

## **Conference on the Future of the Protection of Social Rights in Europe**

### **Guarantee of the social rights in a broader context: the contribution of the UN Committee on Economic, Social and Cultural Rights**

Many thanks to the Belgian Chairmanship of the Council of Europe for this most welcome invitation to join you all at this Conference to celebrate the 50<sup>th</sup> anniversary of the entry into force of the European Social Charter.

My task today is to present the contribution of the UN Committee on Economic, Social and Cultural Rights towards the guarantee of social rights in a broader context. Let me begin with a few snapshots of the International Covenant on Economic, Social and Cultural Rights itself, one of the 9 core international human rights instruments<sup>1</sup> ratified by 163 States parties, from all the regions in the world, the most recent being South Africa, just a couple of weeks ago.

The rate of ratification of UN treaties that deal with economic, social and cultural rights by the Council of Europe Member States is very high except for the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families<sup>2</sup>.

The Covenant sets an internationally agreed framework to assess the commitments of states parties as regards the realisation of rights guaranteed under the treaty to everyone living under the jurisdiction of the State party.

Two cross cutting principles apply to all Covenant rights – the principle of non-discrimination and the principle of the equal right of men and women to the enjoyment of all economic, social and cultural rights. They are not stand-alone rights but need to be read in conjunction with each specific right guaranteed in part III of the Covenant – that is the rights to and at work, social security, protection of the family and its

---

<sup>1</sup> International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICMW); International Convention for the protection of All Persons from Enforced Disappearances (CIPED); Convention on the Rights of Persons with Disabilities (CRPD)

<sup>2</sup> CEDAW and CRC (100%); ICESCR (98%); CRPD (87%); ICMW (9%)

members, adequate standard of living, health, education, participation in cultural life and scientific progress.

Let me now turn to the Committee on Economic, Social and Cultural Rights, whose main role has been of monitoring the implementation of the Covenant through the reporting cycle and of providing guidance to States parties through its General Comments, Statements and Letters from the Chair.

In spite of the general consensus on the universality, indivisibility, interdependence and interrelatedness of all human rights<sup>3</sup>, the truth is that economic, social and cultural rights are still placed in a subsidiary position to civil and political rights in many countries, only to be fulfilled “progressively” over time. I was particularly pleased to read in the Conference background note that social rights belong to all human beings in the same way as civil and political rights and to an even greater degree since they are, in many respects, a prerequisite for the effective enjoyment of civil and political rights. I, for one, totally subscribe to this understanding.

The Committee’s framework for the assessment of implementation of Covenant rights is based on 2 fundamental axes. One is that economic, social and cultural rights impose three types or levels of obligations on States parties - the obligations to respect, to protect and to fulfil; the other is the nature of core obligations and of obligations of progressive realisation.

Core obligations, as the qualifier indicates, are fundamental. States parties have an obligation to ensure the satisfaction of, at the very least, minimum essential levels<sup>4</sup> of each of the Covenant rights. In order for a State party to be able to attribute its failure to

---

<sup>3</sup> In addition to the International Covenant on Economic, Social and Cultural Rights, at the regional level, instruments like the European Social Charter and the Revised European Social Charter as well as the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), provide the framework for Governments to adopt the necessary measures for the purpose of achieving progressively the implementation of the rights contained in them.

<sup>4</sup> CESCR General Comment 3 (1990) on the nature of States parties obligations  
CESCR, in its General Comments on the interpretation of the Covenant, has so far identified core obligations arising from minimum essential levels of the right to food, education, health, work, social security and participation in cultural life

meet at least its core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This is understandable because without such obligations the Covenant would be deprived of all meaningful content.

In relation to progressive realisation, lack of resources can certainly affect the full enjoyment of economic, social and cultural rights, but Article 2.1. of the Covenant<sup>5</sup> obliges each State party to take the necessary steps "to the maximum of its available resources" which means that overall priorities should ensure that resource allocation is in conformity with the States party's obligations under the Covenant<sup>6</sup>. Moreover, as expressed in a Statement of the Committee in 2007, the availability of resources, although an important qualifier to the obligation to take steps does not alter the immediacy of the obligation, nor can resource constraints alone justify inaction.

Given the objectives and the agenda of the Conference, I thought it might be of interest to illustrate how the Committee has been dealing with the impact of fiscal adjustment and austerity measures on the right to work, rights at work and the right to social security enshrined in articles 6 to 9 of the Covenant. I will try to do so using the Concluding Observations to the 5 European states parties whose reports we considered in our last 2014 session – Finland, Montenegro, Portugal, Romania and Slovenia.

At a macro level, the Committee has for long been expressing its concern at the fact that the adoption of austerity measures aimed solely at cutting expenses without carrying out the necessary reflection on the adverse impacts such cuts may have on the enjoyment of ESCR has led to drastic cuts in social spending; to increased income and other inequalities; to the weakening of the role of universal public policies; and to pushing individuals and families into situations of poverty or increasing their risk of falling through the cracks of various protection systems.

---

<sup>5</sup> Article 2.1 Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures

<sup>6</sup> CESCR Statement on an evaluation of the obligation to take steps to the "maximum of available resources" under an optional protocol to the Covenant / 2007

It is not that the Committee is unaware of the fact that the Covenant is not being implemented in an ideal world but rather in a real and fast changing world. In fact, while recognizing that the pressure on many States parties to embark on at times severe austerity programmes, in the face of rising public deficits and poor economic growth, has led to the adoption of difficult and complex austerity measures, in a Letter of 16 May 2012 from the Chairperson of the Committee, States parties are reminded that they should avoid at all times taking decisions which might lead to the denial or infringement of economic, social and cultural rights.

Further recognizing that States parties have, of course, a margin of appreciation within which to set national economic, social and cultural policies, the letter reminds them that in order not to violate Covenant rights, any proposed policy changes or adjustments need first of all to identify minimum core content of rights or a social protection floor, as developed by the International Labour Organization, and ensure the protection of this core content at all times. Policy changes must also be non-discriminatory, temporary, necessary and proportionate, in the sense that the adoption of any other policy, or a failure to act, would be more detrimental to economic, social and cultural rights. Changes should comprise all possible measures including tax measures, to support social transfers to mitigate inequalities that grow in times of crisis and to ensure that the rights of the disadvantaged and marginalised individuals and groups are not disproportionately affected. A final point is to reiterate that international assistance and cooperation is a fundamental obligation for the progressive universal realization of ESCR.

More directly in relation to labour and social security rights, the concluding observations to European States parties at the end of more recent reporting cycles are broadly in line with concerns raised by the European Committee of Social Rights and the ILO Committee of Experts on the Application of Conventions and Recommendations. A couple of examples - the high unemployment rate of young people who lack adequate job opportunities; the incidence of temporary employment, undeclared work and “dependent” self-employment; the excessive use of short term and fixed term contracts with a negative effect on job security and social protection; discriminatory working conditions faced by migrant and seasonal workers; the very slow bridging of the gender pay gap even in advanced economies due to vertical and

horizontal job segregation in the labour market for women; increasing trend of transferring collective bargaining to the level of enterprises that may put employees in a disadvantaged position in the determination of wages and working conditions by direct negotiation; and, in the context of social security, the increasingly stringent conditions for eligibility to contributory benefits, such as unemployment and sickness benefits and pensions, for calculation of benefit amounts, and their duration; and cuts in social assistance benefits.

One final point in this chapter on the impact of austerity measures is the Committee's message to European States parties, once they have exited the Economic and Financial Assistance Programme. In such a case, and I quote from the Concluding Observations to my own country, Portugal, the requirement is "to review the policies and programmes adopted in the framework of the Social Emergency Programmes and any other subsequent post-crisis economic and financial reforms with a view to ensuring that austerity measures are progressively waived and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery".

Let me now briefly dwell on the Committee's General Comments issued to provide greater clarity on the intentions, meaning and content of Covenant provisions. 21 General Comments have been adopted so far, including GC 18 on the right to work and 19 on the right to social security, with 2 more under consideration at this point in time – one on sexual and reproductive health and the other on just and favourable conditions of work that we hope to adopt till the end of the year.

General Comments are not binding in themselves, because the Committee cannot establish new obligations, but they have become a critical mechanism for a more progressive and contemporary interpretation of Covenant provisions and been widely used by national and international NGO's and increasingly by Courts.

A few words on the Optional Protocol to the Covenant that entered into force on 5th May 2013 and has been ratified by 17 States parties, among them Belgium, Bosnia and Herzegovina, Finland, Montenegro, Portugal, Slovakia and Spain.

The OP provides the Committee with the competence to receive and consider communications submitted by, or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the Covenant rights, after exhaustion of all available domestic remedies.

Beyond individual communications, the Protocol also empowers the Committee to receive Inter-state complaints, to undertake inquiries into grave and systematic violations of the Covenant, and to request States parties to take interim measures to avoid possible irreparable damage to the victim or victims of alleged violations. It also has the possibility to mediate friendly settlements between the complainant(s) and the State.

One interesting feature of the OP is a provision on a standard of review for considering communications that is materialized in the reasonableness of steps taken by the State party. This is indeed different from other similar procedures and it is probably unique in international law. It establishes that the Committee, in order to determine the violation of any right, has to consider the reasonableness of measures taken by the government in conformity with Article 2.1. of the Covenant, on the use of maximum available resources, while keeping in mind the possibility of States to adopt a variety of measures to implement Covenant rights. It will be very interesting to see how this plays out in practice.

At this point in time there are three pending cases - one related to discrimination in access to a non-contributory pension in prison; the other to the denial of access to court to protect the right to housing; and the third to discrimination of a minor foreigner in participating in football tournaments.

The Committee will certainly build on the experience of international and regional human rights courts and treaty bodies who have already dealt with claims related to economic, social, and cultural rights. In turn, the Committee hopes to influence the development of economic, social and cultural rights through its jurisprudence, to further clarify the content and applicability of Covenant standards and to address the root causes of violations of these rights. This is certainly one area that needs cooperation with other regional bodies with a comparable mandate so as to reinforce the coherence

and consistency of views and opinions that is so important for rights holders and duty bearers alike.

Finally, in line with what the Conference background note has asked us to do, a couple of thoughts on challenges.

The present backdrop for the implementation of economic, social and cultural rights offers food for thought. The crumbling of the Welfare State, the uneven sharing of costs and distribution of benefits of globalization, and various other trends, such as economic setbacks, unemployment and underemployment; financial, food and climate crises; land grabbing and mega development projects with displacement and forced evictions; and free trade and investment agreements, have had a disproportionate impact of disadvantaged groups.

Efforts to rethink and reorganise the role of the Government are far from being successful and States are still grappling with the need to balance long-term financial sustainability concerns with the fulfilment of their overall function of ensuring an acceptable level of protection to all their citizens, especially to the most vulnerable. The on-going debate on the Welfare State, the Welfare Society and the Welfare Mix that has privatization as its main feature permeates the entire human rights discussion, due to the growing difficulties of the more disadvantaged in accessing goods and services.

There are 2 particular issues I would like to highlight, based on the Committee's experience.

The first is that progressive realisation of economic, social and cultural rights seems to have come to some kind of a standstill across the board. Sometimes it can amount to retrogression; always what comes out of our dialogue with State party delegations is that the insufficient fulfilment of economic, social and cultural rights is not only due to the lack of resources, but also, and above all, to the development of domestic priorities that do not attribute sufficient relevance to these rights and, very often, to the fact that material and financial resources, in themselves scarce, are not targeted and used to the fullest extent possible for their implementation.

I think what is happening in the Europe is a good example. The negotiation for the new Sustainable Development Goals post-2015 will soon be in full force and in that context developed countries have a huge responsibility not to send wrong or mixed political messages that universal public policies for the protection of economic, social and cultural rights are not financially sustainable in the long run. One can only imagine the disastrous effect of using the crisis as a blanket excuse for lowering protection levels in the context of an internationally agreed framework that will shape development, hopefully well-grounded in human rights, for the coming years.

Still on progressive realisation, its impact is difficult to monitor for lack of disaggregated indicators over a medium term time frame. The Office of the High Commissioner for Human Rights has been involved in developing illustrative lists of human rights indicators for civil and political rights, and economic, social and cultural rights that enable the assessment of the efforts of Government in achieving outcomes. Some EU Member States have been adapting these indicators to the national context and it would be important for others to follow suit.

The other issue that is gaining increased relevance is the issue of State obligations vis a vis the business sector, as set out in 2 important documents - the Guiding Principles on Business and Human Rights on implementing the Protect, Respect and Remedy Framework, endorsed by the Human Rights Council in 2011 and the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights, developed and adopted by a group of experts in the same year. In a very short assessment of both the documents, regarding the role of States, we could conclude that they are required to set the enabling normative framework and to regulate, bearing in mind their obligation to guarantee fulfillment of economic, social and cultural rights without discrimination. This means that laws, policies and regulations must ensure that non-Government actors, whether State-owned companies or private companies, act in conformity. Furthermore, increasingly, given the advancement of economic globalization, the human rights of individuals, groups and peoples are affected by and dependent on the extraterritorial acts and omissions of States. We all know that in these days of weakening of the decision making power of nation states, either due to the failure of governments or an overall unfavorable economic and development environment, and of the myriad options open to transnational corporations



to carry out their activities at national and extra territorial levels, as well as to settle disputes, the co-relation of power is very unbalanced. Perhaps the upcoming discussion on a new binding treaty on business and human rights will provide the opportunity to craft sound solutions to match the size of the challenge and it would be very important for the European states to push themselves a little further than adopting National Action Plans to implement the UN Guiding Principles, which is, of course, a positive development in itself.

Bottom line, what really matters is to keep in mind that in a changing world, States have to cover traditional risks as well as face new ones in an active and preventative manner, within a context of dwindling resources, with clear goals and strategies for integrated economic and social policies. Central to these goals and strategies is the principle of “equality of rights, conditions and opportunities, which refer broadly to ways in which people are able to participate in society as citizens, to exercise their entitlement to resources, and their ability to contribute to the well-being of themselves, their families and their communities”<sup>7</sup>.

It is indeed a huge endeavour but also one from which no one is exempted!

Virginia Bras Gomes

Member and Rapporteur of the CESC

---

<sup>7</sup> UN Secretary General (2005) “Review of further implementation of the World Summit for Social Development and the Outcome of the 24<sup>th</sup> special session of the General Assembly”, report presented at the 43<sup>rd</sup> Session of the UN Commission for Social Development