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GT-DH-SOC(2003)005

[Français](#)

## **STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH)**

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## **WORKING GROUP ON SOCIAL RIGHTS (GT-DH-SOC)**

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## **REPORT**

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**1<sup>st</sup> meeting**  
**Strasbourg, 16-17 October 2003**

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## **Introduction**

1. The Working Group on Social Rights (GT-DH-SOC) held its 1<sup>st</sup> meeting in Strasbourg, on 16-17 October 2003. The meeting was chaired by Mrs Deniz AKÇAY (Turkey). The list of participants figures in [Appendix I](#). The agenda, as it was adopted, may be found in [Appendix II](#).
2. In the course of this meeting, the Group examined in particular the terms of reference which it received from [the CDDH](#) in June 2003 (reproduced in [Appendix III](#)) and, on this basis, proceeded, mainly in the light of the elements prepared by the Secretariat in document [GT-DH-SOC\(2003\)003](#) (reproduced in [Appendix IV](#)), to discuss the question of justiciability of fundamental social rights under the supervisory mechanism established under the [European Convention on Human Rights](#) (“the Convention”).
3. At its next meeting (second semester 2004), it envisages examining in more detail the possibility of making them justiciable within the framework of the Convention, on the basis of concrete drafting formulations that the Secretariat was invited to prepare in consultation with the members of the Group. The Group noted that it would have to submit its proposals to the CDDH before June 2005.

### **Item 1:       Opening of the meeting and adoption of the agenda**

4. See introduction.

### **Item 2:       Examination of the terms of reference and first exchange of views**

5. The examination of the terms of reference and the first exchange of views were particularly based upon the above mentioned Secretariat document [GT-DH-SOC\(2003\)003](#), which is reproduced in [Appendix IV](#). The Group also kept in mind the developments underway in particular within the United Nations and the European Union ([GT-DH-SOC \(2003\)002](#)).

#### ***Notion of “social rights”***

6. For the purposes of its terms of reference, the Group was of the view that the notion of “social rights” might be understood in its broad sense, encompassing economic and cultural rights. Without excluding such an interpretation, it preferred to concentrate, at this stage, on the examination of social rights in the sense of the revised European Social Charter, using the list which figures in paragraph 11 of [Appendix IV](#) as a starting point.

#### ***Justiciability of social rights at international level***

7. The Group tackled the question of justiciability of social rights at international level by using the questions put by the Secretariat in paragraph 5 of [Appendix IV](#).

- Some experts considered that it is difficult to make social rights justiciable within the framework of the Convention, due to the very nature of social rights, whose concrete protection and enjoyment depends, essentially, on political and economic factors, which do not easily lend themselves to scrutiny by the [European Court of Human Rights](#) (“the Court”). They feared that execution of a ruling of the Court could give rise to the allocation of considerable sums, to the detriment of other priorities set out by the State in question in the social domain.
- Other experts noted that social rights are justiciable. They held it is rather the nature of the Court that may be perceived as problematic. They considered that justiciability required specific measures for its implementation. As for the risk of “interference” by the Court in the social policies of a State, they considered that, by this logic, the same would be true of all other commitments entered into by the State within the framework of other international treaties.
- Certain experts felt that the system of protection of social rights offered by the [European Social Charter](#) is the appropriate framework.

8. The Chair recalled that the supervisory mechanism of the Court offers the following advantages over the Social Charter system: the right of individual petition, the establishment of fault, the possibility of fair compensation, the execution of judgments under the monitoring of the [Committee of Ministers](#).

9. The complementarity and interaction of the two protection systems of [the Council of Europe](#) (Social Charter and Convention) were emphasised. To illustrate this, it was pointed out that the decisions of the European Committee of Social Rights on the first collective complaints, or its conclusions with regard to the procedure of reports on national situations within the framework of the European Social Charter, may allow the general problems that are noted in a given State to be remedied, and that this is, in principle, compatible and complementary with the fact that an individual may, someday, bring a complaint before the Court and obtain reparation.

10. In general, it was felt that the conclusions of the relevant supervisory mechanisms (notably the European Committee of Social Rights, the Court of Justice of the European Communities or the supervisory bodies of the International Covenants of the United Nations) could be sources of inspiration when assessing whether such rights might be made justiciable within the framework of the Convention.

11. At the close of this discussion, two main tendencies had emerged. On the one hand, there were experts who expressed the clear desire to progress in the area of justiciability of social rights within the framework of the Convention. On the other, there were experts who asked that the added value (both practical and theoretical) of such an exercise be demonstrated more clearly.

***Current situation as regards the protection of social rights by the Court***

12. It was emphasised that the Court may already rule on the right to form or join trade unions (article 11), the right to education (article 2, [Protocol No. 1](#)), as well as the right to protection of property (article 1, Protocol No. 1). It was also recalled that the Court may, through the use of various interpretative techniques, rule on cases which relate to the social field, if it upholds the alleged violation of the right to life (art. 2), the prohibition of torture (art. 3), the right to a fair trial (art. 6), the right to respect for private and family life (art. 8), the prohibition of discrimination (art. 14), etc. However, in the absence of explicit provisions on social rights, the scope of their protection by the Court is unpredictable, given that it rules on a case-by-case basis, that it leaves a margin of appreciation to States and that it does not rule directly on the social dimension of the right in question.

13. Certain experts emphasised the potential of [Protocol No. 12](#) in terms of the protection of social rights within the framework of the Convention. Other experts considered, however, that the difficulties encountered by States in relation to the ratification of this Protocol should be borne in mind when drafting any new rights to be possibly inserted into the Convention.

14. It was suggested that where there is agreement among the experts on the fundamental nature of a social right, as well as on its justiciability before the Court, it would seem advisable to insert a sufficiently precise formulation of the right in question into the Convention. Nevertheless, certain experts emphasised that it must first be established whether such an insertion would, in fact, serve to guarantee more effective protection of the right in question for the individual.

15. On the subject of the existing jurisprudence of the Court touching on the social field, the Group noted the information gathered by the Secretariat, as well as that presented in the article written by professor F. SUDRE (“La protection des droits sociaux par la Cour européenne des Droits de l’Homme : un exercice de jurisprudence fiction ?”, *Revue Trimestrielle des droits de l’homme*, n° 55, 1<sup>st</sup> July 2003, pp. 755-779). The Secretariat was asked to contact M. Michel DE SALVIA, legal advisor, former registrar at the Court, in order to request that he write a commentary on this article, and more generally, on the case-law and decisions of the Court (particularly decisions of inadmissibility) in the social field.

### ***Criteria for justiciability***

16. The Group held that in order to be justiciable within the framework of the Convention, a social right must have the same characteristics as those rights already protected under the Convention, that is, they must be fundamental, universal and formulated sufficiently precisely (as a subjective right conferred directly on individuals) to give rise to legal obligations on the part of the State.

17. Concerning the *fundamental* character of any new right, which might be liable to be included in the Convention, it was emphasised that that it is of primary importance to assess the impact of the right on human dignity (does failure to respect this new right

undermine human dignity?). The Convention, however, also contains certain rights which might be considered as not being “fundamental” in the strict sense of the term, but which are just as necessary as the others. Furthermore, certain additional Protocols explicitly set out rights, which might have been considered to be implicitly protected by the Convention (for example, equality between spouses; article 5 of [Protocol No. 7](#)).

18. In order to avoid any misunderstanding, it was also made clear that the assertion that a right must be universal in order to be inserted into the Convention is not intended to mean that it must be guaranteed in a uniform fashion. To illustrate this point, the current jurisprudence of the Court with regard to the right to freedom of expression (art. 10) was cited: the Court takes a range of factors and circumstances into account before deciding whether this right has been breached in the case under examination.

19. Concerning the formulation of the right, the Group considered it indispensable that any new right, which might possibly be inserted into the Convention, be defined in a precise manner and that its scope of application be clearly delineated.

20. The scope of application of social rights that might be included in the Convention gave rise to debate: should the right be universal in the sense that it is guaranteed to “everyone” (including, for example, illegal immigrants) or should it be guaranteed to every person in a specifically defined situation, described in a sufficiently precise manner (for example, to “anyone in a situation of extreme hardship”)? The Group decided to examine this question in relation to each of the possible new rights which it will examine in the future.

### *Which social rights might be integrated into the Convention system ?*

21. The Group is of the opinion that the list should be brief, the rights figuring on it should form a kind of “hard core”. The right to the satisfaction of basic material needs of persons in situations of extreme hardship, set forth by the Committee of Ministers in its [Recommendation n° R\(2000\) 3](#) to member States, was an example given by many of the experts as a starting point. However, at this early stage of work, the Group decided that the list figuring in paragraph 11 of [Appendix IV](#) should be retained for in-depth examination, in the clear understanding that it is intended only to be indicative and in no way prejudices decisions to be taken at a future date.

### **Item 3: Future Work**

22. At its next meeting in Autumn 2004, the Group envisages examining in more detail the question of the justiciability of social rights under the supervisory mechanism of the Convention, on the basis of concrete drafting formulations that the Secretariat will prepare and in the light of the commentary of the case-law of the Court, mentioned in paragraph 15 above.

23. Given the considerable time-lapse between the first and second meetings of the GT-DH-SOC, and in order that the work of the Group can move forward before Autumn 2004, it

is essential that members of the Group be able to exchange all relevant ideas and studies, as well as all possible drafting proposals. Experts are therefore encouraged to send their suggestions and contributions to Ms SCAPPUCCI who will undertake to transmit them to all the members of the Group.

**Item 4:      Date for the next meeting**

24.      For the moment, the proposed dates are [...September 2004].

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Appendix I**List of participants / Liste des participants****BELGIUM / BELGIQUE**

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*Observers / Observateurs*

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**PARLIAMENTARY ASSEMBLY / ASSEMBLEE PARLEMENTAIRE**

Apologised/Excusé

**EUROPEAN COMMITTEE FOR SOCIAL COHESION / COMITE EUROPEEN POUR LA COHESION SOCIALE**

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M. Alfonso DE SALAS, Head of the Division / Chef de la Division

Mrs Gioia SCAPPUCCI, Administrator / Administratrice, Secretary of the GT-DH-SOC / Secrétaire du GT-DH-SOC, Human Rights Intergovernmental Cooperation Division / Division de la coopération intergouvernementale en matière de droits de l'homme

Ms Dearbhal MURPHY, Trainee/stagiaire

Mme Michèle COGNARD, Assistant / Assistante

**Secretariat of the European Social Charter / Secrétariat de la Charte sociale européenne**

M. Régis BRILLAT, Executive Secretary / Secrétaire exécutif

\* \* \*

Interpreters/Interprètes  
Mme Anne CHESNAIS  
Mme Sara WEBSTER

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Appendix II**Agenda****Item 1:       Opening of the meeting and adoption of the agenda**

- Draft agenda [GT-DH-SOC\(2003\)OJ001rev](#)

**Item 2:       Examination of the terms of reference and preliminary exchange of views**

- Report of the 55<sup>th</sup> meeting of the CDDH (17-21 June 2003) [CDDH\(2003\)018](#), Item 5 (i)
- Terms of reference received by the CDDH [CDDH\(2003\)018](#), Appendix VII
- Information gathered by the Secretariat [GT-DH-SOC\(2003\)002](#)
- Reference documents [GT-DH-SOC\(2003\)002](#)  
[Addendum1](#)
- Preliminary observations of the Secretariat [GT-DH-SOC\(2003\)003](#)
- Bibliography [GT-DH-SOC\(2003\)004](#)

**Item 3:       Future Work****Item 4:       Date for the next meeting**

**Friday 17 October at 12 at the Palais de l'Europe**  
Participation in the Ceremony to mark the  
**World Day to overcome extreme poverty**  
together with the "Extreme poverty and social cohesion" group and  
ATD Fourth World

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### Appendix III

#### **Terms of reference for the GT-DH-SOC** (CDDH(2003)018, Appendix VII)

**1. Name of committee:** Working Group on Social Rights (GT-DH-SOC)

**2. Type of committee:** Working Group

**3. Source of terms of reference:** [Steering Committee for Human Rights \(CDDH\)](#)

**4. Terms of reference:**

i) To examine:

- the implementation of [Recommendation No. R\(2000\)3](#) of the [Committee of Ministers](#) to member States on the right to the satisfaction of basic material needs of persons in situations of extreme hardship;
- the case-law of the [European Court of Human Rights](#) on any positive obligations in the field of social rights;
- the developments in relation to the [European Social Charter](#);
- the developments in relation to the Charter of Fundamental Rights of the European Union;
- the on-going work within the United Nations with regard to the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights recognising a right to individual and/or collective complaints;
- the developments in relation to [Protocol 12](#) of the ECHR;
- any other relevant international instruments and developments in this field.

ii) On the basis of such elements, to consider whether any possible new rights or aspects of such rights might be appropriate for justiciability under the control system established under the ECHR.

**5. Composition:**

i) The working group is composed of a Chair and seven members, specialists in the field of social rights: Belgium, Bulgaria, Finland, France, Ireland, Netherlands, Russian Federation and Turkey (Chair).

ii) Other member States, the observers to the CDDH, as well as [the Parliamentary Assembly](#) and the European Committee for Social Cohesion (CDCS) may also participate in the work, at their own expenses.

**6. Working methods:**

i) The GT-DH-SOC will consult/exchange views with the European Committee of Social Rights and the European Court of Human Rights.

ii) The GT-DH-SOC will decide about the appropriateness of engaging consultants.

**7. Duration of the terms of reference:**

The present terms of reference will be reviewed on 30 June 2005.

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Appendix IV**Preliminary observations of the Secretariat for the members of GT-DH-SOC**  
(document [GT-DH-SOC\(2003\)003](#))**Preliminary Remark**

These observations of the Secretariat are intended to provide a starting point for the work of the Group.

**Introduction**

1. The GT-DH-SOC is asked to consider whether certain possible new rights might be justiciable under the control mechanism put in place by the European Convention on Human Rights (“the Convention”).<sup>1</sup>

2. This reflection is not a new exercise,<sup>2</sup> however, it has lost none of its relevance. The starting point remains the same: the recognition of the inherent dignity of all human beings. It is a question, therefore, of building upon the effort that was made with the Convention<sup>3</sup> in order to achieve the collective enforcement, under the supervision of the European Court of Human Rights, of the rights stated in the Universal Declaration of Human Rights, thus clearly enshrining their indivisibility.

3. The [European Ministerial Conference on Human Rights](#), which took place in Rome on the 3-4 November on the occasion of the 50<sup>th</sup> anniversary of the Convention, did not fail to solemnly recall the interdependent and indivisible nature of human rights. It was also emphasized that the reflection being carried out with a view to improving the protection of social rights in Europe should continue.<sup>4</sup>

***The question of the “justiciability of social rights” at international level***

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<sup>1</sup> See Appendix VII of the [CDDH\(2003\)018](#) report, containing the terms of reference adopted by the CDDH for the GT-DH-SOC at its 55<sup>th</sup> meeting (17-21 June 2003).

<sup>2</sup> See document GT-DH-SOC (2003)018.

<sup>3</sup> Its preamble suggests that the rights and freedoms included in the Convention of 1950 are the *first steps* for the enforcement of the rights stated in the Universal Declaration of Human Rights.

<sup>4</sup> See letter D, paragraphs 23-28, Resolution I “Institutional and functional arrangements for the protection of human rights at national and European levels” adopted at the Conference.

4. It can no longer be doubted that today most social rights are justiciable at national level. The retention, at international level, of a dichotomy which is nowadays considered to be artificial and dangerous<sup>5</sup>, between civil and political rights on the one hand, (conceived as “freedom rights”, “the right to do”, which place a negative duty “not to do” on States) and economic, social and cultural rights on the other (conceived as “claims”, “the rights to have”, which place a positive duty “to do” on States)<sup>6</sup> has served to maintain the idea that social rights were not, by their nature, justiciable. Yet this position, which was widely accepted in the past, is questioned today and it would be desirable that, from the outset of its work, the Group reach a shared understanding on some essential elements relating to the justiciability of social rights at international level.

5. To this end, the Group might put the following questions to itself:

- Is it the nature of the social right in itself that is problematic or is it the nature of the control mechanism?
- Are there legal and technical reasons which would constitute an obstacle to the Court’s ruling on fundamental social rights which might be included in the Convention?
- Starting from the conclusions reached by the European Committee on Social Rights on the first collective complaints submitted within the framework of the European Social Charter, is it possible to formulate arguments in favour of the justiciability of social rights at European level?
- Does the jurisprudence of the Court of Justice of the European Communities provide examples as to the justiciability of certain social rights?
- Could some of the views of the Human Rights Committee of the International Covenant on Civil and Political Rights of the United Nations also be of interest in this area?

#### ***Current situation as regards the protection of social rights by the Court***

6. The Court may rule on certain economic and social rights which are already present in the Convention, such as: the prohibition of forced or compulsory labour (article 4§2), the right to form or joint trade unions (article 11), the right to education (article 2, Protocol 1), as well as the right to protection of property (article 1, [Protocol 1](#)). It may also, through the use of various interpretative techniques<sup>7</sup>, rule on cases which relate to

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<sup>5</sup> See IMBERT, Pierre-Henri: “Droits des pauvres, pauvre(s) droit(s)? Réflexions sur les droits économiques, sociaux et culturels” in *Revue du Droit Public* N°1 1989, pp. 742-748. Among others, see also the Proceeding of the International Congress of the *Mouvement international de juristes catholiques* on «*La justiciabilité des droits sociaux*» (Strasbourg 22-24 November 1991) published in *Affari Internazionali* Anno XX N° 1, 1992 p.297.

<sup>6</sup> The consistent jurisprudence of the Court shows that many civil rights do necessitate positive action from the State in order to ensure their application.

<sup>7</sup> Some examples include, in the area of social benefits and allowances: *Gaygüsüz v. Austria* (16 September 2003), *Van Raalte v. the Netherlands* (21 February 1997) and *Koua Poirrez v. France* (30 September 2003); in the area of healthcare: *McGinley and Egan v. the United Kingdom* (9 June 1998), *Bensaïd v. the United Kingdom* (6 February 2001), *Berktaş v. Turkey* (1 March 2001), *Cavelli and Ciglio v. Italy* (17 January 2002) and *Oneryildiz v. Turkey* (18 June 2002); in the area of the right to housing: *James and others v. the*

the social field. However, as long as social rights are not explicitly set forth in the Convention, many applications will be rejected *ratione materiae* and even in the event that these applications were considered admissible, it would not necessarily follow that the Court may be able to be creative. To quote only one example which highlights the limits of interpretative techniques, one may refer to the decision taken by the Court in the case *Marzari v. Italy* (n° 36448/97 of 4 May 1999) on the issue of the right to housing of a disabled person.

7. Once [Protocol No. 12](#) to the Convention comes into force, the Court could indeed be called upon to rule on the right to non-discrimination in the enjoyment of a given social right, since article 1 of this Protocol sets forth a general prohibition of discrimination and thus brings all rights accorded to an individual “by law” within the scope of application of the Convention and the jurisdiction of the Court.<sup>8</sup>

8. The Court will not, however, be empowered to check whether a State implements the recognition and protection of any social right that is not explicitly set forth in the Convention. It will rule on the conformity of the national legislation vis-à-vis Protocol n°12. It is not, therefore, the social right itself which will be within its jurisdiction, but rather the right to enjoy that social right without suffering discrimination.

#### ***Criteria for the selection of new rights***

9. The situation which has just been evoked serves to demonstrate that many aspects of the social domain risk exclusion from the supervision mechanism of the Court if specific rights are not integrated into the Convention. With a view to determining which rights might be concerned,<sup>9</sup> it is useful to recall the characteristics of those rights which figure in the Convention, in order to identify the criteria for the selection of new rights, which should be included in the Convention system. The Group may naturally discuss the advisability of taking other criteria into consideration:

*Any right capable of being justiciable within the framework of the Convention should be fundamental, universal and formulated sufficiently precisely to give rise to legal obligations on the part of the State.*

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United Kingdom (21 February 1986); *Mellacher and others v. Austria* (19 December 1989), *Spadea and Scalabrino v. Italy* (28 September 1995) and *Scollo v. Italy* (28 September 1995).

<sup>8</sup> The Court might equally judge the failure of States to fulfill the positive obligations which are necessary to guarantee the effective enjoyment of equality of treatment. Indeed the preamble of Protocol No. 12 states that “the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures”.

<sup>9</sup> Naturally, it must be a “new” right (or a “new” aspect of a right) in the sense that it is not already guaranteed in the Convention.

a) *The right must be fundamental*

When considering a social right that might be introduced into the Convention, one must first ask whether or not such right is generally guaranteed within the domestic legal order of the member States of the Council of Europe, at European level or at the level of the United Nations. Does its violation constitute a threat on human dignity?

b) *The right must be universal*

The right should be recognized in the largest number of member States of the Council of Europe. It should also be guaranteed to “everyone” and not to specific categories of people.

c) *The right must be formulated sufficiently precisely to give rise to legal obligations on the part of the State*

It is not a question of simply establishing a general norm. Can the new right be formulated as a subjective right directly conferred on individuals?

***Which rights ?***

10. To facilitate discussion, the Secretariat has drawn up a list of social rights, indicating in each case whether the right is already set forth in the Universal Declaration of Human Rights (UDHR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Social Charter (in its 1961 version ESC and in its revised version ESC rev) or the Charter of Fundamental Rights of the European Union (CFR). The right to the satisfaction of basic material needs of persons in situations of extreme hardship figures on this list. This right was set forth in January 2000 by the Committee of Ministers in its [Recommendation n°R\(2000\) 3](#) to member States and the Group is called upon, in its terms of reference, to examine it particularly. Nonetheless, social rights should not be reduced to the rights of the poor.

11. Naturally this list of rights and reference texts is not exhaustive.

Right to the satisfaction of basic material needs (food, clothing, shelter and basic medical care) / right to an adequate standard of living	Recommendation R(2000) 3 of the Committee of Ministers / UDHR (art. 25), ICESCR (art. 11), ESC and ESC rev (art. 3), CFR (art. 34)
The right to freedom from hunger	ICESCR (art.11)
The right to housing	UDHR (art. 25), ESC rev (art. 31)
The right to medical care and social services	UDHR (art. 25), ESC and ESC rev (art. 13), ICESCR (arts. 9 et 12),

	CFR (art. 35)
The right to protection from poverty and social exclusion	ESC rev (art. 30), CFR (art. 34)
The right to social security	UDHR (art. 22), ESC and ESC rev (art. 12), ICESCR (art. 9), CFR (art. 34)
The right of the family to social, legal and economic protection	UDHR (art. 16), ESC and ESC rev (art. 16), ICESCR (art. 10), CFR (art. 33)
The right to education	UDHR (art. 26), ESC rev (art. 17), CFR (art. 14)
The right to work	UDHR (art. 23), ESC and ESC rev (art. 1), ICESCR (art. 6), CFR (art. 15)
The right to fair working conditions	UDHR (art. 23), ICESCR (art.23), ESC and ESC rev (art. 2), CFR (art. 31)
The right to safe and healthy working conditions	ESC and ESC rev (art. 3), ICESCR (art. 7)
The right to equal pay for equal work	ESC and ESC rev (art. 4), ICESCR (art. 7),
The right of collective bargaining	ESC and ESC rev (art. 6), ICESCR (art. 6), CFR (art. 28)
The right to vocational guidance and training	ESC and ESC rev (arts. 9 et 10), ICESCR (arts 6 et 13)
The right of workers to information and consultation within the undertaking	ESC rev (art. 21), CFR (art. 27)
Protection in the event of unjustified dismissal	ESC rev (art.24), CFR (art. 30)
The right to protection against unemployment	UDHR (art. 23)
The right of access to a free placement service	ESC and ESC rev (art. 1), CFR (art. 29)

The right to holidays with pay

UDHR (art. 24), ESC and ESC rev  
(art. 2), CFR (art. 31)

The right to rest and leisure

UDHR (art. 24), ESC and ESC rev  
(art. 2), CFR (art. 31)

12. In the light of the national legislation of members States, of the jurisprudence of the Court and of any other relevant legal instrument, the GT-DH-SOC could evaluate which among these rights, and what possible others<sup>10</sup>, would satisfy the criteria laid out above, so that they might be recognised as justiciable under the Convention.

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<sup>10</sup> Specific categories' rights (for example the rights of children, mothers, elderly persons, disabled persons, migrant workers, etc.) have not been mentioned as these do not correspond to the criterion of universality as the Court understands it to date. However, it is naturally possible for the Group to discuss about this.