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International Covenant on Civil and Political Rights

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Human Rights Committee

Decision adopted by the Committee under the Optional Protocol, concerning communication No. 2972/2017*, **

Communication submitted by:	M.C.Z. (represented by the criminal cassation defence counsel of the Province of Buenos Aires)
Alleged victim:	The author
State party:	Argentina
Date of communication:	11 February 2015 (initial submission)
Document references:	Decision taken pursuant to rule 92 of the Committee's rules of procedure, transmitted to the State party on 6 April 2017 (not issued in document form)
Date of adoption of decision:	19 July 2023
Subject matter:	Imposition of a sentence greater than that requested by the Prosecutor
Substantive issues:	Right to be tried by a competent, independent and impartial tribunal; right to due process; right to a defence, adequate time and facilities; right of appeal; equality before the law
Procedural issue:	Exhaustion of domestic remedies
Articles of the Covenant:	14 (1), (3) (a) and (b) and (5)
Article of the Optional Protocol:	2

1. The author of the communication is M.C.Z., a national of Argentina born on 7 December 1975. She claims that the State party has violated her rights under article 14 (1), (3) (a) and (b) and (5) of the Covenant. The Optional Protocol entered into force for the State party on 8 November 1986. The author is represented by counsel.[1]

* Adopted by the Committee at its 138th session (26 June–26 July 2023).

** The following members of the Committee participated in the examination of the communication: Tania María Abdo Rocholl, Farid Ahmadov, Wafaa Ashraf Moharram Bassim, Rodrigo A. Carazo, Yvonne Donders, Mahjoub El Haiba, Carlos Gómez Martínez, Laurence R. Helfer, Marcia V.J. Kran, Bacre Waly Ndiaye, Hernán Quezada Cabrera, José Manuel Santos Pais, Soh Changrok, Tijana Šurlan, Kobauyah Tchamdja Kpatcha, Teraya Koji, Hélène Tigroudja and Imeru Tamerat Yigezu.

[1] The initial submission was received on 11 February 2015 but was not registered until 6 April 2017. During the intervening period, the secretariat did not receive any additional information from the author.

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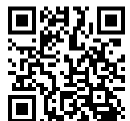

Facts as submitted by the author

2.1 On 15 June 2005, the author was convicted by Criminal Court No. 1 of Tandil in the Province of Buenos Aires for the aggravated homicide of her husband, mitigated by extraordinary circumstances.

2.2 The author notes that the Public Prosecution Service, in seeking a sentence of 10 years' imprisonment for the aggravated homicide of her husband, moved for the following aggravating circumstances to be taken into consideration: (a) the fact that the act had been planned long in advance; (b) the devious and underhand manner in which the homicide was committed; and (c) the attempts to hinder the establishment of the facts. At the same time, the Public Prosecution Service moved for the following mitigating factors to be taken into account: (a) the defendant's good standing; and (b) her lack of a criminal record. The author notes that the lower court disregarded one of the aggravating circumstances, considering only the premeditation and the devious and underhand manner of the homicide, and, in addition to the mitigating factors raised by the prosecution, took into account that the author is a loving and attentive mother to her children. Nevertheless, the court sentenced the author to 12 years' imprisonment, or two years more than the penalty sought by the prosecution.

2.3 On 4 July 2005, the author appealed the sentenced before the Second Chamber of the Court of Criminal Cassation of the Province of Buenos Aires. Among other allegations, the author claimed that the lower court had not taken due account of the mitigating factors and aggravated circumstances, in breach of articles 40 and 41 of the Criminal Code, and had exceeded the penalty sought by the Public Prosecution Service. The author argued that there was no procedural rule giving the court the power to impose a harsher penalty than that sought by the prosecution. Yet, the court had been able to do this, demonstrating that it had played an inquisitorial role in the criminal proceedings, in violation of the Code of Criminal Procedure of the Province of Buenos Aires, which establishes an adversarial system where the most important part of a criminal claim − sentencing, according to the author − limits the intervention of the court, preventing it from imposing a sentence more severe than that sought by the Federal Prosecution Service.

2.4 On 15 July 2008, the Second Chamber of the Court of Criminal Cassation dismissed the appeal for being unfounded, as the penalty imposed on the author was within the established range for the offence. The Second Chamber reviewed the decision, noting, inter alia, that the lower court had arrived at the sentence after weighing the aggravating circumstances and mitigating factors and that considering one less aggravating circumstance and one more mitigating factor than what the prosecution had submitted did not necessarily entail the imposition of a less severe penalty than the one sought by the prosecution. It further noted that articles 40 and 41 of the Criminal Code, regulating the determination of sentences, did not require judges to begin at the lowest end of the range of applicable penalties or set any formal limits on the guidelines that they should follow when determining a sentence.

2.5 The judgment of the Court of Criminal Cassation establishes that, once the prosecution has initiated criminal proceedings, it is the exclusive power of the court to administer justice and impose the penalty it deems appropriate, within the ranges applicable to the offence and in accordance with the guidelines set out in the law, without any limit whatsoever, except in the case of expedited trials conducted under article 399 of the Code of Criminal Procedure of the Province of Buenos Aires,[2] which does not apply in the present case. The judgment also notes that, to justify the duration of the penalty, judges need only follow the guidelines established in article 40 of the Criminal Code and the limits defined in article 371 (4) of the Code of Criminal Procedure of the Province of Buenos Aires in force at the time of the ruling.

2.6 On 27 February 2009, the author filed an appeal against the judgment with the Supreme Court of the Province of Buenos Aires, citing the inapplicability of the law invoked, in which she repeated that the sentence imposed on her was arbitrary and that her constitutional rights to due process, to be tried by an impartial court and to a defence had

[2] "Chapter III − Expedited trials … The sentence shall be handed down within five days on the basis of the evidence presented prior to the ruling. The sentence may not exceed the penalty sought by the prosecution …"

been violated. In addition, the author requested the Supreme Court to declare unconstitutional article 371 of the Code of Criminal Procedure of the Province of Buenos Aires on the grounds that it promoted an inquisitorial system of criminal justice by not preventing judges from handing down a more severe penalty than that sought by the prosecution. She subsequently requested the subsidiary application of article 399 of the above-mentioned Code, which delineates the discretionary powers of judges in respect of the applicable penalties in expedited trials.

2.7 On 6 June 2011, the Supreme Court of the Province of Buenos Aires dismissed the author's appeal, noting that, while article 374 of the Code of Criminal Procedure stipulates that the courts may not deviate from the facts included in the indictment and any expansions thereof, it does not contain a similar provision concerning the penalty.

2.8 Furthermore, the Supreme Court explained that matters of interpretation and application of procedural law fell outside its competence. It found that it could not consider the constitutionality of article 371 of the Code of Criminal Procedure of the Province of Buenos Aires because the provision had not been applied against the author's claim and that article 399 of the Code only applies to expedited trials, which was not the type of proceeding in the author's case.

2.9 On 3 October 2011, the author filed an extraordinary federal appeal with the Supreme Court of the Province of Buenos Aires in which she reiterated that her constitutional rights to due process, to be tried by an impartial court and to a defence had been violated. In addition, she submitted that the pro homine principle had been violated,[3] alleging that the most restrictive interpretation of the law had been applied in her case.

2.10 On 13 November 2013, the Supreme Court of the Province of Buenos Aires dismissed the extraordinary federal appeal. It was of the view that the author's allegations reproduced the arguments raised in the appeal against the applicability of the Code of Criminal Procedure, noting that, as the pro homine principle had not been raised in the other proceedings, it could not be brought to bear at that stage.

2.11 On 30 April 2014, the author filed a complaint before the Supreme Court of Argentina, citing the dismissal of her extraordinary federal appeal.

2.12 On 30 December 2014, the Supreme Court of Argentina dismissed the complaint for being manifestly unfounded under article 280 of the National Code of Civil and Commercial Procedure.[4]

Complaint

3.1 The author claims that the State party has violated her rights under article 14 (1), (3) (a) and (b) and (5) of the Covenant.

3.2 With regard to article 14 (1) of the Covenant, the author stresses that she was not provided with a public hearing with all appropriate safeguards since, although the hearing was public, from a substantive point of view, it cannot be said to have served as a mechanism to ensure compliance with those safeguards. She also notes that she was not tried by an impartial court, as the judges not only acted in a manner that favoured one of the parties over the other, they also acted against the interests of both parties by handing down a sentence more severe than that sought by the prosecution. The author submits that the lower court's impartiality was compromised when it handed down a penalty more severe than the one

[3] In accordance with paragraph 36 of Inter-American Court of Human Rights advisory opinion No. 7/86 on the enforceability of the right to reply or correction (arts. 14 (1), 1 (1) and 2 of the American Convention on Human Rights) of 29 August 1986, "…the fundamental criterion which creates the very nature of human rights requires that the norms which guarantee or extend human rights be broadly interpreted and those that limit or restrict human rights be narrowly interpreted … the pro homine principle ..."

[4] "The Court, at its discretion and on the sole basis of this law, may dismiss the extraordinary appeal where there is insufficient cause for a federal grievance or where the matters raised lack substance or significance …"

sought by the prosecution, as it had not at any point expressed its intention to impose a harsher sentence than had been discussed during the trial.[5]

3.3 The author claims that article 374 of the Code of Criminal Procedure of the Province of Buenos Aires, whereby judges are not prevented from imposing a more severe penalty than that sought by the Public Prosecution Service, is incompatible with article 14 (3) (a) and (b) of the Covenant. Regarding article 14 (3) (a), the author claims that, by handing down a harsher penalty than that sought by the Public Prosecution Service, the State party also violated her right to be informed without delay and in detail of the nature and cause of the formal indictment against her. In fact, she was informed of the duration of the penalty at a late and unexpected stage of sentencing. Concerning article 14 (3) (b), the author claims that the late disclosure of the duration of her sentence also violated her right to adequate time and facilities to prepare her defence inasmuch as the manner of the disclosure prevented her from presenting evidence of the penalty's disproportionality.[6]

3.4 The author notes that, under Act No. 27.063 amending the Federal Code of Criminal Procedure, which entered into force on 10 December 2014, the State party established that judges cannot impose a more severe penalty than that sought by the prosecution in any federal criminal proceedings.[7] According to the author, this should also apply to offences governed by the Code of Criminal Procedure of the Province of Buenos Aires and therefore the proceedings against her violated rights enshrined in the Covenant.

3.5 The author claims that, by imposing a harsher penalty than that sought by the Public Prosecution Service, the State party also violated her right to have her conviction and sentence reviewed by a higher court in keeping with article 14 (5) of the Covenant. The author argues that the ultimate duration of the sentence was not part of the trial or the charges; therefore, the appeal before the Court of Criminal Cassation was the first opportunity to defend herself against the sentence.

State party's observations on admissibility and the merits

4.1 On 7 February 2018, the State party provided its observations on the admissibility and merits of the communication. The State party submits that the communication is inadmissible under article 2 of the Optional Protocol due to lack of sufficient substantiation.

4.2 The State party contends that the author's submission constitutes an abuse of the right of submission because it is an attempt to use the Committee as a fourth instance to obtain a reduction of her sentence. It also contends that the author failed to demonstrate in her submission that there have been any violations of due process, as the legal issues she raised were addressed competently and in sufficient detail in the court decisions, and that she was requesting the Committee to examine the legal interpretation contained in the decisions of the national courts in her regard. It points out that, in keeping with the Committee's jurisprudence, the Committee is not a fourth instance competent to re-evaluate the findings of national courts and interpret domestic legislation.[8]

4.3 With regard to the right to a defence, the State party submits that the indictment never changed and that the author knew from the start of the proceedings with which offence she was charged. The offence, along with the minimum and maximum penalties for its commission, are provided for in article 80 of the Criminal Code. The State party refers to the interpretation of article 8 (2) (b) of the American Convention on Human Rights, in conjunction with article 14 (3) (a) of the Covenant, in arguing that it is essential for defendants that the facts and circumstances in the indictment be immutable, as these are an

[5] The author cites *Rodríguez Orejuela v. Colombia* (CCPR/C/75/D/848/1999), para. 7.3.

[6] Human Rights Committee, general comment No. 32 (2007), paras. 31 and 33.

[7] Article 273 of the Federal Code of Criminal Procedure: "Parallel between indictment and sentence … [Judges m]ay not impose a more severe penalty than that sought by the prosecution and shall acquit the defendant when both parties so request."

[8] The State party cites *G.A. Van Meurs v. the Netherlands* (CCPR/C/39/D/215/1986), para. 7.1.

indispensable basis for the exercise of their defence and the consistent reasoning of the court's decision.[9]

4.4 The State party submits that the author's claims were appropriately dealt with by the national appellate courts, namely, the Court of Criminal Cassation of the Province of Buenos Aires and the Supreme Court of the Province of Buenos Aires. Therefore, it cannot be said that her right to be heard was infringed. In addition, the State party notes that the author benefited from counsel and, contrary to her claims, was tried by impartial courts with no breaches of due process.

4.5 The State party is of the view that the communication does not reveal any violation of article 14 of the Covenant and therefore requests the Committee to find it inadmissible under article 2 of the Optional Protocol.

Author's comments on the State party's observations

5.1 On 3 April 2018, the author submitted her comments on the admissibility and merits of the communication. The author notes that the aim of her submission is not to clarify the facts or assess the evidence but to report violations of her rights under the Covenant. She submits that her aim is to obtain a finding of violation of article 14 (1), (3) (a) and (b) and (5) of the Covenant resulting from the fact that the court handed down a harsher sentence than the one sought by the Public Prosecution Service.

5.2 Concerning her right to a defence, the author reiterates that, in accordance with the Covenant, all persons charged with an offence have the right to be informed in detail of the charge against them. She notes that the State party's argument that she was aware of the penalty she was facing because it is established in article 80 of the Criminal Code would imply that all persons charged with an offence would have to defend themselves against the maximum established penalty.

5.3 The author claims that the indictment in her case was changed, going against the jurisprudence of the Inter-American Court of Human Rights cited by the State party. The author asserts that she was not afforded the right to prepare an adequate defence when the court of first instance unexpectedly broadened the indictment, in violation of procedural safeguards.

5.4 The author notes that the remedies she sought cannot be said, in substance, to have functioned as a safeguard. She submits that, from the moment that a penalty harsher than the one sought by the Public Prosecution Service was imposed in her case, there was a rift between the proceedings and the verdict that was eventually handed down. The foregoing was in violation of her right to a defence and to have the ruling reviewed by a higher court, as enshrined in article 14 (1) and (5) of the Covenant.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 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.

6.2 The Committee notes the author's claim that, by imposing a sentence more severe than that sought by the Public Prosecution Service, the lower court violated her rights to a defence, to due process and to be tried by an impartial court, as enshrined in article 14 (1) of the Covenant. The Committee points out that the Second Chamber of the Court of Criminal Cassation of the Province of Buenos Aires explained that, although the prosecution initiates criminal proceedings, it is the exclusive power of the court to administer justice and pronounce whatever sentence it deems appropriate within the range of penalties established for the offence, except in expedited trials governed by article 399 of the Code of Criminal Procedure of the Province of Buenos Aires. The Committee further notes the author's

[9] The State party cites the Inter-American Court of Human Rights, *Fermín Ramírez v. Guatemala*, judgment of 20 June 2005, para. 67.

argument that, since article 273 of the Federal Code of Criminal Procedure was amended, judges may no longer impose a penalty more severe than that sought by the prosecution in any type of criminal trial. However, the Committee points out that the amendment, which pertained to procedural law, became effective only in 2014, when it entered into force. The Committee also points out that the amendment, which does not apply to the author's case because it relates to the Federal Code of Criminal Procedure, not to the Code of Criminal Procedure of the Province of Buenos Aires, does not in itself illustrate that the provisions of the local procedural code applicable to the author's case are contrary to article 14 (1) of the Covenant. Moreover, the Committee recalls its constant jurisprudence, according to which it is not a fourth instance competent to re-evaluate the findings of national courts and interpret domestic legislation.[10] The Committee is thus of the view that the author has not substantiated these claims sufficiently for the purposes of admissibility and finds them inadmissible under article 2 of the Optional Protocol.

6.3 The Committee notes the author's assertion that the State party violated her rights under article 14 (3) (a) of the Covenant by imposing a harsher penalty than the one sought by the Public Prosecution Service, in contravention of her right to be informed without delay and in detail about the nature and cause of the formal indictment against her. The Committee also notes the author's argument that the imposition of a harsher penalty than the one sought by the Public Prosecution Service removed her from the protection of the law, as she was not afforded adequate time and facilities to sufficiently prepare her defence, in violation of her rights under article 14 (3) (b) of the Covenant. In addition, the Committee notes the State party's argument that what is essential for the accused's right to a defence is that the facts and circumstances in the indictment be immutable.[11] The Committee notes that no change was made to the indictment in the author's case, that she was aware from the beginning of the proceedings of what offence she was accused and that the sentence handed down is within the range of penalties established in law for the criminal offence in question. In the light of the foregoing and of the information before it, the Committee is of the view that the author has not sufficiently substantiated, for the purposes of admissibility, her claim that the imposition of a more severe penalty than that sought by the Public Prosecution Service removed her from the protection of the law and therefore finds it inadmissible under article 2 of the Optional Protocol.

6.4 The Committee notes the author's claim that the imposition of a more severe penalty than that sought by the Public Prosecution Service violated her right, under article 14 (5) of the Covenant, to have the ruling reviewed by a higher court. The Committee also notes the author's argument that not permitting her to challenge the appropriateness of the sentence meant that her appeal before the Court of Criminal Cassation was in effect the first opportunity to defend herself against the duration of the sentence. The Committee points out that the Second Chamber of the Court of Criminal Cassation of the Province of Buenos Aires heard all the points raised by the author during the appeal proceedings and reviewed the entirety of the conviction and sentence in keeping with the Covenant. Accordingly, the Committee is of the view that the author has not substantiated these claims sufficiently for the purposes of admissibility and finds them inadmissible under article 2 of the Optional Protocol.

7. The Committee therefore decides that:

(a) The communication is inadmissible under article 2 of the Optional Protocol;

(b) The present decision shall be communicated to the State party and to the author.

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[10] General comment No. 32 (2007), para. 26; *G.A. Van Meurs v. the Netherlands,* para. 7.1.

[11] Inter-American Court of Human Rights, *Fermín Ramírez v. Guatemala*, judgment of 20 June 2005, para. 67.