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

M.C.T.C.
v
Ecuador

Communication 10/2015

THIRD PARTY INTERVENTION

Submitted jointly by:

Amnesty International
Asociación Civil por la Igualdad y la Justicia
Center for Economic and Social Rights
Economic and Social Rights Centre – Hakijamii
Foro Ciudadano de Participación por la Justicia y los Derechos Humanos
Global Initiative for Economic, Social and Cultural Rights
International Women's Rights Action Watch Asia Pacific
Legal Resources Centre
Social Rights Advocacy Centre
Professor Lilian Chenwi
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As coordinated by: the International Network for Economic, Social and Cultural Rights (ESCR-Net), in accordance with Rule 14(1) of the Provisional Rules of Procedure of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights

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I. INTEREST OF THE INTERVENERS

1. Pursuant to leave granted by the Working Group on Communications of the Committee on Economic, Social and Cultural Rights (CESCR or Committee), by letter dated 8 September 2017, in accordance with Rule 14(1) of the Provisional Rules of Procedure of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), this third party intervention is submitted by the following members of the Strategic Litigation Working Group and Women and ESCR Working Group of ESCR-Net – International Network for Economic, Social and Cultural Rights:

    a. Amnesty International (AI, international)
    b. Asociación Civil por la Igualdad y la Justicia (ACIJ, Argentina)
    c. Center for Economic and Social Rights (CESR, international)
    d. Economic and Social Rights Centre – Hakijamii (Kenya)
    e. Foro Ciudadano de Participación por la Justicia y los Derechos Humanos (FOCO, Argentina)
    f. Global Initiative for Economic, Social and Cultural Rights (GI-ESCR, international)
    g. International Women's Rights Action Watch Asia Pacific (IWRAW AP, international)
    h. Legal Resources Centre (LRC, South Africa)
    i. Social Rights Advocacy Centre (SRAC, Canada)
    j. Professor Lilian Chenwi, School of Law, University of Witwatersrand (South Africa)
    k. Viviana Osorio Pérez (Colombia)

2. Each participant has extensive experience in the analysis of economic, social and cultural rights and/or gender issues, and is able to offer international and comparative perspectives to support the Committee in a proper determination of this case.

3. ESCR-Net is made up of over 280 NGOs, social movements and advocates across more than 75 countries. Members work collectively to facilitate the enjoyment of economic, social and cultural rights through, among other activities, engagement with UN treaty bodies as well as regional human rights mechanisms and processes. ESCR-Net has submitted collective third party interventions, and supported its members to submit such interventions, in a number of international and national jurisdictions in recent years. Since 2006, ESCR-Net has held consultative status with the United Nations Economic and Social Council through its previous fiscal sponsor, the Tides Center.

II. INTRODUCTION

4. This is the first case in which the Committee has the opportunity to consider the right to social security (article 9), and its interaction with the rights to non-discrimination and substantive equality of women guaranteed in articles 2(2) and 3, and the right to an adequate standard of living (article 11) under the International Covenant on Economic, Social and Cultural Rights (ICESCR or Covenant).

5. Currently, CESCR's General Comment No. 19 on the right to social security (General Comment) stands as the most comprehensive and authoritative articulation of the right and accompanying State party duties by a UN human rights treaty body.[1] It complements a broader international human rights law framework on this right, of which the major sources include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and other authoritative instruments and statements issued by the Committee on the Elimination of Discrimination against Women (CEDAW Committee), the International Labour Organization (ILO), the UN Special Rapporteur on extreme poverty and human rights (Special Rapporteur), and the UN Working Group on the issues of discrimination against women in law and practice.[2]

6. The General Comment addresses partly the situation of unpaid care work and its consequences for making contributions; the Committee refers to the importance of States parties taking steps to eliminate the factors that prevent women from making equal contributions, such as "intermittent participation in the workforce" due to "family responsibilities".[3] However, the Committee does not explicitly address the treatment of social insurance contributions made during periods of unpaid care work, and the associated implications for the right to social security specifically and the progressive realisation of the Covenant more broadly, particularly with regard to women undertaking unpaid care work.

7. Accordingly, CESCR has the opportunity to elaborate on its guidance regarding States parties' obligations and, in light of the relationship between gender, unpaid care work, social security, and living standards, the measures needed to ensure that the Covenant is responsive to women's lived experiences in practice.

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[1] CESCR, *General Comment No. 19: The Right to Social Security (art. 9)*, UN Doc. E/C.12/GC/19 (23 November 2007).
[2] For an overview of this framework, see Beth Goldblatt, *Developing the Right to Social Security – A Gender Perspective*, Routledge, 2016, Ch. 3.
[3] CESCR, *General Comment No. 19*, footnote 1 above, para. 32.

III. SUBMISSION

A. States parties must ensure that existing social security systems are enjoyed without discrimination, including for women who undertake unpaid care work

8. The exclusion of a significant number of the author's voluntary contributions, and the impact of such action, raises the question as to whether the Respondent State's actions constitute indirect discrimination, intersectional discrimination, and/or a failure to take positive steps to ensure substantive equality in practice.

9. **Indirect discrimination** occurs when a law or policy appears to be neutral, but has a disproportionate adverse impact based on a prohibited ground.[4] In line with standard UN human rights treaty law, the Constitutional Court of South Africa held that it is not essential to establish intent to discriminate, noting that showing intention will be extremely difficult in cases of indirect discrimination because "*there is almost always some purpose other than a discriminatory purpose.*"[5] Once indirect discrimination is *prima facie* established – which may occur through, for example, a recognised context of vulnerability and statistical or other evidence to show adverse impact on a particular group[6] – the burden of proof shifts to the State to demonstrate that there was a reasonable justification for the discrimination.[7] This is to be determined on the basis of reasonable and objective criteria in light of the facts of each particular case.[8]

10. CESCR has also recognised that ensuring freedom from discrimination requires States parties to take account of, and address, **intersectional discrimination** which arises due to intersecting factors of disadvantage.[9] Similarly, the CEDAW Committee draws on the principle of intersectionality

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[4] CESCR, *General Comment No. 20: Non-discrimination in economic, social and cultural rights (art. 2, para. 2)*, UN Doc. E/C.12/GC/20 (2 July 2009), para. 10(b); see also HRC, *Prince v South Africa*, Communication No. 1474/2006, UN Doc. CCPR/C/91/D/1474/2006 (14 November 2007), para. 7.5; *City Council of Pretoria v Walker*, 1998 (2) SA 363 (CC) (regarding indirect discrimination on the basis of race in connection with electricity rate and collection policies), paras. 31 and 32; *Mvumvu and Others v Minister of Transport and Another*, 2011 (2) SA 473 (CC) (regarding indirect discrimination on the basis of race in connection with public transportation compensation caps), para. 31.

[5] *City Council of Pretoria v Walker*, ibid, para. 43.

[6] In this regard, the European Court of Human Rights (ECtHR) has considered contexts of vulnerability and accepted statistics as a basis to establish indirect discrimination. ECHR, *D.H. v Czech Republic,* Application No. 57325/00, Grand Chamber final judgment, 13 November 2007.

[7] *D.H. v Czech Republic,* ibid; *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC), para. 68.

[8] CESCR, *General Comment No. 20*, footnote 4 above, paras. 13, 31; HRC, *Cecilia Derksen v the Netherlands*, Communication No. 976/2001, UN Doc. CCPR/C/80/D/976/2001 (2004), para. 9.3; *City Council of Pretoria v Walker*, footnote 4 above, para. 43; CESCR, *Rodríguez v Spain*, Communication No. 1/2013, UN Doc. E/C.12/5/7/D/1/2013 (20 April 2016), para. 14.1. For two examples of indirect discrimination in international social rights cases, see: HRC, *Rupert Althammer v Austria*, Communication No. 998/2001, UN Doc. CCPR/C/78/D/998/2001 (2003); CERD, *L.R. et al v Slovakia*, Communication No. 31/2003, UN Doc. CERD/C/66/D/31/2003 (7 March 2005).

[9] CESCR, *General Comment No. 16 on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art.3)*, UN Doc. E/C.12/2005/4 (11 August 2005), para. 5, in which the Committee noted that "[m]any women experience distinct forms of discrimination due to the intersection of sex with such factors as race, colour, language, religion, political and

outlining, among others, health, status and age as factors that inextricably impact women's experiences of discrimination.[10] It confirmed the obligation upon States to "*legally recognize and prohibit such intersecting forms of discrimination and their compounded negative impact on the women concerned*",[11] and deepened analysis of how intersectional discrimination acts to limit enjoyment of economic, social and cultural rights,[12] including through cases such as: *Alyne da Silva Pimentel v Brazil*[13] (regarding the intersection of sex, Afro-descendant status, and socio-economic background); *Kell v Canada*[14] (regarding the intersection of sex and Indigenous status); and *R.P.B. v The Philippines*[15] (regarding the intersection of sex, gender, disability and age).

11. The Inter-American Court of Human Rights (IACtHR) addressed intersectional discrimination in a case in which a young girl was infected with HIV following blood transfusions and subsequently experienced discrimination and exclusion from school, and her family were evicted by landlords because of her HIV status. The IACtHR found that "*numerous factors of vulnerability and risk of discrimination intersected that were associated with her condition as a minor, a female, a person living in poverty, and a person living with HIV*", and highlighted that "*if one of those factors had not existed, the discrimination would have been different.*"[16]

12. Engagement in unpaid care work may create disproportionate adverse impacts for women in connection with social security systems. 'Unpaid care work' has been defined to include "*domestic work (meal preparation, cleaning, washing clothes, water and fuel collection) and direct care of persons (including children, older persons and persons with disabilities, as well as able-bodied adults) carried out in homes and communities*",[17] and voluntary community work.[18] These activities are considered work because theoretically a third person could be paid to perform them.[19]

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other opinion, national or social origin, property, birth or other status, such as age, ethnicity, disability, marital, refugee or migrant status, resulting in compounded disadvantage". CESCR, *General Comment No. 20,* footnote 4 above, para. 17, in which the Committee said "Such cumulative discrimination has a unique and specific impact on individuals and merits particular consideration and remedying".

[10] CEDAW, *General Recommendation No. 28 on the Core Obligations of States Parties (art.2),* UN Doc. CEDAW/C/GC/28, (16 December 2010), para. 18.

[11] Ibid.

[12] CEDAW, *General Recommendations Nos. 16, 17 and 18,* adopted at the Tenth Session, 1991, UN Doc. A/46/38 (1991).

[13] CEDAW, *Alyne da Silva Pimentel v Brazil*, Communication No. 17/2008, UN Doc. CEDAW/C/49/D/17/2008 (25 July 2011) para. 7.7.

[14] CEDAW, *Kell v Canada*, Communication No. 19/2008, UN Doc. CEDAW/ C/51/D/19/2008 (28 February 2012), para. 10.2.

[15] CEDAW, *R.P.B. v The Philippines*, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011 (21 February 2014), para. 8.9.

[16] IACtHR, *Gonzales Lluy et al v Ecuador*, Judgment of September 1, 2015, para. 290. At the national level, the Nova Scotia Court of Appeal in Canada found that weaker security of tenure provisions for public housing tenants disproportionately affected single mothers, black and poor individuals: this constituted discrimination on the grounds of race, sex, marital status and poverty, see: *Sparks v Dartmouth/Halifax County Regional Housing Authority and the Attorney-General of Nova Scotia,* S.C.A. No. 02681 (March 2, 1993).

[17] UN General Assembly, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, UN Doc. A/68/293 (9 August 2013), para. 3. (hereinafter, Special Rapporteur on Poverty Report, 2013) According to the United Nations System of National Accounts of 1993 (SNA), which provides the conceptual framework that sets the international statistical standard for the measurement and classification of economic activities, some unpaid work activities are deemed 'economic work' and, much like paid work, are considered to belong within the 'SNA production boundary'." Other

13. Generally, women commit substantially more time than men to unpaid care work and have a greater likelihood to have periods of absence from formal employment due to such work.[20] This heavy and unequal burden is a "*barrier to women's greater involvement in the labour market, affecting productivity, economic growth and poverty reduction.*"[21] CESCR affirmed recently that unpaid workers, the majority of whom are women in domestic work and unpaid care, are entitled to social security.[22] However, UN Women has observed that "*[w]omen are often overrepresented among those who lack access to social protection*",[23] and the Special Rapporteur has noted that, in reality, women in unpaid work are vulnerable in relation to social security. The social security contributions of women undertaking unpaid care work, even if combined with paid work, "*are more likely than those of men to be interrupted by periods of full-time caregiving, and therefore they are less likely to receive an adequate pension on retirement*".[24] She recommended that "*[p]olicymakers must ensure that unpaid care work does not hamper women's equal enjoyment of the right to social security.*"[25]

14. In 2011, while addressing the fulfilment of women's economic and social rights, the Inter-American Commission on Human Rights recommended that its member states adopt legislative measures to formally recognise unpaid domestic work and consequently grant the same benefits formal work demands, particularly as it relates to social security.[26] In Ecuador specifically, regardless of marital status, area of residence, age and educational level, women's unpaid working time is higher than

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unpaid work activities are classified as "noneconomic." See Rania Antonopoulos, *The unpaid care work - paid work connection*, ILO, 2009, p. 4.

[18] Diane Elson, *Progress of the World's Women 2000*, UNIFEM Biennial Report, United Nations Development Fund for Women, 2000.

[19] Gaëlle Ferrant, Luca Maria Pesando and Keiko Nowacka, *Unpaid Care Work: The missing link in the analysis of gender gaps in labor outcomes*, OECD Development Centre, December 2014, p. 3. Calling it anything but unpaid care work obscures the fact that the daily social reproduction of all members of society and the generational reproduction and upbringing of children is achieved through unpaid care work, see Rania Antonopoulos, *The unpaid care work - paid work connection*, ILO, p. 5.

[20] Debbie Budlender, *Time Use Studies and Unpaid Care Work*, Routledge, 2010; Marzia Fontana, *Gender dimensions of rural and agricultural employment*, in Gender Dimensions of Agricultural and Rural Employment: Differentiated Pathways out of Poverty — Status, Trends and Gaps, FAO, 2010 in Special Rapporteur on Poverty Report, 2013, footnote 17 above, para. 7. See also, Women at Work: Trends 2016, ILO, 2016, p. 19 – 20, which found that, where data is available, women carry out at least two and a half times more unpaid household and care work than men in countries.

[21] Special Rapporteur on Poverty Report, 2013, footnote 17 above, para. 7.

[22] CESCR, *General Comment No. 23 on the right to just and favourable conditions of work (art.7),* UN Doc. E/C.12/GC/23 (27 April 2016), para. 47(j).

[23] UN Women, *Progress of the World's Women 2015-2016: Transforming Economies, Realizing Rights*, 2015, p. 15.

[24] Special Rapporteur on Poverty Report, 2013, footnote 17 above, para. 50.

[25] Ibid, para. 52.

[26] CIDH, *El Trabajo, La Educación y los Recursos de las mujeres: La ruta hacia la igualdad en la garantía de los derechos económicos, sociales y culturales*, 2011, para. 169.

men's time.[27] Unpaid care production is estimated as 15% of the GDP (12% by women, 3% by men).[28]

15. Where unpaid care work is undertaken disproportionately by women, a link between eligibility for pension benefits and formal paid employment status may amount to indirect and intersectional (on the grounds of, at least, gender and employment status, with the negative impact being felt most severely by older women) discrimination in relation to the right to social security. Such discrimination is exacerbated in circumstances where unpaid care workers are required to submit voluntary contributions in order to access and benefit from the existing social security system, face additional procedural hurdles and higher likelihood of disqualification from actually receiving benefits, while at the same time their voluntary contributions disproportionately accrue to male workers in formal paid employment.

16. Further, ensuring **substantive equality** will require States parties to take a multidimensional approach to: *redressing disadvantage* (based on historical and current social structures and power relations that define and influence women's abilities to enjoy their human rights); *addressing stereotypes, stigma, prejudice, and violence* (with underlying change in the ways in which women are regarded and regard themselves, and are treated by others); *transforming institutional structures and practices* (which are often male-oriented and ignorant or dismissive of women's experiences); and *facilitating social inclusion and political participation* (in all formal and informal decision-making processes).[29]

17. CESCR has stated that States parties must "*immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or* de facto *discrimination*".[30] This includes effective measures, which have to be periodically revised, to ensure non-discriminatory access to social security and, at the very least, a minimum enjoyment of social security by all.[31] Although everyone has the right to social security, States parties must pay particular attention to individuals and groups that have traditionally faced difficulties in exercising this right, specifically, among others, women.[32] This obligation requires positive measures to address inequality at the intersection between article 2, 3 and 9 of the Covenant.[33]

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[27] According to the 2012 Time Use Survey conducted by the National Institute of Statistics, women spent 31 hours on average per week on unpaid work – four times as much as men, see: Instituto Nacional de Estadística y Censos, 2013. Similarly, another report points out that despite greater inclusion in the work force, 85 per cent of women in Ecuador devote over 20 hours a week to informal domestic work, while 80 per cent of men spend fewer than eight, see: CEPAL, *Protección social y trabajo no remunerado: Redistribución de las responsabilidades y tareas del cuidado. Estudio de caso Ecuador*, 2012, p. 7.
[28] OECD, *The Pursuit of Gender Equality: An Uphill Battle: An Uphill Battle*, 2017**,** p. 193.
[29] For more information on this framework, see Sandra Fredman and Beth Goldblatt, *Gender Equality and Human Rights*, UN Women Discussion Paper No. 4, 2015.
[30] CESCR, *General Comment No. 20*, footnote 4 above, para. 8b.
[31] CESCR, *General Comment No. 19,* footnote 1 above, paras. 2, 4, 23, 29-32. See also Articles 2 and 3 of the ICESCR.
[32] CESCR, *General Comment No. 19*, footnote 1 above, para. 31; CESCR, *Rodríguez v Spain*, Communication No. 1/2013, UN Doc. E/C.12/5/7/D/1/2013 (April 20, 2016), para 11.1. Regional standards on the right to social security also emphasise the importance of social security systems catering for individuals belonging to vulnerable and disadvantaged groups and ensuring non-discrimination in social security schemes, including through ensuring reasonable eligibility conditions and adequate access

18. The significant impact of the refusal to recognise the author's voluntary contributions during periods of unpaid care work is relevant to the question as to whether the Respondent State has met its positive obligations to ensure substantive equality. We take up those positive obligations in more detail in section B below, where we consider the broader obligation to take steps to realise the right to social security as read with other articles of the Covenant.

B. States parties should take positive measures to ensure social security protections for persons unable to access or benefit from existing social security systems, particularly for older women

19. CESCR has confirmed that "*[a]ll persons should be covered by social security system, especially individuals belonging to the most disadvantaged and marginalized groups, without discrimination…In order to ensure universal coverage, non-contributory schemes will be necessary.*"[34] Further, States parties "*…should take appropriate measures to establish social security schemes that provide benefits to older persons…"* and *"…within the limits of available resources, provide non-contributory old-age benefits, social services and other assistance for all older persons who…have not completed a qualifying period of contributions or are not otherwise entitled to an old-age insurance-based pension or other social security benefit or assistance, and have no other source of income.*"[35]

20. In considering the measures taken by the Respondent State in accordance with its obligations in this regard, comparative jurisprudence will be helpful.[36] In addition, it may be appropriate for CESCR to consider this obligation on two levels: firstly, the Respondent State (in)action in the immediate or short-term as a response to individuals finding themselves in grave circumstances and needing social support; and secondly, the Respondent State (in)action in the longer-term in developing and periodically revising a social security system that is responsive to the lived experiences of women (as informed by a reading of articles 2, 3, 9 and 11 of the Covenant together). This broader perspective is necessary given that "*[g]uarantees of equality and non-*

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to information, for example, see: African Commission on Human and Peoples' Rights, *Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights*, adopted 24 October 2011, paras. 82(i) and (j).

[33] See Goldblatt, footnote 2 above, Ch. 2, in which she outlines seven principles for a substantively equal gendered right to social security, namely: women's reproductive labour and care must be recognised and supported and care must be understood as a responsibility of the whole society; women's other unpaid work such as in subsistence production and family industries must be recognised and supported for the purpose of social security; women's work in the informal sector, in the many forms this takes, requires an accompanying right to social security; women's work must be valued and attract sufficient and equal social security; social security must be provided to all women who need it, regardless of their relationship to work; the design of social security systems must promote gender equality; and women must have full and equal access to social security.

[34] CESCR, *General Comment No. 19,* footnote 1 above, para. 23.

[35] Ibid, paras. 15. See also para. 4(b).

[36] For example, the Constitutional Court of Costa Rica has considered on several occasions the need to protect people not covered by the social security system. The Court based its decisions on the constitutional right to social security, which is founded on the principle of social solidarity, and supported by the right to equality as well as the principle of human dignity. The Court further based its rulings on the principles of universality, compulsory affiliation and tripartite contributions, on which the social security system is based in accordance with the Constitution. See Social Security and the Rule of Law, International Labour Conference, 100th Session, 2011, para. 275.

discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of economic, social and cultural rights."[37]

21. In relation to the longer-term measures, it is instructive to recall the overarching purpose of social security and its connection with facilitating the enjoyment of the Covenant rights and addressing gender-related poverty. The right to equal enjoyment of adequate protection from social risks and contingencies[38] and the broader role that social security plays in "*poverty reduction and alleviation, preventing social exclusion and promoting social inclusion*"[39] requires consideration of the lived experience of women including, among other interrelated and compounding factors: the extent to which women are able to, and do, participate in paid, formal, stable employment (and the reasons for existing patterns); pervasive gender pay gaps, and consequential gender savings and pension gaps; and the intersectional discrimination and vulnerability experienced by older women.

22. For example, the ILO has noted that for many women it is not possible to accumulate contributions for a pension on an equal footing with men.[40] Women's participation in salaried employment, particularly in formal wage employment, has historically been lower than men's and continues to be so in much of the world.[41] In addition, women in paid employment systematically earn less than men,[42] which also affects the level of their contributions to contributory pension schemes. As women tend to assume greater involvement in family responsibilities, they are more likely to shorten or discontinue their employment and face a greater risk of working in precarious conditions and informal employment, intermittence that also affects their ability to accumulate pension rights. These are factors that lead to relatively low pensions, as calculated on the basis of income, unless effective measures are in place to compensate for gender inequalities.

23. The CEDAW Committee has recognised that, in general, older women's access to health insurance and pension schemes is restricted for a variety of reasons including their work as unpaid family members in the informal sector, part-time work, interrupted career patterns and concentration in low-paying jobs.[43] It highlighted the impact of a life time of gender-based discrimination in employment faced by older women which has a "*cumulative impact in old age, compelling older women to face disproportionately lower income and lower or no access to pensions compared with older men*."[44] Again, such discrimination may be experienced differently or to a greater degree given discrimination based on intersecting characteristics such as gender, ethnic origin, disability, degree of poverty, sexual orientation and gender identity, migrant status, marital and family status,

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[37] CESCR, *General Comment No. 9: The Domestic Application of the Covenant*, UN Doc. E/C.12/1998/24, (3 December 1998), para. 15.
[38] CESCR, *General Comment No. 19,* footnote 1 above, para. 9.
[39] Ibid at para. 3.
[40] Social protection for older persons: Key policy trends and statistics, ILO, 2014, p. 19.
[41] Ibid, p. 20.
[42] Ibid.
[43] CEDAW, *Ending discrimination against older women through the Convention*, A/57/38 (2002) Part I, Decision 26/III, paras. 430-6.
[44] CEDAW, *General recommendation No. 27 on older women and protection of their human rights*, UN Doc. CEDAW/C/GC/27, (16 December 2010), para. 20.

literacy and other circumstances.[45] The Special Rapporteur has recommended that "*[s]ocial security and social assistance programmes must take account of women's unequal burden of unpaid care work*" and "*States must take measures to ensure that social insurance schemes are designed to take account of factors, including child-rearing periods, that prevent women from making equal contributions.*"[46]

24. Clearly, non-contributory pensions play a key role in ensuring women's access to at least a basic pension; as the ILO has pointed out, "the establishment of large-scale non-contributory pension schemes in many countries has expanded effective coverage and reduced inequalities, both between genders and between rural and urban populations."[47] To fully realise the Covenant, States parties "*must take effective measures, <u>and periodically revise them when necessary, within their maximum available resources</u>, to fully realize the right of all persons without any discrimination to social security…*"[48] This will require analysis and monitoring of an evolving social security system, reflective of progression from a system based on traditional or stereotyped notions of the 'male breadwinner' worker in formal, paid employment, to one that recognises the varying forms of work that exist and in fact underpin the ability of many to engage in paid work.

25. In assessing the reasonableness of measures to take steps to the maximum of available resources, CESCR has stated that it will consider, among other factors, whether *"…the decision (not) to allocate available resources was in accordance with international human rights standards*", and "*…the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.*"[49] Further, in the context of social security, "*it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination*".[50] The burden of proof rests on the Respondent State to explain any circumstances where it has not ensured social security system protections for persons unable to access or benefit from the existing social security system, particularly for older women.

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[45] CEDAW Committee, General Recommendation No. 27, footnote 44 above, para. 13. See also CEDAW, *General Recommendation No. 25 on Article 4, paragraph 1, of the Convention (Temporary Special Measures)* (2004), which also recognizes that age is one of the reasons why women can suffer multiple forms of discrimination. See also, CEDAW, *General Recommendation No. 34 on the rights of rural women*, UN Doc. CEDAW/C/GC/34 (4 March 2016), paras. 40-41. In this General Recommendation 34 the CEDAW Committee further makes explicit the link between women's lack of access to formal employment and the resultant absence of social security protections. This puts women at increased risk and requires States to take measures responding to their specific situation including ensuring access to non-contributory social protection and adopting gender-sensitive social protection floors.

[46] Special Rapporteur on Poverty Report, 2013, footnote note 17 above, para. 52.

[47] ILO, footnote 40 above, p. 21.

[48] CESCR, *General Comment No. 19,* footnote 1 above, para. 4(b). Emphasis added.

[49] CESCR, *An evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the covenant*, UN Doc. E/C.12/2007/1 (10 May 2007), paras. 8(c) and (f).

[50] *Khosa and Others v Minister of Social Development and Others, Mahlaule and Another v Minister of Social Development*, 2004 (6) SA 505 (CC), para. 69.

C. States parties must ensure that existing social security systems facilitate access to information and are subject to due process, including the right to an effective remedy

26. CESCR has confirmed that "*[q]ualifying conditions for benefits must be reasonable, proportionate and transparent. The withdrawal, reduction or suspension of benefits should be circumscribed, based on grounds that are reasonable, subject to due process, and provided for in national law*."[51] It has stated previously that appropriate procedural protection and due process are essential aspects of all human rights, and has confirmed that States parties must take all reasonable measures to adequately notify people about decisions that can affect the enjoyment of Covenant rights.[52]

27. In 2009, the Constitutional Court of Colombia ruled in favour of a pensioner and her fundamental right to social security, equality and a minimum subsistence income.[53] The Social Security Institute (SSI) had denied the plaintiff her old-age pension for lack of adequate contributions, despite previously issuing certification stating that she had paid sufficient contributions to receive a pension. The Court held that the SSI had induced her into error and acted in violation of the principle of legitimate expectations. The SSI was ordered to grant the plaintiff a pension in view of the period for which she had worked, which had not been included in the second calculation, and considered that she had been misled regarding her contributions and induced to apply for a pension replacement.[54]

28. The European Court of Human Rights (ECtHR) has issued decisions on a similar basis.[55] For example, in *Moskal v Poland*,[56] Ms Moskal was granted a pension to care for her son but after quitting her job and receiving the pension for ten months, the Social Security Board quashed its previous decision on the basis that her son's health condition turned out to be insufficiently serious to make her eligible for the pension. Referencing the basic purpose of social security, the ECtHR emphasised that many individuals depend "for survival" on social benefits, and that recipients should therefore be provided with some security concerning the State assistance granted, to avoid serious human rights violations.[57]

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[51] CESCR, *General Comment No. 19,* footnote 1 above, para. 24.

[52] For example: in relation to the right to housing, the Committee considered a situation of inadequate notice as a violation of the right to housing. It found that that if the Respondent State does not remedy such a violation through available mechanisms, this might constitute a violation of the right to an effective remedy. See, CESCR, *I.D.G. v Spain*, Communication No. 2/2014, UN Doc. E/C.12/55/D/2/2014 (17 June 2015), paras. 12.1, 12.4, 13.7, 15.

[53] Constitutional Court of Colombia, *Ruling T-268/09*, 2009.

[54] General Survey concerning social security instruments in light of the 2008 Declaration on Social Justice for a Fair Globalization, ILO, 2011, para. 277.

[55] The ECtHR has considered social security issues under article 1, protocol 1 of the European Convention on Human Rights as it the Convention contains no explicit right to social security.

[56] ECtHR, *Moskal v Poland*, Application No. 10373/05 (15 September 2009).

[57] Ibid, para.39.

29. The IACtHR has held that States are obliged to provide effective remedies to human rights violations within a **reasonable timeframe**,[58] and that "*a prolonged delay may in itself constitute a breach of judicial guarantees*".[59] The ECtHR takes a similar approach; in a case involving German courts taking over ten years to review a social security process, it noted that "*such duration is unusual, considering the particular diligence needed in matters of social security*."[60] Further jurisprudence on the reasonable timeframe for adjudicating claims for social assistance emanates from the African courts.[61]

30. An **effective remedy** is one that is appropriate in correcting the particular violation. In this regard, the IACtHR has referenced the notion of "useful effect" to indicate that States must take as many measures as are needed to give the provisions of the American Convention on Human Rights concrete effect in practice.[62] The IACtHR has further pointed out that that "*[t]he Court has reiterated that such obligation involves that the recourses shall be suitable to attack the violation and that its application by the competent authority shall be effective. To that end, the recourses that are deceptive, due to the general conditions of the country or even due to the particular circumstances of a given case, shall not be considered effective*."[63] Therefore, in addition to refraining from procedural delays in providing a decision on social security issues, States parties must ensure access to a proper hearing of the alleged human rights violations themselves. Whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary.[64]

31. Also, States parties must make sure that the suffering sustained by victims of human rights violations is not deepened once they begin to have contact with the judicial system.[65]

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[58] See, for example, IACtHR, *Tibi v Ecuador*, Judgment of September 7, 2004, Preliminary Objections, Merits, Reparations and Costs, para. 136; Article 8.1 of the American Convention on Human Rights; IACHR, "Access to Justice as a Guarantee of Economic, Social and Cultural Rights", OAS/Ser.L/V/II.129, Doc. 4, Ch. IV, Section 4, September 7, 2007, para. 203/224.

[59] IACtHR, *López Álvarez v Honduras*, Judgment of February 2, 2006, paras. 15, 128; IACtHR, *Fornerón and Daughters v Argentina*, Judgment of April 27, 2012, paras. 101-106.

[60] ECtHR, *Deumeland v Germany,* Application No. 9384/81 (29 May 1986), para. 90.

[61] See, for example, *MEC, Department of Welfare v Kate* 2006 (4) SA 478 (SCA); *Mbanga v MEC for Welfare,* [2002 (1) SA 359 (SE)].

[62] IACtHR, *Cantoral Huamaní and Garcia Santa Cruz v Perú*, Monitoring of Compliance with Judgment, (April 28, 2009), para. 6.

[63] IACtHR, *Usón Ramírez v Venezuela*, Judgment of November 20, 2009, Preliminary Objections, Merits, Reparations and Costs, para. 129.

[64] CESCR, *General Comment No. 9*, footnote 37 above, para. 9.

[65] Brasilia Regulations regarding Access to Justice for Vulnerable People, para. 12. See also, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, UN Doc. A/RES/60/147 (21 March 2006), Principle 10.

V. RECOMMENDATIONS

32. If the Committee finds a violation or violations on the facts of the case and issues general recommendations, we respectfully suggest that, to avoid similar situations in the future, the Respondent State should take measures:

    1) To address the existence of indirect and intersectional discrimination connected to the linking of social security eligibility requirements with formal employment status, including among other measures:
        a. revision of administrative requirements and provision of support for the purpose of avoiding permanent exclusion or other serious consequences for women taking breaks from formal paid employment and missing contributions during or after this time; and
        b. recognition of all voluntary contributions made during periods of unpaid care work.

    2) To fully develop and apply in practice non-contributory social protection schemes, with an intersectional approach attentive to the situations of older women.

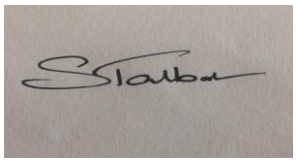
    3) To take concrete, targeted steps to develop a (or revise its) social security national action plan to progressively realise the right to social security, responsive to women's lived experiences (as such experiences continue to evolve and without the plan itself perpetuating gender stereotypes), which among other factors:
        a. acknowledges and addresses issues of unpaid care work;
        b. involves the consultation and meaningful engagement of women in the revision and development of the plan;[66] and
        c. adopts a comprehensive analysis which recognises that substantive equality both *applies to* the realisation of Covenant rights and *requires* the realisation of Covenant rights, and takes a multidimensional approach to substantive equality.

    4) To address due process and access to information deficiencies, including access to administrative and judicial justice mechanisms, as appropriate.

[66] UN General Assembly, Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepúlveda Carmona, UN Doc. A/HRC/23/36 (11 March 2013), para. 42. The Special Rapporteur stressed the issue of women's participation, arguing that participation is a human rights principle, and urged States to take account of gender power relations when designing, implementing and monitoring participatory processes. She noted that such processes "must also acknowledge the responsibilities of care providers without reinforcing patterns of discrimination and negative stereotyping."

This third party intervention is submitted on behalf of the following organisations and advocates

Date: 30 October 2017



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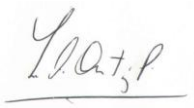
Legal Director
International Network for Economic, Social and Cultural Rights (ESCR-Net)

Iain Byrne
Amnesty International



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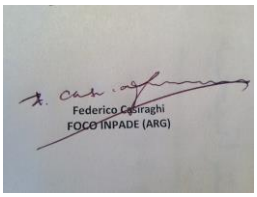

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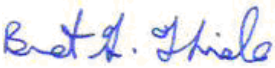

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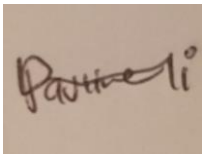

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Annex 1: Web links for some key citations
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