since 2010 was been a series of increases to the value added tax (VAT), even though this disproportionately affected the bottom 10 per cent and contributed to income inequality.⁶⁶ Meanwhile, large companies continued to benefit from generous tax incentives and privileges, paying just 5.3 per cent in income tax in 2012 (against the 30 per cent nominal rate that year).⁶⁷ That national budget cuts from 2011-2012 amounted to €27.3 billion while the potential estimated revenue gained by combating tax evasion amounted to €38 billion, demonstrating that fighting tax evasion and avoidance could have easily offset the need to cut the budget.⁶⁸

C. Maximum available resources must also be measured in terms of international cooperation requested by State parties

27. Maximum available resources must also be measured in terms of international cooperation requested by States parties, in cases where States cannot guarantee with their own resources the right to adequate housing,⁶⁹ with such requests for international cooperation to be made “*as soon as possible*.”⁷⁰
28. Taking into account that Spain is a State party of the European Union, with associated cooperation agreements in force, the request for cooperation from the Spanish government to the European Bank for

⁶² “Villa la Dulce” case, above no. 27.

⁶³ “Blue Moonlight” case, above no. 20, para. 74.

⁶⁴ *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona*, UN Doc. A/HRC/26/28, para. 25.

⁶⁵ CESR, *Joint Submission to the Committee on Economic, Social and Cultural Rights on the occasion of the review of Spain’s 5th Periodic Report at the 48th Session* (May 2012), at <http://www.cesr.org/downloads/Joint%20Submission%20CESCR%2048%20Session%20Executive%20Summary%20English.pdf?preview=1>

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*, p. 9 (citing Ministry of Finance and Public Administrations of Spain, 2012 and GESTHA, 2011).

⁶⁹ CESCR, *General Comment No. 4*.

⁷⁰ CESCR, *General Comment No. 7*, para. 10.

Regional Development (European Regional Development Fund) to co-finance social policies related to employment, poverty and housing⁷¹ is relevant in the consideration of whether or not the Respondent State has adequately developed and implemented State housing policies that guarantee human rights protections for people evicted for nonpayment of mortgage and/or rentals. Only 12 per cent of the program "Madrid ERDF2014-20 OP" is assigned to the issue of social inclusion, which covers access to housing.⁷² Further, the program is aimed at the acquisition and rehabilitation of housing conditions in informal settlements (*chabolas*) and does not include alternative housing in connection with evictions. The program lasts for six years and it is estimated that 439 homes will be purchased and /or rehabilitated. Likewise, although the *Acuerdo de Asociación de España*⁷³ and the EU 2014-2020 include housing within their thematic objective No. 9 regarding the "Promotion of social inclusion and the combating of poverty and all forms of discrimination", policies and programs are limited to the allocation and/or rehabilitation of "marginal housing" (or housing for marginalized populations); in none of their hundreds of pages is any reference made to the situation of families who are forcibly evicted.

D. States parties must take specific measures with regard to public spending and the rights of the child

29. States parties should also ensure that measures taken to the maximum of available resources are informed by the CRC Committee's (draft) General Comment No. 19 on Public Spending and the Rights of the Child.⁷⁴

III. STATE PARTIES MUST GUARANTEE THE RIGHT TO EFFECTIVE REMEDIES

30. The right to effective remedies must cover tenants' right to housing and provide for equality of arms.

A. State parties must guarantee a universal right to effective remedies, including for tenants subject to forced eviction

31. All victims of human rights violations have the right to an effective remedy, as recognized under various international and regional human rights treaties and instruments.⁷⁵ CESCR has clarified the obligation of States parties to ensure an effective remedy for ICESCR violations, stating that "[t]he Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place".⁷⁶

⁷¹ Information from the official website of the European Bank for Regional Development, at http://ec.europa.eu/regional_policy/EN/atlas/programmes/2014-2020/spain/2014es16rfop017.

⁷² Programa operativo en el marco del objetivo de inversión en crecimiento y empleo (Operative program under the objective for investment on growth and employment), p.16.

⁷³ As set forth by the Regulation (EU) No 1303/2013 of the European Parliament and Council, the Association Agreement in this case is the document prepared by the Member State with the involvement of partners and multilevel governance, in which the strategy of that member State, its priorities and the provisions are set out to use the Structural and Investments European Funds in an effective and efficient way to pursue the Union strategy for smart, sustainable and inclusive growth. The Association Agreement of Spain for 2014-2020 was approved by the European Commission on 4 November 2014. Government of Spain, UAFSE, p. 41, available at: <http://www.empleo.gob.es/uafse/es/index.html>.

⁷⁴ CRC, General Comment No. 19. (2016) on Public Spending and the Rights of the Child, UN Doc. CRC/C/GC/19 (Draft version, 11 June 2015).

⁷⁵ See, for example: Article 8 of the Universal Declaration of Human Rights; Article 2(3) of the International Covenant on Civil and Political Rights; Article 2(1) of ICESCR; Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; and Article 83 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

⁷⁶ CESCR, *General Comment No. 9. The domestic application of the Covenant*, UN Doc. E/C.12/1998/24 (1 December 1998), para. 2.

32. A remedy must include the measures necessary to repair the specific harm suffered by victims, for example, returning to them the home from which they have been forcibly evicted, compensating them for their loss and any harm suffered, and providing a legal guarantee that the violation will not occur again. CESCR has emphasized that, whatever remedies are available, they must be “*accessible, affordable, timely and effective*”. They must also be implemented by the State and lead to an end to the violation. CESCR has also emphasized that any person or groups who are victims of a violation “*should have access to effective judicial or other appropriate remedies at both national and international levels. All victims of such violations should be entitled to adequate reparation, which may take the form of restitution, compensation, satisfaction or guarantees of non-repetition.*”⁷⁷ In November 2013, three UN Special Procedures reminded the Spanish Government that States must ensure that all the legal recourses and remedies are available to those affected by evictions.⁷⁸

B. State parties must guarantee equality of arms between parties, including in eviction proceedings

33. For the right to an effective remedy to be realized, there need to be conditions and mechanisms that guarantee equality of arms between a complainant and the State party. The principle of equality of arms applies to both civil and criminal cases and is a central feature of the right to a fair trial. It must be respected whenever domestic law entrusts a judicial body with a judicial task.⁷⁹ This principle requires that there must be procedural equality between parties. The right includes adequate opportunity to adduce evidence, to challenge hostile evidence and to present arguments on the matters at issue. It also requires conditions that do not place any party at a substantial disadvantage in relation to the other side.⁸⁰ Drawing from the general principle of equality of arms, public authorities must ensure the fairness of negotiation processes to redress any inequality between the parties.

C. State parties must guarantee the justiciability of the right to housing

34. The European Court of Human Rights (ECtHR) has affirmed that “*Any person at risk of [the loss of one’s home] should in principle be able to have the proportionality of the measure determined by an independent tribunal.*”⁸¹
35. In 2008, the Special Rapporteur on housing recommended that Spain “*ensure justiciability of the right to adequate housing contained in the Spanish Constitution and relevant international instruments, through accessible complaint mechanisms available to all*”.⁸² In its last report on Spain, CESCR urged the government, “*in light of the indivisibility, universality and interdependence of human rights, to take the necessary legislative measures to ensure that economic, social and cultural rights enjoy the same level of*

⁷⁷ CESCR, *General Comment No. 14. The right to the highest attainable standard of health (Article 12)*, UN Doc. E/C.12/2000/4 (11 August 2000), para. 59.

⁷⁸ Letter to Spain from the Special Rapporteur on adequate housing, the Special Rapporteur on extreme poverty and human rights, and the Independent Expert on Foreign Debt and Human Rights, above no. 55.

⁷⁹ Human Rights Committee, *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, UN Doc. CCPR/C/GC/32 (23 August 2007), Section II.

⁸⁰ *Neumeister v. Austria*, ECtHR Judgment of 27 June 1968, para. 22; *H. v. Belgium*, ECtHR Judgment of 30 November 1987, para. 53.

⁸¹ *McCann v. UK*, ECtHR Judgment of 9 Sept. 2008, para. 50; *Paulic v. Croatia*, ECtHR Judgment of 22 Oct. 2009, para. 43; *Kay et al v. UK*, ECtHR Judgment of 21 Sept. 2010, para. 68.

⁸² Human Rights Council, Special Rapporteur on adequate housing, Miloon Kothari, Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Mission to Spain, A/HRC/7/16/Add.2, 2008, para. 97, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/105/31/PDF/G0810531.pdf?OpenElement>.

*protection as civil and political rights (and to) take appropriate measures to ensure that the provisions of the Covenant are fully justiciable and applicable by domestic courts”.*⁸³

36. Although the right to housing is recognized in the Spanish Constitution, neither the central government nor the autonomous communities have adopted laws developing the content and meaning of the right to housing, detailing its minimum core content, providing adequate safeguards, and allowing individuals to challenge violation of the right in court. As a result, people at risk of evictions remain unprotected.
37. In recent years, Spain has adopted new rental housing legislation that has worsened access to effective remedies. According to Observatori DESC, the Tenancy Act 29/1994 and the Law of Civil Procedure were reformed purportedly in order to reverse the situation of homelessness during the economic crisis, but, in reality, the effect of the changes has been to expedite the eviction process; among other things, subsequent legal reform reduced the deadline for payment of outstanding debt, required for starting an eviction process, from two months to one month and then to 10 days.⁸⁴

IV. CLEAR DISADVANTAGE IS NOT A CRITERION FOR ADMISSIBILITY

38. Article 4 of the OP-ICESCR is unique within the UN treaty body system, providing that CESCR may, if necessary, decline to consider a communication where it does not reveal that the author has suffered a clear disadvantage unless the Committee considers that the communication raises a serious issue of general importance.
39. This is the first communication to be considered by the Committee in which the Respondent State has requested that the Committee make a finding in relation to Article 4. As such, it is important for the Committee to be clear that Article 4 is not an admissibility criterion. While there is no question that the author has experienced a clear disadvantage in relation to the enjoyment of the right to adequate housing in this case, particularly taking into account the particular vulnerability of the evicted persons in terms of low-income and age, ESCR-Net submits that such an assessment is not applicable to the present case because there are no circumstances which make it “necessary” to apply it.
40. The *travaux preparatoire* provide guidance to the Committee as to how it should interpret the restriction of Article 4 to circumstances when it is necessary. The provision was proposed, originally by the United Kingdom with the purpose of providing a safety valve for the Committee to use if confronted with an unmanageable workload comparable to the situation of the ECtHR. In response to such concerns “[t]he United Kingdom said that, while it would have preferred “shall”, it considered that the Committee should be relied upon to adopt a consistent approach in the light of its workload and the prevailing circumstances”.⁸⁵ However, in order to clarify that the discretionary consideration of clear disadvantage would only be applied when it was necessary because of workload, the additional phrase “if necessary” was added at the last minute to the final text.⁸⁶
41. The relevant facts for the Committee to consider in relation to the necessity of applying Article 4 are the number of petitions that have been submitted and the Committee’s capacity to proceed to consider all communications submitted on admissibility and merits, without invoking Article 4.
42. The Respondent State has ignored the phrase “if necessary” and made no submissions as to the circumstances that would justify applying Article 4 in the current circumstances. Rather, the Respondent State has essentially asked the Committee to consider Article 4 as an additional admissibility criterion and to dismiss the communication on the basis of finding under Article 4. Such a request is contrary to the wording of Articles 2, 3 and 4 of the Optional Protocol and inconsistent with the Committee’s Rules of Procedure, Rule 14(5), which establish the Committee will consider all admissibility grounds contained in Articles 2 and 3 prior to proceeding to consider the merits.

⁸³ CESCR, *Concluding Observations: Spain*, above no. 35, para. 6.

⁸⁴ *Ley de Medidas de Fomento y Agilización Procesal del Alquiler* (2009); *Ley de Eficiencia Energética de los Edificios* (2009); *Ley de Medidas de Agilización Procesal* (2011).

⁸⁵ Fifth report of the Open-Ended Working Group to consider options regarding the elaboration of an Optional Protocol, 6 May 2008, UN Doc. A/HRC/8/7 (Fifth Working Group Session Report), para. 157.

⁸⁶ *Ibid.*, p.34.

V. RECOMMENDATIONS

43. In the event that the CDESCR finds a violation on the facts of the case, we respectfully suggest that recommendations concerning both individual measures and general measures (regarding underlying systemic violations) are likely to be appropriate, in order to provide an adequate remedy to the Author and also assist the Respondent State (and States parties generally) in understanding and complying with obligations under the ICDESCR.
44. In relation to individual measures, these might extend to, *inter alia*:
- (1) a declaration of violation(s);
 - (2) compensation (pecuniary and non-pecuniary); and
 - (3) direction regarding effective judicial protection for Covenant rights.
45. In relation to general measures, which may be appropriate in order to respond to the failure to adequately realize the right to housing and the associated systematic violations of the right to housing, these might extend to the adoption of legislative, administrative, judicial and other measures to guarantee that:
- (1) evictions are only carried out in exceptional circumstances and after all feasible alternatives to eviction are addressed, including in case of tenants, in accordance with Article 11 of the ICDESCR, read together with General Comments Nos. 4 and 7 (par. 2-5, above);
 - (2) evictions are never carried in a discriminatory manner or in a manner that would render someone homeless or vulnerable to other human rights violations (par. 2-5, above), including through such steps as affordable rent and the provision of alternative housing, among others (par. 6-14, above);
 - (3) where alternative housing is provided, the reasonableness standard is respected in regard to the substantive components of the right to housing (CESCR GC 4, para 8), as well as regarding dates of eviction and dates of provision of alternative housing (par. 10-11, 18 and 26 above);
 - (4) the right to housing is made justiciable in Spain for all types of tenure (par. 6-14, above); and
 - (5) special protection is granted for vulnerable groups, including those with low income and children (par. 14-19, above).
46. General measures should also include the adoption of fiscal measures as well as requests for international cooperation to ensure maximum availability of resources for the right to housing, including the adoption of increasing social housing stock, as recommended by the CDESCR to Spain in 2012 (par. 21-31, above) as well as other recommendations as made previously by Amnesty International Spain.⁸⁷

Submitted on 17 May 2016 by the following:



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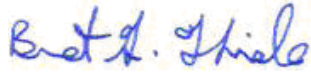
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⁸⁷ See also: Amnesty International Spain, above no. 50, p.46.

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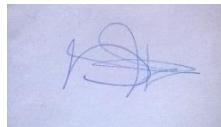
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