

Day of General Discussion: The Right to Social Security (article 9 of the Covenant)

Introduction

1. At its 35th session (7-25 November 2005), the Committee on Economic, Social and Cultural Rights decided to elaborate a general comment on the right to social security (article 9 of the International Covenant on Economic, Social and Cultural Rights). Toward this end, it decided to organise a Day of General Discussion (DoGD) at its 36th session (1-19 May 2006) on this topic.

2. At its 21st and 22nd meetings on 15 May 2006, the Committee on Economic, Social and Cultural Rights held its DoGD on the right to social security. The aim of the DoGD was to review the draft general comment prepared by the Rapporteurs of the Committee entrusted with this responsibility, Mr. Eibe Riedel and Ms. Maria Virginia Bras Gomes, in the light of the comments and suggestions made by Committee members, experts in the field, and other participants during the discussion.

3. The following experts were invited to participate in the thematic debate:

- (i) Mr. German Lopez Morales, Co-ordinator, International Labour Standards Department, International Labour Organisation (ILO);
- (ii) Mr. Yannick D'haene, Acting Secretary General, International Social Security Association (ISSA);
- (iii) Mr. Jean-Michel Belorgey, President, European Committee of Social Rights (ECSR);
- (iv) Ms. Lucie Lamarche, Professor of Law, Université du Québec à Montreal, Canada;
- (v) Mr. Malcolm Langford, Senior Legal Officer, Centre on Housing Rights and Evictions (COHRE);
- (vi) Ms. Angelika Nussberger, Member, ILO Committee of Experts on the Application of Conventions and Recommendations;
- (vii) Ms. Anna Biondi, Director of the Geneva Office, International Confederation of Trade Unions (ICFTU);
- (viii) Mr. Michel Barde, Vice-President for Europe, International Organisation of Employers (IOE);
- (ix) Mr. Christian Courtis, Legal Officer, International Commission of Jurists (ICJ);
- (x) Ms. Pauline Barrett-Reid, Deputy Director, Social Security Department, International Labour Organisation (ILO);
- (xi) Mr. Vijay Nagaraj, Assistant Professor, Tata Institute of Social Sciences, Mumbai.

4. States parties, United Nations bodies and specialised agencies, national human rights institutions and non-governmental organisations also attended the DoGD.

Organisation of the thematic debate

5. On behalf of the United Nations High Commissioner for Human Rights, Mr. Alessio Bruni, Team Leader of the Treaty Implementation and Follow-up Team I at the Office of the High Commissioner, welcomed participants in the DoGD. In his remarks, he stated that the right to social security represented an important legal guarantee aimed at ensuring the right of everyone to live a life in human dignity in situations of social distress such as old age, disability, unemployment, employment injury, illness, childbirth, death, or other unforeseen circumstances. The implementation of that right was an essential pre-condition for the realisation of other related human rights, such as the right to an adequate standard of living, the right to health, the protection of mothers and children, and other rights enshrined in the Covenant and other human rights instruments. Thus, the recognition of social security as a human right represented an essential bridge between needs-based charity to rights-based social justice.

6. Mr. Riedel and Ms. Bras Gomes introduced the text of their draft general comment. They recalled that the aim of general comments was to clarify the content and implication of the Covenant provisions and the nature of States parties' obligations, with a view to assisting States parties in complying with their reporting obligations and, ultimately, to fulfilling their substantive obligations under the Covenant. The Rapporteurs encouraged States Parties, United Nations bodies and specialised agencies, United Nations human rights mechanisms, national human rights institutions, trade unions, employers' organisations, non-governmental organisations, academic institutions and other interested organisations and individuals to provide comments and suggestions on their draft. The Rapporteurs planned to review the text of the general comment in the light of the comments and suggestions received and present a second draft for discussion at the 37th session of the Committee (6-24 November 2006).

7. The thematic debate was divided into four sessions: (i) international organisations; (ii) international experts; (iii) official non-State actors in the ILO system; and (iv) regional perspectives. The experts invited to the DoGD were encouraged to present their views and experiences on the issue of social security and, more specifically, to comment on the draft general comment prepared by the Committee Rapporteurs. At the end of each session, the experts responded to questions and comments made by Committee members and other participants in the discussion.

Session 1: International organisations

8. Mr. Lopez Morales (ILO) stated that according to the ILO, there was a basic minimum protection – covering, inter alia, access to basic health care, disability or old age pensions and support for families – that States parties had to provide immediately to everyone. The Income Security Recommendation (No. 67) and the Medical Care Recommendation (No. 69) provide a basis for the formulation of a minimum social security floor. These Recommendations call for the progressive extension of social security coverage to the whole population, including persons in the informal economy, migrant workers and other vulnerable groups. Having implemented the minimum social security floor, States parties had an obligation to progressively attain higher standards of protection.

9. Mr. D'haene (ISSA) expressed the concern of his organisation regarding the poor level of access to social security. Today, only about 20 per cent of the world's population has appropriate and adequate social protection. One major reason is the increase in the numbers of persons working in the informal sector. Increasing criticism has been levelled against the traditional approach of social security based on concepts of solidarity, due to the perceived burdens it places on the national economy and the competitiveness of private enterprises. According to ISSA, a

strong, inclusive, non-discriminatory social security system is an important investment, both from an economic and a social point of view. As for challenges ahead, ISSA mentioned the need to establish a link between the formal and the informal sector, and to guarantee minimum health coverage to all, without discrimination.

10. During the discussion, members of the Committee recalled that the right to social security was well established in international law since the adoption of the Universal Declaration of Human Rights, and that the real challenge was to ensure the effective realisation of this right in times of economic distress. A Committee member noted that many countries that had provided a certain level of protection were transferring some of these responsibilities to the private sector. Another member suggested that the draft general comment should contain references to the large number of people living under military conflict or suffering from natural disasters, who often had no access to social security schemes. The ILO representative said the over-riding issue was how to extend coverage of social security world-wide. He also stated that a minimum social package was affordable for all countries; the challenge was how to achieve that goal in practice, and to define the role on international co-operation in this regard.

Session 2: International experts

11. Mr. Belorgey (European Committee of Social Rights) noted that the provisions of the European Social Charter on social protection were more detailed and developed than article 9 of the Covenant, and covered not only the right to social security but also other related aspects (e.g. the protection of the family and maternity, the right to social and medical protection, the rights of elder persons and persons with disabilities). While the distinction between social security and social assistance was often of arbitrary nature and needed to be revisited, the underlying obligation for States parties is to ensure that a reasonable number of risks are covered for a significant part of the population, and that the services provided covered at least the basic needs of the beneficiaries. The experience of the European Committee of Social Rights showed that discrimination in the context of social security continued to be widespread, especially against part-time workers; this also constituted an indirect form of gender-based discrimination, since the vast majority of part-time workers were women. Other forms of discrimination were based on the residence status, which in practice excluded family members of migrant workers from social security benefits.

12. Ms. Lamarche (Université du Québec) noted that the issue of social security had in the past often been addressed outside a human rights framework. As a consequence, social security as a human right had been indirectly protected and promoted through other rights (e.g. the right to work, the right to an adequate standard of living, the right to due process, or – in the case of regional instruments – the right to property). Article 9 of the Covenant reversed the classical approach to social security and allowed a focus on the progressive inclusion of different categories of workers toward different social risks. It should ensure, as a minimum, the immediate basic protection of vital needs for every person. She concurred that the draft general comment should devote special attention to the increasing role played by women in the informal economy, as well as their role as providers of care services, and on the informal sector.

13. Mr. Langford (COHRE) noted that the issue of social security had not received the same level of attention accorded to other Covenant rights, and that challenges to the realisation of the right were enormous for all countries, including the developed ones. He believed that the draft general comment should give more prominence to the role of non-contributory schemes so as to ensure the realisation of this right for everyone – including those who are unemployed or in

irregular forms of employment. The draft general comment should also provide a more detailed analysis of the obligations of States with regard to the regulation of the private sector. With regard to disadvantaged and marginalised groups, the general comment could devote more attention to the rights of women and non-nationals, and in particular to the extent to which the right to social security applied to illegal migrants or residents.

14. During the discussion, two Committee members expressed concerns with regard to the coverage of the right, and suggested that in this particular area it might be reasonable to differentiate between nationals and non-nationals. Another Committee member suggested that the general comment expressly address the issue of the privatisation of social security schemes. A representative of the United Nations High Commissioner for Refugees (UNHCR) welcomed the attention devoted to the concerns of refugees, asylum seekers, stateless persons and internally displaced persons in the draft general comment as well as the emphasis given to non-discrimination in securing access to the right to social security, and suggested the inclusion in the draft of an additional section on 'returnees'. Other participants suggested devoting greater attention to the situation of rural women in the draft general comment.

Session 3: Official non-State actors in the ILO system

15. Ms. Nussberger (ILO Committee of Expert) recalled that there were four different concepts of social security: the 'narrow' approach, confined to the support in case of loss of income; the 'classical' approach, which identified nine major social risks and is adopted by the ILO Convention No. 102; the 'broad' concept of social security, which takes poverty – and not the loss of work – as a starting point; and a fourth, even broader concept, which construes social security as a collective all-embracing right. According to Ms. Nussberger, the general comment should provide a precise definition of 'social security'. Ms. Nussberger also suggested that the jurisprudence of the European Court of Human Rights and the American Court of Human Rights clarifying the relationship between the right to social security and such civil rights as the right to property, the right to fair trial or the right to private life be reflected in the draft general comment.

16. Mr. Barde (IOE) said that any social security model had to conform to the socio-economic realities of a country and that there had to be a balance between the resources needed for social security and the need to maintain employment, competitiveness, and economic growth. Employers should not be called upon to bear the costs of social security systems alone. Furthermore, enterprises and workers in the formal economy should not be asked to pay for those working in the informal economy. A balance had to be found to ensure that social security did not become a barrier to employment. Social security worked well only when the economy was robust. Without an active employment policy incorporating social aspects, there could be no viable social security system.

17. Ms. Anna Biondi (ICFTU) said that social security was an important component of decent work, since it provided income security to help individuals cope with important risks of life. Rather than representing a burden on the competitiveness of enterprises, social security seemed to be capable on boosting economic growth. For example, country-level HIV/AIDS programmes showed that access to health care facilities and anti-retroviral drugs provided not only substantial social benefits, but also economic ones. ICFTU stressed the need to combat feminised poverty through social security policies, as women were disproportionately affected by poverty and poor integration in the labour market. The positive impact that social protection policies could have on

the economic environment both directly and indirectly through fostering social cohesion and social peace should be recognised.

18. Mr. Riedel observed that the draft general comment had opted for a comprehensive approach, since the adoption of a more limited concept would have excluded the possibility of enhancing the protection already afforded by the ILO system. Ms. Nussberger said that the adoption of a comprehensive definition of social security – which did not deem necessary to differentiate between the loss of income and other reasons for poverty – risked watering down the right to social security, as it was difficult to treat individuals in exactly the same way, regardless whether they had saved. The approach under the European Convention on Human Rights to treat social security rights as property rights was one way of dealing with this; but in the jurisprudence of the European Court of Human Rights the differentiation between the right to social security and the right to social assistance had not been upheld. Social assistance had to be covered in some way in the Covenant, either under article 9 or article 11. Ms. Bras Gomes explained why the Committee had decided to address social assistance under article 9. Ms. Bras Gomes referred to people working in the informal economy, who were not covered under social security schemes, but nonetheless needed income guarantee as workers, and not poverty alleviation.

19. Ms. Barrett-Reid (ILO) noted that the existence of different levels of development and the dichotomy between formal and informal sectors called for the adoption of a comprehensive definition of social security, while recognising at the same time that there were large parts of the world where ratification of Convention No. 102 was not a possibility in the near future. Prof. Lamarche added that the expression “every person” used in article 9 of the Covenant showed that it was the adoption of a comprehensive definition was the only possible solution, as it allowed bringing different approaches such as that of the ILO and that of the European Court of Human Rights.

Session 4: Regional perspectives

20. Mr. Courtis (ICJ) welcomed the broad concept of social security endorsed by the general comment. He noted that the right to social security could not be conceived only as a right of workers, or of persons working in the formal sector, but – as the wording of article 9 clearly states – as a right of every person. Mr. Courtis suggested that the general comment should devote greater attention to gender-based discrimination in social security systems, since in many national schemes there were persistent patterns of disparate treatment between men and women, or between married and unmarried women. He recalled that regional human rights courts had on several occasions stressed the link between the right to a fair trial and the right to social security, and suggested that references to these decisions be included in the draft general comment.

21. Ms. Barrett-Reid (ILO) said that the main problems faced by the African continent in the context of social security were a limited level of GDP spent on social security, the impact of HIV/AIDS, and the lack of confidence in social security institutions, due to poor governance. As in other regions of the world, lack of coverage was concentrated in the informal sector and in rural areas. Ms. Barrett-Reid stated that a minimum package – including universal access to basic health care, minimum income security covering old age and invalidity pensions as well as cash benefits for children, and basic education – was affordable in all countries, including the low income ones. According to Ms. Barrett-Reid, the extension of social security coverage would rely on the following principles: (i) universality and sustainability; (ii) social solidarity;

(iii) strong and well-functioning social dialogue; (iv) rule of law; (v) well-functioning social security institutions; and (vi) decent work.

22. Mr. Nagaraj (Tata Institute of Social Sciences) said that developing countries like India presented several distinctive features and characteristics with regard to social security and social protection schemes that had to be kept in mind whilst discussing social security. The draft general comment appeared to focus on social security as a tool for managing risks. For social security to be meaningful in developing countries, it had to address not only social risks, but also endemic vulnerabilities, such as those associated with poverty. Therefore, social security should be regarded as a public means to respond to levels of vulnerability, risk and deprivation deemed socially unacceptable within a given society. The draft general comment should emphasise that social security was more effective in developing countries when integrated with larger anti-poverty programmes and initiatives.

23. One member of the Committee stated that from the previous discussions appeared that the existence of an effective and functioning social security system depended in the end on the existence of democracy, and suggested that this link be expressly recognised in the draft general comment. Ms. Bras Gomes replied that the example of Western democracies showed that democracy per se does not ensure the implementation of the right to social security. Ms. Bras Gomes also noted that the draft general comment should pay greater attention to the issue of empowerment, as well as to the concept of vulnerability.

24. Mr. Riedel summarised the main elements of the discussion, listing the main issues that the drafters would take up in the light of the suggestions made by the experts who participated in the thematic debate. A critical issue raised by several participants was how to ensure the realisation of the right to social security for those working in the informal sector. Secondly, the draft should better reflect the concept of a minimum social security package in the light of the relevant ILO Conventions. Other issues to be explored were: (i) the need to define the material scope of application and the coverage of the right to social security; (ii) the inclusion of references to military conflicts and emergency situations; (iii) the need to define the linkages between articles 9 and 11 of the Covenant; (iv) the issue of non-retrogressive measures; (v) emergency assistance on health care for illegal migrants; (vi) the question of the definition. Mr. Riedel and Ms. Bras Gomes thanked all participants, particularly the social security experts, for sharing their insights and expertise with the Committee. Any interested parties who wished to submit comments on the draft general comment circulated at the Day of General Discussion were invited to do so in writing by 30 June 2006.

Programme

Morning session

Session 1: International Organisations

- 10.00-10.05 Welcome by the Chairperson of the Committee
- 10.05-10.10 Welcome by a representative of the Office of the High Commissioner for Human Rights
- 10.10-10.20 Mr. German Lopez Morales, Co-ordinator for International Social Security Standards, International Labour Standards Department, ILO
- 10.20-10.30 Mr. Yannick D'haene, Acting Secretary General, International Social Security Association
- 10.30-11.30 Discussion

Session 2: International Experts

- 11.30-11.40 Mr. Jean-Michel Belorgey, President, European Committee of Social Rights
- 11.40-11.50 Prof. Lucie Lamarche, Université du Québec à Montreal, Canada
- 11.50-12.00 Mr. Malcolm Langford, Senior Legal Officer, COHRE
- 12.00-13.00 Discussion

~ **Lunch Break** ~

Afternoon session

Session 3: Official Non-State Actors in ILO system

- 15.00-15.10 Welcome by the Chairperson of the Committee
- 15.10-15.20 Prof. Angelika Nussberger, ILO Committee of Experts
- 15.20-15.30 Ms. Anna Biondi, International Confederation of Trade Unions
- 15.30-15.40 Mr. Michel Barde, Vice-President for Europe, International Organisation of Employers
- 15.40-16.30 Discussion

Session 4: Regional perspectives

- 16.30-16.40 Mr. Christian Courtis, International Commission of Jurists
- 16.40-16.50 Mr. Vijay Nagaraj, Tata Institute of Social Sciences (TISS), Mumbai
- 16.50-18.00 Discussion