

Austerity measures v. Human Rights and EU foundational values*

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1. First of all, let me thank very warmly the Council of Europe Commissioner for Human Rights, Mr. Nils Muižnieks, for honouring us with his active participation in this meeting and for his constant and strong support; CoE Human Rights Director Mr. Christos Giakoumopoulos for honouring us with his participation and drawing conclusions that pave the way to our future cooperation; the FRA for hosting this meeting and the Council of Europe (CoE), the European Network of NHRIs and the EQUINET for co-organising it with the FRA. It is a privilege for me to participate, on behalf of the Greek National Commission for Human Rights (GNCHR), in this highly important and topical meeting.

2. Our theme is “*Strengthening fundamental rights protection together in a changing human rights landscape*”. Is indeed Europe’s Human Rights landscape changing? And if so, in what direction? What about Europe’s fundamental values – the cornerstone of our civilisation: the CoE values, as expressed in the European Convention on Human Rights (ECHR) and the European Social Charter (ESC); the EU foundational values, as enshrined in its Treaties and its Charter of Fundamental Rights (EU Charter) which is binding on both Member States and the EU; the universal values, as expressed in the Universal Declaration and the UN Covenants – the International Bill of Rights – and earlier, since 1919, in the ILO Constitution? Are they respected, are they implemented, are they still alive?

A. The GNCHR Recommendation

3. By a Recommendation “*On the imperative need to reverse the sharp decline in civil liberties and social rights*”,¹ the GNCHR expressed its “deep concern” at “the dramatic deterioration of living standards” in Greece, “coupled with the dismantling of the Welfare State and the adoption of measures incompatible with social justice”; and warned that this situation is “rendering a significant part of the population destitute, widening the social divide, disrupting the social fabric, strengthening extremist and intolerant elements and undermining democratic institutions”.

4. These phenomena are not unique in Europe. They are part of an all too slippery ground on which many European countries are currently situated, leading to a radical change of heart of Europeans vis-à-vis European integration. Moreover, as the CoE Parliamentary Assembly is stressing in its Resolution “*Austerity measures – a danger for democracy and social rights*”,² “*although many of the decisions related to the so-called ‘sovereign debt crisis’ are taken in the realm of [EU] institutions and the Eurozone, many countries of Greater Europe feel the need to further consolidate public budgets*” and “*the impact of the persisting economic crisis.*”

5. As the GNCHR Recommendation recalls, the EU Court of Justice (CJEU) held that the EU “*is not merely an economic union, but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasized in the Preamble to the Treaty*”.³

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¹ Recommendation adopted unanimously by the GNCHR Plenary on 8 December 2011: www.nchr.gr.

² Resolution 1884 (2012) of 26 June 2012 (22nd Sitting), “*Austerity measures – a danger for democracy and social rights*”: <http://www.assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=18916&Language=EN>

³ C-50/96 *Schröder*, C-270/97 *Sievers* [2000] ECR I-933, I-933. This remains in the EU and TFEU Preambles.

6. The Recommendation also recalls that, according to the EU Treaty (Arts. 2, 3(1) and (3)), “civil liberties and social rights constitute fundamental values and the cornerstone of the EU”; “the social objectives of the EU are inextricably linked to its economic objectives and condition the effectiveness of the latter”; “the first aim of the EU is to promote its values and the well-being of its peoples”. Moreover, “the Charter, which is binding on both the EU and its Member States, guarantees indivisible civil liberties and social rights and proclaims that the EU *‘places the individual at the heart of its activities’*.”

7. Therefore, “*it is obvious that there is no way out of the socio-economic and political crisis, which plagues Europe as a whole – in fact no future for the Union – if civil liberties and social rights are not effectively guaranteed*”. Consequently, the GNCHR “*is sounding the alarm*” and calling for an “*immediate joint mobilization of all European forces, if it is to save the values on which the European civilization is founded*”. “*Every measure of ‘economic governance’ as well as the planned amendments to the EU Treaty [must] be adopted and implemented with due respect for and in a manner that safeguards fundamental civil liberties and social rights*”.

8. As EU economic governance measures of purely monetarist character, with spillover effects across Greater Europe, are multiplying, this call is more urgent than ever. The ‘*programmed impoverishment*’ or ‘*pauperisation*’ of a significant segment of the population, as deplored by a growing number of international organisations⁴ see Nos. 38, 56 below) is violating the very right to life.

B. Responses of treaty bodies to the Recommendation and their wider relevance

9. The European Committee of Social Rights (ECSR) quotes the GNCHR Recommendation in seven decisions finding violations of the ESC 1961.⁵ The ILO Committee of Experts on the Application of Conventions and Recommendations (CEACR) also quotes it in its Report to the International Labour Conference (ILC) 2013 regarding violations of ILO Conventions 95 (protection of wages) and 102 (social security-minimum standards) ratified by Greece.⁶

10. The measures condemned by the above and by other ILO bodies, such as the Committee on Freedom of Association (CFA),⁷ were imposed by Memoranda of Understanding (MoU) signed by the European Commission, acting on behalf of the Euro-area Member States, and the Hellenic Republic, as conditions for the disbursement of loan installments. The implementation of the MoU is monitored by the “Troika” (International Monetary Fund (IMF), Commission, European Central Bank (ECB)).⁸

I. Lack of assessment of the social impact of austerity measures

11. No *ex ante* or *ex post* assessment of the social impact of austerity measures was made. As an ILO fact-finding High Level Mission to Greece (September 2011), which met with Government, social partners and Commission and IMF representatives, deplored,

“the Government indicated that [...] employment objectives [...] were not taken into account when discussing the general framing of macroeconomic policies with the Troika”. While “about 20% of the population was facing the risk of poverty [see recent data, No. 21 below], it did not have an opportunity, in meetings with the Troika, to discuss the impact of social security reforms on the spread of poverty [...] and the

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⁴ CEACR Report ILC 102nd Session (2013), C. 102, Greece: <http://www.ilo.org/dyn/normlex/en>; ECSR Complaints 76-80/2012, 7.12.2012: http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints_en.asp.

⁵ ECSR, 23.5.2012 Complaints 65/2011, 66/2011 and Complaints in note 4, op. cit.

⁶ CEACR, C. 102, op.cit.

⁷ CFA 365th Report, Case 2820, November 2012, website in note 4.

⁸ On the situation in Greece until September 2012, see S. Koukoulis-Spiliotopoulos, “Greece”, in *European Gender Equality Law Review*, No. 2/2012: <http://ec.europa.eu/justice/gender-equality/document>.

social security benefits to withstand any such trend, [nor] the impact that policies in the area of taxation, wages and employment would have on the sustainability of the social security system". "It was encouraged by the fact that these issues were on the agenda of [the ILO] and hoped that the ILO would be in a position to convey them to the Troika".

12. At their meeting with the ILO Mission, the Commission's representatives expressed "serious doubts about the sustainability of the situation", while the IMF representatives "were very concerned about high and rising unemployment, not least as Greek social safety nets were weak. [...] only a few of the unemployed received adequate unemployment benefits" (see Nos. 20-22 below). No meeting of the Mission with the ECB is mentioned.⁹

13. The lack of assessment – of concern to the ECSR too (see No. 35 below) – has not been subsequently remedied, in spite of "the serious deterioration of the situation", as the ILO bodies deplored, asking for it to be urgently made, together with the social partners.¹⁰

14. The above concerns meet those of the Commission, which is proposing a social dimension for the EMU, while deploring that "social issues have so far not appeared explicitly in the implementation of the MIP [macroeconomic imbalances procedure]. Making such a link more explicit [...] would ultimately help to identify policy measures to correct imbalances while minimizing their social consequences."¹¹

II. Are austerity measures exacerbating the socio-economic crisis?

15. Treaty bodies stressed the imperative need to safeguard social rights in times of crisis, while seriously questioning the overall economic effectiveness of austerity measures and pointing out the accountability of all parties to the international support mechanism.

16. The ECSR recalled in the Greek cases certain core principles:

"The increasing level of unemployment is presenting a challenge to social security and social assistance systems, as the number of beneficiaries increases, while tax and social contribution revenues decline." "The economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, governments are bound to take all necessary steps to ensure that [they] are effectively guaranteed at a period of time when beneficiaries need the protection most [...]. Doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis, but also accept pro-cyclical effects liable to make the crisis worse and to increase the burden on welfare systems".

17. The CFA shared the Mission's concern that "unprecedented changes are introduced in the Greek labour market institutions in a manner which seems disconnected from Greek realities, thereby weakening, among other things, the impact and real effects of reforms".

18. Consequently, the CFA urged for social dialogue, so as to promote "social cohesion in the country, an element which may relieve the downward economic spiral caused by some of these measures." "[Social partners must be] fully implicated in the determination of any further alterations within the framework of [the MoU] that touch upon matters core

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⁹ ILO, *Report on the High Level Mission to Greece*, paras. 84, 88, 275, 292, 322-324: http://www.ilo.org/global/standards/WCMS_170433/lang-en/index.htm

¹⁰ CEACR Report ILC 102nd Session 2013, C.95, 102; CFA Case 2820, paras. 991, 995, 1002; website in note 4,

¹¹ Communication from the Commission to the European Parliament and the Council: Strengthening the social dimension of the EMU. COM(2013) 690 final, para. 3.1: http://ec.europa.eu/commission_2010-2014/president/news/archives/2013/10/pdf/20131002_1-emu_en.pdf

*to the human rights of freedom of association and collective bargaining and are fundamental to the very basis of democracy and social peace”.*¹²

19. The CEACR quoted the ILO Mission’s estimate that “*should unemployment increase to 1 million from the [September 2011] 800.000, social security funds would lose €5 billion annually and the sustainability of the benefits provided by them would be called into question*”. It therefore urged the Government “*to assess past and future social austerity measures in relation to [...] the prevention of poverty*” and “*to put this question on the agenda of its future meetings with the parties to the international support mechanism*”.¹³

20. The Mission’s gloomy forecast was soon surpassed: in October 2012, the unemployed were officially 1.302.206 (in a 10 million population) (rate 26,1%). In October 2013, they were 1.387.520 (rate 27,8%, the highest in the EU: women: 32,1%, men: 24,7%; 15-24 y.: 57,9%, 25-34 y.: 37,8%), of which 71% long term unemployed (12 months and over).¹⁴ The Commission estimates youth unemployment at 63%.¹⁵ Only 125.300 (9,5%) of the unemployed receive unemployment benefits, which do not cover the long-term unemployed, as they last, in principle, 12 months, while the conditions for paying them are increasingly stricter and their amount (€ 360 per month, plus € 36 for each dependent family member)¹⁶ is well below the poverty level (€ 580, No. 34 below). Moreover, about 1 million workers remain unpaid for months due to financial problems of their employer; not being “unemployed”, they receive no unemployment benefits¹⁷ (see also No. 56 below).

21. According to recent research, 44,3% of the population were, in 2013, below the poverty threshold; 1 in 7 persons below the ‘extreme’ poverty threshold (compared to 1 in 9 in 2012 and 1 in 45 in 2009), mainly due to “the steep rise in joblessness, combined with the dramatic gaps in coverage left by a patchy and inadequate social safety net. This is Greece’s *New Social Question*”, a dramatic feature of which is “the massive phenomenon of jobless couples with children, lacking unemployment benefits or other income support”. “A sharp shift in policy is called for: a comprehensive upgrading of income support and social services to prevent the economic crisis from mutating into a social catastrophe”.¹⁸

22. UN Independent Expert Dr. Cephas Lumina¹⁹ is stressing that rights guaranteed by international law, “*particularly socio-economic rights, are under threat of being undermined by the harsh procyclical policies the Government has been constrained [by the Troika] to implement*”; “*the successively rigid measures have resulted in the contraction of the economy and significant social costs for the population (including high unemployment, homelessness, poverty and inequality)*”. He is also deploring drastic health budget cuts and rising barriers to access to health and medical care. The growing deterioration of physical and mental care is also of concern to the CoE Parliamentary

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¹² CFA Case 2820, website in note 4, paras. 991, 995, 1002.

¹³ CEACR Report ILC 102nd Session (2013), C.102, website in note 4.

¹⁴ Hellenic Statistical Authority (ELSTAT), 9 January 2014, data for October 2013: <http://www.statistics.gr>.

¹⁵ http://europa.eu/rapid/press-release_IP-13-879_en.htm.

¹⁶ Manpower Employment Organisation (OAED) which pays these benefits: <http://www.oaed.gr>.

¹⁷ Labour Institute of the General Confederation of Labour (GSEE) press release: <http://www.capital.gr/News.asp?id=1929437>; http://www.kathimerini.gr/4dcgi/w_articles_kathremote_1_01/12/2013_530184.

¹⁸ Athens University of Economics and Business, Policy Analysis Research Unit (PARU), Newsletter 5/2013, “Poverty in Greece: trends in 2013”: <http://www.paru.gr/index.php?lang=en&page=home>.

¹⁹ Independent Expert on the effects of foreign debt on human rights. “End of Mission Statement”, 26.4.2013: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13281&LangID=E>.

Assembly, which is warning that “Greece is now faced with a health and even “humanitarian crisis”.²⁰

23. In a recent follow-up Resolution, the GNCHR presented the reports and decisions of the treaty bodies and it reiterated and updated its recommendations.²¹

C. Are the measures condemned by treaty bodies compatible with EU law?

24. As most measures condemned by treaty bodies fall within the scope of EU law, the question of their conformity with EU human rights standards inevitably arises. Let us see some examples:

I. Measures condemned by the ECSR

a) Discrimination on grounds of age in employment and social security

25. Most measures condemned by the ECSR fall within the scope of the EU general principle of non-discrimination on grounds of age, which has vertical and horizontal effect. This principle is enshrined in Art. 21 EU Charter, which prohibits all discrimination on grounds, inter alia, of age, and is given specific expression in Directive 2000/78,²² which sets out minimum standards for the public and private sectors regarding employment and occupation (Directive Arts. 3, 8).²³ This Directive – to be also read in light of the right to work enshrined in Art. 15(1) EU Charter²⁴ – prohibits (direct and indirect) discrimination in “employment and working conditions, including dismissals and pay” (Arts. 2(2), 3 (1) (c)). ‘Pay’ includes severance allowances and occupational social security benefits²⁵ (e.g. pensions, sickness benefits – Art. 157 TFEU (ex 141 TEC)).²⁶

26. “Member States may provide that differences of treatment on grounds of age shall not constitute [direct] discrimination, if they are objectively justified by a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and the means of achieving that aim are appropriate and necessary” (Directive Art. 6(1)); i.e. they are suitable and do not go beyond what is necessary for attaining their aim or the detriment that they cause is effectively offset (e.g. by prolonging employment or ensuring a replacement income).²⁷ Moreover, the means must “genuinely reflect a concern to attain the aim in a consistent and systematic manner”²⁸.

27. Allowing justifications is a mere option for Member States; as this option constitutes an exception to a fundamental right, it must be construed strictly.²⁹ No justification is admitted where age is “the sole criterion” of differentiation.³⁰ It is for the State to establish, “to a high standard of proof”, the legitimacy of the justification.³¹ “Mere

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²⁰ Doc. 13225/7.6.2013, Committee on Social Affairs, “Equal access to health care”. Rapporteur Mr. J-L. Lorrain, after a fact-finding visit to Athens of Ms. L. Pasquier, Chair of the Committee: <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19776 &Language=en>.

²¹ “The NCHR Recommendation and decisions of international bodies on the conformity of austerity measures to international human rights standards”: www.nchr.gr.

²² Directive 2000/78/EC (equal treatment in employment and occupation) OJ L 303 of 2 December 2000, p. 16.

²³ CJEU C-555/07 *Kücükdeveci* [2010] ECR I-365, paras. 20-22; C-297-298/10 *Hennigs* [2011] ECR I-7965, para. 47; C-447/09 *Prigge* [2011] I-8003, para. 38; C-144/04 *Mangold* [2005] ECR I-9981, paras. 74-77.

²⁴ CJEU C-141/11 *Hörnfeld* [2012] nyr., para 37; C-159-160/10 *Fuchs* [2011] ECR I-6919. para. 62; C-499/08 *Ingenjörforeningen* [2010] ECR I-9343, para. 45.

²⁵ A social security scheme is ‘occupational’ if it grants benefits by reason of the beneficiaries’ (existing or past) employment relationship. Directive 2000/78 only applies to such schemes: Preamble, recital 13.

²⁶ CJEU C-67/06 *Maruko* [2008] ECR I-1757, para. 60; C-147/08 *Römer* [2011] ECR I-3591, para. 35; C-124/11 *Dittrich* [2012] njr.

²⁷ CJEU C-476/11 *HK Danmark* [2013] njr., para. 68; *Hörnfeld*, para. 42; *Fuchs*, para. 67; C-411/05 *Palacios de la Villa* [2007] ECR I-8531, para. 73.

²⁸ CJEU *HK Danmark*, para. 67; *Fuchs*, para. 85.

²⁹ CJEU C-388/07 *Age Concern* [2009] ECR I-1569, para. 62; C-167/97 *Prigge*, paras. 56, 72.

³⁰ CJEU *Mangold*, para. 65; *Hennigs*, para. 86.

³¹ CJEU *Fuchs*, para. 78; C-388/07 *Age Concern* [2009] ECR I-1569, para. 65.

generalisations” do not suffice,³² while “*budgetary considerations*” cannot justify discrimination.³³ Nor can the need to protect “EU financial interests” be relied on to justify an adverse effect on a fundamental right.³⁴ The same test serves to identify indirect discrimination on any ground; this is why there are cross-references in CJEU case law in such cases. Moreover, there can be no justification for direct discrimination in pay, including occupational social security benefits, as no derogation from Art. 157 TFEU is allowed.³⁵

28. The above apply, in any case, to different treatment imposed by the MoU, as both Member States and EU institutions, bodies, offices and agencies are bound by the general principles and the EU Charter, according to Art. 51(1) EU Charter and CJEU case law.³⁶

29. As the ECSR applies the same test, the lack of justification that it ascertained, as well as the lack of impact assessment and the overall ineffectiveness of austerity measures deployed by treaty bodies (Nos. 11-14 above) must be taken into account.

i) Termination of the employment contract without notice and severance allowance

30. By its first decision³⁷ the ECSR found that a provision making the first year of employment on a contract of indefinite duration a probationary period, during which termination without notice and severance allowance is allowed, violates Art. 4(4) of ESC 1961 (*right to a reasonable period of notice*).

31. This measure affects the conditions of dismissal of a category of workers most of whom are very likely to be young. It thus establishes a difference in treatment indirectly linked to age, which constitutes indirect discrimination on grounds of age, unless it is “objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary” (Directive 2000/78 Art. 2(b)(i)).

32. In the ECSR case, the Government invoked “the trial nature” of the working period concerned and “the unstable nature of Greek enterprises’ activities due to the economic crisis”. The ECSR replied: “*the only acceptable justification for immediate dismissal is serious misconduct*”. The Government’s arguments are also inadequate under EU law; this is the more so as they constitute “*mere generalisations*” (they do not specify the aim, the appropriateness and necessity of the measure) (see Nos. 26-27 above).

33. According to the ECSR and the CJEU, the notice and the allowance are aimed at assisting workers in finding new employment.³⁸ The workers concerned are hard hit by the measure, as it totally deprives them of their income. Moreover, it affects their right to work; this is the more so as their employment prospects are increasingly gloomy (No. 20 above). The inadequacy of the justification is corroborated by the admitted lack of impact assessment and the ineffectiveness of austerity measures deployed by treaty bodies. This measure is thus likely to conflict with EU law, in the light also of Art. 30 EU Charter (*protection in the event of unjustified dismissal*).

ii) “Sub-minima” for young workers – limitation of their social security coverage

34. The second ECSR decision concerned a provision reducing the minimum wage for workers below 25 years old to 68 % of the national minimum wage (“*sub-minima*”). The

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³² CJEU *Age Concern*; C-167/97 *Seymour-Smith* [1999] ECR I-623; C-77/02 *Steinicke* [2003] ECR I-9044.

³³ CJEU C-393/10 *O’Brien* [2012] nyr., para. 66; *Fuchs*, para. 74; C-486/08 *Zentralbetriebsrat* [2010] ECR I-3527, para. 46.

³⁴ CJEU C-579/12 *RX-II, Strack* [2013] nyr., para. 55.

³⁵ Well-established CJEU case law since Case C-262/88 *Barber* [1990] ECR I-1889.

³⁶ CJEU C-617/10 *Fransson* [2013] nyr.; C-92-93/09 *Schecke* [2010] ECR I-11063; C-236/09 *Test-Achats* [2011] ECR I-773; C-402/05P, 415/05P *Kadi* [2008] ECR I- 6351, para. 284; *Strack*.

³⁷ ECSR Complaint 65/2011, op. cit.

³⁸ ECSR Complaint 65/2011, op. cit.; CJEU *Ingeniørforeningen*, op. cit.

Government justified it as an incentive to employ young workers, aimed at combating their acute unemployment while ensuring a decent living. Relying on EUROSTAT data, the ECSR found that this wage is below the poverty level (€ 580 for Greece), in breach of ESC 1961 Art. 4(1) (*right to a fair remuneration sufficient for a decent standard of living*). It noted that it might be justified if the State showed that it furthers a legitimate aim of employment policy (to integrate young workers in the labour market). It considered, however, that the extent of the reduction and the way in which it applies to all workers below 25 are disproportionate, even in the particular economic circumstances, and concluded that this provision also violates ESC 1961 Art. 4(1) in light of the non-discrimination clause of the Preamble to ESC 1961 (*discrimination on grounds of age*).

35. The second ECSR decision also concerned a provision confining the social security coverage of workers aged 15 to 18, employed on “special apprenticeship contracts” of up to one year, to sickness benefits in kind (excluding financial sickness benefits) and to occupational accident coverage at a rate of 1%.³⁹ Noting that this provision established a distinct category of workers within the social security system, the ECSR requested information on: i) the reasons for these restrictions, their necessity and their results, and ii) the existence of social assistance measures for those who find themselves in need due to these restrictions. The Government gave no reply. Consequently, the ECSR found a violation of Art. 12(3) of ESC 1961 (*right to social security*).

36. The above measures fall within the scope of the EU principle of non-discrimination on grounds of age, which precludes the determination of the level of pay (including occupational social security benefits, No. 25 above) by reference to the worker’s age. They are thus likely to constitute direct discrimination on grounds of age under EU law as well, since age is the sole criterion of pay differentiation⁴⁰ (see No. 27 above). Further, a decent standard of living is also an EU norm – an expression of human dignity as a fundamental right and EU foundational value (see Arts. 2, 3(3) TEU, Art. 151 TFEU which refers to Art. 1 ESC 1961⁴¹, Arts. 1 (“*human dignity*”) and 31(1) EU Charter (“*right of every worker to working conditions which respect his or her health, safety and dignity*”).

iii) Reduction or suppression of retirement benefits on grounds of age

37. By five further decisions⁴² the ECSR found that reductions or suppression of retirement benefits, “due to their cumulative effect” and “the procedures adopted to put them into place” (no impact assessment; no observance of the proportionality principle) violate ESC 1961 Art. 12(3). Some of these measures are related to age (they disadvantage beneficiaries below 55 or 60 years of age). The Government argued that they aim to enhance economy competitiveness and labour market operation, and are required by the MoU; exceptions are provided for vulnerable groups.

38. The ECSR deplored that “*even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions [...], [it] has not conducted the minimum level of research and analysis into the effects of so far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups*”. Thus, “*it has not been discovered whether other measures could have been put in place, which may have limited the cumulative effects of the contested restrictions upon pensioners*”, while “*the adopted*

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³⁹ ECSR Complaint 66/2011, *op. cit.*

⁴⁰ CJEU *Hennigs*, para. 86.

⁴¹ CJEU C-395-396/08 *Bruno & Pettini* [2010] ECR I-5119, para. 31; C-268/06 *Impact* [2008] ECR I-2483, para. 55; C-377/98 *The Netherlands v Parliament, Council and Commission* [2001] ECR I-7079, para. 70; C-179/11 *CIMADE* [2012], para. 42, 56.

⁴² Decisions on Complaints 76/2012, 77/2012, 78/2012, 79/2012 and 80/2012, *op. cit.*

measures risk bringing about a large scale pauperisation of a significant segment of the population”.

39. The above measures fall within the scope of the EU non-discrimination principle and they are likely to constitute direct discrimination on grounds of age, regarding occupational social security benefits, since the sole criterion of differentiation is age. Moreover, a decent standard of living is also a fundamental right under EU law (No. 36 above), while persons below 55 years of age are likely to have more financial needs than older persons, due to heavier family burdens.⁴³ Indirect gender discrimination prohibited by Art. 23 EU Charter and Directive 2006/54/EC (equal opportunities and treatment of men and women in employment and occupation (recast))⁴⁴ is also likely, as most pensioners below 55 years old are mothers of minor children who were entitled in the past to an earlier pension, after a shorter period of service, as the ILO Mission (No. 11 above) noted.⁴⁵ Further, the fundamental “*right of the elderly to lead a life of dignity and independence and to participate in social and cultural life*” (Art. 25 EU Charter), an expression of the fundamental right and EU foundational value of “*human dignity*” (Art. 1 EU Charter, Art. 2 TEU) is an ultimate barrier to austerity.

b) No paid annual leave for young workers

40. By its second decision the ECSR also dealt with “special apprenticeship contracts” for young persons aged 15-18, who were not entitled to paid annual leave, and found a breach of ESC 1961 Art. 7(7), which requires at least three weeks paid leave.

41. A fundamental principle of EU social law allowing no derogations and having vertical and horizontal effect, enshrined in Art. 31(2) EU Charter (*fair and just working conditions*) and referred to in Directive 2003/88/EC⁴⁶, grants all workers a right to at least four weeks paid annual leave⁴⁷ (one week more than the ESC 1961 minimum). Therefore, the provisions condemned by the ECSR also violate that principle.

II. Measures condemned by the ILO bodies

a) Trade union and collective bargaining rights (Conventions 87 and 98)

42. All ILO bodies are stressing the wider importance of trade union and collective bargaining rights, as fundamental international labour law principles, for labour relations and social cohesion and peace. The CFA, the CEACR and the Committee on the Application of Standards found numerous violations of these rights (Conventions 87 and 98) in the public and private sectors, due to statutory measures imposed in the context of the international mechanism of support to the Greek economy. These measures introduced repeated and extensive interference, seriously weakening collective bargaining and collective agreements (CAs) and violating the autonomy of social partners.⁴⁸

43. These measures restricted or abolished the binding nature of CAs; they enabled associations of persons, not enjoying the guarantees granted to trade unions, to conclude firm-level CAs deviating from higher level CAs to the detriment of workers; they thus reversed CA hierarchy, with the result that the fundamental principle of favourability to workers was abolished; they imposed or allowed derogations from CAs, to the detriment of workers; they modified or replaced CA clauses by unfavourable statutory provisions; they

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⁴³ CJEU *Hennigs*, op. cit., para. 70.

⁴⁴ OJ L 204 of 26 July 2006, p. 23.

⁴⁵ ILO, *Report on the High Level Mission to Greece*, op. cit., para. 321.

⁴⁶ Directive 2003/88/EC (working time) OJ L 299 of 4 November 2003, p. 9.

⁴⁷ CJEU C-173/99 *BECTU* [2001] ECR I-4881; C-579/12 RX-II, *Strack* [2013] nyr; C-78/11 *ANGED* [2013] nyr.

⁴⁸ CFA 365th Report (November 2012), Case 2820, Conclusions: CEACR, Report to 101st ILC session (2012) and Report to 102nd ILC Session (2013) on Conventions 87 and 98, Greece; Committee on the Application of Standards, Report to ILC 102nd Session, Part II/76-8, Greece, Conclusions: website in note 4.

restricted the subjects of CAs. Finally, following substantial statutory reductions of the general minimum wages, their determination was removed from the scope of national general CAs and assigned to the legislature. Essential safety nets were thus abolished.

44. The ILO bodies acknowledged that, in very exceptional circumstances, certain state interferences may be allowed, provided they are limited in time (not exceeding anyway three years) and degree, they are subject to full and in-depth prior and subsequent consultations and assessment with the social partners and they are accompanied by adequate safeguards to protect workers' living standards. As none of these requirements was met, they requested that the Government urgently review the measures with the social partners and the Troika, so as to make them compatible with the Conventions.

45. However, the statutory interferences, which started in 2010, are being constantly extended and intensified and so are the MoU requirements. Each austerity measure is thus of limited duration, in the sense that, after a while, it is totally or partially replaced by a stricter measure, as the previous one has proven ineffective. The Government, admitting the lack of *ex ante* and *ex post* consultations and impact assessment and the inexistence of the concept of "*subsistence wage*", invoked the urgent character of the austerity measures, as conditions for the disbursement of loan instalments, and the need to improve Greece's competitiveness by reducing labour costs, as required by the Troika. Yet, the CFA recalled that, in discussions with the ILO Mission (No. 11 above), employers' organisations acknowledged that labour costs are not what is hindering Greek business.⁴⁹

i) A characteristic case of violation of ILO Conventions 87 and 98 and EU law

46. Among the measures violating Conventions 87 and 98 are increasing and massive staff reductions in the public service, imposed by the MoU. The CFA considered that such measures should be the subject of extensive *ex ante* and *ex post* consultation with the social partners. It urged the Government to engage immediately in constructive social dialogue to consider appropriate steps for mitigating the massive consequences of these measures, something that may relieve the downward economic spiral they caused.⁵⁰

47. Such a measure is the following⁵¹: civil servants having completed at least 35 years of service and the age of 55 years until 31 December 2013, shall be *ipso jure* dismissed (prior to normal retirement age, which is 65). Others shall be *ipso jure* placed in "*pre-retirement suspension*", with reduced pay (60% of the basic salary paid at the time of the suspension; suppression of additional benefits) until they complete at least 35 years of service and the age of 55 years; they shall then receive a full pension. The suspension period is deemed service period for pension purposes, but not for promotion and pay increase (this entails a reduced pension); the posts held by these servants are abolished. The Council of the State (CS) (Supreme Administrative Court), by judgment 3354/2013 (Plen.), found this measure contrary to the Constitution (Arts. 4(1) (equality before the law) and 103 (guarantees against dismissal of civil servants)). The CS stressed that this measure was not based on previous individual assessment of the civil servants concerned, nor on a rational re-definition of state functions and a reform of the organisational needs of Public Administration, but only on random and fortuitous criteria (age and service period).

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⁴⁹ CFA, Case 2820, op. cit., para. 960.

⁵⁰ CFA, Case 2820, op. cit., para. 991.

⁵¹ Art. 33 of Act 4024/2011, OJ A 226/27.10.2011.

48. The above measure is likely to constitute direct discrimination on grounds of age under EU law regarding pay, i.e. wages and social security benefits (cf. Nos. 36, 39 above). According to the CJEU, the social security scheme for civil servants is occupational.⁵²

ii) The right of collective bargaining and action or freedom of association under EU law

49. The right of collective bargaining and action or freedom of association, including the right to engage in trade union activities and to negotiate and conclude CAs, is a fundamental right recognised by the CJEU long ago⁵³ as a general principle of EU law; it is enshrined in Arts. 12 (1) (*freedom of assembly and association*) and 28 (*right of collective bargaining and action*) of the EU Charter (Art. 28 explicitly guarantees the right of employers' and workers' organisations to negotiate and conclude CAs). It is thus binding on both EU and Member States. It is also guaranteed by several international treaties that have inspired the EU general principle and the EU Charter, including, besides ILO Conventions 87 and 98, the ECHR (Art. 11: *freedom of assembly and association*). According to Art. 52(3) EU Charter, the meaning and scope of Charter rights which correspond to ECHR rights "shall be the same as those laid down by [the ECHR]".

50. The ECtHR interprets Art. 11 ECHR in a dynamic way, extending the scope of the rights guaranteed and limiting the possibilities of their restriction. It holds that this Article imposes both a negative obligation (to refrain from arbitrary interferences) and a positive obligation (to ensure the effective enjoyment) regarding the rights, including the right of trade unions to negotiate and conclude CAs and "*to be heard*" "*for the protection of their interests*". These obligations apply to both the private and the public sector and are binding on all state authorities, including the courts; Art. 11 has thus a horizontal effect.

51. Art. 11 (2) ECHR allows restrictions to the exercise of these rights subject to very strict conditions: that they are "*prescribed by law*", "*clearly and strictly defined*" and "*necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder and crime, the protection of health and morals or the protection of rights and freedoms of others*". These exceptions "*must be interpreted strictly, in a way which ensures concrete and effective protection of the rights*". They may only be justified by "*convincing and imperative reasons*". In this respect, the States have "*a restricted margin of appreciation*", subject to "*strict European control*" of the law and its implementation.⁵⁴

52. The ECtHR referred to Arts. 28 and 12 (1) EU Charter, both before the EU Charter acquired binding force⁵⁵ and thereafter,⁵⁶ considering that they correspond to Art. 11 ECHR. It noted that "*the [EU Charter] adopts a wide approach of trade union rights*" and acknowledged it as one of the important European developments from which it should draw inspiration in order to extend the interpretation of Art. 11.⁵⁷ We may, therefore, consider that the numerous violations of trade union rights found by the ILO bodies also constitute violations of Arts. 12(1) and 28 EU Charter, in the light of ECtHR case law.

b) Right to social security (Convention 102), wage protection (Convention 95)

53. The CEACR deplored the consecutive drastic pension cuts made in November 2011 and three times in 2012, as a condition for bailout funds, with retroactive effect, some of

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⁵² Case C-559/07 *Commission v. Greece*, op. cit.

⁵³ Case 36/75 *Rutili* [1975] ECR 1219; see also, inter alia, Case 415/93 *Bosman* [1995] ECR I-4921, para. 79.

⁵⁴ See in particular *Demir and Baykara v. Turkey*, 12.11.2008 and *Enerji Yapi-Yol Sen v. Turkey*, 21.4.2009.

⁵⁵ See e.g. *Demir*, paras. 47, 51, 105, 150.

⁵⁶ See e.g. *Sindicatul "Păstorul Cel Bun" v. Romania*, 09.07.2013 (Grand Chamber), para. 59.

⁵⁷ *Demir*, paras. 153-154.

them harsher for pensioners below 55 years old, while retirement age was further raised (from 65 in 2010, to 67 in 2012). It underlined that “*pension cuts across the board have put a large percentage of the population into instant poverty, with no indication as to when and how [it] would recover*”. The Government “*did not respond to [its] previous demand to assess the spread of poverty in the country and to consider social security policies in coordination with its tax, wage and employment policies under the [MoU]*”. “*In view of the serious deterioration of the situation in Greece, [it is] an urgent duty of the Government to assess past and future austerity measures in relation to one of the main objectives of the Convention, the prevention of poverty [...] and to put this question on the agenda of its future meetings with the parties to the international support mechanism for Greece.*”

54. The CEACR also deplored that “*there is no concept of a subsistence wage in Greece*”, while “*the minimum pension is set well below the poverty threshold*”. “*In a country where large segments of the population live below the poverty threshold, wages and benefits should be linked to indicators of physical subsistence [...] determined in terms of the basic needs and the minimum consumer basket*”. It asked the Government “*whether any subsistence level is established for different age groups [...], if so, how it is determined and how it is related to the minimum wage and minimum amounts of social security benefits.*”

55. The above “*raise concerns about the impact of austerity policies on the viability of the social security system, its observance of the minimum standards prescribed by the Convention, and its capacity to reduce poverty and ensure subsistence*” and compliance with “*the principles of social solidarity, justice and equity in handling the crisis*”. “*Applying exclusively financial solutions to the economic and social crisis could lead to the collapse of the internal demand and the social functioning of the State, condemning the country to years of economic recession and social unrest*”.

56. Also noting the gloomy predictions for the Greek economy, the CEACR called for a “*reverse engineering of austerity*” through “*the most rapid scenarios of undoing certain austerity measures and returning disproportionately cut benefits to the socially acceptable level, which at least prevents the ‘programmed’ impoverishment of the beneficiaries.*”⁵⁸ It also deplored wage cuts and delays in wage payment due to financial problems of many enterprises, which also affect pensions (see No. 20 above). The CEACR was “*seriously concerned about the cumulative effect these measures have on workers’ income level and living standards and compliance with labour standards related to wage protection*”.⁵⁹

57. In its observations on Conventions 102 and 95, the CEACR noted the deep concern of the GNCHR (Recommendation, Nos. 3-6 above) “*at the ongoing drastic reductions in even the lower salaries and pensions*” and “*the drastic reductions or withdrawal of vital social benefits*”. The CEACR further observed that “*as this Recommendation has not been followed by the Government, the Court of Auditors, which vets Greek laws before they are submitted to parliament, one year later, ruled that recurrent cuts in pensions were contrary to the Constitution as they conflict with the constitutional obligation to respect and protect human dignity, the principles of equality, proportionality and the protection of labour*”.

58. As these measures were judged by the ECSR, we refer to No. 39 above regarding EU law and we recall that in EU law “*human dignity*” is the ultimate barrier to austerity.

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⁵⁸ CEACR Report 102nd ILC (2013), C. 102, Greece: website in note 4.

⁵⁹ CEACR Report 102nd ILC (2013), C. 95, Greece: website in note 4.

c) Conventions 100 (equal pay), 111 (discrimination) and 156 (family responsibilities)

59. The CEACR deplored the “*disproportionate impact*” of the crisis and austerity on women, as “*the combined effect of the financial crisis, the growing informal economy and the implementation of structural reform measures adversely affect the negotiating power of women, and lead to their over-representation in precarious low-paid jobs*”. It indicated several factors which are favouring direct and indirect gender discrimination, the widening of the gender pay gap and the soaring of female unemployment (No. 20 above). It recalled that “*collective bargaining is an important means of addressing equal pay issues in a proactive manner, including unequal pay that arises from indirect discrimination on the ground of sex*”. The reversal of CA hierarchy (No. 43 above) and the facilitation of part-time and rotation work and subcontracting by temporary employment agencies affected more women, as such forms of work were more often imposed on them and their pay was reduced, due to their weak negotiating power; this often happened to mothers returning from maternity leave, in spite of their statutory protection.⁶⁰ The above are also relevant under EU law, as they may involve breaches of Directives 2006/54/EC (No. 39 above), 92/85/EEC (maternity protection) and 2010/18/EU (parental leave).⁶¹

D. Solidarity and fair sharing of responsibility regarding migration policies

60. In its oral statement at the presentation of the Report of the UN Special Rapporteur on Human Rights of Migrants, Mr. François Crépeau,⁶² delivered by Mr. Bruce Adamson, International NHRI Coordinating Committee representative, the GNCHR thanked the Special Rapporteur for recalling that “*Greece is the custodian of an external EU border*” and requesting “*a European-wide approach to migrants’ human rights*”. Fully agreeing with his Conclusions and Recommendations, the GNCHR particularly thanked him for recommending its reinforcement through the provision of competent staff and resources.

61. The GNCHR also stated that “it is very glad that the Report includes recommendations to the EU and stresses the need for more solidarity and responsibility-sharing among EU Member States. The recommended revision of the Dublin Regulation is crucial. In view of the growing migration flow, it is not merely by providing financial assistance to Greece that the EU will fulfill its primary duty to protect human rights. The EU asylum system must be re-designed and must focus on human dignity and rights – not merely on ways to stockpile human beings in some Member States”.

62. Sadly, the Dublin III Regulation⁶³ does not materialize the fundamental EU principles of *solidarity, human dignity* and *fair sharing of responsibility* proclaimed by the Treaties and the EU Charter (Art. 1 EU Charter, Arts. 2 and 3(3) TEU, 80 TFEU–asylum policies). Moreover, most measures against migration flows amount to automatic *refoulement*. Therefore, the deep human rights concerns in Greater Europe and the UN remain.

Final remarks

63. We firmly believe that European and universal human rights are still alive. We also believe in the will and ability of NHRIs to promote an effective joint mobilisation of national authorities, European and international organisations, institutions and bodies,

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⁶⁰ CEACR Reports 101st and 102nd ILC (2012 and 2013), C. 100, 111, 156, Greece: website in note 4.

⁶¹ OJ L 348, 28.11.1992, p. 1; OJ L 68. 18.3.2010, p. 13.

⁶² 23rd session of the Human Rights Council, Geneva, 24 May 2013.

⁶³ Regulation (EU) No. 604/2013 (criteria and mechanisms for determining the Member State responsible for examining an application for international protection (recast)), OJ L 180/31, 29.6.2013.

with a view to eliminating the factors that are shaking the very foundations of Europe; and to recall the accountability of all the above, including European and international financial institutions, for the respect, safeguard and promotion of human rights. Indeed, EU financial institutions are also bound by the EU charter, which has the same value as the Treaties and is explicitly addressed to them (Art. 51(1), No. 28 above).

64. Treaty bodies and the European Commission express their concern a the omission of any ex ante or ex post assessment of the social impact of austerity measures. Austerity measures have contributed to a massive loss of employment in the private and public sectors and unprecedented labour law deregulation leading to increase in atypical, insecure, low-paid and non-insured employment. This situation, coupled with drastic social budget, wage and pension cuts and rising direct and indirect taxes and other charges, has led to the “*large scale pauperisation*” or “*programmed impoverishment*” of significant segments of the population which treaty bodies deplore (Nos. 38, 56 above). Women and the young are greatly affected. “*Thus, the prospects of a significant part of the population to access the job market and secure an adequate standard of living, in line with international human rights standards, has been compromised*”; also, as the most talented young go abroad, the resulting “*brain drain*” is “*undermining Greece’s potential*”.⁶⁴

65. Moreover, as the European Commission is deploring, “*the continuing austerity and the limited prospects of economic recovery*” are “*likely to make homelessness a salient social problem in the coming years*”. “*A new class of homeless is on the rise: people with high education, no psychological or addiction problems, formerly with middle-class lifestyles, now unable to make ends meet following job loss or bankruptcy*”. Also, the demand for food handouts has risen, while a new class of recipients has formed.⁶⁵

66. This situation is raising crucial socio-economic and political concerns, but also, and increasingly, serious legal issues – issues of growing violations of fundamental rights guaranteed by international and European, including EU, law. consequently, treaty bodies, having found many austerity measures incompatible with international and European human rights norms, are calling for the reverse engineering of austerity.

67. The Greek case is but an example. We are grateful to the CoE Commissioner for Human Rights for having drawn attention today to the growing general feeling of vulnerability across Europe. This meets the GNCHR concern for the “*avalanche of unpredictable, complicated, conflicting, and constantly modified austerity measures of immediate and often retroactive effect, which exacerbate the general sense of insecurity*”, as expressed in its Recommendation (see also in No. 53 above an example regarding social security). Moreover, this factor makes austerity measures, which are taken in compliance with successive, increasingly rigid MoU requirements, incompatible with the ECHR.

68. Indeed, the ECtHR requires a certain “*quality of the law*” by which human rights may be restricted, when this is allowed by an ECHR provision: “the law” must be accessible, clear, precise and foreseeable, so as to satisfy the general principle of legal certainty⁶⁶ (see also No. 51 above: Art. 11 ECHR). However, from 2010 onward, “the law” imposing austerity measures fulfils none of these requirements. The growing legal uncertainty, even among specialised lawyers and judges, as to the law to be applied in each case is

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⁶⁴ C. Lumina, “End of Mission Statement”, No. 22 above.

⁶⁵ European Commission *Employment and Social Situation Quarterly Review* September 2012, pp. 16, 45-48: <http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=1668&furtherNews=yes>; June 2013, pp. 45-47: <http://ec.europa.eu/social/main.jsp?catId=89&langId=en&newsId=1923&furtherNews=yes>.

⁶⁶ See e.g. *Sunday Times v. UK* (No. 1), 26.4.1979, paras. 47, 49; *Baranowski v. Poland*, 28.3.2000, para. 52 .

thus preventing effective judicial protection. In view of the alignment of EU rights to ECHR rights (No. 49 above), the “quality of the law” is also an EU law requirement.

ADDENDUM

After our meeting, the following important developments occurred, by chronological order:

The CoE Committee of Ministers Resolution on the application of the European Code of Social Security by Greece

The observations of the CoE Committee of Ministers, included in its 16 October 2013 Resolution on the application of the European Code of Social Security by Greece (period from 1 July 2011 to 30 June 2013),⁶⁷ converged with those of the CEACR (see Nos. 53-57 above), with which it officially cooperates in assessing the implementation of the Code. The Committee deplored “the austerity measures which put into question the ability of the [social security] system to withstand the continuing contraction of the economy, employment and public finances”. It also deplored the devaluation of the standards of living of the Greek people, due to these measures, which Greece “was compelled to take within the framework of the austerity package agreed in the context of the economic adjustment programme”. Like the CEACR, the Committee invoked the GNCHR Recommendation and the Greek Court of Auditors opinion, and it echoed the CEACR call for a “*reverse engineering of austerity*”.

The Issue Paper published by the CoE Commissioner for Human Rights: “Safeguarding Human Rights in times of economic crisis”

1. After our meeting, in November 2013, the CoE Commissioner for Human Rights published an issue paper entitled “*Safeguarding Human Rights in times of economic crisis*”,⁶⁸ which aims to contribute to debate and reflection on relevant issues. The paper includes recommendations by the Commissioner to CoE Member States for “*actionable measures which help forge a new path along which they can align their economic recovery policies with their commitments to human rights*”. The Commissioner recommends that the effectiveness and independence of NHRIs be strengthened; that they be consulted in decision making on austerity measures and budgets; and that sufficiently broad mandates and the expertise and stable funding needed to cover them be effectively ensured.

2. The paper is underlining that, since 2010, many governments have focused on emergency austerity policies, often side-stepping regular channels of participation and democratic checks and balances. Public budget cuts, regressive tax hikes, reduced labour protection and pension reforms have exacerbated the already severe human consequences of the economic crisis marked by record levels of unemployment, affecting the whole spectrum of human rights. The paper is stressing that “*economic, social and cultural rights are not expendable in times of economic hardship, but essential to sustained and inclusive recovery*”. It also draws attention to the accountability of European and international institutions of economic governance, “*which have assumed a central role in enforcing austerity*”.

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⁶⁷ Resolution CM/ResCSS(2013)21 (period from 1 July 2010 to 30 June 2011): http://www.coe.int/t/dg3/socialpolicies/socialsecurity/default_en.asp.

⁶⁸ See the Commissioner’s website: www.commissioner.coe.int