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Committee on Economic, Social and Cultural Rights

Views adopted by the Committee under the Optional Protocol to the Covenant concerning communication No. 10/2015*

<i>Communication submitted by:</i>	Marcia Cecilia Trujillo Calero (represented by counsel, Ramiro Rivadeneira Silva, Patricio Benalcázar Alarcón, José Luis Guerra Mayorga and Rodrigo Varela Torres, of the Office of the Ombudsman of Ecuador)
<i>Alleged victim:</i>	The author
<i>State party:</i>	Ecuador
<i>Date of communication:</i>	17 July 2015
<i>Date of adoption of Views:</i>	26 March 2018
<i>Subject matter:</i>	Denial of special reduced retirement pension
<i>Procedural issues:</i>	Committee's competence <i>ratione temporis</i> ; Committee's competence <i>ratione materiae</i> ; failure to sufficiently substantiate allegations
<i>Substantive issues:</i>	Right to social security; exercise of Covenant rights without discrimination; equal right of men and women to the enjoyment of all Covenant rights
<i>Articles of the Covenant:</i>	2 (2), 3 and 9
<i>Articles of the Optional Protocol:</i>	3 (2) (b), (d) and (e)

1.1 The author is Marcia Cecilia Trujillo Calero, an Ecuadorian national born on 10 April 1952. She claims to be a victim of a violation by the State party of her rights under article 9 of the Covenant. The Optional Protocol entered into force for the State party on 5 May 2013. The author is represented by the Office of the Ombudsman.

1.2 In the present Views, the Committee first summarizes the information and the arguments submitted by the parties and the intervening third party (paras. 2.1 to 8.2 below), without reflecting the position of the Committee. It then considers the admissibility and merits of the communication and, lastly, draws its conclusions and issues recommendations.

* Adopted by the Committee at its sixty-third session (12–29 March 2018).



A. Summary of the information and arguments submitted by the parties

The facts as submitted by the author

2.1 The author was a voluntary affiliate of the social security system, since she worked as an unpaid domestic worker (also called “housewife”), responsible for the care of her home and her three minor children, aged 7, 9 and 11. As a voluntary affiliate of the Ecuadorian Social Security Institute, she made monthly payments (contributions), despite not having an employment relationship with an employer, from November 1981 onward, except for a period of eight consecutive months in 1989/1990, during which time she made no contributions.¹ These contributions were paid retroactively in April 1990. The author continued to make monthly payments as a voluntary affiliate until February 1995, when she began a new employment relationship and therefore joined the scheme for employees. The author claims that, in 2001, she consulted Ecuadorian Social Security Institute officials on a number of occasions about whether she was able to retire under the special reduced retirement scheme (early special retirement) and, on each occasion, the officials informed her verbally that it was possible, as she met the requirements, namely having made more than 300 monthly contributions and being more than 45 years old, but she should resign from her job in order to be able to retire.² On the basis of this information, in 2001, the author resigned from her job and applied to the Institute for special retirement.

2.2 On 13 September 2002, the Benefits Commission of the Ecuadorian Social Security Institute, Regional 1, held that the author’s voluntary affiliation had terminated in August 1989, in accordance with article 158 of the Codified Statute of the Ecuadorian Social Security Institute, which provides that voluntary affiliation terminates if the insured person fails to pay contributions for six consecutive months. On 6 March 2003, the National Appeals Board of the Ecuadorian Social Security Institute upheld the decision on appeal. The author claims that she was not aware of either of these decisions until the National Appeals Board notified her of its decision on 21 June 2007.³

2.3 On 20 June 2003, the Regional 1 Commission rejected the author’s request for retirement, on the grounds that she had made only 238 monthly contributions between 1972 and 2001 and that at least 300 were required. The Ecuadorian Social Security Institute noted that the contributions that she had made between August 1989 and February 1995 were invalid. The author claims that she learned of this decision on 10 May 2007.

2.4 On 21 June 2007, the National Appeals Board of the Ecuadorian Social Security Institute rejected the author’s appeal on the grounds that she did not meet the eligibility requirements for a special reduced retirement pension as set out in article 121 of the Codified Statute of the Ecuadorian Social Security Institute and article 2 of resolution C.I. 137. The Board referred to its decision of 6 March 2003, in which it ruled that the author’s voluntary affiliation had terminated in August 1989 and that only 238 monthly contributions had been credited.

2.5 On 31 August 2007, the author filed an application with Quito District Administrative Court No. 1, requesting that the decisions of the Regional 1 Commission and the National Appeals Board be set aside and that she be granted a special retirement pension. The author claimed, among other things, that the denial of her retirement request was unlawful, since she was not notified in a timely manner that the voluntary contributions she had made between August 1989 and February 1995 were invalid; furthermore, she noted that the errors made by the Ecuadorian Social Security Institute could not be attributed to her.

2.6 On 22 September 2010, Court No. 1 dismissed the application. It observed that the decisions of the Regional 1 Commission and the National Appeals Board had not been challenged by the author within the statutory time limit and that the author had agreed to the invalid contributions not being taken into account. The Court held that the author had

¹ For detailed information about the author’s contributions to the Ecuadorian Social Security Institute, see para. 4.7 below.

² The author refers to article 121 of the Codified Statute of the Ecuadorian Social Security Institute.

³ See paras. 2.5 and 2.10 below.

made only 238 contributions — not 300 — and that she therefore did not qualify for a special reduced retirement pension.

2.7 The author lodged an appeal in cassation with the National Court of Justice, alleging, among other things, the failure to apply constitutional provisions protecting the right to social security. The author claimed that Court No. 1 had failed to take into account the fact that, because of negligence on the part of the Ecuadorian Social Security Institute, it was only after she had submitted her retirement request that the contributions that had been paid late and all the subsequent contributions that had been paid monthly were annulled.

2.8 On 17 April 2014, the National Court of Justice dismissed the author's appeal, noting that the National Appeals Board's decision of 6 March 2003 had not been duly communicated to the author and that, therefore, the author had not learned of that decision until she was notified of the Board's decision of 21 June 2007. The Court ruled that, in her application, the author had challenged the decisions of the Regional 1 Commission and the Board on the wrong grounds; she should have appealed on grounds of administrative silence, arguing that the Ecuadorian Social Security Institute had failed to give proper notice of the Board's decision of 6 March 2003 within the statutory period. The Court concluded that it was unable to review the lawfulness of the payments made by the author as a voluntary affiliate between 1989 and 1995, since it could not settle a matter that was not at issue in the action.

2.9 Subsequently, the author brought an application before the Constitutional Court for a special protective remedy, claiming that, in its ruling, the National Court of Justice had violated her rights under articles 66.23 (right to file complaints), 76.5 and 76.7.1 (application of the most favourable rule, defence and due substantiation of decisions) of the Constitution, since it had allegedly made an erroneous assessment of the evidence adduced. On 17 July 2014, the Constitutional Court dismissed the author's application under article 62.5 of the Organic Act on Jurisdictional Guarantees and Constitutional Oversight, ruling that the application concerned the assessment of evidence by the National Court of Justice.

2.10 The author claims that her communication meets the admissibility criteria established in the Optional Protocol. She submits that, although some of the events occurred in 1989, these events have an effect that has continued since the Optional Protocol entered into force for Ecuador and that, at the time of the submission of the communication, she had not obtained a pension.

The claim

3.1 The author claims that the State party violated her right to social security under article 9 of the Covenant.

3.2 The author considers that everyone should have access to information on eligibility for social benefits and to an administrative process that guarantees due process. The Ecuadorian Social Security Institute failed to notify the author in 1989 that the voluntary contributions she had made were invalid owing to arrears in payment of the contributions for eight consecutive months. Moreover, the Institute continued to receive a further 65 contributions over a period of more than five years. It was not until 2003 that Institute officials ruled that her voluntary contributions were not valid. However, the author learned of this decision only in May 2007 when she received notice of the denial of her request for special retirement. This further shows that the administrative procedures were not efficient, prompt or effective.

3.3 The author claims that she had the reasonable expectation that in her old age she would receive a pension as a result of the 305 contributions she had made over 29 years. During those years, the author received no clear information regarding the requirements she still needed to fulfil to obtain her retirement pension.

3.4 The author refers to article 2 (2) of the Covenant and points out that the right to social security must be guaranteed without discrimination on grounds of gender. The author claims that she is a part of a generation of women who dedicated the majority of their lives to unpaid domestic work and who faced greater obstacles than men in accessing their right to social security.

3.5 The author explains that women engaged in cleaning and care activities in their homes did not have an employment relationship and generally made use of the voluntary affiliation regime. However, the regime had serious restrictions for unpaid female domestic workers because it was intended for professionals: among other requirements, voluntary affiliates had to pay both the affiliate's and the employer's contributions, had to have at least three years of previous contributions and lost voluntary affiliate status if they failed to contribute for six consecutive months. Furthermore, unpaid female domestic workers had to pay contributions even though they had no salary, which placed them at a disadvantage compared to other professionals, who generally had fixed incomes. In the author's case, the Ecuadorian Social Security Institute annulled more than five years of contributions because she was unable to make payments for six consecutive months. She concludes that this regulation discriminates against women who engage in unpaid domestic work and violates the Covenant.

3.6 The author points out that the State party has no non-contributory pension scheme in place for persons unable to contribute to social security, thus leaving older persons completely unprotected. The author claims that she is divorced, unemployed and living in poverty and has serious health problems.⁴ Despite her continued requests over a period of more than 14 years, she has no pension.

State party's observations on the admissibility and merits of the communication

4.1 On 2 February and 8 June 2016, the State party submitted its observations on the admissibility and merits of the communication. It maintains that the communication does not meet the admissibility requirements of the Optional Protocol and that, in any case, it does not disclose any violation of Covenant rights.

4.2 The State party presents a detailed description of the legal provisions governing special reduced retirement at the time of the events and the legislation and the institutional structure in place to realize the right to social security.

4.3 The communication does not meet the admissibility requirement established in article 3 (2) (b) of the Optional Protocol, since the events that are the subject of the communication took place before 5 May 2013, the date on which the Optional Protocol entered into force for Ecuador.⁵ According to the State party, the main act that allegedly violates the author's rights is the Regional 1 Commission's decision of 20 June 2003 refusing the request for special reduced retirement. Even though some of the legal proceedings were decided by the courts after that date, those decisions did not in themselves constitute acts violating the author's rights. It therefore concludes that the Committee lacks competence to consider the communication.

4.4 The Communication is manifestly ill-founded and provides no information to demonstrate that the authorities that ruled on the author's request for special retirement acted with the intent to infringe her rights. The author's disagreement with the decisions of the authorities, who did not uphold her claim, does not mean that her rights have been violated or that she is a victim of discrimination. Furthermore, the purpose of the communication is to have the administrative and judicial decisions concerning the author overturned. However, the Committee cannot act as a fourth level of jurisdiction, and the author had the opportunity to challenge the administrative decisions with which she disagreed, and the proceedings were conducted in accordance with due process and the legislation in force.

4.5 The author claims that the procedures of the Ecuadorian Social Security Institute were not efficient, prompt or effective, in an attempt to establish a violation not of the right to social security but rather of the right to due process; however, the Committee is not competent to consider such claims, since the right to due process is set out in the International Covenant on Civil and Political Rights.

⁴ The author claims that she has been diagnosed with diabetes, high blood pressure, hearing loss, a malformation of the bones of her feet requiring surgery and that she has sporadic memory loss.

⁵ The State party refers to article 28 of the Vienna Convention on the Law of Treaties, ratified by Ecuador on 11 January 2005.

4.6 Should the communication be declared admissible, the State party maintains that it does not reveal any violation of the author's rights, since the denial of her request for special retirement by the Ecuadorian Social Security Institute was neither unlawful nor arbitrary. The author did not make her monthly contributions from August 1989 to March 1990; consequently, on 13 September 2002, the Regional 1 Commission ruled that the author's voluntary affiliation had automatically terminated and that her subsequent contributions were not valid. Based on these decisions, the Regional 1 Commission and the National Appeals Board of the Ecuadorian Social Security Institute rejected the author's retirement request on 20 June 2003 and 21 June 2007, respectively, since, as at 30 November 2001, the author had credited only 238 contributions.

4.7 According to certification issued by the Ecuadorian Social Security Institute, the author made contributions to the Institute from September 1972 to October 1981 as an employee of various public and private institutions; from November 1981 to February 1995, she contributed to the voluntary affiliation scheme; and, between March 1995 and November 2001, she again contributed to the scheme for employees. The decisions denying her special retirement request were based on an analysis of all the contributions made by the author, but without taking into account contributions that had been declared invalid or fraudulent; it was concluded that she had credited only 238 contributions.

4.8 Proceedings between individuals and the administration are governed by the principle of good faith and based on presumption of knowledge of the law. Article 158 of the Codified Statute of the Ecuadorian Social Security Institute clearly establishes that if an affiliate is in arrears of his or her voluntary contributions for a period of more than six consecutive months, such affiliation terminates; consequently any subsequent contributions are invalid. Furthermore, the Regional 1 Commission's decision of 12 September 2002 was duly communicated to the author, so that she was able to file an appeal with the National Appeals Board of the Ecuadorian Social Security Institute. The State party maintains that the author was aware that her contributions record showed that some contributions were invalid and fraudulent and that she could therefore have foreseen that her request would be denied.

4.9 The author could have taken up new employment or continued with the voluntary affiliation regime in order to make the remaining number of contributions needed to obtain an ordinary retirement pension.⁶

4.10 The fact that the author was a housewife and enrolled in the voluntary affiliation scheme does not constitute discriminatory treatment on grounds of gender, since the scheme was open to anyone on a voluntary basis, irrespective of gender and regardless of the type of work performed, with everyone qualifying for the same social services and benefits. The State party describes the legal provisions that regulated voluntary affiliation from 1979 onward, including the eligibility requirements for voluntary affiliates. It highlights the fact that the voluntary affiliation scheme provided cover for persons who were not employed or who worked in the informal sector. The author was enrolled in this scheme and was the beneficiary of various services and benefits.

4.11 The State party guarantees the rights established in the Covenant for older persons, who are a priority group. In this connection, public policies have been implemented to promote the right to social security.

Authors' comments on the State party's observations

5.1 On 3 March and 24 November 2016, the author submitted her comments on the State party's observations.

5.2 The aim of the communication is not to request the Committee to act as a court of appeal and to review decisions made by the State party's authorities, but rather to request it to determine whether the actions of the authorities are compatible with the Covenant.

5.3 In its observations, the State party merely states that the authorities did not act with the intent to infringe the author's rights and that her request for special retirement was

⁶ The State party refers to article 185 of the Social Security Act.

denied because she did not meet the relevant eligibility requirements. However, neither Court No. 1 nor the National Court of Justice analysed the violations she had suffered owing to the failure of the Ecuadorian Social Security Institute to provide her with timely and appropriate information and because of irregularities in the notifications. They also failed to consider the fact that the author is an older person and that she is not in receipt of a retirement pension that would enable her to live a dignified and decent life.

5.4 It is the responsibility of the Ecuadorian Social Security Institute to determine, in a timely and efficient manner, whether its affiliates' contributions are made within the established time frame. In the present case, the Institute failed to inform the author in a timely fashion that the contributions she had made between August 1989 and February 1995 were invalid. Furthermore, the incorrect information provided verbally by Institute officials to the effect that she was eligible for retirement led her to resign from her job.

5.5 The administrative and judicial proceedings lasted some 14 years, which demonstrates a lack of timeliness. The author points out that, under article 115.1 of the Legal and Administrative Rules governing the Executive Branch, "the Administration is required to issue an express decision in all proceedings and give notice thereof in whatever form". Accordingly, the Ecuadorian Social Security Institute could not justify its delay and failure to give notice by arguing that the author had not approached the authorities to ascertain the status of her request.

5.6 Furthermore, the National Appeals Board's decision of 6 March 2003 was not duly notified, the author becoming aware of it only in 2007. Apart from that, the decision could not constitute timely notification because it was adopted after she had submitted her retirement request and resigned from her job.

5.7 The author maintains that the failure of Ecuadorian Social Security Institute officials to provide her with the appropriate information and to inform her in a timely manner that her contributions were invalid, constitutes a violation of the right to social security, specifically as regards access to information.

Additional observations by the State party

6. On 3 March 2017, the State party reiterated its observations on the inadmissibility of the communication and added that the author is claiming a violation of the right to information, which is not protected under the Covenant; accordingly, the Committee lacks competence *ratione materiae* to consider the allegation.

Third-party intervention

7.1 On 28 September 2017, the Working Group on Communications, acting on behalf of the Committee, admitted a submission from the International Network for Economic, Social and Cultural Rights (ESCR-Net) under article 8 of the Optional Protocol and in accordance with the guidance on third-party interventions.^{7, 8}

7.2 On 30 October 2017, ESCR-Net submitted its intervention to the Committee. It highlighted the obligation of States parties to ensure that their social security systems benefit all without discrimination, including women who perform unpaid care work, to take positive steps to ensure social security coverage for persons who have no access to or are unable to benefit from existing social security systems, in particular older women, and to ensure that such systems facilitate access to information and due process, including the right to an effective remedy. The Committee transmitted the ESCR-Net submission to the State party and the author and asked for their observations and comments.

⁷ The members of ESCR-Net involved in the preparation of the third-party submission were the International Network on Economic, Social and Cultural Rights, the Global Initiative for Economic, Social and Cultural Rights, the Social Rights Advocacy Centre, Asociación Civil por la Igualdad y la Justicia, Foro Ciudadano de Participación para la Justicia y los Derechos Humanos, the Center for Economic and Social Rights, Amnesty International, Lilian Chenwi, University of the Witwatersrand, the Legal Resource Center, the Economic and Social Rights Center-Hakijamii, International Women's Rights Action Watch Asia Pacific and Viviana Osorio, lawyer, Colombia.

⁸ Decision adopted by the Committee at its fifty-ninth session.

State party's observations on the third-party intervention

8.1 On 1 December 2017, the State party noted that the ESCR-Net submission addresses discrimination against women, which is an issue unrelated to the present communication, since the author has never claimed, either before the national courts or before the Committee, to have been a victim of discriminatory treatment on grounds of gender.

8.2 The State party points out that the legislation in force at the time of the events, like that currently in force, guaranteed and continues to guarantee the right to social security for all inhabitants of the State party, without discrimination of any kind.

B. Committee's consideration of admissibility

9.1 Before considering any claim contained in a communication, the Committee must decide, in accordance with the Optional Protocol, whether or not the communication is admissible.

9.2 The Committee finds it compatible with the Optional Protocol for a national human rights institution, such as the Office of the Ombudsman of Ecuador, to represent a person or group of persons who consider that their rights under the Covenant have been violated.

9.3 The State party argues that the Committee lacks competence *ratione temporis*, since the facts that gave rise to the alleged violations occurred before 5 May 2013, the date on which the Optional Protocol entered into force for Ecuador, and did not continue after that date. The author contends that, although some of the facts occurred prior to 5 May 2013, they have continuing effect to the present day.

9.4 In accordance with article 3 (2) (b) of the Optional Protocol, the Committee must declare a communication inadmissible when the facts that are the subject of the communication occurred prior to the entry into force of the Protocol for the State party concerned, "unless those facts continued after that date". As the Committee has noted, a fact that may constitute a violation of the Covenant does not have a continuing character merely because its effects or consequences are prolonged over time.⁹ In the present case, the Committee notes that the act that gave rise to the alleged violation of the author's right to social security occurred on 20 June 2003, when the Regional 1 Commission denied her request for special retirement. Although the author continues to suffer the consequences of that decision, this circumstance does not change the characterization of this act as instantaneous.

9.5 However, the appeal in cassation relating to the administrative proceedings and the special protective remedy were decided by the National Court of Justice and the Constitutional Court on 17 April and 17 July 2014, respectively. In this regard, the Committee recalls that judicial or administrative decisions of the national authorities are also considered as part of the "facts", in accordance with article 3 (2) (b) of the Optional Protocol, when they are the result of proceedings that are directly related to the initial events, acts or omissions that gave rise to the violation and provided that they allow redress to be obtained for the alleged violation, in accordance with the law applicable at the time.¹⁰ The State party maintains that such decisions, by their nature, do not in themselves constitute acts that violate the author's rights. The Committee notes, however, that the appeal in cassation and the special protective remedy provided an opportunity for the National Court of Justice and the Constitutional Court to examine the merits of the alleged violation of the author's right to social security and possibly provide a remedy.¹¹ Therefore, the Committee considers that it is competent *ratione temporis* to consider the present communication.

9.6 The State party submits that the author's allegations relate not to a violation of a Covenant right but to the right to due process and the right to information, and that the

⁹ *Alarcón Flores et al. v. Ecuador* (E/C.12/62/D/14/2016), para. 9.7; and *Merino Sierra v. Spain* (E/C.12/59/D/4/2014), para. 6.7.

¹⁰ *Alarcón Flores et al. v. Ecuador*, para. 9.8.

¹¹ *I.D.G. v. Spain* (E/C.12/55/D/2/2014), para. 9.3.

Committee is therefore not competent *ratione materiae* to consider the allegations. The Committee notes that the author's allegations concerning the alleged lack of adequate notice and the delay in the administrative and judicial proceedings, and the lack of timely and appropriate information on how to obtain a pension are presented as relating to components of the right to social security.

9.7 The Committee recalls that the lack of adequate judicial protection may entail a violation of a right recognized in the Covenant, since it is the duty of States to guarantee effective judicial remedies for the protection of Covenant rights; there cannot be a right without a remedy to protect it.¹² The Committee also considers that the failure to provide persons with appropriate information on how to access a right may entail a violation of that right. The Committee therefore considers that the author's allegations concerning due process and timely access to information are intimately linked to the complaint of a violation of the right to social security under article 9 of the Covenant and are inseparable from it. The Committee concludes that it is competent *ratione materiae* to consider this part of the communication.

9.8. The State party further submits that the communication is inadmissible, since it is manifestly ill-founded in that it provides no information to demonstrate a violation of the author's rights. It adds that the communication seeks to have the administrative and judicial decisions relating to the case overturned, but that the Committee cannot act as a fourth level of jurisdiction.

9.9 The Committee recalls its jurisprudence according to which its task in considering a communication is confined to assessing whether the facts as described in the communication, including the application of domestic law, reveal a violation by the State party of the economic, social and cultural rights set forth in the Covenant, and that it is in the first place for the courts of States parties to evaluate the facts and evidence in each particular case and to interpret the relevant law. The Committee is called upon to express its views as to the evaluation of the evidence or the interpretation of domestic law applied in the case only if such evaluation or interpretation was manifestly arbitrary or amounted to a denial of justice and entailed the violation of a right recognized in the Covenant.¹³ The Committee observes that the complaints made in the present communication do not call into question the evaluation of the evidence by the State party's authorities or the interpretation of the law, *per se*, but concern whether the actions of the authorities in the author's case constitute a violation of her right to social security. Furthermore, the Committee considers that the facts put forward in the communication enable it to assess whether or not there was a violation of the Covenant and that the author has sufficiently substantiated, for the purposes of admissibility, her allegations of a violation of article 9 of the Covenant.

9.10 When the documentation submitted to the Committee discloses facts established in adversarial proceedings, regarding which the parties have had the opportunity to present their respective observations and comments, that clearly reveal a possible violation of a provision of the Covenant that has not been cited, the Committee is empowered to examine the possible violation of articles not invoked by the parties, provided that it does not look beyond the claims made in the communication.¹⁴ Thus, the Committee considers that, in the

¹² General comment No. 9 (1998) on the domestic application of the Covenant, para. 2. See also *I.D.G. v. Spain*, para. 11.3.

¹³ *López Rodríguez v. Spain* (E/C.12/57/D/1/2013), para. 12; and *I.D.G. v. Spain*, para. 13.1.

¹⁴ Regarding the application of the principle of *iura novit curia*, see International Court of Justice, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, judgment of 27 June 1986, *ICJ Reports 1986*, para. 29; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, judgment of 25 July 1974, *ICJ Reports 1974*, paras. 18 and 19; Permanent Court of International Justice, *Lotus, Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 31; Committee against Torture, *Guerrero Larez v. Bolivarian Republic of Venezuela* (CAT/C/54/D/456/2011), para. 5.4; European Court of Human Rights, *G.R. v Netherlands*, application No. 22251/07, judgment of 10 January, 2012, para. 36; *Silickienė v. Lithuania*, application No. 20496/02, judgment of 10 April 2012, para. 45; *Handyside v. United Kingdom*, application No. 5493/72, judgment of 7 December 1976, para. 41; Inter-American Court of Human Rights, *Lagos del Campo v. Peru*, judgment of 31 August 2017, paras. 139 and 171; and *Godínez-Cruz v. Honduras*, judgment of 20 January 1989, para. 172.

present case, the facts presented and the information contained in the case file (see paras. 3.4, 3.5, 4.10 and 4.11 above) also raise issues under article 2 (2) of the Covenant.

9.11 The Committee notes that, in the present case, the State party has not contested the admissibility of the communication on the grounds of a failure to exhaust domestic remedies and that the communication meets the other admissibility requirements established in the Protocol and, accordingly, declares the communication admissible and proceeds to its consideration on the merits.

C. Consideration of the merits

Facts and legal issues

10.1 The Committee has considered the present communication taking into account all the information provided to it, in accordance with the provisions of article 8 of the Optional Protocol.

10.2 The author claims that, owing to the Ecuadorian Social Security Institute's lack of diligence, she was in practice deprived of a special pension, despite having made 305 contributions over a period of 29 years, and that the State party violated her right to social security because her request for special retirement was denied by the Institute after it had concluded that she had credited only 238 contributions, and not the 300 or more required by law. However, she considers that the authorities took no account of the fact that the Institute failed to inform her in a timely manner that the contributions made by her between August 1989 and February 1995 were not valid, that it was only in 2003 that the Institute ruled that her contributions were invalid, and that she did not learn of the decision until May 2007. Furthermore, the administrative and judicial proceedings relating to her retirement request lasted some 14 years and the Regional 1 Commission's decision of 20 June 2003 denying her retirement request was not communicated to her until May 2007. The author further alleges that the Institute's decisions constitute, in practice, discriminatory treatment on grounds of gender; and that she was also unable to obtain a minimum old-age pension, since the State party has not implemented a non-contributory pension scheme.

10.3 The State party contends that the administrative and judicial authorities did not act with the intent to infringe the author's rights, that the Ecuadorian Social Security Institute's decision denying the author's special retirement request was taken in strict application of the law in force at the time, which clearly set out the criteria that affiliates were required to meet in order to qualify for special retirement, and that the author did not meet all the criteria, since she had made only 238 — not 300 — monthly contributions to the social security system. Furthermore, the fact that the author was a housewife and enrolled in the voluntary affiliation scheme does not constitute discriminatory treatment on grounds of gender.

10.4 Neither party disputes the fact that the author contributed to the Ecuadorian Social Security Institute from September 1972 to October 1981, as an employee; that, from November 1981 to February 1995, she contributed to the voluntary affiliation scheme; or that, between March 1995 and November 2001, she again contributed to the affiliation scheme for employees. Nor is there any dispute that, on 26 April 1990, the author paid her voluntary contributions for the months of August 1989 to March 1990; and that she therefore made no voluntary contributions for eight consecutive months; that, subsequently, the author continued to make monthly voluntary contributions (65 contributions) to the Institute until February 1995, without being notified that her affiliation and contributions were invalid; and that she was so notified only after submitting her retirement request to the Institute.

10.5 The Committee further observes that the State party does not contest the author's claim that, in 2001, she consulted Ecuadorian Social Security Institute officials on a number of occasions about whether she was able to retire under the special reduced retirement scheme and, on each occasion, the officials informed her verbally that it was possible, as she met the requirements of having made more than 300 monthly contributions and being more than 45 years old, but she should resign from her job in order to be able to retire,

which she did. Further, it does not contest that the author is in a critical financial situation or that she has serious health problems.

10.6 In the light of the Committee's conclusion on the relevant facts and the claims made by the parties, the communication raises a central question: whether the denial of the author's request for special retirement constitutes a violation of the right to social security under article 9 of the Covenant because the Ecuadorian Social Security Institute not only did not inform her in a timely manner that her voluntary affiliation had terminated in August 1989 and that the subsequent contributions made by her until February 1995 were invalid but also continued to receive her contributions. This basic legal problem is linked to three other questions: (a) whether the penalty of termination of membership of the voluntary affiliation scheme in the event of non-payment of contributions during six consecutive months is proportionate; (b) whether the lack of a comprehensive non-contributory scheme in the State party that could provide cover for the author is of relevance to the case; and (c) whether the conditions of voluntary affiliation imposed on the author constitute discriminatory treatment on grounds of gender and a violation of article 2 (2), read together with article 9, of the Covenant. To answer these questions, the Committee will recall certain elements of the right to social security, particularly in respect of access to retirement benefits for unpaid female domestic workers, before moving on to analyse the central question raised by the communication.

The right to social security and to a retirement pension

11.1 The Committee recalls that the right to social security is of central importance in guaranteeing human dignity.¹⁵

11.2 The right to social security carries significant financial implications for States, but the latter have an obligation to ensure the satisfaction of, at the very least, minimum essential levels of this right.¹⁶ Among other things, they are required to ensure access to a social security scheme that provides a minimum essential level of benefits, without discrimination of any kind.¹⁷

11.3 The Committee recalls that article 9 of the Covenant implicitly recognizes the right to old-age benefits.¹⁸ States are obligated to pay particular attention to promoting and protecting the economic, social and cultural rights of older persons,¹⁹ to which end they must take appropriate measures to establish general regimes of compulsory old-age insurance.²⁰

States parties' obligations to ensure access to a retirement pension

12.1 States parties have a certain margin of discretion in adopting the measures they consider necessary to ensure that everyone enjoys the right to social security,²¹ with a view to, among other things, ensuring that retirement pension systems are efficient, sustainable and accessible for everyone. States may therefore establish requirements or conditions that claimants must meet in order to be eligible for social security schemes or to receive a retirement pension or other benefit, provided that the conditions are reasonable, proportionate and transparent.²² These conditions should be communicated to the public in

¹⁵ General comment No. 19 (2008) on the right to social security, paras. 1–3; and *López Rodríguez v. Spain*, para. 10.1 and 10.2.

¹⁶ General comment No. 19, para. 41; and *López Rodríguez v. Spain*, para. 10.3. See also the statement by the Committee on an evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant, para. 4.

¹⁷ General comment No. 19 (2008) para. 59. See also the statement by the Committee on "Social protection floors: an essential element of the right to social security and of the sustainable development goals", paras. 7–8.

¹⁸ General comment No. 6 (1995) on the economic, social and cultural rights of older persons, para. 10, and general comment No. 19, para. 10.

¹⁹ General comment No. 6, para. 13.

²⁰ *Ibid.*, para. 27, and general comment No. 19, para. 15.

²¹ General comment No. 19, para. 66.

²² *Ibid.*, para. 24.

a timely and sufficient manner so as to ensure that access to retirement pensions is predictable. When non-fulfilment of these requirements or conditions entails the penalty of termination of affiliation to a social security scheme, whether publicly or privately managed, it is for the State party to demonstrate that such a penalty is reasonable and proportionate.

12.2 National laws and regulations should specify the range, qualifying conditions and levels of benefits.²³ Although in the legal systems of several States parties there is a presumption that everyone knows the law, States must ensure the right of all affiliates to request, seek and receive information on their right to social security, including their retirement pension or future retirement pension,²⁴ and take the necessary steps to ensure that the institutions, whether public or private, responsible for managing the social security system provide affiliates with timely and appropriate information on, among other things, the validity of their contributions and any changes to their affiliation status.

12.3 If a social security scheme requires contributions, those contributions should be stipulated in advance, and the direct and indirect costs and charges associated with making contributions must be affordable for all, and must not compromise the realization of other Covenant rights.²⁵

The right of unpaid female domestic workers to social security and the right to obtain a retirement pension without discrimination

13.1 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.²⁶

13.2 The Committee recalls that the Covenant prohibits any discrimination, whether in law or in fact, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.²⁷ Indirect discrimination refers to laws, policies or practices which appear neutral at face value, but have a disproportionate impact on the exercise of Covenant rights as distinguished by prohibited grounds of discrimination.²⁸

13.3 States must therefore take effective measures, and periodically revise them when necessary, within their maximum available resources, to fully realize the right of all persons without any discrimination to social security.²⁹ They must also take steps to ensure that, in practice, men and women enjoy their economic, social and cultural rights on a basis of equality;³⁰ consequently, their public policies and legislation must take account of the economic, social and cultural inequalities experienced in practice by women.³¹ States must therefore at times take measures in favour of women in order to attenuate or suppress conditions that perpetuate discrimination.³²

13.4 States must review restrictions on access to social security schemes to ensure that they do not discriminate against women in law or in fact.³³ In particular, States must bear in mind that, because of the persistence of stereotypes and other structural causes, women

²³ International Labour Organization (ILO), Social Protection Floors Recommendation, 2012 (No. 202), para. 7.

²⁴ General comment No. 19, para. 26.

²⁵ Ibid., para. 25.

²⁶ Ibid., para. 31.

²⁷ General comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights, para. 7, and general comment No. 19, para. 29.

²⁸ General comment No 20, para. 10 (b). See also paras. 8 and 9.

²⁹ General comment No. 19, para.4.

³⁰ General comment No. 16, paras. 5 and 21.

³¹ Ibid., paras. 8 and 21.

³² Ibid., para. 15, and general comment No. 20 (2009) on non-discrimination in economic, social and cultural rights, para. 9. See also general recommendation No. 29 (2013) of the Committee on the Elimination of Discrimination against Women on the economic consequences of marriage, family relations and their dissolution, paras. 7–12.

³³ General comment No. 19, para. 30.

spend much more time than men in unpaid work.³⁴ States should take steps to eliminate the factors that prevent women from making equal contributions to social security schemes that link benefits with contributions or ensure that schemes take account of such factors in the design of benefit formulas, for example by considering periods spent, especially by women, rearing children or taking care of adult dependants.³⁵

Access to non-contributory old-age benefits

14.1 Pursuant to article 9 of the Covenant, States parties are obliged to establish non-contributory schemes or other social assistance measures to provide support to those individuals and groups who are unable to make sufficient contributions for their own protection.³⁶

14.2 In accordance with their core obligations with regard to the right to social security as established in the Covenant (paras. 11.1 and 11.2 above), States should 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.³⁷ Non-contributory schemes must also take account of the fact that women are more likely to live in poverty than men; that often they have sole responsibility for the care of children; and that it is more often they who have no contributory pensions.^{38, 39}

14.3 In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources, it must demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, these minimum obligations.⁴⁰

Analysis of the author's complaint

15.1 The State party argues that the author's right to social security was not violated, since the Regional 1 Commission and the National Appeals Board of the Ecuadorian Social Security Institute denied the author's special retirement request because she had credited only 238 contributions and therefore did not meet the requirement of 300 contributions. It adds that the author can make the remaining number of contributions that will enable her to obtain an ordinary retirement pension.

15.2 The State party also submits that the decisions mentioned in the previous paragraph were based, in turn, on the Regional 1 Commission's decision of 13 September 2002, which declared the author's voluntary affiliation terminated from August 1989 onward and ordered the annulment of the periods of service declared from that date until February 1995, under article 158 of the Codified Statute of the Ecuadorian Social Security Institute; that this decision was upheld by the National Appeals Board on 6 March 2003; and that the author did not judicially challenge that latter decision. The State party has not provided the Committee with sufficient detail concerning the effective remedies that were available to the author to challenge the latter decision, given that she learned of that decision on 21 June 2007, when she was informed of the National Appeals Board's second decision.

Lack of adequate and timely information and disregard of legitimate expectations

16.1 The Committee notes that, in April 1990, the author retroactively paid her outstanding monthly contributions to the Ecuadorian Social Security Institute for the period from August 1989 to March 1990 and that, subsequently, she made a further 65 monthly voluntary contributions until February 1995. According to the information made available

³⁴ General comment No. 23 (2016) on the right to just and favourable conditions of work, para. 47 (j).

³⁵ General comment No. 19, para. 32.

³⁶ *Ibid.*, para. 50.

³⁷ General comment No. 6, para. 30, and general comment No. 19, para. 15.

³⁸ General comment No. 19, para. 32.

³⁹ General comment No. 6, para. 21.

⁴⁰ General comment No. 19, para. 60.

by the parties, the Institute informed the author that her contributions were invalid after she had submitted her retirement request and more than 10 years after her voluntary affiliation had allegedly terminated. The State party has not explained to the Committee why the Institute continued to receive the author's monthly voluntary contributions for such a long time and why she was not immediately informed that her affiliation had terminated and that her contributions would not be taken into account in determining the number of retirement contributions.

16.2 According to the State party, the author could have foreseen this situation, since she must be considered to have been aware of the laws in force at the time, including, for example, article 158 of the Codified Statute of the Ecuadorian Social Security Institute, which clearly established that voluntary continuation automatically terminated if the insured person failed to make contributions for six consecutive months; therefore, the author was aware of the situation and could have foreseen that she was not eligible for special retirement. However, the Committee notes that, in 2001, Institute officials confirmed verbally to the author that she met all the requirements for special retirement (para. 10.5 above). The Committee considers that these facts, together with the Institute's receipt of the voluntary contributions between 1990 and 1995 and the failure to provide the author with adequate and timely information concerning the invalidity of those contributions, could have reasonably created a legitimate expectation in the mind of the author that she met the requirements for special retirement.

16.3 The Committee considers that the Ecuadorian Social Security Institute not only failed to inform the author in an appropriate and timely fashion of the invalidity of her voluntary contributions but that it also disregarded the legitimate expectation that it had created in the author's mind. This situation might not entail a violation of the right to social security if it had no significant impact on the author's life plan and her effective enjoyment of the right through a retirement pension. In the present case, however, the information in question concerned a considerable proportion of the author's contributions and it was brought to her attention only after she had submitted her retirement request, by which time she was an older person, faced with difficulties in gaining access to the labour market, in a critical economic situation and experiencing health problems. In such circumstances, it was in practice very difficult for the author to take steps that would enable her to make up for the contributions that had been declared invalid, without causing undue hardship to herself. The situation was exacerbated by the delays in the administrative proceedings and the judicial processes, which went on for some 14 years and placed the author in a particularly vulnerable situation.

16.4 The above considerations show that the author's right to social security was violated, since the Ecuadorian Social Security Institute not only did not inform her clearly that her voluntary affiliation had terminated because she had not made contributions for six consecutive months, but also continued to receive contributions from her for more than five years, leaving the author to believe reasonably that she was making the contributions required to obtain her special retirement pension. Moreover, Institute officials informed her verbally that she had met the legal requirements for the pension; she therefore resigned from her job and applied for her pension. In other words, she submitted her application several years after she had made those five years of contributions to the voluntary affiliation scheme and at a time when her capacity for work had diminished considerably. It was only after she had resigned from her job and applied for a retirement pension that the author was informed that those more than five years of contributions were not valid, with the result that she was not eligible for special retirement, since she had not reached the required 300 months of contributions, and this at a time when it was very difficult for her to re-enter the labour market in order to make further contributions. This situation frustrated the author's legitimate expectations of obtaining a special contributory retirement pension. It is true that, strictly speaking, those expectations might not have been based on the existing legal regulations governing access to special retirement but they were nonetheless legitimate expectations which should have been met, since they were based on the conduct of the State party's authorities, who had themselves led the author to believe in good faith that she was meeting the requirements for the special contributory retirement pension. These facts constitute a violation of the author's right to social security.

The lack of proportionality of the termination of voluntary affiliation

17.1 The Committee also observes that the Ecuadorian Social Security Institute ruled that the author's voluntary affiliation terminated in August 1989, in accordance with article 158 of the Codified Statute of the Ecuadorian Social Security Institute, which provides that voluntary affiliation terminates if the insured person fails to pay contributions for six consecutive months and that, therefore, the payments made retroactively in April 1990 in respect of the contributions owed and all subsequent payments made up to February 1995 were invalid. In its observations, the State party refers to the Institute's decision and to the legislation applicable to voluntary affiliation at the time of the facts but does not explain in what way the penalty is reasonable and proportionate. Even if it is assumed that the aim of penalty is to protect the resources of the social security system, which is a valid and legitimate objective, the State party has not shown that it was the only way to achieve this purpose. In this regard, it has not shown that there were no alternative measures that did not seriously affect the author's access to a pension, such as excluding months in which no contributions were made from the contributory pension calculation. The Committee considers that it may be inappropriate and disproportionate for any independent worker with a monetary income, albeit irregular, to be disaffiliated for not being able to pay contributions for six consecutive months; a fortiori, such a penalty is disproportionate for the author, who at the time was an unpaid domestic worker.

17.2 In view of the foregoing (paras. 16.1 to 17.12 above), the Committee concludes that the State party violated the author's right to social security.

The impact of a lack of a comprehensive non-contributory pension scheme

18. The situation described above, which in itself implies a violation of the author's right to social security, is exacerbated by the fact that the State party's authorities failed to offer her an alternative measure that would ensure an adequate standard of living for her old age (paras. 11.1 and 11.2 above), inasmuch as the State party does not have a comprehensive non-contributory old-age pension scheme (paras. 14.1 and 14.2 above) covering persons unable to obtain contributory benefits. As a result, the author was denied access to a contributory pension, in disregard of her legitimate expectations, while the State party failed to offer her any form of non-contributory pension as an alternative.

Discrimination against women in respect of social security

19.1 The violation of the author's right to social security is not unrelated to the fact that she is a woman who dedicated part of her life to unpaid domestic work; accordingly, the Committee will analyse her claim that she suffered discriminatory treatment on grounds of gender.

19.2 The Committee recalls that the Covenant prohibits any discrimination, whether in law or in fact, whether direct or indirect, which has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to social security.⁴¹ The Committee notes that the author is an older person who is in a critical economic situation and has health problems and that the intersection of the alleged gender and age discriminations makes her particularly vulnerable to discrimination in comparison with the general population. This means that particularly special or strict scrutiny is required in considering the question of possible discrimination.⁴²

19.3 The Committee takes note of the author's allegations (paras. 3.4 and 3.5) to the effect that she is part of a generation of women who dedicated the majority of their lives to unpaid domestic work and who faced greater obstacles than men in accessing their right to social security. She submits that women who were responsible for looking after their homes generally made use of the voluntary affiliation regime; that this regime nonetheless had serious restrictions for unpaid domestic workers, inasmuch as it was intended for independent workers and professionals, usually men. Among other requirements, unpaid female domestic workers had to contribute on the same basis as independent workers,

⁴¹ General comment No. 16, para. 7; and general comment No. 19, para. 29.

⁴² *López Rodríguez v. Spain*, para. 14.1

including professionals, despite not having a salary, thus placing them at a disadvantage compared to such persons, most of whom had fixed incomes. In her case, because she was unable to make her contributions for six consecutive months, the Ecuadorian Social Security Institute annulled more than five years of contributions, which in practice left her without a retirement pension.

19.4 The Committee considers that, when relevant information is presented in a communication indicating, *prima facie*, the existence of a legal provision that, although formulated in a neutral manner, might in fact affect a clearly higher percentage of women than men, it is for the State party to show that such a situation does not constitute indirect discrimination on grounds of gender. According to publicly available information on the State party, among persons of working age outside the labour market, those engaged exclusively in unpaid domestic care work are almost entirely female.⁴³

19.5 In the present case, the State party, in its arguments, focuses primarily on the gender neutrality of the legislation that was applicable at the time of the events, maintaining that the voluntary contribution regime was open to anyone on a voluntary basis, irrespective of gender and regardless of the type of work performed, with everyone qualifying for the same social services and benefits. However, the State party has not provided sufficient detail as to the reasonableness and proportionality of the eligibility requirements for voluntary affiliation or the conditions for continued affiliation, as established by the legislation in force at the time of the events (paras. 12.1 to 12.3 above), in the case of women engaged in unpaid domestic work. The State party has failed to demonstrate that the requirements and conditions of voluntary affiliation do not constitute indirect discrimination. The Committee refers to its conclusion in paragraphs 17.1 and 17.2 above and is of the view that, while this penalty may be problematic for those who receive an income, it can be devastating for women who, as in the author's case, have no personal monthly income, not even an irregular income, given that they engage in unpaid domestic work.

19.6 Accordingly, 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.

D. Conclusion and recommendations

20. In the light of all the information provided and the particular circumstances of the case, the Committee considers that the 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 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.

21. The Committee, acting under article 9 (1) of the Optional Protocol, is of the view that the State party violated the author's right under article 9 and articles 2 (2) and 3, read together with article 9 of the Covenant. In the light of the Views contained in the present communication, the Committee makes the following recommendations to the State party.

Recommendations in respect of the author

22. The State party is under an obligation to provide the author with an effective remedy, including by: (a) providing the author with the benefits to which she is entitled as part of her right to a pension, taking into account the contributions she made to the Ecuadorian Social Security Institute, or, alternatively, other equivalent social security benefits enabling

⁴³ See, for example, Alison Vásquez Rodríguez, *Social protection and unpaid work: redistribution of caregiving tasks and responsibilities, a case study of Ecuador*, Santiago, Economic Commission for Latin America and the Caribbean (ECLAC), 2013 (information provided by ESCR-Net).

her to have an adequate and dignified standard of living, bearing in mind the criteria established in the present Views; (b) awarding the author adequate compensation for the violations suffered during the period in which she was denied her right to social security and for any other harm directly related to such violations; and (c) reimbursing the author for the legal costs reasonably incurred in the processing of this communication.

General recommendations

23. The Committee considers that the remedies recommended in the context of individual communications may include guarantees of non-repetition and recalls that the State party has an obligation to prevent similar violations in the future. The Committee considers that the State party should ensure that its legislation and the enforcement thereof are consistent with the obligations established under the Covenant. In particular, without prejudice to the social security reforms introduced by the Organic Act on Labour Justice and the Recognition of Work in the Home of 20 April 2015, the State has the obligation to:

(a) Adopt appropriate legislative and/or administrative measures to ensure the right of all affiliates to request, seek and receive information on their right to social security, including their retirement pension or future retirement pension;

(b) Take the necessary measures to ensure that the Ecuadorian Social Security Institute or any other institution responsible for managing the social security system, including affiliates' contributions and retirement pensions, provides affiliates/beneficiaries with timely and appropriate information on, among other things, the validity of their contributions and any changes to their affiliation status;

(c) Take the necessary measures, including those of a legislative nature, to ensure that penalties imposed on affiliates of the Ecuadorian Social Security Institute or of any other institution responsible for managing the social security system are proportionate and do not constitute in practice an obstacle to obtaining a retirement pension;

(d) Provide affiliates of the Ecuadorian Social Security Institute or of any other institution responsible for managing the social security system with appropriate and timely administrative and judicial remedies for violations of the right to social security;

(e) 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;

(f) In the light of the views set out by the Committee in paragraph 18 above, formulate within a reasonable time, to the maximum of available resources, a comprehensive and complete non-contributory benefits plan.

24. In accordance with article 9 (2) of the Optional Protocol and rule 18 (1) of the provisional rules of procedure under the Optional Protocol, the State party is requested to submit to the Committee, within a period of six months, a written response, including information on measures taken in follow-up to the Views and recommendations of the Committee. The State party is also requested to publish the Views of the Committee and to distribute them widely, in an accessible format, so that they reach all sectors of the population.