IS IT POSSIBLE TO VIOLATE THE OBLIGATIONS ARISING FROM THE IMPLEMENTATION OF SOCIAL RIGHTS UNDER INTERNATIONAL LAW?[1]

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There have always been a lot of doubts whether such thing as international law exists or not. An answer to those who question the existence of international law might be that the violation is a form of existence of the international legal norms. Even if international law is violated there is something to violate, and by such legal rules a scale is provided to measure the behaviour of the states.[2] I think the real problem is that the scale itself is uncertain, it is well illustrated by the issues related to the international legal protection of social rights.

The essence of the international legal obligation to implement social rights is captured in Paragraph 1, Article 2 of UN International Covenant on Economic, Social and Cultural Rights. According to it each state party undertakes to take steps to the maximum of its available resources, with a view of achieving progressively the full realisation of the rights recognised in the Covenant. Obviously, it is not an obligation of result. As Robert E. Robertson stated, „maximum" refers to idealism and „available" refers to reality.[3] The first provides teeth to human rights idealism. The second secures a way of escape for the state, because it is not clear how much of the resources should be used for this purpose. We know from the text of Para 1, Article 2 that the state parties should provide the resources individually and through international co-operation and assistance, but the notion of resource is not clear enough, as the *travaux préparatoires* proves it.[4] What is even more important that there is no

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1 This article highlights the author's habilitation lecture.

2 In the interwar period this answer was given by Rezső Márffy-Mantuano, – a professsor of international law at the predecessor university of ELTE, – to his students' doubts.

3 Robert E. Robertson: Measuring State Complience with the Obligation to Devote the „Maximum Available Resources" to Realizing Economic, Social, and Cultural Rights. *Human Rights Quarterly,* Vol. 16, no. 4. (1994) p. 694.

4 Philiph Alston and Gerard Quinn: The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social, and Cultural Rights. *Human Rights Quarterly,* Vol. 9, no. 1. (1987) pp. 156, 178-179.

guidance how could we decide on how much of the resources is enough for compliance. The founding fathers of the Covenant probably thought, if a state ratified the treaty it was a clear sign of having the necessary resources for the implementation, or the leadership was optimistic. In the middle of the golden sixties, under Keynesian economic policy, when the permanent economic development seemed to be eternal, there was a base for step by step implementation. Today thanks to monetarist beliefs, and mainly because of the effects of globalisation the *Zeitgeist* is different, more and more questions are raised about the ability of the state to secure social rights properly. Danilo Türk, a special *rapporteur* of the UN, in his analyses raises the question, is the attitude of the states towards their obligation to implement social rights correct, if more and more states regard themselves as less able to comply with them?[5] His conclusion is not a recommendation to increase the resources, – he is realist, – but he advocates a tolerance towards de facto solutions, such as the existence of the grey or black labour market.[6]

The UN Committee dealing with the supervision of the implementation of the Covenant gives a priority to the minimum core obligations arising from the protected rights. If the Covenant does not provide at least a minimum set of obligation *vis-a-vis* each right, it loses its *raison d'etre*. To compliance the state should provide evidences to prove that she gave priorities to the minimum set of obligations and maximum of its resources has been used to satisfy basic human needs and to provide basic services. The progressive realisation is equivalent to the recognition of that the full compliance can not be done immediately, states the mentioned UN Economic, Social and Cultural Rights Committee. This phrase provides enough room for the Committee to consider the obstacles arising in a state.[7] During the drafting of the Covenant the states declined to provide a competence to come to legally binding conclusions by the supervisory body exactly because they were afraid from such power of interpretation. To step back, to lower the standards is possible, but the state should prove that it is justified to refer to such obstacles in case of all protected rights it used maximum of its resources for this purpose. The Limburg Principles[8] and

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5 *The Realization of Economic, Social and Cultural Rights.* Second Progress Report prepared by Danilo Türk, UN Commission on Human Rights, Sub-Comission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN 4/Sub. 2/1991 / pp. 17, 56.

6 *The Realization of Economic, Social and Cultural Rights.* Final Report prepared by Danilo Türk, UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN 4/Sub. 2/1992 / pp.16, 50.

7 *General Comment No. 3* (Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/1991/23, points 10, 11.

8 *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights.* UN Doc. E/CN4/1987/17.

the Maastricht Guidelines,[9] as non official guidance on the implementation of internationally protected social rights emphasise that the progressive realisation requires an immediate start and in the field of freedom rights having social context such as to organise freely trade unions it is not valid. In case of such rights the obligation implies an immediate full realisation.

The international protection of social rights suffers from the problem of efficiency. In this case the efficiency problem of the international supervisory mechanism is interrelated with the nature of the obligation arising from the international norms protecting social rights, the difficulty to specify their content. The essence of the problem is not only the interpretation of uncertain categories – civil and political rights especially their restriction clauses also include such notions – but the lack of universal scale. The scale should be adapted from country to county.

The structure of law in a broad sense can be seen as a three storey building, according to Oscar Schachter.[10] The general values and political aspirations can be found on the third floor. On the second floor the law in narrow sense having internal consistency and a regulatory possibility has its place. On the ground floor law can be seen as it actually regulates, it is the social reality. There are elevators and staircases between the levels. In case of international norms protecting social rights the efficiency problems emerge both on second and ground floors, in conjunction with regulatory capability and actual implementation. Under such conditions the essence of international supervision is not "more" than guidance and someone could raise doubts *vis-a-vis* the seriousness of the values of the third floor.

There is an approach to the supervision over international protection of social rights which is called „violation approach." Its starting point is that to conclude positively on violation – *even without further legal consequences* – strengthens the efficiency of the norm. I don't think this thesis is right, at least it is not right if there are such conclusions reached in a great number, because such practice undermines the belief in the reality of implementation of the norm. That is the reason why the UN Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights is careful in this question. It is also important to emphasise that the violation approach proved to be very useful by providing an analytical tool on what should be concentrated if the implementa-

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9 The Maastricht Guidelines on Violation of Economic, Social and Cultural Rights. *Human Rights Quarterly,* Vol . 18, no. 3. (1998)

10 Oscar Schachter: Towards a Theory of International Obligation. In: S. M. Schwebel (ed.): *The Effectiveness of International Decisions.* pp. 29-30, as quoted by: Pieter van Dijk: Normative Force and Efectiveness of International Norms. *German Yearbook of International Law,* Vol. 30, (1987) Berlin, Duncker und Humblot, 1988, p. 23.

tion reports of the states are under scrutiny. Audrey R. Chapman correctly identifies three major things: the implementation of minimum core obligations, – remember it is the *raison d'etre* of the regulation – the discrimination issues, – they are easier targets – and finally the governmental policy issues.[11] In the latest case the objects of analyses are the effects and side effects of governmental reforms in the field of social security, health system, etc. To draw correct conclusions it is important to rely on indicators and benchmarks. Two types of them can be identified, the first group reflects the capability of the state to perform, the second the achievements in the light of capability. The first group mainly includes statistical data, the second data reflecting the change in the social settings of those who live at bottom of the social ladder, data reflecting that the government gave priority to the implementation of obligations arising from international protection of social rights, and data reflecting the compliance with indicators of a specific social right, for example in case of right to education availability.[12]

The implementation does not make mandatory to include social rights into the constitution, but as the UN Committee stated in its general commentary, it is highly important to have domestic framework legislation. Such framework legislation can be the main vehicle of the national implementation strategy by setting the goals, the timeframe, ways and means, institutional responsibility and if possible, legal remedies.[13] The problem is the practice. The governments are frequently reluctant to enact such legislation with clear goals and timeframe, because they feel too much obliged by it.

The implementation of certain internationally protected social rights, – such as the right to social and health assistance as it is enshrined in Paragraph 1, Article 13 of the European Social Charter, and as it was cleared by the European Committee of Social Rights – requires a secured procedural right of the individual to turn to an independent body or court.[14] It is also important to note that it does not mean that case should directly be based on the text of the Charter itself. It is enough if the case is based on domestic legislation aiming the implementation of the above mentioned right.[15] The recognition of the direct ef-

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[11] Audrey R. Chapman: A „Violation Approach" for Monitoring the International Covenant on Economic, Social and Cultural Rights. *Human Rights Quarterly,* Vol. 18, no. 1, (1996) p. 43.

[12] Asbjorn Eide: The Use of Indicators in the Pracice of the Committee on Economic, Social and Cultural Rights. In: Asbjorn Eide, Catarina Krause and Allan Rosas (eds.): *Economic, Social and Cultural Rights.* A Textbook. Dordrecht, Martinus Nijhoff, 2001, p. 531.

[13] General Comment No. 12, on the right to adequate food, para 29, Report of the Committee on Economic, Social and Cultural Rights, UN Doc. E/2000/22

[14] *Case Law on the Europen Social Charter, Supplement No. 2,* p. 25.

[15] Martin Scheinin: Economic and social rights as legal rights. In: Asbjorn Eide, Catarina Krause and Allan Rosas (eds.): *Economic, Social and Cultural Rights. A Textbook.* Dordrecht, Martinus Nijhoff, 2001, p. 44.

fect of the articles of the European Social Charter is a slow process, even in the Netherlands where there is a legal culture to accept the justifiability of social rights, it needed lengthy time. In case of the UN Covenant the reluctance is bigger, even in cases of freedom type obligations.[16] That is the reason why Matthew Craven is right emphasising that the main function of the domestic application of the Covenant (and of the European Social Charter, we might add) is a contribution to the interpretation and development of the open constitutional and statutory regulation.[17]

Although there is a draft protocol on this issue to attach to the UN Covenant under elaboration there is no individual complaint mechanism in the field of the protection of social rights so far. It is not by chance, an international body lacks the assistance provided by lower level legislation. Benchmarks and indicators are not suitable substitutes of lower level domestic legislation. In case of the European Social Charter there is a protocol on a collective complaint mechanism giving right to submit alleged violations to representative unions, organisations of employers. Because of the collective nature of the complaint there is better chance to use indicators and benchmarks, but it is important to note that the majority of the more than thirty complaints so far dealt with freedom type obligations, as child labour, trade union rights and discrimination.

To conclude on the violation of international protection of social rights, it is not a simple thing because of the uncertain nature of the obligation arising from them. It leads to efficiency problems for a certain extent remedied by the use of indicators and benchmarks, and in case the collective complaints by the stronger necessity to conclude more clearly, but the essence of the supervision remains guidance and constructive dialogue. This seems to be in harmony with the main thesis of the New Haven School of international law, that international law should be better understood as a decision-making process where permanently new options have to be made rather than as a set of rules simply waiting for implementation.[18]

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[16] Aalt Willem Heringa: Social Rights in the Dutch legal order. Paper presented at the *Conference on Justiciability of Social Rights.* Strasbourg, 12 – 23 November, 1991. pp. 4-5.

[17] Matthew Craven: the Domestic Application of the International Covenant on Economic, Social and Cultural Rights. *Netherlands International Law Review,* Vol XL, No. 3, (1993) p. 364.

[18] See Stefan Oeter: International Law and General Systems Theory. *German Yearbook of International Law,* Vol. 44, (2001) Berlin, Duncker und Humblot, 2002, p. 83.