

Sir
Reid Ra' ad Al Hussein
High Commissioner for Human Rights
Office of the United Nations

Honorable High Commissioner

We are writing to you in regards to communication No. 10/2015, registered in the name of Ms. Marcia Cecilia Trujillo Calero (hereinafter, the petitioner), in order to respond to the communication presented by the State of Ecuador, dated February 2, 2016. To this end, we will analyze the preliminary objections the State raises in the order they were presented. First, we shall refer to *ratione temporis* jurisdiction, demonstrating that the Committee has jurisdiction, given that the present case involves the continuous violation of a right. Second, we will address the exception of the fourth instance objection, explaining that the purpose of the petition is not for this Committee to act as a court of appeal, given that it is alleging direct violations of the International Covenant of Economic, Social, and Cultural Rights (hereinafter, ICESCR). Finally, we will address the argument that the petition is groundless and does not characterize a violation of rights, clarifying the facts that constitute rights violations that form the basis for this communication.

I. Preliminary exceptions

1. *Ratione temporis* jurisdiction

As was expressed in the initial petition, the present case addresses a continuous violation of the right to social security. The facts that occurred prior to the entry into force of the Optional Protocol to the ICESCR caused a violation of Ms. Trujillo's right to social security that continues to the present day.

Due to the lack of notification and erroneous information provided to Ms. Trujillo by officials of the Ecuadorian Institute of Social Security (hereinafter IESS), when presenting this communication the petitioner found herself unemployed and unable to obtain any type of retirement. When the petition was presented before the Committee, Ms. Trujillo met the age requirement prescribed by legislation to access retirement for old age.¹ However, as a result of the errors of the IESS, the petitioner did not have the necessary number of contributions to receive any type of retirement. On this point, it must be noted that the contributions Ms. Trujillo made, and that the IESS declared invalid would at no point be taken into account in order to allow the petitioner to access any type of retirement or related right.

On this matter, what this Committee stated in its General Comment No. 19 should be noted,

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

¹ Law of Social Security. Official Register, Supplement 465 of November 30, 2001, art. 185.

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.²

To this end, it should be noted that currently Ms. Trujillo is unemployed and has not been able to access any type of retirement pension for not meeting the number of necessary contributions, in spite of having reached the age prescribed by legislation, all of which is due to causes directly imputable to the State. However, to date, the State has not adopted measures to repair the violation of the right to social security of which Ms. Trujillo has been a victim. These facts evidence the continuation of the violation of this right.

Additionally, in accordance with the aforementioned General Comment No. 19,

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.³

In the case at hand, the petitioner made use of all the available resources at the domestic level that she considered adequate for her case. However, she did not obtain reparation for her right that was violated. None of the processes carried out at the domestic level considered the legal consequences of the lack of IESS notification regarding the “invalidity” of Ms. Trujillo’s contributions; nor did it analyze the lack of expedited and transparent proceedings. They also failed to consider the legal consequences and effects on the Ms. Trujillo’s rights, given the situation of the petitioner with respect to her inability to access a retirement pension. Consequently, the lack of protection and reparation within the various administrative and judicial procedures form part of the violation of the right to social security. In this respect, that the most recent resolution issued by the Constitutional Court of Ecuador in July 2014 forms part of the violation of the right to social security alleged in this communication, which further confirms the Committee’s *ratione temporis* jurisdiction.

2. The fourth instance preliminary objection

With respect to the argument that the communication seeks the Committee to act as a fourth instance, as the Inter-American Court of Human Rights has stated in cases in which the Ecuadorian State has argued this preliminary objection,

The Court has also indicated that, for the fourth instance objection to be admissible, it would be necessary that the applicant seeks that the Court examine the decision of a domestic court “owing to its incorrect assessment of the evidence, the facts, or the

² Committee on Economic, Social and Cultural Rights. 39th Period of Sessions, Geneva. November 5 – 23, 2007. General Comment No. 19 on the right to social security (article 19). Para. 15.

³ Committee on Economic, Social and Cultural Rights. 39th Period of Sessions, Geneva. November 5 – 23, 2007. General Comment No. 19 on the right to social security (article 19). Para. 77.

domestic law, without, at the same time, arguing that the said decision violated international treaties over which the Court has jurisdiction.⁴

The Inter-American Commission on Human Rights also adopts this criterion, when it affirms that,

The basic premise of this formula is that the Commission cannot review the judgments issued by the domestic courts acting within their competence and with due judicial guarantees, unless it considers that a possible violation of the Convention is involved.⁵

In the case at hand, the petitioner does not request the Committee to review decisions made by judicial bodies of the State as an appeals court, but rather requests the Committee to analyze the actions of different state bodies to determine their compatibility with the OP-ICESCR, understanding these domestic proceedings as a whole. Ultimately, what this communication argues is that the actions of the State's administrative and judicial bodies did not effectively guarantee Ms. Trujillo's right to social security. Precisely, the exhaustion of domestic remedies after fourteen years without having obtained reparation and the protection of her right is what grants her standing to present this communication before this Committee.

Consequently, this communication alleges the violation of the right to social security, and, therefore, the violation of international obligations the State of Ecuador assumed by ratifying the ICESCR.

3. Communication manifestly groundless and fails to characterize a violation of Convention rights

First, it is worth recalling the facts alleged in this communication that constitute a violation of rights:

- a) Lack of notification with respect to the legal consequences of having delayed making contributions during eight months, which means that Ms. Trujillo continued contributing to the IESS during five years and five months, in spite of remaining unemployed. During the period of her invalid contributions, the IESS did not notify her of the invalidity of these contributions. To this end, the IESS would never consider the contributions that Ms. Trujillo made and that the IESS declared invalid for the effects of her access to a retirement pension.
- b) Erroneous information that officials of the IESS provided Ms. Trujillo, upon the basis of which Ms. Trujillo quit her job, and found herself unemployed and in precarious health.

⁴ Inter-American Court of Human Rights. Case of Palma Mendoza et al. Vs. Ecuador. Judgment of September 3, 2013. Preliminary objections and merits

⁵ Inter-American Commission on Human Rights. Report No. 39/96. Case 11.673 "Marzioni" vs. Argentina. IACHR Annual Report 1997. Para. 50.

- c) Lack of alacrity in administrative and judicial proceedings. The petitioner's case lasted nearly fourteen years in the domestic sphere, from the moment she requested her retirement pension in 2001 until the Constitutional Court issued its judgment in 2014.
- d) Gender discrimination. At the time of her affiliation, Ms. Trujillo was a housewife at a disadvantage compared to affiliates who were employees or voluntary affiliates with a profession that generated income. The State did not consider this situation when it suspended the continuity of her affiliation and declared invalid the contributions she made during five years and five months.

With respect to this objection, the State asserts:

There is nothing that demonstrates that the administrative and judicial authorities that resolved her legal situation with respect to her retirement pension have acted in such a way so as to deliberately infringe upon her rights, as it was established that she did not meet the legal and regulatory requirements necessary to benefit from a social security benefit.

The State makes reference to the fulfillment of "legal and regulatory requirements necessary to benefit from a social security benefit;" however, it does not consider the lack of clarity and transparency with respect to the law that governs the exercise of the right to social security. To this end, we will analyze the lack of access to information regarding the legal and regulatory requirements and the lack of transparency of the administrative proceedings, all of which constitute a violation of the right to social security for the failure to guarantee accessibility.

First, the State's description of the facts evidences the multiplicity of norms in place to regulate access to a retirement pension. The State mentions a Law of Obligatory Social Security in place from 1988 to November 2001; a Law of Social Security, with its respective Transitory Dispositions, in place from November 2001 to date. It also mentions the Codified Statute of the IESS, in place from 1990 until March 9, 2006; the Transitional Regulation of Disability, Old Age, and Death Insurance issued by the Governing Board of the IESS through a resolution on February 21, 2006; and the C.I. Resolution 137 of July 12, 2002, issued by the Financial Controller of the IESS.

Evidently, the multiplicity of norms by itself does not violate any rights. However, in the face of the diversity of norms that regulate access to retirement pensions, the administration must adopt the necessary measures so that the legal and regulatory requirements it references are made known to affiliates. In the present case, it has not been demonstrated that the State has adopted such measures. By contrast, it has been shown that neither the petitionary nor IESS officials clearly understood the requirements to access a special reduced retirement pension.

To this end, the lack of clarity with respect to the norms is evidenced by the lack of knowledge on the part of the IESS' own officials regarding the "legal and regulatory requirements necessary to benefit from a social security benefit." As a result of this lack of knowledge, when the petitioner consulted the IESS regarding the special reduced retirement

pension, she was informed that she met all the requirements to access the pension, and that she need only quit her job. For this reason, Marcia quit her job, and was left unemployed and without access to any retirement pension.

Second, it has been demonstrated that the IESS accepted the contributions that Marcia made during five years and five months without making any type of notification with respect to the legal consequences of not having contributed during eight months, or regarding the invalid nature of her contributions, which evidences the lack of transparency.

Third, in its description of the facts, the State fails to mention the lack of notification of the resolution that denied the special reduced retirement pension Ms. Trujillo requested. It stated that “the Commission of Benefits and Controversies of the Provincial Directorate of the IESS of Pichincha, through agreement N 2002-2992-R-1 of June 20, 2003, denied the request for retirement for failure to meet the requirements prescribed by the legislation in force.” However, this agreement was only made known to the petitioner on May 10, 2007, nearly four years after it was issued, which confirms the lack of transparency of the administrative proceedings.

Moreover, as General Comment No. 19 of this Committee states,

Qualifying 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.⁶

In the case *sub judice*, the reasonability and proportionality in the State’s decision to not recognize the contributions the petitioner made during five years and five months based on her eight month delay due to a lack of income should be analyzed. To this end, it has been shown that the State did not make any type of consideration regarding Marcia’s situation as a housewife with limited resources when suspending the continuity and declaring her contributions invalid.

Finally, in reference to the extraordinary appeal for protection, the State asserts that “it is impossible to use this legal guarantee to analyze issues of mere legality that were already judged in the ordinary court system.” Thus, independently of the legal nature and scope of the recourse to which it refers, the State’s perspective regarding access to a retirement pension should be highlighted.

In this context, the lack of clarity with respect to the nature of the IESS benefits is demonstrated. First, it must be noted that retirement forms part of the right to social security. It should be emphasized that, through IESS benefits, the State seeks to guarantee the right to social security. As such, regardless of the system established, the State must ensure that access to IESS benefits respects the minimum content of the right to social

⁶ Committee on Economic, Social and Cultural Rights. 39th Period of Sessions, Geneva. November 5 – 23, 2007. General Comment No. 19 on the right to social security (article 19). Para. 24.

security. Therefore, the present case requests that the Committee analyze the failure to apply international human rights standards in the legislation and procedures that regulate and operationalize access to a retirement pension as a part of the right to social security.

In conclusion, the State's affirmation with respect to a groundless petition and the failure to describe a rights violation demonstrates the lack of guarantees with respect to the non-repetition of the facts denounced in this case, and evidences the importance of a Committee pronouncement on the violations alleged.

II. Petitions

In view of the foregoing, we reiterate our initial petition and request that the CDESCR declare the violation of the right to social security (article 9 of the ICESCR) of MARCIA CECILIA TRUJILLO CALERO.

José Luis Guerra Mayorga
General Director of Protection
Ecuador Ombudsman

Maria Fernanda Alvarez Alcívar
National Director of "Good Living" Rights
Ecuador Ombudsman

Sir
Reid Ra' ad Al Hussein
High Commissioner for Human Rights
Office of the United Nations

Honorable High Commissioner

We are writing to you in response to Document No. 06353, dated June 2, 2016, sent by the State of Ecuador, in response to the complaint presented by Ms. Marcia Cecilia Trujillo Calero, identified with No. 10/2015. In this respect, we declare the following:

I. Facts motivating the petition

First, we consider it useful to review the facts that occurred as of 2001. At that time, Ms. Trujillo approached the IESS office to request information regarding the requirements she needed to fulfill in order to obtain a reduced retirement pension, which she could request at that time, as was applicable.⁷ At that time, IESS officials informed Ms. Trujillo that she could retire under the “Special Reduced Retirement” regime, as she met this regime’s requirements: having made more than 300 contributions and being more than 45 years of age.

As a result of this interaction, on March 1, 2001, Ms. Trujillo filled out the form to obtain a reduced retirement and quit her job. After requesting her retirement, on March 20, 2003, the IESS denied her request for retirement because, in its view, Ms. Trujillo had only made 238 contributions and not the 300 required to access the retirement pension. This denial was based on the fact that the contributions made between August 1989 and February 1995 were declared “invalid” and could not be considered to grant the reduced retirement pension. This denial was dated June 20, 2003, and was notified to Ms. Trujillo on May 10, 2007, five years later, which indicates that the IESS authorities did not act in a timely manner in this case.

Upon notification of the denial of her request, Ms. Trujillo presented an appeal within the timeframe provided for in the relevant legal norms. The National Commission of IESS Appeals denied this appeal. Upon exhausting the administrative route, Ms. Trujillo went before the Contentious Administrative Tribunal, and, later, to the National Court of Justice, to present her case. Both tribunals decided to deny her petition based on the fact that the IESS had only recognized 238 contributions. Thus, the number of contributions was insufficient for Marcia Trujillo to access the right to a retirement pension.

⁷ The Codified Statute of the IESS, in place in 2001, established in its article 12: “The affiliate who leaves and does not return to any social security regime within the six months following his termination, shall have the right, without the need to prove invalidity, to a special retirement, provided that he has made at least 300 monthly contributions and reached 45 years of age.

II. Allegations of the State

a) Nonfulfillment of the requirements to access a retirement pension

The State's main argument of substance consists in affirming that the denial of a retirement pension was done according to the law, given that the petitioner failed to fulfill the requirements established in the applicable legislation. Therefore, the State affirms, the denial does not violate her rights, as it was not an arbitrary decision, but rather a resolution based on the existing legal framework. In sum, Ms. Trujillo did not meet the requirements established by law, specifically the number of contributions, given that a certain number of contributions were declared invalid.

In response to this argument it is necessary to make the following considerations:

1. The IESS, through its information system, did not notice the omission that the petitioner supposedly made. As a result of this, Ms. Trujillo, as an affiliate, could not know that the contributions she had made were invalid. It is the responsibility of IESS officials to determine, through their information system, if the contributions their affiliates make are made within the established time frame. Additionally, they should undertake this analysis in a timely and efficient manner to communicate this important information to their affiliates.
2. The IESS did not inform Ms. Trujillo in a timely manner that the contributions she made between the periods of August 1989 to February 1995 were invalid due to the eight-month consecutive delay in payment. The institution received 65 contributions during more than five years. Even though Ms. Trujillo returned to work and changed her contribution regime, the IESS did not inform her at that moment that her previous contributions were invalid.

To this end, the Constitutional Court has indicated "*In this way, it is a contradiction that the Ecuadorian Institute of Social Security denies its responsibility of an adequate control of the system of contributions of affiliates, in particular when the result is that an elderly person is placed in a precarious situation (...).*"⁸

b) Lack of notification and access to information

IESS officials have states that "Ms. TRUJILLO CALERO MARCIA CECILIA has not approached the Institute to determine that state of her proceeding."⁹ However, in the Ecuadorian legal order, one finds that article 115 of the Statute of the Legal and Administrative Regime of the Executive Function establishes in article 118.1: "*The administration is required to issue an express resolution in all proceedings, and notify it in any form.*" Thus, even in the case that the statute of limitations has run, the demand is

⁸ Id. 62.

⁹ Ecuadorian Institute of Social Security, Provincial Sub-Directorate of the Pension System, Pichincha. Document No. 22301700-357. 2003.

renounced, the time frame has run, or the plaintiff desists in his claim, the IESS must issue a resolution that states this circumstance, and describes the facts and applicable norms.

The State representatives indicate “(...) on September 13, 2002, the Benefits Commission of IESS Regional 1 issued Agreement 3001202-CL-1029, which declared that due to the delay of Ms. Marcia Cecilia Calera in the payment of her contributions as a voluntary affiliate, her affiliation automatically terminated, and as a result the contributions she made later were invalid.”¹⁰

In this context, the IESS first fails to note that the petitioner was not duly notified of the resolution to which it refers. Regardless of this, the resolution would not constitute timely notice, as it occurred after the petitioner presented a request for retirement and quit her job to obtain this retirement pension. Additionally, the petitioner was not notified until 2007 of the IESS’ decision that she did not meet the requirements for special reduced retirement, due to the fact that several of her contributions were declared invalid.

To this end, one must refer to Judgment No. 287-16-SEP-CC of Case No. 0578-14-EP, which the Constitutional Court of Ecuador issued in a similar case. In this case, the IESS declared contributions invalid because the affiliate did not make contributions for six consecutive months. Thus, the affiliate lost his status as a voluntary affiliate. In this case, the Constitutional Court states

“...the IESS should have noted in a timely manner that the petitioner’s contributions were invalid, and communicate this fact to him, so that he could have adopted alternative measures during an age in which he could still work. However, in the IESS’ criteria, as noted in the record of the hearing held for the action for protection (page 23 of the first instance file) “each affiliate must be attentive that his work history contains the contributions that the law requires,” a criteria that does not in any way justify the IESS’ failure to carry out a control regarding its benefits system, and its obligation as a provider of the right to keep its affiliates duly informed”¹¹

In the present case, the IESS did not provide Ms. Trujillo with timely notification of the fact that her contributions were declared invalid during the years that she was affiliated with this institution. She was only informed of this fact after she had filed her request for special reduced retirement and quit her job.

c) Access to information as part of the right to social security

With respect to Ms. Trujillo’s lack of knowledge that the IESS considered a certain number of her contributions to be invalid for having allegedly fallen into arrears,

Proceedings between individuals and the administration are guided by the principle of good faith, in its dimension of legitimate trust and respect for one’s actions. Thus, as

¹⁰ Ecuadorian Institute of Social Security, Provincial Sub-Directorate of the Pension System, Pichincha. Document No. 22301700-357. 2003.

¹¹ Constitutional Court of Ecuador, Judgment No. 287-16-SEP-CC, CASE NO. 0578-14-EP. 62

public norms, there is a legal presumption of knowledge; thus Ecuadorian civil law establishes that “the law requires all residents of the Republic, including foreigners [know the law] and ignorance of the law excuses no one for his failure to comply with it. This normative mandate stems from the need to follow the law, assuming the fundamental obligation to respect and fulfill the legal system as a whole.

This statement places the burden on the affiliate to determine whether his contributions are valid. However, the IESS’ officials were unaware of this fact. This is reflected both in the fact that they accepted Ms. Trujillo’s contributions, as well as the affirmative answer the institution gave Ms. Trujillo when she asked if she fulfilled the requirements for a special reduced retirement.

To this end, the Constitutional Court of Ecuador, in Judgment No. 287-16-SEP- CC in Case no. 0578-14-EP, has established,

... the Ecuadorian Institute of Social Security, as one of the institutions responsible for guaranteeing the right to social security, and as part of this right, the right to universal retirement, should have adopted all the measures necessary to ensure the services this institution provides to its affiliates are efficient. However, in the current case, it is apparent that the institution has placed all the responsibility on the petitioner, an elderly woman, who views her retirement as an instrument through which she may live out her last years of life in dignified conditions.¹²

In this context, it is important to note that the petitioner was never informed that, according to the IESS’ regulations, her contributions could be declared invalid. By contrast, the IESS continued to receive her contributions until March 1, 2001, when she requested her special reduced retirement pension. The Benefits Commission informed her, in an untimely manner, that these contributions had been declared invalid, and that she therefore did not fulfill the requirements to obtain her fundamental right to a retirement pension.

In regards to this, the Constitutional Court of Ecuador has indicated

...The State must guarantee that the social security system is exercised in accordance with principles including efficiency, according to which affiliates have adequate information channels to inform themselves of issues of interest to them, as well as that officials within these institutions provide satisfactory attention to affiliates to offer guidance regarding the rights and duties of the affiliates.¹³

Therefore, the omission of IESS officials in providing the petitioner with accurate information and having failed to inform her that her contributions were invalid at an opportune moment, evidence the violation of the right to social security in its specific component of access to information.

c) Current situation of Ms. Trujillo

¹² Id.

¹³ Constitutional Court of Ecuador, Judgment No. 287-16-SEP-CC, Case No.0578-14-EP.66.

The IESS indicates that after the petitioner learned that some of her contributions were declared invalid,

[...] the petitioner could carry out new employment activities or continue with the voluntary affiliation regime, in order to make the remaining number of contributions that would grant her access to an ordinary retirement pension. However, from the certification the IESS issued, it is evidenced that since December 2001, and during a 14-year period, she did not make any type of contribution to social security, and began to again make contributions from December 2015 to the present date, and therefore, is a beneficiary of obligatory social security benefits.

The IESS' assertion ignores the facts of the case and the effects of the acts and omissions of this institution on Ms. Trujillo's life. We reiterate what we stated in the original communication, that in order to access a special reduced retirement, after IESS officials informed her that she met the requirements, Ms. Trujillo quit her job. Currently, Ms. Trujillo cannot obtain employment, and the passage of time has affected her health. She has been diagnosed with diabetes, high blood pressure, and hearing deficiency. For these reasons, it has been demonstrated that Ms. Trujillo is in a situation of vulnerability due to her poor economic and health conditions, which worsen on a daily basis as she does not receive a retirement pension.

e) In regards to considering the Committee as a fourth instance

We reiterate that this petition does not request that the Committee act as a fourth instance. Likewise, it does not request the Committee to review the court decisions issued in Ms. Trujillo's case. It requests the Committee to review the actions of the State of Ecuador and the procedures applied in the present case. In particular, the petitioner requests the Committee analyze the actions of the IESS officials, with respect to the denial of a special reduced retirement pension.

Although Ms. Trujillo did use the ordinary justice system, none of the judges of the Contentious Administrative Tribunal, the National Court of Justice, or the Constitutional Court, ruled on the substantive issue, nor did they comment regarding the violation of Ms. Trujillo's fundamental rights to social security, legal security, a dignified life, and health.

In the present document we have made reference to a resolution of the Constitutional Court of Ecuador from 2016, regarding a similar case to Ms. Trujillo's. In this decision, the Court analyzes the effects to the right to social security due to the acts and omissions of the Ecuadorian Institute of Social Security, determining the obligations of this institution as the guarantor of this right. However, Ms. Trujillo's situation did not receive the same protection as in the case described. Additionally, the responsible administrative entity maintains its position regarding the lack of violation of her rights.

Finally, it must be noted that to date, the State of Ecuador has not adopted any measure to repair the violation of the right to social security of Ms. Trujillo, thus demonstrating that the State has not observed the indications of the CESCER in its General Comment 19, in

which it states that “[a]ll victims of violations of the right to social security should be entitled to adequate reparation, including restitution, compensation, satisfaction or guarantees of non-repetition.”¹⁴

III. Petitions

In light of the foregoing, we reiterate our initial petition and request the CDESCR declare the violation of the right to social security (article 9 of ICESCR) of MARCIA CECILIA TRUJILLO CALERO.

José Luis Guerra Mayorga
General Director of Protection

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¹⁴ Committee on Economic, Social and Cultural Rights. 39th Period of Sessions, Geneva. November 5 – 23, 2007. General Comment No. 19 on the right to social security (article 19). Para. 77.