

# Social Security – Just as much a Human Right in Developing Countries and Emerging Markets

By Michael Krennerich\*

**Abstract:** *A vast majority of states have formally committed to respect, protect, and progressively fulfill the right to social security by ratifying human rights and ILO conventions. Accordingly, social security systems should guarantee indiscriminate access to health services, provide benefits in the case of work losses due to illness, disability, death of family members, old age, unemployment, and maternity, and further support families, children and adult dependents. As a matter of law and fact, however, social security systems in developing countries usually benefit only a minority of the population. From a human rights perspective, enormous efforts are necessary to increase the coverage of social security systems, reaching people in the informal sector and from poorer parts of the population.*

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Only some twenty percent of the world's working age population benefits from comprehensive social protection, according to an estimate of the first and most recent global report on social security of the International Labour Organization (ILO).<sup>1</sup> The report illustrates that in many countries, access to social security systems in the realm of medical care, pensions, unemployment benefits, coverage of work-related accidents and diseases, or social assistance is uncertain. Particularly in low-income countries, people lack even the most basic security guarantees. And yet the right to social security is an internationally guaranteed human right. The present contribution exposes the legal sources and content of the right to social security, and highlights how important its implementation is also for developing countries.

## A. The Codification of the Human Right to Social Security

Already the Universal Declaration of Human Rights (1948) stipulates a right to social security. Article 22 establishes that „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“.

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1 ILO, World Social Security Report 2010/2011. Providing coverage in times of crisis and beyond, Geneva 2010.

Article 22 must be read together with Art. 25 (1), which similarly contains a right to social security: „Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control“. Art. 25 (2) provides, *inter alia*, for special care and assistance for motherhood and childhood.

The right to social security and social insurance in particular has since been included in several international human rights conventions, for instance the International Covenant on Economic, Social and Cultural Rights (1966/ in force since 1976) (Art. 9), the International Convention on the Elimination of All Forms of Racial Discrimination (1966/ 1969) (Art. 5 (d) (iv)), the Convention on the Elimination of All Forms of Discrimination against Women (1979/ 1981) (Art. 11.2 (b) und Art. 14.2 (c)), the Convention on the Rights of the Child (1989/ 1990) (Art. 26 und Art. 27.3), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990/ 2003) (Art. 27), as well as the Convention on the Rights of Persons with Disabilities (2006/ 2008) (Art. 28). In addition, various regional human rights conventions contain a right to social security, for example the Revised European Social Charter (1996/ 1999) (Art. 12) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of Salvador”, 1988/1999) (Art. 9).<sup>2</sup>

At least parts of the Universal Declaration of Human Rights constitute customary international law, and for states parties, the human rights Covenants are legally binding. Nevertheless, the right to social security has so far assumed only a marginal role in the UN human rights system. Even as economic, social and cultural rights (ESCR) were gaining in importance since the mid 1990 s,<sup>3</sup> the right to social security remained largely neglected. Discussions rather centered on other ESCR like the right to food, the right to adequate housing, the right to education, to health, to safe drinking water and sanitation – all of which are of course closely connected to the right to social security. In 2008, the UN Committee on Economic, Social and Cultural Rights, which is tasked with supervising the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), sought to raise the profile of the complex right to social security with the publication of General Comment (No. 19).<sup>4</sup> With regard to contents, the General Comment could draw on previous efforts of the ILO, which is actually spearheading the right to social security.

Since 1919 the ILO has adopted more than 30 conventions on different aspects of social security. Of continuing importance is particularly the Social Security (Minimum Standards) Convention (No. 102) of 1952, although it was not drafted in a gender-sensitive manner at that time. Based on this and other Conventions, the ILO has intensified its debates and efforts

2 In contrast, the African Banjul Charter, while comprising economic, social, and cultural rights, does not contain an explicit right to social security.

3 See Michael Krennerich, Soziale Menschenrechte zwischen Recht und Politik, Schwabach/Ts. 2013.

4 E/C.12/GC/19, 4 February 2008.

concerning the development of social security systems since 2000. In the last decade, the organization has initiated a “Global Campaign on Social Security and Coverage for All” and, together with the World Health Organization (WHO), developed a “Social Protection Floor Initiative”, aimed at making basic protection possible for everyone.<sup>5</sup> Lastly, in 2011, the ILO has adopted the Resolution and Conclusions concerning the recurrent discussion on social protection (social security), followed by the Social Protection Floors Recommendation (No. 202) in 2012.<sup>6</sup> In all of these documents, the ILO insists that social security constitutes a human right.

## B. The Human Right to Social Security – Duties on States

### I. The Perception of the UN-Committee on ESCR

The right to social security does not specify in detail how states have to construct their national social security systems. As long as they are adequate in fulfilling the right to social security, it is not important whether social security systems are of a public, private, or public-private nature. Accordingly, states have a considerable scope of discretion and creative leeway concerning the implementation of the right. There are however, some limits to that discretion. The General Comments and recommendations of the UN treaty bodies, in particular the UN Committee on ESCR, provide useful guidance in this regard. Although they are not legally binding, they have contributed significantly to the concretization of individual human rights, and are widely acknowledged as important guides for states in their implementation.

In General Comment No. 19, the UN Committee on ESCR defines as follows: „The right to social security encompasses the right to access and maintain benefits, whether in cash or in kind, without discrimination in order to secure protection, *inter alia*, from (a) lack of work-related income caused by sickness, disability, maternity, employment injury, unemployment, old age, or death of a family member; b) unaffordable access to health care; c) insufficient family support, particularly for children and adult dependents“.<sup>7</sup> The Committee thus picks up the same aspects that the ILO has already stipulated in its 1952 Social Security (Minimum Standards) Convention (No. 102), as well as in further Conventions and Recommendations. Meanwhile, the ILO’s World Security Report 2010/2011, additionally includes general protection from poverty and social exclusion in its working definition.<sup>8</sup>

In concretizing the right to social security, the UN Committee on ESCR focuses on the availability, accessibility, and adequacy of social security systems, which have to cover the aforementioned social risks and contingencies. In other words, social security systems should

5 ILO, Social Protection Floor for a fair and inclusive globalization. Report of the Advisory Group chaired by Michelle Bachelet, Geneva, 2011.

6 ILO, The strategy of the International Labour Organization. Social Security for all. Building social protection floors and comprehensive social security systems, Geneva 2012.

7 E/C.12/GC/19, para. 2.

8 ILO, World Security Report, note 2, p. 13 and p. 2.

guarantee indiscriminate access to health services, provide benefits in the case of work losses due to illness, disability, death of family members, old age, unemployment, and maternity, and further support families, children and adult dependents. Accessibility thereby encompasses, *inter alia*, the universal coverage of social security systems (for which non-contributory schemes are considered mandatory), as well as the affordability of contributory social insurance.

As with other human rights, the UN Committee on ESCR refers to the widely recognized three types of obligations on states: the obligation to respect, to protect, and to fulfill.<sup>9</sup> Obligation to respect means that the state itself must not violate the right to social security. According to the Committee, government bodies are not allowed to limit the equal access to social security (principle of non-discrimination). Moreover, they are prohibited from arbitrarily interfering with existing public and private institutions of social security.<sup>10</sup> For next to the state, social security systems can also be organized by other entities. In many developing countries, communities that help each other in times of distress, as well as non-commercial member organizations like self-help groups, cooperatives, and religious associations regularly assume a greater role than market-oriented, commercial insurance systems.

The obligation to protect provides that states must safeguard individuals from interferences with their right to social security through third parties. Where social security schemes are run by non-state entities, e.g. private-sector providers, the state has to ensure „that private actors do not compromise equal, adequate, affordable, and accessible social security“.<sup>11</sup>

The obligations to fulfill under the right to social security are extensive. According to the Committee, states must, first, assist individuals in realizing their right to social security, e.g. through legislative measures and national action plans that aim to ensure that social security systems are universally accessible and cover the aforementioned social risks and contingencies (obligation to facilitate). Second, states shall enhance access to social security systems through awareness raising and education (obligation to promote). Third, states shall offer non-contributory benefits to individuals who are unable to benefit from existing social security systems themselves (obligation to provide). Moreover, states shall make sure that social security systems are able to cope with emergencies, for instance, natural disasters, armed conflict, or crop failures.<sup>12</sup>

It is to fulfill those obligations in particular that pose a major challenge for states. In the light of limited resources and persisting social grievances, particularly developing countries struggle to fulfill all aspects of the right to social security and ESCR in general overnight. This concerns especially those aspects of ESCR that require states to provide comprehensive services and take long-term action. Therefore, the ICESCR allows states to work towards the full realization of ESCR progressively, while avoiding setbacks as far as possible.

9 See Krennerich, note 4, pp. 103-110.

10 E/C.12/GC/19, para. 44.

11 E/C.12/GC/19 para. 46.

12 E/C.12/GC/19, paras. 47-50.

This does not mean, however, that obligations to fulfill can be put off forever. A lack of resources, for instance, does not automatically count as an excuse for remaining inactive, or for deferring the implementation of the right to social security for indefinite times. States are obliged to take immediate and discernible steps towards achieving the right to social security. As part of the “core obligations” that need to be fulfilled immediately, states are required to ensure at least the “minimum essential levels” of social rights laid down in the ICESCR. Core obligations require, for instance, “to ensure access to a social security scheme that provides a minimum essential level of benefits to all individuals and families that will enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, food-stuffs, and the most basic forms of education”<sup>13</sup> In the opinion of the UN Committee on ESCR, states are thus required to build on the obligation to fulfill “minimum essential levels” in working progressively towards the complete realization of the right to social security.

## *II. The Perception of the ILO*

The „two-dimensional strategy“ of the ILO, which was laid down in the 2011 Resolution and Conclusions and the 2012 Recommendation, follows a similar logic. „Effective national strategies to extend social security, in line with national circumstances, should aim at achieving universal protection of the population by ensuring at least minimum levels of income security and access to essential health care (horizontal dimension) and progressively ensuring higher levels of protection guided by up-to-date ILO social security standards (vertical dimension).“<sup>14</sup>

### *The two-dimension strategy for the extension of social security (ILO)*

High level of protection ↑ floor level of protection	Voluntary insurance under government regulation	
		Social security benefits of guaranteed levels
	Basic social security guarantees: Access to essential health care and basic income security for all	
	Low individual/household income → high individual/household income	

Source: ILO, Social Security for all, Geneva 2012, p. 3.

13 E/C.12/GC/19, para. 59 (a). In case a state, with all available resources, is unable to provide cover for the minimum level of all risks and contingencies the Committee recommends to identify and prioritize, on the basis of a comprehensive consultative process, a core group of social risks and contingencies (*ibid.*).

14 ILO, Social Security for All, note 7, p. 1.

With regards to the horizontal dimension of the ILO strategy, all national social protection floors should guarantee at least the following four basic social guarantees: “a) access to essential health care, including maternity care; b) basic income security for children, providing access to nutrition, education, care and any other necessary goods and services; c) basic income security for persons in active age who are unable to earn sufficient income, in particular in cases of sickness, unemployment, maternity and disability; and d) basic income security for older persons”.<sup>15</sup> Basic social security guarantees should be anchored in national legislation and be implemented through a combination of benefits<sup>16</sup> and schemes<sup>17</sup>, as fits the national context.

The ILO explicitly states, however, that establishing a comprehensive social security system should not stop at the ground floor of protection. Having build this ground floor – and possibly while building it already – the objective is to achieve higher levels of income security and access to health care for as many people as possible, and as soon as possible. Relevant standards are included in the Social Security (Minimum Standards) Convention (No. 102) and other ILO Conventions and Recommendations, which together concretize the right to social security. The ILO’s Recommendations No. 202 of 2012 provide guidance regarding the development and implementation of national social security extension strategies, which shall ideally be based on national consultations and social dialogues.

### C. Recognition of the Human Right to Social Security

A vast majority of states have formally committed to respect, protect, and progressively fulfill the right to social security by ratifying relevant human rights treaties and/or ILO Conventions. The ICESCR has been signed by 160 states worldwide, including many developing countries. Other human rights conventions that similarly contain a right to social security have even more treaty parties. For instance, the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have 187 and 193 treaty parties respectively (as of September 30, 2013). Meanwhile, the ILO’s Conventions have fewer signatories. Only 29 states have ratified the Social Security (Minimum Standards) Convention (No. 102) of 1952, and mostly only in parts.<sup>18</sup> Nevertheless, the bottom line is that the majority of states have formally accepted the right to social security in one way or another.

Apart from looking at its ratification status, to what extent a human right has been formally recognized needs to be determined by considering whether states have issued reservations and

15 ILO, Social Protection Floors Recommendation 2012 (No. 12), para. 5.

16 E.g. child and family benefits, sickness and health-care benefits, maternity benefits, disability benefits, old-age benefits, unemployment benefits, employment injury benefits.

17 E.g. universal benefit schemes, social insurance schemes, social assistance schemes, negative income tax schemes, public employment schemes, employment support schemes.

18 Art. 2 of the Convention requires states only to ratify a minimum number of provisions, which they can choose individually.

interpretative declarations, which possibly limit its scope of protection. Kuwait, for instance, has rendered the following interpretative declaration when ratifying the ICESCR: „The Government of Kuwait declares that while Kuwaiti legislation safeguards the rights of all Kuwaiti and non-Kuwaiti workers, social security provisions apply only to Kuwaitis“.<sup>19</sup> The declaration affects the principle of non-discrimination between nationals and foreigners, which will be addressed later. In some cases, reservations and interpretative declarations can thus diminish the degree of acceptance of certain passages of the human rights conventions.

Further, it is significant whether states have accepted the control mechanisms foreseen in the human rights conventions. While all states parties to the human rights conventions are obliged to submit regular reports, complaints procedures are usually optional. In the case of the ICESCR, an optional protocol concerning the use of an individual complaints mechanism was only adopted in December 2008, and has recently come into force with its tenth ratification on May 5, 2013. The small number of ratifications shows that states are still very reluctant to allow their citizens access to an international complaints procedure for social rights. The optional protocol to CEDAW, which similarly foresees an individual complaint procedure, has been ratified by 104 states and come into force in December 2000. However, it has so far been used only sparingly. In contrast, states are much more willing to cooperate in the context of the obligatory reporting system. Still, there are numerous states which are unable or unwilling to meet their reporting obligations in due time. Moreover, the concluding observations of the Committee on ESCR are not always adequately respected and implemented.<sup>20</sup>

In addition, it is not clear to what extent states indeed meet their obligation to give legal effect to international human rights in domestic law. In this regard, it must be assessed how international treaties find their way into national law, and what position they are accorded within the domestic hierarchy of norms. In numerous South American countries, for example, human rights treaties are accorded the status of constitutional norms. Sometimes they are even seen as part of constitutional law, in the sense of a *bloque constitucional*.<sup>21</sup> Meanwhile, no coherent state practice has yet emerged that would guarantee that the ICESCR rights and thereby the right to social security are brought to bear in domestic law. It must also be noted that despite a growing number of contrary examples, national courts only marginally refer to ESCR included in international treaties. Accordingly, the UN Committee on ESCR regularly complaints about the insufficient possibilities for individuals to assert their ICESCR rights before domestic courts. This applies also to the right to social security.

Finally, it is crucial that domestic law is in conformity with human rights and includes legal guarantees that cover their material scope. For contrary to international law, where few or no means exist for enforcing ESCR, domestic law can be enforced. Accordingly, it is all

19 Available online, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec) (last accessed on 04 December 2013).

20 See Krennerich, note 4, pp. 389-398.

21 See Helen Ahrens, Die Zukunft als Herausforderung des Rechts – Gedanken zur (Menschen-)Rechts-politik in Lateinamerika, Zeitschrift für Menschenrechte. Journal for Human Rights 2 (5) (2011), p. 33.

the more important that ESCR and the right to social security are anchored in domestic legal orders, and equipped with the necessary institutional guarantees for their implementation. Ideally, ESCR are included as fundamental rights in the national constitution, thus providing the basis for constitutionally protected, justiciable legal claims. For example, South Africa's constitution, adopted in 1996, has received much praise as an "excellent framework" for the implementation of ESCR.<sup>22</sup> Its Bill of Rights contains also a right to social security:

*Article 27 (Health care, food, water and social security):*

1. *Everyone has the right to have access to:*
  - a) *health care services, including reproductive health care;*
  - b) *sufficient food and water; and*
  - c) *social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.*
2. *The states must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.*
3. *No one may be refused emergency medical treatment.*

While a number of more recent constitutions, for instance in South America (e.g. Colombia, Venezuela, Ecuador, Bolivia), equally provide for a broad spectrum of ESCR, many constitutions contain no ESCR, or at least not coupled with a subjective legal entitlement. If so, a subjective entitlement can still be based on ordinary domestic law, which would have to be checked in each case.

#### **D. Social Security Systems and Coverage Gaps of Social Security**

Some form of social security systems exist in almost every developing country. Compared to those in Western welfare states, however, they are usually much more limited in scope regarding the risks they cover, the benefits they provide, and the population groups they include. As a matter of law and fact, social security systems in developing countries usually benefit only a minority of the population. In particular rural populations, or people employed in the typically large informal sector often remain without social security protection.<sup>23</sup> According to the UN Committee on ESCR and the ILO, within the meaning of core obligations or a Social Protection Floor respectively, such coverage gaps need to be closed and basic coverage be made accessible for all. On this basis, the right to social security and the relevant ILO standards could then be fully realized. In the following, a number of aspects of the right to social security will be looked at in more detail:

22 *Venitia Govender*, Economic, Social and Cultural Rights in South Africa: Entitlements, Not Mere Policy Options, in: Berma Klein Goldewijk/ Adalid Contereras Baspineiro/ Paulo Cesar Carbonari, (eds.), *Dignity and Human Rights. The Implementation of Economic, Social and Cultural Rights*, Antwerp 2002, p. 87.

23 Insufficient social security coverage virtually constitutes a defining characteristic of informal employment. See ILO, World Report, note 2, p. 27.

### *I. Social health protection coverage*

When people get sick, they need adequate and affordable health care. The goal of universal health coverage, as defined by the World Health Organization (WHO), is to ensure “that all people obtain the health services they need without suffering financial hardship when paying for them”.<sup>24</sup> According to ILO estimates, however, one third of the world’s population and three quarter in low-income countries have no access to health facilities and services when in need – “and, for many more, the expenditure necessary to obtain health care may cause financial catastrophe for their households in the absence of adequate social health protection to cover or refund such expenditure.”<sup>25</sup> Every year, 100 million people alone are forced into poverty because they need to pay for health services themselves (out-of-pocket payments).<sup>26</sup> At the same time, in developing countries, people who get sick and cannot work anymore often lose their income, and hence their livelihood.

The right to social security demands affordable access to health care. In this sense, it is closely connected to the right to health, which comprises availability, accessibility, acceptability and quality of public health, as well as health-care facilities, goods, services and programmes. Accessibility thereby requires that access to health-care facilities and services is open to all people, which includes several dimensions: (a) without discrimination, especially of vulnerable and marginalized groups; (b) physically accessible, i.e. within reach and easily accessible for women, children, elderly, and people with chronic diseases or disabilities; (c) economically accessible, i.e. affordable; and (d) informed, which means that people have the right to seek, obtain, and share health relevant information.<sup>27</sup>

Considering the millions of people around the globe who lack access to adequate health care, and who suffer and die from preventable and curable diseases, the scope of the challenge from a human rights perspective is obviously immense. Data and reports on developing countries provided by the WHO and the ILO make the gaps in affordability of health services and financial protection of people in need strikingly clear.<sup>28</sup> Meanwhile, there are large differences between and within different regions as well as countries, concerning the coverage, the scope, and the quality of health services. Similarly, there is a great variety of social health protection mechanisms, e.g. different public schemes, social insurance schemes, private insurances, as well as community-based schemes.

24 See [www.who.int/features/factfiles/universal\\_health\\_coverage/en/index.html](http://www.who.int/features/factfiles/universal_health_coverage/en/index.html) (last accessed on 20 September 2013).

25 ILO, Extending social security for all. A guide through challenges and options, Geneva 2010, p. 66 and p. 73.

26 See [www.who.int/features/factfiles/universal\\_health\\_coverage/en/index.html](http://www.who.int/features/factfiles/universal_health_coverage/en/index.html) (last accessed on 20 September 2013).

27 See, for instance, the General Comment on the right to health, CESCR E/C.12/2000/4, 11 August 2000, para. 12. For an introduction, also: Krennerich, note 4, pp. 203-227.

28 WHO, The World Health Report 2013. Research for Universal Health Coverage, Geneva 2013; WHO, World Health Statistics 2013, Geneva 2013.

A positive example that is frequently cited is Thailand's progress towards universal health care. Thailand's health coverage consists of three pillars: employer-provided schemes, a health insurance scheme, and a universal health care scheme.<sup>29</sup> The ILO has also pointed to the experience of Ghana, which demonstrates "that it is possible for a country – whose workforce in the informal economy accounts to 90 per cent of the total workforce – to successfully address challenges such as insufficient funding, low service quality and exclusion, by introducing multiple social health protection schemes ranging from community-bases schemes to a national health insurance scheme for different groups for the population and bringing them progressively into alignment".<sup>30</sup> Transferring such positive experiences to other countries, however, is often difficult. Considering the different local contexts, there is no one-size-fits-all solution concerning access to health care and financial protection of people in need.

## II. Pension schemes

Pension schemes aim to ensure a regular income also for people in retirement age. The vast majority of people living in developing countries, however, must work even at old age, especially in the informal sector. This is because they do not have a statutory right or factual access to pensions, or because pensions are so low that they simply do not suffice. In developing countries, most people in retirement age have never paid into contributory old-age-pension schemes (often because they could not), and do not benefit from non-contributory social assistance or a universal pension. Often, pension standards are not high enough to guarantee a life in dignity.

Again, the discrepancies between and within different regions are enormous. The situation is particularly dire in Africa, where only 10 percent of elderly people have any pension entitlement. Within Africa, some states still stand out as positive examples. Next to contributory schemes for employees in the formal sector, they provide social assistance pensions (South Africa) or manage to reach the bulk of their populations by providing for universal pensions (e.g. Botswana, Mauritius, Namibia and Lesotho). In South Africa, for instance, a means-tested and tax-financed social pension provides a monthly benefit to those above the age of 60 years und who live in poverty. In Namibia, all citizens living in rural areas and above 60 years of age are entitled to an unconditional old-age pension.<sup>31</sup>

In Asia, the percentage of elderly people receiving pensions is substantially higher than in Africa, but with huge discrepancies existing between individual countries. Former socialist states of Central Asia like Mongolia have a remarkably high coverage rate, while the level of pensions is very low. In Latin America, which has the highest coverage rates of all developing regions, countries that make up the Cono Sur perform better than those within Central Amer-

29 ILO, Extending Social Security for All, note 26, pp. 75-77. See also: *Gita Sen, Engendering Social Security and Protection: The Case of Asia*, FES, International Policy Analysis, Berlin 2011, p. 6.

30 ILO, Extending Social Security to All, note 26, pp. 77-78.

31 ILO, Extending Social Security to All, note 26, pp. 81-82.

ica.<sup>32</sup> Argentina, Brasil, and Chile have significantly increased the coverage of non-contributory pension schemes.<sup>33</sup> Brasil is notable for its “rural pension”, a non-contributory, largely tax-financed pension for men and women over 60 years (55 years respectively), which have for a certain minimum period of time participated in a “rural family economy”.<sup>34</sup> In sum, however, most elderly people in developing countries receive no or only vastly inadequate old-age pensions.

### *III. Unemployment protection schemes*

Protection is even weaker in case of unintentional unemployment. In theory, unemployment benefit schemes can make up for a temporary loss of income for a certain time. Such schemes can consist of unemployment insurance or income support programmes for the unemployed. Statutory provisions, for instance in the Labour Code, can also play a role in some developing countries, requiring employers to pay a “lump sum” of several monthly wages to employees that have been dismissed.

In developing countries, where underemployment and precarious employment are more often a problem than unemployment, unemployment protection schemes generally apply only to a small section of the economically active population (EAP), mainly in the formal sector. In Northern Africa, Asia, the Middle East and Latin America, only approximately 20 percent of the EAP are legally covered. In Sub-Saharan Africa, the percentage of legally covered is even lower, whereas effective coverage tends to zero.<sup>35</sup>

### *IV. Social Assistance*

In countries with a large informal sector and only a small coverage of contributory social security systems, non-contributory social assistance programmes constitute an opportunity to close coverage gaps and reduce poverty at least partly. Such schemes provide individuals and families with minimum income support or other social benefits.

Social assistance schemes exist in a large variety. Next to the non-contributory pension schemes mentioned earlier, cash transfer programmes have gained in importance over the last years, especially those addressed to children and families. The conditional cash transfer (CCT) programmes *Bolsa Familia* and *Oportunidades* (previously: *Progresa*) in Mexico,<sup>36</sup> for instance, are considered as “flagship programmes”.<sup>37</sup> Becerra Moro has counted 23 CCTs alone operating in 18 countries of Latin America and the Caribbean, covering 25 million families

32 ILO, World Social Security Report, note 2, p 52.

33 ILO, Social Protection Floor, note 6, p. 64.

34 ILO, Extending Social Security to All, note 26, pp. 82-83.

35 ILO, World Security Report, note 2, p. 60-62.

36 See, for instance: *Martina Ulrichs/ Keetie Roelen*, Equal Opportunities for All? A Critical Analysis of Mexico’s Oportunidades, IDS Working Paper, Brighton 2012, No. 413.

37 ILO, World Security Report, note 2, 76.

during the financial crisis in 2011.<sup>38</sup> Examples of CCTs from Africa include the Child Support Grant (CSG) programme in South Africa,<sup>39</sup> and a pilot social cash transfer scheme in Zambia.<sup>40</sup> An example of a public work programme is the National Rural Employment Guarantee Scheme (NREGS) in India, the largest public works employment project in the world.<sup>41</sup> The NREGS enables rural households to work 100 days for a public work programme, for which they receive the minimum wage of an agricultural laborer. Overall, such non-contributing social transfers programmes in developing countries and emerging markets, most of which have been introduced over the last decade, are seen positively. Criticism may be directed at the details, however, and there remains room for improvement. More generally, the charity character of social assistance has been criticized.

## E. Challenges for the Implementation of the Right to Social Security

By and large, enormous efforts are necessary to increase the coverage of social security systems in developing countries. From a human rights perspective, it is essential to expand the range, the level, as well as the quality of social services.

### I. The Informal Sector

In developing countries, employment in the informal sector is not an exception, but rather the rule. The informal sector includes large parts of the economically active population, especially women. Although variations exist, it is generally characterized by insecure contracts, low wages, and mostly no protection whatsoever in the case of unemployment, illness, or other risks. Therefore, the reach of contributory social insurance programmes in developing countries is already limited by the fact that they usually exclude the huge informal sector. The German Federal Ministry for Economic Cooperation and Development (BMZ) estimates that so far only few developing countries have systematically engaged in efforts to extent social protection schemes to the informal sector, making them adapt to the specific challenges of informally employed.<sup>42</sup>

Although states enjoy large discretion in implementing the right to social security, in the light of the low coverage of social insurance schemes at present, there is still a need for non-

38 *Maria José Becerra Moro*, Engendering Social Security and Protection: The Case of Latin America, FES, International Policy Analysis, Berlin 2011, p. 4.

39 DSD/SASSA/UNICEF, The South African Child Support Grant Impact Assessment, Pretoria 2012.

40 ILO, Extending social security to all, note 26, pp. 83-89.

41 See, for example, *Yanyan Liu/Christopher B. Barrett*, Heterogeneous Pro-Poor-Targeting in India's Mahatma Gandhi National Rural Employment Guarantee Scheme, International Food Policy Research Institute (IFPRI), Discussion Paper 01218, Washington D.C. 2012, <http://www.ifpri.org/publication/heterogeneous-pro-poor-targeting-india-s-mahatma-gandhi-national-rural-employment-guarantee> (last accessed on 11 December 2013).

42 BMZ, Sektorkonzept Soziale Sicherung, Bonn/ Berlin, p. 9.

contributory social security schemes to reach people in the informal sector and from poorer parts of the population. Depending on their design and implementation, such schemes have at least the potential to contribute to realizing social security, reducing poverty, and facilitating development among poor and the poorest households.

Since neither the state, nor the market in developing countries currently provide sufficient social protection to large parts of the population, poor people continue to rely on traditional, informal, or cooperative communities or organizations. However, they are becoming increasingly fragile in the light of changing living conditions (e.g. economic modernization, urbanization etc.), and are thus unable to tackle the huge challenges of social security (e.g. extreme poverty, HIV/AIDS etc.) on their own. On the one hand, the right to social security requires states to respect and protect such solidarity structures, networks, and organizations. On the other hand, states cannot dispose of their own obligations, and with respect to their duty to fulfill, must organize and establish a universal social protection scheme themselves. Ideally, family, neighborly, cooperative, market-oriented and governmental social security systems complement each other.<sup>43</sup>

## *II. Protection of Vulnerable Groups vs. Bias towards the Privileged*

Social security systems in developing countries are not only generally limited in their coverage, but also considerably biased towards already privileged groups within the population. Social security systems traditionally benefit mainly strategically important and strong groups. These are military personal, employees in the public sector, urban employees, as well as workers in large, formal sector corporations, who are organized in syndicates.<sup>44</sup> The BMZ has also criticized that social security systems in partner countries of German development co-operation often produce regressive distributary outcomes in favor of wealthier parts of the population.<sup>45</sup> Hence, it is important that social policy focuses more strongly on those groups that are excluded from traditional systems of social security. According efforts to reach poorer parts of the population are discernable all over the globe.

Further, from a human rights perspective, states are compelled „to ensure the right of access to social security schemes on a non-discriminatory basis, especially for disadvantaged and marginalized individuals and groups.“<sup>46</sup> States are thus not allowed to discriminate directly or indirectly against specific groups concerning their access to social services – no matter whether women, indigenous people, or internally displaced, to mention but a few groups explicitly that the UN Committee on ESCR explicitly names.<sup>47</sup> For instance, including

43 See *Hans Gsänger*, Förderung der sozialen Sicherheit. Ein strategisches Feld der Entwicklungszusammenarbeit zur Erreichung des globalen Armutshaltierungszieles, in: Joachim Betz/ Wolfgang Hein (eds.), Soziale Sicherung in Entwicklungsländern, Opladen 2004, p. 95.

44 BMZ, Sektorkonzept Soziale Sicherung, note 43, p. 11.

45 BMZ, Sektorkonzept Soziale Sicherung, note 43, p. 11.

46 E/C.12/GC/19, para. 59 b).

47 E/C.12/GC/19, para. 29 pp.

women in social security systems without discrimination constitutes a great challenge in all developing regions.<sup>48</sup> Especially the Committee on the Elimination of Discrimination against Women (CEDAW) has regularly pointed to the feminization of poverty, and to the fact that women in precarious living and working conditions are often precluded from accessing social security systems.<sup>49</sup> Meanwhile, non-discrimination in access to social security constitutes a duty on states that must be directly implemented, and that can be enforced by legal action before national courts in the case of a violation.

### *III. Social Security also for Foreigners?*

The ICESCR does not link the right to social security to citizenship. According to the UN Committee on ESCR, non-nationals that have contributed to a social security system must also be able to claim benefit from the social services they provide. In addition, they must have access to non-contributory social services. Where limitations exist, e.g. time lines etc., they must be adequate and justified. Ultimately, the Committee finds that all people, regardless of their nationality or residency status, have a right to basic health services and non-discriminatory access to non-contributory social benefits, in line with international standards. Particular attention should thereby be paid to migrant workers, refugees, asylum seekers and stateless persons, explicitly considered as vulnerable groups.<sup>50</sup>

In many countries, however, non-nationals do not have access to social services. In the context of the ICESCR's state reporting system, the UN Committee on ESCR regularly criticizes such discrimination against non-nationals. Criticism is directed not only at poor states, like Kazakhstan.<sup>51</sup> In the rich, Arab, oil-producing countries, for instance, foreign migrant workers cannot access the comprehensive social services that exist for national citizens.<sup>52</sup>

Meanwhile, national courts have intervened in some cases, referring to the principle of non-discrimination. Two examples serve to illustrate this point. In Argentina, the court had to deal with the case of a Bolivian girl that due to its disabilities, could not move her arms and legs, eat without help, or speak. The girl had been refused a disability pension on the grounds that she had not yet been living 20 years in the country, as required by national law in order

48 See, for instance: *Becerra Moro*, note 39; *Clara Osei-Boateng*, Engendering Social Security and Protection: The Case of Africa, Friedrich-Ebert-Stiftung, International Policy Analysis, Berlin 2011; *Shahra Razavi*, Engendering Social Security and Protection. Challenges for Making Social Security and Protection Gender Equitable, FES, International Policy Analysis, Berlin 2011; *Sen*, note 30.

49 See also the comment on Art. 11 of the Convention in: *Marsh A. Freeman/ Christine Chinkin/ Beate Rudolf*(eds.), The UN Convention on the Elimination of All forms of Discrimination Against Women: A Commentary, Oxford 2012, p. 294.

50 E/C.12/GC/19, paras. 36-38.

51 E/C.12/KAZ/CO/1, 21. May 2010, para. 14.

52 *Ziad Abdel Samad / Diana Zeidan*, Soziale Sicherheit in der arabischen Region: Konzeptionelle Herausforderung und harsche Realität, in: *Richard Brand* (ed.), Social Watch Deutschland Report 2007: Würde und Menschenrechte wahren. Das Recht auf soziale Sicherheit für alle verwirklichen, Bonn 2007, pp. 31-35.

to be legally entitled to receive benefits. Some judges found that the relevant statutory provision constituted a disproportionate encroachment on the right to social security, whereas others constituted a violation on the grounds of the principle of non-discrimination.<sup>53</sup>

The South African constitutional court equally referred to the principle of non-discrimination in the case *Khosa v. Minister of Social Development* (2004), declaring as unconstitutional a statutory provision that limited access to social services to national citizens. The court criticized the blanket exclusion and discrimination of non-nationals with permanent residency, without considering further whether the government's social security programmes were sufficient to meet possible duties to fulfill under the right to social security. The argument of the government concerning the excessive financial burden was refused by the court, which remarked that the government had failed to make clear which additional costs it would have incurred from providing social benefits to elderly and disabled non-nationals permanently residing in the country.<sup>54</sup> Meanwhile, critics have pointed out that the court in this case had drawn a distinction between permanent residents and temporary residents, which according to Manisuli Ssenyono, was incompatible with the ICESCR.<sup>55</sup>

#### *IV. Is the Right to Social Security financially feasible?*

In the opinion of the BMZ, the low coverage rate and limited effectiveness of social security systems in part results from their inadequate financing.<sup>56</sup> Clearly, states need considerable resources to build and maintain universally accessible, functioning social security systems in diverse areas (health, age, unemployment etc.). Developing countries will typically have fewer resources at their disposal than western welfare states. Nevertheless, the UN Committee on ESCR finds they are obliged to take immediate actions. Similarly, the ILO does not accept general excuses on the grounds of a lack of resources. Guy Ruder, Director-General of the ILO, states that "there is no excuse for any society to put off building social security for its members, and it can be done at any stage of development, even if gradually".<sup>57</sup> The ILO thereby explicitly does away with the assumption that social security is a luxury good, and shows that developing countries, too, can afford at least basic social security systems. A necessary condition is an according prioritization of expenditures, as well as an extension of the revenue base.

The fact that countries in a comparable stage of development show significant variations in the scope and quality of their social security systems illustrates that governments always

53 Corte Suprema, R. 350. XLI. Recurso de Hecho, Reyes Aguilera, Daniela v. Estado Nacional.

54 *Jonathan Berger*, Litigating for Social Justice in Post-Apartheid South Africa: A Focus on Health and Education, in: Varun Gauri/ Daniel M. Brinks (eds.), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge, 2008, p. 49.

55 *Manisuli Ssenyono*, *Economic, Social and Cultural Rights in International Law*, Oxford 2009, pp. 169-170.

56 BMZ, Sektorkonzept Soziale Sicherung, note 43, p. 11.

57 ILO, *Social Security for All*, note 7, vi.

enjoy a certain political scope of action. After all, it is a political decision what percentage of public expenditures are allocated towards social security systems. The authors of the World Security Report 2010–2011 argue along these lines: „And at any size of government, countries have some choice as to what proportion of public resources to invest in social security“.<sup>58</sup> After all, the inadequate social protection of people in developing countries is not only owed to a shortage of financial resources. Culturally determined ideas about social justice within society and politics are also of importance, as well as the fact that for decades, neither states nor the international community have recognized social security for the underprivileged and marginalized as an important political goal, let alone a human rights obligation. The development of social security systems has, however, gained in political importance, together with the growing realization that social security systems are not only a cost factor, but nothing less than a precondition for sustainable economic development, contributing to the stabilization of societies in times of economic crisis.

While the ILO assumes that Social Protection Floors should in principle be financed through domestic sources of revenue, it also points out how international cooperation can provide support. The UN Committee on ESCR goes further in this regard, declaring international support as an obligation. Its General Comment on the right to social security contains a chapter on international obligations, which establishes not just extraterritorial duties to respect and protect, but also to fulfill. States are accordingly required not only to respect the right to social security in other countries, and to protect it from interferences through third parties residing within their territory. Depending on their resources, they are also obliged to support other states in the implementation of the right to social security.<sup>59</sup>

Such international obligations can be based on the UN Charter, which requires UN member states to foster universal respect and realization of human rights in international cooperation (Art. 56 and 55). In the ICESCR, treaty parties have committed to “take steps, individually and through international assistance and co-operation “to contribute to the full realization of Covenant rights progressively (Art. 2). The UN Committee in ESCR, as well as the authors of the „Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights“<sup>60</sup>, require states to provide international assistance, if they are able to do so. However, many governments (still) reject such a position for going too far. They recognize a political responsibility to support the protection of human rights in other states – but not a legal obligation.

58 ILO, World Security Report, note 2, p. 3.

59 E/C.12/GC/19, para. 53-55.

60 See online: [www.etoconsortium.org/en/library/maastricht-principles/](http://www.etoconsortium.org/en/library/maastricht-principles/) (last accessed on 30 September 2013). see also: *Olivier de Schutter et al.*, Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, *Human Rights Quarterly* 34 (4) (2012), pp. 1084-1169.

## F. Development Cooperation and Global Context

For a long time, development cooperation – or “development assistance”, as it was called back then – did not pursue genuine social policy goals. In line with modernization theories of development, establishing a social welfare state was expected to automatically follow from economic development. Accordingly, the development of social security systems did not need to be further supported through development assistance.<sup>61</sup> On the contrary, it was even seen as an obstacle to economic growth and industrialization, not least because it would allegedly bind resources in an unproductive manner, resources that could otherwise be devoted to the objective of furthering economic development. Ever since the 1960s, however, there have always been voices that highlighted the developmental gains of social security systems, for instance in the United Nations Economic Commission for Latin America and the Caribbean (CEPAL). These voices proposed to support the development of welfare states,<sup>62</sup> which had already been established in some Latin American countries in the first half of the 20<sup>th</sup> century.<sup>63</sup>

In the context of the debt crisis and economic stagnation in the early 1980s, the social security systems existing in many Latin American countries – often inefficient and poorly financed – were drawn into crisis. Consequently, social systems were reformed in line with the then-dominant neoliberal credo and the prescriptions of international financial organizations, which resulted in a considerable reduction of social policy expenditures.<sup>64</sup> Yet the reforms demanded by international lenders within the meaning of the Washington Consensus (liberalization, deregulation, privatization) came with high social costs in many countries. Against this background, poverty reduction and social policy measures became more important again on the international development agenda in the 1990s, as illustrated by the World Social Summit in Copenhagen in 1995, the Follow-up Conference Copenhagen +5, and ultimately the adoption of the Millennium Development Goals. In the light of the East-Asian crisis, even the World Bank formulated “Principles and Good Practice in Social Policy” in 1999.<sup>65</sup> The Principles aim at strengthening the development of social safety nets in developing countries, including through ensuring universal access to basic social services, fostering social security systems and social integration.

61 See also *Lars Kohlmorgen*, Globalisierung, Global Governance und globale Sozialpolitik, in: Joachim Betz / Wolfgang Hein (eds.), *Soziale Sicherung in Entwicklungsländern*, Opladen 2004, p. 59.

62 See *Bernhard Thibaut*, Soziale Sicherheit, in: Dieter Nohlen/ Peter Waldmann/ Klaus Ziemer (eds.): *Die östlichen und südlichen Länder. Lexikon der Politik*, Bd. 4, München 1997, p. 514.

63 See *Carmelo Mesa-Lago* (ed.), *Social Security in Latin America: Pressure Groups, Stratification, Inequality*, Pittsburgh 1978.

64 See *Susanna Sottoli*, Sozialpolitik und entwicklungspolitischer Wandel in Lateinamerika, Opladen, 1999; Ingrid Wehr, Wohlfahrtsregime und soziale Ungleichheit in Lateinamerika, in: Ingrid Wehr/ Hans-Jürgen Burchard (eds.): *Soziale Ungleichheiten in Lateinamerika*, Baden-Baden 2011, pp. 265-267.

65 See *Kohlmorgen*, note 62, p. 69.

At the same time, the issue of social security gained in importance in multilateral and bilateral development cooperation. As a BMZ position paper on the promotion of social security in 2002 reads: “Questions of social security and the strengthening of social security systems have become a central component of poverty reduction strategies. This is illustrated by the OECD/DAC Guidelines on poverty reduction, the World Bank’s World Development Report 2000/2001, the strategies of regional development banks (particularly ADB and IDB), and the German government’s Action Program 2015 on the global reduction of extreme poverty by half. In the 11<sup>th</sup> Development Report of the German government, the goal of social security constitutes one of three main pillars of poverty reduction.”<sup>66</sup>

In 2012, the sector concept on social security (“Sektorkonzept Soziale Sicherung”) replaced the BMZ position paper of 2002. Based on the increased importance of establishing and strengthening social security systems in development policy, the new concept declares social security systems as a crucial ingredient of strategies for the structural reduction of poverty. The same becomes clear looking at the 2012 cross-sector concept on poverty reduction “Fighting poverty more effectively – globally!”. With the concept, the German government commits to a) support the establishment of a poverty-oriented financing of health systems, providing a safety net in the case of sickness; b) promote the development of social security systems; c) help making risk insurance systems more adapt to the needs and potentials of the informal sector; d) support partner countries in providing basic social security to people living in extreme poverty; and e) work with the private sector and civil society to foster the development and implementation of adapted instruments of social security.<sup>67</sup> Already in 2010, the German government, responding to a request of the parliamentary opposition, affirmed that it was very committed to supporting developing countries and newly industrializing countries in building and improving social security systems, pointing to success stories from Indonesia, Cambodia, Tanzania, Kenia, and El Salvador.<sup>68</sup>

Whereas the sector concept on social security makes explicit reference to the human right to social security, neither the two (non-binding) development policy action plans of the BMZ on human rights 2004-2007 and 2008-2010, nor its (binding) cross-sectoral concept on human rights in development cooperation from 2011 refer to the right explicitly and separately.<sup>69</sup> Other human rights assume a more important role. Meanwhile, the previous Great Coalition had passed a resolution in the German parliament that called on strengthening support to

66 BMZ, Förderung sozialer Sicherheit und sozialer Sicherungssysteme in Entwicklungsländern. Ein Positionspapier des BMZ, BMZ Spezial No. 069, Bonn, see *Gsänger*, note 44, pp. 81-82.

67 BMZ, Armut wirksamer bekämpfen – weltweit! Übersektorales Konzept zur Armutsbekämpfung, BMZ-Strategiepapier 6/2012, Bonn/ Berlin 2012, p. 9.

68 Reponse of the German Federal Government to the request of the parliamentary opposition (*Kleine Anfrage*) concerning „Förderung von sozialen Sicherungssystemen in Entwicklungsländern“, Deutscher Bundestag, Drs. 17/1518, 22. April 2010, p. 2.

69 BMZ, Menschenrechte haben ein Recht auf Entwicklung. Entwicklungspolitischer Aktionsplan für Menschenrechte 2004-2007, Bonn/ Berlin 2004; BMZ, Entwicklungspolitischer Aktionsplan für Menschenrechte 2008-2010, BMZ-Konzepte 155, Bonn/ Berlin 2008; BMZ, Menschenrechte in der deutschen Entwicklungspolitik, BMZ-Strategiepapier 4/2011, Bonn/ Berlin 2011.

developing countries and emerging markets in establishing and reforming their social security systems, which refers to the right to social security in the Universal Declaration on Human Rights.<sup>70</sup>

Both from a human rights and a development perspective, the significance of the right to social security has by now been acknowledged. The right to social security influences the programmatic orientation of bilateral and multilateral development cooperation. According efforts, however, must be placed in a greater context. Even the most vigorous attempts of states and the international community can achieve little, as long as global economic developments keep forcing people into poverty, reducing employment, and counteracting social policy efforts, especially under the conditions of the financial and debt crises. Moreover, global economic competition puts enormous pressure on social security systems, often leading to “social dumping” or a “race to the bottom”, in particular in low-income countries. In this context, more fundamental questions arise concerning the existing world economic order and the necessity of a global social policy and global social rights.

A first step in this direction could be the broad acknowledgement and complete implementation of extraterritorial, international obligations on states, as well as making human rights effectively binding on international organizations (World Bank, IMF, WTO, etc.) and transnational corporations. Sadly, we are still far away from that. For now, human rights regimes are primarily aimed at committing and supporting individual states in implementing ESCR in their own territories – even if the UN Committee on ESCR by now exerts international obligations from all states. Although the Committee urges states to make sure that trade agreements and financial loans of international organizations do not restrict the ability of states to implement the right to social security, ESCR play no noteworthy role in the regulation of the global economy.<sup>71</sup> In this sense, ESCR have not yet established themselves as “global social rights”.<sup>72</sup>

70 Deutscher Bundestag, Drs. 16/7747, 16 January 2008.

71 E/C.12/GC/19, paras. 57-58.

72 *Andreas Fischer-Lescano / Kolja Möller*, Der Kampf um globale soziale Rechte: Zart wäre das Gröbste, Bonn 2012.