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# Participation in Scientific Research, Access to Reproductive Rights and the Right to Sexual and Reproductive Health: the Approach of the UN Committee on Economic, Social and Cultural Rights in S.C. and G.P. v. Italy Communication

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# Participation in Scientific Research, Access to Reproductive Rights and the Right to Sexual and Reproductive Health: the Approach of the UN Committee on Economic, Social and Cultural Rights in *S.C. and G.P. v. Italy* Communication

***Laura-Maria CRĂCIUNEAN-TATU***[*]

***Abstract*****:** *On the 7th of March 2019, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted its views on a communication which was submitted to it by S.C. and G.P., Italian nationals, against Italy. The authors complained that several actions of the Italian authorities – Italy being one of the States Parties to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) – interfered with and constituted a breach of theirs rights under article 10 (the right to the widest possible protection of the family), article 12 (right to the enjoyment of the highest attainable standard of physical and mental health – often referred to as the right to health) and article 15 (the right to benefit from scientific progress and its applications) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).*

*Being one of the few communications in which, so far, the CESCR adopted views and being also the first one to have a submission under article 15 of the Covenant, the aims of this paper are those of presenting the facts of case, the claims, the submissions and the arguments of the authors, as well as the views of the Committee – which limited its findings to a violation of article 12, alone and in conjunction with article 3 – and to discuss the approach and the concrete solution which was adopted by the Committee in this communication.*

*Thus, the paper will first summarize the facts of the communication (Section II); it will continue with the claims and submission of the authors*

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*(Section III); it will then touch upon and briefly analyse the qualification of the communication by the Committee, the admissibility criteria and the views adopted (Section IV) finally, it will conclude by evaluating the communication in the context in which the CESCR is just building up its own jurisprudence under the ICESCR and OP-ICESCR and in light of a work-in-progress new General Comment on the relation between economic, social and cultural rights and science (Section V).*

***Key-words:*** *reproductive rights, right to health, participation in scientific research, sexual and reproductive health, access to reproductive rights, informed consent, the right to enjoy the benefits of scientific progress and its applications, CESCR jurisprudence, scientific research, regulation of in vitro fertilization, research on human embryos, genetic disorders, assisted reproductive technology, pre-implantation genetic diagnosis, ESC rights and science.*

## I. Introduction

On the 7th of March 2019, the UN Committee on Economic, Social and Cultural Rights (CESCR) adopted its views on a communication, against Italy, which was submitted to it by S.C. and G.P., Italian nationals.

The authors complained that several actions of the Italian authorities – Italy being, since 20th of February 2015, one of the States Parties to the *Optional Protocol of the International Covenant on Economic, Social and Cultural Rights* (*OP-ICESCR*) – interfered with and constituted a breach of theirs rights under article 10 (the right to the widest possible protection of the family), article 12 (right to the enjoyment of the highest attainable standard of physical and mental health) and article 15 (right to enjoy the benefits of scientific progress and its applications) of the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*).

Being one of the few communications in which, so far, the CESCR adopted views and being, also, the first one to have a submission under article 15 of the Covenant, the aims of this paper are those of presenting the facts of case, the claims, the submissions, the arguments of the authors and the views of the Committee – which limited its findings to a violation of article 12 of the *ICESCR* – and to discuss the approach and the concrete solution which was adopted by the Committee in this caseThus, the paper, which follows the exact structure of the views adopted by the Committee, will first summarize the facts of the communication (Section II); it will continue with the claims,

submissions and the arguments of the authors (Section III); it will then touch upon and briefly analyse the qualification of the claims by the Committee, the admissibility criteria and the views of the CESCR (Section IV) and, finally, conclude by evaluating the communication in the context in which the CESCR is just building up its own jurisprudence under the *ICESCR* and *OP-ICESCR* and in light of a work-in-progress new General Comment on the relation between economic, social and cultural rights and science (Section V).

## II.The facts of the communication

In 2008, S.C. and G.P. – a woman and a man of Italian nationality, both of legal age – referred to, in the following paragraphs, as the authors of the communication, visited a private clinic in Italy specialized in assisted reproductive technology and sought assistance to conceive a child. In this respect, the woman, S.C. underwent two in vitro fertilization (IVF) cycles.

Thus, in 2008, a first IVF cycle was carried out. In the context of this cycle, because the authors had reasons to fear of a very high risk that their embryos were affected by genetic disorders – namely the multiple hereditary osteochondromas[1] – they requested the clinic that: firstly, at least six embryos be produced through the in vitro fertilization procedure; secondly, that those embryos be subject to pre-implantation genetic diagnosis (PGD),[2] to identify possible "genetic disorders" and thirdly, that the embryos with such disorders not be transferred into the uterus of S.C.

At the time, all matters related to the in vitro fertilization procedure were regulated by the *Italian Law in Assisted Reproductive Technology (ART), Law no. 40/2004* which, among others, contained provisions which: prohibited any clinical and experimental research on human embryos; limited the number of embryos to be produced during IVF to three; prohibited the performance of the PGD; mandated the simultaneous transfer in the uterus of all embryos, regardless of their viability or genetic disorder and prohibited the cryopreservation of embryos.

[1] The multiple hereditary osteochondromas, also known as hereditary multiple exostoses, was explained by the authors as being a hereditary genetic disorder that causes bones deformations through youth and adolescence. They submit that the disorder is not only painful, but that it is also emotionally distressing because the deformities are visible to the naked eye. It is highly transferable, with a high penetrance, and has severe detrimental effects on human health.

[2] PGD – Pre-implantation Genetic Diagnosis – it is a procedure whereby embryos are first created in a controlled environment outside the woman' s body where they are screened to identify if affected by a genetic disorder before being transferred to the woman's uterus.

Consequently, referring the authors to the provisions of the law, the clinic replied that theirs requests were not authorized under Law no. 40/2004 and, therefore, could not be accepted.

The authors filed a case against the clinic before *Tribunale di Firenze* (Court of Florence). On the 18th of July 2008, *Tribunale di Firenz*e ruled provisional measures and ordered the clinic to carry out the PGD testing. Moreover, it referred the matter to the Italian Constitutional Court and asked for a constitutionality test in respect of many of the Law no. 40/2004 provisions.

While waiting for the Italian Constitutional Court to deliver its judgment, three embryos were produced. The clinic performed the PGD testing (in accordance with the provisional measures ordered by *Tribunale di Firenze*) and discovered that all three embryos were affected by genetic disorders, namely by multiple hereditary osteochondromas. The clinic decided not to transfer the three embryos into S.C. s' uterus.

On the 8th of May 2009, the Italian Constitutional Court found parts of the Law no. 40/2004 as being incompatible with the Italian Constitution and with the Council of Europe *Convention for the Protection of Human Rights and Fundamental Freedoms* (*ECHR*) and narrowed the scope of application of the law. More precisely, it declared as unconstitutional articles 14.2 (which imposes the creation of a maximum of three embryos per in vitro fertilization cycle and the duty to transfer all of them simultaneously into the uterus) and 14.3 (which does not provide that the transfer of embryos should be made without prejudice to the health of the woman) of Law no. 40/2004.

In October 2009, at the same clinic, the author (S.C.) underwent the second IVF cycle. This time, taking due account of the Italian Constitutional Court decision, *ten embryos* were produced. Six of the embryos underwent the PGD testing. Only one, out of the six tested embryos, was determined to be free of the hereditary multiple osteochondromas but was graded "average quality", thus having a low chance of nesting if transferred into the uterus. The other four embryos which were produced could not be tested due to technical reasons.

The staff of the clinicasked S.C. to subject herself to the IVF procedure, namely to accept that the only embryo free of the hereditary multiple osteochondromas but which was of "average quality", to be transferred into her uterus. Initially, S.C. declined to have the "average quality" embryo transferred into her uterus. However, the staff of the clinic insisted that, according to their understanding of Law no. 40/2004, consent to transfer embryos into the uterus can only be revoked before fertilization has taken

place. Moreover, the clinic personnel threatened S.C. with a lawsuit if she insisted on not having the embryo transferred. Finally, because of this threat, S.C. agreed to have the ”average quality” embryo transferred into her uterus, but she eventually suffered a miscarriage.

The other nine remaining embryos were cryopreserved.

The authors requested the clinic to surrender the nine cryopreserved embryos (PDG tested or not) in order to be able to donate them to be used for scientific research.

The clinic refused the authors request holding that article 13 of the Law no. 40/2004 prohibited all research performed on embryos.

On 30 March 2012, the authors filed a lawsuit against the clinic and the State party, before the *Tribunale di Firenze* and requested the Court: firstly, to order the clinic to surrender the embryos; secondly, to determine the validity of S.C.'s decision not to have the embryos transferred into her uterus and thirdly, to pay a pecuniary compensation.

On 7 December 2012, as a matter of urgency, the *Tribunale di Firenze* referred the matter to the Italian Constitutional Court, pursuant to article 700 of the Code of Civil Procedure, and called upon it to determine the compatibility of articles 6.3 (regarding the revocation of the consent before fertilization) and 13 (regarding the prohibition of research on embryos) of Law no. 40/2004 with the Italian Constitution.

On 22 March 2016, the Italian Constitutional Court delivered its judgement and found that *Tribunale di Firenze*'s request is inadmissible,[1] as follows: *firstly*, it stated that the claim concerning the irrevocability of the consent was moot, after S.C. eventually agreed to have the embryo transferred into her uterus; *secondly*, it stated that the claim relating to the possible withdrawal of S.C.'s consent in the context of future in vitro fertilization treatments was speculative; *thirdly*, found that the conflict had multiple ethical and juridical implications related to the balance between the right to enjoy the benefits of scientific progress, and its applications (and the related benefits), and the rights of the embryo, and that those issues divided jurists, scientists and society. Moreover, the Court stated that legislators were the proper authority to strike the balance between the rights of the embryo and the right to enjoy the benefits of scientific progress and its applications, and not the Constitutional Court itself. Thus, it called on legislators to consider "the views and calls for action (…) deeply rooted at any given moment in time within the social conscience".

[1] Italian Constitutional Court, Judgment no. 84 of 22nd of March 2016.

On the 20 of March 2017, the authors submitted, under *the OP-ICESCR* – to which Italy was a State party since the 20 of February 2015 – a communication to the UN CESCR. In support of their communication, the authors argued that they have exhausted all domestic remedies, since the decision of the Italian Constitutional Court is final and not subject to appeal. Concerning the requirement established in article 3 (2) (b) of the *OP-ICESCR*, the authors claim that although the main events occurred prior to 20 February 2015, the date of entry into force of the Optional Protocol for the State Party, the decisions adopted thereafter reflect a continuing violation of their rights.

## III. The claims, submissions and arguments of the authors before the CESCR

The authors of the communication formulated, before the CESCR, *four claims*. Thus, they submitted that: III.1. that the State Party has violated their right, under article 15 (1) (b) of the *ICESCR,*[1] to enjoy the benefits of scientific progress and its applications because, *by prohibiting research on embryos, Law no. 40/2004 interferes with scientific progress, slowing down the search for a cure for various diseases and that the Covenant incorporates a right for every person to take part in scientific research*; III.2. that the State Party has violated their right under article 15 (2), (3) of the *ICESCR*[2] because the State Party *blocks the research on embryos without a legitimate purpose;* III.3. that the State Party has violated their right to health under article 12 (1) and (2) (c) and (d) of the *ICESCR,*[3] because *Law no. 40/2004 cannot provide for adequate physical and mental*

[1] Article 15 (1) (b) of the *ICESCR* states: *(1) The States Parties to the present Covenant recognize the right of everyone: (...) (b) to enjoy the benefits of scientific progress and its applications*.

[2] Article 15 (2) (3) of the *ICESCR* states: *(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture. (3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.*

[3] Article 12 (1) (2) (c), (d) of the *ICESCR* states: *(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (...) (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of a sickness.*

*health*; and III.4. that the State Party has violated their rights under article 10 of the *ICESCR*[1] because *it failed to provide the widest possible protection and assistance to the authors, as a family*, as well as to other couples in Italy who are or will be in similar situations.

The authors provided to the CESCR a very complex motivation of these four claims and raised a series of issues to which the Committee had to deliberate upon such as: restrictions/prohibition on the research on human embryos, the right of the authors to participate in scientific research, ownership over the embryos produced during an IVF cycle, to name just a few of them.

III.1. *Firstly*, the authors claim that the State Party has violated their *right* under article 15 (1) (b) of the *ICESCR* t*o enjoy the benefits of scientific progress and its applications* because, *by prohibiting research on embryos, Law no. 40/2004 interferes with scientific progress, slowing down the search for a cure for various diseases*. They submitted that S.C. is an asymptomatic carrier of hereditary multiple osteochondromas and nine out of ten of the embryos the authors have produced were either affected by this genetic disorder or could not be tested. Unless a cure for hereditary multiple osteochondromas is found, their chances of conceiving a child are slim. S.C. also has family members who are affected by the illness.

Moreover, the authors also considered that *this prohibition prevented them from participating in scientific research through the donation of their unused embryos*. In this respect, the authors argued that even if the wording of the ICESCR does not mention, explicitly, a right of everyone to participate in scientific research, such a right steam from the holistic interpretation of the *Universal Declaration of Human Rights* and of articles 15 (2) and 15 (3) of the Covenant. In view thereof, the authors consider that

[1] Article 10 of the *ICESCR* states: The States Parties to the present Covenant recognize that: *(1) The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses. (2) Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits. (3) Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law.*

the Covenant protects the right of everyone to participate in scientific research.

As far as the clinic's refusal to surrender to them the unused embryos – so that they donate them to scientific research – the authors reminded the CESCR of the *Parrillo v. Italy Case*. In this case the European Court of Human Rights[1] considered that the complainant's ability to exercise a choice regarding the fate of the embryos concerned an intimate aspect of her personal life, related to her self-determination, and that the application of Law no. 40/2004 had resulted in interference with the applicant's right to private life.

III.2. *Secondly*, the authors claim that the State Party has violated their right under article 15 (2), (3) of the *ICESCR* because the State party *blocks the research on embryos without a legitimate purpose* and *it is not fulfilling the duty to develop science and disseminate scientific developments*.

While acknowledging that freedom of research is not absolute, the authors submit that it can only be restricted to protect other rights. Or, in the present case there is no contradicting right to be protected as the embryos concerned will never grow and have been left forever in a frozen limbo.

Moreover, the authors argued that *the right to enjoy the benefits of scientific progress includes accessing medical technology necessary to exercise the right to private life and reproductive freedom to found a family*, as the Inter-American Court of Human Rights established in *Artavia Murillo et al. v. Costa Rica Case*.[2]

III.3. *Thirdly*, the authors claim that the State Party has violated their right to health under article 12 of the Covenant, in particular 12 (1) and (2) (c) and (d), because *Law 40/2004 cannot provide for adequate physical and mental health*.

They argued that: 1. *the Law 40/2004 is arbitrary* and introduces a restriction that is not reasonable or justified, as the ban on research does not distinguish between viable and non-viable embryos. The authors and draw the Committee's' s attention to *S.H. and others v. Austria* Case, in which the

[1] ECHR, *Parrillo v. Italy* Case, Application no. 46470/11, Judgment of 27 August 2015, para. 159.

[2] IACHR, *Artavia Murillo et al. v. Costa Rica* Case, Communication no. 257, Judgment of 28 November 2012, para. 146.

European Court of Human Rights[1] observed that artificial reproductive treatments were an area in which contracting States must constantly review their legislation. Or, Italy has failed to develop and adapt its legislation on this issue; 2. the law prohibits scientific research on embryos, even when they are affected by genetic disorders that make them not transferable; 3. *the Law hinders scientific research* on hereditary multiple osteochondromas and, as a result, the authors right to health is violated (since they cannot attempt to conceive again, unless a cure for hereditary multiple osteochondromas is found); and 4. *the law does not specify* whether *consent to transfer an embryo into the uterus can be withdrawn after fertilization* thus, S.C.'s right to health was violated when she was forced to endure transfer into her uterus of an embryo against her will and was not given the opportunity to withdraw her consent. The transfer of the embryo resulted in a miscarriage, which causes long-term physical and long-term psychological effects. Moreover, the authors argue that this uncertainty regarding whether or not consent to transfer can be withdrawn after fertilization has prevented them from trying to conceive again, thus violating their right to health, and in particular reproductive health.

III.4. *Fourthly*, the authors claim that the State Party has violated their rights under article 10 of the *ICESCR* because *it failed to provide the widest possible protection and assistance to the authors, as a family*, as well as to other couples in Italy who are or will be in similar situations.

The authors further claim that if a woman cannot decline the transfer into her uterus of an embryo that, on the basis of objective criteria, is deemed to have "low chances of success", and if she does not want to take the high risk of a miscarriage, then she cannot freely decide the number, spacing and timing of her children. The continuing silence of the State party on the question of the withdrawal of consent to embryonic transfer after the IVF violates the rights of S.C., as well as of any woman in a similar situation, to choose if, when and how to establish her family.

In terms of *reparations* sought, the authors requested that:

1. the State Party takes *measures to ensure non-repetition* – either replacing Law 40/2004 with *a new law* that takes into consideration

[1] ECHR, *S.H. and others v. Austria* Case, Application no. 57813/00, Judgment of 3 November 2011, para. 118.

all international human rights obligations that the State party has committed to, and all relevant decisions of the Constitutional Court of Italy, the European Court of Human Rights and the Committee or, alternatively, *amended some of the provisions of the existing law* to ensure non-repetition (for example, articles 13 and 14.1 of the Law no. 40/2004 must contain a definition of embryo that allows research and experimentation on blastocysts and embryos up to 14 days after fertilization or when they are affected by a genetic disorder or are otherwise non-transferrable into the uterus; article 6 must specify that consent to transfer an embryo into the uterus can be withdrawn);

2. the State Party *compensate* them for the *physical, psychological and moral suffering;*
3. the State Party *reimburse their legal costs*.

## IV. The qualification of the authors' claims by the CESCR. The admissibility criteria. The legal questions and the views of the CESCR

### IV.1. The qualification of the communication by the CESCR

In my opinion, one of the most interesting part of this view – even if the Committee declared that a claim under article 15 is inadmissible – is the one in which the CESCR qualified the claims of the authors as this part actually points out one of the recent preoccupations of the Committee namely the one related to the clarification of the scope of application of article 15 of the *ICESCR*. To be more precise, this qualification is done in a context in which the Committee undertakes a vey innovative approach in its new draft General Comment which aims to bring light as to the relation and interaction between ESC rights and science.[1]

Thus, in the communication before it, the Committee noted that – even if the authors themselves formulated theirs claims in a slightly different logic – in reality they raised, in their communication, *two different claims with very different legal grounds.*

In the Committee' s opinion, the *first* claim is that the authors' right to health, alone and in conjunction with the protection of family, has been

[1] See for other details, about the process but also about the contents of the new draft General Comment *Science and economic, social and cultural rights*, 2nd of January 2020: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/DraftGeneralComment_Science.aspx

violated because: 1. S.C. was compelled, against her will, to have transferred into her uterus an embryo with low possibilities of nesting and that she eventually suffered a miscarriage and 2. that the uncertainty created by the law regarding whether the consent to the transfer can be withdrawn after fertilization prevented the authors from trying to conceive again through an IVF procedure. This claim raises issues under article 12 and article 10 of the *ICESCR*.

As far as the *second* claim is concerned, this has to do with the prohibition faced by the authors to donate their nine remaining embryos, to scientific research and that raises issues on a possible interference with the author right to enjoy the benefits of scientific progress and its applications, restricting freedom of reach and thus constituting a violation of the authors right to health. Thus, the Committee considered that this claim raises issues under article 15 and under article 12 (2) (c) and (d) of the Covenant.

If the first claim, as qualified by the Committee, was found to be substantiated and thus the Committee dealt with its merits, in respect of the second one, the Committee took the opposite view and considered it to be insufficiently substantiated, thus inadmissible and did not discussed the merits.

Because this second claim was dealt with by the CESCR under the admissibility criteria, we will also explain the Committee's rationale when discussing the admissibility criteria, namely in the following sub-section.

### IV.2. The admissibility criteria

In accordance with article 3 of the *OP-ICESCR*, before considering any claim contained in a communication, the Committee must decide whether or not the communication is admissible.[1]

[1] Article 3 of the *OP-ICESCR* states that: *1. The Committee shall not consider a communication unless it has ascertained that all available domestic remedies have been exhausted. This shall not be the rule where the application of such remedies in unreasonably prolonged. (2) The Committee shall declare a communication inadmissible when: a. it is not submitted within one year after the exhaustion of domestic remedies, except in cases where the author can demonstrate that it had not been possible to submit the communication within that time limit; b. the facts that are subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date; c. the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement; d. it is incompatible with the provisions of the Covenant; e. it is manifestly ill-founded, not sufficiently substantiated or exclusively based on reports disseminated by mass media; e. it is an abuse of the right to submit a communication; or when g. it is anonymous or not in writing.*

In the present communication, even if the State Party has not challenged any of the admissibility criteria under the Optional Protocol in respect of the authors' communication, nevertheless the Committee followed its well established practice – independently of whether this was or was not raised by the State Party – of dealing with each of the admissibility criteria that need to be fulfilled under the *OP-ICESCR* (para. 6.2.).

If many of the admissibility criteria were quickly considered as fulfilled (for example, the exhaustion of domestic remedies), some of them were discussed by the Committee in greater length and in much detail (for example, the admissibility *ratione temporis* or the substantiation of the claim).

When discussing the admissibility *ratione temporis* of the communication the Committee departed from two main statements of the situation: firstly, that other human rights treaties include a similar *ratione temporis* provision – giving rise to various interpretations and therefore it deems useful to clarify the meaning of this condition of admissibility – and secondly, from the existence of its already established jurisprudential lines as to the admissibility *ratione temporis* under the Optional Protocol.

Thus, the Committee noted that, in order to determine whether a communication satisfies the admissibility criteria established in article 3 (2) (b) of the Optional Protocol, it is necessary to distinguish between the facts allegedly amounting to a violation of the Covenant, and the consequences or effects that flow from those facts.

In this respect the CESCR reiterated its previously formulated views.[1]

Consequently, firstly, the Committee has noted, that an act that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences extend in time.[2] Therefore, when the facts constituting a violation of the Covenant occurred before the entry into force of the Optional Protocol for the State party concerned, the mere fact that their consequences or effects have not been extinguished, after the entry into force, is not sufficient grounds for declaring a communication admissible *ratione temporis*. If no distinction were made between the acts

[1] See for details L.-M. Crăciunean-Tatu, *Admissibility* ratione temporis *of an individual communication: synthesis of the UN Committee on Economic, Social and Cultural rights Case-Law* in *AULB* no. 2/2017, p. 189-195.

[2] CESCR, *Merino Sierra v. Spain* Case (E/C.12/59/D/4/2014), para. 6.7.; CESCR, *Alarcón Flores et al. v. Ecuador* Case (E/C.12/62/D/14/2016), para. 9.7. See also *Yearbook of the International Law Commission 2001*, vol. II, Part Two, draft articles on responsibility of States for internationally wrongful acts, commentary on art. 14 (extension in time of the breach of an international obligation), p. 60, para. 6.

that gave rise to the alleged violation and its ongoing consequences or effects, the *ratione temporis* admissibility criteria established in the Optional Protocol, relating to the Committee's competence to consider individual communications, would be virtually irrelevant[1] (para. 6.5.).

Secondly, it continued with a definition of facts – for the purposes of article 3 (2) (b) of the Optional Protocol – and presented a much elaborated (when compared with previous views) explanation of these facts. Thus, in the CESCR opinion: "*facts are the sequence of events, acts or omissions* which are attributable to the State party and may have given rise to the alleged violation of the Covenant. (…) *the judicial or administrative decisions of the national authorities are also considered to be part of the facts when they are the outcome of proceedings directly related to the initial events, acts or omissions that gave rise to the violation and could have provided reparation for the alleged violation in accordance with the law in force at the time"* (para. 6.6.).[2]

With respect of the admissibility criteria related to the *substantiation* of certain parts of the communication, as previously mentioned the Committee noted that all claims raised by the authors are related to two facts: first, the transfer of the authors' embryo into S.C.'s uterus without her consent; and second, the refusal by the clinic to surrender the embryos so that they could be donated for use in scientific research. The first fact fulfills all the admissibility criteria. Instead the second one does not, being insufficiently substantiated. Thus, the Committee declared the communication inadmissible, for not being sufficiently substantiated, in relation to the claim that the prohibition on donating the embryos violated the rights of the authors under article 15 of the Covenant.

The rationale of the Committee was as follows.

The Committee departed in its analysis from the fact that it may not – with the consequence of the communication being inadmissible – examine a communication *in abstracto* and thus assess whether an action or an omission of a State party is compatible with the Covenant, unless such action or omission has affected the author of the communication. The main argument is that the provisions of article 2 of the *OP-ICESCR* follow such an approach and restrict the *locus standi* for submitting communications" to the *victims* of a violation of any of the economic, social and cultural rights

[1] *Alarcón Flores v. Ecuador* Case, para. 9.7.

[2] See for details, in respect of previous definitions of facts in the views of the CESCR, L.-M. Crăciunean-Tatu, *Repere din jurisprudența Comitetului ONU pentru Drepturile Economice, Sociale și Culturale* [*Brief Overview of the United Nations Committee on Economic, Social and Cultural Rights' Jurisprudence*] in *AUVT* no. 2/2018, p. 18-19.

set forth in the Covenant by that State Party".[1] Even though the Optional Protocol does not specifically substantiate the victim status, that provision was explained, in this case, by the CESCR, as referring to *real/actual* or *potential victims* of a violation of the rights enshrined in the Covenant.[2]

Or, in the present case, the authors had not "provided sufficient evidence that there was a probable, or at least a reasonable, link between the donation of these specific embryos and the development of better treatments for the disease or the reduction of the probability of its hereditary transmission, that would benefit them personally" (otherwise, their claim would have been admissible – seems to suggest the CESCR). Moreover, the Committee continues by saying that:" the petition does not substantiate the existence of this link (…) it does not provide any minimum level of evidence that the donation of these specific embryos would produce any concrete benefit for the authors in relation to hereditary multiple osteochondromas. It is not even clear at all that the embryos would be used in research on this disease. Thus, the argument about the benefits for the authors remains speculative" (para. 6.16).

As to the argument that the authors want to donate the embryos to scientific research, in general, – even if that research does not have any meaningful possibility of benefiting them directly – and that the restriction (on the possibility of donating their embryos) imposed by Law no. 40/2004, violates their right to participate in scientific research – which they consider to be part of the Covenant – the Committee considered that: "it is not necessary to analyze, on this occasion, whether or to what extent the Covenant incorporates a right for every person to take part in scientific research", that, in any case, "the burden is on the authors to show that they really intended to take part in a scientific endeavor" and that "the authors do not substantiate in any meaningful manner that a donation of an embryo is really a form of participation in scientific research" (para. 6.17.).

### IV.3. The legal questions and the views of the CESCR

In the light of its own qualification of the claim and its conclusion on the relevant facts, CESCR considered that the communication raises *two central legal questions* – both questions were raised under the rights protected by

[1] Article 2 of the *OP-ICESCR* states that: *Communications may be submitted by or on behalf of the individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party.*

[2] CESCR, *S.C. and G.P. v. Italy* Case, Communication no. 20/2017, para. 6.15.

article 12, taken alone or in conjunction with article 10 of the *ICESCR* – and *two preliminary legal questions* – which were considered important to answer before the Committee answers to the central ones.

The central legal questions were: 1. *whether the transfer of an embryo into S.C.'s uterus without her consent was a violation of her right to the highest attainable standard of physical and mental health* (article 12 of the *ICESCR*); and 2. *whether the uncertainty, created by the law***,** regarding whether consent to the transfer of embryos can be withdrawn after fertilization, *constitutes a violation of the authors' right to the highest attainable standard of health* under article 12 and *to the protection of their family* under article 10.

As far as the preliminary questions were concerned, the Committee considered that these two were: 1. which is the *scope of the right* to the highest attainable standard of physical and mental *health* and its *relation with gender equality*; and 2. which are the *restrictions* that are allowed to *article 12.*

To answer these two preliminary legal questions the CESCR *firstly*, *clarified the scope of article 12* and established that *the right to the highest attainable standard of physical and mental health incorporates the right to sexual and reproductive health.* This right (to sexual and reproductive health) is indivisible from and interdependent with other human rights. It is intimately linked to civil and political rights underpinning the physical and mental integrity of individuals and their autonomy, such as the rights to life; liberty and security of person; freedom from torture and other cruel, inhuman or degrading treatment".[1] The Committee also recalls that "the right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health".[2] Additionally, "violations of the obligation to respect occur when the State, through laws, policies or actions, undermines the right to sexual and reproductive health. Such violations include State interference with an individual's freedom to control his or her own body and ability to make free, informed and responsible decisions in this regard (…). Laws and policies that prescribe involuntary, coercive or forced medical interventions,

[1] CESCR, *General Comment no. 22/2016 on the right to sexual and reproductive health*, para. 10.

[2] Ibid., para. 5.

including forced sterilization or mandatory HIV/AIDS, virginity or pregnancy testing, also violate the obligation to respect".[1]

*Secondly*, the CESCR *discussed this article in relation with the non-discrimination provision* – in this case, on the basis of sex – as guaranteed in article 2 (2) of the Covenant, *and with the equality of women and men*, as guaranteed in article 3 of the Covenant. In the Committee' s opinion, these two provisions require the removal of both direct and indirect discrimination, and the ensuring of formal as well as substantive equality. Seemingly neutral laws, policies and practices can perpetuate already existing gender inequalities and discrimination against women. Substantive equality requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health"[2]. Thus, the Committee recalled that, as part of State party's obligations under article 3, "it is incumbent upon States parties to take into account the effect of apparently gender-neutral laws, policies and programmes and to consider whether they could result in a negative impact on the ability of men and women to enjoy their human rights on a basis of equality".[3]

*Thirdly*, the *restrictions* which are allowed *to the right to the highest attainable standard of health* were discussed. The CESCR departed from the fact that article 12 of the Covenant is not absolute and may be subject to such limitations as permitted by article 4 of the Covenant. Then recalled that the Covenant's limitation clause, article 4, is primarily intended to protect the rights of individuals rather than to permit the imposition of limitations by States. And concluded that, a State party imposing a restriction on the enjoyment of a right under the Covenant has the burden of justifying such serious measures in relation to each of the elements identified in article 4 and that such restrictions must be in *accordance with the law*, including international human rights standards, *compatible with the nature of the rights* protected by the Covenant, *in the interest of legitimate aims pursued*, and *strictly necessary* for the promotion of the general welfare in a democratic society.[4]

After founding its replies to the preliminary questions, the CESCR continued with the two central legal questions.

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[1] Ibid., paras. 56–57.

[2] Ibid., paras. 26–27.

[3] CESCR, *General Comment no. 16/2005 on the equal right of men and women to the enjoyment of all economic, social and cultural rights*, para. 18.

[4] CESCR, *General Comment no. 14/2000 on the right to the highest attainable standard of health*, para. 28.

The *first* question was *whether the transfer of an embryo into S.C.'s uterus without her consent was a violation of her right to the highest attainable standard of physical and mental health* (article 12 of the *ICESCR*).

In this respect the Committee discussed the lack of consent to and the forced transfer of the „average quality„ embryo into S.C.'s uterus and was of the opinion that forcing a woman to have an embryo transferred into her uterus, clearly, constituted a forced medical intervention. Moreover, recalling that the right to health includes the right to make free and informed decisions concerning any medical treatment a person might be subjected to and that laws and policies that prescribe involuntary, coercive or forced medical interventions violate the State's responsibility to respect the right to health, the Committee concluded that, in the circumstances of the case, the facts presented before it constitute a violation of S.C.'s right to health, as enshrined in article 12 of the Covenant.

As far as the relation of article 12 read in conjunction with article 2 of the *ICESCR* was concerned, the Committee recalled that the requirement of equality between women and men, as guaranteed by article 3 of the Covenant, requires that laws, policies and practices do not maintain, but rather alleviate, the inherent disadvantage that women experience in exercising their right to sexual and reproductive health, and that seemingly neutral laws can perpetuate already existing gender inequalities and discrimination against women. Or, the Law no. 40/2004, as interpreted in the authors' case, restricts the right of women undergoing the treatment to waive their consent, leading to the possibility of forced medical interventions or even pregnancies for all women undergoing IVF treatments. It considers that, even if, on the face of it, this restriction on the right to withdraw one's consent affects both sexes, it places an extremely high burden on women. The Committee notes that the possible consequences on women are extremely grave, constituting a direct violation of women's right to health and physical integrity.

Thus, the Committee concluded that the transfer of an embryo into S.C.'s uterus without her valid consent constituted a violation of her right to the highest attainable standard of health and her right to gender equality in her enjoyment of her right to health, amounting to a violation of article 12, read alone and in conjunction with article 3, of the Covenant.

The *second* question was *whether the uncertainty, created by the law,* regarding whether consent to the transfer of embryos can be withdrawn after fertilization, *constitutes a violation of the authors' right to the highest attainable standard of health* under article 12 and *to the protection of their family* under article 10.

As experienced by the authors, S.C. was unable to withdraw her consent after fertilization, and the authors have reasons to fear that they might experience a similar situation if they attempt an in vitro fertilization again. Consequently, the Committee acknowledged that the authors are prevented from accessing IVF treatments and considered that the Law no. 40/2004 imposes a restriction on the authors' right to health, as it prevents their access to a health treatment that is otherwise available in the State party.

Consequently, the next issue under discussion was if this restriction complies with the limitations provided for in article 4 of the Covenant, namely with the nature of the right under discussion. The Committee has found that the prohibition on withdrawing one's consent to the transfer of an embryo constitutes a violation of the right to health, as it can lead to forced medical interventions or even forced pregnancies. This prohibition touches upon the very substance of the right to health and goes beyond the kind of restriction that would be justified under article 4 of the Covenant. This prohibition, or at least the ambiguity concerning the existence of this prohibition, is at the origin of the author's inability to access in vitro fertilization treatments. Consequently, the Committee has found that the restriction is not compatible with the nature of the right to health and that the facts presented before it discloses a violation of article 12 of the Covenant in respect of both authors.

Having found that the restriction on the authors' access to IVF treatment violates the authors' rights under article 12 of the Covenant, the Committee considered that it is not necessary to examine the authors' claims under article 10.

Consequently, the CESCR made two type of recommendations, in respect of the authors and general recommendations.

As far as *the authors* are concerned, Italy has to provide them with an *effective remedy*, including by: (a) establishing the appropriate conditions to enable the authors' right to access IVF treatments with trust that their right to withdraw their consent to medical treatments will be respected; (b) ensuring that S.C. is protected from any unwanted medical intervention and that her right to make free decisions regarding her own body is respected; (c) awarding S.C. adequate compensation for the physical, psychological and moral damages suffered; and (d) reimbursing the authors for the legal costs reasonably incurred in the processing of the present communication.

As far as the *general recommendations*, the CESCR asked the Italy to provide *guarantees of non-repetition* and ensure that its legislation and the enforcement thereof are consistent with the obligations established under the

Covenant. In particular, the State party has the obligation to: (a) adopt appropriate legislative and/or administrative measures to guarantee the right of all women to take free decisions regarding medical interventions affecting their bodies, in particular ensuring their right to withdraw their consent to the transfer of embryos into their uterus; (b) adopt appropriate legislative and/or administrative measures to guarantee access to all reproductive treatments generally available and to allow all persons to withdraw their consent to the transfer of embryos for procreation, ensuring that all restrictions to access to these treatments comply with the criteria provided in article 4 of the Covenant.

## V. Conclusions

To conclude, the communication is interesting to read and discuss, at least,[1] because of *five of its contributions* brought to the building up and the evolvement of the CESCR' jurisprudence.

In short, these contribution might be: *firstly* and *secondly*, a preliminary discussion on the *scope of application of article 15* of the *ICESCR* including the existence, in article 15, of distinct *right of every individual to take part in scientific research* (even if the Committee did not found a violation of this provision), in a general context in which one of the recent preoccupations of the Committee is to clarify the scope of application of article 15 of Covenant, including by providing a better understanding and explanation as to what are the relations and interactions between science and economic, social and cultural rights; *thirdly*, a substantiation of the *victim status*, as referring to real/actual or potential victims of a violation of the rights enshrined in the Covenant; *fourthly*, a *more elaborated definition of facts,* for the purposes of article 3 (2) (b) of the Optional Protocol; and *fifthly*, the reminder that artificial reproductive treatments are an area in which contracting States must constantly review their legislation as to be able to fulfill their obligations under the *ICESCR*.

[1] Some other contributions such as the discussion of article 12 in relation with the non-discrimination provision – in this case, on the basis of sex – as guaranteed in article 2 (2) of the Covenant, and with the equality of women and men, as guaranteed in article 3 of the Covenant, as well as the access to reproductive rights and the existence, in the contents of article 12, of a right to sexual and reproductive health, are also worth mentioning.

As far as the *first and second* contributions are concerned, as mentioned before, this the first communication under article 15 and it comes in the moment in which the Committee undertakes a very innovative approach in its new draft General Comment which aims to bring light as to the relation and interaction between economic, social and cultural rights and science.[1]

The *third* contribution, explains and elaborates on the provisions of article 2 of the *OP-ICESCR*. Thus, even though the Optional Protocol does not specifically substantiate the victim status, that provision was explained, in this case, by the CESCR, as referring to *real/actual* or *potential victims* of a violation of the rights enshrined in the Covenant.[2]

The *fourth* contribution, which elaborates, for the purposes of article 3 (2) (b) of the Optional Protocol, the definition of facts states that: ”facts are the sequence of events, acts or omissions which are attributable to the State Party and may have given rise to the alleged violation of the Covenant. As the Committee has noted in previous Views, **th***e judicial or administrative decisions of the national* authorities are also considered to be part of the

[1] See for other details, about the process but also about the contents of the new draft General Comment *Science and economic, social and cultural rights*, 2nd of January 2020: https://www.ohchr.org/EN/HRBodies/CESCR/Pages/DraftGeneralComment_Science.aspx

This Draft affirms the existence of both a right of every individual to participate in science as well as the existence of a distinct human right to science. To quote from the draft, ”this understanding is corroborated by the *travaux préparatoires* concerning the drafting of article 15 of the Covenant and its relationship with the UDHR. The UDHR is in general relevant to establish the scope of all the rights enshrined in the Covenant, not only because the preamble explicitly mentions the UDHR but also because both Covenants were an effort by the international community to develop in binding treaties the UDHR. In that sense, article 27 of the UDHR, which recognizes a right to take part or participate in scientific advancement and its benefits, should be taken into account. Further, a strictly dichotomous approach whereby scientists would have an extensive right to participate in and contribute to scientific development, but the general population would merely have the right to enjoy passively the benefits of scientific progress and its applications, is incompatible with the principles of participation and inclusiveness underlying the Covenant and a systemic reading of Article 15 in the broader context in which it appears. Thus, doing science does not only concern scientific professionals but also includes citizen science (ordinary people doing science) and the dissemination of scientific knowledge. State Parties must not only refrain from preventing citizen participation in scientific activities but must also facilitate such participation”. Thus, in this context, a right to science will be: ”a set of rights, entitlements, liberties, duties or obligations related to science, analyzed in this General Comment, might be brought together in a single broad concept named the human right to science, in the same way that, for example, the human right to health encompasses a set of rights and freedoms. This approach and name have already been adopted by the Special Rapporteur on Cultural Rights by UNESCO, by some international conferences and summits and by some important scientific organizations and publications”.

[2] CESCR, *S.C. and G.P. v. Italy* Case, Communication no. 20/2017, para. 6.15.

facts *when they are the outcome of proceedings directly related to the initial events, acts or omissions* that gave rise to the violation and could have provided reparation for the alleged violation in accordance with the law in force at the time.[1]

*Finally*, the reminder, to States Parties, that artificial reproductive treatments are an area in which they must constantly review their legislation as to be able to fulfill their obligations under the *ICESCR*.

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[1] See for details, L.-M. Crăciunean-Tatu, *Repere din jurisprudența Comitetului ONU pentru Drepturile Economice, Sociale și Culturale* [*Brief Overview of the United Nations Committee on Economic, Social and Cultural Rights*' *Jurisprudence*] in *AUVT* no. 2/2018, p. 18-19.