



# International Covenant on Civil and Political Rights

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## Human Rights Committee

### Decision adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 3599/2019\*, \*\*, \*\*\*

<i>Communication submitted by:</i>	F.A.J. and B.M.R.A., acting on their own behalf and on behalf of their missing relatives, M.J.V. and A.A.M. (represented by Women's Link Worldwide and TRIAL International)
<i>Alleged victims:</i>	The authors, M.J.V. and A.A.M.
<i>State party:</i>	Spain
<i>Date of communication:</i>	14 January 2019 (initial submission)
<i>Document references:</i>	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 6 May 2019 (not issued in document form)
<i>Date of adoption of decision:</i>	28 October 2020
<i>Subject matter:</i>	Enforced disappearance
<i>Procedural issues:</i>	Competence <i>ratione materiae</i> , <i>ratione temporis</i> , <i>ratione personae</i> ; exhaustion of domestic remedies
<i>Substantive issues:</i>	Right to an effective remedy; right to life; prohibition of torture and cruel and inhuman treatment; right to liberty and security of person; recognition as a person before the law
<i>Articles of the Covenant:</i>	6, 7, 9 and 16, read in conjunction with 2 (3)
<i>Article of the Optional Protocol:</i>	5 (2) (b)

1.1 The authors of the communication are F.A.J., born on 8 June 1928, and B.M.R.A., born on 3 March 1950. They are submitting the communication on their own behalf and on behalf of their parents (in the case of F.A.J.) and grandparents (in the case of B.M.R.A.), M.J.V., born on 21 July 1896, and A.A.M., born on 10 January 1894, whose fate and whereabouts have remained unknown since August 1936, when they were arrested by

\* Adopted by the Committee at its 130th session (12 October–6 November 2020).

\*\* The following members of the Committee participated in the examination of the present communication: Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla, Furuya Shuichi, Christof Heyns, Marcia V.J. Kran, David H. Moore, Photini Pazartzis, Hernán Quezada Cabrera, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany, Hélène Tigroudja and Gentian Zyberi.

\*\*\* A joint (concurring) opinion of five members of the Committee and two joint (partially dissenting) opinions of six members of the Committee are annexed to the present decision.



officers of the Guardia Civil. The authors claim that the State party is responsible for a continuing violation of the rights of Ms. J.V. and Mr. A.M. under articles 6, 7, 9 and 16 of the Covenant, read in conjunction with article 2 (3), owing to the State party's obstruction of investigation and search efforts. The authors also claim to be victims of a violation by the State party of their rights under article 7 of the Covenant, read in conjunction with article 2 (3). The authors request priority processing on the grounds of F.A.J.'s advanced age. The Optional Protocol entered into force for the State party on 25 April 1985. The authors are represented by counsel.

1.2 On 26 November 2019, the Special Rapporteur on new communications, acting on behalf of the Committee, decided to accept the State party's request that the admissibility of the communication be considered separately from its merits.

1.3 On 30 December 2019, and 14, 15 and 20 January 2020, the Committee received four requests for the submission of *amicus curiae* briefs from Victor Rodríguez Rescia, a former member of the Committee and the President of the Inter-American Institute of Social Responsibility and Human Rights; Rainer Huhle and María Clara Galvis Patiño, former members of the Committee on Enforced Disappearances; Margalida Capellà Roig, Director of the Legal Clinic of the Faculty of Law of the University of the Balearic Islands and a former member of the parliament of the Balearic Islands, who participated in the drafting of the autonomous community legislation on the recovery of persons who disappeared during the Civil War and the Franco regime; and the Mallorca Association for the Recovery of Historical Memory. The proposed statements were mainly concerned with the obligation to investigate serious human rights violations that occurred in the past, the continuous nature of disappearances, the lack of action taken to search for persons who disappeared during the Civil War and the Franco regime, and the impossibility of obtaining access to justice.

1.4 On 21 and 29 January 2020, the Special Rapporteurs on new communications decided to reject the four requests for intervention by third parties.

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

2.1 The authors affirm that the facts of the present case fall within the framework of the systematic practice, during the Civil War (1936–1939) and the ensuing Franco dictatorship (1939–1975), of enforced disappearances of persons accused of adhering to an ideology contrary to that of the Franco regime.

2.2 According to the Judge of Central Court of Investigation No. 5 of the National High Court, who has begun to investigate enforced disappearances that occurred during the Civil War and the Franco regime, the “system of enforced disappearance was systematically used in order to make it impossible to identify the victims”. The Judge has estimated that there were at least 114,226 victims of enforced disappearances during this period.<sup>1</sup>

2.3 In Mallorca, the enforced disappearance of persons allied to the Republic was practised systematically and on a mass scale, becoming particularly prevalent in areas such as Manacor, where the authors' relatives disappeared. Troops took full control of the Balearic Islands 20 days after the coup of 18 July 1936. Although in the country as a whole the dictatorship of Francisco Franco was established in 1939, when the Republic was defeated and the war ended, the dictatorship began to impose itself very quickly in Mallorca, from 1936 onward.

2.4 Ms. J.V. and Mr. A.M. were originally from the town of Llubí in Mallorca. After getting married, they moved to Manacor, where they both worked in a watchmaking business that they owned. At the time of the events, they had two daughters, A., who was 11 years of age (now deceased, the mother of B.M.R.A., author of the communication) and F., who was 8 years of age (author of the communication). In addition, Ms. J.V. was around seven months pregnant.

2.5 Mr. A.M. was sympathetic to the ideals of the Republican left. On Sundays, rather than going to Mass, he and his daughters usually went to a bar frequented by Republicans. He was also a devoted reader of the Republican magazine *Nosotros*, every edition of which

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<sup>1</sup> Central Court of Investigation No. 5 of the National High Court, order of 16 October 2008, p. 24.

he kept in his home collection. Although, at the time, girls did not usually remain in school after their first communion, the couple kept their daughters in school as they wanted them to receive a broad education.

2.6 In mid-August 1936, Mr. A.M. was detained for a week at Manacor police station. On 22 August 1936, a member of the Guardia Civil went to the couple's home and ordered Ms. J.V. to go to the police station because, in order for her husband to be released, they needed to take a statement from her. When Ms. J.V. arrived at the police station, she was arrested. Mr. A.M. was released the same day. According to his daughters, "he was very happy but his heart fell when he learned that our mother was being held". At the police station, they were not allowed to see her. One morning, when the daughters woke up, they realized that they were alone. Their father had disappeared and the door of the house was open. From that point onward, they had no further contact with their parents.

2.7 In early September 1936, the girls' paternal grandfather went to the house to look for them. Claiming that he was bringing clothes to his son and daughter-in-law, he tried to locate them but Captain Jaume, who at the time was mayor of Manacor and the head of the Falange, told him that his son and daughter-in-law had no need for clothes.

2.8 The lives of F.A.J. and her older sister changed drastically following the disappearance of their parents. As girls and "the daughters of reds", they were particularly vulnerable in a deeply patriarchal society. They went from living a peaceful life and receiving a good education to living separately from each other in the homes of different relatives, undertaking domestic chores and working on building sites and in family bars without being able to attend school. The girls kept hoping that their parents would return.

2.9 During the Franco dictatorship, the repression of Republican sympathizers and their families built a wall of silence around the crimes committed by the victors in the Civil War. The mere act of stating what had happened entailed a serious risk. It is estimated that 214,000 persons were executed and 270,000 were detained in inhuman conditions in order to maintain the pact of silence.<sup>2</sup>

2.10 Even when the transition to democracy took place, the victims were still unable to demand truth, justice and reparation, largely because institutions established under the Franco regime remained a part of the police, security and justice apparatus. The State maintained that forgetting was essential if a stable democratic future was to be achieved, even raising the threat of a return to dictatorship if the past was remembered. Thus, on 15 October 1977, after it had ratified the Covenant, the State party adopted the Amnesty Act (No. 46/1977), maintaining that reconciliation was possible only if the past was forgiven and forgotten.

2.11 This pact of silence also shaped the lives of the authors of the communication. When, at a young age, F.A.J. and her sister finally learned what had happened, their social and family circles forced them to keep the events secret as the repression made it necessary to remain silent. According to a psychological study, this led to a so-called "pact of denial", whereby a family group subconsciously agrees to set aside painful aspects of their past in order to protect themselves. Years later, when a neighbour in the village told the daughters that he had seen at least one of the Falangists raping their mother, a so-called "pregnant red", and when Josep Lluís Sastre, known in Manacor as "Pep i la Resta", told F.A.J., who was by then a married adult, that he was one of the Falangists who had arrested her parents, she was traumatized. Her husband, who was unaware of the events but witnessed the encounter, also chose to remain silent. The inability to talk about the events therefore had consequences for the mental health of both the daughters and their offspring. Although B.M.R.A., as a member of the next generation, did not find out what happened to her grandparents until she was 25 years old, she felt the effects of the trauma, as she witnessed her mother and aunt behaving in incomprehensible ways. The psychological study also noted that B.M.R.A. was adversely affected by the extent of the denial, which prevented her from mourning.

2.12 The silence was broken in 2002 with the founding of the Association for the Recovery of Historical Memory. Furthermore, the 2003 decision of the Working Group on Enforced or

<sup>2</sup> Brunner, José, "Ironías de la historia española: observaciones sobre la política post-fascista de olvido y memoria", in *Historia Contemporánea*, No. 38 (2010), pp. 163–183.

Involuntary Disappearances to include Spain on the list of countries with unresolved cases of enforced disappearance<sup>3</sup> expanded the scope of the investigations from social and family circles to the institutional sphere. When the authors joined the Mallorca Association for the Recovery of Historical Memory, which was established in 2006, it opened up a new life for them in which they could disclose their secrets and share their suffering. Although they have not been able to find any official information in any file or record (many of those belonging to the military and the Church are still classified), joining the Association has enabled them to begin searching for their relatives' remains.

2.13 On 14 December 2006, acting through the Mallorca Association for the Recovery of Historical Memory, the authors submitted a complaint of crimes against humanity to Central Court of Investigation No. 5 of the National High Court, seeking clarification of the truth and the whereabouts of Ms. J.V. and Mr. A.M. and the recovery of their remains. In addition to this action, complaints have been made by many other associations of relatives of disappeared persons, corresponding to a total of 114,266 victims of enforced disappearances between 1936 and 1951.

2.14 In an order issued on 16 October 2008, this Court noted that "impunity has been the rule in respect of events that could legally be classified as crimes against humanity", and that, for this reason "it is necessary to start proceedings in response to the actions initiated because there are still victims, and, in order for their rights to be respected (...), an end must be brought to the offences committed, and this will be achieved only when the bodies of the disappeared have been searched for and located".<sup>4</sup> Ruling that no amnesty law could be invoked to obstruct investigations into the offences in question, the Court assumed jurisdiction.

2.15 Four days later, however, the Public Prosecution Service filed an appeal against the statement of jurisdiction, arguing that the National High Court did not have territorial jurisdiction, that it constituted a violation of the principle of legality and non-retroactivity of criminal law, as the conduct concerned did not constitute a criminal offence at the time, and that the events were time-barred and subject to amnesty. Thus, on 2 November 2008, the Criminal Chamber of the National High Court, sitting in plenary, declared the statement of jurisdiction of 16 October 2008 to be null and void, albeit with three dissenting opinions considering that a denial of justice might render the State responsible under international law. On 18 November 2008, the National High Court agreed to relinquish jurisdiction over the case in favour of the courts in the regions where the events had taken place.

2.16 On 22 June 2009, the authors submitted a complaint to Court of Investigation No. 10 in Palma de Mallorca. The complaint was dismissed on 14 October 2009 on the grounds that it was time-barred and subject to amnesty. On 25 February 2010, the High Court of Mallorca dismissed the authors' appeal. They submitted an application for *amparo* to the Constitutional Court but this too was rejected, on 9 September 2010.

2.17 The authors maintain that Supreme Court judgment No. 101/2012 of 27 February 2012, handed down in the proceedings brought against National High Court Judge Baltasar Garzón for perverting the course of justice, led to the general dismissal of all appeals lodged by victims throughout the country as it established case law on the purported reasons for which judges were not authorized to investigate crimes committed during the Civil War and the Franco era, namely, those provided for by the Amnesty Act, the principle of legality and non-retroactivity of criminal law, the statute of limitations and the Historical Memory Act.<sup>5</sup>

2.18 In September 2012, faced with the context of impunity in the State party, the authors turned to the courts of Argentina. In this regard, the authors point out that, in April 2010, on the basis of universal jurisdiction (which allowed Spain to investigate enforced disappearances that occurred during the Argentine dictatorship),<sup>6</sup> relatives of disappeared persons had already submitted an appeal to the Argentine courts, giving rise to case No.

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<sup>3</sup> E/CN.4/2003/70 and Corr.1 and 2.

<sup>4</sup> Central Court of Investigation No. 5 of the National High Court, order of 16 October 2008, pp. 4 and 16.

<sup>5</sup> Act No. 52/2007 of 26 December, which recognizes and extends rights and establishes measures in favour of persons subjected to persecution or violence during the Civil War and the dictatorship.

<sup>6</sup> Judgment No. 798/2007 of the Supreme Court.

4.591/10 before National Criminal and Correctional Court No. 1 of Buenos Aires. By means of an international letter rogatory issued on 14 October 2010, the Argentine court requested the Spanish State to indicate whether any investigation was being carried out into a systematic plan to eliminate political opponents during the Civil War and the dictatorship. On 6 May 2011, the Office of the Attorney General of the Spanish State reported that numerous judicial proceedings were under way in relation to the facts addressed in the letter rogatory. On 13 December 2011, a second letter rogatory was issued in which the Spanish State was asked to report on the number of disappeared persons. On 27 March 2012, without mentioning the Supreme Court's ruling of 27 February 2012, which led to the dismissal of a number of cases in progress in the country, the Spanish State replied that Argentina did not have jurisdiction to investigate the facts.

2.19 On 18 September 2013, as the authors were already complainants before the Argentine court, the Argentine justice system issued an order for the extradition of Juan Antonio González Pacheco ("Billy el Niño"), José Ignacio Giralte González, Celso Galván Abascal and Jesús Muñecas Aguilar for crimes against humanity. In April 2014, the Office of the Attorney General of the Spanish State objected, citing the lack of description of the events mentioned in the extradition order and the fact that these events were subject to an amnesty and a statute of limitations. On 30 October 2014, the Argentine justice system, acting through INTERPOL, issued a request for the arrest of 19 persons under investigation. Once again, Spain refused. Finally, on 30 September 2016, the Office of the Attorney General shut down all possibility of cooperation with the Argentine proceedings, instructing the prosecutors to oppose any action requested by the Argentine justice system on the grounds that the events fall within the jurisdiction of Spain and are clearly time-barred and subject to amnesty, meaning that to comply with the Argentine requests for judicial assistance would constitute a serious breach of Spanish law.

2.20 Following the opening of a grave in Porreras, a village situated 20 kilometres from Manacor, in November 2016, the authors submitted a new complaint, this time to Manacor Court of Investigation No. 1. On 3 August 2017, the complaint was dismissed on the basis of the arguments set out in the Supreme Court's ruling.

2.21 In accordance with the Historical Memory Act and autonomous community Act No. 10/2016 on the recovery of persons who disappeared during the Civil War and the Franco regime, which provided for the establishment of the Technical Commission on Disappeared Persons and Graves, the authors have also pursued various administrative courses of actions in an attempt to find the mortal remains of their relatives and obtain reparation.

2.22 In particular, the authors have requested that they be recognized as victims under the Historical Memory Act. This recognition, which is merely symbolic,<sup>7</sup> has been granted.

2.23 On 10 April 2018, the authors submitted a written request for the recovery of the remains of their family members to the Technical Commission on Disappeared Persons and Graves of the Government of the Balearic Islands. The response mentioned the need to study the feasibility of conducting exhumations. No action to open the graves has yet been taken.

2.24 Lastly, on 14 May 2018, the authors submitted an application for medical and pharmaceutical assistance, social assistance and a family pension to the Ministry of Finance. The response was negative. Previously, F.A.J. had failed to obtain an orphan's pension of the kind established in 1940 because she was not legally an orphan; nor was she able to receive a special pension of the kind established in 1979 because she was married and the law benefited only unmarried daughters and widows.

### The complaint

3.1 Firstly, the authors maintain that the communication is admissible *ratione temporis* since the events constitute continuous and ongoing violations.<sup>8</sup> They point out that Ms. J.V.

<sup>7</sup> As it falls far short of international standards on justice, truth and reparation.

<sup>8</sup> The authors refer, inter alia, to the case of *Sankara et al. v. Burkina Faso* (CCPR/C/86/D/1159/2003), para. 6.3, in which the Committee held that a "continuing violation is to be interpreted as an affirmation, after the entry into force of the Optional Protocol, by act or by clear implication, of previous violations by the State party".

and Mr. A.M. were last seen alive in the custody of State officials who concealed their fate and whereabouts as part of a systematic plan to make people disappear. Although these enforced disappearances began before the entry into force of the Covenant, the State party has, since the entry into force of the Optional Protocol, violated its positive procedural obligations to investigate and establish the fate and whereabouts of disappeared persons, to identify, prosecute and punish the perpetrators and to provide full reparation. They also emphasize that the communication is admissible *ratione temporis* because they brought legal challenges after the entry into force of the Protocol.<sup>9</sup>

3.2 Secondly, the complainants maintain that they have exhausted all available avenues by which action might be taken to investigate the events, identify, prosecute and punish the perpetrators, locate the authors' relatives and provide full reparation for the harm suffered. They recall that the National High Court declined jurisdiction to hear the case and referred it to the Court of Palma de Mallorca, where the proceedings were dismissed. The dismissal was upheld by the High Court of Mallorca and the Constitutional Court did not admit an application for *amparo*. Later, following the opening of a grave near Manacor, they made an unsuccessful application to the Court of Manacor. Furthermore, and although mention of this fact is not necessary to demonstrate that domestic remedies have been exhausted, their attempt to seek remedy before the Argentine courts was blocked by Spain. In this respect, they mention that several experts and special rapporteurs of the United Nations issued a joint communiqué entitled "España debe extraditar o juzgar a los responsables de violaciones graves de derechos humanos" (Spain must extradite or prosecute persons responsible for serious human rights violations), a view which the Committee against Torture has also expressed.<sup>10</sup> Ultimately, the administrative measures taken to locate their relatives and obtain reparation were also unsuccessful.

3.3 The authors argue that lack of access to justice is a structural problem. Owing to the landmark judgment of the Supreme Court that established case law on the purported reasons for which Spanish judges are prevented from investigating crimes committed during the Civil War and the Franco era (see para. 2.17 above), there are no reasonable and effective avenues of recourse available in the State party to establish the fate and whereabouts of victims of enforced disappearance during that period. The Amnesty Act remains in force, despite the repeated requests for its repeal made to the State party, including those issued by the Committee,<sup>11</sup> the Committee against Torture,<sup>12</sup> the Working Group on Enforced or Involuntary Disappearances,<sup>13</sup> and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, who is further concerned about the State party's official line that "either we all agree that we are fully reconciled, or the only alternative is the resurgence of underlying hatreds".<sup>14</sup> These bodies have also expressed concern about the pattern of impunity established by the Supreme Court.<sup>15</sup> Furthermore, as the Committee has noted, the Historical Memory Act is ineffective and insufficient in that it makes the work of exhuming and identifying disappeared persons a private initiative.<sup>16</sup> In short, the United Nations has already taken it for granted that in the State party: (a) there are no remedies that would allow access to justice; (b) there are no effective search measures; and (c) there are no resources to provide compensation and comprehensive reparation to the victims of the Civil War and Franco's dictatorship. The Council of Europe and the European Parliament have

<sup>9</sup> *Tyan v. Kazakhstan* (CCPR/C/119/D/2125/2011), para. 8.4.

<sup>10</sup> CAT/C/ESP/CO/6, para. 14; see also A/HRC/27/56/Add.1, para. 84.

<sup>11</sup> CCPR/C/ESP/CO/5, para. 9; CCPR/C/ESP/CO/6, para. 21; see also general comment No. 36 (2018), para. 27.

<sup>12</sup> CAT/C/ESP/CO/5, para. 21; CAT/C/ESP/CO/6, para. 15.

<sup>13</sup> A/HRC/27/49/Add.1, paras. 37, 43 and 64.

<sup>14</sup> A/HRC/27/56/Add.1, para. 102; see also paras. 67, 71 and 74; A/HRC/27/56/Add.3, paras. 7 and 10.

<sup>15</sup> A/HRC/27/49/Add.1, para. 37; A/HRC/38/39/Add.3, p. 122, para. 44; CAT/C/ESP/CO/6, para. 15; A/HRC/27/49/Add.1, para. 77.

<sup>16</sup> CCPR/C/ESP/CO/6, para. 21; see also A/HRC/27/49/Add.1, paras. 21–25 and 67; CED/C/ESP/CO/1, para. 31; A/HRC/27/49/Add.1, paras. 63 and 64.

voiced similar views, and have also expressed concern about the failure to implement the recommendations of the United Nations treaty bodies.<sup>17</sup>

3.4 Thirdly, the authors argue that the communication is admissible as it does not represent an abuse of the right of submission. Since 2006, they have submitted numerous complaints to both the Spanish and Argentine authorities and have continued to use every domestic opportunity that appeared to present itself in administrative channels in order to search for the remains of their relatives and obtain reparation, the last action dating back to May 2018. The authors are approaching the Committee a few months after the exhaustion of their last administrative challenge and less than a year and a half after the dismissal of their last legal challenge, having attempted every possible action to determine the whereabouts of their loved ones and obtain truth, justice and reparation and having given the State party numerous opportunities to meet its obligations.

3.5 The authors claim that the facts of the present case constitute a continuing violation by the State party of the rights of Ms. J.V. and Mr. A.M. under articles 6, 7, 9 and 16 of the Covenant, read in conjunction with article 2 (3). With regard to article 7, they specify that persons who are detained before being disappeared are subjected to merciless treatment, including all kinds of abuse, torture and other cruel, inhuman and degrading treatment and, at the very least, suffer the anguish of not knowing what might happen to them. With regard to article 16, they specify that the intentional removal of a person from the protection of the law and the obstruction of the investigations by the State authorities constitute a refusal to recognize that person's legal personality. They specify that article 2 (3) imposes an obligation to investigate that gives rise to a continuing violation while it remains unfulfilled even if the disappeared person may be presumed dead, since this presumption does not remove the procedural obligation to investigate in order to clarify and explain the circumstances of the disappearance.

3.6 Furthermore, the authors maintain that a gender perspective is essential to understanding the case as Ms. J.V. was seven months pregnant at the time of the disappearance and was a victim of sexual abuse (see paras. 2.4 and 2.11 above). They point out that not only did a specific form of violence emerge, in response to the view that women had caused Spain's destruction by undermining traditional female roles, whereby women suffered reprisals for being Republicans or adhering to politically progressive or communist movements,<sup>18</sup> but also that women were subjected to violence for the so-called crime of "consorting", that is, being a relative of men who were ideologically opposed to the regime. The authors also cite various studies on the gender perspective in enforced disappearances, highlighting that the violation is aggravated when victims are pregnant at the time of the disappearance as they are fearful about their health and the possibility that they might give birth in inhumane circumstances that may result in the loss of the child at the hands of State officials.<sup>19</sup>

<sup>17</sup> European Parliament, Mission report and recommendations following the fact-finding visit to Spain conducted on 22–23 May 2017, (23 November 2017), p. 27, para. 15; Council of Europe, *Missing persons and victims of enforced disappearance in Europe* (2016), pp. 21 and 22, and Recommendation 1736 (2006), "Need for international condemnation of the Franco regime", para. 8.2.2.

<sup>18</sup> The authors refer to Mirta Núñez Díaz-Balart, *Mujeres caídas. Prostitutas legales y clandestinas en el franquismo*, Madrid, Oberón, 2003; Enrique González Duro, *Las rapadas. El franquismo contra la mujer*, Madrid, Editorial Siglo XXI, 2012; Maud Joly, "Las violencias sexuadas de la Guerra Civil española: paradigma para una lectura cultural del conflicto", in *Historia Social*, No. 61 (2008) pp. 89–107; Pura Sánchez, "Individuas de dudosa moral", in Raquel Osborne (ed.), *Mujeres bajo sospecha. Memoria y sexualidad (1930–1980)*, fourth ed., Madrid, *Fundamentos*, 2013.

<sup>19</sup> Working Group on Enforced or Involuntary Disappearances, General comment on women affected by enforced disappearances (A/HRC/WGEID/98/2); Committee on the Elimination of Discrimination against Women, general recommendations Nos. 19 (1992) and 35 (2017); Inter-American Court of Human Rights, *Gelman v. Uruguay*, judgment of 24 February 2011, merits and reparations, para. 97, Series C No. 221; International Center for Transitional Justice, *Las desaparecidas y las invisibles. Repercusiones de la desaparición forzada en las mujeres*, 2015; Ariel Dulitzky and Catalina Lagos, "Jurisprudencia Interamericana sobre desaparición forzada y mujeres: la tímida e inconsistente aparición de la perspectiva de género", *Lecciones y Ensayos*, No. 94 (2015), pp. 45–94.

3.7 The authors also claim a continuing violation of their own rights under article 7 of the Covenant, read in conjunction with article 2 (3), because of the profound suffering, anguish and stress, lasting over 80 years, in the case of F.A.J., caused not only by the enforced disappearance of their family members, the uncertainty surrounding their fate and whereabouts, and the economic and social consequences suffered, in particular, by F.A.J, but also by the attitude of indifference shown by the State party to their repeated requests for truth and justice. Thus, the authors maintain that the enforced disappearance of their parents and grandparents, and the refusal of the authorities to open an investigation, constitute a form of cruel and inhuman treatment bordering on torture.<sup>20</sup> They also recall that a psychological evaluation concluded that F.A.J. has always been sickened by sadness and that B.M.R.A. has suffered the effects of the trauma.

3.8 The authors also specify that the obligation to search remains until the missing person is located and, in the event of his or her death, until the remains are exhumed, identified and returned to the family. Failure to do so constitutes a reaffirmation of the violation.<sup>21</sup> As with the failure to investigate, failure to bring to justice perpetrators of such violations could in and of itself give rise to a separate breach of the Covenant.<sup>22</sup>

3.9 The authors request that the State party: (a) conduct a thorough and effective investigation into the disappearances, removing all legal obstacles for this purpose; (b) locate, identify and return the mortal remains; (c) provide them with psychological and social support; (d) hold a public ceremony at which responsibility is acknowledged, an apology is made and a commemorative plaque is put in place; and (e) provide them with full reparation.

3.10 In addition, the authors generally request, inter alia, that the State party: (a) take all necessary measures to ensure that enforced disappearances are not offences subject to amnesty; (b) establish a truth commission; (c) review the Historical Memory Act in order to bring it into line with international standards; (d) develop a national register of disappeared persons; (e) develop a protocol for collecting and identifying mortal remains; (f) guarantee public access to State, military and Catholic Church archives; and (g) design and implement educational programmes on violations committed during the Civil War and the dictatorship.

#### State party's observations on admissibility

4.1 On 10 July 2019, the State party set out four grounds for inadmissibility, after first making various proposals for legislative reforms related to historical memory. It explained that these proposals related to some of the reparation measures requested by the authors, such as the exhumation of mass graves, the establishment of a national list of victims, the opening of State archives, the inclusion of materials on the Civil War and the Franco regime in educational curricula, the establishment of a national DNA bank, the establishment of a truth commission, the annulment of judgments issued by the extraordinary courts under the Franco regime, the declaration of the rights of persons who had been punished by the Political Affairs Courts in force at the time of the events in order to punish persons collaborating with the Republicans, and the outlawing of associations that defend and extol fascism, Nazism and the Franco regime.

<sup>20</sup> See *Zaier v. Algeria* (CCPR/C/112/D/2026/2011), para. 7.6; *Serna et al. v. Colombia* (CCPR/C/114/D/2134/2012), para. 9.8; *Rizvanović and Rizvanović v. Bosnia and Herzegovina* (CCPR/C/110/D/1997/2010 and Corr.1), para 9.6; *Ičić v. Bosnia and Herzegovina* (CCPR/C/113/D/2028/2011), para 9.7; *Prutina et al. v. Bosnia and Herzegovina* (CCPR/C/107/D/1917/2009, 1918/2009, 1925/2009 and 1953/2010), para. 9.6; *Selimović et al. v. Bosnia and Herzegovina* (CCPR/C/111/D/2003/2010), para 12.7; *Durić and Durić v. Bosnia and Herzegovina* (CCPR/C/111/D/1956/2010), para 9.8; Human Rights Committee, general comment No. 36 (2018), para. 58; E/CN.4/1998/43, para. 72; Inter-American Commission on Human Rights, OEA/Ser.L/V/II.68, Doc. 8 rev.1, p. 205; Inter-American Court of Human Rights, *Goiburú et al. v. Paraguay*, judgment of 22 September 2006, merits, reparations and costs, para. 97, Series C No. 36; and *Gómez Palomino v. Perú*, judgment of 22 November 2005, merits, reparations and costs, Series C No. 153, para. 61.

<sup>21</sup> See *Cifuentes Elgueta v. Chile* (CCPR/C/96/D/1536/2006), para. 8.5; *Yurich v. Chile* (CCPR/C/85/D/1078/2002), para. 6.4; *Sarma v. Sri Lanka* (CCPR/C/78/D/950/2000), para. 6.2; *Sankara et al. v. Burkina Faso*, para. 6.3.

<sup>22</sup> Human Rights Committee, general comment No. 31 (2004), para. 18.

4.2 In February and March 2019, a public consultation on a draft royal decree concerning the establishment of a national census of victims of the Civil War and the dictatorship was held. The aim of this decree, which is still in the drafting stage, is to create a database on enforced disappearances.

4.3 With regard to exhumations of mass graves, the State party affirms that work has begun on updating an exhumation protocol dating from 2011 and that some autonomous communities, including that of the Balearic Islands, envisage adopting such a protocol.

4.4 The State party argues that access to the archives of the State law enforcement and security agencies was already guaranteed by the Historical Memory Act (article 22 of which establishes a requirement to adopt measures to promote the protection and use of such archives) and that the Ministry of Defence has adopted two resolutions, in November 2018 and January 2019, which extended access to document collections belonging to the general military archive of Ávila, the military archives of Barcelona, Ferrol, Melilla, Ceuta and Guadalajara, and the general archive and historical archive of the air force.

4.5 The State party also reports that efforts will be made to encourage the production of teaching materials on violations committed during the Civil War and the dictatorship for primary, lower secondary and upper secondary (baccalaureate) school students and adults undertaking continuing education. Use of such materials will also be promoted at the university level. Further research into the repression suffered by women will be promoted and plans to train and raise awareness among public officials are in place.

4.6 Firstly, the State party maintains that the communication is inadmissible *ratione materiae* because the search for reparation and justice for victims of enforced disappearance is covered not by the Covenant but by the International Convention for the Protection of All Persons from Enforced Disappearance. Therefore, the authors' complaint should be submitted to the Committee on Enforced Disappearances.

4.7 Secondly, the State party argues that the communication is inadmissible *ratione personae* because it constitutes an *actio popularis* in that it is intended to serve as a comprehensive critique of legislation and court proceedings.

4.8 Thirdly, the State party claims that the communication is inadmissible *ratione temporis* because the Committee has no jurisdiction over events that occurred before the existence of the Covenant.<sup>23</sup>

4.9 Lastly, the State party also claims that the communication is inadmissible for failure to exhaust domestic remedies since the legal proceedings were brought by the association and not directly by the authors and the administrative proceedings that they have initiated have been challenged.

4.10 In the light of these four grounds of inadmissibility, the State party requests that admissibility be considered separately from the merits, and also states that a public ceremony might be organized to recognize the authors as victims.

#### **Authors' comments on the State party's observations on admissibility**

5.1 On 9 September 2019, the authors argued that none of the alleged grounds of inadmissibility is valid and that the State party's request that admissibility be examined separately from the merits, in addition to being submitted late, is a clear strategy to delay the proceedings. They therefore request that it be rejected.

5.2 As to the alleged lack of competence *ratione materiae*, the authors point out that the State party's argument illustrates its ignorance of the jurisprudence of the Committee, which has examined cases of enforced disappearance.

5.3 With regard to the alleged lack of competence *ratione personae*, the authors maintain that the requirement to prove a specific violation of rights is satisfied,<sup>24</sup> because, although

<sup>23</sup> See *Yurich v. Chile* and *Acuña Inostroza et al. v. Chile* (CCPR/C/66/D/717/1996).

<sup>24</sup> Human Rights Committee, *Aumeeruddy-Cziffra et al. v. Mauritius*, communication No. 35/1978, para. 9.2.

their analysis refers to the case law of the Supreme Court, which is a factor in the general context of impunity, this case law has affected them directly because it was applied by the Court of Manacor when it dismissed their complaint in 2017.

5.4 In addition, the lack of State legislation on the search for disappeared persons and the ineffectiveness of autonomous community legislation are also directly related to the reported violations and the authors' decision to seek recourse before the Committee. In fact, the regulations in force are contrary to the guiding principles for the search for disappeared persons of the Committee on Enforced Disappearances (which serve as a guide by which to interpret the State party's obligations), which establish that the search must be governed by a comprehensive, clear, transparent, visible and consistent public policy and that decentralized bodies cannot act as a barrier to an effective search. The authors also argue that the proposals for legislative reform developed by the State party are measures that are not in force and are unlikely to be adopted in the future. To date, no exhumation work has been started in any of the graves where it is thought that the authors' relatives might be, including the old cemetery of Manacor, the current cemetery of Manacor and the cemetery in the municipality of Petra. Instead of dignifying and preserving the site of the old cemetery, the authorities have installed a playground in its place. It is not known when the authorities might start excavation and exhumation work at the current cemetery because the tender for the project has not been awarded and no schedule has been drawn up for the work. Without specifying its reasons, the State party has ruled out the possibility that the remains might be in the cemetery of the municipality of Petra. Lastly, the authors note that it is contradictory for the State party to claim that the communication is inadmissible as an *actio popularis* while referring, in most of its comments, to policy proposals for general measures without specifying how these would affect the authors of the communication.

5.5 With regard to the alleged lack of competence *ratione temporis*, the authors affirm that the two cases against Chile cited by the State party cannot be compared to the present communication for two reasons: because, on ratifying the Protocol, Chile made an interpretative declaration recognizing the competence of the Committee only for acts occurring after March 1990, a declaration not made by Spain; and because, in these cases, responsibility was alleged only for the disappearances themselves whereas, in the present complaint, violations of a procedural nature are also alleged to have occurred at the present time, and to be attributable to the State party's obstruction of judicial and administrative proceedings initiated after the Covenant was ratified. Moreover, jurisprudence on competence *ratione temporis* for events occurring prior to ratification has evolved, as the Committee rules on the consequences of violations perpetrated before the entry into force of the Covenant that persist after its ratification owing to a failure to investigate.

5.6 With regard to the alleged inadmissibility for failure to exhaust domestic remedies, the authors point out that they have taken legal action, through the Mallorca Association for the Recovery of Historical Memory, at all levels up to and including the Constitutional Court. They also point out that, even if the State party believes that the authors should bring legal challenges directly, without being represented by the Association, the Committee has already stipulated, in a case against Spain, that "when the case law of the highest domestic court has settled the point, ruling out any chance of a successful appeal to the domestic courts, the authors are not required under the Optional Protocol to exhaust domestic remedies".<sup>25</sup> Thus, the State party should have demonstrated the existence of available, effective remedies that might have a chance of being successful.

5.7 The authors argue that the State party has still not done anything to provide an adequate and gender-sensitive response<sup>26</sup> and that they are still unable to put flowers on the ground in which their parents and grandparents are buried. Therefore, the State party's proposal to hold a public ceremony at which they would be given a document attesting to their status as victims (which they already have and which is merely symbolic) is insufficient.

5.8 The authors also affirm that, since the criterion set out in paragraph 2 of the Committee's guidelines on making oral comments concerning communications is met, the

<sup>25</sup> *García Sánchez and González Clares v. Spain* (CCPR/C/88/D/1332/2004), para. 6.3.

<sup>26</sup> See guiding principles for the search of disappeared persons (CED/C/7), principle 4.

case should be heard, taking into account the differences in the two parties' interpretations of national law and the Covenant.

### **Additional information submitted by the authors**

6.1 On 6 March 2020, the authors reported that the proceedings initiated in Argentina are still being obstructed as the Spanish authorities had just prevented the judge presiding over the Buenos Aires court from travelling to take a statement from a party under investigation (a former minister under Franco) as she had been scheduled to do that month at the Argentine Embassy in Spain.

6.2 The authors also affirm that the Spanish courts are continuing to dismiss complaints submitted by victims of offences committed under the Franco regime, citing a recent example of a dismissal based on the arguments set out in the Supreme Court judgment of 27 February 2012 (see para. 2.17 above).

6.3 The authors also point out that the recent decision of the Committee against Torture<sup>27</sup> is particularly significant in that the Committee deems itself competent *ratione temporis* to deal with alleged violations of obligations under the Convention that occurred prior to the recognition of the Committee's competence on the grounds that they constitute a continuing violation of the duty to investigate. They request that the Committee apply, *mutatis mutandis*, the same criteria to the present case.

6.4 Lastly, the authors are sending three amicus curiae briefs to the Committee that they received directly from their authors.<sup>28</sup>

6.5 On 24 September 2020, the complainants informed the Committee that they had learned from the media that 17 bodies had been excavated and exhumed in the Manacor cemetery known as San Coletes in July and August 2020. According to information they were able to obtain through unofficial channels, a DNA analysis of the bodies is being carried out and it is possible that one of them might belong to one of the victims, Ms. M.J. They also requested the Committee to postpone consideration of the case, if possible.

### **Issues and proceedings before the Committee**

#### *Consideration of admissibility*

7.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with rule 97 of its rules of procedure, whether the communication is admissible under the Optional Protocol.

7.2 The Committee has ascertained, as required under article 5 (2) (a) of the Optional Protocol, that the same matter is not being examined under another procedure of international investigation or settlement.

7.3 The Committee notes the State party's argument that the communication is inadmissible *ratione materiae* because efforts to obtain reparation and justice for victims of enforced disappearance are covered not by the Covenant but by the International Convention for the Protection of All Persons from Enforced Disappearance, and that the authors'

<sup>27</sup> *Coppin v. Ireland* (CAT/C/68/D/879/2018), para. 6.3.

<sup>28</sup> The Mallorca Association for the Recovery of Historical Memory recalls that, in 2017, the Working Group on Enforced or Involuntary Disappearances recommended that Spain should cooperate with the judicial proceedings in Argentina (A/HRC/36/39/Add.3, p. 122, para. 45). The Inter-American Institute for Social Responsibility and Human Rights recalls that, even when national legislation provides otherwise, serious human rights violations that constitute continuing violations cannot be subject to any statute of limitations or amnesty, irrespective of the date of their commission, in accordance with the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Lastly, Margalida Capellà Roig argues that the communication is admissible because the Amnesty Act, the Supreme Court's case law and the Historical Memory Act constitute barriers that impede access to justice, in violation of standards of truth, justice and reparation. She also recalls that, of the European countries that collaborated with Nazi Germany, Spain is the only one where no legal action has yet been taken in connection with crimes committed under international law against the backdrop of the Second World War.

complaint should therefore be submitted to the Committee on Enforced Disappearances. However, the Committee recalls that, although the term “enforced disappearance” is not explicitly used in the Covenant, the enforced disappearance of persons raises issues under several articles of the Covenant, in particular articles 6, 7, 9 and 16. The Committee recalls that it has examined a large number of individual communications related to enforced disappearances and has found violations in several of them.<sup>29</sup> Accordingly, the Committee finds that article 3 of the Optional Protocol does not constitute a barrier to the admissibility of the present communication.

7.4 The Committee notes the State party’s argument that the communication is inadmissible *ratione personae* as it is an *actio popularis* that is intended to serve as a comprehensive critique of legislation and judicial proceedings. The Committee also notes the authors’ assertion that they have analysed the case law of the Supreme Court because it gives context to the issue of impunity and has directly affected them because it was implemented in connection with the challenges that they have brought. Furthermore, they mention the legislation on the search for disappeared persons not only because it breaches international standards on the subject but also because it is directly related to the violations reported in this communication in that it has prevented exhumations from being conducted in any of the graves where their relatives might be. In this regard, the Committee notes that the authors have substantiated the claim that they have suffered personal, individual harm as a result of the disappearance of their parents and grandparents by identifying specific violations of their individual rights under the Covenant. The Committee therefore considers that article 1 of the Optional Protocol does not constitute an obstacle to the admissibility of the present communication.

7.5 The Committee notes the State party’s argument that the communication is inadmissible *ratione temporis* because the enforced disappearances occurred before the existence of the Covenant. The Committee also notes the authors’ claim to be subjected to procedural violations in the present because the State party has obstructed actions initiated after the ratification of the Covenant with a view to having investigations initiated in order to establish the fate and whereabouts of the missing persons and identify the perpetrators, and to obtaining reparation for the harm suffered (in part by having the State party hand over the mortal remains). According to the authors, this represents a continuing violation of the duty to investigate by which violations committed prior to the ratification of the Covenant are reaffirmed. The Committee also notes the authors’ assertion that, although the enforced disappearances began before the ratification of the Covenant, they are continuing and persistent violations in themselves, and that the State party did not make a declaration to place a time limit on its responsibility when it ratified the Protocol.

7.6 The Committee recalls that article 2 (3), which has been invoked by the authors in conjunction with articles 6, 7, 9 and 16 of the Covenant, may give rise in exceptional circumstances to a continuing obligation to investigate continuing violations that occurred before the entry into force of the Covenant and the Optional Protocol for the State party (on 27 July 1977 and 25 April 1985, respectively),<sup>30</sup> and that cases of enforced disappearances may entail such a continuing effect. Nevertheless, the Committee notes that the events underlying the alleged violation of articles 6, 7, 9 and 16 with respect to the authors’ relatives occurred in 1936, 41 years before the entry into force of the Covenant for the State party and 49 years before the entry into force of the Optional Protocol. It further notes that the obligation under articles 6, 7, 9 and 16, read in conjunction with article 2 (3), did not exist before the Covenant entered into force for the State party in 1977 and could not have been the subject of individual communication proceedings before 1985.<sup>31</sup> The Committee considers that, in the particular circumstances, where the principal events underlying the violation in question took place so far back in time, even before the consolidation of modern international human rights law, it would be unreasonable for it to regard the ratification of the Covenant by the State party as entailing an active duty on its part to investigate enforced disappearances which occurred in the very distant past. Therefore, in view of the significant

<sup>29</sup> Human Rights Committee, general comment No. 36 (2018), paras. 57 and 58.

<sup>30</sup> *K.K. et al. v. Russian Federation* (CCPR/C/127/D/2912/2016), para. 6.4.

<sup>31</sup> *Ibid.*, para. 6.5.

passage of time since the principal events of the claim (which occurred almost 85 years ago) and the absence of a clear acknowledgement by judicial authorities of the violation of the authors' relatives' rights after 1985,<sup>32</sup> the Committee cannot conclude that it has jurisdiction over a violation, even with certain continuing effects, stemming from events that occurred in 1936.<sup>33</sup>

7.7 In addition, the Committee considers that the authors do not adequately explain why they did not present their complaint to the Committee in 1985, upon ratification of the Optional Protocol by Spain, or, alternatively, why they submitted their application more than eight years after the rejection, on 9 September 2010, of their application for *amparo*. The Committee considers that even communications alleging enforced disappearances should not be submitted after excessive or unexplained delays on the part of authors who have, or should have, become aware that no investigation has been instigated or that the investigation has lapsed into inaction or become ineffective and where, in any of those eventualities, there is no realistic prospect of an effective investigation being carried out in the future to shed light on the fate of the victims, the possible offenders and the whereabouts of the remains, given that 85 years have now passed since the events occurred.<sup>34</sup> While acknowledging the profound suffering, anguish and stress caused by the enforced disappearance of their family members and by the attitude of indifference shown by the State party to their repeated requests for truth and justice for many decades after the disappearance of their relatives, the Committee finds the delayed submission of the communication to be incompatible with the *ratione temporis* requirements of rule 99 of its rules of procedure and therefore to be inadmissible.

7.8 In relation to the authors' claim of a continuing violation of their own rights under article 7 of the Covenant, read in conjunction with article 2 (3), because of the profound suffering, anguish and stress caused by the enforced disappearance of their family members and by the attitude of indifference shown by the State party to their repeated requests for truth and justice, the Committee considers that the authors have not shown that this claim was raised before the domestic authorities. It therefore considers that domestic remedies have not been exhausted.

8. In the light of the above, the Human Rights Committee decides:

- (a) That the communication is inadmissible *ratione temporis* under articles 1 and 5 (2) (b) of the Optional Protocol;
- (b) That the present decision shall be communicated to the State party and to the authors.

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<sup>32</sup> *Ibid.*, para. 6.4; see also *Yusupova v. Russian Federation* (CCPR/C/114/D/2036/2011), para. 6.6 (the status of victim of arbitrary detention had been recognized by the court); and *Tyan v. Kazakhstan*, para. 8.4.

<sup>33</sup> *K.K. et al. v. Russian Federation*, para. 6.5.

<sup>34</sup> *Ibid.*, para. 6.5.

## Annex I

### **Joint opinion of Committee members David H. Moore, Vasilka Sancin, José Manuel Santos Pais, Yuval Shany and Gentian Zyberi (concurring)**

1. We support the Views of the Committee that it is unreasonable to construe the obligations of States parties under the Optional Protocol as allowing for a review of tragic incidents that occurred long before the adoption of the Covenant (41 years) and of the Optional Protocol (49 years), and that the authors should have exercised a certain degree of diligence in pursuing their claims before the Committee without serious delay after the ratification by Spain of the Optional Protocol, notwithstanding the continuing nature of the crime of enforced disappearances.

2. We wish to underscore that the fact-finding tools available to the Committee do not allow it to effectively establish the historical truth about events that, as in the present case, occurred in the distant past, in the context of a bitter and tragic civil war, and that have left deep scars on Spanish society to the present day.

3. Furthermore, the long passage of time, which considerably exceeds the presumed lifespan of the victims, had they not been killed during the Spanish Civil War, and that of the perpetrators of the crimes in question, renders unsuitable the normal doctrines developed by the Committee in relation to the prompt and effective investigation of past crimes, which assume the availability of sufficient forensic evidence and witnesses, and are directed at holding living perpetrators legally accountable. In the same vein, it is difficult to rely so many decades after the events on legal doctrines developed to consider enforced disappearance as a continuing offence, which are largely premised on the assumption that the victim may still be alive and that a remedy of release may still be necessary.

4. We believe that the remedy for the authors' plight and their entitlement to obtain some sense of closure in respect of the historical injustice suffered by their relatives is to be found in the recent process undertaken by the State party to address its difficult past and the problem of historical memory, to establish the truth about the events and to identify and commemorate the victims of the Civil War and the dictatorship. Such efforts will continue to be monitored by the Committee in the context of the periodic review of Spain, in light of the interrelationship between dealing with a tragic past and the existence of a human rights-respecting culture in the State party, allowing for the healing of deep and enduring wounds. To the extent that the individual rights of living family members are directly affected by recent acts or omissions by Spain in the process of addressing its past, the exercise of quasi-judicial review under the Optional Protocol might also be appropriate, subject to admissibility requirements such as lack of undue delay and exhaustion of domestic remedies. Still, a quasi-judicial review of the rights of the victims of the Civil War themselves, as in the present case, conducted some 85 years after the facts, exceeds the temporal scope of powers vested in the Committee, as well as its functional fact-finding capacity.

## Annex II

### Joint opinion of Committee members Yadh Ben Achour, Arif Bulkan, Ahmed Amin Fathalla and H el ene Tigroudja (partially dissenting)

1. The first-named author was just 8 years old when she awoke one morning in August 1936 to find her father gone, vanished without warning. Shortly before, her mother had been arrested and detained incommunicado, both parents succumbing to the unspeakable fate of many who opposed the Franco dictatorship. From one day to the next, without a chance even to say goodbye, the author and her sister were cruelly orphaned, condemned to live their entire lives under the weight of this trauma.

2. In light of the time that has elapsed since those tragic events, we do not disagree with the majority of the Committee that the authors' claims in respect of their parents are inadmissible *ratione temporis*. However, the authors' claim of a violation of their own rights under article 7, read in conjunction with article 2 (3), is one of a qualitatively different nature – continuing, uninterrupted and directly related to them, and for the reasons herein we disagree that it is inadmissible.

3. The Committee's cursory treatment of the article 7 claim as inadmissible for failure to exhaust domestic remedies is bewildering, given the mountain of uncontested facts that demonstrably reveal the contrary. As painstakingly recounted, despite official denial and their personal severe psychological stress, the authors pursued a variety of legal and administrative avenues in their dogged quest for justice. These included multiple claims before national and regional courts in Spain, requests for recognition as victims and consequential reliefs, and even the novel step of invoking extraterritorial avenues in the Argentinian legal system. Any or all of those claims would have provided some accounting for the disappearance of their parents, and in that way assuaged some of the authors' pain and suffering resulting from their lack of knowledge of what happened. But their claims repeatedly floundered because of the uncompromising stance taken by the State party, both during and after the dictatorship, of maintaining a complete wall of silence around the atrocities committed during the dictatorship.

4. The majority's finding of non-exhaustion is even more inscrutable when considered against extant laws in the State party. In February 2012, the Supreme Court ruled definitively that crimes committed during the Civil War and the Franco era could not be investigated or prosecuted, relying on the Amnesty Act 46/1977, the principle of legality and non-retroactivity of criminal law, the statute of limitations and the Historical Memory Act. That decision cemented the position taken by lower courts in relation to the authors' claims, henceforth foreclosing actions not just by the authors but all victims of this period. Given the amnesty law and structural barriers to justice for victims that created a climate of impunity for grave and massive violations of human dignity,<sup>1</sup> combined with the State party's failure to provide any information on alternative judicial remedies at the authors' disposal,<sup>2</sup> there is in fact no available remedy remaining for the authors to exhaust. In this context of "impediments to victims' access to justice",<sup>3</sup> ironically recognized by this very Committee in its concluding observations on Spain adopted in 2008,<sup>4</sup> we would conclude that the authors' claim of a violation of article 7 of the Covenant read in conjunction with article 2 (3) in respect of their own pain and suffering is not precluded by article 5 (2) (b) of the Optional Protocol and is therefore admissible.

<sup>1</sup> A/HRC/27/56/Add.1.

<sup>2</sup> *Yklymova v. Turkmenistan* (CCPR/C/96/D/1460/2006), para 6.2; and *Abromchik v. Belarus* (CCPR/C/122/D/2228/2012), para. 9.3.

<sup>3</sup> A/HRC/27/56/Add.1, paras. 67 and 104 (f).

<sup>4</sup> CCPR/C/ESP/CO/5. See also the concluding observations adopted in 2013 by the Committee on Enforced Disappearances (CED/C/ESP/CO/1).

5. Lastly, we note that the authors' claim in relation to themselves is of a type that has been repeatedly recognized under the Covenant, covering the profound anguish and suffering experienced by persons whose immediate relatives are the victims of serious human rights violations and exacerbated by the indifference of official authorities.<sup>5</sup> The first-named author is the child of the disappeared couple, and the effects of being orphaned were both material and emotional, acute and omnipresent throughout her life and that of her deceased sister. That the first-named author continues to seek justice 84 years later, undaunted by the structural barriers placed in her way by the State party, is indicative of the depth and persistence of her grief. Had this case been found admissible by the Committee, it is difficult in such circumstances to envisage any conclusion other than that of a violation of article 7 of the Covenant, read in conjunction with article 2 (3).

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<sup>5</sup> *Schedko v. Belarus* (CCPR/C/77/D/886/1999), para. 10.2; *Sankara et al. v. Burkina Faso* (CCPR/C/86/D/1159/2003), para 12.2; and *Khadzhiyev v. Turkmenistan* (CCPR/C/122/D/2252/2013), para. 7.6.

## Annex III

### **Joint opinion of Committee members Marcia V.J. Kran and Hernán Quezada Cabrera (partially dissenting)**

1. We have reviewed the decision of the majority of the Committee and are not able to fully agree with their Views.
2. We do find we can agree with the majority that the communication is inadmissible *ratione temporis* regarding the claims relating to articles 2 (3), 6, 7, 9 and 16 of the Covenant in respect of M.J.V. and A.A.M. for the specific reasons given.
3. However, we are not able to agree that the authors' claim of a continuing violation of their own rights under article 7, read in conjunction with article 2 (3), of the Covenant is inadmissible for failure to exhaust domestic remedies.
4. The authors' claim of a continuing violation of their own rights rests upon the profound suffering, anguish and stress caused by the enforced disappearance of their family members and the attitude of indifference shown by the State party to their repeated requests for truth and justice. We note that the complaints submitted by the authors before the national courts are directly related to the authors' lack of awareness of the circumstances of the enforced disappearances of their family members, which is the main cause of their suffering.
5. The authors have unsuccessfully tried to take every possible action to exhaust domestic remedies before approaching the Committee. In this regard, they have unsuccessfully brought legal challenges before the National High Court, the Court of Palma de Mallorca, the High Court of Mallorca, the Constitutional Court and the Court of Manacor. In addition, they have unsuccessfully taken procedural and administrative steps before the Technical Commission on Disappeared Persons and Graves of the government of the Balearic Islands to have their family members' remains exhumed and returned and to obtain full reparation for the harm suffered. However, the State party is continuing to implement the Amnesty Act, despite the Committee's repeated recommendations that it be repealed or brought into line with the Covenant.<sup>1</sup>
6. Although the authors brought their domestic claims through the Mallorca Association for the Recovery of Historical Memory, it is clear that the authors were members of that Association, authorized it to bring the claim on their behalf and were involved throughout. The State party has not disputed the authors' claim that they requested full reparation for the harms suffered from the domestic authorities and we therefore consider that the claim for reparation for mental suffering was sufficiently raised. Moreover, the State party has not disputed the authors' claim that Supreme Court judgment No. 101/2012 of 27 February 2012 led to the general dismissal of all appeals lodged by victims throughout the country, as it established case law on the purported reasons for which judges were not authorized to investigate crimes committed during the Civil War and the Franco era. Even if the authors were now to bring an action in their own name, the State party has not disputed that their cases would be dismissed due to established case law. We are therefore of the view that the authors do not have any further effective remedy. In these circumstances, article 5 (2) (b) of the Optional Protocol does not constitute a barrier to the admissibility of the present claim and the communication is admissible regarding the claims relating to articles 2 (3) and 7 of the Covenant in respect of the authors.

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<sup>1</sup> CCPR/C/ESP/CO/6, para. 21; and CCPR/C/ESP/CO/5, para. 9.