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INTERNATIONAL STATE OBLIGATIONS IN PROTECTING
SOCIAL RIGHTS: RIGHT TO SOCIAL SECURITY

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MA thesis

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Table of Contents

List of abbreviations.....	6
Introduction.....	7
I Theoretical and Historical Background.....	12
1 Normative character of international human rights.....	12
1.1 Interdependence approach.....	15
1.2 Rights and obligations.....	17
1.3 Obligations and violations approach.....	20
2 Typologies of state obligations	24
2.1 Tripartite typology.....	24
2.1.1 Obligation to respect.....	27
2.1.2 Obligation to protect.....	28
2.1.3 Obligation to fulfil.....	29
2.2 Obligation to conduct and result.....	31
2.3 Obligations of immediacy and obligations of progressive realization.....	32
3 Practical application of typology.....	34
3.1 Consequences of violations of obligations.....	36
3.2 Minimum core obligations.....	38
3.3 Victims of violations.....	38
3.4 Consequences and remedies of violations.....	39
3.4.1 Means of Legal Protection.....	41
3.4.2 Domestic legal remedies.....	43
4 Evolution of welfare rights.....	43
4.1 UN system.....	45
4.2 Council of Europe.....	47
II Principles and Rights.....	50

1	Vienna Convention on the Law of Treaties.....	51
2	Obligations clause in CDESCR.....	52
2.1	Obligation to take steps.....	53
2.2	Obligation to use all appropriate means.....	53
2.3	Progressive realization.....	56
2.4	Obligation to use maximum of its resources.....	58
2.5	Conclusion.....	59
3	General obligations in European Social Charter.....	61
4	Equality.....	64
5	General normative structure of Right to Social Security.....	65
6	Genesis of right to social security.....	70
III	Social Security in UN system.....	73
1	CCPR and the practice of HRC.....	73
2	CDESCR.....	76
2.1	Material scope.....	78
2.2	Personal scope.....	79
2.3	Equality.....	82
2.4	Minimum level of benefits.....	84
2.5	Administration of the system.....	90
2.6	Progressive development.....	91
3	Conclusion.....	91
IV	Social Security in European Legal Instruments.....	96
1	European Convention of Human Rights and ECtHR.....	98
1.1	Right to a fair trial.....	99
1.2	Right to property.....	100
2	European Social Charter.....	101
2.1	Social security or social assistance.....	103
2.2	ILO Convention 102 and European Code of Social Security.....	105

2.3 Material scope.....	108
2.4 Personal scope.....	110
2.5 Minimum level of benefits.....	111
2.6 Administration of the system.....	113
2.7 Progressive development.....	114
3 Conclusion.....	116
Conclusion.....	120
Resümee.....	124
Annex 1	137

List of abbreviations

<i>Abbreviation</i>	<i>Name</i>
ACHPR	African Charter on Human and Peoples Rights
ACHR	American Convention on Human Rights
Art	Article
CCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant on Economic, Social and Cultural Rights
CoE	Council of Europe
ComESCR	Committee on Economic, Social and Cultural Rights, UN
ECHR	European Convention on Human Rights and Peoples Freedoms
ECOSOC	Economic and Social Council, UN
ECSR	European Committee on Social Rights, Council of Europe
ECtHR	European Court of Human Rights, Council of Europe
ESC	European Social Charter, Council of Europe
ESC Revised	European Social Charter (Revised)
HRC	Human Rights Committee, UN
IACtHR	Inter-American Court of Human Rights
ILC	International Law Commission
ILO	International Labour Organization
P	Page
UDHR	Universal Declaration on Human Rights
UN	United Nations

Introduction

International human rights law is going through important developments. The traditional understanding of what international human rights are designed for is changing and human rights are more seen as not merely political aims but rather as practical legal tools that individuals can use against the actions of the state.

International legal instruments cover wide range of different rights. International social rights form one part of the human rights system that has for long had secondary status besides civil and political rights.

By ratifying or acceding to the international social rights instruments, States Parties freely assume a wide range of binding obligations. However, the nature of the obligations that they impose have been the subject of controversy. After both the Covenant on Economic, Social and Cultural Rights¹ and the European Social Charter² entered into force, they were interpreted by some government representatives and some scholars as amounting to the mere declarations of “aspirations” or “goals to be achieved” rather than imposing binding legal obligations upon states. This meant that social rights were never considered as justiciable rights, rights that can be protected in effective national or international proceedings.

From the international level, the key provision in the CESCR regarding the nature of state obligations is article 2§1. It has been in the heart of the discussion as well as lack of similar provision in the ESC.

Aim of the thesis is to take closer look into international social rights and analyse the obligations they impose on states. Research examines the CESCR and ESC from the perspective of the state obligations. It outlines and evaluates nature of obligations in relation to right to social security in conjunction with general obligations clauses in these respective treaties.

The central right of the study is the right to social security. It is protected by article 9 of

¹Hereinafter CESCR, 1966, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force on 3rd January 1976.

²ESC, 1961. It was opened for signature on 18th of October 1961 and entered into force on 26th of February 1965. Additional Protocol of 5th May 1988 added the Charter four further articles. The ESC Revised, 1996, was opened for signatures on 3rd may 1996 and entered into force on 1st of July 1999.

the CESCR and article 12 of the ESC. Some elements of right to social security have also found protection under international instruments protecting civil and political rights. Non-discrimination in particular, has also given rise to case law under the Covenant on Civil and Political Rights³ and European Convention on Human Rights⁴. As the central interest of this study is the obligations under the social right conventions and the possible violations of these obligations, the practice of HRC and the ECtHR will be only shortly looked into as a possible example of justiciability and implementation of social rights.

Research uses the obligations approach as starting point and the hypothesis of the current research is that international social rights create legal obligations and minimum core of these obligations is justiciable both nationally and internationally.

The necessity to examine the obligations imposed by the Covenant and ESC in the light of the developments that have occurred in the international human rights law has taken on even greater relevance in the light of the debate over a possible individual complaints procedures in relation to social rights. In the European System, the collective complaints system has been already introduced and the discussions on the Optional Protocol to the Covenant has reached the drafting level. Adoption of EU Charter of Human Rights provides also additional social protection to persons without making any distinction between social rights and civil and political rights.

The thesis is limited in looking on international obligations and their nature i.e. the domestic justiciability is looked at only as a pre-condition for international litigation and this is done from the perspective of international treaties.

As stated above, two international treaties form the legal ground of the research - International Covenant on Economic, Social and Cultural Rights and European Social Charter both Charter of 1961 and revised Charter. In relation to right to social security, also other instru-

³Hereinafter CCPR, 1966: International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

⁴Hereinafter ECHR, 1950: Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 was adopted in Rome 4th of November 1950, entry into force 3rd September 1953.

ments of ILO and Council of Europe are vital for the interpretation and are referred to by the supervisory body.

The approach taken in the research is referred to as the obligations approach. It is based on concept that every legal norm is comprised of rights and obligations. When traditional analysis of human rights start with the individual and her rights, the obligations approach start with the obligations that human rights norms create and then turn to individual and her justiciable rights. The starting point is that obligations under human rights instruments create obligations that are different in their nature and only some of these obligations form substance of the subjective rights. Other are obligations with no subjective element.

This approach has degree of complexity as there are many factors that increase the uncertainty with regard to the precise content of the obligations under these treaties. For example, both of these treaties were drafted with a wording that to a greater or lesser degree is general and vague. Although such wording in itself is not exceptional in the framework of international human rights law and is usually further regulated by treaty supervisory organs and their case-law, the weakness of the supervisory systems have however prolonged due creation of case-law. This situation by now has improved as the UN Committee on Economic, Social and Cultural Rights has been functioning since 1987. Also, the work of the European Committee of Social Rights has been made more efficient by increasing the number of experts reviewing the state reports. International jurisprudence in terms of international petition procedure is lacking within the UN system. Same applies to the ESC, however, it has the advantage of collective complaints procedure.

Moreover, as the drafting of the treaties did not rely on constitutional practices of the states, with the exception of labour-related rights, the range of the rights recognized was considerably in advance of most national legislations.⁵ Lack of domestic jurisprudence on the implementation meant that the clarification of the substance of social rights by international treaty supervisory bodies started from almost scratch.

These difficulties and the recent developments have brought about the need to clarify the

⁵Alston, 1992, p. 490

general obligations that the social rights carry as well as the substance of the need for clarification of each rights. Current research is aimed to fulfilling this need in the area of right to social security.

The research analysis states obligations and the state obligations are then presented within the typology. Comparative approach is used while analysing CESCRC and ESC, also, practice of HRS and ECtHR is analysed. Generic overview of human rights helps to understand the legal context these treaties operate.

The study is divided into four parts. First chapter discusses the theoretical approach taken when analysing social rights and right to social security in particular. It provides basis for the discussion on state obligations by identifying the duty holders and different types of obligations. It also provides short historical overview of the development of welfare rights in the UN and Council of Europe systems.

Second chapter analyses general obligations clauses in CESCRC and ESC with the aim of establishing the system in which the right to social security is to be defined. It also provides an overview of the supervisory system and creation of the case-law.

Third part of the research concentrates on right to social security in CESCRC and the obligations under social security. Right to social security is substantiated in line with the proposed typology of obligations. Additional materials used are ILO conventions on the right to social security. Chapter ends with the grouping of the obligations as well as discussion on what sub-elements of the right to social security would have the perspective of being justiciable. For comparison, practice of the HRC is shortly discussed.

Forth chapter analyses right to social security in ESC using the similar approach as in chapter 3. Additional materials used are the European Code of Social Security and practice of European Court of Human Rights.

Right to social security is closely linked to demographic changes and the changing structures of employment and to the constantly increasing cost of social welfare systems and at the same time the constantly growing numbers of people in need, particularly the unemployed who are no longer entitled to benefit. The international framework of this right was developed

during 1960s and since only modest developments have taken place. The real-life situation has however changed tremendously – the categories of persons entering labour has changed as well as the nature of economy, structure of family etc.

These new developments have made the discussion over protection of social rights and right to social security in particular an important subject of discussion in international human rights law and thus has become important to establish international obligations states have assumed when ratifying international instruments protecting social rights. More importantly – international instrument foresee different complaints procedures where the violation of these obligations can and are being brought up.

Author of the study is grateful for prof. Matti Mikkola for supervision and assistance as well as to the Helsinki University for the possibility of research. EuroFaculty of the Tartu University has given its support through EuroFaculty Fellowship project where I have had the privilege to participate for the duration of my MA studies.

I Theoretical and Historical Background

International human rights law has been designed to protect full range of rights that are necessary for people to have a full, free, safe, secure and healthy life. Right to live a humane life cannot be attained unless all basic necessities of life - work, food, housing, health care, education and culture - are adequately and equitably available to everyone. Based on fundamental principle of human dignity, international human rights law has established individual and group rights relating to the civil, cultural, economic, political and social spheres - all spheres of human life.

International human rights restrict state's freedom in enacting laws as well as constrain the budget. Thus, it has been common rhetoric of states to divide international human rights into different categories and levels and consider some rights to be legal in their nature and other rights to be mere policy goals and principles with no binding legal effect. Even strong welfare states such as the Nordic countries do not have tradition of defining welfare services and welfare benefits as legal rights at the constitutional level.⁶ On the other hand, international human rights rhetoric has used the interdependence approach as guiding principle for human rights law. According to this, human rights are interdependent on each other. For example, right to vote has no meaning to a person who does not have enough food to eat or place to live. Integrated approach has been in the agenda of international human rights discussion from the beginning of international codification and the Universal Declaration of Human Rights.

Current chapter defines bases for the research, explains the typology of obligations used in analysing the state obligations and right to social security in particular, and provides short overview of the development of welfare rights.

1 Normative character of international human rights

It is usually considered beyond dispute that civil and political rights are justiciable rights, whereas the normative character of economic, social and cultural rights is debatable at the international and national level. Due to their historical origin, human rights are traditionally

⁶Most recently see discussion in Rytter, 2001.

divided into three different categories or generations:

1. The first generation – civil and political rights;
2. The second generation – economic, social and cultural rights;
3. The third generation – group rights.⁷

Civil and political rights form the first generation of rights and are seen as being in principle negative – they require state's abstention rather than the intervention of government i.e. they are rights of non-interference. They include two subgroups: active and passive rights. Active or liberty rights are rights to act in accordance to the free will of a person. Such as right to vote and right to run for the elections. Passive rights involve the right to let alone, such as the right not to be injured, rights to property. These rights are immediately enforceable and justiciable, as the obligation of state parties and steps to be taken are clearly stated. International treaties that are traditionally seen as including the first generation of rights are CCPR and ECHR. International community has been willing to give these areas strong international protection through international judicial or semi-judicial bodies.

The second generation comprises of economic, social and cultural rights. This generation traditionally requires state's positive action i.e. requiring state intervention in distributing values. Positive rights are benevolent towards actions from other people, such as rights to food, clothing, and shelter, or the right of an accident victim to be helped. Given the emphasis on benevolence, positive rights are sometimes called welfare rights.⁸

As second generation rights are traditionally seen as rights that the state has to provide for, these rights seem to be more costly and must thus lead to an overgrown state apparatus - State has to take positive action through legislative and administrative procedure and use its resources. Therefore states commonly see them as political aims and thus not directly enforceable.

On the international level this has led to different enforcement and supervision mechanism

⁷This group of rights will not be discussed further. On collective rights see generally Galenkamp, 1995, and Lerner, 2003.

⁸On that distinction see for example Bossuyt, 1975, p 790.

involving only reporting and political co-operation to second generation. States have been reluctant in creating international tribunal for the better protection of social rights. This division of rights was the basis for international human rights understanding during the Cold War era.

Generations approach has been rejected by international human rights institutions. As discussed below, HRC and ECtHR have take interdependence approach and have reviewed elements of social rights under their supervisory mechanisms. Generations approach is also challenged by the ComECSR and ECSR. The ComECSR has stated:

[...] there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions. It is sometimes suggested that matters involving the allocation of resources should be left to the political authorities rather than the courts. While the respective competences of the various branches of government must be respected, it is appropriate to acknowledge that courts are generally already involved in a considerable range of matters which have important resource implications. The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of the courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.”⁹

The ECSR has also stressed the understanding that all international human rights aim for the protection of human dignity and therefore rights guaranteed in ESC are not ends in themselves but they complement the ECHR. According to the Vienna Declaration of 1993¹⁰, all human rights are “universal, indivisible and interdependent and interrelated”. The Committee has therefore been mindful of the complex interaction between both sets of rights.¹¹

The difference that is underlying the above division is that economic and social rights are seen as rights to conduct, whereas civil and political rights are seen as right to result. There is a requirement in the CESC that the rights should be realized progressively whereas the CCPR requires to “respect and ensure” the rights recognized in the Covenant.¹² This differen-

⁹ComESCR: General Comment 9, para 10.

¹⁰GA Res: Vienna Declaration, 1993, para 5.

¹¹ECSR: Collective Complaint 14/2003, para 27-30.

¹²Buergenthal, 1981

tiation is too simplistic and overstates the difference of the rights. There has been considerable debate on whether the obligations in the CCPR are immediate and on the contrast, whether some of the social rights are directly applicable and justiciable.¹³ Alston and Quinn comment:

*The reality is that the full realization of civil and political rights is heavily dependent both on the availability of resources and the development of the necessary societal structures.*¹⁴

What might be true is that these rights are not essentially different but there are rather some significant differences of emphasis between the typical civil rights on the one hand and economic and social rights on the other hand. This difference concerns the role of the state. The main emphasis in civil rights is on freedom from state non-intervention, whereas a major element in regard to economic, social and cultural rights is the claim on the state for protection and assistance¹⁵.

1.1 Interdependence approach

One methodology to address the differences of human rights and the issue of justiciability in the context of economic and social rights is integrated approach, which emphasizes the interdependence and interaction of all human rights.¹⁶ Thus, international treaties as well as domestic constitutional provisions of traditional civil rights may afford their protection to economic and social rights or concrete aspects of these rights.

The ComECSR noted in General Comment no 3 that although the full realization of rights protected in the Covenant should be achieved progressively, the Covenant still establishes clear obligations and thus, the states are under an obligation to move as expeditiously and effectively as possible towards that goal.¹⁷

Second central argument for justifying the differentiation between civil and political and economic and social rights is dependence on economic resources. During the drafting of

¹³See e.g. Report: Optional Protocol to CESC, para 34-64.

¹⁴Alston and Quinn, 1987, p. 172.

¹⁵Eide and Rosas, 2001, p 5.

¹⁶See e.g. Scheinin, 2001 (2), p 44-52.

¹⁷ComESCR: General Comment 3, para. 4.

CESCR, the progressive nature of rights was included in the Covenant. This meant that implementation of rights was considered to be dependant on economic resources but it was not considered to be an excuse for States to delay in the realization of the rights.¹⁸ It was merely recognised that many states did not have sufficient resources to undertake the large-scale action required by the Covenant immediately.

It is still true that number of international instruments protecting social rights are not considered to be positive law nor have strong enough sanctioning system. Also there is lack of constitutionalization of social rights. Therefore, significance should also be attached to civil and political rights as protectors of social rights. Classical civil and political rights such as liberty, equality, fair trial provide support in answering social questions.¹⁹

For example, European Court of Human Rights found in case of *Airey v. Ireland*²⁰ that a watertight division between classic civil and political rights and social or economic right cannot be maintained. As an example, article 6§1 imposes positive obligation to provide in certain cases free legal assistance.

The UN Human Rights Committee has also touched the issue of interdependence of human rights. First, the Committee was reluctant in extending the scope of principle of non-discrimination to rights protected in other international instruments. In 1982 in the case *J.B. et al v. Canada*²¹ the committee found that as right to strike is protected under CESCR, it is not entitled to look at possible discrimination of this right. The case-law of HRC has developed and elements of social rights including right to social security and non-discrimination in social security legislation have been discussed in variety of case-law. HRC has extended the application of non-discrimination principle to all legislation and legal practice²².

¹⁸Craven, 1998, p 131-136.

¹⁹Zacher, 2002, p 10-11.

²⁰ECtHR: *Airey v. Ireland*, para. 26.

²¹HRC: Communication 118/1982.

²²HRC: General Comment 18, para 12: “[...] It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other

One example is the case of *Hopu and Besset v. France*²³ where economic rights were analysed together with a right to fair trial. The same is also clear in one of the recent general comments of the HRC General Comment no. 28²⁴.

The interdependence of human rights is specially obvious in relation to right to non-discrimination (article 26 of the Covenant and article 14 of the ECHR). The non-discrimination principle does not only cover the legislation adopted but also all discriminatory practice. Moreover, non-discrimination principle applies to all areas of law including social law and is sometimes protected through special positive measures.²⁵

Thus, interdependence approach sees civil and political rights being inherent element of economic, social and cultural rights and *vice versa*. One can not be protected without attention to the other and protection of one can and should be extended to the other.

Analysis based on the types of State duties assists to understand that there is no difference in the nature of obligations imposed by civil and political rights and economic, social and cultural rights. Moreover, the interdependence approach is also strongly being supported by both the violations approach and the obligation approach²⁶.

1.2 Rights and obligations

Every legal norm grants rights and imposes corollary obligations to the subjects of norm. Thus, full realization of any right requires fulfilment of correlative duties and obligations. Same principles stand for international human rights law.²⁷

words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.”

²³HRC: Communication 549/1993. This case analysed articles 17 and 23.

²⁴HRC: General Comment 28, para 31 in particular.

²⁵“[...] the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.” para 10 of HRC: General Comment 18.

²⁶See e.g. Craven, 1998, p 106 *et seq*; Sepulveda, 2003, p 170-173.

²⁷It is argued by some legal scholars that right-obligation correlation does not hold. For example Hohfeld argues that every legal right could be constituted by any one of four elements – by a claim, but also by liberty, by a power or by an immunity. See discussion in Martin, 1997, p 29-30. Author does not agree with this approach

From the perspective of public international law, the concept of human rights is an anomaly. In accordance with the horizontal nature of international law the large majority of treaties contain reciprocal obligations under which compliance by one state party is condition for another State party to be bound by the terms of the treaty in their relations *inter se*.²⁸ Human rights treaties in contrast are not based on reciprocal relations, rather, they are intended to create a legal order in which states make binding unilateral commitments to protect the rights of all individuals within their jurisdiction.

Thus, international human rights law differs from traditional international law as it does not regulate state-state relationship but deals with vertical state-human relationship. Moreover, depending on the right, international human rights can create rights and obligations also horizontally, between persons.

As Kelsen puts it, international law is a primitive legal system as it is up to the subjects of law to decide what legal norms to accept and also, what are the legal consequences of the violation of the created norms.²⁹ This is particularly true in regard to human rights. Although the grounding principle in the international human rights law is principle of universality, it is up to the state to decide what instruments it ratifies and whether or not it subordinates himself under scrutiny of international treaty bodies. As international human rights treaties are designed to work in different legal systems, they usually follow the minimalist approach and defines the core minimum rights and obligations. Effects of international human rights treaties is described in Table 1.

and finds that some types of legal obligations are present in every human rights norm and thus, every human rights norm entail rights and obligations.

²⁸See e.g. Sieghart, 1986, p. 92-93; Henkin, 1987, p 8; Craven, 1998, p 30-31.

²⁹Kelsen, 1992, p 107-109.

Table 1: Application of international human rights treaties in domestic legal system³⁰

Rational	Purpose and Goal (preamble, general provisions of the treaty, subsequent declarations etc)		
	Dynamism		
	Explanatory Report	International treaty (articles)	Case law of the supervisory body
	Measures		
	National law	Other resources	Practice: - application; - supervision
Results			
Physical	- absolute (bans) - relative (employment, wages, pensions, business environment etc.) Impacts		

Primary entitled subjects of international human rights norms are individuals or groups of persons and obligated subjects are State Parties³¹. There are numerous human rights instruments aiming at protection of specific rights or groups of persons. All rights and obligations in these instruments require variety of actions and they do not depend on whether we talk about civil, political right or economic, social or cultural right but depend on the specific right and its regulative nature.

Social rights can in many instances be secured without any or with only modest state purveyance.

The clearest example is the obligation to provide. In principle there could be three models of provision or any combination thereof: the State, the market, groups, the family, or the individual acting autonomously.³²

³⁰The table is a generalization of the similar typology used by M. Mikkola on European Social Charter, Mikkola, 2004.

³¹Horizontal effect of international human rights treaties is only discussed within the state obligation to ensure protection from interference of third parties.

³²See e.g. Andreassen, 1999, p 484-485.

Duty-holders can be seen in hierarchy. Primary and active subject in providing social security should be the individual³³. The individual is expected whenever possible through his or her own efforts and by use of own resources, to find ways to ensure the satisfaction of her own needs. On the secondary level are the associations of individuals³⁴. And only on the third level, when the other two subjects are not able to provide for the realization of social rights, the state has an obligation to actively use its resources for the protection of economic and social rights.³⁵ Therefore, duty-holders in obligation to provide can be viewed as described on Figure 1.

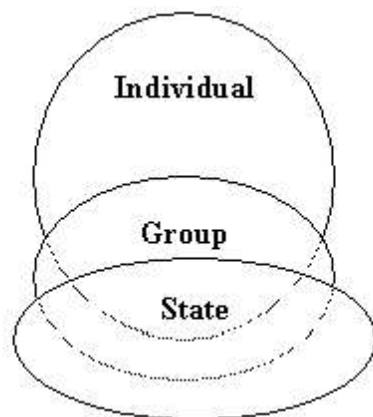


Figure 1: Hierarchy of duty-holders

This hierarchy is based on the understanding that the state should first and foremost establish a system where the individual could uninterruptedly develop and provide for her own needs. The state has to promote the free use of resources owned or at the disposal of the individual alone or in association with others. The secondary level obligation falls on the groups where the individual belongs to.³⁶

1.3 Obligations and violations approach

The most common approach analyses human rights norms from the perspective of individual. The rights approach is interested in subjective rights. The common deficiency of this

³³See e.g. at 2 of the Declaration on the Rights to Development.

³⁴Family, NGO, unions etc.

³⁵Eide, 2001.

³⁶The research will not touch upon the obligation of the first two duty-holders and will concentrate in different obligations of the state.

system is making conclusions on the subjective nature of right without fully discussing all the obligations imposed on state.

Another way of analysing these norms is from the perspective of state obligations. For example, obligations of the state in protecting right to health differ substantially from obligations in protection of right to vote.

Classification of state obligations helps to analyse material scope of rights in order to conclude, what are the measures the state has to take in order to provide full realization. Furthermore, as the consequences of obligations differ, the consequences of violations of rights can be looked at in more systematic way. As the current research deals with international obligations of the states, only the minimum core obligations of right to social security can be found. The possible consequences are not discussed.

The text of the ECS and CESCR is laconic, thus the practice of the supervisory bodies the European Committee on Social Rights and UN Committee on Social, Economic and Cultural rights, has to be researched. These bodies make their conclusions based on state reports and they do not have the authority to address individual complaints. Therefore they approach the protection of individual human rights through the prism of the responsibility of the state. This makes their practice particularly valuable for the research.

It is relatively common to analyse compliance with international human rights instruments by enumerating acts and omissions which constitute violations – the so-called violations approach.³⁷ It was first introduced in 1996 by Audrey Chapman and number of other researchers have since discussed international instruments from the perspective of violations.³⁸ The most detailed development in this regard was the adoption of Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights³⁹ which was the result of unanimous agreement of more than 30 experts in the field of human rights and economic and social rights in particular.

Current study takes an obligations approach with primary focus on the obligations that in-

³⁷Chapman, 1996.

³⁸See e.g. Leckie, 1998; Dankwa, Flinterman and Leckie, 1998.

³⁹Maastricht Guidelines.

ternational instruments impose on States Parties. It is well established that failure of a state to comply with the obligations in the international instruments is a violation of a treaty.⁴⁰

Third possible approach for analysing rights is violations approach. It starts with identifying the violations of the rights i.e. it identifies the acts of omissions by which the state fails to comply with the instruments without first identifying these obligations.

When Chapman first introduced the “violations approach” she noted that a systematic monitoring of economic, social and cultural rights required five methodological preconditions:

1. conceptualization of the specific components of each enumerated rights and the concomitant obligations of States Parties;
2. delineation of performance standards related to each of these components, including identification of potential major violations;
3. collection of relevant data, appropriately disaggregated by sex and variety of other variables;
4. development of an information management system for these data to facilitate analysis of trends over time and comparison of the status of groups within a country;
5. ability to analyse this data in order to determine patterns and trends.⁴¹

None of these 5 conditions was fulfilled at the time and therefore “violations approach” was the most feasible and effective alternative to monitor economic, social and cultural rights.⁴²

M. Sepulveda has suggested that although Chapman's position was coherent and consistent in her time Now it is time to define the obligations as definition of obligations is the first logical step in determining whether a violation exists.⁴³ Author of the current research be-

⁴⁰ILC Draft Articles on State Responsibility, 2001, article 12 provides that there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character. For commentaries on draft articles see Crawford, 2002.

⁴¹Chapman, 1996, p. 29.

⁴²Chapman, 1996, p. 29 and 36.

⁴³Sepulveda, 2003, p 20-22.

believes that this approach proves to be more useful for the benefit of the States Parties, because in order to know whether certain facts disclose a violation of international obligations, it is necessary to first establish with precision the content of these obligations and the normative content of the rights.

Concentration on obligations rather than violations does not mean that the two approaches are alternatives to each other. Rather, they complement each other. The obligations approach is the first step in identifying possible state obligation. Second step would be identification of possible violations of these obligations and the third would concentrate on the international/national measures and remedies as well as the question of justiciability.

In the ILC articles on state responsibility the search for the concrete obligations under international law corresponds to the search for primary norms and violation of these norms brings international responsibility that is contained in the secondary norms of the ILC draft articles.⁴⁴

The European Court of Human Rights has noted that the European Convention on Human Rights:

*“[...] comprises more than mere reciprocal engagements between the contracting States. It creates, over above a network of mutual bilateral undertakings, objective obligations which[...] benefit from “collective enforcement”.*⁴⁵

Thus, as human rights treaties entail unilateral commitments, that other states can not be relied upon to ensure compliance. The institution of international supervisory mechanisms through the creation of international human rights courts or semi-judicial organs has become the accepted form to guarantee effective compliance with human rights treaty obligations.

⁴⁴The ILC has stated that it must be stressed again that the articles do not purport to specify the content of the primary rules of international law, or of the obligations thereby created for particular States. In determining whether given conduct attributable to a State constitutes a breach of its international obligations, the principal focus will be on the primary obligation concerned. It is this which has to be interpreted and applied to the situation, determining thereby the substance of the conduct required, the standard to be observed, the result to be achieved, etc. There is no such thing as a breach of an international obligation in the abstract, and chapter III can only play an ancillary role in determining whether there has been such a breach, or the time at which it occurred, or its duration. ILC Draft articles, Commentaries 2001, Chapter 3, para. 2.

⁴⁵ECtHR: Ireland v. United Kingdom.

2 Typologies of state obligations

There are different basis on which the state obligations can be divided. There are three central divisions of obligations in the contemporary legal theory that can be used to note the differences of obligations. All human rights entail the whole spectrum of these obligations .

The advantage of analysis based on types of State duties imposed by human rights is that it serves to illustrate the significance and interdependence of human rights and all duties, the equal nature of all human rights and the scope of obligations.⁴⁶

The obligations discussed above are not mere theoretical tools but they are in practice used for example by the ComESCR in their General Comments and Concluding Observations⁴⁷ and also by ECSR.⁴⁸

2.1 Tripartite typology

All rights impose three different types of obligations on States: the obligations to respect, protect and fulfil. The base for the typology is the nature of correlative measures, the level of state involvement. Failure to perform any one of these three obligations constitutes a violation of such rights⁴⁹.

This is the most commonly used typology of state obligations. This typology was first suggested by Shue, who divided basic rights into three categories: 1) security rights; 2) subsistence rights; 3) liberty.⁵⁰

⁴⁶Sepulveda, 2003, p 169-173.

⁴⁷The Outline suggests dividing the text of the General Comments into six sections: introduction, normative contents of rights, State Parties obligations, obligations of other relevant actors, violations and recommendations for States Parties. ComESCR: Outline for drafting Comments, 1999, p 135-136. The third section on State Parties obligations refers to the application by the ComESCR of three categories or typologies of State obligations: 1) obligation of immediacy and obligation of progressive realization; 2) obligations of conduct and result; 3) obligations of respect, protect, fulfil and promote.

⁴⁸ The ECSR has not declared that it follows the proposed typology. However, it has used it in its practice both directly and indirectly. See e.g. ECSR: C VI, Conclusion on Sweden, p 128.

⁴⁹See Maastricht Guidelines, para. 6.

⁵⁰See Shue, 1980, p 52 *et seq.* and Shue, 1984, p 85. Shue`s division of obligations was not restricted to the State as duty holder. The analysis was on obligations in general which should be performed by States, individuals and institutions. Shue, 1996, p 52. According to Shue, the fulfilment of every basic right involves the following kinds of duties:

1. To avoid depriving

This typology was complemented in 1987 by A. Eide. The first version of his proposal refers to three levels of state obligations – obligations to respect, protect and fulfil.⁵¹ In more recent studies, Eide has modified his approach by adding the obligation to facilitate on the fourth level.⁵² The tripartite typology of Eide has received considerable amount of support and response. There have been two main proposals for advancing this division.⁵³

Thus, in theory, all human rights entail four types of state obligations:

1. duty to respect;
2. duty to protect;
3. duty to fulfil (facilitate, provide and promote)
4. duty to promote⁵⁴

There have been different proposals of categorizing all different obligations under international human rights law whether to talk about civil and political or economic, social and cultural rights. Table 2 illustrates these different proposals.

Table 2: Proposals for typologies of obligations under human rights instruments

<i>Proposal</i>	<i>Duties</i>			
Shue	Avoid depriving	Protect from deprivation	Aid deprived	
Eide	Respect	Protect	Facilitate	Fulfil
Van Hoof	Respect	Protect	Ensure	Promote

2. To protect from deprivation: 1) by enforcing duty 1 and; 2) By designing institutions that avoid the creation of strong incentives to violate duty 1

3. To aid the deprived: 1) Who are one's special responsibility; 2) Who are victims of social failures in the performance of duties 1, 2.1, and 2.2 and; 3) who are victims of natural disasters

On the substance of these rights see Shue, 1996, p 55-61, 89-91 and 153-173. Short summary of Shue's work can also be found in Sepulveda, 2003, p 157-160.

⁵¹Sepulveda, 2003, p 157-160.

⁵²Eide, 1989, p 35-50.

⁵³ Van Hoof proposed to add the obligation to promote at the fourth level. Hoof, 1984, p 106-108. More recently Steiner and Alston have proposed a scheme of 5 types of obligations: 1) Duty to respect the rights of others; 2) Duty to create institutional machinery essential to the realization of rights; 3) Duty to protect rights/prevent violations; 4) Duty to provide goods and services to satisfy rights; 5) Duty to promote rights. Sepulveda, 2003, p 163.

⁵⁴ Obligation to "promote" has been mentioned by ComESCR, Fact Sheet no 16, 1991.

<i>Proposal</i>	<i>Duties</i>				
Steiner and Alston	Respect	Protect / prevent	Create institution- al machinery	Provide goods and services	Promote

These obligations usually form the hierarchy described in Figure 2 when discussing justifiability or state interference. Intensive state involvement usually requires more resources whereas obligation to respect requires minimal amounts.

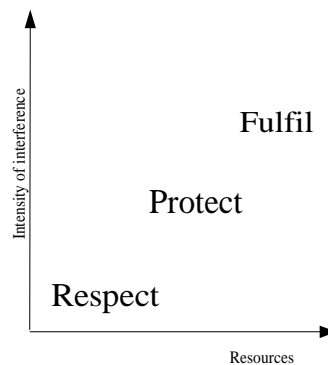


Figure 2: *Hierarchy of obligations in relation to resources and interference.*

Thus, states must at primary level respect the resources owned by individual, his or her right to find a job and the freedom to take necessary action and use the necessary resources to satisfy his or her own needs. On the secondary level, state obligation consists the protection of freedom of action and the use of resources against other more assertive or aggressive subjects. For example consumer protection, labour contracts etc. Here, the judicial control has the central role. At the tertiary level, the state has an obligation to fulfil the rights of everyone under economic and social and cultural rights by way of facilitation or direct provision.⁵⁵

The tripartite division of obligations is often complemented with obligations to promote. Obligation to promote presents the state obligation to make rights under social rights known to persons and support wider acceptance of social rights whether horizontally or vertically.

⁵⁵Eide, 2001, p 22-25.

2.1.1 *Obligation to respect*

The obligation to **respect** is the primary obligation of the state and requires it to refrain from interfering with the enjoyment of economic, social and cultural rights⁵⁶ – the state has to abstain from interference with the freedom of the individual. Obligation to respect is a typical negative obligation of the state.

Obligation to respect requires state “abstention” or “restraint”. These are the rights that require immediate application. These rights require the state no economic input and these rights should be put in effect without delay. For example, the right to organize⁵⁷ requires no substantial input from the state and can be implemented immediately through the state non-intervention. Similarly, the articles that refer to “freedom” or “liberty” of persons involve the element of obligation to respect⁵⁸. The obligation to respect also refers to the obligation of the state to refrain from acts that could deprive individuals from rights protected under the Covenant.⁵⁹

The obligation to respect is also included in all the positive obligations in the form of leaving the individuals the highest possible degree of freedom of action. This has been explained by a member of the committee in the following terms:

“One of the principles underlying the convention was to secure full development of the human personality, something that is called for the element of free choice in the exercise of the rights set forth.”⁶⁰

Although the full realization of economic and social rights requires considerable state intervention, all the activities should take into consideration the inherent freedoms and dignity of persons.

⁵⁶Maastricht Guidelines, para. 6.

⁵⁷Right to form trade union as set out in art 8(2) of the CDESCR and right to organize as provided in art 5 of the ESC.

⁵⁸ See e.g. the freedom of academic research art 15 (3) of CDESCR.

⁵⁹ Thus, a law in Ukraine restricting the freedom to form trade unions, including the right of everyone to join a trade union of his/her choice, as well as acts of intimidation by local authorities against independent trade unions and their leaders was criticized by the committee as being a violation of art. 8 of the CDESCR. ComESCR: Conclusion on Ukraine, 2001, para. 16.

⁶⁰ComESCR: Summary Record, 13 meeting, 1 session, para 24.

Obligation to respect has also been used by the IACtHR. In *Valasquez Rodriguez*⁶¹ the IACtHR held:

“The first obligation assumed by the States Parties under Article 1 (1) is “to respect the rights and freedoms” recognized by the Convention. The exercise of public authority has certain limits which derive from the fact that human rights are inherent attributes of human dignity and are, therefore, superior to the power of the State.

Obligation to respect is traditional negative duty of non-interference, obligation not to take any measures that result in denying or limiting access to the enjoyment of human rights. Obligation to respect also entails due regard to the application of non-discrimination principle and equality.

2.1.2 *Obligation to protect*

On the secondary level, the state has an obligation to **protect** social rights. This obligation refers to the duty of the state to prevent other individuals from interference with the freedoms of the individuals. It requires State parties to prevent violations of such rights by third parties. For example failure to ensure that private employer complies with labour standards or does not offer equal pay for men and women may amount to a violation of the right to work or the right to just and favourable conditions of work.

Obligation to protect is in its nature a positive obligation of the state. It means that the state has to provide individuals the protection against third parties. Similar obligation rests on state in relation to civil and political rights in relation to effective functioning of justice system or police. The obligation to protect deals with the horizontal effect of human rights – the relationship between private persons and state’s role in regulating these affairs.

The horizontal effect of human rights is widely disputed subject, but in relation to some rights it has both national and international recognition. This question has particular importance in relation to economic and social rights. The full enjoyment of rights is not possible without some control over the private parties. For example, the right to work provided in art 7 of the CESCR and art 1 and 2 of the ESC would be largely deprived of any effect without

⁶¹IACtHR: *Velasquez Rodriguez v. Honduras*, para. 165.

state regulation. The same applies on right to housing, right to education etc.

Recognition of obligation to protect can be found in international instruments themselves. Firstly, the rights provided pertain to “everyone”. Also, action must be taken for all sectors of population⁶². Moreover, there are specific references on state obligation to protect certain vulnerable groups from others⁶³ - the state responsibility goes beyond the acts of its agents to positive protection of the individuals from third party violations.⁶⁴

This approach has been confirmed also by the supervisory bodies who have shown particular concern on application of economic and social rights in private sphere, especially as regards employment. The most common measure for regulating the private sector has been the enactment of legislation, effective enforcement of these measures and establishment of mechanisms for the settlement of private disputes.⁶⁵ Thus, the realm of state responsibility extends not only to the acts of agents of the state but also those third parties over whom the state has or should have control.⁶⁶

2.1.3 Obligation to fulfil

At the tertiary level, the state has an obligation to **fulfil** the rights. This obligation requires States to take appropriate measures whether legislative, administrative, budgetary judicial and/or others to ensure the satisfaction of the individuals that cannot be secured by the personal efforts of that individual, towards the full realisation of such rights. Thus, the failure of States to provide for example essential primary health care to those in need may amount to a violation.⁶⁷

The obligation to fulfil is often seen as the central element for the full realization of economic, social and cultural rights. Obligation to fulfil requires the state to facilitate or provide for the realization of economic and social rights. the obligation to fulfil through facilitation

⁶²This is provided in non-discrimination clauses of the instruments.

⁶³See e.g. art 10 (3) of CESCR stipulates that children and young persons should be protected from economic and social exploitation. Similar reference is made in art 7 of ESC and number of other provisions.

⁶⁴See further the discussion in Craven, 1998, p 107-113.

⁶⁵See e.g. ComESCR: Conclusion on Iran, 1993, para 7, or ECSR: C XV-1, Denmark p 158-160.

⁶⁶Craven, 1998, p 113.

⁶⁷Maastricht Guidelines, para. 6.

can take various forms and these are often specifically mentioned in the respective international instruments.⁶⁸ The obligation to fulfil by way of provision could consist in making available what is required to satisfy the basic needs when no other possibility exists.

Obligation to fulfil itself contains obligations to:

- facilitate;
- Provide;
- promote.⁶⁹

The obligation to fulfil requires States to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right in question. The tripartite system of obligations is concluded in Table 3.

Table 3: State obligations in the tripartite typology

<i>Obligation to</i>		<i>State obligation</i>
<i>Respect</i>		- traditional negative duty of non-interference, - obligation not to take any measures that result in denying or limiting access to the enjoyment of human rights. - application of non-discrimination principle and equality. Phrases used: avoid, respect, refrain from, abstain, not to take measures
<i>Protect</i>		- protection against third parties; - adoption of non-discrimination laws, control application; - creation of complaint procedures. Phrases used: protect, take measures to ensure, adopt law, control, prevent.
<i>Fulfil</i>	<i>Facilitate</i>	- to take positive measures that enable and assist individuals to enjoy the rights Phrases used: ensure, pro actively engage in, assist, adopt policy, plan of action, measures, to give sufficient recognition, provide for, assist access to,
	<i>Provide</i>	- Recognition of human rights in legal systems; - provide a specific right when individuals are unable by reasons beyond their control to realise rights themselves by means at their disposal. Phrases used: provide directly, to take steps to ensure, ensure, adopt, recognize. Provide aid,

⁶⁸See e.g. art 11 (2) of the CESCR the state shall take measures to improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources.

⁶⁹ComESCR: General Comment 14 Para. 33. According to ComESCR: General Comment 12 and ComESCR: General Comment 13 the obligation to fulfil incorporates an obligation to facilitate and obligation to promote. Thus, it depends on the right in question, which obligation should be applied.

<i>Obligation to</i>		<i>State obligation</i>
	<i>Promote</i>	<ul style="list-style-type: none"> - make researches; - provide information on human rights; - provide training; <p>Phrases used: research, train, ensure dissemination of information, give due attention, take steps to ensure</p>

The obligations to respect, protect and fulfil are to be found to some extent in every human right norms. Thus it is not possible to state that economic, social and cultural rights are solely positive and civil and political rights are solely negative rights.

2.2 Obligation to conduct and result

While the previous typology suggest the necessary involvement of the state, it does not include the principle of progressiveness as one of the grounding principles of economic and social rights.

Therefore, the International Law commissions, when working out the general principles of state responsibility in international law, has suggested different typology of international obligations to respond to the necessary flexibility in human rights - the obligation to **conduct** and obligation to **result**. Previously presented distinction - the obligations to respect, protect and fulfil - each contain elements of obligation of conduct and obligation of result.

This distinction derives from civil law systems and, more particularly, from French law, which treated the former as being in the nature of "best efforts" obligations - such as those of a doctor towards a patient - and the latter as being tantamount to guarantees of outcome. The distinction makes some difference in terms of the burden of proof. Whereas, in French law, an obligation of conduct was the less stringent of the two, in international law, the obligation of conduct was considered more stringent than the obligation of result. This was because of the emphasis in international law on the determinacy of the conduct in question, whereas the original French law distinction was concerned with risk.⁷⁰

An **obligation to conduct** as understood by the ILC requires the state to undertake a specific course of conduct (active or passive), whether through act or omission, which represents

⁷⁰ILC Report on State Responsibility, 1999. For comprehensive analysis of differences between the meaning at the domestic level and the international levels, see Dupuy, 1999, p 371-385.

a goal in itself. Thus, the obligation of conduct requires action reasonably calculated to realise the enjoyment of a particular right. In other words, these obligations require States to take or refrain from taking certain legislative, executive or judicial measures.⁷¹

The **obligation to result** requires on the other hand the state to achieve a particular result through the course of conduct, the form of which is left to the state's discretion. Thus, the obligation of result requires States to achieve specific targets to satisfy a detailed substantive standard – the realisation of right.⁷²

Economic rights are usually seen as including the obligation to result – achievement of full realisation of rights, whereas civil and political rights are traditionally seen as representing obligation to conduct.

This classification is useful for the analytical purposes, whereas the application of concrete social rights includes both the obligation to conduct and obligation to result. The classification of a specific right to one group or another rests primary upon the amount of emphasis or specificity given to either the requisite of conduct or result in a particular right.⁷³

The division of obligations to result and conduct has received critics saying that although this typology is generally implemented in general international law, it is not appropriate to characterize the duties imposed by human rights treaties.⁷⁴

2.3 Obligations of immediacy and obligations of progressive realization

State obligations can also differ depending on the time of full realization. Rights can impose obligations of progressive realization or obligations of immediate effect.⁷⁵ Both in the CESCER and the ESC there is recognition that there are certain elements that are to be applied immediately and that enforcement of all rights has progressive elements.⁷⁶

⁷¹Article 20 of the ILC Draft Articles on State Responsibility, 2001.

⁷²Maastricht Guidelines, para. 7.

⁷³Craven, 1998, p 107.

⁷⁴Sepulveda, 2003, p 184.

⁷⁵Limburg Principles, para 16 and 21.

⁷⁶Progressive realization clause is provided in article 2§1 of the CESCER. ESC does not have a general obligations clause but requirement of progressive realization in relation to right to social security can for example be found in article 12§3

ComESCR has noted in General Comment no 3:

*(...) while the Covenant provides for progressive realization and acknowledges the constraints due to the limits of available resources, it also imposes various obligations which are of immediate effect.*⁷⁷

The existence of immediate obligations is also mentioned by the ComESCR also in subsequent General Comments.⁷⁸ Among the obligations that the ComESCR has specifically indicated as being of an immediate nature are the “obligation to take steps” and the “obligation to guarantee the rights without discrimination”.⁷⁹ As obligation to take steps (art. 2(1)) and non-discrimination (art. 3) are in the II part of the CDESCR, the immediate effect of these provisions apply to all rights contained in the Covenant.

The situation is not so clear with regard the ESC. As there is no general obligations clause of the ESC, the immediate obligations are defined through the work of the ECSR. One of central immediate obligations that is in the core of all social rights protected in the Charter is the non-discrimination requirement.⁸⁰ Furthermore, the immediate effect of non-discrimination clause has been recognized by the ECtHR and the HRC in their case law. As the civil and political rights instruments also contain norms that may provide protection in the socio-economic sphere, there are number of social right that have been found having immediate effect.⁸¹

ComESCR has stated that the following general obligations have immediate character⁸²:

- negative obligations that require non-intervention of states (abstention from);

⁷⁷ComESCR: General Comment 3, para. 1.

⁷⁸ComESCR: General Comment 9, para 10; ComESCR: General Comment 4, para 8; ComESCR: General Comment 11, para 11; ComESCR: General Comment 12, para 16; ComESCR: General Comment 14, para 30; ComESCR: General Comment 15, para 17.

⁷⁹ComESCR: General Comment 3, para 1, ComESCR: General Comment 11, para 10, ComESCR: General Comment 13, para 31 and 43

⁸⁰Article E of the ESC Revised, 1996

⁸¹For example, the obligation to provide for certain levels of conditions in places of detention has proved to have immediate effect both in UN system (article 19 of the CCPR and HRC: General Comment 21 para 3) and in European framework (article 3 of the ECHR and Harris, O’Boyle and Warbrick, 1995 p 55 *et seq*)

⁸²Concluding from ComESCR: General Comment 14; ComESCR: General Comment 12; ComESCR: General Comment 13, ComESCR: General Comment 3; ComESCR: General Comment 9 See also Sepulveda, 2003 p 174-184.

- availability of judicial measures – i.e. right to fair trial;
- application of non-discrimination principle and equal protection of men and women, including but not only equal remuneration;
- Special protection of vulnerable groups (e.g. Protection of young children and young persons (in particular against economic exploitation));
- Effective monitoring;
- Obligation to take steps (art. 2(1)). These steps must be deliberate, concrete and targeted towards the full realization of the right in question;
- Seek international co-operation in accordance with articles 11, 22 and 23 of the Covenant (E/1996/22, Annex VII, para. 10);
- Obligation to adopt plan of action;
- Obligation to improve health and social conditions in prisons;
- Duty to protect cultural rights of minorities;
- obligation to protect rights and obligations recognized by other international treaties in relation to economic and social rights.

The progressive elements of rights apply similarly to every right and they are considered to be the obligation of a state when there are no similar immediate obligations. Thus, everything that does not create immediate obligations, should be achieved progressively.

3 Practical application of typology

The typology of rights provided above has practical implications in the implementation of human rights. The traditional division of rights has often been used for stating that social rights are merely policy options and these rights are not rights in their ordinary legal meaning. The interdependence approach is wider and suggests that all rights have justiciable elements.

This understanding influences the practical use of state obligations and state responsibility as it allows to rely on social rights as subjective rights in court of law and use the international instruments under question as justiciable instruments⁸³.

⁸³The research will not discuss the possible use of international human rights in domestic legal system as this requires deeper analysis on the status of international law in particular state. Current analysis is based on

State responsibility means that when any of the social rights are violated, these rights can be protected through national legal system or through international supervisory system and when the violation is confirmed, it would bring the state certain consequences.

From the theoretical perspective, the typology of obligations suggest that by nature some obligations are directly and immediately justiciable whereas the others are not.

It is generally recognized that immediate obligations should have direct justiciability in domestic and international courts. This has been shown by the practice of the European Court of Human Rights and HRC when applying the principles of non-discrimination, fair trial and property to economic and social rights. Progressive obligations have different effect. This however does not mean that some progressive obligations do not have justiciable character. Depending on the obligation, progressive realisation might also mean that at some point of time the state has an obligation to ensure the concrete obligation although there has been time for progressive implementation.

From the tripartite typology of obligations, obligation to respect is one of the justiciable obligations, the substance of which is refraining from something. Some elements of obligation to protect might also be of justiciable as well as element of obligation to fulfil. In the latter types of obligations, obligation to facilitate and provide might be justiciable. When justiciable, these obligations are usually provided as a list of minimums and must be non-derogable. Obligation to promote does not seem to have justiciable character. Thus, from the analysis of typology of obligations and from the perspective of justiciability, obligations of states can be seen as described in Table 4. It has to be noted that this conclusion is not absolute. Every right needs analysis on obligations it brings and only then conclusions on justiciability can be made.

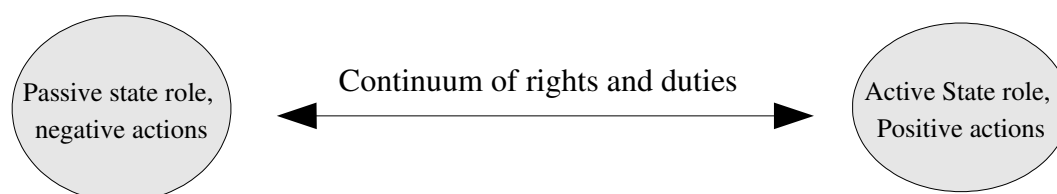
Table 4: Relationship between justiciability and tripartite obligations system.

<i>Obligation to</i>		<i>Immediate</i>	<i>Progressive</i>
<i>Respect</i>		Justiciable	
<i>Protect</i>		Some elements might be justiciable	
<i>Fulfil</i>	<i>Facilitate</i>	Some elements might be justiciable	Usually non-justiciable

international instruments and on the discussion of state responsibility in these instruments.

<i>Obligation to</i>		<i>Immediate</i>	<i>Progressive</i>
	<i>Provide</i>	Some elements might be justiciable	Usually non-justiciable
	<i>Promote</i>	Non-justiciable	Non-justiciable

The rights contained in human rights instruments are subject to dynamic evolution of international human rights law. An analysis based on state obligations assists to understand that there is no difference in the nature of obligations imposed by civil and political rights and economic, social and cultural rights. The typologies mentioned above apply to all human rights instruments. M. Sepulveda has used the scheme in Figure 3 to show the variety of duties.



*Figure 3: Variety of duties, M. Sepulveda.*⁸⁴

3.1 Consequences of violations of obligations

State obligations and responsibility in relation to economic and social rights was elaborated by a group of experts convened by the International Commission on Jurists in Limburg in June 1986. The outcome of this meeting was adoption of Limburg principles⁸⁵ that was the best available source on state responsibility in relation to economic, social and cultural rights at the time. Although Limburg principles were drafted taking into account mainly the CESCR, the principles are considered to have general application⁸⁶.

⁸⁴Sepulveda, 2003, p 156

⁸⁵Limburg Principles.

⁸⁶This was reaffirmed by the Maastricht Guidelines, para. 5: As in the case of civil and political rights, the failure by a State Party to comply with a treaty obligation concerning economic, social and cultural rights is, under international law, a violation of that treaty. Building upon the Limburg Principles, the considerations below relate primarily to the CESCR. They are equally relevant, to the interpretation and application of other norms of international and domestic law in the field of economic, social and cultural rights.

The Limburg principles stress that economic and social rights should be seen as representing the obligation to result:

*The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization.*⁸⁷

The experts also proposed, that most of the social rights are in principle justiciable. The variable element is the time when specific right become justiciable:

*Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.*⁸⁸

Principles stressed that all obligations in relation to economic and social rights should be understood having the same effect in international and national level as other international obligations under international law do. Thus, when implementing any of these obligations, states have to act in good faith.⁸⁹ This means that international instruments protecting social rights are legally binding and create international legal obligation to State Parties. In many countries, these international instruments have also been incorporated into the domestic legal order, which affords them with formal validity also in national legal system.

The Limburg principles confirm that international social rights should not be seen as creating only international obligations but that they also create right-obligation relation between the state and the people⁹⁰ i.e. they create subjective individual or collective rights.

The Limburg principles were further elaborated in 1997 when group of experts met in Maastricht with the aim of taking into account the recent development in international human rights law. In Maastricht, the Guidelines on Violation of Economic, Social and Cultural Rights was adopted.

The Maastricht guidelines stated that realization of economic, social and cultural rights

⁸⁷Limburg Principles, para. 5.

⁸⁸Limburg Principles, para. 8.

⁸⁹Here the experts made reference to VCLT. Article 26 reads: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

⁹⁰"States parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant." Limburg Principles, para. 10.

does not depend solely on the action of the state, although under international law, the state is still the ultimate holder of obligations and responsibility in guaranteeing the realization of rights.⁹¹

3.2 Minimum core obligations

Experts stressed in the Maastricht guidelines that there are certain rights that have to be guaranteed irrespective of the available resources or other considerations. These rights are contained in the notion of minimum core obligations:

*Violations of the Covenant occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights [...]."*⁹²

These minimum core obligations are not defined in the CESCR nor ESC, these obligations are defined through the supervisory systems and in relate to specific rights. These minimum rights should be protected irrespective of the resources or any other factors.

As the minimum core obligations apply irrespective of the available resources or any other factors and difficulties of the country concerned, these rights should be regarded as being immediately justiciable.

Minimum core obligations are for example the availability of essential foodstuffs, essential primary health care or basic shelter and housing or for example the most basic forms of education. These core obligations should be provided to everyone unconditionally and not doing so constitutes a *prima facie* violation of the international human rights law.

3.3 Victims of violations

The practical use of state obligations requires existence of subjective right and possibility of being declared a victim of a violation. The victim principle is central in the international enforcement of civil and political rights.⁹³

As the question of whether and to what extent the social rights create subjective rights is

⁹¹Maastricht Guidelines para. 2

⁹²Maastricht Guidelines para. 9

⁹³For example under art 1 of the CCPR, Optional Protocol 1966, only individuals who have been victims of a violation of subjective rights are entitled to make communications to the Committee of Experts.

open, the definition of possible victims of violations of social rights should be wide. Therefore, both individuals and groups can be the victims of violations of social rights. Here the emphasis is rather on groups than individuals.

3.4 Consequences and remedies of violations

The question of violation of state obligations in social rights was also brought out by the experts in drafting the Limburg principles. The underlying idea of the principles was that:

*A failure by a State party to comply with an obligation contained in the Covenant is, under international law, a violation of the Covenant*⁹⁴.

It is important to distinguish the inability from the unwillingness of a State party to comply with its obligations.⁹⁵ As most of the social rights contain obligation to result, one has to bare in mind when applying these principles, that the states have margin of appreciation in deciding on what kind of measures to adopt for the achievement of the objective of the right.⁹⁶

According to the para 72 of Limburg principles, a state is in violation of social rights when:

- It fails to take a step which it is required to take by the Covenant;
- It fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;
- It fails to implement without delay a right which it is required by the Covenant to provide immediately;
- It wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- It applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
- It deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;

⁹⁴Limburg Principles, para. 70

⁹⁵ComESCR: General Comment 14, para. 47

⁹⁶Limburg Principles, para. 71

-It fails to submit reports as required under the Covenant.

Limburg principles do not deal with individual's right to take international action when some subjective social right has been violated. This is more a question of particular treaty and supervisory system not so much the question of general application. It however speaks of state's international responsibility and the right of other member states to take international action in the violation of the obligations by some of the state parties:

*"In accordance with international law each State party to the Covenant has the right to express the view that another State party is not complying with its obligations under the Covenant and to bring this to the attention of that State party. Any dispute that may thus arise shall be settled in accordance with the relevant rules of international law relating to the peaceful settlement of disputes."*⁹⁷

Maastricht guidelines elaborated the system of state responsibility Firstly, the grounds of violations were modified and widened and the following possible elements of violations were included:

- The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
- The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
- The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
- The failure to utilize the maximum of available resources towards the full realization of the Covenant;
- The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
- The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

The consequences of violations can be different. Central principle of remedies is that any

⁹⁷Limburg Principles, para. 73

person who has been a victim of a violation of economic, social or cultural rights, should have access to effective remedy, be in judicial or other appropriate remedy, under national and international law. The right to remedy includes the right to effective and adequate reparation⁹⁸.

3.4.1 Means of Legal Protection

All human rights systems have their supervision procedures. Petition procedures have long been characterized as an indispensable component of any effective human rights regime. After the establishment of the United Nations, Sir Hersch Lauterpach concluded that:

*“...there is no prospect of the fulfilment of the purpose of the Charter in the matter of human rights and freedoms unless an effective right of petition is accepted as being of the essence of the system established by the Charter.”*⁹⁹

There are two main forms of supervision: the reporting system and the petition system. Reporting systems is the most common within the UN and it requires states to submit periodic reports on the domestic implementation of the rights protected by the treaty. The reports are considered by a special supervisory body who has the right to make general recommendations. Supervision often has a communication element between the state, the organization and NGO-s.

Reporting systems are often viewed as being dependant on the good will of the States parties.¹⁰⁰ This might be true in relation to number of systems but in relation to social rights reporting system has proven to be effective. The advantage of reporting system is its process nature i.e. a spiral dialogue where different social partners have possibility to interact and improve the legal system through communication.

The aim of the supervision is not so much the discovery of a violation than providing assistance and advise for the state parties and bringing out possible shortcomings in the national implementation of rights. Reporting systems are therefore considered to be more mechanisms for fact-finding and verification or the promotion of human rights.

⁹⁸The reparation mentioned in the Maastricht Guidelines can be in the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

⁹⁹Lauterpacht, H. 1950

¹⁰⁰Schoenberg, 1977 as Referred by Craven, 1998, p 31.

The petition system in contrast deals with rights of a concrete subjects and has strong protective function. It is considered to be the most effective means for the protection of human rights and it involves the receipt of communications from individuals, groups or states parties alleging violations of the treaty concerned. Individual petition systems are usually optional to the parties and the procedure provides victim of violation with an international legal remedy.

Even though the international supervisory body might not have the power to enforce its decision, this does not decrease the impact of it. International bodies dealing with individual petitions are European Court on Human Rights¹⁰¹, Inter-American Court on Human Rights¹⁰² and African Court of Human Rights¹⁰³. There are also semi-judicial bodies that review individual petitions – for example the HRC.

International treaties protecting social rights have not been successful in introducing strong supervisory mechanisms. CESCRC has only reporting system although there are discussions on possible additional protocol relating to individual complaints¹⁰⁴. ESC has traditionally also had a reporting system but a new collective complaints procedure was introduced to European Social Charter in 1995.¹⁰⁵

¹⁰¹The European Convention on Human Rights as a supervisory mechanism first comprised of European Court of Human Rights and European Commission on Human Rights. The latter was dissolved in 1998 when Prot 11, ETS 155 to the Convention entered into force. ECtHR examines both individual applications brought before the court by individuals who allege that they have not received effective protection in one of the member states. The court also examines cases brought before it by one contracting state. For general overview see e.g. Ovey and White, 2002

¹⁰²AmCHR, 1978 entered into force 18th of July, 1978 and is supervised by Inter-American Commission on Human Rights and Inter-American Court on Human Rights. It has contentious jurisdiction and advisory jurisdiction. For general overview see e.g. Hanski and Suksi, 2000 pp 371-386; Harris and Livingstone, 1998

¹⁰³AfCHPR, 1981, it was adopted June 27, 1981 and entered into force on 21st of October 1986. Its primary supervisory body has been African Commission on Human and Peoples Rights and it was established by the African Charter on Human and Peoples' Rights. The African Commission on Human and Peoples' Rights is charged with ensuring the promotion and protection of Human and Peoples' Rights throughout the African Continent. Additional Protocol to the Charter was adopted in June 1998 and entered into force on 25th January 2004, however, the court has not started functioning yet (status on 10th of May 2004). It creates African Court of Human and Peoples` Rights that complements and reinforce the functions of African Commission on Human Rights. The court has both advisory and contentious jurisdiction. For general overview see Umozurike, 1997

¹⁰⁴Report: Optional Protocol to CESCRC.

¹⁰⁵See in detail Chapter IV.

3.4.2 *Domestic legal remedies*

National justiciability of international treaties has been long debated. The practice of both the ComESCR and the ECSR has convincingly shown, that in principle, the rights contained in these treaties should be domestically justiciable.¹⁰⁶

The ComESCR has been concerned when there exists no case-law on the application of the Covenant and when the Covenant has not been invoked before national courts¹⁰⁷. Recently, the ComESCR has noted even more strongly that the state party should take immediate action to ensure that all the Covenant rights are effectively upheld and that concrete remedies, judicial or otherwise, are provided to those, whose economic, social and cultural rights are infringed, especially in relation to the disadvantaged and marginalized groups.¹⁰⁸

The ComESCR has recommended that effective measures taken by the state-parties should ensure that legal and judicial training takes full account of the justiciability of Covenant rights and promotes the use of the Covenant as a source of law in domestic courts¹⁰⁹ and that there are effective judicial and other remedies for violations of economic, social and cultural rights¹¹⁰.

4 Evolution of welfare rights

Before 1945, international law was dealing only with the relations between the states and did not concern with how States treated their individuals. The treatment of individuals and the regulation of providing for their welfare was in the domestic jurisdiction of states. There were certain exceptions in the cases of slavery¹¹¹, humanitarian law¹¹², treatment of aliens, minorit-

¹⁰⁶ComESCR: Conclusion on Algeria, 2001, para. 11; ComESCR: Conclusion on France, 2001, para. 13.

¹⁰⁸ComESCR: Conclusion on Brazil, 2003, para. 41,

¹⁰⁹See e.g. ComESCR: Conclusion on Luxembourg, 2003, para. 26; ComESCR: Conclusion on Brazil, 2003, para. 42.

¹¹⁰ComESCR: Conclusion on Iceland, 2003, para. 10.

¹¹¹See Lauren, 1998, p 38-45.

¹¹²Kolb, 1998, p109-419

ies¹¹³ and the law of war¹¹⁴, but even these exceptions were rather political in their nature.¹¹⁵ The systematic development of international human rights law as a matter of discussion in international organisations started with the creation of United Nations and regional international co-operation frameworks such as Council of Europe, European Union, started after Second World War.

Before the question of social rights was discussed in international law, it was being dealt in different national systems of Europe in particular. There are many examples of common provident provisions in the Middle ages and many of these traditions remained active also in 19th and 20th centuries. In the Nordic countries for instance, economic, social and cultural rights emerged more or less at the same time as political rights while in Bismarck's Germany they even preceded the latter.

The evolution of welfare rights was a response to two fundamental political transformations in history of international relations – the formation of nation-states and their gradual change into democracies and the expansion of capitalism as the dominant mode of production. Evolution of welfare institutions may be interpreted as responding to growing demands for social security and economic equality¹¹⁶. Thus, providing also for the increase of social and political stability.

Increase of poverty and need to regulate employer-employee question were the questions that give rise to the development of social security policy. There were generally two ways of answering to these problems.¹¹⁷ The first was to alter the legal relationship between employers and employees – to internalize the solution of the social problems into the existing legal rela-

¹¹³See PCIJ Adv. Op: Minority Schools in Albania, 1935.

¹¹⁴See Lauren, 1998, p 57-62

¹¹⁵First emphasis on individual dignity can be found in the Renaissance and in the discussion of natural rights in the 17th century. Authors such as Machiavelli, Althusius, J. Locke, J.-J. Rousseau, T. Pain and T. Jefferson made important contributions to the debate on individual and authority. The result of the debate was adoption of several national instruments such as English Bill of Rights in 1689, The American Declaration of Independence in 1776 and the French Declaration on the Rights of Man and the Citizen of 1789. For detailed overview on development of international human rights law see Lauren, 1998.

¹¹⁶Andreassen, 1999, p. 455.

¹¹⁷Zacher, 1987, p 379-387.

tionships. The second was to seek the solution to the social problems from the outside the legal relationships that existed and to transfer it to institution that served only that social purpose – to externalize the solution out of the existing legal relationships.¹¹⁸

In 1883-84 Germany, Otto von Bismarck initiated social security scheme whereby workers and employers were to pay contributions in order to finance sickness insurance and workers compensation. After successful functioning in some years, these schemes were complemented with old-age insurance programs that were partly financed through taxes.¹¹⁹

In the course of time, right to social security did not go beyond the framework of social insurance. Only the development of the states towards welfare states led more and more to the provision of social security for a broader public. Nevertheless, it was only after the First World War that an express link was established between social rights are human rights. Some of the new constitutions that evolved after 1918 included an acknowledgement of principle of social insurance. The then newly established international Labour Organisation was very active in establishing international regime for social insurance.¹²⁰

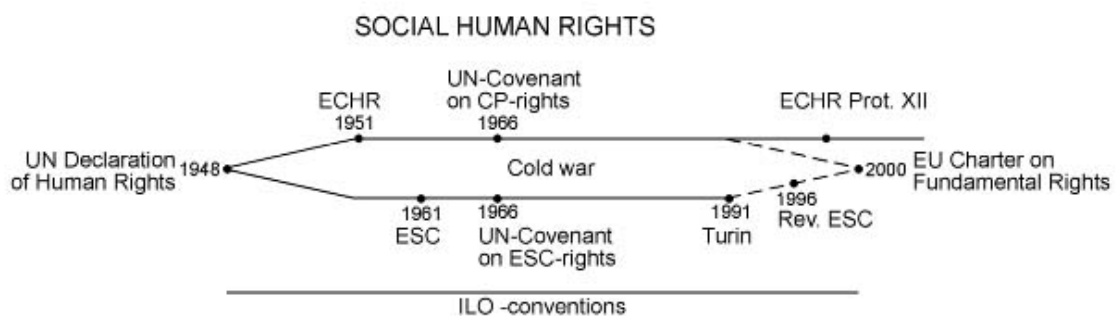


Figure 4: Historic development of social human rights¹²¹.

4.1 UN system

As the reaction to the Second World War, international community understood the need for the adoption of international instruments protecting individuals against the action of the

¹¹⁸Zacher, 2002; p 3

¹¹⁹Gordon, 1988; p 134-137

¹²⁰See e.g. Otting, 1993; Eichenhofer, 2002.

¹²¹Mikkola, 2004.

state. Accordingly, the protection of human rights was declared to be one of the purposes of the United Nations and the UN Charter imposed certain elements to that end. Since then, a large number of human rights treaties both universal and regional have been adopted to fulfil the above mentioned purpose.

Central instrument for the United Nations human rights development has been the International Bill of Rights. Universal Declaration of Human Rights was adopted in 1948, economic and social rights were included as inherent part of human rights. While traditionally human rights included protection of civil and political rights UDHR extended the human rights platform to embrace the whole field – civil, political, economic, social and cultural rights, and made the different rights interrelated and mutually reinforcing.¹²²

After the adoption of the UDHR by the General Assembly, the UN Human Rights Commission was faced with the problem of drafting legally binding instrument including the rights stated in UDHR. The UDHR took the interdependence approach. Interdependence of human rights was affirmed by the General Assembly on several occasions. In its resolution 421 from 4th of December 1950, the GA stated:

“/.../enjoyment of civic and political freedoms as well as economic, social and cultural rights are interconnected and interdependent.

When deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the man.”¹²³

The drafting of the Covenant was not an easy task - there was difficult dispute between the Western states and socialistic state on which rights should be primarily guaranteed. As a result, the rights contained in UDHR were divided into two separate categories, although emphasizing that these rights should be regarded as interrelated. General Assembly in its resolution 543 (VI) from 5th of February 1952 stated:

“/The General Assembly/ Requests the Economic and Social Council to ask the Commission on Human Rights to draft two Covenants of Human Rights, to be submitted simultaneously for the consideration of the General Assembly at its 7th session, one to contain civil and political rights and the other to contain economic, social and cultural

¹²²Eide, 2001, p. 14.

¹²³GA Res 421 (V), para E.

rights, in order that the General Assembly may approve the two Covenants simultaneously and open them at the same time for signature, the two Covenants to contain, in order to emphasize the unity of the aim, in view and to ensure respect for and observance of human rights, as many similar provisions as possible /.../”¹²⁴

The International Covenant on Economic, Social and Cultural Rights was adopted by the UN General Assembly in 1966, at the same time as the International Covenant on Civil and Political Rights and entered into force 3rd of January 1977.¹²⁵

4.2 Council of Europe

Parallel to the drafting in the United Nations, the Council of Europe also started the drafting of different human rights instruments. Two central instruments to regulate social rights in Europe: European Convention of Human Rights and European Social Charter. The general framework for the protection of social and economic rights has been established by ECHR, whereas the aim of the ESC is substantial regulation of fundamental rights in the areas of employment, social protection and health care.¹²⁶

The European Social Charter was adopted on 1961 but remained the “Great Unknown” in legal and human rights discourse for more than 30 years because of deficiencies in the norm-setting.¹²⁷ Reporting system did not function effectively as despite the work done in the Committee of Social Rights, the supervisory body designed to take legally binding decisions on the assessments of the Committee – Governmental Committee and the Committee of Ministers - did not make any recommendations following the findings of the Committee.

It was the reflection of “cold war” in the human rights framework. And the sensitive position of Europe in relation to Soviet Union did not allow the Committee of Ministers to accept deficiencies in social protection in Europe.

Following the decisions of Rome in 1990, the Committee of Ministers of Council of Europe approved the “Turin Protocol” in 1991. This changed the reporting system by provid-

¹²⁴GA Res 543 (VI), para 1

¹²⁵For detailed history of the development of international human rights law see Eide and Rosas, 2001, and Eide, 2001, p 3-28; for general overview see: Lauren, 1998.

¹²⁶Mikkola, 2000, p 259-260

¹²⁷Mikkola, 2000, p. 261

ing the social partners with more central role in enforcing the Charter and by affirming the exclusive competence of the Committee of Independent Experts to make legal assessments. The first Recommendations from the Committee of Ministers followed the ratification of Turin protocol and since 1993 the Committee has adopted 35 recommendations on violations of European Social Charter¹²⁸.

in 1995, the Committee of Ministers approved Additional Protocol¹²⁹, which led to the development of Collective Complaint system.

The European Social Charter of 1961 guarantees 19 fundamental social and economic rights. The aims that Parties undertake to pursue, by all appropriate means, are determined in Part I of the Charter. The Charter stipulates that any State wishing to become a Party must undertake to be bound by at least 10 Articles (out of 19) or 45 numbered paragraphs of Part II of the Charter. However, of the seven Articles regarded as particularly significant, each Party must accept at least five, namely: the right to work, the right to organize, the right to bargain collectively, the right to social security, the right to social and medical assistance, the right to the social, legal and economic protection of the family, and the right to protection and assistance for migrant workers and their families. Additional Protocol of 1988¹³⁰ included 4 new right to the Charter.

The Revised European Social Charter¹³¹ was opened for signature on 3rd May 1996. It entered into force on 1st July 1999. The adoption of this treaty was the result of the decision to relaunch the Charter that was taken in 1990 on the occasion of the Inter-ministerial Conference in Rome for the 40th anniversary of the European Convention on Human Rights. The revision of the substance of the 1961 Charter was, in quantitative terms, the most significant task of the *ad hoc* committee entrusted with the relaunching (the Charte-Rel committee).

The Revised Charter brings together in one instrument the rights guaranteed by the European Social Charter of 1961 with certain amendments, the rights guaranteed by the Addi-

¹²⁸Information as of 1. June 2004

¹²⁹ESC, Additional Protocol 1995, Protocol entered into force on the 1st of July 1998.

¹³⁰ESC, Additional Protocol 1988, Protocol entered into force 4th of September 1992.

¹³¹ESC Revised, 1996

tional Protocol of 1988 as well as new rights. Two principal considerations guided the revision of the Charter: taking account of the development of social rights in other international instruments and the legislation of member states, but also social problems not covered by other instruments in force.

The rights composing the “hard core” of the Revised Charter, which is more extensive than that of the 1961 Charter, are the following: the right to work (Article 1), the right to organize (Article 5), the right to bargain collectively (Article 6), prohibition of work for children under the age of 15 and right of young persons aged 15-18 years to suitable working conditions (Article 7), right to social security (Article 12), right to social assistance (Article 13), rights of the family (Article 16), rights of migrants (Article 19) and the right to equal opportunities between women and men (Article 20). Compared to the 1961 Charter, these provisions have been amended considerably.

II Principles and Rights

Current research will use the theoretical typology of obligations to analyse the substance of the state obligations. The structure used follows the approach of the ComESCR but adds to it the element of immediacy/progressiveness. As the division of obligations to conduct and result has not been used by any of the international bodies except the ComESCR in its drafting guidelines and General Comment 3, this division will not be used in the current research.¹³² Thus, elements of right to social security will be categorized into the system provided in Table 5.

Table 5: Typology of obligations

<i>Obligation to</i>		<i>Immediate</i>	<i>Progressive</i>
Respect			
Protect			
Fulfil	Facilitate		
	Provide		
	Promote		

The typologies of obligations reflect the manner in which the States must behave in order to discharge its commitments. It also assists to assess the compliance of a State Parties with its commitments under human rights instruments and assess whether a state has fulfilled its obligations or violated them and establishing possible international and domestic accountability. The above division should make clear what are the state obligations in relation to right to social security and which of these obligations might be justiciable in international and national frameworks as well as what are the progressive elements of that right.

Before discussing the material scope of a right to social security, there are general pre-requisite normative elements that are applicable to every right protected by those treaties.

Vienna Convention on the Law of Treaties creates general international law framework for all international treaties regardless of the material scope of application. Then the principles

¹³²See Sepulveda, 2003, p 184-196 for deeper discussion on why the conduct/result typology is not suitable for to be used for analysing human rights and obligations.

and rights in the concrete instrument should be analysed.

Firstly, there are moral values that govern every legal instruments. In normative meaning, these are the values reflected in the preamble of an instrument. In the CESCR these values are human dignity, equal and inalienable rights of all members of the human family and concept of mutual obligations of persons towards the society. In the ECHR these values are human value, fundamental freedoms and justice. In the ESC these values are solidarity and equal protection.

Secondly, there are policy aims, showing the pattern of development and the principles that are to be taken into account when substantiating legal rights.

Thirdly, there are obligation clauses that give meaning to norm-sentences. The two instruments looked at in the current research take different approach here. In the CESCR, there is a general obligations clause defining the elements common to all provisions. The European Social Charter does not have general obligations clause and instead defines in every provision the scope of obligations and policy aims. Nevertheless, there are certain principles like principle of equality applies to all provisions.

1 Vienna Convention on the Law of Treaties

Human rights law and social rights within it is embedded in the broader discipline of international law and therefore, in general, the rules of interpretation which are applicable under international law are also applicable to human rights treaties. General principles of interpretation are contained in the Vienna Convention on the Law of Treaties¹³³ and are considered to be customary international law principles of treaty interpretation.

The rules for treaty interpretation are contained in articles 31 to 33 of the VCLT:

1. “good faith” - article 31§1, states are bound to what they have agreed to observe as is reflected in the ordinary meaning of the terms of the treaty (literal interpretation);

¹³³Hereinafter VCLT. ECtHR held in the case of *Golder v. the UK* in 1975 when the VCLT has not yet entered into force that articles 31 to 33 of the VCLT enunciate in essence generally accepted principles of international law to which the Court has already referred on occasion. ECtHR: *Golder v. the UK*, 1975, para 29

2. “context” - article 31§1 and §2, the context of the treaty entails in addition to the text, including its preamble and annexes:
 1. any agreement or instrument in connection with the conclusion of the treaty and related to it;
 2. any subsequent agreement and practice regarding the interpretation of the treaty;
 3. any relevant rule of international law applicable in relations between the parties.
3. When states agree to give a special meaning to a term, that meaning prevails (article 31§4).

As has been established by the ICJ, treaties should be interpreted and applied within the framework of the legal system prevailing at the time of the interpretation rather than at time of the drafting or adoption of the text¹³⁴. Thus, the *travaux préparatoires* of the treaties plays a role in only as supplementary means of interpretation. This is also true to the interpretation of human rights treaties.

Although the VCLT provides general rules for the interpretation of the human rights treaties, it does not resolve all problems of treaty interpretation because the rules of the VCLT are not unequivocal. Moreover, the interpretation of human rights treaties requires that special characteristics of human rights treaties is taken into account.¹³⁵

2 Obligations clause in CESC

The nature of the obligations undertaken by the state parties to the Covenant is provided in article 2§1 of the CESC:

“Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

The substance of this provision has been explained by the Economic and Social Council in its General Comment 3.

¹³⁴ICJ Adv. Op. on South West Africa, 1970

¹³⁵ICJ Adv. Op. Convention on Genocide, 1951

2.1 Obligation to take steps

One of the fundamental obligations in CESCR is the obligation to “take steps” towards the full realization of the rights contained in the Covenant. This is a traditional obligation under international law that requires the states to take necessary action to execute the provisions of a treaty. The precise nature of that commitment, should however be inferred from other phrases of that provision. Obligation to “undertake steps” might refer both to obligation to conduct or obligation to result, depending on the context.¹³⁶

Thus, article 2§1 requires member states to begin immediately to take measures towards the full enjoyment of by everyone of all the rights in the Covenant - “to take steps” until the full realization of the rights is achieved. Steps towards that goal have to be taken within the reasonable time. Such steps should be deliberate, concrete and targeted towards meeting the obligations recognized in the Covenant¹³⁷.

Legal obligations under the Covenant are immediate, although the full realization of the rights can be achieved progressively. Therefore, Craven has found that all States, whether developing or developed, will need to take specific measures following ratification of or accession to the Covenant. Moreover, lack of resources in itself does not allow States to defer taking the necessary steps to give effect to the obligations under the Covenant.¹³⁸

2.2 Obligation to use all appropriate means

The aim of the all steps should be the full realization of the rights, thus, representing the obligation to result. Still states have a high degree of discretion in their conduct towards this end. Thus, the means to be used are not limited – they might be legislative, administrative, judicial, social, educational or other methods. The requirement is that the measures taken are appropriate means, with specific reference to legislative measures.

As the states vary in their economic and legal systems, and the level of development differs, it is natural, that the approach of each state vary depending on these circumstances.

¹³⁶Alston and Quinn, 1987, p 165

¹³⁷ComESCR: General Comment 3, para 2

¹³⁸Craven, 1998, p 114-115

Nevertheless, when supervising the application of the Covenant, it is up to the ComESCR to decide, whether the measures taken were appropriate or not. Therefore, the states parties reports should indicate not only the measures that were taken but also the bases on which these measures were considered to be the most appropriate means under the circumstances¹³⁹.

Legislative measures are specially mentioned in article 2§1. This suggests that they are the most normal and appropriate measures for achieving the purposes of the Covenant¹⁴⁰. In the General Comment no 3, the Committee has stated that depending on different rights, legislation might be the indispensable element for realizing rights, in particular, when existing laws are incompatible with the obligations assumed under the Covenant. Thus, obligation to legislate can also be seen as imposing an obligation to conduct. The mere adoption of legislation is however not exhaustive. More analysis is devoted on the implementation of the legislation.¹⁴¹ When the state has adopted some legislation, the ComESCR considers it important to see whether there exist case-law concerning the economic and social rights and whether these rights are cited in judgements.¹⁴²

Depending on the protected right, the measures required differ. The ILC has recognized, that the reference to legislative action in article 2§1 does not alter the fundamental principle of state discretion in the choice of means.¹⁴³ These means may include judicial remedies, policies etc¹⁴⁴. Even the practice of the ComESCR has focused on the practical implementation rather than on the presence or absence of legislation.¹⁴⁵

The ComESCR has noted, that at the first step, States are obliged to monitor and evaluate

¹³⁹ComESCR: General Comment 3, para 4h

¹⁴⁰ILC Report, 1977, para 8. the ILC commented that the expression of preferred means of implementation is consistent with an obligation of result as there is no obligation to take this course of action.

¹⁴¹In the case of Jordan, the Committee noted that although the state has provided detailed information on the constitutional and legislative provisions relating the implementation of the Covenant, there is insufficient information on the effectiveness of these measures. ComESCR: Conclusion on Jordan, 2000, para 13.

¹⁴²ComESCR: Conclusion on Jordan, 2000, para 13, 24.

¹⁴³ILC Report, 1977.

¹⁴⁴ComESCR: General Comment 3, paras. 3-8.

¹⁴⁵ComESCR: Conclusion on Kenya, 1993, para 10; ComESCR: Conclusions on Canada, 1993, para 25; ComESCR: Discussions on Iceland, 1993, para. 10-18.

the actual situation in regard to the enjoyment of each right protected under the Covenant within its jurisdiction.¹⁴⁶ The next stage in implementation is to establish a coherent policy to overcome the problems encountered and to make further progress in the realization of the rights. ComESCR has noted that an obligation to “*work out and adopt a detailed plan of action for the progressive implementation*” of each rights contained in the Covenant is clearly implied by the obligation “to take steps by all appropriate means”¹⁴⁷.

Craven has proposed, that the ComESCR has particularly been interested in the implementation of four main issues: participation, disadvantagedness, privatization and State organization¹⁴⁸. Additionally, In the recent opinions the position of women and issues of equal treatment has had increased coverage as well as the issue of justiciability of economic and social rights. These are the areas where the state policy is under serious scrutiny. The Committee has noted that one such means, through which important steps could be taken, is the work of national institutions for the promotion and protection of human rights.¹⁴⁹

Other obligatory measures under the Covenant are the dissemination of the text of the Covenant¹⁵⁰ as well as the conclusions of the ComESCR; seeking the participation of the NGO-s in preparing the reports as well as in advancing protection of economic and social rights¹⁵¹.

As stated before, the final aim of the Covenant is the full realization of rights. Its effect is to emphasize that the State conduct referred to in article 2§1 is to be directed at this result. The Covenant nor the ComESCR has not indicated what the final result is that the states are aiming for. In its supervisory procedure, the committee has rather concentrated on process

¹⁴⁶ComESCR: General Comment 1, para 2; See e.g. ComESCR: Conclusion on Lebanon, 1993, para 9. The ComESCR has often demanded that the States establish certain national yardsticks by which it would be possible to evaluate the domestic situation. ComESCR: General Comment 1, para 6-7.

¹⁴⁷ComESCR: General Comment 1, para 4.

¹⁴⁸Craven, 1998, p 120.

¹⁴⁹ComESCR: General Comment 10.

¹⁵⁰ Translating and publishing the Covenant in the National Gazette is an example of this obligation. See e.g. ComESCR: Conclusion on Jordan, 2000, para 11.

¹⁵¹ComESCR: General Comment 10.

rather than the result of implementation. As shown below, even in the case of developed countries, the full realization of right has not been achieved. Thus, economic and social rights are dynamic in their nature.

2.3 Progressive realization

Most of the international social rights foresee the progressive realization of the rights. The progressiveness of social rights means that the level of protection provided by the state depends on the concrete possibilities of the state.

Progressive realization requires states to move as expeditiously as possible towards the realization of the rights. The progressive realization means continuing work towards the full realization of rights and enhancing the system of social rights to cover as much individuals as possible, advance the system of protection and supervision etc.

This does not mean that all social rights are of progressive nature. There are number of rights that require immediate and full implementation such as for example the rights of non-discrimination.

Progressive realization of social rights should not be confused with the availability of resources. The obligation to progressive realization exists independently of the increase of resources, although it requires effective use of available resources. Progressive implementation of rights can be achieved also through by the development of societal resources necessary to realize social rights by everyone.

The standard of implementation specified in the Covenant as “progressive implementation”, has been the central notion for the conceptualization of rights as well as in the process of monitoring. art. 2§1 of the Covenant permits full realization of the rights to be accomplished in stages, step by step, depending on the resources available.

The concept of the progressive realization of rights reflected the understanding of the drafters that most States parties that through the ratification of the Covenant become legally obligated to implement these standards, are not ready to implement the rights contained in the Covenant immediately and fully. Thus, the progressive realization means that there should be a continuous improvement of conditions over time without any stagnation.

Progressive realization principle means that the level of implementation of each right depends on variety of factors: level of development, economic resources, level of legal system etc. The committee has noted, that every state has specific problems that are to be taken into consideration in the supervisory procedure. Thus, the central question for the committee is the progress that has been made taking into consideration the problems that were indicated in the previous reports. Therefore, it is expectable, that the application of rights under the Covenant is not uniform.

This brings back to the question, whether the Covenant creates legal obligations or mere policy goals. This question has been addressed by the committee finding that the progressive realization expressed in article 2§1 does not mean that some of the rights provided in the Covenant are not by nature more apt to be implemented or even directly justiciable. Many provisions of the Covenant are required to be implemented immediately, by creating obligations to result (for example principle of non-discrimination, obligation to refrain from actively violating economic and social rights). The committee has noted:

“[...] there are a number of other provisions in the Covenant, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.”¹⁵²

From the theoretical perspective, article 2§1 is a fine example of obligation to result. The progressive component of the Covenant is often mistaken to imply that only once State reaches a certain level of economic development, the rights established under the Covenant must be fully realized. Rather, the provision implies of the duty of states to move as soon as possible towards the realization of all rights, notwithstanding their level of national wealth.¹⁵³

The evolving practice of the Committee recognizes that some elements of the rights create immediate duty on the part of the State and therefore are not subject to the progressive realization standard. For example, State parties have the immediate obligation to ensure non-

¹⁵²ComESCR: General Comment 3, para 5

¹⁵³Fact Sheet no 16, 1991, para 4; ComESCR: General Comment 3.

discrimination. Obligations under articles 2§2 and 3 ensure that non-discrimination is not subject to progressive realization. The Committee has interpreted these provisions as requiring measures to prevent discrimination as well as positive affirmative action initiatives to compensate for past discrimination that went beyond the enactment of legislation.¹⁵⁴

As the development towards full realization has to be progressive, the Committee has pointed out that any retrogressive measure needs the most careful consideration and justification in the light of all the rights protected under the Covenant.¹⁵⁵ The justification for such retrogressive measures might be suffering from economic crisis or when the measures are taken with the purpose of improving the situation with regard the protection of rights.

2.4 Obligation to use maximum of its resources

States have an obligation to use “the maximum of its available resources”. Similarly to progressive realization principle, this standard is often used to justify the non-enjoyment of rights. Generally, the ComESCR has taken the economic situation of the country in the consideration in its evaluation of the reports¹⁵⁶. The assessment on what resources are available is left to the State. The committee has for example evaluated the government expenditure. Reference is being made on the proportion of GNP or GDP spent on public services.¹⁵⁷ The resources available for countries differ. To illustrate, when in one country the concern is providing free higher education¹⁵⁸ the other country might be facing public dept comprising more than 100% of national GDP¹⁵⁹ or has to first deal with free primary education¹⁶⁰.

¹⁵⁴Chapman and Russell, 2002, p 5-6.

¹⁵⁵ComESCR: General Comment 3, para 9.

¹⁵⁶See e.g. ComESCR: Conclusion on Mongolia, 2000, para 9 where the transition from centrally planned communist regime and sudden eruption of economic links was seen as main factor impeding the implementation of the Covenant; ComESCR: Conclusion on Sudan, 2000, para 14 where the committee notes that it takes into account the financial difficulties Sudan has, the amount of foreign debt and the status of Least Developed Country. Factors impeding the realization of right also includes the great size of country lack of infrastructure which is a condition for full realization of number of rights such as right to health, education etc. para 15 of the conclusion.

¹⁵⁷ComESCR: Conclusion on Denmark, 2004, para 5 where the development aid of Denmark amounting to 0,85% of the GDP was welcomed. The target set by UN was 0,7%.

¹⁵⁸See e.g. ComESCR: Conclusion on Luxembourg, 2003, para 42.

¹⁵⁹See e.g. ComESCR: Conclusion on Jamaica, 2001, para 5, where the public debt of Jamaica was over 140% of national GDP.

¹⁶⁰See e.g. ComESCR: Conclusion on Colombia, 2001, para 48.

The availability of resources thus influences the level of protection provided by the state in the context of permissible progressive development. The obligations of the states under international law vary depending on the level of development, the position of a state within the other states and prognoses of development. Still, the Committee has established that there is a minimum core content with regard to each economic, social and cultural rights that all the States parties are obliged to fulfil.¹⁶¹ General Comment No. 3 provides only a few specific examples and the Committee has further started to develop this core through its General Comments.

As further recognized in the Limburg principles, this requirement obliges the states to ensure minimum substance of rights or minimum core obligations to everyone, regardless of the economic development of the country.¹⁶² Thus, economic considerations do not exempt the state from its obligations under the Covenant. The State still has to strive to ensure the widest possible enjoyment of relevant rights under the prevailing circumstances.¹⁶³ During economic difficulties, the resources that might be used are both domestic and international¹⁶⁴.

2.5 Conclusion

From the general obligations clauses of CESC, the state has obligations as described in Table 6.

¹⁶¹ComESCR: General Comment 3, para 10.

¹⁶²Limburg Principles, para 25-28.

¹⁶³ComESCR: General Comment 3, para 11.

¹⁶⁴Not only is it possible to receive international assistance but developed countries are also obliged to allocate resources to international co-operation and increase their input in correlation with their progress. See generally ComESCR: General Comment 2; ComESCR: Conclusion on Belgium, 2000, para 30.

Table 6: General obligations under CESCR

<i>Obligation</i>		<i>Immediate</i>	<i>Progressive</i>
<i>Respect</i>		<ul style="list-style-type: none"> - Obligation to adopt legislation for the protection of rights protected in the Covenant; - Adoption of non-discrimination legislation - Adoption of immediate measures towards full enjoyment of rights - Obligation not to take any measure that result in denying or limiting access to the enjoyment of the Covenant's rights. - Prohibition to adopt laws or policies incompatible with the standards set forth. - The duty to avoid depriving individuals of the possibility to be self-supporting on the basis of their own work. - The duty to abstain from depriving individuals of the means of subsistence. - Duty to abstain from interfering with the provision of services (or direct satisfaction of these rights) provided by others. 	<ul style="list-style-type: none"> - Full realization of all rights; - obligation to review periodically adopted legislation, make necessary amendments.
<i>Protect</i>		<ul style="list-style-type: none"> - Ensure, that individuals under their jurisdiction are protected from infringements of the Covenants rights by third parties. - Obligation to uphold the principle of non-discrimination in legislation or to take other measures ensuring equal access to the enjoyment of rights - prevent any direct or indirect discrimination in relation to enjoyment of rights. - collection and keeping of statistics. 	<ul style="list-style-type: none"> - Obligation to protect vulnerable and marginalized groups in the society.
<i>Fulfil</i>	<i>Facilitate</i>		<ul style="list-style-type: none"> - Pro-actively engage in activities intended to enable and assist individuals and communities to enjoy the Covenant's rights.
	<i>Provide</i>	<ul style="list-style-type: none"> - obligation to recognize the Covenant in its legal system.¹⁶⁵ - to give recognition to the Covenant's rights in national legal systems and in national policies.¹⁶⁶ 	<ul style="list-style-type: none"> - Requires the State to provide a specific right contained in the Covenant when individuals are unable, for reasons beyond their control, to realize the rights themselves by the means at their disposal. Then the state has an obligation to provide that right directly. The extent of this obligation is subject to the text of the Covenant.

¹⁶⁵ComESCR: General Comment 13 Para 37

¹⁶⁶ComESCR: General Comment 13 Para 37

<i>Obligation</i>		<i>Immediate</i>	<i>Progressive</i>
	<i>Promote</i>		Undertake positive action: - research on the Covenant's rights; - provision of information to individuals under their jurisdiction; - training; - ensure dissemination of appropriate information relating to Covenant's rights

3 General obligations in European Social Charter

The ESC does not have a specific separate provision on general state obligations. The wording of the charter different depending of the part of the Charter and consequently might result in creating different types of obligations.

Part 1 of the Charter starts with the following statement:

“The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised...”

Part 1 of the Charter contains general statements of rights and principles setting out the aim for policy of the parties. However, this does not mean, that the obligation is political in its nature. Each point in Part 1 corresponds with specific article in Part II. Thus, the Part I contains a political declaration and has to be accepted as a whole irrespective of whether the corresponding provision of Part II has been accepted.¹⁶⁷ Thus, the binding character of the Charter is indirect, it requires the incorporation of national legislation and legal practice¹⁶⁸.

Part II of the Charter provides for specific rights and measures that have to be taken. As mentioned, not all of these provisions have to be adopted. Article A of Part III defines the extent of the hard core article that have to be accepted – six of articles 1, 5, 6, 7, 12, 13, 16, 19 and 20¹⁶⁹ and total number of articles or numbered paragraphs by which it is bound is not less

¹⁶⁷ESC 1996, Explanatory Report para 12-16

¹⁶⁸Mikkola, 2000 p 268

¹⁶⁹Part III, Art. A, para 1.b

than sixteen articles or sixty-three numbered paragraphs¹⁷⁰.

All the articles in Part II start with common phrase:

With a view to ensuring the effective exercise of the right to...

The wording implies, that the aim of the provisions is to guarantee the result – effective exercise of specific rights. This result can be achieved through different measures that are specified in sub-paragraphs. The following means for the achievement of effective exercise are to be found in the ESC and the Revised ESC¹⁷¹:

- **Ensure** - “to make sure, certain”, see e.g. article 2 (5) – weekly rest period;
- **Provide** - “to take precautionary measures, to make a proviso or stipulation, to make preparation to meet a need”, see e.g. article 1 (4) – vocational training; article 2 (1, 2, 3) – working hours, holidays with pay; article 7 (1) – minimum age of admission to employment;
- **Prevent** - “to keep from happening or existing”, see e.g. article 11 (3) – as far as possible epidemic, endemic and other diseases, as well as accidents;
- **Issue** - “publishing or officially giving out”, see e.g. article 3 (2) – safety and health regulations;
- **Eliminate** - “to cast out or get rid of”, see e.g. article 2 (4) – risks in inherently dangerous or unhealthy occupations;
- **Recognize** - “to acknowledge formally”, see e.g. article 4 (1) – right to remuneration;
- **Promote** - “to encourage public acceptance”, see e.g. article 6 (1) – joint consultations between workers and employers; see also articles 14 (1) and 15 (3);
- **Formulate** – “to develop”, see e.g. article 3 (1) – formulation of coherent national policy on occupational safety
- **Implement** - “to give practical effect to and ensure of actual fulfilment by concrete measures”, see e.g. article 3 (1) - implementation of coherent national policy on occupational

¹⁷⁰Part III, Art. A, para 1.c

¹⁷¹The list provided is not exhaustive and provides an example of the formulations used. Explanations of the different obligations are taken from Merriam-Webster Dictionary.

safety, occupational health and the working environment.

- **Review** – “a critical evaluation, examination”, see e.g. article 3 (1) – periodic review of coherent national policy on occupational safety, occupational health and the working environment.
- **Permit** - “to authorize”, see e.g. article 4 (5) – deduction of wages;
- **Establish** - “to bring into existence, to put on a firm basis”, see e.g. article 1 (3) – establishment of free employment services;
- **Maintain** – “to sustain, continue or persevere”, see e.g. article 1 (3) – free employment services;

The legal obligations undertaken by contracting parties in respect of the rights protected by the charter, are thus varying in degrees of detail. The Conclusions of the Committee of Independent Experts of the European Social Charter have given these obligations a much more precise meaning. Hence, unlike the ICESCR, the ESC does not have single statement on the nature of obligations, rather, each and every provision in the charter has possibly different legal effect.¹⁷²

These different obligations can be grouped as follows in Table 7.¹⁷³

Table 7: Obligations under ESC

<i>Obligation to</i>		<i>Obligations under ESC</i>
<i>Respect</i>		Obligation to ensure
<i>Protect</i>		Issue, permit
<i>Fulfil</i>	<i>Facilitate</i>	Eliminate, recognize, formulate, implement, review, establish, maintain
	<i>Provide</i>	Provide, prevent
	<i>Promote</i>	Promote

As was shown above, all different types of obligations presented in the fourth part of the research were present in the Charter - obligation to conduct and result, obligations to respect, protect and fulfil. Although, due to the lacking system of supervision, the norms do not have

¹⁷²Gomien et al, 1996 p 381

¹⁷³Some of the obligations can also divided between different groups of obligations.

the same effect as the ECHR has, the concrete norms might have direct applicability in national system as have been seen in national courts in Germany, Italy, The Netherlands, Romania and Spain and Estonia.¹⁷⁴

4 Equality

One of the central values that human rights instruments including social rights instruments refer to is the principle of equality.

As stated before, the equality clause is one of the central obligations that the States parties have to ensure immediately. The concept of equal rights is confirmed in the Covenant in a general manner referring to right of “everyone”, the general non-discrimination clause in article 2§2 and article 3 which refers to the equality of men and women.

Article 2§2 of Covenant includes a general equality clause according to what:

“The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

As stated by Craven, it is apparent that a notion of equality runs through the heart of the Covenant. The Covenant assumes the creation or maintenance of State welfare institutions and social nets (for example the provisions of housing, food, clothing and social security).¹⁷⁵ As the material benefits in the society can never be equally distributed, the Covenant does not envisage absolute equalization. As discussed above, it is first and foremost the obligation of the state to create supportive environment for the person to manage by him or herself. Nevertheless, the Covenant recognizes a process of equalization where the social resources are redistributed to satisfy the needs of every member of the society. From the theoretical point of view, the objective of the Covenant is to achieve equality of opportunity in its strongest sense.

To conclude, examination of general obligations in article 2§1 of the CESCR shows that it includes both an obligation to conduct and obligation to result - full achievement of rights. In principle, it also includes obligation to promote, obligation to respect and fulfil, but the pre-

¹⁷⁴Mikkola, 2000 p 268

¹⁷⁵Craven, 1998 p 157-158

cise nature of the obligation should be decided through the analysis of specific requirements.

In the CoE's framework, equality and principle of non-discrimination is present in both instruments of interest for the present research. Article 14 of the ECHR is limited to prohibiting instances of discrimination that occur in the enjoyment of rights and freedoms set forth in the Convention. Independent right to non-discrimination is included in Protocol 12 of the ECHR. However, this protocol is not yet in force. ESC does not have separate non-discrimination clause but makes reference to non-discrimination as a general principle both in the Preamble and in specific provisions. The revised ESC has also an independent non-discrimination clause in article E.

5 General normative structure of Right to Social Security

With the aim of testing the practical value of the state obligations and responsibility theories, the right to social security has been selected as a basis for the analysis. Right to social security is one of the central elements of social protection, where all different parties and duty holders in the society are involved.

The concept of the social security is one of the most difficult areas of social rights as it creates system of benefits that persons are entitled to. Also, the definition of "social security" differs. The division proposed by T. Annus and B. Aaviksoo shows best the dichotomy of social security and social assistance¹⁷⁶.

Table 8: Social protection

Social protection			
Public protection against social risks. Public benefits and support can be provided as subjective rights (including constitutional rights) as well as under discretion.			
Social security		Social assistance	
Guaranteed income in the event of social risks		support for subsistence	
Insurance benefits	Public benefits	Monetary assistance	Social services

Liberal welfare state is based on a unwritten doctrine: every adult (who is not aged nor tied down by family work) has the possibility and responsibility for earning an income by

¹⁷⁶Annus & Aaviksoo, 2002, p 8

work and thus of satisfying his needs and those of his family.¹⁷⁷

It is however self-evident that this principle has number of exceptions and problems. The rule provides a system that does not meet different social problems such as when the possibility to engage in gainful employment is absent; when the physical capacity for work is absent; when the income earned is too small or is no longer obtained; when the family is too big and the number of breadwinners too small; when the family needs more services than the members providing the services can offer; when the parents die or become incapable of working; when parents do not perform their tasks properly; when the goods (or commodities or services) which are needed in order to satisfy the needs are not available; when those goods are too expensive; when the satisfaction of certain needs – such as in the event of illness – no longer bears any relationship to the ability to perform etc.

There are also imperfections, hazards and violations in the implementation of the basic doctrine which do not allow the implementation of personal rights. The classical field of inadequacy of implementation is the work conditions, wages earned for work. The situation of families is unequal. Countering these hazards and deficits is the responsibility of the state.¹⁷⁸

The state has here both internal and external possibilities for intervening. Internal intervention gives order to the relationships and processes by which they are implemented. Examples are labour law, collective agreements, equal rights of man and women, protection of children. Second range of obligations relates to external solutions – compensating for deficits in income and maintenance (income replacement, unemployment benefits, invalidity benefits, old-age benefits etc.) and supplementing on family income (child allowances) and guaranteeing services.

¹⁷⁷Zacher, 1987. In substance, this is an expression of liberty and it includes a variety of different civil and political as well as social and economic rights which guarantee that income could be earned by work – right to education, freedom of property, freedom to found a family, freedoms which secure autonomy and privacy of persons, right to equality etc. See Zacher, 2002, p 7-8.

¹⁷⁸For a list of examples see Kause, 1987, p 31-51; see also Zacher, 2002, p 8-11.

Table 9: Economic and social rights in various multilateral treaties.

Right	UDHR	ICESCR	CRC	ESC 1961 and ESC Revised	ACHPR	AmCHR, add prot
Right to adequate standard of living	Art. 25	Art. 11(1) Also right to improvement of living conditions.	Art. 27	ESC art. 4(1) (for workers and their families); ESC Revised art. 30 (protection against poverty and social exclusion).	-	-
Right to housing	Art. 25	Art. 11(1)	-	ESC Revised art. 31	-	-
Right to food	Art. 25	Art. 11(1)	-	-	-	Art. 12
Right to clothing	Art. 25	Art. 11(1)	-	-	-	-
Right to health	-	Art. 12	Art. 24	ESC art. 11 (right to the protection of)	Art. 16	Art. 10
Right to medical care	Art. 25	-	Art. 24	ESC art. 13 (right to medical assistance)	-	-
Right to property	Art. 17	-	-	1*	Art. 14	2**
Right to protection of intellectual property rights	Art. 27(2)	Art. 15(1)(c)	-	-	-	Art. 14(c)
Right to social security	Art. 22 and 25	Art. 9, partly art. 10 and art. 11(1)	Art. 26	ESC art.12 (art. 14 social welfare services) + art. 13 (social assistance)	-	Art. 9
Right of the family	Art. 16	Art. 10(1)	-	ESC art. 16	Art. 18	Art. 15

* ECHR, Prot. 1 art 1 includes the right to property

** AmCHR, art. 21 includes right to property

Economic and social rights are closely connected to the property. The right to property however can not be enjoyed on equal basis. Hence, it has to be supplemented by at least two other rights: right to work and right to social security. The right to social security is essential when the a person does not have necessary property available or is not able to secure his or her adequate standard of living through work.¹⁷⁹

The systems of social protection in different countries are not only different in their effect but also differ in their organization and funding, according to the cultural, historic and institutional backgrounds of the countries in which they are established. However, all social protection systems have one common characteristic – they protect all those in need of assistance, whether temporary through illness or the loss of employment or for longer periods as a

¹⁷⁹It has been stressed, that right to social security should not be viewed as a matter of charity but as a unilateral right for the individuals concerned. Eide and Eide, 1999 p 534

result of the termination of paid employment, permanent disability or the need to take care of children, regardless of income levels.¹⁸⁰

In relation to social security, the following issues have to be dealt with:

- Material scope i.e. the risks covered;
- Personal scope;
- Conditions for entitlement
- Benefits and their adequacy, calculation method, period of entitlement.
- Practical administration: financing the system;
- Right to appeal

Risks

Right to social security includes all social policy questions that have the aim of providing security for different social risks and help the individual the capability in continuing the normal life when these risks appear. There are several traditional social risks that have to be covered by the social security system of the states. It has to be noted, that the risks covered by different instruments differ. There are nine common risks: unemployment, sickness, maternity, work injury and occupational disease, incapacity to work, old age, health, family, survival. There is no coverage of the risk of need or poverty as such. Coverage of this risk is typically referred to as “social assistance” whereas the primary focus of the social security is “social insurance”.

The common nominator of all these risks is that it limits the means of the individual and the family to continue self-sufficient life. Most of these risks are unexpected (although this is not a decisive element in deciding over some risks).¹⁸¹

Coverage

International instruments allow states to choose whom to provide the protection. Social security systems were traditionally designed for substituting income for workers and their families. This understanding has however developed and the tendency today in international

¹⁸⁰Social protection in ESC, 2000 p 15-16

¹⁸¹Tuori, 2000, p 8-9

law is to aim for universal coverage.

This is specially so when looking at European Social Charter. Similar tendencies are also seen in ILO system and thus also in UN system. It has to be noted however that the personal scope of a benefit depends on its type and aim.

Benefits

Social security is meant to substitute loss of income. As the loss of income could vary in its length, the system included short-term benefits (unemployment, sickness, maternity), long-term benefits (old age and survival) and benefits in between (work injury and incapacity). Some of the benefits are also designed to cover certain costs (housing, studies, single parenthood). Some benefits are combined with social assistance and provide access to services (health care, rehabilitation etc.).

Benefits can take number of forms. They may be periodic or lump-sum benefits, periodic benefits are paid regularly whereas lump-sum benefits are one-off payments. Calculation method used for cash benefits may be: earnings-related, flat-rate benefits and means tested benefits. The minimum amounts of the benefit are based on the “standard beneficiary”. At the time of creation of the instruments in 1950s and 1960s, the standard beneficiary was defined on the basis of the typical family model.

International instruments set periods below which the maximum duration of the benefit may not fall. The duration of the concrete benefit depends on the type.

Practical administration

The traditional understanding is that the financing principle of the benefits should be solidarity i.e. the system is financed through contributions. Contributions are then redistributed in vertical and horizontal (meaning also the redistribution between generations). The funds are administered by collective funds. The level of contributions is not defined by the international instruments except stating that they should not leave person in hardship.

The minimum level of benefits is provided for in international instruments. The benefit is usually dependent on average wage and poverty line. Some of the benefits include cost-com-

pensation system and are either universal or means-tested.

6 Genesis of right to social security

As stated above, right to social security developed firstly as right to social security depending solely on the payments of a person. When the UDHR was adopted in 1948, all the Nordic countries and most countries in Europe had introduced some form of social security legislation. Common element of these systems was that they offered assistance to people in utmost need. Few of them were universal in the sense that they were available to the whole population, irrespective of the income. Some provisions were offered only to members of trade unions or other associations based on membership and solidarity.¹⁸²

Universal Declaration on Human Rights was the first instrument where right to social security was introduced in the international human rights discourse. Article 22 of the UDHR stated:

*Everyone as a member of society, has the right to social security and is entitled to realisation through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*¹⁸³

As codification of Covenants was delayed, codification of right to social security was initiated by a specialized agency of UN – International Labour Organization. ILO adopted in 1951 Convention no 102 on Minimum Standards in Social Security defining 9 traditional benefits, coverage and the minimum level of benefits. ILO Committee of Experts started to supervise the implementation of these standard by reviewing regular reports of the states.

In the UN system, a more general codification of right to social security as human rights was made in the CESCR adopted in 1966:

“The State Parties to the present Covenant recognize the right of everyone to social security including social insurance.”

The majority of international instruments followed the model of UDHR and include the right to social security instead of narrow right to social insurance.

¹⁸² Andreassen, 1999, p 459.

¹⁸³ Article 22 of the UDHR, see further Andreassen, 1999.

Development of international regional codification of right to social security has been notably progressive in Council of Europe's human rights protection system. European Social Charter of 1961 and Revised ESC of 1996 go further from simple protection of right to social security and provide more complete protection – it is the only treaty addressing all the aspects of social protection. In addition to the right to social security it provides for the right to social and medical assistance and the right to benefit from social services¹⁸⁴.

Charter makes reference to ILO Convention no 102, the revised Charter refers to the European Code of Social Security of 1964. The Code has been amended with a protocol in 1964 providing higher levels of protection and widens the scope of persons. The Revised Code of Social Security was adopted in 1990 and it provides for still higher standards and more flexibility. The Code is supervised by ILO Committee of Experts.

Also European Convention on Human Rights and European Court of Human Rights has developed the justiciability of right to social security through Additional Protocol no 1 art 1 protecting saved contributions.

When social security is considered, the ILO's work and the standards it has developed is the most important source of interpretation and definition the right to social security. Right to social security is in the core of several ILO conventions and ILO as been the central developer of this right.

Creation of ILO was one of the results of Treaty of Versailles. Its aim was to create the conditions for social justice. The originality of ILO was that in all decision-making levels member states, employers and employees representatives were given right to vote.

ILO's first conventions concentrated on the labour conditions. Soon however, the Conference adopted several conventions that aimed the creation of national mechanism protecting workers from industrial and social risks.¹⁸⁵

¹⁸⁴Current research will deal only with right to social security in UN system and in the framework of ESC. See also European Code of Social Security (ECSS, 1964) adopted under the auspices of Council of Europe in 16.04.1964, entered into force 17.03.1968.

¹⁸⁵See ILO Convention C 17 and ILO Convention C 18 on Workmen's Compensation; ILO Convention C 24 and ILO Convention C 25 on Sickness Insurance; ILO Convention C 35 and ILO Convention C 40 on Old Age, Invalidity and Survivor's Insurance and ILO Convention C 44 on Unemployment Provision.

The notion of social risks is clearly defined in these first conventions and covers: sickness and medical care, unemployment, old age benefits, workers compensation, family and maternity benefits, disability and survivor's benefits.

The right to social security was developed in a context in which industrial work predominated in Europe and other developed world and the male industrial worker as the family breadwinner was seen as the first direct beneficiary of this right.

III Social Security in UN system

United Nations human rights system is based on the UN Charter of 1945 and the Universal Declaration on Human Rights of 1948. UDHR provides in article 22:

“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”

This is a general provision and it does not specify what is meant by this right. Furthermore, it does not define the minimum core of social rights that should be “indispensable for the dignity and and personal development of the individual”. As explained by Andreasson, it was the intent of the drafters to avoid specification in order to give the possibility for specifying this provision for ILO and more specific international treaties¹⁸⁶.

Article 25 of UDHR is more specific and provides that everyone has the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control as part of the right to adequate standard of living.¹⁸⁷

Right to social security is substantiated by two Covenants – the CCPR and CESCR and the practice of their supervisory bodies.

1 CCPR and the practice of HRC

Although right to social security is traditional social rights and it is not solely included in traditional social instruments, there are elements of social security that have been discussed by both HRC and ECtHR. These bodies have taken the interdependence approach and discussed this rights mainly in the context of non-discrimination and equality. Thus, right to social security has been justiciable in the context of these bodies at least in questions of equality, non-discrimination, right to access to courts and right to property.

Right to social security has mainly been analysed in the context of non-discrimination. Non-discrimination is a human rights on its own and it is inherent in the fundamental idea of

¹⁸⁶ Andreassen, 1999, p 462-249, 488

¹⁸⁷ For the development of article 25 see Eide and Eide, 1999.

universal human rights. The prohibition of discrimination is a standard element of all international human rights treaties.¹⁸⁸ Different human rights treaties have taken different approach to the scope of non-discrimination. Article 26 of the CCPR is a self-standing right to non-discrimination providing protection on unlimited list of grounds.¹⁸⁹

The prohibition of discrimination is all-encompassing i.e. including any possible ground of discrimination. Also, the list of prohibited grounds of discrimination is not exhaustive as there is mentioning of “other status”¹⁹⁰, thus, covering also all possible social rights including the right to social security.

In two of the three cases concerning the social security system in the Netherlands, a violation of Article 26 was established by the HRC. These cases, *Zwaan-de Vries v. the Netherlands*¹⁹¹ and *Broeks v. the Netherlands*¹⁹² related to Dutch legislation, according to which married women were denied some unemployment benefits granted to unmarried women and to all men, regardless of the latter being married or not. The presumption behind this regulation was that married women were not “breadwinners” of a family. Only by submitting evidence and proving herself being a breadwinner a married women could receive the benefit.

The relevance of article to social rights was explained by the HRC as follows:

*Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.*¹⁹³

In these cases, the committee found violation based on sex. The committee noted that the

¹⁸⁸ Article 2 of UDHR; article 2§2 of CESCER and article 2§1, 3 and 26 of the CCPR, number of ILO Conventions are dedicated to non-discrimination as well as regional instruments: article 2 of ACHPR; article 24 of ACHR and article 14 of ECHR.

¹⁸⁹ On the interpretation of this provision see Nowak, 1993, p 458-479; HRC: General Comment 18.

¹⁹⁰ para 12 of HRC: General Comment 18.

¹⁹¹ HRC: Communication No. 182/1984.

¹⁹² HRC: Communication No. 172/ 1984.

¹⁹³ para 12.4 of HRC: Communication No. 182/1984.

Netherlands did change its law but found it appropriate to recommend the state also to provide effective remedy.

Simultaneously with adoption of its views in the latter cases, the HRC dealt with the third case against the Netherlands, *Danning v. the Netherlands*¹⁹⁴ where the complainant alleged discrimination on based on marital status. In this case, the committee repeated the view on the application of article 26 but then stated that a differentiation between a married person and an unmarried cohabiting persons in the field of invalidity benefits did not constitute discrimination.

In all these three cases, the committee used proportionality test in analyzing whether the differential treatment of persons was justified or not.

Finding of discrimination based on sex was also found in the case of *Pauger v. Austria*¹⁹⁵ where the applicant was a male person. The committee found that it was not reasonable to differentiate between widows and widowers in providing full pension:

*“This in fact means that men and women, whose social circumstances are similar, are being treated differently, merely on the basis of sex. Such a differentiation is not reasonable...”*¹⁹⁶

in one case, the committee has also found that discrimination based on sex in relation to right to social security was justified. In the case of *Vos v. the Netherlands*¹⁹⁷ the committee found that the unfavourable result complained of by Mrs. Vos followed the application of a uniform rule to avoid overlapping in the allocation of social security benefits. Right to social security has also been dealt under other grounds of discrimination. In the case *Snijders et al v the Netherlands* the Committee dealt with alleged discrimination based on other status i.e. Marital status.¹⁹⁸

¹⁹⁴HRC: Communication No. 180/1984.

¹⁹⁵HRC: Communication No. 415/1990.

¹⁹⁶para 7.4 of HRC: Communication No. 415/1990.

¹⁹⁷HRC: Communication No. 218/1986.

¹⁹⁸HRC: Communication No. 651/1995.

2 CESC

Article 9 of the CESC¹⁹⁹ is a general provision on the right to social security providing that States parties "recognize the right of everyone to social security", without specifying the type or level of protection to be guaranteed. This was due to the agreement with ILO that the Covenant should continue the practice of ILO and take their standards as the basis for the development.²⁰⁰

There are also provisions that further right to social security for particular group of people and give them additional protection. Article 10 of the Covenant covers the protection of the family and mentions specifically social security benefits during the maternity leave.²⁰¹ Article 11(1) of the Covenant deals with the right to adequate standard of living and partly relates to social assistance and other need-based forms of social benefits in cash or in kind to anyone without adequate resources.

The principal ILO convention in the field of social security is ILO convention no 102 from 1952²⁰². It was adopted with the aim of unifying national legislation of the states parties concerning their social security systems and has been ratified by 41 countries²⁰³. ILO standards are by nature universal. They are intended to be applied by the 175 member states of the ILO, irrespective of their legal system or their level of economic development. It has to be reminded that ILO conventions have specific nature. They are adopted by conferences which are composed of the governments of member states, as well as representatives of workers and employers. This principle of tripartism is applicable throughout the ILO system i.e. also in the

¹⁹⁹It is worth noting that CESC can not have the same precision in its wording than regional human rights instruments as it is aimed to cover countries with very different legal background and level of development and that the intention of this norm is not to unify social security systems but rather to provide general minimum requirements that can be applied to all states.

²⁰⁰Lamarche, 2002, p 90.

²⁰¹The Revised Reporting Guidelines indicate that this clause relates not only to benefits in cash but also to medical and other benefits.

²⁰²ILO Convention C 102, Adopted on 26th of June 1952, entered into force on 27th of April 1955. UN Secretary General has listed this Convention in his report to the ComECSR as important for the application of article 9 and article 10. See Annex 2.

²⁰³ILOLEX, available online <http://www.ilo.org/ilolex/english/convdisp1.htm>, status on 7th of June 2005.

supervisory procedure of the ILO Convention 102.

The convention covers all 9 branches of social security, defines the scope of convention in the terms of the persons protected, provides for temporary exceptions, method of calculating the rate of benefits etc. Thus, Reporting Guidelines of the CESCR ask the states to declare whether they are parties to the ILO convention no 102 and whether they have submitted reports to the supervisory body of this convention. If so, the parties can refer to that report.

This connection to the ILO reflects the importance of the Labour Organization in standard-setting. Thus, the substance of CESCR articles 9 and 10 can not be discussed without further insight into ILO convention no 102.

Besides defining minimum level of protection, ILO Convention also has an independent supervisory system whose opinions are taken into consideration also by the ComESCR. ILO monitoring is based on the periodical examination of national reports by the Committee of Experts for the application of conventions and recommendations. If this committee considers that a government is failing to honor its commitments to the full, it draws the attention of the government to the failings observed and invites it to take measures to remedy them.

ILO convention 102 is not the only instrument relevant for the full application of CESCR. ILO Convention no 118 on equal treatment in social security is another central convention for interpretation of CESCR²⁰⁴. The ComESCR has also noted, that states should adopt ILO convention of 1962 no. 117 on Social Policy.²⁰⁵

The ILO convention 102 on Social Security Minimum standards is a *a`la carte* type convention, obliging members to comply with Part I (General Provisions); at least three of the following parts of the Convention: medical care, sickness benefits, unemployment benefits, old age benefits, worker's compensation, family, disability, maternity and survivor's benefit. From among these enumerated risks at least on provision concerning unemployment, old age, worker's compensation, disability or survivor's benefit must be included. Each part of the convention provides specific standards aimed at guaranteeing the benefit of social security, as

²⁰⁴ILO Convention C 118.

²⁰⁵See e.g. ComESCR: Conclusion on France, 2001, para 19.

well as the level of benefits and protected classes of persons.

In all cases a ratifying member state has to comply with general parts of the Convention. General obligations include proper administration of the social security system, participation of insured persons, financing of benefits, periodic payments and right to appeal.

Table 10 shows ILO specialised instruments covering different social security branches.

Table 10: ILO social security conventions

<i>Social Security branch</i>	<i>Second generation standards: Convention No 102 (1952)</i>	<i>ILO third generation standards</i>
Medical care	Part II	Convention No 130 (1969)
Sickness benefit	Part III	Convention No 130 (1969)
Unemployment benefit	Part IV	Convention No 169 (1988)
Old-age benefit	Part V	Convention No 128 (1967)
Employment injury benefit	Part VI	Convention No 121 (1964)
Family benefit	Part VII	-
Maternity benefit	Part VIII	Convention No 183 (2000)
Invalidity benefit	Part IX	Convention No 128 (1967)
Survivor's benefit	Part X	Convention No 128 (1967)

This close relationship in protecting social rights also means that there is a division of powers between the ILO and CESCR. The latter primarily focuses on social security in narrow sense e.g. income-based and situation-based cash benefits for workers and their families and applies the standards and practice of ILO when assessing whether the member states comply with obligations contained in the right of social security or not.

2.1 Material scope

Article 9 of the Covenant provides generally that States parties “recognize the right of everyone to social security”. The term “social security” implicitly covers all the risks involved in the loss of means of subsistence for reasons beyond a person’s control.²⁰⁶ People should be protected in circumstances such as old age, disability, ill health or other situation that do not allow them to earn a decent living. Additional protection in relation to social security should

²⁰⁶ComESCR: General Comment 6, para 26

be given to marginalized groups, for family and for women during maternity leave.

According to the Revised reporting guidelines, the ComECSR asks the states to indicate, whether the following social security branches exist in the country: Medical care, Cash sickness benefits, Maternity benefits, Old-age benefits, Invalidity benefits, Survivors' benefits, Employment injury benefits, Unemployment benefits, Family benefits.²⁰⁷

There exists no detailed General Comment of the ComESCR on the interpretation of the right to social security but there is a considerable amount of conclusions of the ComESCR on the reports of State Parties. The ComECSR has devoted particular attention on the enjoyment of the right to social security of women, older person²⁰⁸ and persons with disabilities²⁰⁹. General rule is that all social assistance should ensure adequate standard of living for those receiving the assistance²¹⁰.

The requirements for social security system are set forth in ILO Convention 102. ILO Convention 102 provides protection against 9 contingencies as concluded in Annex 1.

The primary obligation was to set up an social security system that would cover at least the minimum amount of risks. This system can be comprised of different parts i.e. The medical system, the pension fund etc. can function independently but they form one system of social security in the meaning of article 9 of the CDESCR. Other obligations under material scope include keeping of adequate statistics for calculation of benefits, keeping record of people.

2.2 Personal scope

Protected classes of persons is defined in ILO Convention 102 and a state must be able to demonstrate for each provision of the Convention that a certain percentage of specified population groups is protected against the specified social risk. States have to identify in relation to each risk, which group it provides the protection for. Lamarche has generalised the alternative groups of persons in ILO Convention 102 as follows²¹¹:

²⁰⁷Revised Reporting Guidelines, art. 9, para 2

²⁰⁸ComESCR: General Comment 6.

²⁰⁹ComESCR: General Comment 5.

²¹⁰See e.g. ComESCR: Conclusion on Germany, 2001, para 27

²¹¹Lamarche, 2002, p 91-92

- a) prescribed classes of employees constituting certain percentage of all employees;
- b) prescribed classes of economically active population including their wives and children constituting certain percentage of all residents (the scheme or the benefit must not deprive the beneficiary and his wife or children of what is necessary to maintain health and decency);
- c) all residents according to a means test if the benefit meets the level stated in the Convention.²¹²

For example, the Convention specifies that in the case of sickness benefit, it is deemed sufficient if the total of benefits paid exceeds by at least 30% of unskilled labourers' wages in benefits when the states uses as a reference the economically active population.²¹³ The Convention also provides for list of standard beneficiaries and standard percentage of benefit. For example for sickness benefit, standard beneficiary should be man with wife and two children and the percentage should be 45%.²¹⁴ All the benefits could require qualifying period as might be considered necessary.

In its case-law, in relation to accessible health care, the ComESCR has been concerned that affordable and adequate health care is accessible and available to everyone, with special attention to older women in rural areas.²¹⁵ Establishing universal coverage of health care insurance and providing 100% coverage to persons with very low income was noted as one of the necessary and positive developments²¹⁶. People with disabilities and their health care has also been a concern of the Committee as the Committee noted in the case of Ireland²¹⁷. In its evaluation the ComESCR looks at the total coverage of population and applies the standards of ILO²¹⁸.

²¹²Articles 9, 15, 21 etc of ILO Convention C 102

²¹³Article 67(d)(i) of ILO Convention C 102

²¹⁴ILO Convention C 102, Schedule to Part XI: Standards to be complied with by periodical Payments

²¹⁵ComESCR: Conclusion on Estonia, 2002, para 49.

²¹⁶ComESCR: Conclusion on France, 2001, para 11.

²¹⁷ComESCR: Conclusion on Ireland, 2002, para 15.

²¹⁸E.g. when health-care system coverage is not more than 20% of the population it is considered to be too small. ComESCR: Conclusion on Morocco, 2000, para 28.

Practice of ILO and ComESCR shows that there is constant tension between the goals of the ILO and that of the member states. The ultimate goal of ILO is universal coverage²¹⁹ whereas the Member States want to limit the application of the social security as much as possible. Their objective is supported also by the wording of the Convention that was drafted under substantially different economic and labour conditions.

The assumptions, under which ILO Convention 102 was adopted, has to be stressed here. First, it is a “male” convention, where women are described as “the wife of”. Although female workers may be and often are included in the categories of workers used to establish protected classes of persons, there is constant reference to male industrial worker in technical provisions²²⁰.

Secondly, defining the protected groups of persons permits states to avoid addressing the problems of a atypical worker (often being also a gendered issue) such as part-time workers or self-employed.²²¹ The ComESCR has also been concerned over informal sector and the fact that people in informal sector are not covered by the system.²²²

Thirdly, in the cases where a state has opted for all residents coverage calculation for the purpose of ratifying Convention 102, the adequacy of the the coverage is problematic as it is assessed by reference to industrial wages to ensure that the regime meets the standards of Convention 102.

Fourthly, the convention establishes a special benchmark for determining the capacity of the social security scheme to cover the needs of industrial worker and his family and is thus calculated as a percentage of the industrial wages of either skilled or unskilled labourer. This however, does not take into account latest developments of the labour marked as well as the change in the work-force.

²¹⁹Humblet and Silva, 2002, p 7-8.

²²⁰For example when defining the categories of persons protected for medical care in article 9 of the ILO Convention C 102.

²²¹See for example the discussion in ILO preceding the adoption of ILO Convention C 128 in Int. Labour Conf. Report V (I), p 12-13.

²²²ComESCR: Conclusion on Benin, 2002, para 171 where the concern of the ComESCR was that 80% of the workers worked for the informal sector and were thus not covered by the social security system.

2.3 Equality

Treatment of different groups and applying the principle of equality i.e. the question of participation, has been the central concern of the ComESCR also in relation to right social security. The ComESCR has recommended that the social security system and social development measures should take into account the needs of disadvantaged and marginalized groups²²³. Also, when reforming the social security systems, the assistance should be targeted more specifically to disadvantaged and marginalized groups, including person with special needs, single parent families and homeless persons but the reform should also not decrease the level of effective social protection of others²²⁴.

There should also not be unequal treatment in regard to nationality or ethnic origin. Thus, all the citizens irrespective of their origin should be granted same protection of social rights²²⁵. In recent conclusions, the position of Roma people has gained committees special attention.²²⁶

One marginalized group that has been given special attention by the ComESCR are disabled persons. In its conclusion on Ireland, the committee was concerned, that people with disabilities do not have the status of employees and thus do not qualify for minimum wage arrangement. That on return means loss of right to free medical care. Thus, the committee recommended reconsidering the methods of fixing minimum wage and welfare payment level as to include also the marginalized groups.²²⁷ Furthermore, the employment rate for persons with disabilities specially in public sector should be enforced and laws against all kinds of discrimination relating to disabled persons should be adopted.²²⁸

Article 3 of the Covenant deals specially with equality between men and women:

“The States Parties to the present Covenant undertake to ensure the equal right of men

²²³See e.g. ComESCR: Conclusion on Brazil, 2003, para 50.

²²⁴ComESCR: Conclusion on New Zealand, 2003, para 28.

²²⁵ComESCR: Conclusion on Israel, 2003, para 32.

²²⁶ComESCR: Conclusion on Greece, 2004, para 15.

²²⁷See paras. 15 and 28 of ComESCR: Conclusion on Ireland, 2002.

²²⁸ComESCR: Conclusion on Japan, 2001, para 52.

and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”

Unequal treatment of women in labour force and thus in social security is large scale. There exist cultures where women are not allowed to participate in social life without the consent of her husband or father or are forced into early marriage whereby they are not able to exercise the rights which the Covenant gives them²²⁹.

There exist inequality in joining the labour market - in particular in terms of promotion, and segmentation of the labour market²³⁰. There exists *de facto* inequality between men and women regarding wages for work of equal value²³¹ and career track that is specially noted in relation to developed countries²³². The working arrangements often do not support women with children nor single parents²³³. Part-time work is in large scale performed by women and these workers receive lower wages, pension benefits, health benefits and have less job security²³⁴. For example, lack of child-care institutions constitutes an obstacle for women's equal participation in the labor market²³⁵ and thus, participation in the social security schemes.

Thus, the ComESCR has recommended that all the states should aim for equality in social security systems and that for example the pension system is reformed with the aim to remedy persisting *de facto* inequalities in the pension system to the maximum possible extent²³⁶.

Equal treatment is the central obligation under the CDESCR and also under ILO Convention 102. Article 65 provides that all the residents should be granted the same protection. ILO has also adopted a social security convention that deals only with equal treatment - thus adoption of Convention 118²³⁷ shows that practical implementation of equal treatment of citizens

²²⁹See e.g. ComESCR: Conclusion on Benin, 2002, paras. 12-13 and 30-32.

²³⁰See e.g. ComESCR: Conclusion on Germany, 2001, para 37.

²³¹See e.g. ComESCR: Conclusion on Republic of Korea, 2001, para 16.

²³²See e.g. ComESCR: Conclusion on Japan, 2001, para 44; ComESCR: Conclusion on Iceland, 2003, para 12.

²³³See e.g. ComESCR: Conclusion on Colombia, 2001, para 14.

²³⁴See e.g. ComESCR: Conclusion on Republic of Korea, 2001, para 17.

²³⁵ComESCR: Conclusion on Germany, 2001, para 26.

²³⁶See e.g. ComESCR: Conclusion on Japan, 2001, para 51.

²³⁷ILO Convention C 118.

and non-citizens has been a problem.

ILO convention no 118 on Equality of Treatment (social security) was adopted in 1962²³⁸ and deals with equality in treatment in these nine social security branches. It provides that equal treatment should be granted to the nationals of any other Member State to the Convention. The treatment should be equal in comparison with the state's own nationals, both as regards coverage and the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention²³⁹.

The ComESCR has noted that ILO convention 118 has great importance for the full application of CDESCR and thus has recommended in its conclusions the ratification of it²⁴⁰.

Accordingly, the nationals of all the member states should be provided equality of treatment under its legislation with its own nationals. The same equality of treatment should also be provided for survivors of the nationals of other member states irrespective of the nationality of the survivor. Equal treatment is reciprocal i.e. it might not be granted to the nationals of the member state who has ignored this responsibility towards the nationals of other states²⁴¹.

2.4 Minimum level of benefits

Level of social security benefit is closely linked to guaranteeing decent standard of living. As the aim of the social security is to substitute loss of income and as the money used comes from the payment of employer and employee, the level of benefits is closely linked to previous earnings.

The level of benefits is defined in ILO Convention 102 and it depends on the categories of population covered by the benefit. The level of benefit is depending on the basis on which the coverage of specific social risk is designed – whether by categories of workers or by all residents. The latter formulation guarantees a benefit level much closer to the basic income, while the former allows for a flexible level of benefits calculated on the basis of average industrial

²³⁸Adopted on 28th June 1962, entered into force on 25th April 1964

²³⁹Article 3.

²⁴⁰See e.g. ComESCR: Conclusion on Luxembourg, 2003, para 33; ComESCR: Conclusion on New Zealand, 2003 para 25; ComESCR: Conclusion on Iceland, 2003, para 24.

²⁴¹Article 3(3) of ILO Convention C 118.

gains. In both cases wages rather than the needs are taken as basis of the benefits as it is assumed that negotiated wages are already related to the needs of a working family.²⁴²

The obligatory levels differ and depend on the development of the country. Aim of the benefit is not only to guarantee income for the person but also help her to overcome the difficulties and rejoin the workforce as soon as possible. For example unemployment benefit should support a person to rejoin the workforce in the case of dismissal²⁴³. And thus, unemployment benefit should usually be accompanied with other recreational services and social assistance measures.

It is important to note that benefits should be sufficient to secure a decent standard of living for a worker and his/her family²⁴⁴. For example in the case of Estonia, the committee has noted that unemployment benefit which is calculated at 50 % of the amount earned in a previous job, may in some cases be insufficient²⁴⁵. There are also benefits (i.e old age benefits) that have to at least equal to the minimum subsistence level.²⁴⁶

As most of the benefits are connected to wages, the difference in wages of men and women can produce also a difference in benefits. The ComESCR discussed this connection in observing the report of Poland where different retirement age resulted in differences of pensions²⁴⁷.

Calculation and evaluation of benefits requires precise information on unemployment, the structure of labour force and labour market etc. Therefore the state has an obligation to keep precise statistics for proper analysis of benefits²⁴⁸. The state should also note changes in the family structure and act promptly to these new developments.²⁴⁹

²⁴²See discussion in Lamarche, 2002, p 93-94.

²⁴³The committee has stressed the importance of this benefit specially in transition countries. See e.g. ComESCR: Conclusion on Benin, 2002, para 33

²⁴⁴ComESCR: Conclusion on Estonia, 2002, para 40; ComESCR: Conclusion on Benin, 2002, para 36.

²⁴⁵ComESCR: Conclusion on Estonia, 2002, para 17.

²⁴⁶ComESCR: Conclusion on Russian Federation, 2003, para 50.

²⁴⁷ComESCR: Conclusion on Poland, 2002, para 19-20.

²⁴⁸ComESCR: Conclusion on Sudan, 2000, para 35,

²⁴⁹ComESCR: Conclusion on Solomon Islands, 2002, para 22. The Committee was concerned that breakup of the

The state is entitled to determine a qualifying period as might be considered necessary to preclude abuse²⁵⁰. The payments should be periodical. Duration of the payments and other possible limitations are provided by the convention²⁵¹. The CEACR has noted that all the the State is responsible for the due provision of the benefits and shall take all measures required for this purpose²⁵².

All risks have their specifications. Occurrence of some risks is inevitable to every person whereas the possible occurrence of other risks is slight. Therefore the ComESCR has dealt with some benefits more than the others.

Old-age benefit is one of benefits that affects great number of persons - this benefit relates to persons ability to work in certain age. ILO has adopted Convention no. 128 dealing exclusively with old-age benefit. The convention sets forth that the prescribed age for old-age benefit is 65 years or such age as is decided by the competent authority taking into consideration the working ability of elderly persons in the country concerned²⁵³. This benefit is meant to cover living costs after departure from the active labour market. Therefore stable and predictable financing of pensions, sufficient amount and timely payment are crucial in relation to this benefit.

Therefore states parties must take appropriate measures to establish general regimes of compulsory old-age insurance, starting at a particular age, to be prescribed by national law. In keeping with the recommendations contained in the two ILO Conventions mentioned above and Recommendation No 162, the States parties are invited to establish retirement age so that it is flexible, depending on the occupations performed and the working ability of elderly persons, with due regard to demographic, economic and social factors.²⁵⁴ The Covenant does not

traditional social support among relatives and the "wantok" system was not complemented and supported by some other forms of social assistance.

²⁵⁰Article 23

²⁵¹Article 24

²⁵²See e.g. CEACR: Spain 2002 para 1

²⁵³ILO Convention C 128, Article 26

²⁵⁴ComESCR: General Comment 6 Paras 27-28

provide for pensionable age instead it uses the standard of ILO Convention – 65 years. There should also be a possibility to retire at an earlier age²⁵⁵.

The level of pensions should suffice the recognized subsistence level²⁵⁶. The pensions should be clearly linked with previous employment²⁵⁷. However there should be a minimum pension incorporated into the system with the aim to remedy for previous inequalities²⁵⁸. Minimum level of protection should be given to those who have reached the pensionable age but have not been able to contribute to the system for a sufficient number of years²⁵⁹. Furthermore, States should, within the limits of available resources, provide non-contributory old-age benefits and other assistance for all older persons, who, when reaching the age prescribed in national legislation, have not completed a qualifying period of contribution and are not entitled to an old-age pension or other social security benefit or assistance and have no other source of income.²⁶⁰ All the pensions should be paid in time without arrears²⁶¹, with special attention to the most disadvantaged and marginalized groups that have no other mean of subsistence²⁶².

When a state is reforming its pension system, the changes must be based on research and statistical data. In relation to change of pension system in Bolivia, the CEACR has made the following observation:

“[...] In its report, the Government states that no draft amendments to the new Act on pensions are planned with regard to the age of eligibility for a pension, which is set at 65 years. The Committee notes this information. It recalls that under the previous legislation the pensionable age was fixed at 50 years for women and 55 years for men. It requests the Government to indicate, with the support of statistics, the demographic,

²⁵⁵See e.g. ComESCR: Conclusion on Japan, 2001, para 50

²⁵⁶See e.g. ComESCR: Conclusion on Ukraine, 2001 para 9

²⁵⁷ComESCR: Conclusion on Georgia, 2002 para 35

²⁵⁸See e.g. ComESCR: Conclusion on Japan, 2001, para 51

²⁵⁹See e.g. ComESCR: Conclusion on Republic of Korea, 2001 para 23

²⁶⁰ComESCR: General Comment 6 para 30

²⁶¹See e.g. ComESCR: Conclusion on Ukraine, 2001 para 14; ComESCR: Conclusion on Kyrgyzstan, 2000 para 14

²⁶²ComESCR: Conclusion on Georgia, 2002 para 35

economic and social criteria justifying the determination of the age of eligibility to a pension at 65 years since, in view of the observations made previously by the Bolivia Central of Workers (COB), the average life expectancy is well below this age (61.86 years for men and 67.1 for women according to the World Factbook 2002; moreover, according to the same source, persons aged 65 years and over only represent 4.5 per cent of the population).

Furthermore, the Committee once again draws the Government's attention to the fact that, in accordance with Article 15, paragraph 3, of the Convention, the age for entitlement to a pension shall be less than 65 years in respect of persons who have been engaged in occupations that are deemed to be arduous or unhealthy. It trusts that the Government will be able to indicate in its next report the measures which have been taken or are envisaged to give full effect to this provision of the Convention.[...]"²⁶³

The minimum amount of the of the old-age pensions prescribed by the Convention is 45 per cent of the reference wage when the insured person has completed 30 years of contribution or employment²⁶⁴. The rates of old-age and survivors' pensions should be reviewed periodically following substantial changes in the general level of earnings or substantial changes in the cost of living²⁶⁵.

Employment injury branch obliges states first and foremost to take all precautionary measures to prevent employment injuries. States parties are required to formulate, implement and periodically review a coherent national policy to minimize the risk of occupational accidents and diseases, as well as to provide a coherent national policy on occupational safety and health services²⁶⁶. Within the social security scheme, the state has to provide also financial assistance in the case of employment injury.

In relation to **family benefit** the ComESCR has urged to provide greater support to single-

²⁶³CEACR: Bolivia, 2003, para 5.

²⁶⁴CEACR: Bolivia, 2003, para 2 (b).

²⁶⁵See e.g. CEACR: Bolivia, 2003, para 6.

²⁶⁶ComESCR: General Comment 14, para 36. Elements of such a policy are the identification, determination, authorization and control of dangerous materials, equipment, substances, agents and work processes; the provision of health information to workers and the provision, if needed, of adequate protective clothing and equipment; the enforcement of laws and regulations through adequate inspection; the requirement of notification of occupational accidents and diseases, the conduct of inquiries into serious accidents and diseases, and the production of annual statistics; the protection of workers and their representatives from disciplinary measures for actions properly taken by them in conformity with such a policy; and the provision of occupational health services with essentially preventive functions.

parent families²⁶⁷. All the reforms of the social security systems should take specially into consideration the needs of the families²⁶⁸. Family benefits concern also children and according to ComESCR, poverty of children should be dealt with as a matter of urgency²⁶⁹. Even under severe resource constraints states parties are obliged to protect the vulnerable groups of society²⁷⁰.

Persons with disabilities are covered by invalidity benefit. The ComECSR has stated, that social security and income-maintenance schemes are of particular importance for persons with disabilities²⁷¹. The Standard Rules on the Equalization of Opportunities for Persons with Disabilities state, “States should ensure the provision of adequate income support to persons with disabilities who, owing to disability or disability-related factors, have temporarily lost or received a reduction in their income or have been denied employment opportunities”.²⁷² One way of increasing the social protection of the disabled is using positive measures such as a quota system. These measures are not obligatory but when these systems are being introduced, effective implementation should also be guaranteed²⁷³.

Support should reflect the special needs for assistance and other expenses often associated with disability. In addition, as far as possible, the support provided should also cover individuals who undertake the care of a person with disabilities. Such persons are often in urgent need of financial support because of their assistance role.²⁷⁴

Institutionalization of persons with disabilities cannot be regarded as an adequate substitute for the social security and income-support rights of such persons.²⁷⁵

²⁶⁷ComESCR: Conclusion on Iceland, 2003, para 26.

²⁶⁸ComESCR: Conclusion on Germany, 2001, para 23.

²⁶⁹See e.g. ComESCR: Conclusion on Mongolia, 2000, para 13.

²⁷⁰ComESCR: General Comment 3, para 12.

²⁷¹ComESCR: General Comment 5, para 28.

²⁷²Equal Opportunities for Persons with Disabilities, rule 8, para 1.

²⁷³ComESCR: Conclusion on Republic of Korea, 2001, para 24.

²⁷⁴ComESCR: General Comment 5, para 28. The ComECSR also noted that these caretakers are mainly women and family members of the disabled person.

²⁷⁵ComESCR: General Comment 5, para 29. There have to be other considerations for initiating the institutional-

2.5 Administration of the system

ILO Convention 102 has been drawn up so as to leave great flexibility to member states in the method of organizing the schemes providing benefits. There are however contain general principles that have to be taken into account irrespective of the of the type of scheme established.

The Convention allows both private and public schemes when they comply within fundamental principles of organization and management of the system.²⁷⁶

First, the state has general responsibility for the proper administration of the institutions and services concerned in securing the protection envisaged in the Convention. The responsibility of the state also covers the provision of benefits. Irrespective of the method of financing adopted, the competent authorities are under obligation to take all necessary measures to ensure that benefits are duly provided. This includes periodic studies on the equilibrium of benefits and living standard, monitoring of social security spendings (building confidence in the social security system).²⁷⁷

Second, participation of insured persons in the administration of social security system should also be organized by the state. When the administration is not entrusted to an institution regulated by public authority or to a government department, the representatives of the persons protected must participate in its management or have consultative capacities.²⁷⁸

Third, the cost of the benefits and the cost of the administration should be born collectively by way of insurance contributions, taxation or both.²⁷⁹ The method of financing must avoid hardship to persons, therefore article 71(2) specifies that the total of the insurance contributions borne by the employees must not exceed 50% of the total of financial resources allocated for protection.

Fourth, article 70 of the ILO Convention 102 provides right to appeal of claimants in the
ization.

²⁷⁶Humblet and Silva, 2002, p 11

²⁷⁷Humblet and Silva, 2002, p 12, CEACR: Netherlands, 2003.

²⁷⁸Article 72 of the ILO Convention 102.

²⁷⁹Article 71 of the ILO Convention 102.

event of refusal of a benefit or in relation to other questions regulated in the Convention.

2.6 Progressive development

As discussed in Chapter II, one of the general obligation under the CDESCR is progressive implementation of social rights. Due to demographic changes and economic problems deriving from that, there is a tendency of reforming social security systems. This has happened to coverage as well as level of benefits and state involvement. Therefore, both the ComDESCR and EDESCR have had to deal with social security reforms.

Decrease in state expenditure on the social security benefits as well as elimination of subsidies might not be in conformity with state obligations under article 9.²⁸⁰ All changes of social security system require thorough analysis including the effects of the change on the most disadvantaged and marginalized sectors of the society, including for example the unemployed and underemployed, the homeless and those living in poverty and mothers.²⁸¹

As the social welfare system is complex and has a range of different social security benefits, assistance measures and entitlement conditions, the ComDESCR has recommended that during the reforms, the state party should widely disseminate accessible information on the system to all, and especially to those who, owing to language, educational or cultural difficulties, need specific targeted information.²⁸²

When analysing the reforms, the ComDESCR usually welcomes the reform when it enhances the situation of previously marginalized groups. However, the concerns over confinement of costs should not lead to a decrease in the level of effective social protection.²⁸³

3 Conclusion

As discussed above, Human Rights Committee has been eagerly following the interdependence approach and right to social security has received lot of protection through non-

²⁸⁰ComDESCR: Conclusion on Algeria, 2001, para 20.

²⁸¹ComDESCR: Conclusion on Croatia, 2001, para 34. The ComDESCR paid special attention to health care benefits but this conclusion can be generalized on the whole social security system.

²⁸²ComDESCR: Conclusion on New Zealand, 2003, para 29.

²⁸³ComDESCR: Conclusion on New Zealand, 2003, para 28.

discrimination and right to access to court. The advantage of the CCPR and HRC approach is that non-discrimination is a self-standing right that should be applied in every domestic legal act and thus, all acts in principle should also be challenged in light to this principle.

In relation to right to social security as protected by article 9 of CDESCR, first and foremost, the states have to indicate, whether there exists the system of social security and whom it covers²⁸⁴ i.e. the obligation to respect and protect persons right to social security. As shown above, right to social security has numerous different elements for the social security system satisfy the requirements of CDESCR art 9. Observance of the material scope of this provision can be done through legislation when creating social security system.

Thus, the central measures are adoption of legislation and policy creation. As an example, it would be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures. The ComESCR has noted, that in fields such as health, the protection of children and mothers, and education, as well as in respect of other the obligations dealt with in article 9, legislation be an indispensable element for many purposes.²⁸⁵

Secondly, the coverage of the social security system is analyzed. The ComESCR recommends that universal coverage of the social security system should be striven for, giving priority to disadvantaged and marginalized groups in society²⁸⁶. Also, legislative and administrative measures should be taken by the state in order to oblige employers to respect labour legislation and to declare the persons they employ in order to reduce the number of illegal workers who do not enjoy the minimum protection of their right to social security and health care²⁸⁷.

ILO Conventions set forth alternative groups of persons to be covered by the social security system. Thus, it is generally up to the state to decide whom to cover. This however means that coverage for this group should be provided. Even when a state has not ratified relevant

²⁸⁴In Fact Sheet no 16, 1991, the ComECSR has noted that “/.../ a large number of states do not maintain adequate social security or social insurance provisions under domestic law protecting people /.../”.

²⁸⁵ComESCR: General Comment 3, para 4.

²⁸⁶See e.g. ComESCR: Conclusion on Jamaica, 2001, para 23.

²⁸⁷See e.g. ComESCR: Conclusion on Germany, 2001, para 38.

ILO conventions, the committee uses the same standards as set forth by these conventions.²⁸⁸ The coverage should use the maximum of the resources of the state and also provide for those in need.²⁸⁹ Thus it includes elements of obligation to protect and fulfil. Obligation to fulfil includes obligations to facilitate, provide and promote.

Thirdly, the development of the social security system is looked into. As the states have to insure progressive realization of the rights, there has to be growth in the coverage of the system as well as public spendings of the social security should be stable or increasing. When changing the system, it should have some positive effect on the lives of vulnerable groups²⁹⁰. All the changes in the social security systems, the information about the changes should be widely disseminated and accessible to all, taking into special consideration those who owing to language, educational or cultural differences need specific targeted information²⁹¹.

Fourthly, the question of participation. In relation to right to social security, equal treatment of women should not be provided only on the benefits stage but should also be a consideration in deciding who is eligible for the benefit and who is not. Thus, reforming labour relations is one precondition in providing equal access to women. The equality that is aimed for is not formal but substantial and equality in result should be striven for.

Last, there are state obligation connected to management and supervision of the system. It is up to the state to decide whether the social security system is based on public, private or mixed contribution system. It is however up to the state to be the guarantor of the system i.e. when the contributors or the institution set up to administer the social security system fail, the state is obliged to act in order to provide the agreed level of benefits.

State obligations in relation to CESCR are concluded in Table 11. It has to be noted, that

²⁸⁸See e.g. ComESCR: Conclusion on Colombia, 2001 paras. 18 and 39, where the ComESCR was concerned that 43% of Columbian population is not covered by the social security and obliged the state to take measures to ensure that the coverage of the social security system is significantly increased.

²⁸⁹The resources available should not be decreased even when there is a need to reduce national budget deficit. See e.g. ComESCR: Conclusion on Kyrgyzstan, 2000 para. 20

²⁹⁰The effects of changes of system should be analysed with special attention to disadvantaged and marginalized groups. See e.g. ComESCR: Conclusion on Algeria, 2001 para. 36; ComESCR: Conclusion on Croatia, 2001 para. 34.

²⁹¹See e.g. ComESCR: Conclusion on New Zealand, 2003 para. 29

number of obligations had elements of two or more types of obligations, thus, the current division is not intended to be absolute. The position of number of obligations can be disputed.

Table 11: State obligations under CESC

<i>Obligation</i>		<i>Immediate</i>	<i>Progressive</i>
<i>Respect</i>		<ul style="list-style-type: none"> - Prohibition to adopt laws or policies incompatible with the social security standards set forth. - The duty to avoid depriving individuals of the possibility to pay social insurance contributions based on their own work and family situation. - The duty to abstain from depriving individuals of the means of subsistence. - Duty to abstain from interfering with the private social security systems when they follow the rules set forth by the state and international norms. - Obligation to adopt legislation for the creation of social security system: <ol style="list-style-type: none"> 1. selection of social security branches; 2. selection of coverage; 3. selection of financing system; 4. regulation of the administration and control. - Adoption of non-discrimination legislation as well as abstaining from discriminatory practices as a state policy in relation to Social security. - Adoption of immediate measures towards full enjoyment of rights. 	<ul style="list-style-type: none"> - universal coverage of all nine social security branches; - obligation to review periodically adopted legislation, make necessary amendments. - periodic review of social security benefits; - periodic review of state budget and increased revision of allocation for social security.
<i>Protect</i>		<ul style="list-style-type: none"> - Ensure, that private parties do not interfere into persons savings and payment of social security contribution. - in regard to private or combined schemes, control and review the activities of the actors, provide participation of to protected persons in controlling private social security associations. - creation of appeals system for claimants of the benefits. - Obligation to uphold the principle of non-discrimination in legislation or to take other measures ensuring equal access to the enjoyment of rights - prevent any direct or indirect discrimination in relation to enjoyment of rights. 	<ul style="list-style-type: none"> - to protect vulnerable and marginalized groups in the society. - adopt specific programmes for the support of the most vulnerable groups.

<i>Obligation</i>		<i>Immediate</i>	<i>Progressive</i>
<i>Fulfil</i>	<i>Facilitate</i>	<ul style="list-style-type: none"> - keep adequate statistics for calculation of social security benefits. - keep adequate population registration database, statistic on labour force as well as on receivers of benefits. 	<ul style="list-style-type: none"> - create labour policies enabling people to re-enter the labour market; - guarantee stable financing of the social security system; - aim for economy with marginal un-official labour market;
	<i>Provide</i>	<ul style="list-style-type: none"> - in the cases where social security system requires, provide social security benefits also to people who, for reasons beyond their control, have not fulfilled qualifying requirements (i.e. pensions, minimum health care benefits etc.). - guarantee provision of benefits on the agreed level. 	<ul style="list-style-type: none"> - support social security measures with social assistance; - meet individual's specific needs for entering her into the labour market.
	<i>Promote</i>		<ul style="list-style-type: none"> - disseminate information on social security benefits widely with special attention on marginalised groups and disadvantaged regions.

Although there is no case-law by the ComESCR, it has given some indications on the justiciability of the obligations in its General Comments. There is no doubt on the justiciability of non-discrimination provision as well as right to effective remedy.²⁹² Elements concerning participation of contributors in the supervision should also be justiciable as well as challenging policies and legislation not in conformity with the purpose and aim of CESCR.

²⁹²ComESCR: General Comment 9, para 9.

IV Social Security in European Legal Instruments

Right to social security in the European Legal framework is legislated in following regional instruments:

1. European Code of Social Security (1964); Protocol to the Code (1964); Revised Code (1990);
2. European Social Charter and Revised ESC article 12: (reference to ILO Convention 102 (ESC) and to the European Code of Social Security (Revised ESC); supervisory body: European Committee of Social Rights);
3. European Convention of Human Rights Additional Protocol no 1, article 1 - Protection of saved contributions; supervised by the Court of Human Rights;
4. EU draft constitutional treaty and national constitutions (basic rights);
5. National laws: constitutions, other legislation, collective agreements, case law;
6. Coordination rules (EU co-ordination regulation 1408/71, Art. 12§4 of the European Social Charter).

As the current thesis deals with international state obligations in protecting right to social security, it does not include the latter three legal sources. Two central instruments looked under the current chapter are European Convention of Human Rights and European Social Charter.

ECHR and the practice of the ECtHR uses the interdependence approach and has included social security benefits under the notion of property, where principle of non-discrimination is applicable. ESC and the Revised Charter have separate provisions on rights to social security and social assistance.

M. Mikkola has proposed that there are three different traditions of right to social security in the Europe²⁹³:

1. European Community. European Community law has legislated right to social security in relation to free movement of persons. The Community has according to articles 48 and 49 of Treaty of Rome legislative competence in questions of social

²⁹³Mikkola, 2004

security relating to free movement of persons. EU regulations concern transfer of social security benefits while moving within EU. Also, Council co-ordination regulation 1408/71²⁹⁴ provides for coordination of national social security legislation in order to protect the social security rights of persons moving within the European Union.

2. EFTA (United Kingdom, Scandinavia and Portugal). There are no common rules of social security. Co-ordination rules are available only in Scandinavia. Nevertheless, the models of social security are quite similar having the following characteristics: universal benefits for citizens and work-related cash benefits as additional protection. Scandinavian model includes social assistance in the concept of social security.
3. Former Soviet bloc. There were framework laws of the Union of Soviet Socialist Republics in relation to social security where social security was work-related. However, this was in the situation of formal full employment. It provided for universal cash benefits for all and additional increase based on length of service and level of wage. These systems are now in transition trying to find best social security models for their countries.

The approach used in the Council of Europe's social security legislation is a combination of these systems and includes social insurance, family benefits and financing of health care.

Current chapter discusses the central elements of social security first under the European Convention of Human Rights and secondly under the European Social Charter.

First part of the Chapter analyses the interdependence approach used by the ECtHR when discussing the right to social security under the principle of non-discrimination in conjunction with right to property as well the right to access to courts.

Secondly, right to social security is analysed in the European Social Charter and the practice of the European Committee of Social Rights. It is firstly necessary to differentiate between right to social security and social assistance - articles 12 and 13 - comprising of different commitments. Then the essential minimum elements of social security are discussed as

²⁹⁴Amended by regulation no 307/1999

understood by the ECSR. The ESC refers to ILO Convention no 102 and the Revised ESC refers to European Code of Social Security.²⁹⁵ As ILO Convention no 102 was dealt with in the previous chapter, current chapter uses ECSS.

1 European Convention of Human Rights and ECtHR

It has been long since the ECtHR recognized for the first time that the fulfilment of a duty under the Convention sometimes require positive action, that there are no watertight division between two sets of rights and that ECHR is a living instrument in line with developments in societies. However, the ECtHR has not developed a general theory of positive obligations.²⁹⁶

European Convention on Human Rights and the ECtHR has dealt with right to social security under two different concepts. Firstly, it has included the right to social security under right to property as protected with Additional protocol 1 article 1. Secondly, it has analysed the right to social security under article 6 of the Convention.

The European Convention on Human Rights does not protect right to social security *per se*. There are however a number of cases where the ECtHR has been dealing with right to social security under the non-discrimination clause. Article 14 of the convention is a non-discrimination clause and states:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Non-discrimination principle in the Convention is not a self-standing rights²⁹⁷. It is limited to outlawing discrimination that occurs in the enjoyment of the human rights otherwise protected under the ECHR. As a consequence, there is no right to complain to the European Court of Human Rights merely on the basis that the law or practice of a given country discriminates in the field of social security. Therefore, the ECtHR has often used the fair trial

²⁹⁵The ESC refers to ILO Convention 102 whereas the revised ESC uses standards of ECSS.

²⁹⁶Koch, 2002, p 33

²⁹⁷This is changed by Protocol 12 to the Convention creating self-standing right of non-discrimination. As of 1. June 2004 this protocol is not in force.

(article 6 of the Convention) or right to property as a bases of giving protection also to economic and social rights. Violation of non-discrimination clause can be only found in conjunction with another article but without finding a violation of the other article in question.²⁹⁸

1.1 Right to a fair trial

In the case of *Feldbrugge v. the Netherlands*²⁹⁹, the Commission held that article 6§1 of the Convention was not applicable to the proceedings complained of as insurance against sickness was compulsory under the legislation concerned and the health insurance was managed partly by state. The court however took different view. It considered the fact that in many other countries similar social security is based on private law. The great diversity of approach of different Member States made it difficult to find common standards. The entitlement Mrs. Feldbrugge appealed for had both public and private law features but the private law features were predominant. It held that the article 6§1 was applicable.

The judgement of *Feldbrugge* was accompanied with similar ruling in the case of *Deumeland v. Germany*³⁰⁰ which related to German social security. Finally, in the case of *Salesi v. Italy*³⁰¹ the Court ruled that:

“[...] the development in the law that was initiated by those judgements and the principle of equality of treatment warrant taking the view that today the general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance.”³⁰²

This principle was confirmed by subsequent case-law. In the case of *Schuler-Zraggen v. Switzerland*³⁰³ non-discrimination clause was used in conjunction with fair trial principle. Art-

²⁹⁸See generally Dijk and Hoof, 1990, p 532-548; Gomien et al, 1996, p 345-56

²⁹⁹ECtHR: *Feldbrugge v. the Netherlands*. The applicant was no longer entitled to the sickness allowance she has received previously as the consulting doctor had judged her fit to resume work. Mrs. Feldbrugge appealed this decision and after consultation with four other doctors it was finally found that she was indeed fit to resume employment after what she appealed to the ECtHR saying that she has not had a fair trial.

³⁰⁰ECtHR: *Deumeland v. Germany*.

³⁰¹ECtHR: *Salesi v. Italy*.

³⁰²Para. 19 of ECtHR: *Salesi v. Italy*.

³⁰³ECtHR: *Schuler-Zraggen v Switzerland*. Mrs. Schuler-Zraggen, who had contributed to the state invalidity insurance from her wages when working, contracted tuberculosis and was granted an invalidity pension when it was determined that she was unfit for work. She gave birth to a son in 1984 and, after being required to undergo

icle 6 of the Convention was extended to statute-based social security benefits with a public-law character. In *Schuler-Zgraggen* the Court found that that the right to an invalidity pension was an individual, economic right to which Art 6§1 applied. The court found that the state had not attempted to probe the validity of the assumption that women give up work when they give birth to a child and this was the sole basis for the insurance court's reasoning. This assumption introduced a difference of treatment based on the ground of sex only without any reasonable and objective justification and was a violation of Art 14 taken together with Art 6§1.

1.2 Right to property

The next development of social security case-law was taken in the case of *Gaygusuz v. Austria*³⁰⁴ where the ECtHR addressed non-discrimination based on nationality in the field of social benefits. The court had problems applying fair trial clause as it presupposed that right to social security was an individual right under national law. This was not the case in Austria. Thus, the Court applied the property clause in article 1 of Protocol 1. It was sufficient to establish a link between the social security and right to property.

The court stated that the emergency assistance as a pecuniary rights:

*"The Court considers that the right to emergency assistance in so far as provided for in the applicable legislation - is a pecuniary right for the purposes of Article 1 of Protocol No. 1 (P1-1). That provision (P1-1) is therefore applicable without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions"."*³⁰⁵

In 1997 the court decided the case of *van Raalte v. The Netherlands*³⁰⁶. Here the link was

a medical examination, her pension was cancelled with effect from May 1986 as her family circumstances had changed and she was partly able to look after her home and child meaning that she had gained some working abilities.

³⁰⁴ECtHR: *Gaygusuz v. Austria*

³⁰⁵ECtHR: *Gaygusuz v. Austria*, para 41 of the decision

³⁰⁶ECtHR: *van Raalte v. The Netherlands*. The case concerned the obligation to make contributions under a social security scheme related to child-care benefits. In the Netherlands, an unmarried women without a child over 45 years of age was exempted from the obligation to pay contributions under the General Child Care Benefits Act whereas a man in the same situation continued to have an obligation to pay this contribution. The applicant, an unmarried man with no children filed an objection to the tax authorities stating that the exemption should be extended also to men in the same situation.

made between the payment of taxes and right to property as protected by article 1 of Protocol 1. The court discussed here the obligation to pay contributions and the right to be exempted from them. The court found that there was a difference in treatment based on gender and found that this treatment was not justified. Although the states enjoy a wide margin of appreciation in assessing whether different treatment is justified, very strong arguments should be made before the court could regard the difference in treatment based solely on the ground of sex as being compatible with the Convention.

2 European Social Charter

Right to social security is protected through article 12 of the ESC. It is part of the Charter's hard-core³⁰⁷. Social security is a general right that covers the overall characteristics of social security systems. Social security is also a decisive factor in guaranteeing for example the right of employed women to the remuneration in the event of childbirth as provided in article 8 § 1, the right to economic protection of families provided in article 16 and the right of elderly to adequate resources guaranteed by article 4 of the Additional Protocol. These provisions concern the groups that are under special protection in ESC.

Article 12 of the ESC:

1. Establishes the principle of the institution or the maintenance of a social security system and defines a minimum level for this system (12§1);
2. Defines a minimum level for this system by reference to ILO Convention 102 and European Social Code in the Revised Charter (12§2);
3. Provides that the system is progressively being brought up to a higher level (12§3);
4. Encourages measures to ensure equality of treatment between the nationals Contracting parties as well as the granting, maintenance and resumption of social security rights (12 § 4).³⁰⁸

³⁰⁷Part III Article A§1(b) of the ESC and revised ESC provides that Member states undertake to consider itself bound by at least six of the following nine articles of Part II of this Charter: Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20. These articles are considered to be the hard-core obligations.

³⁰⁸As the practice of ESCR has been particularly diverse on this subject, current research does not analyse oblig-

As stated by the ECSR, right to social security has to be of general nature as it deals with complexity of matters.³⁰⁹ Social security includes both universal schemes as well as professional ones³¹⁰. The notion of a social security system in the European Social Charter implies that a significant proportion of the population is covered by a system in essence based on collective funding and that the social risks which are considered essential must be covered by the system. Further the State must be the guarantor of contributions.³¹¹ Thus, article 12 ESC includes contributory, non-contributory and combined allowances related to certain risks.³¹² Financing of the contributions is based on solidarity. Also, the funds should be collectively administered.³¹³

The minimal requirements for social security system as set out by the Committees case-law are as follows³¹⁴.

1. Adequacy of the system (article 12§1 and 12§2):

1. The social security system must offer benefits in all the nine traditional branches;
2. The system must cover a significant percentage of the population; health care and maternity services as well as child allowances and guaranteed income for the elderly should cover the whole population;
3. The system must be based on the principle of collective funding and managed under the supervision of the public authorities, with the state as ultimate guarantor of contributions;

4. Minimum level of benefits:

1. For adult persons: 50% of the equivalized median income;
2. Child allowance: means tested or flat rate, 4-8 % of the median income;

ations deriving from article 12 § 4. Good overview on this subject can be found in Samuel, 2002, p 283.

³⁰⁹ECSR: C I, General observations P 62

³¹⁰Samuel, 2002, p 285

³¹¹ECSR: C XVI-1, General Introduction, p 10 para 8

³¹²ECSR: C 2002, ESC Rev., Romania, p 146-147

³¹³ECSR: C XIII-5, Portugal, p 215-218

³¹⁴ECSR: C XVI-1, General Introduction p 10-11

5. Respect of non-discrimination clause (ethnic and other minorities).
2. Progressive development (article 12§3):
 1. States must take constant efforts to improve the system in terms of material and personal scope and level of protection afforded;
 2. States must ensure that the changes to the social security systems do not unduly restrict the scope and level of social security provision;
 3. Restrictions are acceptable if they aim at attaining a improved sustainability of the social security system, not discriminating any group of people and always affording protection above the level of last resort social assistance.

2.1 Social security or social assistance

There is a tendency in European social security systems towards the expansion both of the categories of persons protected and the range of benefits paid and, in several cases, towards the creation of benefits unconnected with the completion of periods of contribution. Also, the system of social protection often does not include or no longer included any distinction between social security and social assistance benefits.

There are often systems that include combination of social security and social assistance (e.g. subsistence allowance combined with elements of social assistance, assistance for students, assistance for people with disability).

The ECSR in its reporting takes into account the opinion of the state concerned as to whether under domestic law a particular benefit falls under the social security or social assistance. The Committee discussed the dichotomy between social security and social assistance in the Reporting cycle XIII-4³¹⁵ and stressed that these rights in in two separate Articles (Article 12 and Article 13) carry different undertakings and although the Committee looks at how the state has defined the benefit, it pays most attention on the purpose of and the conditions attached to the benefit in question.

It thus considers as social assistance benefits for which individual need is the main criterion for eligibility, without any requirement of affiliation to a social security scheme aimed

³¹⁵ECSR: C XIII-4, General Introduction p 35-37

to cover a particular risk, or any requirement of professional activity or payment of contributions. Moreover, as Article 13 § 1 demonstrates, assistance is given when no social security benefit ensures that the person concerned has sufficient resources or the means to meet the cost of treatment necessary in his or her state of health.

Social security, which includes universal schemes as well as professional ones, is seen by the Committee in its application of Article 12 of the Charter as including contributory, non-contributory and combined allowances related to certain risks (sickness, disablement, maternity, family, unemployment, old age, death, widowhood, vocational accidents and illnesses). These are benefits granted in the event of risks which arise but they are not intended to compensate for a potential state of need which could result from the risk itself.

When the Committee does not feel that it possesses sufficient data on some benefits, it asks the Contracting Party concerned to provide additional information in order for it to be in a position to assess whether the benefits in question should be examined in connection with social security or with social assistance.

The Committee has in its conclusions been aware of the fact that the distinguishing criteria retained are imperfect and that border-line cases exist (which are tending to multiply) so that the division no longer corresponds entirely to the current situation as regards the European systems of social protection characterised by their complexity and their varying structures, the result of successive reforms and which often put social security and social assistance together. However, it has observed that this distinction of social security and social assistance has been maintained in the revised Social Charter and was not questioned by the member states of the Council of Europe during discussion on this new instrument.

The Committee discusses social security system as a whole under article 12, some elements of the system are however more profoundly examined under other articles. The right to medical care primarily under Article 11, the right to family benefits under Article 16 and the right to old age pensions under Article 23 of the Revised Charter³¹⁶.

³¹⁶See ECSR: C XVI-1, General Introduction, para 8, p 11

2.2 ILO Convention 102 and European Code of Social Security

Article 12§2 provides that the social security system should be maintained at a satisfactory level at least equal to that required for ratification of the ILO Convention no 102. Revised Charter makes reference to the European Code of Social Security. The same has been confirmed by the case-law of the Committee.³¹⁷

As stated in the discussion of CESCR, to ratify ILO Convention No 102, a state must accept three of the nine social security branches, one of which must concern unemployment, old age, employment accident, invalidity or survivors' benefits. The Committee therefore considers that a state which is not in compliance with at least three parts of the Convention No. 102 does not fulfil Article 12, para. 2 of the Charter either.³¹⁸

The Committee verifies whether the ILO Committee of Experts has expressed any reservations as to full compliance with the accepted parts. Since most states that have ratified the Charter are also bound by the Convention, the supervision carried out by the Committee is of an indirect type, based on the conclusions of the ILO Committee. The ECSR observes whether the ILO Committee of experts has stated anything in this regard. As most of the states who have ratified the Charter are also members of the relevant ILO convention, the supervision of the ECSR is rather limited and indirect and bases itself on the conclusions of the findings of the ILO Committee of experts.

However, Article 12§2 does not necessarily require the ratification of ILO Convention but requires that the states comply with three branches of Convention No. 102 regardless of whether they have ratified the convention or not. Thus, if state has not ratified the ILO Convention 102 and its legislation and practice are not monitored by ILO, the ECSR itself examines whether that state fulfils the minimum standards³¹⁹. It is not considered to be suffi-

³¹⁷See e.g. ECSR: C XIV-1, Turkey, p 766; ECSR: C 2002, ESC Rev., France, p 36-37; Italy, p 72

³¹⁸So far, there have been three cases of non conformity. ECSR: C IV, Austria, p. 81; ECSR: C IX-2, Addendum, Spain, p. 32; ECSR: C II, Cyprus, p. 191. The case of Cyprus differed as it recognized itself that it does not comply with art. 12 para. 2 of the Charter. The situation was remedied by all three countries. In number of cases, the Committee has deferred its conclusions as it did not have enough information. See e.g. ECSR: C XV-2, add., Slovak Republic, p. 207

³¹⁹See e.g. ECSR: C XVI-1, Poland, p 541-542; ECSR: C XII-2, p 176 and ECSR: C XIII-2, p 339 on Malta, where on 1993, the ECSR deferred its conclusion and asked for further information and in 1995 found that

cient for the state merely to ratify the ILO Convention 102. the legislation and practice of a state has to be fully compliant with the standards of the convention in the branches accepted³²⁰.

In the beginning of the practice of the ECSR, there have been cases when state is considered as complying with article 12§2 even though the ILO Committee of Experts has found them as not complying with particular branch of the convention. This happened when a state accepted greater number of parts than the minimum required for ratification of the Convention.³²¹

When a state has ratified more specific conventions of the ILO, which also provide for higher standards³²², the corresponding of ILO Convention no. 102 cease to apply and the ECSR adheres the conclusions of the ILO Committee of Experts concerning the application of these conventions³²³. When a state has not ratified Convention 102 but has ratified at least 3 ILO Conventions providing higher standards, a state is considered to be in compliance with article 12§2³²⁴. When a state has ratified European Code of Social Security and complies with its standards, the ECSR does not analyse the application of ILO Convention 102 but considers that the state complies with its obligations³²⁵.

The Revised Charter amends Article 12§2 and makes reference to the standard required for the ratification of the ESC that of European Code of Social Security. The standards enshrined in the Code concluded by the Council of Europe in 1964 are virtually identical to those of ILO Convention No. 102. The main differences lie in the fact that when ratifying the Code states must accept six parts, not three.³²⁶

Malta in fact did comply with article 12§2.

³²⁰ECSR: C XV-2, add., Slovak Republic, p 207

³²¹ECSR: C I, p 62

³²²See e.g. ILO Convention C 128, ILO Convention C 121, ILO Convention C 130

³²³ECSR: C 2002, ESC Rev., Slovenia, p 200

³²⁴ECSR: C XIII-3, Finland, p 354.

³²⁵See e.g. ECSR: C XVI-1, Netherlands, p 448; ECSR: C XVI-1, Belgium, p 72. It should be recalled that the monitoring of the implementation of ECSS is also made by the ILO Committee of Experts. See also Nickless, 2002, p 25-27

³²⁶It is the ILO Committee of Experts which monitors the implementation of the Code by the Contracting Parties.

Thus, the ECSR also considers whether states applies the ECSS and its Protocol. As discussed stated above, compliance with ECSS is considered to fulfil the requirements of article 12§2 of the ECS. The Revised Charter makes reference to the European Code and during its 2002 reporting period, the committee for the first time analysed the application of revised charter and ECSS³²⁷. When assessing the compliance with revised article 12§2, the committee takes into account the Resolutions of the Committee of Ministers on application of the Code³²⁸. When a state has not ratified the Code, the Committee applies same procedure as in the case when a state has not ratified the ILO Convention 102³²⁹.

During cycle XIII-3, when addressing the case of a Finland which had not ratified Convention No. 102, the Committee noted that Finland had ratified several other ILO conventions which provide higher levels of protection: the Employment Injury Benefits Convention (No. 121, 1964), the Invalidity, Old-Age and Survivors' Benefits Convention (No. 128, 1967), the Medical Care and Sickness Benefits Convention (No. 130, 1969), the Employment Promotion and Protection against Unemployment Convention (No. 168, 1988), so that the undertakings accepted by Finland covered a greater number of branches than was necessary to ratify Convention No. 102. The Committee consequently considered that Finland complied with the requirements of Article 12§2.³³⁰ By accepting Article 12§1, states undertake "to establish or maintain a system of social security" and they comply with this provision when their social security system covers "certain major risks". The Committee is nevertheless not satisfied by the mere existence of a social security system: it ensures that the system in ques-

Its conclusions are then examined by the Council of Europe's European Social Cohesion Committee (ESCC), which in turn submits a report to the Committee of Ministers. Finally, the Committee of Ministers adopts a resolution stating whether the parties to the Code have honoured their obligations.

³²⁷ECSR: C 2002, ESC Rev.

³²⁸ECSR: C 2002, ESC Rev., Italy, p 88-89; Sweden p 243.

³²⁹Romania has not ratified the ECSS but intends to do so. Thus, in its conclusions ECSR: C 2002, ESC Rev., Romania, p 147 the committee defers its conclusion. Slovenia has also not ratified the Code but has ratified ILO Convention 102 and 121. Thus, the committee examines itself whether Slovenia complies with the requirements but takes also into account the ILO Committee of experts opinions. As Slovenia did not provide enough information, the committee defers its conclusion. ECSR: C 2002, ESC Rev., Slovenia, p 200.

³³⁰ECSR: C XIII-3, Finland, p 354

tion covers a significant percentage of the population and at least offers effective benefits in several areas.³³¹

2.3 Material scope

By accepting Article 12§1, states undertake "to establish or maintain a system of social security" and they comply with this provision when their social security system covers "certain major risks". The Committee is nevertheless not satisfied by the mere existence of a social security system: it ensures that the system in question covers a significant percentage of the population and at least offers effective benefits in several areas.³³²

The social security system must cover at least at the basic level the following six risks from the traditional nine: unemployment; sickness; maternity; old age; family; health. The level of protection and precise description of these risks are defined in ILO Convention no 102 for the Charter of 1961 and ECSS for the revised Charter.³³³

In its early conclusions the Committee considered that a social security scheme existed insofar as the legislation provided for a number of social security benefits within the following three branches: pension insurance, employment accident insurance and health insurance. However, since then, the Committee's case law has evolved, reflecting the increasingly highly developed nature of social security systems themselves. Nowadays, it would be inconceivable for the Committee to acknowledge the existence of a social security system where there were no benefits in kind for sickness and maternity and no family benefit, for example, as it did in the case of Cyprus in 1972-1973.³³⁴

In its first conclusions, the committee considered that social security system existed when there was in fact a social security system.³³⁵ In its following conclusions, the Committee star-

³³¹See ECSR: C XIII-4, General Introduction p 37

³³²See ECSR: C XIII-4, General Introduction p 37

³³³See e.g. Samuel, 2002, p 286

³³⁴ECSR: C IV, Cyprus, p 81. Prior to coming round to this conclusion, the Committee had concluded in Conclusions II and III that there "were numerous inadequacies in the cover afforded against certain risks and, in respect of certain branches, a rather low level of benefits" warranting "serious doubt as to whether the measures in force could be termed a social security system", leading the Committee to adopt a conclusion of non-conformity. This is the only example of non-compliance with Article 12§1 to have been observed to date.

³³⁵ECSR: C I, Italy, Denmark, Norway, Sweden and United Kingdom, p 62

ted referring on ILO Convention 102 and the risks covered by it.³³⁶ Today, the committee observes whether all nine traditional branches of social security are covered by the social security system.³³⁷ Nine traditional branches of social security have remained the same.

When assessing compliance with article 12§2, the committee relies on the practice of ILO Committee. This however does not mean that the Committee has not substantiated the right to social security separately from the ILO. The Committee has done so under article 12§1 of the Charter.

As the nine risks have been defined already in 1951 and have remained the same for more than fifty years, the Committee in its Conclusions 2002 and XVI-1 decided to review the content of article 12 paras 1, 2 and 3³³⁸ and examine whether all nine risks are still relevant and whether new risks have been accepted or should be covered.

Social risks that are considered essential must be covered by the system.³³⁹ In its Conclusions 2004 on revised ESC on Estonia, the ECSR stated that article 12§1 of the Charter requires all nine risks to be covered. This does not however mean that there have to be separate benefits for all the risks. The criteria is whether the risks are covered or not. In the case of Estonia, the social security system comprised of six main components which together covered all the traditional risks.³⁴⁰ It is important to note that not only are the all nine risks to be covered by the system, the level of benefits should also be adequate.

The social security system must offer effective benefits in the most important branches. The Committee has sought to ascertain that the benefits, particularly income-substituting benefits, are in line with the cost of living³⁴¹ and whether they afford effective protection against the main social and economic risks³⁴², however without defining specific criteria or

³³⁶See e.g. ECSR: C III, Austria, p 62 where the Committee enumerates 8 risks.

³³⁷See e.g. ECSR: C XIII-2, Belgium, p 335; ECSR: C XIII-3, Finland, p 352

³³⁸ECSR: C 2002, ESC Rev., General Introduction, p 7; ECSR: C XVI-1, General Introduction, p 10

³³⁹ECSR: C XVI-1, General introduction, p 10

³⁴⁰ECSR: C 2004, ESC Rev, Estonia, p 161

³⁴¹ECSR: C 2004, ESC Rev, Cyprus, p 106

³⁴²ECSR: C 2004, ESC Rev, Bulgaria 60

thresholds.

State has to be the guarantor of contributions and the social security system should be based on collective funding.³⁴³ In its conclusion on the Netherlands the Committee stated³⁴⁴:

“The principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 of the Charter as it ensures that the burden of risks are spread among the members of the community, including employers, in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers.”

The Committee did not conclude negatively on the Netherlands but asked it to provide some more information on the functioning of the new system.

2.4 Personal scope

Social security system must cover a significant percentage of the population. The general personal scope of the Charter is defined in the Appendix. It covers:

1. nationals of other Parties lawfully resident or working regularly within their territory;
2. refugees and stateless persons lawfully staying in their territory.

States are invited to extend the coverage beyond the minimum laid down in the appendix.

The Committee noted in its Conclusions XVII-1³⁴⁵:

“The Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties - in particular the European Convention of Human Rights – or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations.

Whereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter.”

Paragraph 12 of the Part I, establishes the policy aims of the Charter and the right of “all

³⁴³ECSR: C XVI-1, General Introduction, p 10

³⁴⁴ECSR: C XVII-1, The Netherlands, p 149

³⁴⁵ECSR: C XVII-1, General Introduction, para 4, p 9-10

workers and their dependents” to social security. However, the application of article 12 of the Charter and the interpretation of it in the case-law of the Committee does not corroborate with this limitation. Rather, the Committee examines whether the social security system covers a significant percentage of the population³⁴⁶ and whether social security system is in essence based on collective funding and that the social risks which are considered essential are covered by the system.

The Committee examines the proportion of persons covered by the social security system and bases its appraisal on the number of people protected, including the dependent of secured persons.³⁴⁷

The state should not be able to exclude any category of the active population, such as self-employed workers³⁴⁸, part-time workers who work less than a specified minimum time³⁴⁹, or workers, who earn less than a specified sum³⁵⁰.

It further examines to what extent coverage of the needs for social protection is ensured by social security, by private insurance and savings or by social assistance and verifies that the proportion of social security does not fall below a level to be determined. Where the system is financed by taxation (or budgetary resources), its coverage in terms of persons protected should rest on the principle of non-discrimination without prejudice to the conditions for entitlement (means test, etc.).³⁵¹

2.5 Minimum level of benefits

Aim of social security benefits is to substitute the loss of income and additional costs deriving from risks. Thus, a system of social security must provide adequate benefits, i.e. the level of benefit must afford effective protection against the risks. As the Committee put it, the fact that a claimant without other resources may be entitled to social assistance does not alter

³⁴⁶ECSR: C XV-1, Iceland, p 339

³⁴⁷Social protection in ESC, 2000, p 24, para. 17

³⁴⁸ECSR: C XIV-1, Ireland, p 424

³⁴⁹ECSR: C XIV-1, Belgium p 112; Spain, p 702

³⁵⁰ECSR: C XIII-2, Austria, p 107

³⁵¹ECSR: C XVI-1, General introduction, p 10, para. 7

this.³⁵² The Committee has been asking whether the benefits are in line with the cost of living and whether the benefits afford effective protection of persons against the greatest social and economic risks.³⁵³

Originally, the level of benefits was discussed and decided under article 12§2 of the Charter with reference to ILO Convention 102 and ECSS.³⁵⁴ In its Conclusion XVI-1 in 2002, the Committee reformed the understanding of Article 12§2 and stated that in order to be considered as adequate, the level of benefit should in cases of wage substitution, whether temporary or permanent, always stand in a reasonable relation to the wage in question and should in any event exceed the minimum subsistence level. In particular, the income of the elderly should not be one of minimum assistance.³⁵⁵

In its next cycle in 2004 the Committee went further and started discussing the level of benefits under article 12§1 and defined its own criteria for the level of benefit. In its conclusions it used the poverty threshold as the reference level and defined it as 50% of average median equivalised income.³⁵⁶

There have recently been number of cases of non-conformity where the level of the benefit has found to be inadequate. For example, in case of Estonia the Committee found that the level of the unemployment benefit was inadequate and thus the situation in Estonia was not in conformity with article 12§1 of the Revised Charter.

In case on Bulgaria the Committee found that as the level of key social security benefits was inadequate, Bulgaria was not in conformity with article 12§1 of the Charter.³⁵⁷

In the case of Lithuania, the Committee concluded that as the pensions of a standard bene-

³⁵²ECSR: C XVI-1, United Kingdom, p 692

³⁵³See e.g. ECSR: C XIV-1, Malta, p 534

³⁵⁴Samuel, 2002, p 287; Social protection in ESC, 2000, para. 35, p 29

³⁵⁵ECSR: C XVI-1, General Introduction, para 8, p 10

³⁵⁶ ECSR: C 2004, ESC Rev, Bulgaria p 62; Estonia p 124, 139; Romania p 315, 323; ECSR: C XVII-1, Denmark p 37, 45; The Netherlands p 149, 155; Spain p 245, 252 etc.

³⁵⁷ECSR: C 2004, ESC Rev, Bulgaria, p 60. Taking into account that according to Eurostat, the national poverty threshold amounted to about 47,50 € per month in 2001, the Committee considers the minimum unemployment benefit (36 €) to be inadequate and therefore not an effective benefit in the meaning of Article 12§1.

ficiary was situated very close to the poverty threshold and the pensions of persons with shorter insurance period was clearly under that threshold, the pensions were considered to be clearly not adequate under article 12§1 of the ESC.³⁵⁸

2.6 Administration of the system

Social security benefits and cost of administering of social security system must be funded by collective financing.³⁵⁹ collective financing is expression of principle of solidarity and means that contributors do not always receive the same amount of money in benefits that they deposited in contributions. Redistribution has vertical and horizontal effect. The ECSS confirms that the system might be financed by social security contributions paid by employees and/or employers, by general taxation or through a combination of these.

The code does not set lower limit to the contributions. The contracting party has only an obligation to ensure that the contributions or taxation is at such level as to “avoid hardship to persons of small means”.³⁶⁰

The ECSS places obligation on the contracting party to accept general responsibility for the payment of benefits and maintaining the financial balance of their social security systems.³⁶¹ This means that states must guarantee benefits prescribed even if the state has entrusted the organisation of a social security scheme to a private or semi-private body.³⁶²

Both ILO Convention 102 and the ECSS require that the social security system must be managed under the supervision of the public authorities although it does not require public managing of the system.

The state should also take measures in order to stop employers delaying payments or re-

³⁵⁸ECSCR: C 2004, Vol 2, ESC Rev, Lithuania, p 363 . The relative poverty line (50% of average consumption expenditure) published by the Lithuanian Department of Statistics was 77€ in 2001. The average old-age pension paid in 2001 was 91€ but approximately 36% of all old-age pensions were below the relative poverty level and 4,8 of old-age pensions were even below the Minimum Living Standard (36€). Unemployment benefit was equal to the state supported income i.e. 39€ per month and the maximum was 72€ per month. Having regard to the poverty line threshold, the Committee considered the level of benefit to be manifestly inadequate.

³⁵⁹Article 70 of the ECSS, 1964.

³⁶⁰Nickless, 2002, p 125-129

³⁶¹ECSCR: C XVI-1, General introduction, p 10, para. 7

³⁶²Nickless, 2002, p 126

fusing to pay social contributions. The ECSR has also asked for indication of the extent of non-declared work and the measures taken to combat it.³⁶³

2.7 Progressive development

Paragraph 3 of article 12 requires the Contracting Parties

“To endeavour to raise progressively the system of social security to a higher level”

This provision is dynamic in its character and it requires states which have accepted the ESC or Revised ESC to make a continuous effort to bring their social security systems progressively to a higher level and inform the Council of Europe regularly of any steps taken.³⁶⁴

In its second supervisory cycle, the ECSR noted that a state is expected to raise its system higher than that of Convention 102.³⁶⁵ This also means that compliance with paragraph 3 presupposes compliance with paragraph 2. Ratification of ECSS has been considered as evidence of a state's constant determination to raise the standard of its social security scheme.³⁶⁶ Under progressive development, the ECSR analyses the cost of living, reviews the statistics on unemployment etc.³⁶⁷

Question that has been raised in connection with this principle is whether the dynamic character of social security has a limit. Also, the tendency in most contracting parties has been to make legislation and practice in the field of social security more restrictive. The committee has observed it for number of years and in particular during the 14th supervision cycle.

The committee has accepted alterations to social security systems. In order to evaluate the changes made, it requires the following information from the states³⁶⁸:

- the nature of the changes (field of application, conditions for granting allowances, amounts of allowance, lengths etc...);
- the reasons given for the changes and the framework of social and economic policy

³⁶³See e.g. ECSR: C XVI-1, Czech Republic p 143-144

³⁶⁴ECSR: C I, p 62 and ECSR: C XIII-4, Turkey, p 357

³⁶⁵Non-compliance with this provision was found in relation to Cyprus in several cycles ECSR: C II, p 191 and ECSR: C III, p 63 and Austria in ECSR: C IV, p 82

³⁶⁶ECSR: C IV, Denmark, p 84

³⁶⁷ECSR: C IV, Denmark, p 83-84

³⁶⁸ECSR: C XIII-4, p 143-144

in which they arise;

- the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
- the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
- the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13);
- the results obtained by such changes.

Thus, restrictive changes in the social security system are not necessarily contrary to article 12§3 and the ECSR approaches and evaluates each case on the basis of information given by states.

The Committee developed this understanding further in the next cycle when analysing the report of the Netherlands, where number of reforms were undertaken including the structure of the system, level of benefits, conditions for entitlement, supervision of the system etc.

The committee concluded that article 12§3 presupposes that the state maintains social security system that is based on solidarity, as this constitutes fundamental guarantee against discriminatory treatment. Another important factor is the participation of the persons protected in the management and supervision of the system.³⁶⁹

It is important to note that 12§3 is the only provision in the Charter that uses term “endeavour”. This means that the result should not be present but showing one's effort might also be development.³⁷⁰

The Committee concluded negatively on Norway after it had changes in the unemployment benefits. The Committee stated:

The Committee acknowledges that the introduction of measures enabling the social security system to contribute actively to combating unemployment and to the resettlement of unemployed persons in economic life form part of the objectives of the so-

³⁶⁹ECSR: C XIV-1, p 561-562

³⁷⁰ECSR: C III, Denmark, p 63

cial protection policy of the Norwegian Government. It considers that such objectives are not in themselves incompatible with Article 12 para. 3, but it recalls that the means chosen by states to implement these objectives should be adequate.

The Committee observes that in this case the measures adopted in the unemployment branch are very stringent, compelling the person concerned to accept a job regardless of his skills, qualification or prior occupational experience, or of their personal and family situation when the proposed job entails a change of residence. The Committee considers that in a situation close to full employment and of economic growth (see the conclusion under Article 1 para. 1) the adoption of measures which are so restrictive is not proportionate to the objectives pursued and does not come within the range of adaptations of the social security systems permissible under Article 12 para. 3.³⁷¹

Latest few reporting cycles have shown that the Committee has been stronger in emphasising the need of progressive development. In reviewing the report of Poland the committee stated that when state activities run counter to the objectives of the Charter and undermine social security system need high and clear justification on the reasons. Also, in order to evaluate the effectiveness of the social security system, correctly collected statistics is vital.

3 Conclusion

ECtHR has included social rights and right to social security in particular under right to non-discrimination, right to access to court and property rights. These elements of right to social security (as well as other social rights) should be justiciable both in international and national legal systems. The deficiency of interdependence approach by the ECtHR is that right to non-discrimination is not an independent, self standing right and that court has been forced to make sometimes artificial conjunctions with other rights protected by ECHR. Entry into force of Protocol 12 of the ECHR³⁷² providing for self-standing right of non-discrimination but this protocol is to date ratified only by 2 states.

European Social Charter has included right to social security in it as a self-standing right. Concluding from the practice of the ECSR as well as the text of the treaty, obligations in relation to social security under European Social Charter include all three types of obligations and can be classified as proposed in Table 12. It has to be stated, that division of obligations was

³⁷¹ECSR: C XV-1, Norway, p 439-442

³⁷²ECHR, Prot 12, 2000, information on ratification as of 14th of June, 2005.

difficult as most of the obligations defined included elements of different nature. Thus, classification of some obligations might seem arbitrary and their position within the system might be controversial.

Table 12: State obligations under ESC

<i>Obligation to</i>		<i>Immediate obligations</i>	<i>Progressive obligations</i>
<i>Respect</i>		<ul style="list-style-type: none"> - Obligation to adopt legislation in order to ensure protection of right to social security: - choice of the system; - Choice of benefits; - Choice of coverage; - non-discrimination; - non-discrimination in relation to coverage. - system of supervision; 	Endeavour towards progressive development of the system.
<i>Protect</i>		<ul style="list-style-type: none"> - create of complaints system for employers and employees; - timely payment of contributions; - supervision system; collection of information about unregistered labour market, measures to combat it. - adopt non-discrimination legislation applicable between private actors. 	
<i>Fulfil</i>	<i>Facilitate</i>	<ul style="list-style-type: none"> - establish complaint procedures - maintain social security system in the accepted level 	

<i>Obligation to</i>		<i>Immediate obligations</i>	<i>Progressive obligations</i>
	<i>Provide</i>	<ul style="list-style-type: none"> - provide for minimum coverage of persons unable to support themselves. - guarantee social security benefits to covered persons - in cases of arrears of payments by employers, guaranteeing provision of benefits. - in the cases where social security system requires, provide social security benefits to people who, for reasons beyond their control, have not fulfilled qualifying requirements (i.e. pensions, minimum health care benefits etc.). - guarantee provision of benefits on the agreed level. 	<ul style="list-style-type: none"> - keep and collect statistical data on unemployment, wages etc.
	<i>Promote</i>		<ul style="list-style-type: none"> - Promote new benefits with special attention to marginalised groups. - promote re-entering to labour market; - promote employment of marginalised groups.

The substance of the right to social security seems to play less role than expected – these obligations are contained in obligation to create social security system i.e. in the legislation. As social security system should be financed through collective contribution, there does not seem to be lot of pressure on the state budget.

On the contrary, article 12 does not limit the use of contributions collected only for the benefit of social security system. Thus, it is up to the state to use part of the contributions on social assistance as well as other areas of social protection. Though it might be politically difficult on agreeing upon the level of contributions – ESC does not set a minimum limit on it except to requirements in ECSS and ILO Convention 102 that prohibit leaving a person into hardship.

Subsidiary obligations are often not discussed by the case-law of the ECSR. It is often due to the fact that ESC has been adopted by developed countries with steady court system, ad-

equate statistics etc. Therefore, many of the subsidiary obligations have not been discussed by the ECSR.

The ECSR has stressed some elements of right to social security that might be justiciable. There is still not enough international practice on ESC. As national justiciability is not the topic of the current research, conclusions based on national case law can also not be done. There are however certain indirect indications on what might be the justiciable elements of right to social security.

There are several cases brought before ECSR under collective complaints procedure that relate to non-discrimination (both on discrimination of groups as well as men or women). There Collective complaint no 14/2003³⁷³ relates to article 13 (right to health) in conjunction with article 17 (protection of children). In this on decision on the merits the ECSR stated:

*“The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter.”*³⁷⁴

Thus, denying access to social security system without reasonable grounds as well as re-formation of social security and withdrawing protection can through analogy be justiciable. Persons should also have access to court in relation to decisions on their benefits, right to appeal deriving from this obligation should also be justiciable.

³⁷³ECSR: Collective Complaint 14/2003.

³⁷⁴ECSR: Collective Complaint 14/2003, para 32

Conclusion

Every legal norm creates corollary rights and obligations. International human rights treaties are no different. Topic of the thesis originates from the theory that there exist different human rights instruments and human rights norms. Some of norms create legal obligations whereas others create mere policy aims and can not be viewed as legal rights.

Thesis is based on the understanding that all human rights norms carry numerous obligations, some of which entail justiciable rights. This understanding is supported by the interdependence approach accepted in recent years by human rights monitoring bodies. If to agree with this approach, the question arises, how to find the different obligations and whether these obligations can be viewed and analysed in some sort of system. This possible system might enable easier conclusions on what elements of rights are justiciable.

Answer to these questions is given through obligations approach developed by Chapman. This approach analysis human rights norms from the perspective of obligations and has classified all obligations into three: obligations to respect, protect and fulfil. Under this classification obligation to respect is traditional negative obligation requiring adoption of legislation for the protection of the right, otherwise not interfering into the decisions of a person. Obligation to protect obliges state to protect person from the interference of third persons. It requires legislation as well as effective legal remedies - creation and maintenance of relevant institutions. Obligation to fulfil requires states positive action in providing directly either money (benefits), assets etc. Obligations approach and the tripartite system of obligations has been taken as theoretical foundation of the research.

There is great variety of international human rights instruments that could be analysed. Current research has selected CESCR and ESC as primary sources. These two instruments have been designed to protect only social rights and these are the instruments in connection of which the “generations” is usually discussed. One of these treaties, the CESCR is meant to cover all the members of the UN, whereas ESC takes more into account the specific European framework. Both of these instruments cover a variety of rights and thus, selection had to be

made on what rights to analyse.

Right to social security was selected as material right as it shows the complexity of issues every social right rises. Right to social security was also selected as elements of it have been found justiciable by the HRC and ECtHR and there is steady practice from these institutions.

First the thesis gives overview of the theoretical approach and instruments of the research. Secondly, general rights and principles deriving from CESCER and ESC were analysed. Article 2 of the CESCER is a general obligations clause applying to all rights protected in the Covenant. It obliges member states to take steps to the maximum of its available resources and achieve progressively the full realisation of the rights recognised in the Covenant. ESC does not have similar general obligations clause. Right of equal protection is also present in the both instruments and should be applied to all substantial provisions of these instruments.

Article 9 of the CESCER protects right to social security. This provision is general in its terms and seemingly leaves states parties with wide margin of appreciation. Analysis on the practice of ComESCR showed that although the committee takes into account the level of development of states, there are however certain minimum requirement in this article.

These minimum requirements are not defined in the Covenant but are provided by ILO Convention 102. This interesting division of competences has the purpose of unifying the approach in right to social security and in practice means that ComESCR has subsidiary role in analysing article 9. When the supervisory body of ILO concludes positively on the state report, the same is done by the ComESCR.

Obligations found in article 9 included obligation to adopt legislation on social security (fulfilling the minimum substantive requirements of ILO Convention 102), obligation to administer and manage this system, obligation to create effective supervision system where employees are participating, obligation to provide effective legal remedies and obligation to safeguard smooth operation of the system and when necessary, guarantee the benefits.

Analysis on the case-law of the ComESCR showed that number of these obligations have justiciable character, although, finding justiciable elements of the rights was not the main aim of the research.

Article 12 of the European Social Charter provides more detailed protection of the right to social security. The substance of the system comes still from the ILO Convention 102 or the European Code of Social Security. The ECSR has taken more initiative in analysing right to social security and it does not satisfy with only accepting the conclusions of the supervisory bodies of ILO and ECSS.

Similarly to CESCR, the obligations under article 12 included obligation to adopt legislation on social security (fulfilling the minimum substantive requirements of ILO Convention 102 or ECSS), obligation to administer and manage this system, obligation to create effective supervision system where employees are participating, obligation to provide effective legal remedies and obligation to safeguard smooth operation of the system and when necessary, guarantee the benefits.

As there are less countries to review and most of these states have developed legal and social protection system, The ECSR has been able to define more concrete requirements the social security system has to comply with. It has also dealt more with the recent trends in European countries where social security systems are reformed and protection decreased. There are also examples where the ECSR has found these changes to be in violation with the charter.

ECSR has been quite strict in its observations and has often stated that the state has not fulfilled its obligations under the Charter. These negative conclusions have also been noted the Committee of Ministers. There is also one case decided under collective complaints procedure where right to health and in this connection right to health care benefit for illegal immigrants was discussed.³⁷⁵

The analysis showed that all obligations in the typology were present. The analysis however showed the deficiency of the obligations approach. Namely, it was difficult if not almost impossible to identify pure obligations as proposed by the typology. Most obligations under right to social security carried elements of different types and classification of them un-

³⁷⁵ECSR: Collective Complaint 14/2003

der one or other category of obligation was difficult. Also, the position proposed might be debated.

Thus, obligations approach assisted in defining the elements of state obligations in right to social security. That provided good ground for deciding what elements might be justiciable and what elements might not. The typology helped to make this classification but it proved to be difficult to find pure obligations and thus, the practical application of the typology was not very successful.

Resümee

Riigi kohustused sotsiaalsete õiguste tagamisel – õigus sotsiaalkindlustusele

Iga õigusnorm loob õigusi ja kohustusi. Rahvusvahelised inimõiguste lepingud ei ole selle poolest erinevad. Käesoleva magistritöö teemaks on riigi kohustused sotsiaalsete õiguste tagamisel sotsiaal-kindlustuse näitel.

Teema on aktuaalne rahvusvahelise inimõiguste debati kontekstis, kus tihti leiab arvamusi, et inimõiguste normid jagunevad õigusnormideks ning poliitilisteks eesmärkideks. Kodaniku ja poliitiliste õiguste lepinguid peetakse õigusi ja kohustusi tekitavateks, samas kui sotsiaalsete, majanduslike ja kultuuriliste õiguste lepingud peetakse vaid poliitilisteks dokumentideks, mis üksikisikutele kohtukaitstavad õigusi ei loo ning milles kaitstavat ei pea rangelt järgima.

Vahetegemist põhjendatakse sellega, et kodaniku- ja poliitilised õigused on liberaalsed tõrjeõigused ja nõuavad enamasti riigi mitte sekkumist. Nende õiguste tagamine lepingu vastu võtmise hetkest on võimalik ning need õigused ei ole riigi eelarvele koormavad. Sotsiaalseid ja majanduslikke õigusi peetakse aga sooritusõigusteks, mis nõuavad aga riigilt aktiivset tegutsemist ning ressursside eraldamist. Ka leitakse, et sotsiaalsete- majanduslike normide sõnastus on liialt üldine ning seetõttu ei saa need normid luua üksikisikutele õigusi ning et sotsiaalsete õiguste progressiivne iseloom ei võimalda neid kohtus kaitsta.

Teisalt on rahvusvahelised järelevalve institutsioonid – teiste hulgas ka Euroopa inimõiguste kohus ja ÜRO inimõiguste komitee – pidevalt rõhutanud õiguste integreeritust ning sõltuvust. Selle arusaama järgi ei ole võimalik kodaniku- ja poliitilisi õigusi tagada ilma sotsiaalsete õiguste tagamist. Muuhulgas on EIK ja Inimõiguste komitee oma mitmes lahendis kontrollinud sotsiaalsete õiguste sh sotsiaalkindlustuse puhul diskrimineerimise keelu rakendamist. Selline vastuolu riikide ning rahvusvaheliste organisatsioonide retoorika vahel tõstatab

küsimuse, kuidas peaks sotsiaalseid õigusi analüüsima ning kas sotsiaalsed õigused loovad sarnased õigusi ja kohustusi nagu kodaniku- ja poliitilised õigused.

Kõik õigusnormid loovad õigusi õigustatud subjektidele ning kohustusi kohustatud subjektidele. Inimõiguste normide puhul on õigustatud subjektideks üksikisikud või grupid, keskselt kohustatud subjektiks on riik. Inimõiguste normide analüüsiks on mitmed võimalusi. Käesolevas töös on analüüsitud neist kolme. Esiteks on võimalik põhiõigusi analüüsida lähtuvalt üksikisikust ja tema subjektiivsetest õigustest. Teiseks on võimalik analüüsi alustada normides sisalduvatest kohustustest. Leida, milliseid kohustusi õigusnorm tekitab ning seejärel minna üksikisiku õiguste analüüsi juurde. Kolmandaks on välja pakutud võimalust analüüsil keskenduda õiguste rikkumisele.

Käesoleva töö analüüsib inimõiguste norme kohtustuste paradigmas. Seega otsib töö vastust küsimusele, kuidas leida inimõiguste normides sisalduvaid kohustusi ning kas neid kohutusi saab vaadelda ja analüüsida süsteemselt. Süsteemne lähenemine võiks lihtsustada ka hilisemat subjektiivsete õiguste leidmist.

A. Eide loodud kohustuste paradigma järgi loovad kõik inimõiguste normid riigile kolmesuguseid kohtustusi: kohtus hoiduda õiguse riivest (*respect*), kohustus kaitsa kolmandate isikute vastu (*protect*) ning soorituskohustus (*fulfil*). Soorituskohustus võib aga seisneda meetmete võtmises, mis aitavad isikul oma õigust realiseerida (*facilitate*), kohtus otseseks soorituseks (*provide*) ja kohustus inimõiguste kaitset progressiivselt edasi viia ning edendada (*promote*).

Analüüsitavateks rahvusvahelisteks lepinguteks on ÜRO Majanduslike, sotsiaalsete ja kultuuriliste õiguste rahvusvaheline pakt ning Euroopa Sotsiaalharta. Analüüsitavaks õiguseks on õigus sotsiaalkindlusele. Õigus sotsiaalkindlusele on hea näitlik õigus seetõttu, et ta näitab sotsiaalsete õiguste kohustuste kompleksust. Samuti on seda õigust võimalik võrdlevalt vaadelda nii sotsiaalsete õiguste lepingute kui ka kodaniku- ja poliitiliste õiguste lepingute kontekstis.

Kuna nii MSKÕRP-i ja ESH tekst on suhteliselt üldsõnaline, on analüüsis kasutatud ka nende lepingute järelevalve institutsioonide praktikat. Selle praktika kasutamine on veidi

problemaatiline, kuna see praktika on kujunenud riikide raportite analüüside põhjal. Euroopa sotsiaalsete õiguste komitee puhul on küll olemas ka kollektiivsete kaebuste süsteem, kuid seal sotsiaalkindlustuse temaatikat puudutas kaudselt vaid üks lahend.

Esmalt annab töö eelpool kirjeldatud alusteooriast. Teiseks analüüsitakse üldisi kohustusi - MSKÕRP artiklit 2. Sotsiaalharta sarnast üldist kohustuste sätet ei ole. Teiseks analüüsitakse diskrimineerimise keeldu nii MSKÕRP-is kui ja ESH-s.

Töö kolmas ja neljas peatükk keskenduvad sotsiaalkindlustuse analüüsile. Kolmas peatükk analüüsib MSKÕRP-i artiklit 9. Tegemist on väga üldsõnalise normiga, mis näiliselt annab riikidele laia otsustamisvõime. Sotsiaalsete õiguste komitee praktika analüüsist aga selgus, et kuigi komitee võtab arvesse riigi arengutaset, võib siiski välja tuua sotsiaalkindlustusele seatavad miinimumnõuded. Need miinimumnõuded sisalduvad ILO konventsioonis 102. Sotsiaalkindlustuse küsimuses on ILO ja ÜRO vahel huvitav tööjaotus. ÜRO sotsiaalsete õiguste komiteed on sotsiaalkindlustuse analüüsil teine roll. Enamasti ta kordab üle ILO ekspertide komitee poolt tuvastatu.

MSKÕRP-i artiklist 9 tulenevad kohustused olid järgmised:

- Kohustus võtta vastu seadused, millega luuakse sotsiaalkindlustuse süsteem. Süsteemi loomisel peab lähtuma ILO konventsiooni 102 poolt loodud miinimumnõuetega (kaitstavad riskid, isikuline kaitseala, hüvitiste suurus, maksmise süsteem).
- Riik peab tagama sotsiaalkindlustuse süsteemi stabiilse toimimise. Seda isegi siis, kui sotsiaalkindlustuse süsteemi ülevõtmine on antud eraõiguslikule isikule. Riik peab tagama kõigi hüvitiste õigeaegse välja maksmise ning probleemide korral leidma puuduolevad vahendid oma eelarvest.
- Süsteemi järelevalvesse peab kaasama töötajad, kes kindlustusmaksid tasuvad.
- Isikutele peab olema kaebeõigus neile määratud hüvitiste vaidlustamiseks, töötaja-tööandja vaidluste lahendamiseks.

Analüüsist tulenes, et mitmetele nendele kohustustele vastavad ka subjektiivsed õigused, kuigi nende õiguste leidmine ei olnud töö peamiseks eemärgiks.

Euroopa Sotsiaalharta üle teostab kontrollil Euroopa sotsiaalsete õiguste komitee. Komit-

ee praktika analüüs näitas, et harta artiklis 12 sisalduvad kohustused on sarnased MSKÕRP-i artiklis 9. Seda saab põhjendada sellega, et ka artikkel 12 viitab ILO konventsioonile 102 ning Euroopa sotsiaalkindlustuse koodile.

Euroopa sotsiaalsete õiguste komitee on võtnud endale rohkem initsiatiivi ning on olnud altime riikide kritiseerimisel. Seda võib põhjendada see, et Euroopa komitee analüüsib arenenud ning rikaste riikide sotsiaalkindlustuse süsteeme, mistõttu neile seatavad nõuded võivad olla selgemad ning rangemad.

Kohustused sisaldavad:

- Kohustust luua sotsiaalkindlustuse süsteem, mis täitab ILO Konventsiooni 102 ja Euroopa sotsiaalkindluse koodi nõudeid.
- Kohustus tagada süsteemi tõrgeteta toimimine, tagada hüvitiste õigeaegne väljamaksmine.
- Kohustus efektiivseks järelevalveks, kuhu on kaasatud ka makseid tasuvad isikud.
- Kohustus tagada kaebeõigust.

Kohustuste analüüs andis hea ülevaate sotsiaalkindlustuse olemusest. Selgus, et sotsiaalkindlustuses sisalduvad mitmed kodaniku- ja poliitilised õigused – näiteks kaebeõigus, õigus mittediskrimineerimisele – ning et paljudele kohustustele vastavad isiku subjektiivsed õigused. Tüpoloogia kasutamine oli praktikas keerulisem kui esialgselt arvatud. Ka identifitseeritud kohustused sisaldasid mitmeid alakohutusi, mistõttu kohutuse paigutamine ühte või teise tüüpi tundus tihtilugu arbitraarsena. Mitmete kohustuste asukoha üle võib seega arutleda.

Kohustuste tüpoloogia aitas otsida ja rühmitada erinevad kohustusi, mistõttu neid sai esitada ülevaatlikult. On aga selge, et puhtaid kohutusi ei eksisteeri ning et kasutatud kohustuste tüpoloogia on omab pigem teoreetilist tähtsust analüüsis ning selle praktiline väljund on küsitav.

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Annex 1

Benefits under ILO Convention no 102

<i>Benefit</i>	<i>Nature of benefit</i>	<i>Conditions for entitlement</i>	<i>Duration of benefits</i>
Medical care	<ul style="list-style-type: none"> – preventive care; – General practitioner care including home visits – specialist care in hospitals or outside – essential pharmaceutical supplies as prescribed – hospitalization where necessary – prenatal, confinement and postnatal care either by medical practitioner or by qualified midwives, and hospitalization where necessary 	<ul style="list-style-type: none"> – Possibility to impose a qualifying period 	<ul style="list-style-type: none"> – Benefit granted throughout the contingency covered; – possibility of limiting the duration of benefit to 26 weeks – the duration of medical care is to be prolonged as long as the beneficiary is entitled to sickness benefit and in case of diseases recognized as entailing prolonged care
Sickness benefit	<ul style="list-style-type: none"> – Periodical payments corresponding to at least 45% of the reference wage 	<ul style="list-style-type: none"> – Possibility to impose qualifying period 	<ul style="list-style-type: none"> – The benefit is granted throughout the contingency – possibility to establish a waiting period of three days. – Possibility of limiting the duration of benefits to 26 weeks in each case of sickness
Unemployment benefit	<ul style="list-style-type: none"> – Periodical payments corresponding to at least 45% of the reference wage. 	<ul style="list-style-type: none"> – Possibility to impose qualifying period 	<ul style="list-style-type: none"> – Possibility of establishing a waiting period of seven days – The benefits have to be granted in principle throughout the contingency. – Nevertheless, the duration of benefit can be limited to 13 or 26 weeks depending on the case within a period of 12 months.

<i>Benefit</i>	<i>Nature of benefit</i>	<i>Conditions for entitlement</i>	<i>Duration of benefits</i>
Old age benefit	<ul style="list-style-type: none"> – Periodical payments at least 40% of the reference wage. – Rates of periodical payments must be revised following substantial changes in the general level of earning and/or the cost of living 	<ul style="list-style-type: none"> – The prescribed age must not be more than 65 years. – Possibility of fixing higher age with due regard to the working ability of elderly persons in the country. – Possibility of prescribing qualifying period: either 30 years of contribution or employment or 20 years of residence. – Where a qualifying period is established, obligation to guarantee a reduced benefit after completion of a qualifying period of 15 years of contribution or employment. 	<ul style="list-style-type: none"> – The benefits have to be granted throughout the contingency.
Employment injury benefit	<ul style="list-style-type: none"> – Medical care (a list which is contained in the convention). – Periodical payments corresponding to at least 50% of the reference wage in cases of incapacity to work or invalidity. – In case of death of the breadwinner, benefits for the widow and dependent children. Periodical payments corresponding to at least 40% of the reference wage. – Except the case of incapacity to work, obligation to revise the rates of periodical payments following substantial changes in the cost of living. – Possibility to convert periodical payments into a lump sum where <ul style="list-style-type: none"> – the degree of incapacity is slight or – where the competent authority is satisfied that the lump sum will be properly utilized. 	<ul style="list-style-type: none"> – Prohibition to prescribe a qualifying period. – In case of a widow, the right to benefit may be made conditional on her being presumed to be incapable of self-support. 	<ul style="list-style-type: none"> – No waiting period except in the case of temporary incapacity to work (maximum 3 days). – The benefit has to be granted throughout the contingency.
Family benefit	<ul style="list-style-type: none"> – Either: <ul style="list-style-type: none"> – periodic payment; or – provision of food, clothing, housing, holidays or domestic help; or – a combination of (a) and (b). – Minimum amount for the total value of benefits granted in the country. 	<ul style="list-style-type: none"> – Possibility of prescribing a qualifying period, either three months of contribution or employment or one year of residence. 	<ul style="list-style-type: none"> – In the case of periodic payment, it should be granted throughout the contingency.

<i>Benefit</i>	<i>Nature of benefit</i>	<i>Conditions for entitlement</i>	<i>Duration of benefits</i>
Maternity benefit	<ul style="list-style-type: none"> – Medical care including at least prenatal, confinement and postnatal care either by medical practitioner or by qualifying midwives and hospitalization where necessary. – Periodic payments at least 45% of the reference wage. 	<ul style="list-style-type: none"> – Possibility of prescribing a qualifying period. – Benefits also has to be secured to the wife of man in the classes protected where the latter has completed the qualifying period. 	<ul style="list-style-type: none"> – Benefits granted throughout the contingency. – Possibility of limiting the periodical payments for 12 weeks unless a longer period of absence from work is required of authorized by national laws.
Invalidity benefit	<ul style="list-style-type: none"> – Periodical payments corresponding to at least 40% of the reference wage. – The rates of periodical payments must be revised following substantial changes in the general level of earnings and/or in the cost of living. 	<ul style="list-style-type: none"> – Possibility of prescribing a qualifying period either 15 years of contribution or employment or 10 years of residence. – In this case obligation to secure a reduced benefit after qualifying period of 5 years of contribution or employment. 	<ul style="list-style-type: none"> – The benefit shall be granted throughout the contingency or until old-age benefits become available.
Survivors` benefit	<ul style="list-style-type: none"> – Periodical payments corresponding to at least 40% of the reference wage. – The rates of periodical payments must be revised following substantial changes in the general level of earning and/or in the cost of living. 	<ul style="list-style-type: none"> – Possibility of requiring the breadwinner to complete a qualifying period which may be 15 years of contribution or employment or 10 years of residence. – In this case, obligation to secure reduced benefits if the breadwinner has completed a qualifying period of five years or contribution or employment. – In the case of a widow, the right to benefits may be made conditional on her being presumed to be incapable of self-support. – For childless widows presumed to be incapable of self-support, a minimum duration of the marriage may also be required. 	<ul style="list-style-type: none"> – The benefit has to be granted throughout the contingency.