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**INTERNATIONAL COMMISSION OF JURISTS (ICJ) SUBMISSION FOR THE  
PREPARATION BY THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL  
RIGHTS OF A LIST OF ISSUES FOR THE EXAMINATION OF THE COMBINED  
THIRD, FOURTH AND FIFTH PERIODIC REPORTS OF EL SALVADOR**

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**ICJ's submission for the Committee on Economic, Social and Cultural Rights for the preparation of a List of Issues on El Salvador**

1. During its 52<sup>nd</sup> session, from 28 April to 23 May 2014, the Committee on Economic, Social and Cultural Rights (the Committee) will examine the combined third, fourth and fifth periodic reports of El Salvador under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Ahead of this examination, in the context of its 52<sup>nd</sup> pre-sessional Working Group, the Committee will prepare and adopt a List of Issues.
2. The International Commission of Jurists (ICJ) welcomes the opportunity to contribute to the Committee's preparation of the List of Issues. In this submission, the ICJ brings to the attention of the Committee concerns related to access to justice and the right to an effective remedy and reparation for the victims of violations of ESC rights in El Salvador. The organization formulates suggestions to the Committee for the List of Issues for the examination of El Salvador.
3. The content of the present submission is based on an extensive study<sup>1</sup> carried out by the ICJ focusing on the issue of the availability and effectiveness of domestic legal remedies for violations of the rights guaranteed under the ICESCR in El Salvador. For ease of reference, a copy of the ICJ study is attached to this document. The ICJ's submission takes account of the fact that El Salvador was among the first States to ratify the Optional Protocol to the ICESCR (the Optional Protocol), and that upon ratification, it made the declaration to accept the competence of the Committee with regard to the procedures under article 10 and 11 of the Protocol.
4. With the Optional Protocol's entry into force, it is timely to assess domestic remedies, as well as the opportunities and obstacles in the normative and institutional frameworks faced by individuals and groups seeking to assert their rights and obtain redress for violations of ESC rights.
5. States have a general obligation under article 2 to ensure the availability of and access to effective remedies in cases of ICESCR violations. The concerns raised in this submission are thus of a cross-cutting nature, since that right must be assured in respect of all substantive Covenant obligations. Nevertheless, specific concerns will also be highlighted in relation to the protection of substantive rights guaranteed in the ICESCR, including under its articles 6 to 8, and under article 11 and 12.

(i) The right to an effective remedy

6. Acknowledging the progress in the world-wide recognition of the "justiciability" of ESC rights that the adoption and entry into force of the Optional Protocol represents, the study on which the present submission is based adopts a broad notion of access to justice. In this respect, it follows the definition that is given in international law, especially in the Universal Declaration of Human Rights (UDHR) and in human treaties to which El Salvador is a party. The UDHR states that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>2</sup> In addition, the UN

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<sup>1</sup> The study is also accessible at <http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/>. At present the study is only available Spanish.

<sup>2</sup> Article 8 UDHR.

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>3</sup> establishes the principles of access to justice and fair treatment of victims who "(...) should be treated with compassion and respect for their dignity. They are entitled to access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered."<sup>4</sup> Other relevant instruments include the International Covenant on Civil and Political Rights<sup>5</sup> and the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.<sup>6</sup> In relation to access to justice, the above-mentioned UN Basic Principles and Guidelines on the Right to a Remedy and Reparation emphasize that: "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws."<sup>7</sup>

(ii) The rights of victims of alleged violations of ESC rights and the right to a judicial protection at national and international levels

7. As far as access to justice for victims of violations of ESC rights is concerned, the Committee has reiterated on several occasions that remedies shall be made available to rights-holders by State parties to the ICESCR.<sup>8</sup> In particular, the Committee has stated as a general principle of international law that: "appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place". The Committee has also indicated that it considers the provision of domestic legal remedies for violations of ESC rights as being part and parcel of the state obligations under article 2.1 of the ICESCR, which, in turn, requires States to take all "appropriate means" for the realization of the rights under the Covenant, and that "other means used could be rendered ineffective if they are not reinforced or complemented by judicial remedies."<sup>9</sup>
8. While the ICJ's study attached to this submission describes and evaluates a wide range of possible remedies, aside from constitutional and legislative remedies, the organization recalls that to discharge its obligations under article 2, the State must provide not simply a remedy, but an "effective" remedy. Indeed, a fundamental element of the right to an effective remedy is that it must lead to the cessation of the

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<sup>3</sup> UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Resolution A/RES/40/34 (1985).

<sup>4</sup> Article 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

<sup>5</sup> Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights.

<sup>6</sup> UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution A/RES/60/147 (2005).

<sup>7</sup> See Principle VIII entitled Access to justice.

<sup>8</sup> Committee of Economic, Social and Cultural Rights, General Comment nr.9, UN Doc. E/C.12/1998/24 (1998), paras.2 and 3. See also General Comments nr.12, UN Doc. E/C.12/1999/5 (1999), paras.32-35; nr.14, UN Doc. E/C.12/2000/4 (2000), paras.59-62; nr.15 UN Doc E/C.12/2002/11, paras.55-59; nr.18 E/C.12/GC/18 (2006), paras.48-51; and nr.19 UN Doc E/C.12/GC/19 (2008), paras.77-81.

<sup>9</sup> Committee of Economic, Social and Cultural Rights, General Comment nr.9, UN Doc. E/C.12/1998/24 (1998), paras.2 and 3.

violation and to "full and effective reparation (...) which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."<sup>10</sup> Furthermore, domestic remedies, where they are not effective, need not be exhausted in order for the right to submit an individual communication alleging violation/s of ESC rights can be exercised under the Optional Protocol.

## **ARTICLE 2.1 – STATE OBLIGATIONS AND THE RIGHT TO AN EFFECTIVE REMEDY**

### (i) Progress and remaining difficulties in the treatment of the Covenant in domestic courts

9. The Constitution of El Salvador guarantees several ESC rights. However, under the domestic law of El Salvador, there is no recognition of the direct applicability of the ICESCR without corresponding Constitutional provisions. In addition, there is uncertainty around the protection of rights protected under the ICESCR but not explicitly guaranteed in the Constitution, such as the rights to food, housing, water and sanitation. Finally, certain rights, such as labour rights, are recognized in the Constitution, but their construction is not fully consistent with international standards.
10. In this respect, the recent decision of the Constitutional Chamber of the Supreme Court (Decision 53-2005/55-2005 of February 2013)<sup>11</sup> is a significant step forward, as it reflects the willingness of the highest levels of the judiciary in El Salvador to ensure an expansive protection of all ESC rights in line with relevant international obligations. In the decision, the Court establishes especially the following with regard to its protection of ESC rights: a) certain rights not currently expressly protected under constitutional or legislative provision may be protected by the Constitutional Chamber through its construction or interpretation of existing provisions and rights present in the constitutional or legislative framework; b) the fact that public authorities have both negative and positive obligations in respect of ESC rights; and c) the realization of rights may require, depending on the circumstances, that the authorities act in a certain way or that they refrain from taking certain actions. Yet, the Court's stance does not guarantee the continuity, predictability and certainty that an explicit normative recognition of all rights under the ICESCR can provide. Further, judicial interpretation may be transitory, and depend on the membership of the Court. This is particularly relevant in the context of the ongoing dispute involving all three branches of the State around the composition and work of the Supreme Court and more specifically about the Constitutional Chamber that could soon lead to substantial changes in the Court's membership.<sup>12</sup>
11. In addition, according to the study carried out by the ICJ, there seems to be a normative gap created by the failure to adopt and implement primary legislation and further administrative measures that are necessary to ensure that not only the Supreme Court but also other courts and tribunals can enforce and effectively protect the rights enshrined in the Constitution. The adoption of such a legislative and administrative framework should be consistent with human rights principles and ensure meaningful participation of the concerned individuals, as well as transparency

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<sup>10</sup> General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution A/RES/60/147 (2005), section IX.

<sup>11</sup> See ICJ study, chapter 3.3.

<sup>12</sup> For more information on this situation, please see for instance <http://www.icj.org/el-salvador-authorities-urged-to-respect-and-protect-the-independence-of-the-judiciary/> and [http://www.observatoriojudicial.org.sv/index.php?option=com\\_content&view=article&id=7058:1&catid=9:noticias-revelantes&Itemid=10](http://www.observatoriojudicial.org.sv/index.php?option=com_content&view=article&id=7058:1&catid=9:noticias-revelantes&Itemid=10).

and accountability.

(ii) Institutional and procedural obstacles to ensuring access to justice and in asserting Covenant's rights before the Courts?

12. Beyond the position of the ICESCR in the domestic legal order, its direct applicability or its use as a framework to interpret national law in compliance with El Salvador's international obligations, a number of obstacles related to procedures, institutions and the administration of justice continue to impede access to justice for victims of violations of ESC rights. For the purposes of this submission, those obstacles are referenced below. However, the above-mentioned ICJ study analyses them in greater detail.
13. The lack of a comprehensive legal aid scheme, the severe backlog and delays in the judicial procedures that mark in particular civil remedies proceedings and damages awards, the lack of enforcement of judicial decisions and the inadequacy of sanctions in cases of violations of ESC rights are of particular concern.
14. The ICJ welcomes the positive and important role that the Procuraduría de los derechos humanos (PDH) has played in the protection of ESC rights and in facilitating increased access to justice for victims of violations of human rights, including ESC rights. Because of this role, the ICJ considers that the PDH should enjoy adequate resources and additional capacity. Also, it is crucial that the work of the different institutions that are involved in the legal enforcement of rights be coordinated so as to ensure their effective protection. The need for a coordinated approach is particularly relevant for the PDH and the Procuraduría de la República, which is in charge of general prosecutions and has jurisdiction, *inter alia*, over labour disputes.
15. In general, strengthening the capacity of the various actors involved in justice delivery is fundamental for an improved protection of human rights and of ESC rights in particular. Education and training programmes on international human rights law and standards, including El Salvador's international legal obligations, should be designed and implemented with judges, lawyers, prosecutors and administrative personnel dealing with victims of alleged violations and involved in the assessment of their claims. Furthermore, access to justice can be effective for victims of violations of human rights only if the independence of the judiciary is guaranteed.
16. In the same vein, legal information should be easily accessible to all. For this to happen, new laws should not only be disseminated through the official gazette but also made known to the broader public taking into due account the realities of groups who are particularly disadvantaged and marginalized.
17. Against this background, the ICJ makes the following suggestions for the List of Issues for the examination of El Salvador:
  - ***What steps has the Government of El Salvador taken to ensure the legal protection of all ESC rights guaranteed by the ICESCR? What steps has the State taken towards the necessary constitutional and/or legislative reforms for this comprehensive protection and towards guaranteeing the direct application of the ICESCR in the domestic legal order?***
  - ***Given the existence of a diffuse control of constitutionality, what steps have been taken to strengthen the knowledge of international legal standards and comparative law relevant for the protection of ESC rights across the judiciary, including magistrates and judges at all levels, as well as within the legal profession more generally?***
  - ***What measures have been taken to ensure the effectiveness of sanctions,***

- the award of damages and the better enforcement of decisions? In particular, are there plans to improve the functioning of the services of the ejecutor (the authority in charge of the enforcement of judicial decisions) so that the financial burden of resorting to this service to seek enforcement of remedies does not lie with the victims?***
- ***In addition to the legal aid that is already available in respect of certain areas of family, labour and criminal law, what plans does the State have for the development of a legal aid system that guarantees access to justice for victims of violations of ESC rights who would not otherwise have the means to bear the various costs that such access entails? Additionally, what steps does the State envisage to take to strengthen the capacity of the Procuraduría de los Derechos Humanos and the Procuraduría General de la República so as to enhance their ability to assist victims in asserting their rights and to prosecute violations? And what measures are envisaged to improve the coordination and collaboration between the two Procuradorías?***
  - ***What efforts have been undertaken to combat backlog and serious delays affecting judicial procedures?***

#### **ARTICLES 2.2 and 3 – ESC RIGHTS AND LEGAL PROTECTION AGAINST DISCRIMINATION AND INEQUALITIES**

18. Despite the progress achieved in establishing the normative framework in domestic law concerning non discrimination and equality, especially thanks to initiatives such as the adoption of the 2011 law on equality, equity and eradication of discrimination against women, the 2010 special law on violence against women,<sup>13</sup> and the 2010 presidential decree nr.56 prohibiting discrimination on the ground of sexual orientation and gender identity (SOGI) in the public sector, important implementation gaps remain. Among them, the ICJ is concerned about the still missing legal guarantee and protection of the rights of indigenous peoples, and of lesbian, gay, bisexual, transgender and intersex persons, since the recognition of SOGI status as a prohibited ground of discrimination only applies to the public sector.
19. Comprehensive equality legislation would address these gaps and cover all discrimination grounds prohibited by international human rights law, as well as ensure better protection for all individuals and groups who suffer inequalities on these grounds. The process of elaboration of such legislation would give the opportunity [for the State Party] to undertake a comprehensive and systematic review, in line with the Committee's recommendation in its General Comment 20, of the laws, policies and practices that are directly or indirectly discriminatory. An example of such discriminatory norms that remain in force is the penal code's comprehensive and absolute prohibition and criminalization of abortion that may adversely impact a range of women's rights, including the right to health.<sup>14</sup>
20. The ICJ thus suggests that the Committee raises the following issues with the State of El Salvador:
- ***Which measures does the State envisage to address the normative gaps in relation to the protection of specific sectors of the population, especially towards the constitutional recognition of indigenous peoples and their rights?***

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<sup>13</sup> Respectively in Spanish the "Ley de Igualdad, Equidad y Erradicación de la Discriminación contra las Mujeres" of 2011 (decree nr. 645) and the "Ley Especial Integral para una Vida Libre de Violencia para las Mujeres" of 2010 (decree nr. 520).

<sup>14</sup> See also paragraphs 28 and 29 below.

- ***In addition, does the State envisage a systematic review of norms and practices to eliminate any of those that are directly or indirectly discriminatory, and to adopt comprehensive equality legislation?***
- ***What steps has the State taken to complement the first advances in the legal recognition of the rights of LGBT persons and to ensure that discrimination on the ground of sexual orientation and gender identity is prohibited not only in respect of access to public services but also in relation to employment and access to trade and services in the private sector as well?***
- ***More generally, what steps does the State envisage to undertake to pursue and strengthen the efforts to eliminate the widespread and wide-ranging discrimination and inequalities? Are there plans for the elaboration of comprehensive anti-discrimination and equality legislation giving effect to article 3 of the Constitution, and covering all grounds of discrimination prohibited by international law and creating effective mechanisms and procedures to provide victims with effective remedies?***
- ***Are there plans to reform the penal code and end the criminalization of acts and conducts when this criminalization gives rise to violations of ESC rights, such as in the case of abortion and sex work?***

#### **ARTICLES 6 to 8 – ACCESS TO JUSTICE FOR LABOR RIGHTS**

21. Labour rights as guaranteed in international law -- and more specifically in articles 6, 7 and 8 of the ICESCR -- cover multiple and various aspects of workers' protection, ranging from the prohibition of forced labour and the promotion of employment to trade unions activities and collective bargaining, through remuneration, health and safety at work. The Salvadorian constitutional framework guarantees several of these rights and protections, in its articles 2 and in its title II, chapter II, section 2. However, despite the inclusion of several rights and protections in the Constitution and the country's labour code, the ICJ is concerned about the adequacy and effectiveness of the implementation and enforcement of those rights and protections.
22. The adoption of the necessary primary legislation and administrative measures to implement constitutional provisions is fundamental to avoid legal uncertainties and challenges for justice users and providers. This importance has been reiterated in the above-mentioned Decision 53-2005/55-2005 of February 2013<sup>15</sup> of the Constitutional Chamber of the Supreme Court. In the decision, the Constitutional Chamber condemned a total legislative omission of the State that, according to article 252 of the Constitution, should have adopted a law to regulate and give effect to article 38 of the Constitution, which, in turn, guarantees employees' rights in cases of voluntary resignation.
23. As far as the enforcement of labour standards is concerned, the ICJ draws the Committee's attention to two main issues. The first concerns the inadequacy and the weakness of sanctions for breaches of the labour code. For instance, the sanction foreseen for employers who do not comply with their obligation to employ one person with disability for every 25 employees amount to only five US dollars. Moreover, there are concerns about the lack of effectiveness of the labour inspectorate that should play a fundamental role in the promotion and protection of labour rights. Further concerns arise in respect of the length of administrative and judicial procedures in cases of labour disputes; as well as the weaknesses in the enforcement of judicial decisions in labour matters.<sup>16</sup>

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<sup>15</sup> See paragraph 10 above.

<sup>16</sup> See ICJ study, chapter 5.

24. Finally, it should be noted that the Code of Constitutional Procedures excludes labour matters from the scope of the remedy of "Amparo", in turn limiting the prospects of asserting the rights of victims of alleged violations of articles 6, 7 and 8 of the ICESCR.
25. In relation to articles 6, 7 and 8, the ICJ thus suggests the following questions for the List of Issues concerning the examination of El Salvador:
- ***What steps has the Government of El Salvador taken to ensure the availability of effective remedies, adequate sanctions and penalties in cases of violations of labour rights as guaranteed under articles 6, 7 and 8 of the ICESCR, and for breaches of the labour code?***
  - ***Can the State Party provide information concerning possible plans to reform the Code of Constitutional Procedures to do away with the exception that exclude labour issues from the scope of the recourse of Amparo?***
  - ***What steps has the Government of El Salvador taken to ensure that labour inspectorates aimed at preventing violations of rights under Article 7 of the ICESCR are effective in monitoring and inspecting work sites?***

#### **ARTICLE 11 – ACCESS TO JUSTICE FOR THE RIGHT TO ADEQUATE FOOD, HOUSING, WATER AND SANITATION**

26. Beyond the policy challenges that remain to ensure to all Salvadorians the enjoyment of the rights guaranteed under article 11 of the ICESCR, there are normative gaps to address. Indeed, the rights to adequate food, housing, water and sanitation are not recognized in the Constitution. While the implementation of a welcome constitutional reform concerning the rights to adequate food and water is awaiting the final approval of the current Legislative Assembly, no such initiatives have been launched to guarantee the other rights guaranteed under Article 11 of the Covenant.
27. With regard to article 11 of the Covenant, the ICJ makes the following suggestions:
- ***Can the State of El Salvador provide an update about the state of the legislative initiative towards the guarantee of the right to adequate food?***
  - ***Are there similar plans to guarantee in law the rights to adequate housing and sanitation?***

#### **ARTICLE 12 – THE RIGHT TO HEALTH AND THE PENAL CODE**

28. The ICJ study looks at the relevance of the country's penal code for some aspects of ESC rights. In particular, the State of El Salvador is one of the few States in the world that imposes a comprehensive prohibition of abortion, even in cases in which the life and health of the mother is at risk. Two recent cases, namely the ones of Beatriz and Manuela,<sup>17</sup> have shown how the provisions of the penal code prohibiting abortion under any circumstances lead to violations of a whole range of women's rights, including the right to health.
29. Taking into account the results of its study on access to justice for ESCR in El Salvador, the ICJ recommends the Committee to requests additional information on

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<sup>17</sup> See ICJ study, chapter 4.1.



following issues:

- ***What measures will be taken to ensure protection of the right to health of women needing access to reproductive services, including, in some instances, abortion services? Does the State Party intend to modify the law imposing an absolute prohibition on abortion services in order to ensure adequate protection of women's right to health?***