

UNITED NATIONS COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

**52<sup>nd</sup> Session of the UN Committee on Economic, Social and Cultural Rights**  
28 April to 23 May 2014

**SUBMISSION OF THE INTERNATIONAL COMMISSION OF JURISTS (ICJ)  
TO THE UN COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN  
VIEW OF THE COMMITTEE'S EXAMINATION OF THE COMBINED THIRD,  
FOURTH AND FIFTH PERIODIC REPORTS OF THE REPUBLIC OF EL SALVADOR  
UNDER THE CONVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS**

Submitted March 2014

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## Introduction

1. During its forthcoming 52<sup>nd</sup> session, from 28 April to 23 May 2014, the UN Committee on Economic, Social and Cultural Rights (the Committee) will consider and review the Republic of El Salvador's compliance with its obligations and implementation of the provisions of the Covenant on Economic, Social and Cultural Rights (the Covenant), including in light of the State Party's combined third, fourth and fifth periodic reports under articles 16 and 17 of the Covenant.<sup>1</sup>
2. In this context, the International Commission of Jurists (ICJ) welcomes this opportunity to submit its observations to the Committee on the organization's concerns about access to justice and the right to an effective remedy and reparation for victims of violations of economic, social and cultural (ESC) rights in El Salvador. In doing so, the ICJ submission raises issues and makes recommendations concerning cross-cutting provisions under article 2 and 3 of the Covenant, as well as concerning specific rights under articles 6, 7, 8, 11 and 12.
3. The content of this submission is based primarily on an extensive study carried out by the ICJ focusing on the availability and effectiveness of domestic legal remedies for violations of the rights guaranteed under the Covenant in El Salvador.<sup>2</sup>
4. The ICJ takes account of and welcomes the initiative by El Salvador to become among the first States to ratify the Optional Protocol to the Covenant (the Optional Protocol), and to make the declaration to accept the competence of the Committee with regard to the procedures under article 10 and 11 of the Protocol.  
With the Optional Protocol's entry into force, the ICJ considers it particularly timely to assess the domestic remedies that are available in the country, 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. Where the right to effective remedy is fully realized at the domestic level, there will necessarily be less need to the communication procedure under the Optional Protocol.
5. The ICJ welcomes, in general terms, the progress achieved by El Salvador towards the development of social policies that are designed, implemented and monitored adopting a human rights framework and thus applying human rights standards.<sup>3</sup>
6. However, the ICJ is also of the view that the lack of accessibility of legal, including judicial, remedies for ESC rights violations and, when available, their scant effectiveness remain causes of concern. In addition, the organization considers that these problems in turn have prevented the social policies developed by El Salvador from translating into concrete improvements in the realization of rights, especially for specific sectors and groups of the population,

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<sup>1</sup> Combined third to fifth periodic reports of El Salvador to the UN CESCR, UN Doc. E/C.12/SLV/3-5 (2012).

<sup>2</sup> The study is also accessible at <http://www.icj.org/new-icj-study-analyses-obstacles-preventing-salvadorians-to-access-justice-effectively/>. The full study exists solely in Spanish. However, an executive summary is available in English.

<sup>3</sup> Op.cit. note 1, in particular the development of a "Universal Social Protection System".

such as women, indigenous people or lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals.

**States' obligations with regard to the implementation of rights under the covenant, article 2.1**

7. 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 incorporates the definition and elements of the right to an effective remedy that is provided in international law and standards, 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>4</sup> In addition, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power<sup>5</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>6</sup> The International Covenant on Civil and Political Rights<sup>7</sup> similarly contains an obligation to provide an effective remedy. In 2005, the UN General Assembly adopted by consensus 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>8</sup> It provided that in all cases of alleged human rights and humanitarian law violations, whether or not they are gross or serious violations, States have an obligation to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice...irrespective of who may ultimately be the bearer of responsibility for the violation" and "[p]rovide effective remedies to victims, including reparation."<sup>9</sup> In addition, "[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>10</sup>

*The rights of victims of alleged violations of ESC rights and the right to judicial protection at national and international levels*

8. As far as access to justice for victims of violations of ESC rights is concerned,

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<sup>4</sup> Article 8 UDHR.

<sup>5</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>6</sup> Article 4 of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

<sup>7</sup> Articles 2, 14 and 26 of the International Covenant on Civil and Political Rights.

<sup>8</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>9</sup> Principle II(3) (c and d).

<sup>10</sup> See Principle VIII entitled Access to justice.

the Report of the UN Secretary-General on the question of the realization in all countries of ESC rights of December 2013 provides a fully fledged and updated overview of the standards relevant to access to justice and the right to an effective remedy for violations of ESC rights.<sup>11</sup>

9. As highlighted in the Secretary-General Report, as well as in the ICJ study, the Committee has reiterated on several occasions that there exists an obligation under article 2.1 of the Covenant for State Parties to make effective remedies available to rights-holders for violations of Covenant rights.<sup>12</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 to be part and parcel of the state obligations under article 2.1 of the Covenant, 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>13</sup>
10. While the ICJ's study 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. For a remedy to be effective it must be prompt, accessible and before an independent authority.<sup>14</sup> In addition, a fundamental element of the right to an effective remedy is that it must lead to the cessation of the violation and to "full and effective reparation (...) which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."<sup>15</sup> Furthermore, domestic remedies, where they are not effective, need not be exhausted to exercise the right to submit an individual communication alleging violation/s of ESC rights under the Optional Protocol.

*Progress and remaining difficulties in the treatment of the Covenant by the domestic courts*

11. The Constitution of El Salvador guarantees several ESC rights. However, under the domestic law of El Salvador, there is no recognition of the direct

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<sup>11</sup> Report of the Secretary-General on the question of the realization in all countries of economic, social and cultural right, UN Doc. A/HRC/25/31 (2013).

<sup>12</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>13</sup> Committee of Economic, Social and Cultural Rights, General Comment nr.9, UN Doc. E/C.12/1998/24 (1998), paras.2 and 3.

<sup>14</sup> See, Chapter 3 entitled "Un panorama de las debilidades y oportunidades en la protección constitucional de los DESC en El Salvador" of the above-mentioned ICJ study on the availability and effectiveness of domestic legal remedies for violations of the rights guaranteed under the Covenant in El Salvador, available at <http://icj.wppengine.netdna-cdn.com/wp-content/uploads/2013/10/ACCESO-A-LA-JUSTICIA-EL-SALVADORElectronic.pdf>.

<sup>15</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.

applicability of the Covenant except where specific Constitutional provisions may mirror partially or entirely some Covenant provisions, including for example as is the case in respect of labour rights and the right to education. In addition, there is uncertainty around the protection of rights protected under the Covenant 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 content and scope is not fully consistent with international standards.

12. In this respect, the decision of the Constitutional Chamber of the Supreme Court of Justice (SCJ) February 2013 (Decision 53-2005/55-2005)<sup>16</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 specifically establishes 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) 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 take certain actions or that they refrain from taking certain actions. Yet, the Court's decision does not serve to guarantee the continuity, predictability and certainty that an explicit normative recognition of all rights under the Covenant would provide. Further, judicial interpretation may be transitory, and depend on the membership of the Court.
13. 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 SCJ 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 and accountability.

*Institutional and procedural obstacles in claiming violations of Covenant rights before the Courts and ensuring access to justice for victims*

14. Beyond the position of the Covenant 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. In addition, the above-mentioned ICJ study analyses them in greater detail.
15. El Salvador lacks a comprehensive legal aid scheme. Judicial procedures for civil remedies damages awards are plagued by backlogs and delays. Sanctions imposed in cases of violations of ESC rights are often inadequate, and judicial decisions are in any event often not enforced.

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<sup>16</sup> See ICJ study, chapter 3.3.

16. As regards civil proceedings, it is important to point out that compensation for damages and material and non-material loss for violations of ESC rights is largely based on legal precedent established by the Civil Chamber and the Constitutional Chamber of the SCJ. This precedent serves as a benchmark for the other judicial bodies. In the past, *amparo* decisions from the Constitutional Chamber included compensation for damages and material and non-material loss arising from the violation in question. However, more recently the Constitutional Chamber has no longer provided for compensation in the *amparo* decision, but rather leaves room for the possibility of civil proceedings in order to establish the amount for material and non-material damages. This process, which must take place within the civil courts, constitutes *per se* a disadvantage for the victims, because not only do they have to endure an often lengthy wait and burdensome expenses for a favourable judgment in the *amparo* proceedings, but also after each decision they have to embark in yet another lengthy procedure before the civil courts.
17. The administrative litigation route is used in cases that call into question the legality of acts of the Public Administration. In this regard, it is pertinent to note that in El Salvador, the Administrative Chamber of the SCJ is the only competent judicial body to deal with such matters. Administrative litigation remedies are flawed in two respects: first, it is a geographically centralized process that is difficult for most people to access, and second, this centralization increases the backlog of pending cases.

*The need to strengthen the institutional framework for access to justice*

18. The ICJ welcomes the positive and important role that the National Human Rights Institution, the *Procuraduría para la Defensa de los Derechos Humanos* (PDDH) has played in the protection of ESC rights and in facilitating increased access to justice for victims of human rights violations, including ESC rights. Because of this role, the ICJ considers that the PDDH has so far not been provided with adequate resources and adequate capacity to carry out effectively its important function of facilitating victims' access to justice. An increase in such resources was recommended already in the Committee's Concluding Observations from 2006.<sup>17</sup>
19. In addition, 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 PDDH and the Attorney General's Office, the *Procuraduría General de la República (PGR)*, which is in charge of ordinary criminal prosecutions, as well as having jurisdiction, *inter alia*, over labour disputes.
20. 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. The ICJ Study showed that there remains a significant need for education and training programmes on international human rights law and standards, including El Salvador's international legal obligations, addressed to judges, lawyers, prosecutors and administrative personnel dealing with victims of alleged violations and involved in the assessment of their claims.
21. In the same vein, the ICJ Study showed that El Salvador had fallen well short of

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<sup>17</sup> UN CESCR, Concluding Observations on El Salvador, UN Doc. E/C.12/SLV/CO/2 (2007), para.27.

the objective of making legal information easily accessible to all. The fact that the official gazette that is issued irregularly, remains the main if not the exclusive means of making new laws public, ignores the realities of groups who are particularly disadvantaged and marginalized. Human rights education should be promoted on the largest basis possible and rights-holders should be made aware of their rights so that they can claim them.

22. Finally, as the ICJ study explores, there is an alternative and complementary channel for preventing and remedying ESC rights violations namely the Consumer Protection Authority. This body aims to protect consumer rights by helping to settle consumer-related disputes, improving access to services, strengthening surveillance of suppliers, promoting education and citizen participation and coordinating joint initiatives with other State institutions in order to contribute to better functioning of the market and exercise of citizenship. In that regard, the ICJ is encouraged by the positive role that the Authority plays in its areas of competence as defined in the National Consumer Protection Policy. The strategic goals of the Policy include health and safety protection in goods and services consumption, especially in the areas of food, medicine and drinking water.

**Articles 2.2 and 3, and article 12: ESC rights and legal protection against discrimination and denial of equal rights**

23. El Salvador has made substantial progress towards establishing a normative framework in domestic law concerning non-discrimination and equality. Nevertheless the ICJ continues to be concerned about implementation gaps in practice as well as 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 sexual orientation and/or gender identity as a prohibited ground of discrimination only applies to the public sector.
24. In accordance with the recommendations made by the Committee in November 2006 in its previous Concluding Observations on El Salvador's implementation of the Covenant,<sup>18</sup> the State Party enacted two laws on equality between men and women in all areas of life. In 2011, the Law on Equality, Equity and Eradication of Discrimination against Women came into force and in 2012 the Comprehensive Special Law for a Life free of Violence for Women was introduced. As mentioned above, both pieces of legislation respond to proposals made by the Committee in its 2006 Concluding Observations, and also entail progress in the implementation of other recommendations such as consolidating a "health system based on equity and accessibility, in accordance with article 12 of the Covenant".<sup>19</sup>
25. Another step forward at national level is Presidential Decree number 56, issued in May 2010, which aims to prevent all forms of discrimination on grounds of gender identity and/or sexual orientation in the acts of the public authorities. In addition, the right to health, as guaranteed in article 33 of El Salvador's Health Code (Legislative Decree No. 955 of 1988) prohibits discrimination in access to and the provision of health care services on the basis of nationality, religion, race, political opinion or social status. In March 2009, the Ministry of Health

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<sup>18</sup> UN CESCR, Concluding Observations on El Salvador, UN Doc. E/C.12/SLV/CO/2 (2007), para.28.

<sup>19</sup> UN CESCR, Concluding Observations on El Salvador, UN Doc. E/C.12/SLV/CO/2 (2007), para.43.

signed Ministerial Decree 202, which stipulates that all public health services should facilitate and promote the eradication of discrimination based on sexual orientation. Nevertheless, like Presidential Decree 56 mentioned above, Ministerial Decree 202 does not cover discrimination in the private sector. Moreover, the Decree does not include gender identity as a prohibited ground of discrimination.

26. The establishment of the Secretariat of Social Inclusion within the Office of the Presidency of the Republic in 2009 is another step forward, given that one of its primary purposes is to: ensure that conditions are created to guarantee social inclusion, development and protection for individuals and families, the elimination of various forms of discrimination and development of citizens' involvement and participation, on the basis of a human-rights-based approach.
27. Nonetheless, discriminatory practices against lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals persist in El Salvador, limiting their access to employment, health services, education, and other rights, thus increasing the risk they face of becoming victims of discrimination and other human rights abuses based on their real or perceived sexual orientation and or gender identity (SOGI) or expression.
28. As regards progress in the situation of indigenous peoples, it important to note the constitutional reform, relating to protection for indigenous languages, as well as artistic, historical and archaeological heritage.<sup>20</sup> However, the effectiveness of these measures will depend on the political will of the current Legislative Assembly (2012-2015) in terms of their operationalization through practical implementing steps and policies.
29. Considering the normative gaps and remaining inequalities faced in practice by various sectors and groups of the population, the ICJ is concerned about the lack of a comprehensive equality legislation covering all discrimination grounds prohibited by international human rights law. The ICJ Study showed the need 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.
30. 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 and in particular the right to sexual and reproductive health as guaranteed in article 12 of the Covenant. In this regard, the ICJ is greatly concerned that the recommendation made by the Committee in its 2006 Concluding Observations<sup>21</sup> concerning the absolute prohibition of abortion and its criminalization has yet to be implemented. As shown in at least two submissions to the Committee,<sup>22</sup> the lack of reforms in this regard continues to have dramatic impact on women's life and health.

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<sup>20</sup> Reform of articles 62 and 63 of the Constitution, Acuerdo de reformas constitucionales No.5, Legislative Assembly (9 May 2012), accessible at <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/reformase-la-constitucion-de-la-republica-2>

<sup>21</sup> UN CESCR, Concluding Observations on El Salvador, UN Doc. E/C.12/SLV/CO/2 (2007), para.44.

<sup>22</sup> See for instance the ICJ Study and the information submitted by the Centre for Reproductive Rights to the 52nd session of the Committee.



**The rights to work and to just and favorable conditions of work, articles 6 and 7**

31. Labour rights as guaranteed under articles 6 and 7 of the Covenant 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 to remuneration and health and safety at work. El Salvador's constitutional framework guarantees several of these rights and protections, in article 2 and in title II, chapter II, section 2. However, notwithstanding 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 guarantees.
32. The adoption of the necessary primary legislation and administrative measures to implement constitutional provisions is fundamental to avoid legal uncertainty and other obstacles for those that seek judicial redress, as well as for the members of the judiciary who are tasked with administering justice. The importance of adopting the necessary primary legislation was reiterated in the above-mentioned Decision 53-2005/55-2005 of February 2013 of the Constitutional Chamber of the Supreme Court. In the decision, the Constitutional Chamber condemned a total legislative omission on the part of the State as a result of the authorities' failure to adopt a law to regulate and give effect to article 38 of the Constitution, which, in turn, guarantees employees' rights in cases of voluntary resignation.
33. 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 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 amounts to only five US dollars. Moreover, while the labour inspectorate should play a fundamental role in the promotion and protection of labour rights, there are concerns about its effectiveness. Further concerns arise in respect of the length of administrative and judicial procedures in cases of labour disputes, and about the weaknesses in the enforcement of judicial decisions in labour matters.<sup>23</sup>
34. As the ICJ study cited above highlights, a closer look at the time required for labour proceedings illustrates some of the difficulties mentioned above. In particular, an analysis of the total length of proceedings from the lodging of a complaint reveals that the average time required to obtain a decision is three and a half years, with an average of 292 days to obtain a first instance decision; 140 days for an appeal and another 483 days for cases that go to the Civil Chamber of the SCJ to obtain a cassation ruling.<sup>24</sup>
35. The ICJ Study further highlights the poor enforcement of court decision in labour matters. This is mainly related to the fact that the victim who wishes to have the decision enforced has to request it and has to cover the costs incurred by such request, including the services of judicial officers/bailiffs. In addition, the ICJ received testimony according to which the Public Prosecutors Office

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<sup>23</sup> See ICJ study, chapter 5.

<sup>24</sup> Fausto Payes, *Diagnóstico y recomendaciones del procedimiento de ejecución judicial de sentencias y acuerdos conciliatorios administrativos en materia laboral*, San Salvador, 2010.

does not typically act in support of aggrieved workers when an employer does not comply with the court ruling.

36. 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 and 7 of the Covenant.

### **The right to an adequate standard of living, article 11**

37. The ICJ considers that the Constitution does not fully guarantee the rights provided for under article 11 of the Covenant. In particular, the right to adequate food has not been explicitly mentioned in the Constitution. In practice, bringing a claim to - or otherwise invoking - this right is likely to be futile, because under domestic law it lacks the legal elements necessary to indisputably substantiate the entitlement of any person to its full enjoyment and exercise.
38. In a positive move, in 2012 the Legislative Assembly approved a constitutional reform that established the right to adequate food and water for all Salvadorans. In light of this reform, the following text would be added to the constitution: "every person has the right to adequate food. The State has an obligation to create a food and nutritional security policy for all inhabitants. A specific law shall regulate this matter". As regards the right to water, the following would also be included in the Constitution: "water is a resource that is essential to life, as such, the State has an obligation to develop and preserve water resources and ensure that inhabitants have access to water. The State will establish public policies and there will be a law to regulate this matter". It should be noted that this construction falls short of expressly recognizing the right to water.
39. However, in order for the reform to become effective, it must be ratified by the current Legislative Assembly (2012-2015). If ratified, it would be an unprecedented step forward for the justiciability of ESC rights, because, in addition to giving them constitutional status, it would facilitate and encourage the implementation of measures towards their realization, as well as obligate the State to enact legislation that would allow them to be more effectively invoked in the courts.

### **RECOMMENDATIONS**

40. In light of the above, and given the concerns set out in the ICJ study on Access to Justice for Social Rights in El Salvador, consistent with its obligations under the Covenant, the ICJ considers that the government of El Salvador must:

#### **Article 2.1**

- *Ensure that all the rights enshrined in the Covenant are guaranteed by law, and, in this respect, eliminate the uncertainties that exist regarding their protection in the domestic legal system. In order to do so, the necessary constitutional reforms should be undertaken or guarantees provided that the competent courts would be able to recognize the direct applicability of the Covenant. At the very least, ESC rights that are not guaranteed in the Constitution should be protected by the Supreme Court of Justice through its interpretation, in compliance with the State's international obligations, and/or*

*guaranteed in legislation.*

- *Guarantee that legislation and other necessary regulations be adopted and implemented with a view to making the protection of constitutional rights effective in practice, and operationally justiciable, not only through the Supreme Court of Justice but also by lower courts. In addition, the processes towards the adoption of such acts and regulation should be undertaken in accordance with human rights principles such as transparency and the right to participation.*
- *Guarantee and ensure legal certainty, and, in particular, establish clear criteria that can be consistently applied by judges, not just in constitutional matters where there has been significant progress in terms of the position of the Constitutional Chamber of the Supreme Court, but also at other levels, such as in the labour courts.*
- *Address normative gaps in protection for specific groups of the population, in particular by constitutional recognition of native and/or indigenous peoples, in addition to adopting public policies with a view to protecting their ethnic identity and cultural values. Similarly, greater protection should be afforded to the rights of workers in the informal sector and their vulnerability should be recognized.*
- *Take into account the current doctrine of the Constitutional Chamber of the Supreme Court of Justice, and strengthen and promote knowledge of international and comparative law relevant to Covenant rights protection among judges and magistrates.*
- *Strengthen the human rights training for lawyers and in university curricula, including on ESC rights and their justiciability.*
- *Guarantee accessibility of legal and judicial information. To do so, notices and information on new legislation should be disseminated not only through the Official Journal, but also using other media that take into account people's realities, in particular, marginalized individuals and groups, who are at increased risk of violations of ESC rights.*

### **Articles 2.2 and 3**

- *Ensure that the rights of LGBTI persons and ensure are fully recognized and protected by law and that discrimination is not only prohibited in the public sector but also in the private sector, and that sexual orientation and gender identity be recognized as prohibited grounds of discrimination.*
- *More generally, continue to strengthen efforts to eliminate discrimination and inequality in practice. To do so, steps should be taken to adopt general legislation against discrimination and to promote equality, with a view to implementing article 2.2 and 3 of the Constitution, covering all of the prohibited grounds of discrimination enshrined in international human rights law, with the aim of creating procedures and mechanisms that allow victims of discrimination to gain access to justice, including an effective remedy.*
- *Draw up and implement educational programs against discrimination, stigmatization and taboos, not only for the general population, but also specifically for those working in the justice system, both in the area of public*

*services and public order and law enforcement. In particular, such programs should be designed to protect individuals and groups such as indigenous peoples, maquila workers, sex workers and LGBTI persons.*

**Article 6 to 8**

- *Modify the Code of Constitutional Procedures to eliminate the exception that prevents the provision of the remedy of amparo in labour cases. The latter, by virtue of the broad and complex nature of these rights, should be effectively protected in line with the provisions of the Covenant.*
- *Strengthen the enforcement and general application of judicial decisions and improve the system of reparations for damages and material and non-material loss in general. In particular, ensure that the victim is not made responsible for compensating the services of the enforcement officer (as is currently the case in labour disputes), should this be necessary in cases of non-compliance with decisions.*
- *Modify the sanctions regime concerning labour affairs so that it is commensurate with the seriousness of rights violations on the part of employers, and to ensure that they have a real dissuasive and preventive impact.*
- *Take steps to ensure that labour inspectorates aimed at preventing violations of rights under article 7 of the Covenant are effective in monitoring and inspecting work sites.*

**Articles 11**

- *Address normative gaps in the protection of specific rights, in particular the right to adequate food and water and sanitation. The steps taken to guarantee and protect the right to food should be consolidated. Similar efforts should be realized in favour of the right to adequate housing, water and sanitation.*

**Article 12**

- *Take measures to ensure the protection of the right to health of women needing access to reproductive services, including, in some instances, abortion services. Modify the law imposing an absolute prohibition on abortion services in order to ensure adequate protection of women's right to health.*