

Third-Party Intervention
before the United Nations Committee on Economic, Social, and Cultural Rights
regarding Follow-up to Its Views on
Marcia Cecilia Trujillo Calero v. Ecuador (Communication 10/2015)

Respectfully submitted by:

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- Legal Resources Centre (LRC)
- Social Rights Advocacy Centre (SRAC)
- Women's Legal Centre (WLC)

The interveners have substantial relevant experience in human rights analysis and litigation, including regarding women's rights and economic, social, cultural and environmental rights (ESCR) generally and with respect to gender and intersectionality. The interveners are able to offer international and comparative perspectives to support the Committee's work in the proper determination of this follow-up to its Views.

The interveners are members or allies of **ESCR-Net – International Network for Economic, Social, and Cultural Rights**. ESCR-Net has more than 280 organizational and individual members in more than 75 countries. The secretariat of the network contributed in coordinating the preparation of this document.

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I. Summary

1. This third-party intervention affirms the State of Ecuador has not yet taken appropriate and adequate steps to comply with the general recommendations adopted in the 2018 Views on Communication 10/2015, *Marcia Cecilia Trujillo Calero v. Ecuador* of the United Nations (UN) Committee on Economic, Social and Cultural Rights (CESCR).
2. Article 9(2) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR) states that once the Committee has examined a communication and transmitted its Views and recommendations to the parties, the “*State Party shall give due consideration to the Views of the Committee, together with its recommendations, if any, and shall submit to the Committee, within six months, a written response, including information on any action taken in the light of the Views and recommendations of the Committee.*” “Due consideration” must be understood in accordance with the State Party’s recognition in article 1(1) of the Optional Protocol of competence of the Committee to receive and consider communications.
3. This treaty obligation—which the State of Ecuador must implement in good faith, in line with the principle of *pacta sunt servanda*¹—places a burden on the State to demonstrate compliance with the Committee’s Views via a reporting process. As clarified by the UN Human Rights Committee, the duty of good faith requires cooperation with the Committee with respect to the implementation of the Views; this should not be mistaken for ongoing dialogue or debate regarding issues of compliance and required measures that have been considered and determined by the Committee in its Views.²
4. In our view, the issues before the Committee in conducting its follow-up to Views are therefore whether a State Party: (1) has taken due consideration to the Committee’s findings and (2) has acted reasonably to verifiably implement the Committee’s recommendations.
5. In the follow-up to this case, these two issues mean the State, in essence, must effectively demonstrate it has applied its mind to the Committee’s Views and ensured that women enjoy substantive equality in accessing the right to social protection.
6. The State’s response fails to give “*due consideration*” to the Committee’s Views by rejecting certain findings, such as the lack of substantive equality in Ecuador’s social security system with respect to women who perform unpaid care work.
7. The State also failed to demonstrate it did “*take action in light of the Views*” effectively: it did not provide adequate, disaggregated and unequivocal evidence that it has implemented the Committee’s general recommendations aimed at ensuring equal and effective access in practice to social security, particularly by women who perform unpaid care work, and thus fulfilled its corresponding duties of conduct and result with respect to the Covenant.
8. Therefore, the interveners urge the Committee to:
 - 8.1. maintain its follow-up to the general recommendations in its Views;
 - 8.2. request from the State adequate, disaggregated and unequivocal evidence that it has implemented the Committee’s general recommendations aimed at ensuring equal and

¹ Vienna Convention on the Law of Treaties, 1969, Article 26.

² UN Human Rights Committee, General Comment 33, paras 15, 18.

- effective access in practice to social security, particularly by women who perform unpaid care work;
- 8.3. encourage the State to engage in a consultative process with civil society with respect to the implementation of the general recommendations; and
- 8.4. transmit this third-party intervention to the State to afford it an opportunity for comment.

II. Need for Effective Remedy When Rights are Violated

- 9. Various legal authorities complementary to the Optional Protocol help inform the weight and implications of the Committee's recommendations in its Views.
- 10. Obligations to respect and implement international human rights law include, among others, the duty to “*provide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice, as described below, irrespective of who may ultimately be the bearer of responsibility for the violation.*”³
- 11. A legal remedy is understood to refer to both access to an independent adjudication process as well as access to, and enjoyment of, adequate reparations where it has been determined that a rights violation has occurred. These are defining features of fully-fledged rights.⁴
- 12. With respect to the right to social security, CESCR’s General Comment 19 states that:

*“Any persons or groups who have experienced violations of their right to social security should have access to effective judicial or other appropriate remedies at both national **and international levels**. All victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition. National ombudspersons, human rights commissions, and similar national human rights institutions should be permitted to address violations of the right. Legal assistance for obtaining remedies should be provided within maximum available resources.”*

[emphasis added]
- 13. In harmony with these principles, Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR) requires that when the rights contained therein are violated, the victims may file for an effective, enforceable remedy, having the right to obtain reparation for the violations they have suffered. States Parties have the obligation to offer effective national judicial and administrative mechanisms to vindicate victims of violations of rights protected by the ICCPR as part of the procedural component of access to an effective remedy. And as part of the substantive component of access to an effective remedy, Article

³ 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, Adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, Principle 3(c), available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx>

⁴ The post-World War I arbitral opinion in the Lusitania cases, for example, often considered a landmark in the defining of State responsibility, held that “[i]t is a general rule of both the civil and the common law that every invasion of a private right imports an injury and that for every injury the law gives a remedy”. See Mixed Claims German-American Commission, Decision in the Lusitania Cases, November 1, 1923, Recueil des sentences arbitrales, Volume VII, p. 32, at 35.

2.3 of the ICCPR imposes the obligation of, in general, the granting of appropriate compensation. For reparation to be adequate, it may also include restitution, rehabilitation, measures aimed at providing satisfaction, guarantees of non-repetition and reform of the institutional system.

14. In the same way, the Ecuadorian constitution in its articles 11.3 and 11.9 establishes that:

“Rights shall be fully actionable. Absence of a legal regulatory framework cannot be alleged to justify their infringement or ignorance thereof, to dismiss proceedings filed as a result of these actions or to deny their recognition.”.

“The State’s supreme duty consists of respecting and enforcing respect for the rights guaranteed in the Constitution. The State, its delegates, concession holders and all persons acting in the exercise of public authority, shall be obligated to redress infringements of the rights of individuals for negligence or inadequacies in the provision of public services or for the deeds or omissions of their public officials and employees in the performance of their duties.”.

15. Likewise, the Ecuadorian Constitutional Court, in ruling 012-16-SIS-CC, has established that:

“[t]he constitutional state of rights and justice is not exhausted solely by the determination of the catalog of recognized rights, but rather there must be a system of guarantees that ensures its full validity and effectiveness ...”⁵ [emphasis added]

16. In the same way, the Ecuadorian Constitutional Court has established in judgment 004-13-SAN-CC that reparation constitutes a fundamental constitutional right pertaining to every person affected by a violation of rights. For the Court, reparation must be a guiding transversal principle for the guarantee and exercise of human rights, the maximum and main constitutional function of the State. The Court has also established, according to judgment 146-14-SEP-CC, the need to avoid, *“linking comprehensive reparation only to a reparation reduced to an economic one, since its nature is different. For this reason, said determination must be proportional and rational in relation to the function of the type of violation, the circumstances of the case, the consequences of the facts and the impact on the person’s life project”*⁶. [emphasis added]

17. Similarly, the Constitutional Court of South Africa has stated that:

“an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies, if needs be, to achieve this goal.”⁷

18. The same court further stated that *“without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.”*⁸

⁵ Corte Constitucional de Ecuador, Sentencia, 012-16-SIS-CC.

⁶ Corte Constitucional de Ecuador, Sentencia, 146-14-SEP-CC.

⁷ *Fose v Minister of Safety and Security* 1997 7 BCLR 851 (CC) para 69.

⁸ *Fose*, 69.

19. In the same vein, the Supreme Court of Canada has emphasized that a just and appropriate remedy must fully and meaningfully vindicate the right at stake. That Court has adopted a purposive approach to remedies which, “*requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: courts must craft effective remedies*”⁹. The Court found that ongoing supervision of the implementation of remedies may be required to meet this standard.¹⁰ It has also emphasized that international human rights norms, “*were not meant to be theoretical aspirations or legal luxuries but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.*”¹¹
20. Accordingly, in crafting remedies for rights violations, the central consideration for adjudicators is that they ensure the effective vindication and protection of the rights violated.¹²
21. This consideration is important not only to the immediate victims of the relevant rights violations; remedial relief should be afforded to all people who are in the same situation as the litigants.¹³ In the words of Justice Ackermann in National Coalition for Gay and Lesbian Equality v Minister of Home Affairs¹⁴, the “*bells toll for everyone*” when rights are violated.¹⁵
22. The right to a remedy must be embedded in the concept of the finding of a violation in order to address discrimination and effect substantive equality. Mere recognition of a violation alone is not sufficient. In this instance, the Committee has not only recognised violations, including discrimination, but has also made recommendations designed to be effective remedies to address the discrimination faced by women performing unpaid care work.
23. In 2013, the Court of Justice of the European Union provided guidance in Asociația ACCEPT v Consiliul Național pentru Combaterea Discriminării, C-81/12, in which the Luxembourg Court noted that a purely symbolic sanction cannot be regarded as compatible with the correct and effective implementation of the non-discrimination principle.¹⁶
24. Accordingly, in order for the recommendation of this Committee to be an effective remedy, the mere finding alone is insufficient to shift the lived reality of women who perform care work in Ecuador and who will continue to be discriminated against by its social security system.
25. Supervision is necessary to ensure that a remedy is implemented and rights are vindicated. This supervision of the implementation of the remedy can take many forms. One format that supervision can take is the structural interdict. South African courts have described a structural interdict as “*a means to craft an effective, just and equitable remedy to ensure performance.*”¹⁷ Structural

⁹ Doucet-Boudreau v. Nova Scotia (Minister of Education), [2003] 3 S.C.R. 3 paras 25, 55.

¹⁰ *Ibid*, para 71-76.

¹¹ Nevsun Resources Ltd. v. Araya, 2020 SCC 5 para 1.

¹² *Ibid*.

¹³ *S v Bhulwana; S v Gwadiso* 1996 1 SA 388 (CC), para 32.

¹⁴ 2000 2 SA 1 (CC)

¹⁵ At para 82. See also *Hoffman v South African Airways* 2001 1 SA 1 (CC), paras 42 – 43.

¹⁶ Asociația Accept v Consiliul Național pentru Combaterea Discriminării, Court of Justice of the European Union, Judgment of the Court (Third Chamber), 25 April 2013, para 64.

¹⁷ *Equal Education and Others v Minister of Basic Education and Others* [2020] ZAGPPHC 306 at para 89.

interdicts are often used when there is systematic and sustained failure to realise rights. The Constitutional Court of South Africa held structural interdicts were not only permitted, but required to craft effective relief:

“The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done. Here, the fact that the Department’s tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier. This fact underscores the need for practically effective judicial intervention.”¹⁸

26. Parallels can be drawn in the Ecuador situation to justify supervision of the implementation of the recommendations by the Committee.
27. The interveners are not proposing a detailed, intrusive mandatory interdict, nor proposing that the Committee prescribe to the State Party exactly how it should address the findings. Instead, they ask that the Committee continue to request follow-up reports from the State Party detailing steps taken in light of the Views that are geared towards promoting equality and non-discrimination of women unpaid care workers. The role of the Committee in this regard will be to ensure that the State is respecting, promoting and fulfilling the ICESCR to ensure that the author of the complaint and others similarly placed are not perpetually living without access to secured social security.
28. If the State Party acts promptly and reasonably, the Committee’s supervisory role will be extremely limited: it will read the reports and note the progress made. However, if the State is less than diligent and dutiful in its response to the Views, then it is entirely appropriate for the Committee to use its supervisory role to continue to insist on a more satisfactory outcome for the author of the complaint and those similarly situated.
29. This continued measured form of supervision by the Committee is entirely justified by four factors:
 - 29.1. the vulnerability of unpaid care workers, who are predominantly women, including older women and adolescents;
 - 29.2. the importance of the rights at stake;
 - 29.3. the systemic nature of the required measures, and
 - 29.4. as elaborated below, the State’s demonstrated ambiguity toward the Views and their unwillingness or inability to verifiably remedy the unfair discrimination and lack of due access to social security.
30. The monitoring of the recommendations by the Committee remains necessary, and the State Party must develop and share benchmarks based on available disaggregated data on the gender discrimination identified in order to enable the Committee to adequately assess the implementation of the recommendations. For instance, though in the attachment to the State’s

¹⁸ *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC), para 49.

follow-up submission, the State social security agency says it compiled data on the reach of social security benefits to women, the State failed to provide those statistics to the Committee.¹⁹ Significantly greater transparency is required.

31. The follow-up to Views process in this case, therefore, remains an opportunity for the Committee to ensure that the remedies it crafted—including those providing for systemic redress—are rendered effective.

III. State's Burden to Prove Compliance with the Covenant

32. Securing the effectiveness of its remedies through its follow-up to Views process requires that the Committee consider that the onus is on the State to demonstrate compliance, something which Ecuador has not done in this instance.
33. In addition to elements of the Optional Protocol and complementary authorities discussed above, this State burden to prove compliance flows also from Article 2 of the ICESCR, which describes the nature of the general legal obligations undertaken by States parties. This includes obligations of conduct and obligations of result regarding the full realization of Covenant rights.²⁰ Article 2(1) requires state parties “*to take steps.*” This obligation is not qualified or limited by other considerations.²¹ Article 2(1) specifies this obligation to take steps as including “*all appropriate means, including particularly the adoption of legislative measures*” and applying the “*maximum of available resources.*” Article 8(4) of the Covenant directs the Committee to assess whether the steps taken meet a standard of reasonableness, “*in accordance with*” the right at stake, and bearing in mind that there may be a range of possible policy measures through which the right may be implemented in different contexts. The Committee has emphasized that the measures selected should be capable of fulfilling the right as “*swiftly and efficiently*” as possible²² and has established that the onus is on the State to justify any failure to adopt measures required for compliance with Covenant rights.²³
34. Accordingly, given that the Committee found that the State Party in this matter violated article 9 of the Covenant—Independently as well as read together with Articles 2(2) and 3—and issued remedial recommendations clarifying what policy measures are required for compliance with the Covenant in the present context, it falls to the State to prove its effective fulfillment of those recommendations “*by all appropriate means.*”
35. The State has not provided concrete evidence to indicate that they are incapable of implementing the recommendations. Therefore, the State must inform the Committee what reasonable steps it will take to realise the Views’ recommendations and in what timeframe.

¹⁹ IESS noted it sent a response (Oficio No. IESS-DNAC-2018-0753-M) to the Director of Human Rights of the Ministry of Justice, Human Rights and Religion, following her request for, *inter alia*, a “report” detailing “...the contributory pensions it administers and their distinction the non-contributory ones, the reach of said pensions, statistics and applicability of said pensions for the 2015-2018 period; and special attention to the reach of said pensions specifically to women”. State response to the Committee’s Recommendations, PDF p. 56.

²⁰ CESCR, General Comment 3, para 1.

²¹ *Ibid*, para 2.

²² Communication No. 5/2015, Djazia and Bellili v Spain U.N. Doc. E/C.12/61/D/5/2015, para 15.3.

²³ *Ibid*, para 15.5.

This would be the response expected of a State party who has participated actively in the proceedings of the Committee up to this point and is bound by the treaty duty of *pacta sunt servanda*.

IV. Inadequacy of the State's Response Regarding Accessing Social Security

36. Unpaid care workers in Ecuador, the majority of whom are women, remain without any new social protection. A reading of the State's submission on follow-up—must of it a recitation its pre-decision legal framework—does not reveal any apparent concrete improvement in relation to the obstacles faced by the author, and no meaningful difference in the manner in which social security claims for unpaid workers are being considered and processed in light of their specific circumstances following the resolution of this communication.
37. In this way, the State has not given “*due consideration*” to nor taken “*steps in light of*” the Committee’s Views recognizing that “*everyone has the right to social security, but States should give special attention to those individuals and groups who traditionally face difficulties in exercising this right, such as women.*”²⁴
38. In relation to the finding relating to access to social security for unpaid workers, the state listed these as steps taken: (1) “*interoperability with the Coordinating Ministry of Social Development (MCDS), which guarantees an adequate transfer of information for the granting of contributory and non-contributory benefits in the country,*” (2) interinstitutional cooperation framework between Ecuadorian Social Security Institute (IESS) and MCDS, and (3) instruction guide on the web for unpaid domestic workers.
39. The State also referenced the Organic Law for Labor Justice and Recognition of Women Domestic Workers regulating social security in Ecuador, stating the law recognizes “*unpaid work in the home, performed primarily by women, fulfills an economic and social function of central importance to society that, until said law was issued, had not been subject to regulatory or social recognition.*”²⁵ This is not a new law. It was enacted on April 20, 2015, and reformed on April 6, 2018. Though it permits women like the author to request enrollment with the IESS as domestic unpaid workers and receive social security retirement pensions if they meet certain conditions, the law affords them retirement pensions that are very low, effectively and comparatively placing less value on the work done by unpaid care workers like the author. For example, a woman unpaid care worker with family income up to 50% of the basic unified salary can access a minimum retirement pension of USD 79 (if they have made at least 240 contributions),²⁶ while for other categories of workers in families with the same income, they can access a minimum retirement pension of USD 200, and with less years of contributions (10 years of contributions, while for

²⁴ Para 13.1 of Views.

²⁵ State response to the Committee’s Recommendations, PDF p. 14.

²⁶ Ley de Seguridad Social, PDF pag 64, disponible en:

https://www.ies.gov.ec/documents/10162/33701/Ley_seguridad_social.pdf (accessed September 23, 2020).

women unpaid care workers it is 20 years).²⁷ Thus, the current system does not offer unpaid workers social security under the same conditions as affiliates who had paid employment, and the State has not shown that it has substantially reduced the barriers faced by a person who performs unpaid work to access a retirement based on voluntary contributions.

40. Indeed, there is also the aspect of the financing of the contributory system contained in the Organic Law for Labor Justice and Recognition of Women Domestic Workers, that is, that access to retirement benefits for unpaid workers requires long periods of contribution (240 or more contributions) to the IESS. This period, which corresponds to 20 years of contributions, even exceeds the fifteen years established in article 29.2(a) of Convention 102 of the International Labor Organization (ILO) (ratified by Ecuador) on the minimum standard of social security for access to reduced retirement or old-age benefits. In this way, the Organic Law *de facto* ignores that for women in general there are greater intermittencies in social security contributions, and even more so for those dedicated to unpaid care work, especially considering that these are predominantly located in families with lower incomes, in which they also tend to have less control over the family economy, less economic autonomy and thus less possibilities of making the required number of contributions.
41. A study prepared by the Ibero-American Social Security Organization based on the National Survey of Employment, Unemployment and Underemployment of Ecuador (INEC), shows that for 2018, that is, three years after the entry into force of the aforementioned law, the Regulation has not been effective in substantially increasing the affiliation to security security for people in a similar situation as Ms. Marcia Trujillo, and that a gap remains between households with and without children under 6 years of age. The study found the following:

*'When examining the category of women aged 25 to 54, incorporating some variables related to care work, new inequalities are revealed. The presence of boys and girls under 7 years of age corresponds to an increase in the rates of non-participation in the labor market and to a lower percentage of women who are in employment and affiliated with Social Security. When the universe of female heads and spouses is analyzed according to maternity status, differences are also observed, there is less participation in the labor market, and when they do [participate], a lower proportion is located in occupations with [social security] affiliation among those women who have young children or households with more children and adolescents ... [Likewise], gender differences increase between men and women in those households with the greatest demand for care.'*²⁸

Therefore, the situation of the author and of women in a similar situation has not been significantly altered, which perpetuates discrimination against these women.

42. In our view, the work of the Committee in this follow-up review would not be complete if the Committee does not assess what the Views and the response by the State mean for women

²⁷ Jubilación Ordinaria Vejez, Instituto Ecuatoriano de Seguridad Social, disponible en: <https://www.iess.gob.ec/en/web/pensionados/mejoria-de-pension> (accessed September 23, 2020).

²⁸ Organización Iberoamericana de Seguridad Social (2019) Medidas compensatorias de los cuidados no remunerados en los sistemas de Seguridad Social en Iberoamérica, available at: <https://oiss.org/wp-content/uploads/2019/03/OISS-2019-Medidas-compensatorias-de-los-ciudadanos-no-remunerados-res.-baja.pdf>.

unpaid care and domestic workers in the position of the author of the complaint. Put simply, in order for the Committee to certify the State's compliance, the State must provide satisfactory and detailed information to that effect, including answering:

- 42.1. **Are unpaid domestic care workers, who are predominantly women, in a better position since the Views, and, if so, how? Key indicators to address this question include (but are not limited to):**
 - Number of women who perform unpaid care work who have successfully obtained an IESS retirement pension in each of the past five years.
 - Disaggregation of the total number of women who obtain IESS retirement per maternity and marital status, economic status (household income), ethnicity and geographic location.
 - Projections on the number of women affiliated for their unpaid care work who are expected to successfully obtain IESS retirement for each of the next five years.
 - Whether a temporary pause in voluntary contributions (e.g. stemming from financial hardship that would disproportionately impact women performing unpaid care work) can still lead to disaffiliation or other penalties that could render a woman ineligible for a retirement pension.
- 42.2. **How, if at all, will women unpaid domestic care workers' experience today seeking to access social security be different to that of the author of the complaint? The state should provide qualitative evidence on the experiences of women from different backgrounds and socioeconomic status in accessing social security.**
- 42.3. **What steps has the state taken to adequately inform women performing unpaid care work of any changes introduced since the Views in 2018?**
- 42.4. **How many women affiliated for their unpaid care work have been denied an IESS pension since the Committee issued its Views in 2018? For what reasons? The state should disaggregate the total number of women who were denied along characteristics such as economic status, maternity and marital status, geographic location and ethnicity.**
43. In its response to the Committee, the State also mentioned that an instruction guide has been uploaded on the web system for unpaid domestic workers, and that a specific space has been set up on the IESS web page in order to facilitate management of administrative processes. However, the State also did not provide clear evidence that these measures to provide information are designed expressly with an intersectional gender equality framework in mind, which requires to pay due considerations to the realities of women from different backgrounds and characteristics. For instance, information provided online does not address the reality that many unpaid domestic workers may have poor access to internet and digital literacy, thereby hindering a large proportion of them from being able to access such vital information. And while these measures may assist in giving more information to women unpaid care workers,

they certainly fail to address the discriminatory framework of the law that caused the author challenges and effectively denied her social security. It could be argued that these information measures are mere aesthetics which makes the law appear accessible while its implementation fails to realise the rights of women. It is common cause that in the case of the author, the law did not help at all in ensuring her access to social security without discrimination. In this sense, it is essential that the State not only report on existing laws but also on the measures taken for their proper implementation, providing information that allows measuring their impact on the lives of women and people in such situations.

44. Since the State suggests their legal framework was already in compliance with the Covenant prior to the Views, it is clear that there are currently no proposals to provide better protection to women like the author through reforms. Neither do there appear to be any plans to adopt new legislation to give effect to the Committee's recommendations.
45. The challenges faced by the author persist, and the State Party does not seem to have utilized the time that they have had to work towards implementation of the recommendations in such a manner that is reasonable and within their available resources.
46. Women unpaid care workers remain vulnerable and discriminated against, and their lived reality remains as if the author had not filed her communication to the Committee and the Committee had not issued its Views.

V. Inadequacy of the State's Response Regarding Unfair Gender Discrimination

47. Ecuador's response regarding the Committee's findings and recommendations pertaining to unfair gender discrimination are also unsatisfactory, not acknowledging central findings of the Committee and demonstrating legislative inertia that constitutes a failure to take all necessary and appropriate steps to ensure substantive gender equality with respect to social security.

A. State Party still denying the author was discriminated against

48. In the appendices of the State response's to the Committee about the implementation of the Views, IESS claimed that there was no gender discrimination in the affiliation scheme for unpaid care work in the home.²⁹ This essentially means the State Party is not accepting the finding of the Committee with respect to gender discrimination. This is at odds with its treaty obligation to give the Views "*due consideration*" in good faith. This is disappointing, as it implies that the State still fails to appreciate the need to take steps addressing the intersecting discrimination experienced by unpaid care workers, who are predominantly women, in accessing social security.
49. It is therefore important to emphasise that the Committee found that '*Ecuadorian Social Security Institute's decision denying the author's request for special retirement constituted a violation of article 9 of the Covenant and that the conditions of voluntary affiliation imposed on the author, as an unpaid domestic*

²⁹ State response to the Committee's Recommendations, PDF p. 54.

worker, on the basis of which it was determined that her affiliation and contributions were invalid, constituted discriminatory treatment with respect to her right to social security.’ [emphasis added]

50. The Committee stated that States must review restrictions on access to social security schemes to ensure that they do not discriminate against women in law or in fact.³⁰
51. Specifically to women in the position of the author, the Committee found that “*in the light of the foregoing considerations and in the absence of sufficient explanations from the State party refuting the author’s allegations of discrimination, the Committee considers that the conditions of voluntary affiliation imposed on the author, as an unpaid female domestic worker, on the basis of which it was determined that her affiliation and contributions were invalid, constituted discriminatory treatment.*”³¹
52. The IESS’s denial of the finding of unfair discrimination means this violation has not been remedied and raises doubts about the commitment of the State to adequately address the violation of the Covenant and take steps to implement the recommendations of the Committee.
53. The Committee recommended that the State party should ensure that its legislation and the enforcement thereof are consistent with the obligations established under the Covenant,³² and compliance with this recommendation remains pending.

B. Need for State to engage in legislation reforms to address the discrimination

54. The Committee recommended that the State party take relevant special legislative and/or administrative measures to ensure that in practice men and women enjoy the right to social security, including access to a retirement pension, on a basis of equality, including measures to eliminate the factors that prevent women engaged in unpaid domestic work from contributing to social security schemes.
55. The IESS, in an appendix to the State’s follow-up report to the Committee, argued at several points that they are not a legislative arm of government, implying that because of separation of powers, they are in no real position to respond or to amend current laws to ensure fair and equal provision of social security benefits. This argument, however, ignores the constitutional power that the executive has to propose legislative reforms that it considers appropriate and indispensable for the guarantee of human rights. That is, although the IESS cannot legislate a law, it could, within its mandate, make a legal reform proposal to change this situation and propose it within the executive with the aim of presenting this proposal for the knowledge of the National Assembly.
56. The separation of powers argument should not be understood as excusing the IESS of doing its part to interpret, apply, promulgate, and move policies toward compliance with human rights, in line with their mandate. The doctrine of separation of powers does not imply such a rigid or static concept of functional roles as to allow for the easy shifting of accountability. The different branches of democratic government—in constant dialogue with each other—

³⁰ Para 13.4 of Views.

³¹ Para 19.6 of Views.

³² Para 23 of the Views.

share a commitment to constitutional principles of justice, dignity and equality. That is their common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.³³ The Committee on the Elimination of Discrimination against Women (CEDAW), in its General Recommendation 33 on women's access to justice, calls on administrative bodies to “[e]nsure the national implementation of international instruments and decisions from international and regional justice systems related to women's rights and establish monitoring mechanisms for the implementation of international law.”³⁴

57. Moreover, the State's obligations under the Covenant extend to all three branches of government and to all parts of the State.³⁵ Where legislative measures are required, it is the duty of the legislative branch to adopt the necessary measures.
58. As elaborated above, the State must take steps by all “appropriate means”³⁶ in order to ensure full realization of Covenant rights. That includes the necessary adoption of legislation and administrative actions to address this violation. The Committee has in fact stated that this duty extends to the drafting, introduction of and adoption of legislation and implementation plans where necessary to give effect to the rights³⁷.
59. The State's compliance duty is not attenuated by the separation of powers. All branches of the State are bound by international law, and State representatives are obliged to take the institutional steps and dialogue necessary to ensure compliance with it. In this instance, the obligation is clear. In order to eliminate substantive discrimination:

“States parties may be, and in some cases are, under an obligation to adopt special measures to attenuate or suppress conditions that perpetuate discrimination. Such measures are legitimate to the extent that they represent reasonable, objective and proportional means to redress de facto discrimination and are discontinued when substantive equality has been sustainably achieved. Such positive measures may exceptionally, however, need to be of a permanent nature, such as interpretation services for linguistic minorities and reasonable accommodation of persons with sensory impairments in accessing health-care facilities.”³⁸

60. Legislative change through the development of laws and policy can take some time as it requires consultative processes and engagement. There is, however, a concerning lack of substantive information provided by the State regarding any such processes.
61. The lack of information makes it extremely difficult to assess, for instance, whether the state has set any particular goals or benchmarks that it seeks to meet within a particular time so as to ensure progressive realisation of the right and the implementation of the recommendations of the Committee in this case. This lack of information, coupled with the State's continued

³³ Mwelase, para 46.

³⁴ CEDAW General Recommendation 33, para 56(e).

³⁵ Human Rights Committee, General Comment 31, para 4.

³⁶ ICESCR, Article 2(1).

³⁷ See CESCR General Comment 1, para. 4; CESCR General Comment 3, para. 11.

³⁸ CESCR, General Comment 20.

contention that the law is not discriminatory, is problematic, as it fails to materialize the Committee's remedy for the author of the complaint and for similarly situated women.

62. The recommendations have placed a positive duty on the state to act in order to address the violation of rights. The State is therefore expected to be a proactive agent being seen to both acknowledge its obligation as well as to take the necessary steps to implement the recommendations. It would have been useful for this process if the State had clearly outlined what issues are frustrating their implementation efforts, what steps they have taken to address such issues and what timeline they have in place in order to realise their now established obligations. None of this information is available to adequately assess the implementation of the recommendations, and the State should not get the benefit of a positive follow-up review due to its lack of provision of adequate evidence.

VI. Inadequacy of the State's Response to the Duty to Formulate, in a Reasonable Time, up to the Maximum of Available Resources, a Comprehensive and Complete Plan of Non-Contributory Benefits

63. To design, implement, and assess the impact of a comprehensive scheme for non-contributory pensions, it is essential that the State gather and publish relevant data of high quality and with the highest level of disaggregation. For data to be of high quality it must truly reflect the realities and lived experiences of people whose data is being collected. This requires combining qualitative and quantitative data to obtain an accurate and nuanced understanding of people's experiences of accessing rights and entitlements. The combination of both types of data is essential to not only inform the development of a policy in ways that is inclusive and effectively addresses the needs of everyone, but also to assess the impact of that policy on women from different backgrounds and characteristics.
64. CEDAW recommends the implementation of comprehensive and unified systems for the periodic and timely collection of statistical data disaggregated by sex, age, race, ethnicity, geographical location, socioeconomic circumstances, migrant situation, applicants for asylum, refugee and disability, as well as for sexual orientation and gender identity in all areas of the Convention and in the public and private spheres. It also recommends the development of measurable indicators to assess trends in women's access to rights.
65. Although the information presented by the Ecuadorian State describes a series of administrative measures taken, it fails to: a) prove the formulation and implementation of a comprehensive plan around non-contributory benefits, which takes due account of the needs of all women performing unpaid work and which has been developed mobilizing the maximum resources available to the State; and b) it does not assess the impact of existing policies on women from different backgrounds and characteristics, and therefore fails to provide an accurate picture on the degree of fulfillment of legal obligations flowing from the rights to social security and gender equality. The data does not contain the necessary level of detail and disaggregation required by international obligations, including according to gender, the type of work performed or an intersectional discrimination analysis, nor relevance to

specific ESCR indicators. This gap is apparent in that the information provided by the State does not even specify if the measures benefit women who did unpaid household work in a situation of poverty.

A. Duty to use the maximum of available resources

66. The obligation to allocate the maximum of available resources covers both the budgetary resources approved by budget laws, as well as those socially available, which can be legitimately captured through fiscal reforms that incorporate redistributive measures as well as through international cooperation. Even in times of financial constraint, States must exhaust all possibilities at their disposal to mobilize resources to protect the most vulnerable groups.

67. Within social security obligations that affect the public budget, accessibility requires that, according to CESCR General Comment 19:

All persons should be covered by the 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... States parties should, within the limits of available resources, provide non-contributory old-age benefits, social services and other assistance for all older persons who, when reaching the retirement age prescribed in national legislation, 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.”

68. Article 2 of the Convention on the Elimination of Discrimination against Women requires that women enjoy substantive equality. In other words, all kinds of regulations that contain or reproduce gender biases must be eliminated; but in many cases their elimination will not be enough, with affirmative measures also being necessary (Article 4.1) through proportionally greater investments to benefit women or via targeted programs. For example, if there are levels of inequality in access to social security or protection (even if women represent 50% of the population reached by social security benefits), the expenditure must be higher than 50% of the total to achieve substantive equality.

69. States should allocate the maximum of available resources to reduce and redistribute unpaid care work and to invest in gender-sensitive quality public services, in the care economy and in social protection that is accessible, sufficient and of adequate quality to meet the needs of specific needs of women. This can be done through tax incentives to change the traditional division of labor in the home and promote women's participation in the labor market, or through exemptions from excise taxes on goods typically consumed by the poorest households.

70. The information presented by the State about the Bonds and Pensions as of September 2018 does not clarify if there is (or not) a plan to create a comprehensive system of non-contributory benefits using the maximum resources. In other words, it does not identify the number of people who should be beneficiaries and yet are not reached by the pension system, nor what measures the State is taking to include them. In the same sense, the data on beneficiaries lacks general budget information therefore does not clarify if Ecuador is making maximum efforts to guarantee this right.

B. Cross-cutting obligations applicable to ESCR in terms of fiscal policy

71. Tax laws, policies and practices must be geared towards ending structural discrimination based on gender, ethnic, age, economic, etc., and promoting substantive equality. This obligation contemplates not only the abstention—and if it exists, the elimination—of unjustified differentiated treatment, but also requires the performance of affirmative actions that allow the removal of discriminatory cultural and social structures, through, for example, direct transfers or tax exemptions for disadvantaged individuals and groups.
72. In terms of ESCR, there are two types of obligations: those of immediate compliance and those of progressive compliance. The former are not subject to financial conditions or the availability of resources, and among them are: a) taking measures to guarantee rights and monitor their realization, b) guaranteeing rights under conditions of equality and without discrimination, and c) ensuring the minimum content of the rights.
73. The obligation to take measures and monitor their implementation includes the implementation of fiscal measures that contribute to eradicating structural and intersectional ethnic-racial, territorial, gender and other inequalities, and requires States to mobilize resources and allocate and execute public funds in an equitable manner, helping to achieve substantive equality.
74. The obligation to guarantee rights under conditions of equality and without discrimination must be reflected in the different dimensions of fiscal policy, in the sufficiency of spending to reverse discriminatory situations and in collection in accordance with the contributory capacity of the different income sectors. Regressive measures for allocating public spending and collecting revenue, including those that impose a disproportionate tax burden on the most disadvantaged groups, are incompatible with the principles of equality and non-discrimination.
75. On the other hand, there are the obligations of progressive compliance, which include: a) the obligation of progressivity and non-regressivity, and b) the maximum use of available resources. Both must respect precise guidelines when it comes to groups susceptible to special protection, as is the case of women.
76. The first contemplates the implementation of financial measures to advance in the fulfillment of rights and not to regress in the levels reached. This is a key guideline for the evaluation of economic and fiscal reforms, as it indicates that they are only permissible if it is ensured that they are not discriminatory or affect the minimum content of ESCR; are temporary, legitimate, reasonable, necessary, proportionate, and guarantee transparency and genuine participation of affected groups in the examination of alternatives; at the same time that they are subject to accountability procedures.
77. States must establish and progressively expand the minimum levels of social protection and access to essential levels of ESCR, ensuring that all people have access to essential health care and basic income security, in particular socially disadvantaged groups.

VII. Examples of Public Policies that Advance Substantive Gender Equality with Respect to Social Security

78. **Care credits in social protection systems:** According to the International Labour Organisation, implementing a policy of care credits is an effective way for social protection systems to recognize the value of care. Such care credits, when sufficiently generous, acknowledge and compensate for contributions that were lost due to time spent out of the labour force caring for dependent children, older adults, persons with disabilities or persons with illnesses. Pension care credits are used for prevention of poverty among unpaid carers, to provide improvements in gender equality, recognition of the social value of unpaid work, incentives for women to take up paid employment and, in some cases, to have and raise children³⁹.
79. They are provided, for example, in the Plurinational State of Bolivia and in Uruguay within the pension system, but only to women, who are credited with one year of contributions per child, up to a maximum of three and five children, respectively.⁴⁰ Nevertheless, in order to challenge gender stereotypes, care credits should be provided to both mothers and fathers, and not only to those with children, given the wide range of activities and beneficiaries that unpaid care work encompasses (for example, not only children, but also persons with disabilities or older adults).
80. In Finland and Sweden, both fathers and mothers are credited with social contributions, for pension and other social insurances, covering the period during which they are on leave. With ageing societies, it is crucial that pension credits are granted to all unpaid carers over the life cycle. This is especially relevant to women, who have longer life expectancy.⁴¹
81. In Chile, a reform of the pension system took place in 2008 as a result of the Michelle Bachelet administration's programme aimed at enhancing women's income security in old age. The reform recognized employment interruptions due to childrearing through the provision of care credits for mothers (which increased women's average pensions by 20 per cent) and created the possibility for pension splitting in cases of divorce.⁴²
82. France adopted a series of reforms, starting in 1971, when it first created pension bonuses for bearing children, denoting a pro-natalist policy. In 2004, pension credits were expanded to include mothers of one and two children and, in 2010, they were extended to cover fathers as well. Pension credits are awarded separately for birth (or adoption) and for education of a child⁴³.
83. The first statutory recognition of family caregiving was enacted in the United Kingdom in 1978. The State Second Pension was created in 2002, as a means of helping workers with low

³⁹ ILO, 'Care Work and Care Jobs: For the Future of Decent Work', (2018).

⁴⁰ Organización Iberoamericana de Seguridad Social. Medidas compensatorias de los cuidados no remunerados en los sistemas de Seguridad Social en Iberoamérica.

⁴¹ *Ibid*, 23.

⁴² *Ibid*, 24.

⁴³ *Ibid*, 23.

earnings to build up pension entitlements; care credits are provided for certain periods when no wages have been earned, including for periods of caring. Parents, foster parents or persons caring for a person with a disability who is receiving a family benefit are eligible and, since 2011, grandparents providing care for grandchildren are also eligible.⁴⁴

84. **Universal pensions:** In addition to contributory pensions, further good practices to ensure social protection for all include the provision of universal pensions, as is the case in countries such as Botswana, Mauritius and Namibia. These pension schemes particularly benefit people with care responsibilities (mainly women) who have been outside the formal economy (working in the informal economy or not in employment) and who are therefore often excluded from contributory pension schemes. The adequacy of benefits is crucial in order to reduce the poverty risks faced by unpaid carers. Mauritius stands out as a good example, since the amount of the basic retirement pension is approximately five times higher than the poverty line.⁴⁵
85. The experiences of the Plurinational State of Bolivia, Botswana, Lesotho, Namibia and Zanzibar (United Republic of Tanzania) show that universal, non-contributory social pensions for older persons are feasible and can be financed by governments of low- and middle-income countries. For instance, and despite having the lowest Gross Domestic Product (GDP) per capita on the South American continent, the Plurinational State of Bolivia has one of the highest coverage rates in old-age pensions. With the introduction of the non-contributory old-age pension called Renta Dignidad in 2007, it achieved universal coverage. Renta Dignidad reaches around 91 per cent of the population over the age of 60. The programme costs around 1 percent of GDP and is financed from a direct tax on hydrocarbons and dividends from state-owned companies. It has led to a 14 per cent poverty reduction at the household level and has secured beneficiary incomes and consumption.⁴⁶
86. **Indicators:** Regarding what data the State must collect and report in relation to the implementation of the general recommendations of the Committee's decision (in addition to the questions in bold above), a useful source is found in the Progress Indicators for the measurement of rights contemplated in the Protocol of San Salvador, prepared by the Working Group for the Analysis of the annual reports provided for in said instrument. These indicators regulate a series of data that States must collect on social security, namely:
- 86.1. 1. Process indicators:
- 86.1.1. a) Average time of recognition of the right to pensions or retirements by activity condition and by sex.
 - 86.1.2. b) Percentage of the population insured by contributory systems by sex, ethnicity / race and educational level.
 - 86.1.3. c) Percentage of the population covered by non-contributory systems by sex, ethnicity / race and educational level.

⁴⁴ *Ibid.* 23.

⁴⁵ *Ibid.* 24.

⁴⁶ OIT (2017) World Social Protection Report 2017-19: Universal social protection to achieve the sustainable development goals (Geneva).

- 86.1.4. d) Percentage of the population affiliated to special regimes by sex, ethnicity / race and educational level.
- 86.1.5. e) Percentage of adults over 65 years of age covered by old-age care programs by sex, ethnicity / race and educational level.
- 86.2. 2. Progress indicators:
 - 86.2.1. a) Percentage of affiliated persons who perceive the level of social security coverage as satisfactory.
- 86.3. 3. Results indicators:
 - 86.3.1. a) Economically active population rate by sex, age, educational level and income quintiles.
 - 86.3.2. b) Population covered by a pension or retirement by age group, sex and income quintiles.
 - 86.3.3. c) Percentage of the population insured under a contributory scheme, by sex, age and income quintiles.
 - 86.3.4. d) Number of contributors affiliated to the pension system by sex, age and income quintiles. Total unemployment subsidies for people not affiliated with the contributory systems.
- 87. Effective provision of these indicators, already mandatory for Ecuador within the framework of the inter-American human rights system, may be a good measure for the Committee to request to clarify the level of realization of the right to social security. The San Salvador Protocol Working Group stated in 2016 that the Ecuadorian state should intensify, “*measures to increase access to social security in order to ensure its universal coverage for the entire population, regardless of their Labor conditions, considering also that a labor informality rate of 39.3% is reported.*”

VIII. Conclusion

- 88. Based on the available information, the State’s implementation efforts are very far below the reasonable steps expected of the State to realise rights, as required by article 8(4) of the Optional Protocol and article 2(1) of the ICESCR. The Committee’s jurisprudence makes it clear that the standard of reasonableness requires that the interests of vulnerable groups be given the highest priority, and that a strict scrutiny must be applied in cases involving groups that face systemic discrimination.⁴⁷ As outlined above, a host of examples of examples from a variety of jurisdictions demonstrate that more can and should be done by the State Party to fully implement the Committee’s systemic remedies.
- 89. For the foregoing reasons, the interveners respectfully urge the Committee to:
 - 89.1. Maintain the follow-up procedure regarding its general recommendations in the current case in light of the State’s failure to prove compliance;
 - 89.2. Request answers to the questions posed throughout the filing that are critical to enabling a grounded assessment of the State’s duties of conduct and result with respect to the general recommendations;

⁴⁷ López Rodríguez v Spain, para 14.1.

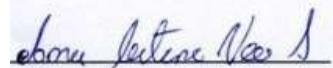
- 89.3. Encourage the State to engage in a consultative process with civil society with respect to the implementation of the general recommendations; and
- 89.4. Transmit this submission to the State party to afford it an opportunity to respond.

Sincerely,



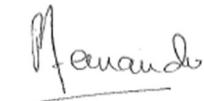
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Asociación Civil por la Igualdad y la Justicia (ACIJ) - Argentina



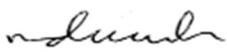
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