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STEERING COMMITTEE FOR HUMAN RIGHTS
COMITÉ DIRECTEUR POUR LES DROITS DE L'HOMME
(CDDH)

**Drafting Group on Social Rights
Groupe de rédaction sur les droits sociaux**

(CDDH-SOC)

**Contributions received from experts on the new draft Analysis
of the legal framework of the Council of Europe
for the protection of social rights in Europe**

**Contributions reçues des experts sur le nouveau projet de rapport d'Analyse du
cadre juridique du Conseil de l'Europe
de la protection des droits sociaux en Europe**

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MEMBER STATES / ETATS MEMBRES



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Introduction

3. The Analysis recalls the terms of reference received by the CDDH from the Committee of Ministers and the methodology followed. It then presents a short review of the background to the protection of social rights within the Council of Europe. It recalls the indivisibility of all human rights, be they civil, political, economic or social, and the interdependence of these rights. It further refers to the context in which it was drawn up, in which the economic crisis was found by a number of Council of Europe organs and institutions to have had an impact on the protection particularly of social rights and social cohesion in its Member States. Furthermore, the social rights protection within the Council has to take into account the international context in which it operates and notably has to ensure coherence and create synergies with the standards of European Union law in this field.

Comment [E.K.1]: When mentioning the different “categories” or rights, cultural rights should also be included (see the UN International Covenant on Economic, Social and Cultural Rights).

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8. Unlike the Convention itself, the (revised) Charter is based on an “à la carte” system of acceptance of its provisions, which allows States to choose to a certain extent the provisions they are willing to accept as obligations under international law. Compliance with the provisions of the (revised) Charter is monitored by the European Committee of Social Rights (ECSR) in the State reporting procedure and the collective complaints procedure. The justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR’s finding of non-conformity of a situation with the (revised) Charter remain rare. Nevertheless, a number of national courts have applied provisions of the (revised) Charter in their decisions in recent years and some States have undertaken significant reforms further to ECSR decisions or conclusions. Moreover, both EU legislation and the case-law of the Court of Justice of the EU made some references to the (revised) European Social Charter, while the ECSR equally takes account of EU law and practice when interpreting the (revised) Charter.

Comment [E.K.2]: The concept of “justiciability” usually refers to the judicial enforcement (or enforcement by other adjudicative bodies) of economic, social and cultural rights at the domestic level.

[...]

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12. The Congress of Local and Regional Authorities, representing authorities for whom social rights play an important role in the day-to-day decision-making, has equally adopted Resolutions covering social rights subjects such as employment and vulnerable groups, access to public spaces of persons with disabilities or access to social rights for immigrants.

Comment [E.K.3]: Replace with “migrants”.

17. The (revised) Charter is further interpreted, *inter alia*, in the light of other international treaties elaborated in different international fora, particularly instruments of the International Labour Organisation.

Comment [E.K.4]: See our comment on para. 261.

[...]

INTRODUCTION

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23. The present analysis of the legal framework of the Council of Europe for the protection of social rights in Europe has been drawn up in accordance with the mandate given by the Committee of Ministers to the CDDH in the field of social rights. The following introduction shall first set out the terms of reference received and the methodology followed by the CDDH and its Drafting Group on Social Rights (CDDH-SOC). It shall further review the background to the protection of social rights within the Council of Europe against which it has been prepared. It recalls the indivisibility of all human rights, be they civil, political, economic or social, and the interdependence of these rights. Reference is further made to the context in which the Analysis was drawn up, in which the economic crisis was found by a number of Council of Europe organs and institutions to have had an impact on the protection particularly of social rights and on social cohesion in its Member States. Sight may further not be lost of the fact that the social rights protection within the Council has to take into account the international context in which it operates and notably has to ensure coherence and create synergies with the standards of European Union law in this field.

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46. As regards the types of obligations arising for the State parties both under the Convention and under the Charter, according to their supervisory bodies and authors of legal doctrine,¹ these are threefold and comprise a (negative) obligation to respect,² a (positive) obligation to protect³ and an obligation to implement⁴. States enjoy a large margin of appreciation⁵ with regard to the means chosen to comply with

Comment [E.K.5]: Add cultural (rights)

¹ See, for instance, Gregor T. Chatton, « *L'harmonisation des pratiques jurisprudentielles de la Cour européenne des droits de l'homme et du Comité européen des droits sociaux : une évolution discrète* », in: Chappuis / Foëx / Kadner Graziano (eds.), *L'harmonisation internationale du droit*, 2007, pp. 45 et seq.

² As an example of the obligation to respect, the following decisions of the ECSR are worth noting: decision of 5 December 2000, Complaint No. 7/2000 (*FIDH v. Greece*) concerning a Greek legislative decree banning career officers who have received several periods of training from resigning their commissions for up to 25 years; decision of 25 April 2001, Complaint No. 8/2000 (*QCEA v. Greece*) concerning the impact of the length of civilian service on the entry of conscientious objectors in Greece into the labour market; and decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning evictions of Roma from sites or dwellings. As for the Court, the duty to respect is at issue in all applications concerning allegedly unjustified interference by State authorities with the Convention rights.

³ As an example of the obligation to protect, mention can be made of the following decisions of the ECSR: decision of 10 October 2005 (admissibility), Complaint No. 30/2005 (*MFHR v. Greece*), § 14 concerning the semi-privatised mining of lignite, posing health and environmental risks; 7 December 2004, Complaint No. 18/2003 (*OMCT v. Ireland*), §§ 56–58 concerning the duty to ban corporal punishment of children; 9 May 2005, Complaint No. 25/2004 (*C.G.S.P. v. Belgium*), § 41 where the ECSR interprets Article 6 § 1 of the Charter on collective bargaining as meaning that States must take positive steps to encourage consultation between trade unions and employers' organisations and, if such consultation does not take place spontaneously, must establish permanent bodies and arrangements in which unions and employers' organisations are equally and jointly represented. It should be noted that similar ("positive") protection obligations are recognised by the Court, which can make it compulsory for States to enact legislation, inform or advise, conduct effective inquiries, instruct/train its staff and adopt specific prevention measures, see, in particular, *Siliadin v. France*, no. 73316/01, §§ 77–89, ECHR 2005-VII with many examples.

⁴ As an example of the obligation to implement, the following decisions from the ECSR are worth mentioning: 4 November 2003, Complaint No. 13/2002 (*Autism-Europe v. France*), § 53 concerning the progressive creation of educational establishments and places suitable for autistic children and adults; 9 September 1999, Complaint No. 1/1998 (*ICJ v. Portugal*), §§ 32 et seq. concerning the abolition of child labour; decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning the creation of suitable sites for nomadic Roma and the introduction of measures, having regard to the different situation of settled Roma, aimed at improving their housing conditions. Although the Court only considers individual cases, many of its judgments require, in terms of execution, general (sometimes structural) measures to be adopted. This is particularly true of its pilot judgments, highlighting structural shortcomings which call for measures that take into account the number of people affected (collective aspect), see, *inter alia*, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, §§ 94 et seq., 10 March 2015.

Comment [E.K.6]: Unless there is specific Charter language, we would prefer using the typology of State obligations developed in the context of the International Convention of Economic, Social and Cultural Rights and widely used in the UN system: obligation to respect (negative obligation), to protect (mainly prevent violations) and to fulfil (adopting measures toward the full realization of a right).

Comment [E.K.7]: The footnote does not seem relevant as far as the European Social Charter is concerned. The reference to the OPICESCR is very important, since article 8 (4) of the Optional Protocol was the first provision incorporating the "margin of appreciation" doctrine in a human rights treaty.

this last category of obligations – more relevant in the context of the Charter – which traditionally necessitate structural measures, and can at times only be fully implemented over time, in view of their complexity and the important budgetary resources required.

[...]

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50. It is also worth noting at this stage that, in their assessment of the cases submitted to them, the Court and the ECSR not infrequently take into account the connections between the Convention and Charter and employ very similar criteria, assessing the implementation in practice of the protected rights and examining whether the restrictions imposed on them are prescribed by law and necessary in a democratic society. In their developing decision practice, the Court and the ECSR ensure that all human rights – whether civil and political or economic and social – are effectively protected in a complementary manner.

Comment [E.K.8]: Add cultural rights

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97. Furthermore, most of the cases concerning austerity measures during the economic crisis concerned alleged violations of Article 1 of Protocol No. 1. The Court found, in particular, in the case of *Koufaki and Adedy v. Greece* that a series of austerity measures, including cuts in public officials' salaries, pensions, bonuses and other allowances, had been justified by the existence of an exceptional crisis without precedent in recent Greek history, necessitating an immediate reduction in public expenditure, and, given the States' wide margin of appreciation when implementing economic and social policies, had therefore complied with Article 1 of Protocol No. 1.⁶ Similarly, the Court has considered temporary reductions in the holiday and Christmas bonuses paid to retired public officials in order to reduce the State budget deficit to be compatible with that provision (*Da Conceição Mateus and Santos Januário v. Portugal*).⁷

Comment [E.K.9]: Add a reference to a more recent admissibility decision of the Court (*Mockienė v. Lithuania* (dec.), no. 75916/13, 4 July 2017).

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124. It must be noted that the justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR's finding of non-conformity of a situation with the Charter remain rare.⁸ Moreover, it may be noted in this context that in accordance with Part III of the Appendix to the Charter, the legal obligations of an international character contained in it are submitted only to the supervision provided for by the Charter's supervisory mechanism, which indicates that the provisions of the Charter shall not have direct effect at the domestic level.⁹

Comment [E.K.10]: This is an issue distinct from the justiciability of rights, which mainly refers to the judicial enforcement (or enforcement by other adjudicative bodies) of economic, social and cultural rights at the domestic level.

Comment [E.K.11]: This does not preclude States from recognizing the direct effect of (at least some) Charter provisions (see paras. 183 et seq. below). This sentence should be softened.

⁵ Part V, Article I of the revised European Social Charter states that its provisions shall be implemented by: a) laws or regulations; b) agreements between employers or employers' organisations and workers' organisations; c) a combination of those two methods; d) other appropriate means. Compare also Article 8 § 4 of the Optional Protocol to the ICESCR, according to which, when examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

⁶ *Koufaki and Adedy v. Greece* (dec.), nos. 57665/12 and 57657/12, 7 May 2013.

⁷ *Da Conceição Mateus and Santos Januário v. Portugal* (dec.), nos. 62235/12 and 57725/12, 8 October 2013.

⁸ See on this issue, for instance, Olivier de Schutter and Matthias Sant'Ana, *The European Committee of Social Rights (the ECSR)*, in: Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, 2012, pp. 81–82.

⁹ See, *inter alia*, O. Dörr, *The European Social Charter*, in: S. Schmah/I.M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraphs 23.23 and 23.75.

125. The decisions and conclusions of the ECSR are only declaratory: they set out the law and should serve as a basis for positive developments with respect to social rights through the passing of new laws, case-law or practices at national level. The Charter's supervisory mechanism differs from that under the Convention which provides in Article 46 § 1 that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Despite this and despite the absence of direct effect of the Charter provisions, these are nevertheless quite regularly referred to by national courts for the purpose of interpreting national law and these courts, at times, declare invalid or set aside domestic legislation if the ECSR has ruled that it is not in compliance with the Charter.

Comment [E.K.12]: See our previous comment.

[...]

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244. Since taking up his duties in 2012, Commissioner Mr Nils MUIŽNIEKS, in particular, has constantly promoted the indivisibility and interdependence of human rights and has regularly called upon States to honour their international commitments in this sphere.¹⁰ His approach has generally been to cover access to social rights of specific groups, among others children, women, elderly people, LGBTI persons, persons with disabilities, migrants, asylum seekers and refugees, Roma and other ethnic or religious minority groups, stateless persons, victims of trafficking in human beings and Internally Displaced Persons (IDPs).¹¹

Comment [E.K.13]: Reflect somehow, where needed, in the text that a new Commissioner has been appointed.

[...]

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2. International fora

Comment [E.K.14]: The word "fora" is too weak. We should maybe put "other international organizations". More emphasis should be given to in this chapter to the UN system, in particular to the ICESCR.

NETHERLANDS / PAYS-BAS

GENERAL COMMENTS

- Given the aim of the report is to provide an analysis of 'the legal framework of the CoE for the protection of social rights in Europe', the report should be more factual in nature and tone, instead of subjective value statements. Or, if it does contain subjective statements, it should be more balanced and also include other perspectives.
- Keep the distinction clear between the European Court of Human Rights as a judicial body and the European Committee of Social Rights as an expert body.
- Since the Turin Process is not embraced by the CM, this should be inserted in the rapport.
- *Immediate measures* (par. 148/141): The indication of an immediate measure in the context of a collective complaint procedure is problematic.
 - o First of all, the nature of the collective right of complaint would by definition imply the measures to be general in character with potentially far-reaching consequences, irrespective of individual circumstances. Lifting such measures at a later stage, in case no violation is found, may once again bring about unforeseen consequences.
 - o Secondly, while measures in individual situations normally fall within the discretionary powers of the relevant authorities – for instance a minister or an executive agency – the suspension of Acts of Parliament by the Government at the mere request of an international body examining a complaint

¹⁰ See, *inter alia*, the [Commissioner's Comment on "Preserving Europe's social model"](#).

¹¹ See the following link for more information on the [Commissioner's thematic work](#).

sits ill with the division of powers in a democratic society and would in any case be constitutionally impossible in the Netherlands.

- Moreover, while interim measures were designed to avert a perceived *imminent risk of irreparable harm* (in other words: the interim measure will avoid any irreparable harm), the request for an immediate measure would appear to be based on the view that irreparable harm has already been done. The imposition of an immediate measure may hypothetically prevent any further harm, but the existence of such harm – past, present or future – is precisely what the parties disagree on. Granting an immediate measure would therefore be tantamount to accepting the applicant organisation’s view. This, the Government is not willing to accept merely on the basis of the Committee’s rules of procedure, without it having had an opportunity to give its views on the merits of the complaint and without the complaint having been duly examined by the Committee.
- Finally, in the context of Complaint No. 90/2013 and 86/2012 the matter fell outside the scope of the of the Charter, as it seemed to seek a measure on behalf of persons not covered by the provisions of the Charter.

- *General principles of interpretation of the Charter:*

- The ECSR’s powers are, and should be, firmly rooted in the Charter itself, and do not go beyond the Charter as the expression of the will of the States Parties. Interpretation of provisions may be necessary, but must at all times take into account applicable rules of international law (see notably Article 31 § 1 of the Vienna Convention on the Law of Treaties¹², as well as the Second Admission Case of the International Court of Justice¹³).
- The first paragraph of the Appendix to the Charter extends the scope of most of the articles of the Charter (in addition to nationals) to “*foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned*”.
- It is unchallenged that by introducing this provision, the States Parties had in mind a limited personal scope of the Charter, and still do so, given the lack of favorable response to a letter of 13 July 2011 of the President of the ECSR, by which the Parties were invited to abandon the provision.
- Not all of the conclusive remarks are a logical conclusion following the report.

[...]

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8. ~~Unlike the Convention itself, the~~ (revised) Charter is based on an “à la carte” system of acceptance of its provisions, which allows States to choose to a certain extent the provisions they are willing to accept as obligations under international law. Compliance with the provisions of the (revised) Charter is monitored by the European Committee of Social Rights (ECSR) in the State reporting procedure and the collective complaints procedure. ~~The justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR’s finding of non-conformity of a situation with the (revised) Charter remain rare. Nevertheless, a number of national courts have applied provisions of the (revised) Charter in their decisions in recent years and some States have undertaken significant reforms further to ECSR decisions or conclusions. Moreover, both EU legislation and the case-law of the Court of Justice of the EU made some references to the (revised) European Social Charter, while the ECSR equally takes account of EU law and practice when interpreting the (revised) Charter.~~

Comment [A15]: Remove as this is not factual.

Comment [A16]: Not appropriate to mention here. It is about the legal framework of the CoE.

¹² Article 31§1 of the Vienna Convention on the Law of Treaties provides that “*a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*”.

¹³ In the Second Admission Case the International Court of Justice stated that “*the first duty of a tribunal which is called upon to interpret and to apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.*”

9. The Secretary General of the Council of Europe launched the “Turin Process” in 2014, which is aimed at strengthening the treaty system of the European Social Charter within the Council of Europe and in its relationship with the law of the European Union and has been pursued, *inter alia*, by a number of high-level conferences since then. As to the follow-up given to date to the process by the Council of Europe Member States, it was noted that only Greece ratified the Revised Charter since then; no further State ratified the 1995 Additional Protocol Providing for a System of Collective Complaints. As for the compliance of Member States with the requirements under the (revised) Charter, while there were conclusions of assumed non-conformity with the (revised) Charter in roughly one third of the situations examined in 2016, some positive developments, for instance, in the protection against discrimination in the field of employment could equally be noted.

10. The reports of the Contracting Parties and the conclusions of the ECSR are submitted to the Governmental Committee (GC), which is composed of one representative of each Contracting Party. The GC prepares the decisions of the Committee of Ministers. It shall select, on the basis of social, economic and other policy considerations, the situations which should be the subject of a recommendation to a Contracting Party concerned.

[...]

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~~III. Actions outside the Council of Europe concerning the social rights protected within the Council~~

15. ~~Certain non-Council of Europe actors can equally adopt measures which concern or have an impact on the protection of social rights within the Council of Europe, particularly by the European Social Charter.~~

16. ~~As regards the European Union, the Council of the EU, the European Parliament and the Commission proclaimed the European Pillar of Social Rights in November 2017, the objective of which is to contribute to social progress by supporting fair and well-functioning labour markets and welfare systems; the Pillar refers, *inter alia*, to the European Social Charter. Moreover, the European Parliament and the EU Agency for Fundamental Rights both made suggestions to EU Member States concerning social rights protected, *inter alia*, by the European Social Charter.~~

17. ~~The (revised) Charter is further interpreted, *inter alia*, in the light of other international treaties elaborated in different international fora, particularly instruments of the International Labour Organisation.~~

18. ~~As for civil society representatives, it is noted that certain international organisations of workers and employers have a privileged role in both the reporting and the collective complaints procedure under the (revised) Charter. The European Trade Union Confederation (ETUC), in particular, has further launched campaigns in the field of social rights, particularly trade union rights, including those protected by the (revised) Charter.~~

[...]

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21. ~~Moreover, s~~Since the beginning of the “Turin Process” aimed at strengthening the treaty system of the European Social Charter, launched by the Secretary General in 2014 and supported by a number of Council of Europe organs and institutions as well as civil society actors, only one State (Greece) ratified the Revised Charter. The number of collective complaints lodged, however, rose in the past years. While there were some positive developments as regards Member States’ compliance with the social rights laid

Comment [A17]: Strictly speaking not part of the “legal framework of the Council of Europe” (mandate). Should be deleted.

Comment [A18]: The rise in number of complaints in itself does not necessarily reflect a positive or negative development of social rights protection.

Comment [A19]: Not factual.

~~down in the (revised) Charter, no clear trend emerged in the ECSR's recent conclusions in the State reporting procedure.~~

[...]

Page 8

23. The present analysis of the legal framework of the Council of Europe for the protection of social rights in Europe has been drawn up in accordance with the mandate given by the Committee of Ministers to the CDDH in the field of social rights. The following introduction shall first set out the terms of reference received and the methodology followed by the CDDH and its Drafting Group on Social Rights (CDDH-SOC). It shall further review the background to the protection of social rights within the Council of Europe against which it has been prepared. It recalls the indivisibility of all human rights, be they civil, political, economic or social, and the interdependence of these rights. Reference is further made to the context in which the Analysis was drawn up, in which the economic crisis was found by a number of Council of Europe organs and institutions to have had an impact on the protection particularly of social rights ~~and on social cohesion~~ in its Member States. Sight may further not be lost of the fact that the social rights protection within the Council has to take into account the international context in which it operates and notably has to ensure coherence and create synergies with the standards of European Union law in this field.

Comment [A20]: Refrain from social cohesion. The mandate only refers to 'social rights'.

[...]

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30. ~~The Universal Declaration of Human Rights, however, has led within the Council of Europe to the adoption of two separate major treaties of fundamental rights reflecting their specificities: the Convention (1950) and the Charter (1964).~~

Comment [A21]: Repetition

[...]

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31. The same distinction was drawn at the United Nations level where two separate International Covenants were adopted in 1966, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). ~~However, it is worth recalling the adoption in 2008 of an Optional Protocol to the ICESCR which reaffirmed the indivisibility and interdependence of all human rights and, as does the First Optional Protocol to the ICCPR, provides for the possibility for individuals to submit communications alleging violations of the rights set forth in the respective Covenant.~~¹⁴

Comment [A22]: Not relevant.

[...]

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35. A 2015 study of the CDDH on "the feasibility of new activities as well as on the revision of existing instruments to deal with the impact of the economic crisis on human rights in Europe" entitled "The impact of the economic crisis and austerity measures on human rights in Europe" analysed the impact of the economic crisis on human rights in specific areas.¹⁵ It disclosed that a number of different Council of Europe organs and bodies had concluded that the crisis had had an impact on human, and in particular social rights in the fields of access to justice and a fair trial and that certain groups of persons, including women, children and young persons as well as prisoners, migrant workers and asylum seekers were often

¹⁴ ~~See for the Optional Protocol to the ICESCR General Assembly Resolution A/RES/63/117 of 10 December 2008, in particular the 4th Recital and Articles 1-2.~~

¹⁵ See *ibid.*, paragraphs 1 and 20 *et seq.*

particularly affected by the economic crisis and reduced State resources, ~~which had further repercussions on the social cohesion in the Council of Europe Member States.~~¹⁶

Comment [A23]: No reference shall be made to social cohesion, given the mandate of the CM.

[...]

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40. The social rights protection within the Council of Europe therefore has to take into account the international context in which it operates. ~~As has been stressed notably by T~~ the Secretary General of the Council of Europe, Mr Thorbjørn JAGLAND, stressed in his strategic vision for his second term (2014–2019), that it was of crucial importance to ensure coherence between the social rights standards in the (revised) Charter and those of the European Union and to increase synergies between the two protection systems.

[...]

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46. As regards the types of obligations arising for the State parties both under the Convention and under the Charter, ~~according to the Court and the ECSR their supervisory bodies~~ and authors of legal doctrine,¹⁷ these are threefold and comprise a (negative) obligation to respect,¹⁸ a (positive) obligation to protect¹⁹ and an obligation to implement²⁰. ~~States enjoy a large margin of appreciation~~²¹ with regard to the

Comment [A24]: Court is different from Committee, not appropriate to address them both as 'supervisory body'.

Comment [A25]: wide

¹⁶ See *ibid.*, paragraphs 20–38.

¹⁷ See, for instance, Gregor T. Chatton, « *L'harmonisation des pratiques jurisprudentielles de la Cour européenne des droits de l'homme et du Comité européen des droits sociaux : une évolution discrète* », in: Chappuis / Foëx / Kadner Graziano (eds.), *L'harmonisation internationale du droit*, 2007, pp. 45 et seq.

¹⁸ As an example of the obligation to respect, the following decisions of the ECSR are worth noting: decision of 5 December 2000, Complaint No. 7/2000 (*FIDH v. Greece*) concerning a Greek legislative decree banning career officers who have received several periods of training from resigning their commissions for up to 25 years; decision of 25 April 2001, Complaint No. 8/2000 (*QCEA v. Greece*) concerning the impact of the length of civilian service on the entry of conscientious objectors in Greece into the labour market; and decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning evictions of Roma from sites or dwellings. As for the Court, the duty to respect is at issue in all applications concerning allegedly unjustified interference by State authorities with the Convention rights.

¹⁹ As an example of the obligation to protect, mention can be made of the following decisions of the ECSR: decision of 10 October 2005 (admissibility), Complaint No. 30/2005 (*MFHR v. Greece*), § 14 concerning the semi-privatised mining of lignite, posing health and environmental risks; 7 December 2004, Complaint No. 18/2003 (*OMCT v. Ireland*), §§ 56–58 concerning the duty to ban corporal punishment of children; 9 May 2005, Complaint No. 25/2004 (*C.G.S.P. v. Belgium*), § 41 where the ECSR interprets Article 6 § 1 of the Charter on collective bargaining as meaning that States must take positive steps to encourage consultation between trade unions and employers' organisations and, if such consultation does not take place spontaneously, must establish permanent bodies and arrangements in which unions and employers' organisations are equally and jointly represented. It should be noted that similar ("positive") protection obligations are recognised by the Court, which can make it compulsory for States to enact legislation, inform or advise, conduct effective inquiries, instruct/train its staff and adopt specific prevention measures, see, in particular, *Siliadin v. France*, no. 73316/01, §§ 77–89, ECHR 2005-VII with many examples.

²⁰ As an example of the obligation to implement, the following decisions from the ECSR are worth mentioning: 4 November 2003, Complaint No. 13/2002 (*Autism-Europe v. France*), § 53 concerning the progressive creation of educational establishments and places suitable for autistic children and adults; 9 September 1999, Complaint No. 1/1998 (*ICJ v. Portugal*), §§ 32 et seq. concerning the abolition of child labour; decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning the creation of suitable sites for nomadic Roma and the introduction of measures, having regard to the different situation of settled Roma, aimed at improving their housing conditions. Although the Court only considers individual cases, many of its judgments require, in terms of execution, general (sometimes structural) measures to be adopted. This is particularly true of its pilot judgments, highlighting structural shortcomings which call for measures that take into account the number of people affected (collective aspect), see, *inter alia*, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, §§ 94 et seq., 10 March 2015.

²¹ Part V, Article I of the revised European Social Charter states that its provisions shall be implemented by: a) laws or regulations; b) agreements between employers or employers' organisations and workers' organisations; c) a combination of those two methods; d) other appropriate means. Compare also Article 8 § 4 of the Optional Protocol to the ICESCR, according to which, when examining communications under the present Protocol, the Committee shall

means chosen to comply with this last category of obligations – more relevant in the context of the Charter – which traditionally necessitate structural measures, and can at times only be fully implemented over time, in view of their complexity and the important budgetary resources required.

[...]

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47. ~~Monitoring-Supervision Monitoring respect of the human rights in the 47 member states of the CoE that have ratified the of the implementation of the~~ Convention is ensured by the European Court of Human Rights (hereinafter “the Court”), as a last resort, by its examination of individual applications. Regarding the (revised) Charter, the monitoring of its implementation is carried out by the European Committee of Social Rights (hereinafter “the ECSR”), by its examination of State reports and of collective complaints, as well as by the Governmental Committee of the European Social Charter and the Committee of Ministers.²²

48. It is to be noted that the collective complaints procedure is a protection system complementing the reporting system. ~~It is and~~ a different system ~~and complementary to from~~ the jurisdictional protection, in the field of social rights, afforded by the Court under the Convention, ~~with its own characteristics thereby offering complementary protection of social rights.~~ Indeed, because of their collective nature, complaints may only raise questions concerning the allegedly unsatisfactory application of the Charter and may not concern merely individual situations. ~~Other than under the Convention system, a~~ complaint may ~~therefore~~ be lodged with the ECSR without domestic remedies having been exhausted and consequently, without delay and without the complainant organisation necessarily being a victim of the alleged violation of the (revised) Charter.

49. It should also be noted that the Convention protects everyone within the jurisdiction of a State Party (Article 1 of the Convention), while foreigners who are not lawfully residing on the territory of a State Party or who are not nationals of another State Party are excluded from the scope of application of the Charter (see paragraph 1 of the Appendix to the Charter).²³

50. It is also worth noting at this stage that, in their assessment of the cases submitted to them, the Court and the ECSR not infrequently take into account the connections between the Convention and Charter and employ very similar criteria, assessing the implementation in practice of the protected rights and examining whether the restrictions imposed on them are prescribed by law and necessary in a democratic society. ~~In their developing decision practice, the Court and the ECSR ensure that all human rights – whether civil and political or economic and social – are effectively protected in a complementary manner.~~

[...]

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52. It is noted at the outset that a detailed analysis of the Court’s case-law providing for a direct or indirect protection of social rights is contained in two CDDH reports ~~prepared by the Rapporteur on Social Rights for the CDDH, Ms Chantal GALLANT~~ (documents CDDH(2006)022 and CDDH(2008)006). The present report shall give a couple of examples of the protection of social rights in the Court’s more recent case-law; more references to further relevant judgments of the Court are contained in Appendix II to the present report.

[...]

consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

²² See in more detail below.

²³ See also O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.05.

Comment [A26]: Also with regard to the obligation to protect, there is often a wide margin of appreciation (positive obligations).

Comment [A27]: The nature and status of ‘decisions’ is quite different. Current description is not appropriate.

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78. The Court has dealt with numerous cases in recent years concerning prison overcrowding and poor hygiene conditions entailing a breach of Article 3 of the Convention; pilot judgments against several States (including Bulgaria, Hungary, Italy, Poland and Russia)²⁴ revealed structural problems in this area. The Court has further handed down a number of judgments on prisoners' access to health care,²⁵ which included several findings of violations of Articles 3 and 34 of the Convention for failure of the respondent State to comply with interim measures the Court had ordered under Rule 39 of the Rules of Court.

[...]

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81. Finally, with regard to social benefits, it is noteworthy that the Court accepted in the case of *Budina v. Russia* that State responsibility could arise under Article 3 where an applicant who was totally dependent on State support found himself or herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity.²⁶ In its inadmissibility decision of 28 July 2016 in *Hunde v. the Netherlands*, the Court found that Article 3 required State Parties to take action in situations of the most extreme poverty (such as the situation in the *M.S.S.* judgment), but there was no right to social assistance as such under the Convention. This case concerned an irregular migrant who was no longer entitled to state-sponsored care and accommodation for asylum seekers.²⁷

[...]

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ii) The European Committee of Social Rights (ECSR)

Composition and members

118. Pursuant to the Charter and its Rules, the ECSR comprises fifteen independent and impartial members who are elected by the Committee of Ministers from a list of experts of the highest integrity and of recognised competence in international social questions, proposed by the States Parties. (see Article 25 of the Charter, read in conjunction with Article C of the Revised Charter). Under the Turin Protocol, they shall be elected by the Parliamentary Assembly (PACE) but this provision in the Protocol is the only one which, for the time being, has not yet been implemented, pending the entry into force of the Protocol (see above).²⁸ ~~Accordingly, the ECSR does not comprise one member per Council of Europe Member~~

²⁴ See *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, 27 January 2015; *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, 10 March 2015; *Torreggiani and Others v. Italy*, nos. 43517/09 and 6 others, 8 January 2013; *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08, 10 January 2012; and *Orchowski v. Poland*, no. 17885/04, 22 October 2009 and *Norbert Sikorski v. Poland*, no. 17599/05, 22 October 2009. See as a recent leading judgment also *Muršić v. Croatia* [GC], no. 7334/13, ECHR 2016.

²⁵ See, *inter alia*, *Poghosyan v. Georgia*, no. 9870/07, 24 February 2009 (concerning the transmission of viral hepatitis C in prisons); *V.D. v. Romania*, no. 7078/02, 16 February 2010 (concerning the failure to provide the applicant with dentures); and *Wenner v. Germany*, no. 62303/13, 1 September 2016 (concerning the refusal to provide drug substitution therapy in prison). See also the Court Press Unit's [Factsheet on Prisoners' health-related rights](#) (November 2017).

²⁶ *Budina v. Russia* (dec.), no. 45603/05, 18 June 2009.

²⁷ See *Hunde v. the Netherlands* (dec.), no. 17931/16, 28 July 2016. The Court did not accept the applicant's argument that the findings by the ECSR under the Charter (in *CEC v. the Netherlands* and *FEANTSA v. the Netherlands*) should be considered to lead automatically to a violation of Article 3 of the Convention. The Court considered the actions by the Netherlands and concluded that it could not be said that the Netherlands authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent.

²⁸ To enhance the legitimacy of the processes of monitoring social rights, PACE encourages the four States which have not yet done so to ratify the Turin Protocol (see document AS/Soc/ESC(2014)03rev, 17 October 2014).

Comment [A28]: Not complete. Be sure to mention all countries who have pilot judgments with regard to prison conditions – not just name some countries.

Comment [A29]: See also inadmissibility decision of 23 January 2018 *Said Good v. the Netherlands*.

Comment [A30]: This decision from the ECHR is crucial on the connection with collective complaints decisions from the ECSR. Par. 53-59

Comment [A31]: This can be deleted in total. It basically describes the ECSR, however this is not done for the Court under the text of the European Convention on Human Rights.

~~State (47), or per State Party to the Charter (43).~~ The ECSR is currently composed of 14 nationals of States of the European Union (EU) and one Norwegian national.

[...]

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119. ~~The latest increase in the number of ECSR members dates from May 2001, when there were just 27 ratifications (9 States: Revised Charter — 18 States: 1961 Charter), whereas now, there are 43 ratifications (34 States: Revised Charter — 9 States: 1961 Charter).~~

Comment [A32]: Not relevant.

120. The ECSR members' term of office is six years (renewable once). ~~They are appointed by the Committee of Ministers from a list of experts submitted by the Contracting Parties (see Article 25 of the Charter, read in conjunction with Article C of the Revised Charter). Under the Turin Protocol, they shall be elected by the Parliamentary Assembly (PACE) but this provision in the Protocol is the only one which, for the time being, has not yet been implemented, pending the entry into force of the Protocol (see above).~~²⁹

Comment [A33]: Repetition

121. The ECSR ~~is not a permanent body.~~ It meets seven times a year, in principle in Strasbourg. The Council of Europe Secretariat (the Department of the European Social Charter) ensures the continuity of the work between sessions.

125. The decisions and conclusions of the ECSR are only declaratory: they set out the law and should serve as a basis for positive developments with respect to social rights through the passing of new laws, case-law or practices at national level. The Charter's supervisory mechanism differs from that under the Convention which provides in Article 46 § 1 that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Despite this and despite the absence of direct effect of the Charter provisions, these are nevertheless quite regularly referred to by national courts for the purpose of interpreting national law and these courts, at times, declare invalid or set aside domestic legislation if the ECSR has ruled that it is not in compliance with the Charter.

Comment [A34]: monitoring

[...]

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130. In 2014, the Committee of Ministers adopted further changes to the Charter reporting and monitoring system, with the aim to simplify the system of national reports for those States (currently 15) which have accepted the collective complaints procedure. Every two years these States must now submit a simplified national report in which they explain the follow-up action taken in response to decisions of the ECSR on collective complaints brought against them.³⁰ Depending on the case, the ECSR may then conclude that the national situation has been brought into conformity with the Charter. ~~If the situation has not been remedied according to the ECSR, the States must continue to submit national reports on the collective complaint, which in fact can mean indefinitely. The new system has been in force since October 2014 for States which have accepted the collective complaints procedure. For the other States, it will come into force one year after their acceptance of the 1995 Protocol providing for the collective complaints procedure.~~

Comment [A35]: Repetition with the first sentence of this paragraph

[...]

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133. In the reporting procedure, the decisions of the Committee of Ministers are prepared by the Governmental Committee of the European Social Charter and the European Social Security Code

²⁹ ~~To enhance the legitimacy of the processes of monitoring social rights, PACE encourages the four States which have not yet done so to ratify the Turin Protocol (see document AS/Soc/ESC(2014)03rev, 17 October 2014).~~

³⁰ The 15 States currently concerned by the simplified reporting procedure have been split into two groups according to the number of complaints lodged against them (from the highest to the lowest number).

("Governmental Committee") comprising representatives of the States Parties and observers from the aforementioned international social partners (Business Europe, IOE and ETUC). In particular, in the light of the reports of the ECSR and the States Parties, it selects, after a thorough discussion of national circumstances and their evolution, given due regard to considerations of social and economic policy, situations which, in its opinion, should be the subject of recommendations to States. It then presents a report to the Committee of Ministers which is made public.

[...]

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135. ~~Lastly, in the State reporting procedure, the ECSR may like the various UN committees also adopt statements of interpretation by which it sets out in general terms the requirements of the (revised) Charter in respect of certain of its provisions. Furthermore, the ECSR has adopted general statements of interpretation, to date on the following issues:~~³⁴

- ~~— 2002: Statement on the application of the Revised Charter.~~
- ~~— 2004: Statement on the personal scope of the Charter;~~
- ~~— 2006: Statement on the nature and scope of the Charter;~~
- ~~— 2008: Statement on the burden of proof in discrimination cases;~~
- ~~— 2013: Statement on the rights of stateless persons under the Charter;~~

~~2015: Statement on the rights of refugees under the Charter, published on an urgent basis in October in advance of the publication of the annual ECSR report.~~

137. The collective complaints procedure has given a more important role to the social partners and NGOs by authorising them to submit a direct request to the ECSR for a decision on the allegedly unsatisfactory application of provision(s) of the (revised) Charter in States which have accepted the procedure. Pursuant to Article 1 of the 1995 Additional Protocol, the organisations entitled to lodge collective complaints are: a) the aforementioned international social partners (Business Europe, ETUC³² and IOE); b) INGOs enjoying consultative status with the Council of Europe whose application to bring collective complaints has been accepted by the Governmental Committee³³ and; c) national social partners. In addition, Article 2 of the Protocol provides that any State may grant the right to lodge complaints to representative national NGOs with particular competence in the matters governed by the Charter. However, out of 15 States, so far only Finland has done so. At present [number] organisations are entitled to lodge collective complaints.

[...]

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148. Moreover, since 2011, the Rules of the ECSR provide that as from the decision on the admissibility of a collective complaint or at any subsequent time during the proceedings before or after the decision on the merits the ECSR may, at the request of a party, or on its own initiative, indicate to the parties any immediate measure the adoption of which seems necessary with a view to avoiding the risk of a serious irreparable injury and to ensuring the effective respect for the rights recognised in the Charter.³⁴ So far, there have been only five requests for immediate measures, three of which were rejected³⁵ and two granted. When granting these two requests on the same day, the ECSR called on the respondent State to:

³⁴ See [http://hudoc.esc.coe.int/eng# \(search by year of Conclusions and tick the "Statements of interpretation" box\).](http://hudoc.esc.coe.int/eng# (search by year of Conclusions and tick the)

³² To date, the ETUC and its national affiliates have filed two collective complaints: No. 32/2005 (*ETUC, CITUB and PODKREPA v. Bulgaria*) and No. 59/2009 (*ETUC, CSC, FGTB and CGSLB v. Belgium*). On the contrary, no complaint has yet been lodged either by Business Europe or by the IOE.

³³ See the following link to the [list of INGOs entitled to submit collective complaints](#) (62 in total, as of 1 January 2018).

³⁴ Rule 36 of the Rules of the ECSR.

³⁵ In the context of Complaints Nos. 93/2013 (*Approach v. Ireland*), 98/2013 (*Approach v. Belgium*) and 113/2014 (*Unione Italiana del Lavoro U.I.L. Scuola – Sicilia v. Italy*).

Comment [A36]: The international social partners have an observer status and do not prepare/ vote on decisions of the CM.

Comment [A37]: What is the treaty basis for these statements?

Comment [A38]: The 'immediate measure' that the ECSR may indicate according to its Rules, does not fit well with the character of the collective complaint procedure.

"[a]dopt all possible measures with a view to avoiding serious, irreparable injury to the integrity of persons at immediate risk of destitution, through the implementation of a co-ordinated approach at national and municipal levels with a view to ensuring that their basic needs (shelter)³⁶/(shelter, clothes and food)³⁷ are met; and ... [e]nsure that all the relevant public authorities are made aware of this decision".

149. Following its deliberations, the ECSR adopts a decision on the merits of the complaint finding that there has or has not been a violation of the Charter. This decision is then transmitted to the parties and to the Committee of Ministers.³⁸ ~~The average duration of the procedure was initially approximately 18 months between registration of a complaint and the decision on the merits; it appears to have risen recently as a result of an increased number of collective complaints. The collective complaint procedure is therefore rather fast and can produce effects on a broader scale rapidly in view of its collective nature.~~ The decisions of the ECSR are not made public until the Committee of Ministers has adopted a resolution, or at the latest four months after the ECSR's decision has been forwarded to the latter (Article 8 § 2 of the 1995 Protocol).

[...]

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151. As with the reports procedure, it is for the ECSR to determine whether the national situation has been brought into conformity with the Charter. This may be done by the ECSR on the occasion of new complaints and/or in the reporting system in which the State provides information, in a simplified report, on the steps it has taken in response to the decisions taken in respect of that State.³⁹ This mechanism illustrates the complementary nature of the two procedures to monitor the application of the Charter, which allows for a quicker follow-up to the decisions of the ECSR, as it is no longer necessary to await the next State report on the question(s) at issue in the collective complaints leading to the finding of a violation or violations of the (revised) Charter.

154. ~~The ECSR further clarified the (revised) Charter's interpretation in the light of the Vienna Convention on the Law of Treaties and the aforementioned 1993 Vienna Declaration:~~

[...]

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163. Until 21 February 2018, the ECSR has delivered more than 100 decisions on the merits⁴⁰ of complaints relating to a wide range of issues – including the rights of Roma, the assistance to and the

³⁶ Decision of 25 October 2013, Complaint No. 86/2012 (*FEANTSA v. the Netherlands*).

³⁷ Decision of 25 October 2013, Complaint No. 90/2013 (*CEC v. the Netherlands*).

³⁸ See Article 8 of the 1995 Additional Protocol and Rule 35 of the Rules of the ECSR.

³⁹ See Rule 40 of the Rules of the ECSR.

⁴⁰ So far there have been only 6 inadmissibility decisions: Decision of 5 December 2006, Complaint No. 36/2006 (*Frente Comum de Sindicatos da Administração Pública v. Portugal*) – insufficient evidence that the representative of the complainant organisation had the authority to act; Decision of 14 June 2005, Complaint No. 29/2005 (*SAIGI-Syndicat des Hauts Fonctionnaires v. France*) – the complaint did not pertain to the applicable rules but rather to the manner in which they were being applied in a particular case in a set of proceedings over a period of eight years before administrative and criminal courts and disciplinary bodies; Decision of 13 June 2005, Complaint No. 28/2004 (*Syndicat national des Dermato-Vénérologues v France* – the facts adduced were not of a nature to enable the ECSR to conclude that there had been a violation of the right guaranteed by the combination of Article E with Articles 1 § 2 and 4 § 1; Decision of 13 October 1999, Complaint No. 3/1999 (*European Federation of Employees in Public Services v. Greece*) – Greece had not accepted the provisions relied upon; decision of 18 October 2016, Complaint 120/2016 (*FFFS v. Norway*) – due to the validity of the reservation to Article 12 § 4 of the 1961 Charter to which Norway was bound before 1994, it was not obliged to grant before this date social security rights to foreign seamen not domiciled in Norway; and Decision of 24 March 2017, Complaint No. 122/2016 (*Movimento per la libertà della psicanalisi-associazione culturale italiana v. Italy*) – the activities carried out by the complainant organisation were not within the essential prerogatives of a trade union and the movement could not be considered as a trade union organisation. In general, it should be emphasised that the fact that the vast majority of complaints have been declared admissible by

Comment [A39]: The request goes far beyond the boundaries of the Charter, as it seems to seek a measure on behalf of persons not covered by the provisions of the Charter.

Comment [A40]: Is that correct? During meeting agents on 3 July 2017 de President of the ECSR mentioned that due to increase complaints procedure now takes about 3 years.

Comment [A41]: Not crucial information. Also the Court has a increased workload.

Comment [A42]: Is it quicker?

Comment [A43]: The ECSR's powers are, and should be, firmly rooted in the Charter itself, and do not go beyond the Charter as the expression of the will of the States Parties. Interpretation of provisions may be necessary, but must at all times take into account applicable rules of international law (see notably Article 31 § 1 of the Vienna Convention on the Law of Treaties, as well as the Second Admission Case of the International Court of Justice). The first paragraph of the Appendix to the Charter extends the scope of most of the articles of the Charter (in addition to nationals) to "foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". It is unchallenged that by introducing this provision, the States Parties had in mind a limited personal scope of the Charter, and still do so, given the lack of favourable response to a letter of 13 July 2011 of the President of the ECSR, by which the Parties were invited to abandon the provision.

right to shelter for irregular migrants, the rights of persons with disabilities, the right to organise and the right to strike. In the vast majority of cases the ECSR has found one or more violation(s) of the Charter (in about 96% of the cases).

164. As for the States against whom collective complaints were lodged, the distribution has been relatively uneven: roughly one third of the complaints concerned France, some 14% Greece and some 10% Portugal and Italy, whereas other States Parties had only two or three complaints lodged against them over a period of more than 15 years. Lastly, it should be pointed out that recently, an INGO (University Women of Europe) lodged ~~the same complaints relating, for the first time, to equal pay between women and men~~ against all the 15 States Parties to the 1995 Protocol.

[...]

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172. With regard to the right to social and medical assistance under Article 13 of the (revised) Charter and the right to shelter, the ECSR held in a series of decisions that from the point of view of human dignity, migrants in an irregular situation should be able to benefit from those rights.⁴¹ It thereby went beyond the Appendix to the Charter which limits its scope *ratione personae*.⁴² In its *FIDH v. France* decision of 2004 the ECSR accepted, first, the applicability of the right to social, legal and economic protection to minors in an irregular situation. In its *DCI v. the Netherlands* decision of 2009, the ECSR reached a similar conclusion with regard to such minors' right to shelter. Lastly, in its *CEC v. the Netherlands* and *FEANTSA v. the Netherlands* decisions of 2014, the ECSR concluded that both minors and adults in an irregular situation had the right to shelter and to urgent medical and social assistance.

173. In these decisions, the ECSR referred to instruments including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child, none of which, just as the Convention, provides for any restriction similar to the one in the above-mentioned Appendix. In its *FEANTSA v. the Netherlands* decision of 2014, the ECSR highlighted the principles of its interpretation of the rights which must be guaranteed:

*"the restriction of the personal scope of the Charter included in its Appendix should not be read in such a way as to deprive migrants in an irregular situation of the protection of the most basic rights enshrined in the Charter, or to impair their fundamental rights, such as the right to life or to physical integrity or to human dignity. On the other hand, its application to migrants in an irregular situation is justified solely where excluding them from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights, and would consequently place the foreigners in question in an unacceptable situation regarding the enjoyment of these rights, as compared with the situation of nationals or foreigners in a regular situation."*⁴³

the ECSR – in contrast to the situation with regard to the applications lodged with the Court – can largely be explained by the fact that there is no requirement to exhaust domestic remedies in the collective complaints procedure.

⁴¹ See Decision of 8 September 2004, Complaint No. 14/2003 (*FIDH v. France*); in its 2011 Conclusions, the ECSR found that the situation had been brought into conformity with the Charter. See further Decision of 20 October 2009, Complaint No. 47/2008 (*DCI v. the Netherlands*); the ECSR equally concluded that the situation had been brought in line with the Charter. See, moreover, Decision of 2 July 2014, Complaint No. 86/2012 (*FEANTSA v. the Netherlands*) and Decision of 1 July 2014, Complaint No. 90/2013 (*CEC v. the Netherlands*); in the assessment of the follow-up to these two decisions, the ECSR held, in 2016, that the situations had still not been brought in conformity with the Charter.

⁴² It is recalled that, in principle, the Charter does not apply to nationals of States which are not parties to the Charter, nor to migrants in an irregular situation. However, the Appendix to the Charter allows States to extend its scope. The ECSR's interpretative statements on the personal scope of the Charter (2004), stateless persons (2013) and refugees (2015) all invite States to go beyond the limited personal scope of the Charter. Given the lack of favourable response, the State Parties still have in mind a limited personal scope of the Charter as the provision in the Appendix states.

⁴³ See Complaint No. 86/2012 (*FEANTSA v. the Netherlands*), § 58. See in contrast *Hunde v. the Netherlands (dec.)*, no. 17931/16, 28 July 2016 where the Court considered the actions by the Netherlands and concluded that it could

Comment [A44]: The first paragraph of the Appendix to the Charter extends the scope of most of the articles of the Charter (in addition to nationals) to "foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". It is unchallenged that by introducing this provision, the States Parties had in mind a limited personal scope of the Charter, and still do so, given the lack of favourable response to a letter of 13 July 2011 of the President of the ECSR, by which the Parties were invited to abandon the provision.

Comment [A45]: Article is not relevant, however the fact that the complaint was lodged against all 15 state parties.

Comment [A46]: The ECSR's powers are, and should be, firmly rooted in the Charter itself, and do not go beyond the Charter as the expression of the will of the States Parties. Interpretation of provisions may be necessary, but must at all times take into account applicable rules of international law (see notably Article 31 § 1 of the Vienna Convention on the Law of Treaties, as well as the Second Admission Case of the International Court of Justice). The first paragraph of the Appendix to the Charter extends the scope of most of the articles of the Charter (in addition to nationals) to "foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned". It is unchallenged that by introducing this provision, the States Parties had in mind a limited personal scope of the Charter, and still do so, given the lack of favourable response to a letter of 13 July 2011 of the President of the ECSR, by which the Parties were invited to abandon the provision.

[...]

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215. Moreover, the European Social Charter can be an “indirect” source of inspiration when the CJEU refers to the case-law of the European Court of Human Rights, which has itself drawn on the Charter in order to determine what is meant by a particular fundamental right.⁴⁴ ~~It should be emphasised is noted that the number of cases in which the CJEU has referred to the European Social Charter remains rather limited in comparison with its references to the Strasbourg Court and the Convention~~

[...]

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232. Furthermore, the Committee of Ministers decided to set up a temporary European Social Cohesion Platform (PECS) in the form of an ad hoc committee for the period 2016–2017.⁴⁵ The aim of this committee is to reinforce the intergovernmental component of the Secretary General’s strategy to develop the Council of Europe’s activities in the field of social cohesion, in particular through the promotion of the European Social Charter and its collective complaints procedure in order to ensure equal and effective access to social rights.

[...]

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III. ACTIONS OUTSIDE THE COUNCIL OF EUROPE CONCERNING THE SOCIAL RIGHTS PROTECTED WITHIN THE COUNCIL

[...]

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272. On the other hand, ~~the dynamic interpretation of the (revised) Charter, a comprehensive catalogue of social rights, by~~ the European Committee of Social Rights in the State reporting and collective complaints procedures has further developed the protection of social rights in a number of Council of Europe Member States. The rights covered by the (revised) Charter notably relate to employment and health, education and social protection and welfare. ~~It-The (revised) Charter~~ further provides for specific protection for a number of groups including young persons, employed women, families, persons with disabilities or migrants.

[...]

276. Against the background of a growing political awareness of the need to uphold and promote social rights in a global environment affected by the economic crisis, the Secretary General launched the “Turin Process” in 2014, which is aimed at strengthening the treaty system of the European Social Charter within the Council of Europe and in its relationship with the law of the European Union. ~~Since the start of this process, a number of Council of Europe organs and institutions as well as civil society actors, in addition to a number of measures they have taken in the field of social rights, have repeatedly called for an enhanced role of the Charter.~~ Member States have been invited, in particular, to ratify the Revised Charter

~~not be said that the Netherlands authorities have fallen short of their obligations under Article 3 by having remained inactive or indifferent.~~

⁴⁴ CJEU, *Werhof*, C-499/04: in a judgment of 9 March 2006, the CJEU drew on the European Court of Human Rights judgment of 30 June 1993 in *Sigurjonsson v. Iceland*, in which the European Court of Human Rights had adopted the ECSR’s interpretation with regard to Article 5 of the Charter.

⁴⁵ See 1241th (Budget) Meeting of the Committee of Ministers of 24–26 November 2015, document CM(2015)161 final, 26 November 2015.

Comment [A47]: How relevant is this? The number itself does not mean anything. Could have different causes, such as the type of cases e.g.

Comment [A48]: Strictly speaking not part of the “legal framework of the Council of Europe” (mandate). Should be deleted.

Comment [A49]: This ‘dynamic interpretation’ sometimes extends the scope of the Charter.

Any interpretation of a treaty should be in good faith and cannot unilaterally impose completely new obligations upon member states.

•Article 31§1 of the Vienna Convention on the Law of Treaties provides that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.

•In the *Second Admission Case* the International Court of Justice stated that “the first duty of a tribunal which is called upon to interpret and to apply the provisions of a treaty, is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter.”

Comment [A50]: Either delete or also include the factual part that other actors have not supported the call for an enhanced role of the Charter.

and accept the collective complaints procedure. Moreover, they have been called upon to implement the decisions and conclusions of the ECSR.

[...]

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277. ~~It was stressed by several actors that the protection of social rights strengthened social cohesion and could thus prevent parts of the population from supporting populist movements and parties, a factor which posed a serious threat to both the rule of law and democracy.~~⁴⁶

Comment [A51]: Not factual. And such a conclusive remarks does not follow from the report.

278. Since the beginning of the "Turin Process", ~~only~~ Greece ratified the Revised Charter (in March 2016). No further Member State ratified either the (revised) Charter or the 1995 Protocol Providing for a System of Collective Complaints. However, the number of collective complaints lodged rose in the past years. As regards Member States' compliance with the social rights laid down in the (revised) Charter, in its recent conclusions on the rights laid down in the Charter, the ECSR found a majority of situations in the Member States in conformity with the Charter, but also numerous cases of ~~assumed~~ non-conformity in the past years. Whereas positive developments were observed in some areas (for instance with regard to the right to protection in cases of termination of employment, the right of workers to the protection of their claims in the event of the insolvency of the employer and the right of access to education), problems remained in other areas (for instance with regard to discrimination in employment, insufficient integration of persons with disabilities into the ordinary labour market and the right to equality of opportunities for women and men). In the collective complaints procedure, ~~however,~~ the ECSR found one or more violation(s) of the (revised) Charter in the vast majority of its decisions.

Comment [A52]: How is this relevant as 'conclusive remark' for the legal framework of social rights in the Council of Europe?

POLAND / POLOGNE

[...]

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5. The Convention, which has been ratified by all 47 Council of Europe Member States, and its Protocols, while essentially protecting civil and political rights, directly protects also a few rights which can ~~also~~ be classified as social rights, namely the prohibition of slavery and forced labour (Article 4), freedom of association (Article 11) and the right to education (Article 2 of Protocol No. 1). Moreover, a number of further rights laid down in the Convention and its Protocols, while not being social and economic rights as such, extend into the sphere of social rights by the interpretation given to these provisions by the European Court of Human Rights and are thus indirectly protected by the Convention. These include the right to life (Article 2), the prohibition of torture and inhuman or degrading treatment (Article 3), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), freedom of thought, conscience and religion (Article 9), freedom of expression (Article 10), the protection of property (Article 1 of Protocol No. 1) and the prohibition of discrimination (Article 14 and Article 1 of Protocol No. 12). The States' undertaking to abide by the binding judgments of the Court, which comprises an obligation to implement appropriate general measures to solve the problems that have led to the Court's finding of a violation also in respect of other persons in the applicant's position, have resulted in numerous reforms in the field of social rights.

[...]

⁴⁶ See the following link to the Secretary General's 2014 Report on the "State of democracy, human rights and the rule of law", p. 40; and the Commissioner's Comment on "Preserving Europe's social model" of 13 October 2014.

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6. As for the treaty system of the European Social Charter, it is noted that the ~~original or (revised)~~ Charter is currently in force in 43 out of the 47 Member States of the Council of Europe. Nine Member States are bound ~~only~~ by the original 1961 Charter, the other 34 Member States are bound by the 1996 Revised Charter. Furthermore, 15 Member States are currently bound by the 1995 Additional Protocol Providing for a System of Collective Complaints.

8. Unlike the Convention itself, the (revised) Charter is based on an “à la carte” system of acceptance of its provisions, which allows States to choose to a certain extent the provisions they are willing to accept as obligations under international law. Compliance with the provisions of the (revised) Charter is monitored by the Committee of Independent Experts also known as the European Committee of Social Rights (ECSR), the Governmental Committee and the Committee of Ministers, in the State reporting procedure and by the Committee of Independent Experts in the collective complaints procedure. ~~The justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR’s finding of non-conformity of a situation with the (revised) Charter remain rare. Nevertheless, a number of national courts have applied provisions of the (revised) Charter in their decisions in recent years and some States have undertaken significant reforms further to ECSR decisions or conclusions. Moreover, both EU legislation and the case law of the Court of Justice of the EU made some references to the (revised) European Social Charter, while the ECSR equally takes account of EU law and practice when interpreting the (revised) Charter.~~

Comment [JC53]: It should be explained (e.g., in a footnote) that this is a shorthand for both original and revised ESC.

Comment [JC54]: What does this mean? Whether the findings of non-conformity are rare or not has nothing to do with justiciability. A provision becomes justiciable when by law a court is authorized to review it. This does apply to the ESC in a very limited way only: only in regard to states which ratified the collective complaints protocol, only in regard to collective complaints (not to individual cases), and still whatever judgments the Committee of Independent Experts render are subject to final approval of the Council of Ministers. This sentence therefore should be struck out.

II. Council of Europe further action for social rights

9. The Secretary General of the Council of Europe launched the “Turin Process” in 2014, which is aimed at strengthening the treaty system of the European Social Charter within the Council of Europe and in its relationship with the law of the European Union and has been pursued, *inter alia*, by a number of high-level conferences since then. As to the follow-up given to date to the process by the Council of Europe Member States, it was noted that only Greece ratified the Revised Charter since then; no further State ratified the 1995 Additional Protocol Providing for a System of Collective Complaints. As for the compliance of Member States with the requirements under the (revised) Charter, while there were conclusions of non-conformity with the (revised) Charter in roughly one third of the situations examined in 2016, some positive developments, for instance, in the protection against discrimination in the field of employment could equally be noted.

Comment [JC55]: National courts can do that, if their national constitutional orders allow for such incorporation. Also, states can introduce reforms inspired by the ESC, as they could do that even if the ESC was not a treaty but just a recommendation.

Comment [JC56]: Yes, courts, committees and other bodies may take into consideration all kinds of legal sources. But what does this have to do with the opening sentence which is about a specific system of verifying states’ compliance with the ESC?

10. The Committee of Ministers, in addition to its role in the process of the implementation of the social rights enshrined in the (revised) Charter following the findings of the ECSR in the State reporting procedure and under the collective complaints procedure, adopted a number of recommendations and other instruments aimed at reinforcing social rights in the past years. These included an Action Plan for Social Cohesion, guidelines on improving the situation of low-income workers, the promotion of human rights of older persons or the access of young people from disadvantaged neighbourhoods to social rights. The Committee of Ministers, which had expressed its resolve to secure the effectiveness of the (revised) Charter in its 2011 Declaration marking the Charter’s 50th anniversary, regularly invites Member States which have not yet done so to consider ratifying the Revised Charter and its Protocols.

Comment [JC57]: This sentence lumps together two unrelated issues. One is that in 1/3 of the situations examined, nonconformity was found. Surely, states reacted to those findings and the CM made their final judgment, whatever it was. The other issue is about protection against discrimination in employment. If the collective complaints procedure helped rectify those infringements, that is OK. The real issue is that the Turin Process did not go far.

[...]

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16. As regards the European Union, the Council of the EU, the European Parliament and the Commission proclaimed the European Pillar of Social Rights in November 2017, the objective of which is to contribute to social progress by supporting fair and well-functioning labour markets and welfare systems; the Pillar refers, *inter alia*, to the European Social Charter. Moreover, the European Parliament and the EU Agency for Fundamental Rights both made suggestions to EU Member States concerning social rights protected, *inter alia*, by the European Social Charter.

Comment [JC58]: Was the Committee of Independent Experts the sole source of inspiration in all those instances? Definitely not in regard to the social cohesion strategy.

Comment [JC59]: The idea of the pillar has little to do with legal protections as per human rights treaties. If it is similar to anything the CoE does, it is to the social cohesion work, which the CoE is now eliminating. The Pillar is about practical policy measures, not legal judgments.

[...]

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20. ~~Certain limitations of the framework of protection of social rights within the Council of Europe equally became apparent. These include the fact that the Convention only covers some aspects of the different social rights while~~ The impact of the (revised) Charter which contains a comprehensive social rights catalogue is restricted by the “à la carte” system of acceptance of its provisions and the fact that only 43 of the 47 Council of Europe Member States are bound by the (revised) Charter and only 15 States by the 1995 Additional Protocol Providing for a System of Collective Complaints.

[...]

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32. At the 1993 World Conference on Human Rights held in Vienna, the international community reiterated its commitment to the principles contained in the Universal Declaration of Human Rights which “is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments, in particular the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.”⁴⁷ Amidst controversy over the claim that the right to development and social rights should be accorded precedence to civil and political rights, the Conference ~~and~~ reaffirmed in paragraph 5 of the Vienna Declaration:

“All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.”⁴⁸

35. A 2015 study of the CDDH on “the feasibility of new activities as well as on the revision of existing instruments to deal with the impact of the economic crisis on human rights in Europe” entitled “The impact of the economic crisis and austerity measures on human rights in Europe” analysed the impact of the economic crisis on human rights in specific areas.⁴⁹ ~~It disclosed that a number of different Council of Europe organs and bodies had concluded that the crisis had had an impact on human, and in particular social rights in the fields of access to justice and a fair trial and that certain groups of persons, including women, children and young persons as well as prisoners, migrant workers and asylum seekers were often particularly affected by the economic crisis and reduced State resources, which had further repercussions on the social cohesion in the Council of Europe Member States.⁵⁰~~

[...]

⁴⁷ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993ⁱⁿ preambular paragraph.

⁴⁸ ~~Ibid.~~ Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. On the controversy at the Vienna Conference, see, e.g.: Alan Riding, “A Bleak Assessment as Rights Meeting Nears”, *The New York Times*, April 25, 1993; Paul Lewis, “Differing Views on Human Rights Threaten Forum”, *The New York Times*, June 6, 1993; Elaine Sciolino, “U.S. Rejects Notion That Human Rights Vary With Culture”, *The New York Times*, June 15, 1993; Paul Lewis, “Differences Are Narrowed at U.N. Talks on Rights”, *The New York Times*, June 21, 1993.

⁴⁹ See *ibid.*, paragraphs 1 and 20 *et seq.*

⁵⁰ ~~See *ibid.*, paragraphs 20–38.~~

Comment [JC60]: Nothing has “become apparent.” Social rights have always been protected in procedures respecting their specificity. So, could not all of the sudden “become apparent”. a different wayre protected in a different

Comment [JC61]: The Convention was not supposed to cover social rights. Thus, it cannot be said, that it “only covers” some of them.

Comment [JC62]: Access to justice and fair trial are civil rights, not social rights. From this sentence it appears, that economically disadvantaged persons or persons in vulnerable positions could have had more difficulties in their enjoyment of civil rights. Why does the first part of the sentence claim that they had impaired access to social rights? As that claim has not been substantiated, the sentence should be struck out.

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36. In the general introduction to its Conclusions 2009, the ECSR stated that the implementation of the social rights guaranteed by the Charter had acquired greater importance in a context of global economic crisis:

“The severe financial and economic crisis that broke in 2008 and 2009 has already had significant implications on social rights, in particular those relating to the thematic group of provisions ‘Health, social security and protection’ [...]. Increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while [...] revenues decline. [T]he Committee recalls that under the Charter the Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. From this point of view, the Committee considers that the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.”⁵¹

37. ~~Many concluded~~ ~~Some observed~~ that vulnerable persons have often been most affected by the economic crises.⁵² The President of the Court at the time, Sir Nicolas BRATZA, for instance, considered in January 2012:

~~“The economic crisis with its potential for generating political instability seems to spiral further and further out of control. All our societies are experiencing difficulties that few of us can have foreseen only a short time ago. In this environment the vulnerable are more exposed and minority interests struggle to express themselves. The temptation is to be inward-looking and defensive, for States as well as individuals. Human rights, the rule of law, justice seem to slip further down the political agenda as governments look for quick solutions or simply find themselves faced with difficult choices as funds become scarce. It is in times like these that democratic society is tested. In this climate we must remember that human rights are not a luxury.~~

[...]

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38. Similarly, the then President of the Court, Mr Dean SPIELMANN, found during the Seminar on the implementation of the European Convention on Human Rights in times of economic crisis in January 2013:

“It must be said that those most affected by the crisis are the vulnerable, for example prisoners (...), migrants (...), pensioners, who see their pensions being reduced – that is to say, the kind of people that our Court tends to protect in many of its cases.”⁵³

⁵¹ Conclusions 2009: General introduction, op. cit.: <http://hudoc.esc.coe.int/eng#>.

⁵² Accordingly, the [joint Declaration of the Presidents of the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities and the Conference of INGOs](#) of the Council of Europe entitled “*Acting together to eradicate extreme poverty in Europe*” of 17 October 2012 stated that it is the people belonging to the most disadvantaged social groups who are the hardest hit by the economic crisis and often also by fiscal austerity measures. On 25 June 2015, the Conference of INGOs adopted a [Recommendation on “The violation of economic, social and cultural rights by austerity measures: a serious threat to democracy”](#) (document CONF/PLE(2015)REC1), signalling a deterioration in several Member States of entitlements related to the right to work, the right to health, the right to education and the right to housing, food and water.

⁵³ See the speech of Dean Spielmann at the Seminar on “Implementing the European Convention on Human Rights in times of economic crisis”, published in [Dialogue between Judges 2013](#), p. 5.

Comment [JC63]: This conclusion does not logically and legally follow from the previous contention. Actually, it is conceivable that protections could decrease, even though states complied with their obligations to “pursue with all appropriate means”, etc.

Comment [JC64]: How many? Sir Bratza?

Comment [JC65]: This is a nice rhetorical figure, except that it has little to do with reality. The political instability did not spiral out of control. There was no “inward looking” and “defensiveness” on the part of the States. On the contrary, systems of social protection cushioned the negative social impact of the crisis and social expenditures grew. Only the last sentence contains a sound observation.

That is why States Parties to the ECS made serious and considered efforts to mitigate the adverse social consequences of the economic crisis in compliance with their obligation under Part I of the (revised) Charter in which the "Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the ... rights and principles [listed in the Charter] may be effectively realised."

For instance, the Social Protection Committee of the EPSCO Council and the European Commission, in their assessment of Member States responses to the social consequences of the crisis, concluded:

Strong policy intervention focused on recovery and social protection systems acting as automatic stabilisers played a major role in mitigating the social consequences of the crisis. (...)

Members States policy responses vary in size and emphasis. A Commission estimate shows that spending on overall recovery measures varies from less than 1% of GDP to more than 3.5%. According to the Autumn Commission economic forecast, as a result of automatic stabilisers and of discretionary measures to reinforce social benefits, social expenditure in the EU are expected to increase by 3.2 percentage points of GDP between 2007 and 2010. ...

*Most Member States continue to strengthen their **policy responses** to the economic slowdown As labour market conditions have continued to worsen in the second and third quarters of 2009, many Member States have strengthened and consolidated the set of **labour market measures** they had adopted at an early stage. These measures aim at preserving employment, supporting activation and promoting re-integration in the labour market, and anticipating and managing the adverse impact of restructuring. The majority of the new or reinforced measures focus on **flexible working time arrangements**, which are seen as effective means to maintain people in employment.*

*Member States have also further enhanced their **measures to support people's income**. ... New measures have especially been taken to strengthen **unemployment benefits** while paying attention to avoiding disincentives to get back to work. Member States have also reinforced **minimum income schemes** especially in countries where they appeared weak under the increased pressure created by the crisis.*
(...)

Overall the measures taken since the beginning of the crisis seem to have mitigated the worst impact that could be expected from the financial crisis on individuals since the repossession and over-indebtedness figures in Europe are still far below the trends observed in the US where more than 1.5 million households have lost their homes in the first 6 months of 2009.⁵⁴

Those observations were later corroborated by the OECD which concluded that: "The global economic crisis has had a major impact on the share of economic resources absorbed by the welfare state. New OECD social expenditure data show that, on average across the OECD, public social spending-to-GDP ratios increased from around 19% in 2007 to 22% of GDP in 2009/11 and estimates for 2012 suggest it has remained high since."⁵⁵

⁵⁴ Second Joint Assessment by the SPC and the European Commission of the social impact of the economic crisis and of policy responses, SPC/2009/11/13 final.

⁵⁵ Social spending during the crisis: Social expenditure (SOCX) data update 2012, OECD <<http://www.oecd.org/els/soc/OECD2012SocialSpendingDuringTheCrisis8pages.pdf>>.

[...]

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42. These treaties are complementary. Civil and political rights protected under the Convention may have aspects pertaining to a number of the social rights protected by the (revised) Charter in greater detail are equally protected, at least in some of their aspects, by the Convention.⁵⁶

43. As a matter of example, an aspect of the right to work under Article 1 of the (revised) Charter, in so far as it covers protection of the right of the worker to earn his living in an occupation freely entered upon, is also covered equally protected under by Article 4 of the Convention insofar as it, which prohibits forced or compulsory labour. Furthermore, trade union rights are protected in several provisions of the (revised) Charter, which provides for the right to organise (Article 5) and to bargain collectively (Article 6) and for the right of workers' representatives to protection in the undertaking (Article 28). Article 11 of the Convention equally covers trade union rights in protecting the right to freedom of peaceful assembly and association, including the right to form and join trade unions.

44. Moreover, the rights to protection of health and to social and medical assistance are provided for specifically in Articles 11 and 13 of the (revised) Charter but some of their aspects may equally also be covered in certain contexts by the prohibition on inhuman or degrading treatment under Article 3 of the Convention or by the right to respect for private life under Article 8 of the Convention.

[...]

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45. Several aspects of the right to respect for private and family life (Article 8 of the Convention) are further laid down as eSpecific rights in the (revised) Charter, such as the right of employed women to protection of maternity (Article 8), the right of the family to social, legal and economic protection (Article 16) or the right of workers with family responsibilities to equal opportunities and equal treatment (Article 27) may in some ways be related to the Art. 8 of the Convention right to respect for private and family life. As for the right to education, as the State has undertaken to provide, guaranteed by Article 2 of Protocol No. 1 to the Convention, it is set out in detail in the (revised) Charter specifies in Articles 7 (right of children and young persons to protection), 9 (right to vocational guidance), 10 (right to vocational training), 15 (rights of persons with disabilities) and 19 (rights of migrant workers) how this right should be implemented mostly in regard to vocational guidance and training. Lastly, there are some links between the protection of property under Article 1 of Protocol No. 1 to the Convention and several articles in the (revised) Charter relating, notably, to remuneration and benefits (Articles 4 and 12).

44. As regards the legal obligations for the Contracting Parties stemming from Convention and the (revised) Charter, the rights guaranteed under the Convention shall be secured by the Contracting Parties to everyone in their jurisdiction, while under the (revised) Charter, the Contracting Parties accept as the aim of their policy to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the rights and principles contained in the Charter may be effectively realized.

46. As regards the types of obligations arising for the State parties both under the Convention and under the Charter, according to their supervisory bodies and authors of legal doctrine,⁵⁷ these are threefold and comprise a (negative) obligation to respect,⁵⁸ a (positive) obligation to protect⁵⁹ and an

⁵⁶ See also <https://www.coe.int/en/web/turin-european-social-charter/-european-social-charter-and-european-convention-on-human-rights>.

⁵⁷ See, for instance, Gregor T. Chatton, « *L'harmonisation des pratiques jurisprudentielles de la Cour européenne des droits de l'homme et du Comité européen des droits sociaux : une évolution discrète* », in: Chappuis / Foëx / Kadner Graziano (eds.), *L'harmonisation internationale du droit*, 2007, pp. 45 et seq.

⁵⁸ As an example of the obligation to respect, the following decisions of the ECSR are worth noting: decision of 5 December 2000, Complaint No. 7/2000 (*FIDH v. Greece*) concerning a Greek legislative decree banning career officers who have received several periods of training from resigning their commissions for up to 25 years; decision of

Comment [JC66]: Obviously it is not true to say that both instruments protect the right to work "equally".

Comment [JC67]: This is very far-fetched. Article 8 of the Convention simply prevents the government or anybody else from interfering with the privacy of the family. What does this have to do with maternity protection, etc., where the government is required to undertake action in order to make certain services available?

Comment [JC68]: Before we get to the nonbinding legal interpretations and views expressed by the bodies and experts referred to in the following para, it must first be stated what the legally binding obligations are. The proposed text almost directly quotes Art. 1 of the Convention and Part I of the (revised) Charter.

obligation to implement⁶⁰. States enjoy a large margin of appreciation⁶¹ with regard to the means chosen to comply with this last category of obligations – more relevant in the context of the Charter – which ~~traditionally~~ necessitate positive structural measures of fulfilment, and can at times only be fully implemented over time, in view of their complexity and the important budgetary resources required.

[...]

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47. ~~Monitoring of~~ The implementation of the Convention is ensured by the European Court of Human Rights (hereinafter “the Court”), as a last resort, by its examination of individual applications. The Court has the right to issue rulings legally binding the responding States. Regarding the (revised) Charter, the monitoring of its implementation is carried out by the European Committee of Social Rights (hereinafter “the ECSR”), by its examination of State reports and of collective complaints, as well as by the Governmental Committee of the European Social Charter and the Committee of Ministers. The Committee of Ministers may direct recommendations to reviewed States.⁶²

48. It is to be noted that the collective complaints procedure is a protection system complementing the reporting system under the Charter. ~~and a different system and complementary to the jurisdictional protection, in the field of social rights, afforded by the Court under the Convention.~~ Indeed, because of their collective nature, complaints may only raise questions concerning the allegedly unsatisfactory application of the Charter and may not concern merely individual situations. Other than under the Convention system, a complaint may therefore be lodged with the ECSR without domestic remedies having been exhausted and consequently, without delay and without the complainant organisation necessarily being a victim of the alleged violation of the (revised) Charter.

Comment [JC69]: This is confusing. It may be read that the Court has jurisdiction over social rights, which it does not.

25 April 2001, Complaint No. 8/2000 (*QCEA v. Greece*) concerning the impact of the length of civilian service on the entry of conscientious objectors in Greece into the labour market; and decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning evictions of Roma from sites or dwellings. As for the Court, the duty to respect is at issue in all applications concerning allegedly unjustified interference by State authorities with the Convention rights.

⁵⁹ As an example of the obligation to protect, mention can be made of the following decisions of the ECSR: decision of 10 October 2005 (admissibility), Complaint No. 30/2005 (*MFHR v. Greece*), § 14 concerning the semi-privatised mining of lignite, posing health and environmental risks; 7 December 2004, Complaint No. 18/2003 (*OMCT v. Ireland*), §§ 56–58 concerning the duty to ban corporal punishment of children; 9 May 2005, Complaint No. 25/2004 (*C.G.S.P. v. Belgium*), § 41 where the ECSR interprets Article 6 § 1 of the Charter on collective bargaining as meaning that States must take positive steps to encourage consultation between trade unions and employers’ organisations and, if such consultation does not take place spontaneously, must establish permanent bodies and arrangements in which unions and employers’ organisations are equally and jointly represented. It should be noted that similar (“positive”) protection obligations are recognised by the Court, which can make it compulsory for States to enact legislation, inform or advise, conduct effective inquiries, instruct/train its staff and adopt specific prevention measures, see, in particular, *Siliadin v. France*, no. 73316/01, §§ 77–89, ECHR 2005-VII with many examples.

⁶⁰ As an example of the obligation to implement, the following decisions from the ECSR are worth mentioning: 4 November 2003, Complaint No. 13/2002 (*Autism-Europe v. France*), § 53 concerning the progressive creation of educational establishments and places suitable for autistic children and adults; 9 September 1999, Complaint No. 1/1998 (*ICJ v. Portugal*), §§ 32 et seq. concerning the abolition of child labour; decision of 7 December 2005, Complaint No. 27/2004 (*ERRC v. Italy*) concerning the creation of suitable sites for nomadic Roma and the introduction of measures, having regard to the different situation of settled Roma, aimed at improving their housing conditions. Although the Court only considers individual cases, many of its judgments require, in terms of execution, general (sometimes structural) measures to be adopted. This is particularly true of its pilot judgments, highlighting structural shortcomings which call for measures that take into account the number of people affected (collective aspect), see, *inter alia*, *Varga and Others v. Hungary*, nos. 14097/12 and 5 others, §§ 94 et seq., 10 March 2015.

⁶¹ Part V, Article I of the revised European Social Charter states that its provisions shall be implemented by: a) laws or regulations; b) agreements between employers or employers’ organisations and workers’ organisations; c) a combination of those two methods; d) other appropriate means. Compare also Article 8 § 4 of the Optional Protocol to the ICESCR, according to which, when examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant.

⁶² See in more detail below.

49. It should also be noted that the Convention protects everyone within the jurisdiction of a State Party (Article 1 of the Convention), while foreigners who are not lawfully residing on the territory of a State Party or who are not nationals of another State Party are excluded from the scope of application of the Charter (see paragraph 1 of the Appendix to the Charter).⁶³

50. Without prejudice to the substantial legal and practical differences in the implementation of the civil and political rights guaranteed under the Convention and the social rights guaranteed under the Charter as described above, it is also worth noting at this stage that, in their assessment of the cases submitted to them, the Court and the ECSR not infrequently take into account the connections between the Convention and Charter and employ very similar criteria, assessing the implementation in practice of the protected rights and examining whether the restrictions imposed on them are prescribed by law, pursue a legitimate end and are necessary in a democratic society. In their developing decision practice, the Court and the ECSR ensure that all human rights – whether civil and political or economic and social – are effectively protected in a complementary manner.

51. The Convention and its Protocols, while essentially protecting civil and political rights, contain some provisions which are related to or may partially overlap with can equally be classified as social rights protected under the Charter. These aspects of social rights are thus directly protected by the Convention and its Protocols. Moreover, several further rights laid down in the Convention and its Protocols, while not being social rights as such, also cover certain aspects of social and economic rights in the interpretation given to them by the Court, which leads to an indirect protection of a number of social rights by these instruments.⁶⁴ As the Court itself found, “[w]hilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature” and an interpretation of the Convention may extend into the sphere of social and economic rights as “there is no water-tight division separating that sphere from the field covered by the Convention.”⁶⁵

[...]

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i) Direct protection of social rights

[...]

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65. As for the parents’ right to respect for their religious and philosophical convictions in education and teaching guaranteed by Article 2 of Protocol No. 1, the Court found in its *Mansur Yalçın and Others v. Turkey* judgment of 16 September 2014 that there had been a breach of this right with regard to compulsory religious culture and ethics classes in school. It considered that the Turkish education system did not offer sufficient options for the children of parents who had a conviction other than that of Sunni Islam and that the procedure for exemption from the religion and ethics classes was likely to subject pupils’ parents to the need to disclose their religious or philosophical convictions in order to have their children exempted.⁶⁶ In contrast, the Court considered that the presence of a crucifix in the classrooms of an Italian state school, an essentially passive symbol with a limited impact on pupils, complied with the respondent State’s obligation under Article 2 of Protocol No. 1 to respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions (see *Lautsi v. Italy*).

⁶³ See also O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.05.

⁶⁴ See for the distinction between a direct and an indirect protection of social rights by the Convention and the Court’s case-law already the Background paper on “Recent developments in the field of social rights” prepared by the Rapporteur on Social Rights, Ms Chantal Gallant, for the CDDH, document CDDH(2006)022, paragraphs 03 and 06–07.

⁶⁵ See *Airey v. Ireland*, 9 October 1979, § 26, Series A no. 32.

⁶⁶ *Mansur Yalçın and Others v. Turkey*, no. 21163/11, 16 September 2014.

Comment [JC70]: This may be the case. But it is far from claiming that social rights are directly protected under the Convention.

Comment [JC71]: This certainly is not direct protection.

[...]

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99. With regard to workers with family responsibilities, reference shall be made first to the Grand Chamber's judgment of 22 March 2012 in *Konstantin Markin v. Russia*, in which it found that the ~~gender-based~~ difference in treatment among male and female military staff concerning the right to parental leave amounted to discrimination on grounds of sex and had breached Article 14~~8~~ taken in conjunction with Article 8~~4~~. In its judgment, the Court referred to Article 27 of the Charter.⁶⁷ The Court further held in several judgments that the refusal to grant a child allowance to the applicants on the ground that they were foreigners had violated the Convention (see *Dhahbi v. Italy*, *Fawsie v. Greece* and *Saidoun v. Greece*).⁶⁸ Moreover, in the case of *Emel Boyraz v. Turkey* the Court found a breach of Article 8 taken in conjunction with Article 14 by the dismissal of the applicant, a female security guard, on grounds of sex.

[...]

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Footnote 132 : CETS No. 163. The amendments compared to the 1961 Charter include a reinforcement of the principle of non-discrimination, the improvement of gender-equality between men and women in all fields covered by the treaty, a better protection of maternity and social protection of mothers, a better social, legal and economic protection of employed children and a better protection of handicapped people.

[...]

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ii) The European Committee of Social Rights (ECSR)

[...]

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120. The ECSR members' term of office is six years (renewable once). They are appointed by the Committee of Ministers from a list of experts submitted by the Contracting Parties (see Article 25 of the Charter, read in conjunction with Article C of the Revised Charter). Under the Turin Protocol, they shall be elected by the Parliamentary Assembly (PACE) but this provision in the Protocol is the only one which, for the time being, has not yet been implemented, pending the entry into force of the Protocol (see above).

124. ~~It is worth noting must be noted that the justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR's finding of non-conformity of a situation with the Charter remain rare.~~ Moreover, it may be noted in this context that in accordance with Part III of the Appendix to the Charter, the legal obligations of an international character contained in it are submitted only to the supervision provided for by the Charter's supervisory mechanism, which indicates that the provisions of the Charter shall not have direct effect at the domestic level.⁷⁰

⁶⁷ *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts), in particular § 55.

⁶⁸ *Dhahbi v. Italy*, no. 17120/09, 8 April 2014; *Fawsie v. Greece*, no. 40080/07, 28 October 2010; and *Saidoun v. Greece*, no. 40083/07, 28 October 2010.

⁶⁹ See on this issue, for instance, Olivier de Schutter and Matthias Sant'Ana, *The European Committee of Social Rights (the ECSR)*, in: Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, 2012, pp. 81–82.

⁷⁰ See, *inter alia*, O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraphs 23.23 and 23.75.

Comment [JC72]: This section should start from the description of the supervisory mechanism in which the Committee of Independent Experts is just one element. That would help avoid various assertions unsubstantiated by the law of the ESC, e.g., on the limited justiciability, declaratory nature of experts' legal opinions, etc. As is, the Committee of Independent Experts stands out as the sole supervisory body which it is not and was never intended to be. Such layout of this section of the report allows for unfounded parallels between the Committee of Independent Experts and the Court.

Comment [JC73]: This info is already given in the 2nd para above.

Comment [JC74]: Justiciability means: liable to trial in a court of justice. Justiciability refers thus to the type of matters a court may adjudicate. That is determined by appropriate law. In this case, the law is the ECS and its protocol of collective complaints. The law of the charter has determined the extent of justiciability insofar as it is allowed under the collective complaints procedure. Therefore, it cannot be said that justiciability is limited because the findings of non-conformity are rare. Let's assume that – for whatever reason – a given criminal court disproportionately dismisses cases or finds the accused not guilty. Would we then say, that the justiciability of criminal law is limited? Surely, not!

Comment [JC75]: This confuses two distinct issues. One is the scope of incorporation of ESC provisions to domestic law. That is determined by the general international law and the constitutional order of a particular member state. The other issue is whether decisions of international supervisory bodies on the compliance or non-compliance with the ESC have direct application to the domestic legal order. That is properly determined by the ESC itself. The ESC mechanism does not allow that. But that does NOT mean that provisions of the ESC do not have direct effect. They do have an effect as expressed in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

125. The decisions and conclusions of the ECSR ~~are not are only legally binding on States Parties~~ declaratory: they ~~set out the law and~~ should serve as a basis for positive developments with respect to social rights through the passing of new laws, case-law or practices at national level. ~~The Charter's supervisory mechanism differs from that under the Convention which provides in Article 46 § 1 that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Despite this and despite the absence of direct effect of the Charter provisions, these legal opinions of the ECSR are nevertheless quite sometimes regularly referred to by national courts for the purpose of interpreting national law. In one case, a national court – and these courts, at times, declare invalid or set aside domestic legislation on the basis of a if the ECSR finding of non-compliance in the collective complaints procedure has ruled that it is not in compliance with the Charter.~~

[...]

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126. The State reporting procedure is set out in Part IV (Articles 21 et seq.) of the 1961 Charter and has been further elaborated in several decisions of the Committee of Ministers. In the course of time the reporting system has become very ~~complex~~ elaborate. The 1991 Protocol (the “Turin Protocol”), which contains amendments to the reporting procedure, has not yet entered into force;⁷¹ despite this, most of its provisions are applied on the basis of a decision of the Committee of Ministers.⁷² This decision clarified the prerogatives and responsibilities of the control organs of the Charter, and has also enabled the social partners and non-governmental organisations (NGOs) to be more closely involved in the procedure. Pursuant to Part IV, Article C of the Revised Charter, the same reporting procedure applies in respect of the undertakings under the Revised Charter.

127. Under the reporting system, States Parties are under the obligation to regularly submit a report on how the provisions of the (revised) Charter they have accepted are applied in law and in practice (see Article 21 of the Charter). A the first stage of the review, the reports are examined by the ECSR which decides, from a legal point of view, whether or not the national situations they describe comply with the (revised) Charter. The findings of the ECSR – known as “Conclusions” – are published annually.

128. The second stage of the review in the reporting procedure, takes place before the the Governmental Committee of the European Social Charter and the European Social Security Code (“Governmental Committee”) comprising representatives of the States Parties and observers from the aforementioned international social partners (Business Europe, IOE and ETUC). In particular, in the light of the reports of the ECSR and the States Parties, it selects, after a thorough discussion of national circumstances and their evolution, given due regard to considerations of social and economic policy, situations which, in its opinion, should be the subject of recommendations to States. It then presents a report to the Committee of Ministers which is made public.⁷³

129. The final stage of the review in the reporting procedure takes place before the Committee of Ministers. Once it has received the report of the Governmental Committee, it adopts, by a two-thirds majority of the votes cast, a resolution which brings each supervision cycle to a close and may contain individual recommendations addressed to the States concerned directing them to remedy the situations of non-conformity, as indicated by the Governmental Committee. Only States Parties to the Charter are entitled to vote on resolutions and recommendations.⁷⁴

Comment [JC76]: To “set out” in this context means that the Committee of Independent Experts state what the law is conclusively. The very nature of the Charter supervisory mechanism denies them does not afford them such conclusivity. It is meant to be a dialogue in which the experts give their legal opinion, which should be seriously considered in view of all the aspects of the matter. That is why there is Governmental Committee and the Council of Ministers at the end of that process.

Comment [JC77]: How do we know this? What is the evidence that domestic courts refer to those opinions “quite regularly”? Furthermore, even if courts look into those opinions, this does not mean that they treat them as legally-binding. They may just use them as evidence of for a certain interpretation of the ESC with which they may agree or disagree. In fact, §§185-187 cite several rulings of Belgian, Spanish and French courts (3 out of 43 Contracting Parties to the ESC). In most of those cases, courts found certain articles of the ESC directly applicable. That courts may do routinely (i.e., find certain provision of international law self-executing). But this has nothing to do with references to legal opinions of the Committee of Independent Experts. They just treated them as useful legal opinions. Only one Spanish court used a decision of the Committee under the collective complaints procedure as basis for their judgment. That is far to little to say that Committees’ legal opinions are “quite regularly” referred to by national courts.

⁷¹ It should be recalled that it requires ratification by all States Parties. To date, four States have yet to ratify it.

⁷² On 11 December 1991 the Committee of Ministers adopted a decision calling on the States and monitoring bodies to consider already applying some of its measures if permitted to do so by the text of the Charter.

⁷³ Part IV, Article 27 of the Charter.

⁷⁴ Part IV, Article 29 of the Charter.

[...]

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133. ~~In the reporting procedure, the decisions of the Committee of Ministers are prepared by the Governmental Committee of the European Social Charter and the European Social Security Code ("Governmental Committee") comprising representatives of the States Parties and observers from the aforementioned international social partners (Business Europe, IOE and ETUC). In particular, in the light of the reports of the ECSR and the States Parties, it selects, after a thorough discussion of national circumstances and their evolution, given due regard to considerations of social and economic policy, situations which, in its opinion, should be the subject of recommendations to States. It then presents a report to the Committee of Ministers which is made public.⁷⁵~~

134. ~~As to the role of the Committee of Ministers in the reporting system, it comes into play in the final phase. Once it has received the report of the Governmental Committee, it adopts, by a two-thirds majority of the votes cast, a resolution which brings each supervision cycle to a close and may contain individual recommendations addressed to the States concerned, given that in the event of a non-conformity conclusion by the ECSR, States are required to remedy the situation and to bring it into conformity with the Charter. If a State fails to respond to the ECSR's finding(s) of non-conformity, the Committee of Ministers can issue a formal Recommendation to the respondent State based on social and economic policy considerations, requesting that it change its law or practice. Given the importance of this decision, it also requires a two-thirds majority of the number of the votes cast. Only States Parties to the Charter are entitled to vote on resolutions and recommendations.⁷⁶~~

135. Lastly, in the State reporting procedure, the ECSR may – like the various UN committees – also adopts its statements of interpretation by which it sets out in general terms the requirements of the (revised) Charter in respect of certain of its provisions. Furthermore, the ECSR has adopted general statements of interpretation, to date on the following issues:

[...]

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152. In the decisions and conclusions, the ECSR has developed a number of general principles of its interpretation of the (revised) Charter.

[...]

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172. With regard to the right to social and medical assistance under Article 13 of the (revised) Charter and the right to shelter, the ECSR held in a series of decisions that from the point of view of human dignity, migrants in an irregular situation should be able to benefit from those rights.⁷⁷ It thereby ruled ultra vires in direct contravention to the clear provision of the law limiting the personal scope to of application of the Charter which allows to "include foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned (went beyond the Appendix to the

⁷⁵ Part IV, Article 27 of the Charter.

⁷⁶ Part IV, Article 29 of the Charter.

⁷⁷ See Decision of 8 September 2004, Complaint No. 14/2003 (*FIDH v. France*); in its 2011 Conclusions, the ECSR found that the situation had been brought into conformity with the Charter. See further Decision of 20 October 2009, Complaint No. 47/2008 (*DCI v. the Netherlands*); the ECSR equally concluded that the situation had been brought in line with the Charter. See, moreover, Decision of 2 July 2014, Complaint No. 86/2012 (*FEANTSA v. the Netherlands*) and Decision of 1 July 2014, Complaint No. 90/2013 (*CEC v. the Netherlands*); in the assessment of the follow-up to these two decisions, the ECSR held, in 2016, that the situations had still not been brought in conformity with the Charter.

Comment [JC78]: The Committee of Independent Experts negative conclusions in the state reporting procedure are not binding. Therefore, they do not create *per se* any requirement on the part of the States to bring their law and practice into conformity with the Charter. It is the Governmental Committee which decides which of the negative conclusions should find their way into the individual recommendations appended to the resolution of the Committee of Ministers.

Comment [JC79]: This creates an unfounded impression of a correctional procedure by the Committee of Ministers in regard to States not conforming with their prior individual recommendations. In fact, at the end of the subsequent reporting cycles, on very rare occasions, the Committee of Ministers may repeat an individual recommendation.

Comment [JC80]: Unlike the Convention Art. 32(1), the ESC (or any UN human rights convention) affords the Committee of Independent Experts the power to interpret the Charter authoritatively. That power rests exclusively and collectively with the Contracting Parties. The Committee does, however, issue its interpretations as a matter of fact.

Charter, point 1)-which limits its scope *ratione personae*.⁷⁸ In its *FIDH v. France* decision of 2004 the ECSR accepted, first, the applicability of the right to social, legal and economic protection to minors in an irregular situation. In its *DCI v. the Netherlands* decision of 2009, the ECSR reached a similar conclusion with regard to such minors' right to shelter. Lastly, in its *CEC v. the Netherlands* and *FEANTSA v. the Netherlands* decisions of 2014, the ECSR concluded that both minors and adults in an irregular situation had the right to shelter and to urgent medical and social assistance.

[...]

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210. Furthermore, it is also worth noting that whereas the provisions of the European Social Charter are binding on those EU Member States which have accepted them, these States are required to comply with the EU Charter of Fundamental Rights only when they are implementing EU law, with the result that the rights in question apply only in certain areas. Furthermore, the EU Charter of Fundamental Rights distinguishes between "rights" and "principles". Legislative and executive acts implementing the "principles" may be interpreted or reviewed by the courts of law, but those "principles" do not give claims for positive action either by the European Union institutions or by its Member States. That is consistent with the with the approach of the EU "Member States' constitutional systems to 'principles' particularly in the field of social law".⁷⁹



PORTUGAL

[...]

Page 20

Right to life (Article 2 of the Convention)

73. The Court had a number of cases before it concerning State responsibility in the context of deaths resulting from alleged medical negligence. It notably confirmed in its Grand Chamber judgment in the case of *Lopes de Sousa Fernandes v. Portugal* that the States were under a substantive positive obligation under Article 2 to put in place a regulatory framework both in the public and the private sector for securing the protection of the patients' lives⁸⁰ and under a procedural obligation to set up an effective and

⁷⁸ It is recalled that, in principle, the Charter does not apply to nationals of States which are not parties to the Charter, nor to migrants in an irregular situation. However, the Appendix to the Charter allows States to extend its scope. The ECSR's interpretative statements on the personal scope of the Charter (2004), stateless persons (2013) and refugees (2015) all invite States to go beyond the limited personal scope of the Charter.

⁷⁹ Interpretation of Art. 52(5) of the EU Charter of Fundamental Rights of the interpretations referred to in Article 6 § 1 of the Treaty on European Union: "Declaration concerning the explanations related to the Charter of Fundamental Rights", Official Journal of the European Union, 16.12.2004, pp. C 310/458-C 310/459: "Paragraph 5 clarifies the distinction between 'rights' and 'principles' set out in the Charter. According to that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers, and by the Member States only when they implement Union law); accordingly, they become significant for the Courts only when such acts are interpreted or reviewed. They do not however give rise to direct claims for positive action by the Union's institutions or Member States authorities. This is consistent both with case-law of the Court of Justice ... and with the approach of the Member States' constitutional systems to 'principles' particularly in the field of social law."

⁸⁰ See for cases in which that substantive obligation had not been complied with, for instance, *Mehmet Şentürk and Bekir Şentürk v. Turkey*, no. 13423/09, ECHR 2013; *Asiye Genç v. Turkey*, no. 24109/07, 27 January 2015; and *Aydoğdu v. Turkey*, no. 40448/06, 30 August 2016.

independent judicial system apt to determine the cause of the death of patients and to make those responsible accountable.⁸¹

Comment [GC81]: P. MARECAS (PORTUGAL)
I agree with § 73. However, in this case, Portugal has only been condemned for the violation of the procedural dimension of article 2. and not for its substantive dimension. May be this should be reflected in the footnote n. 68, pp. 20

⁸¹ *Lopes de Sousa Fernandes v. Portugal* [GC], no. 56080/13, ECHR 2017, in particular §§ 166 and 214.

OTHER COMMENTS / AUTRES COMMENTAIRES

Professor Giuseppe PALMISANO, President of the European Committee of Social Rights / Président du Comité européen des droits sociaux

TABLE OF CONTENTS

COMMENT:

I cannot agree with the structure and organization of this draft document. Since the topic of the analysis is the protection of social rights, it should clearly emerge from the table of contents and the introduction that, within the Council of Europe, the ESC is the major legal instrument – l'instrument juridique par excellence - for the protection of such rights. The Charter system has been specifically created to codify and protect social/economic rights, which as such are not covered by the ECHR, because in 1950 they were deliberately excluded from the material scope of the Convention. With respect to the protection of social rights, the ECHR and the Court do therefore play a minor and indirect role; and it could and should not be otherwise. For these reasons, a clear and correct presentation of the topic should start by recognizing the primary role of the Charter system and should organize the table of contents accordingly. For the same reasons, less insights and pages should be devoted to the jurisprudence of the ECtHR: it is not so important from the perspective of the protection of social rights. All those insights and pages relating to the ECtHR's jurisprudence concerning certain provisions of the ECHR (much more than the insights and pages actually dedicated to the specific substantial provisions of the ESC, as applied by the ECSR) do not give a true, thorough and balanced picture of the protection of social rights within the framework of the Council of Europe. In the same vein, at the end of the document, there should be not only an appendix specifically devoted to the ECtHR's case-law on social rights, but also an appendix devoted to the case-law of the ECSR, indicating all the complaints that have been decided up to now, to be ordered under the different relevant rights of the Charter.

[...]

Introduction

Page 4

3. The Analysis recalls the terms of reference received by the CDDH from the Committee of Ministers and the methodology followed. It then presents a short review of the background to the protection of social rights within the Council of Europe. It recalls the indivisibility of all human rights, be they civil, political, economic or social, and the interdependence of these rights. It further refers to the context in which it was drawn up, in which the economic crisis was found by a number of Council of Europe organs and institutions to have had an impact on the protection particularly of social rights and social cohesion in its Member States. Furthermore, the social rights protection within the Council has to take into account the international context in which it operates and notably has to ensure coherence and create synergies with the standards of European Union law in this field.

Comment [b82]: It would be more correct to say: "the economic crisis and austerity measures were found...", as it is explained in paras. 34-38.

[...]

Page 5

8. Unlike the Convention itself, the (revised) Charter is based on an "à la carte" system of acceptance of its provisions, which allows States to choose to a certain extent the provisions they are willing to accept as obligations under international law. Compliance with the provisions of the (revised)

Charter is monitored by the European Committee of Social Rights (ECSR) in the State reporting procedure and the collective complaints procedure. The justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR's finding of non-conformity of a situation with the (revised) Charter remain rare. Nevertheless, a number of national courts have applied provisions of the (revised) Charter in their decisions in recent years and some States have undertaken significant reforms further to ECSR decisions or conclusions. Moreover, both EU legislation and the case-law of the Court of Justice of the EU made some references to the (revised) European Social Charter, while the ECSR equally takes account of EU law and practice when interpreting the (revised) Charter.

Comment [b83]: The issue here is not one of justiciability of social rights, but of effective protection.

Comment [b84]: It is more appropriate to say "decisions assessing the violation of the Charter, under the collective complaints procedure"

Comment [b85]: Why "Nevertheless"?! The two issues (CM's role – and its lack of commitment - in follow-up to Committee's decisions, on the one hand; use of the Charter (and ECSR's jurisprudence) by national judges, on the other) are not linked together. They are completely separate and autonomous.

II. Council of Europe further action for social rights

9. The Secretary General of the Council of Europe launched the "Turin Process" in 2014, which is aimed at strengthening the treaty system of the European Social Charter within the Council of Europe and in its relationship with the law of the European Union and has been pursued, *inter alia*, by a number of high-level conferences since then. As to the follow-up given to date to the process by the Council of Europe Member States, it was noted that only Greece ratified the Revised Charter since then; no further State ratified the 1995 Additional Protocol Providing for a System of Collective Complaints. As for the compliance of Member States with the requirements under the (revised) Charter, while there were conclusions of non-conformity with the (revised) Charter in roughly one third of the situations examined in 2016, some positive developments, for instance, in the protection against discrimination in the field of employment could equally be noted.

Comment [b86]: But it should be add – in positive terms - that some States, like Belgium and Ukraine, accepted new Charter provisions after the launch of the Turin process...

[...]

Page 7 (Conclusive remarks)

20. Certain limitations of the framework of protection of social rights within the Council of Europe equally became apparent. These include the fact that the Convention only covers some aspects of the different social rights while the impact of the (revised) Charter which contains a comprehensive social rights catalogue is restricted by the "à la carte" system of acceptance of its provisions and the fact that only 43 of the 47 Council of Europe Member States are bound by the (revised) Charter and only 15 States by the 1995 Additional Protocol Providing for a System of Collective Complaints.

Comment [b87]: It would be better to repeat and stress here that 9 (out of the 43) States have not ratified yet the revised Charter.

[...]

Page 13 (I. THE LEGAL FRAMEWORK OF THE COUNCIL OF EUROPE FOR THE PROTECTION OF SOCIAL RIGHTS)

41. The Council of Europe has adopted two major treaties in the area of fundamental rights.⁸²

- The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as "the Convention"). The Convention was opened for signature in Rome on 4 November 1950; it entered into force on 3 September 1953. It was since then supplemented by Protocols Nos. 4, 6, 7, 12 and 13 guaranteeing additional rights. It mainly enshrines "civil and political" rights, that is, rights primarily aimed at protecting individuals against restrictions of their personal freedoms or at facilitating their participation in the political process.⁸³

Comment [b88]: It would also be important to point out here, as a limitation of protection of social rights within the CoE, the limited personal scope of application of the ESC, as established in its Appendix.

⁸² See the website of the European Social Charter for a table on the [Evolution-Convention-and-Charter](#) providing a comparative overview of both instruments and their operation.

⁸³ See for the definition, for instance, O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.01.

- The European Social Charter (hereafter referred to as “the 1961 Charter” or “the Charter”). Opened for signature in Turin on 18 October 1961, it entered into force on 26 February 1965. A new Charter text, the European Social Charter (revised), which embodies in one instrument all rights guaranteed by the 1961 Charter, its Additional Protocol of 1988 and some new rights, was opened for signature on 3 May 1996 and entered into force on 1 July 1999 (hereafter referred to as “the Revised Charter”). The (revised) Charter (that is, the 1961 Charter and/or the Revised Charter) enshrines “economic and social” rights, that is to say, rights to certain economic benefits or a minimum standard of social well-being.⁸⁴

[...]

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49. It should also be noted that the Convention protects everyone within the jurisdiction of a State Party (Article 1 of the Convention), while foreigners who are not lawfully residing on the territory of a State Party or who are not nationals of another State Party are excluded from the scope of application of the Charter (see paragraph 1 of the Appendix to the Charter).⁸⁵

[...]

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117. Concerning the other provisions of the Charter, those that are most accepted by States are the following:

- Article 18 §§ 1 to 3 (right to engage in a gainful occupation in the territory of other Parties),
- Article 23 (right of elderly persons to social protection),
- Article 30 (right to protection against poverty and social exclusion) and
- Article 31 (right to housing).

[...]

Pages 31-32 (Conclusions and decisions)

124. It must be noted that the justiciability of the undertakings accepted by the Contracting Parties to the (revised) Charter appears to be limited by the fact that recommendations addressed to individual States by the Committee of Ministers following the ECSR’s finding of non-conformity of a situation with the Charter remain rare.⁸⁶ Moreover, it may be noted in this context that in accordance with Part III of the Appendix to the Charter, the legal obligations of an international character contained in it are submitted only to the supervision provided for by the Charter’s supervisory mechanism, which indicates that the provisions of the Charter shall not have direct effect at the domestic level.⁸⁷

125. The decisions and conclusions of the ECSR are only declaratory: they set out the law and should serve as a basis for positive developments with respect to social rights through the passing of new laws, case-law or practices at national level. The Charter’s supervisory mechanism differs from that under the Convention which provides in Article 46 § 1 that the High Contracting Parties undertake to abide by the

⁸⁴ See for the definition, for instance, O. Dörr, *The European Social Charter*, ibid.

⁸⁵ See also O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.05.

⁸⁶ See on this issue, for instance, Olivier de Schutter and Matthias Sant’Ana, *The European Committee of Social Rights (the ECSR)*, in: Gauthier de Beco (ed.), *Human Rights Monitoring Mechanisms of the Council of Europe*, 2012, pp. 81–82.

⁸⁷ See, *inter alia*, O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraphs 23.23 and 23.75.

Comment [b89]: This is indeed a very poor and inadequate definition and concept! I am sure that you can do much better, mostly if you make use of more authoritative and competent academic studies on social rights and the ESC...

Comment [b90]: or working regularly

Comment [b91]: It would be important and useful to add a paragraph pointing out that only two States (France and Portugal) have accepted all the Charter provisions, and also a table indicating for each State Party what are the accepted and non-accepted provisions.

Comment [b92]: See supra comment on para.8 (Executive summary).

Comment [b93]: This is not legally correct. It is a false implication stemmed from the Appendix, which has no legal or logic ground!! The direct or indirect effect of the Charter’s provisions at the domestic level depends on a variety of completely different factors, which may change from provision to provision, and from national legal order to national legal order...

Comment [b94]: It would be better being more precise and less vague: they indicate what (positive or negative) measures and actions should be taken by States in order to properly respect social rights and bring their national situation into conformity with the obligations set out by the ESC.

final judgment of the Court in any case to which they are parties. Despite this and despite the absence of direct effect of the Charter provisions, these are nevertheless quite regularly referred to by national courts for the purpose of interpreting national law and these courts, at times, declare invalid or set aside domestic legislation if the ECSR has ruled that it is not in compliance with the Charter.⁸⁸

[...]

Pages 33-34

135. Lastly, in the State reporting procedure, the ECSR may – like the various UN committees – also adopt statements of interpretation by which it sets out in general terms the requirements of the (revised) Charter in respect of certain of its provisions. Furthermore, the ECSR has adopted general statements of interpretation, to date on the following issues:⁸⁹

- 2002: Statement on the application of the Revised Charter.
- 2004: Statement on the personal scope of the Charter;
- 2006: Statement on the nature and scope of the Charter;
- 2008: Statement on the burden of proof in discrimination cases;
- 2013: Statement on the rights of stateless persons under the Charter;
- 2015: Statement on the rights of refugees under the Charter, published on an urgent basis in October – in advance of the publication of the annual ECSR report.

[...]

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173. In these decisions, the ECSR referred to instruments including the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the UN Convention on the Rights of the Child, none of which, just as the Convention, provides for any restriction similar to the one in the above-mentioned Appendix. In its *FEANTSA v. the Netherlands* decision of 2014, the ECSR highlighted the principles of its interpretation of the rights which must be guaranteed:

“the restriction of the personal scope of the Charter included in its Appendix should not be read in such a way as to deprive migrants in an irregular situation of the protection of the most basic rights enshrined in the Charter, or to impair their fundamental rights, such as the right to life or to physical integrity or to human dignity. On the other hand, its application to migrants in an irregular situation is justified solely where excluding them from the protection afforded by the Charter would have seriously detrimental consequences for their fundamental rights, and would consequently place the foreigners in question in an unacceptable situation regarding the enjoyment of these rights, as compared with the situation of nationals or foreigners in a regular situation.”⁹⁰

[...]

Pages 46-47

188. The Labour Division of the French Court of Cassation has also accepted the direct applicability of certain (revised) Charter articles such as Article 5 (right to organise) and Article 6 (right to bargain collectively).⁹¹ It has further accepted the applicability of some of the Revised Charter’s general provisions

Comment [b95]: ?!! see supra comment in para. 124.

Comment [b96]: Please add the important document and letter to States on the need to enlarge the personal scope of the Charter.

Comment [b97]: In order to present the ECSR’s interpretative approach regarding this aspect, it is better to refer to collective complaint n. 69 (DCI v. Belgium), where the Committee’s position is better explained. Furthermore, in that case neither the State (Belgium) nor the Committee of Ministers reacted with criticism to the kind of application of the Charter and its Appendix made by the ECSR.

⁸⁸ See, *inter alia*, O. Dörr, *ibid.*, paragraph 23.77 with further references; and I.2.(d) below.

⁸⁹ See <http://hudoc.esc.coe.int/eng#> (search by year of Conclusions and tick the “Statements of interpretation” box).

⁹⁰ See Complaint No. 86/2012 (*FEANTSA v. the Netherlands*), § 58.

⁹¹ French Court of Cassation, Lab. Div., 14 April 2010, Nos. 09-60426 and 09-60429; 10 November 2010, No. 09-72856; 1 December 2010, No. 10-60117; 16 February 2011, Nos. 10-60189 and 10-60191; 23 March 2011, No. 10-60185; and 28 September 2011, No. 10-19113. See also Carole Nivard, “L’effet direct de la Charte sociale

in conjunction with Article 5: Article A specifying the extent of States' commitments, Article E enshrining the general principle of non-discrimination and Article G laying down the restrictions permitted by the Revised Charter.⁹² France's Conseil d'Etat, for its part, recognised the direct applicability of a Revised Charter article (Article 24 on protection in cases of termination of employment) for the first time in its *Fischer* judgment of 10 February 2014.⁹³

[...]

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275. The impact of the treaty system of the European Social Charter, which is complementary to the Convention and contains a comprehensive catalogue of social rights, is limited by the "à la carte" system of acceptance of its provisions, which allows States to choose to a certain extent the provisions they are willing to accept as obligations under international law. Moreover, the (revised) Charter is not in force in all of the 47 Member States of the Council of Europe: four Member States have neither ratified the Charter nor the Revised Charter, nine Member States are bound only by the original 1961 Charter and 34 Member States are bound by the 1996 revised Charter. As regards the supervisory procedures under the (revised) Charter, only 15 States are currently bound by the 1995 Additional Protocol Providing for a System of Collective Complaints.

Comment [b98]: It could be useful to add a reference to two recent Italian cases where the Constitutional Court has been asked by national judges to use the ESC as a parameter to assess the constitutionality of Italian laws.

Comment [b99]: At least two other critical issues, limiting the impact and potentialities of the Charter system for the protection of social rights, should be pointed out here: 1) the limited scope of application of the Charter in terms of persons protected (which is deeply different from the wide scope of application of the ECHR); 2) the extremely rare commitment on the part of the Committee of Ministers in ensuring an appropriate follow up to the conclusions and decisions of the ECSR (as it would be required according to the Charter)

 **EUROPEAN TRADE UNION CONFEDERATION (ETUC) /
CONFEDERATION EUROPEENNE DES SYNDICATS (CES)**

Preliminary remarks

From the outset, the ETUC would very much like to thank the Rapporteur but in particular the CDDH-SOC secretariat for the excellent and comprehensive work on this (revised) draft analysis following the debates at the first meeting of the drafting group on 19-21 April.

Following earlier observations of 15/04/2017 and 28/04/2017, the ETUC provides below its further proposal and suggestions for amendments on this revised draft analysis. It follows thereby again the structure and content of the (revised) document CDDH-SOC(2018)04. All proposals and changes are duly marked with "track changes/blue marking and/or comment boxes".

Most of these changes/amendments are based on text parts as they appeared in the previous (revised) draft report CDDH-SOC (2017)001 (version of 17 May 2017) and which the ETUC considers worthwhile to reconsider and integrate again in this draft analysis. In that case, reference will be made to "CDDH-SOC(2017)001 + concerned paragraph(s)".⁹⁴

As before, these proposals and changes should not be considered as to define the ETUC's final stance on the document and the further work of the Drafting Group. Indeed, and depending on in particular the

européenne devant les juridictions suprêmes françaises", Revue des droits et libertés fondamentaux (RDLF), 2012, Chron. 28.

⁹² French Court of Cassation, Lab. Div., 29 February 2012, No. 11-60203; and 10 May 2012, No. 11-60235. See also Nivard, *ibid.*

⁹³ Conseil d'Etat, judgment of 10 February 2014. See also Carole Nivard, "L'effet direct de la Charte sociale européenne devant le juge administratif – Retour sur la question évolutive de l'effet direct des sources internationales", RDLF 2016, Chron. 22.

⁹⁴ It is also available at: <https://rm.coe.int/draft-report-of-the-steering-committee-for-human-rights-cddh-168073450c>

discussions and interventions of other Drafting Group members during the 2nd meeting of the Group on 2-4 May, ETUC might/will submit other oral/written during and after that meeting.

This will in particular be the case also in view of the “further report” which needs to be developed on the basis of this analysis and which “shall identify good practices and make, as appropriate, proposals with a view to improving the implementation of social rights and to facilitate in particular the relationship between the Council of Europe and other instruments for the protection of social rights” (see §§ 22 and 279 of the this draft analysis). This “further report” shall thereby thus mainly have to build on the text parts called “Findings” and “Possible action” as they occurred in the (revised) draft report CDDH-SOC(2017)001.

[...]

Page 4

Introduction

3. The Analysis recalls the terms of reference received by the CDDH from the Committee of Ministers and the methodology followed. It then presents a short review of the background to the protection of social rights within the Council of Europe. It recalls the indivisibility of all human rights, be they civil, political, economic or social, and the interdependence of these rights. It further refers to the context in which it was drawn up, in which the economic crisis was found by a number of Council of Europe organs and institutions to have had an impact on the protection particularly of social rights and social cohesion in its Member States. Furthermore, the social rights protection within the Council has to take into account the international context in which it operates and notably has to ensure coherence and create synergies with the standards of European Union law in this field.

[...]

Page 5

II. Council of Europe further action for social rights

9. The Secretary General of the Council of Europe launched the “Turin Process” in 2014, which is aimed at strengthening the treaty system of the European Social Charter within the Council of Europe and in its relationship with the law of the European Union and has been pursued, *inter alia*, by a number of high-level conferences since then. As to the follow-up given to date to the process by the Council of Europe Member States, it was noted that only Greece ratified the Revised Charter since then; no further State ratified the 1995 Additional Protocol Providing for a System of Collective Complaints. As for the compliance of Member States with the requirements under the (revised) Charter, while there were conclusions of non-conformity with the (revised) Charter in roughly one third of the situations examined in 2016, some positive developments, for instance, in the protection against discrimination in the field of employment could equally be noted.

[...]

Page 10

b) Social rights and socio-economic changes

34. The recent years were marked by the impact of the economic crisis and the corresponding austerity measures on the enjoyment of a wide range of economic, social and cultural rights. The impact of the economic crisis and austerity measures was felt differently in Europe from one country to another. The problems linked to the crisis and austerity measures, while not having been created by the crisis, seem to have been exacerbated rather than caused thereby.

Comment [CS100]: Although “politically” correct, this part of the sentence might need to be reformulated as it gives too much the impression that it is the CoE that needs to adapt to the EU rather than vice-versa. Indeed in many areas, the standard-setting and case law of the CoE (ECtHR and ECSR) regarding social rights goes far beyond those of the EU (and CJEU).

Comment [CS101]: This paragraph might be updated/complemented with the results of the Conclusions 2017 adopted in January 2018.

Comment [CS102]: The following paragraphs are the few remaining dealing with the crisis and the impact of austerity measures whereas in the previous draft report CDDH-SOC(2017)001 (version 17 May 2017) several interesting paragraphs on this occurred in particular how the ECtHR, ECSR and other CoE bodies dealt with it. Suggestion is to group these paragraphs here in a summarized way. All relevant paragraphs are group in a new annex at the end of this draft analysis.

[...]

Page 13

41. The Council of Europe has adopted two major treaties in the area of fundamental rights.⁹⁵

- The Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter referred to as “the Convention”). The Convention was opened for signature in Rome on 4 November 1950; it entered into force on 3 September 1953. It was since then supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13 guaranteeing additional rights. It mainly enshrines “civil and political” rights, that is, rights primarily aimed at protecting individuals against restrictions of their personal freedoms or at facilitating their participation in the political process.⁹⁶

[...]

Page 28

109. Finally, 15 States are currently bound by the 1995 Additional Protocol ~~facultative~~, providing for a system of collective complaints.

[...]

Page 30

117. Concerning the other provisions of the Charter, those that ~~are most accepted- the least accepted~~ by States are the following .

[...]

118. Pursuant to the Charter and its Rules, the ECSR comprises ~~for the moment~~ fifteen independent and impartial members who are elected by the Committee of Ministers from a list of experts of the highest integrity and of recognised competence in international social questions, proposed by the States Parties. Accordingly, the ECSR does not comprise one member per Council of Europe Member State (47), or per State Party to the Charter (43). The ECSR is currently composed of 14 nationals of States of the European Union (EU) and one Norwegian national.⁹⁷

[...]

Page 31

~~Conclusions, and~~ Decisions, Findings and Statement of interpretation

122. Conclusions on State compliance with the Charter are adopted by the ECSR in the State reporting procedure on the basis of national reports (see Articles 21–29 of the Charter). While Article 21 of the Charter provides for biennial reports on all accepted provisions, since 2007, following a decision of the Committee of Ministers, States are required to submit annual reports, but only on one out of the four thematic groups of substantive rights created.⁹⁸ In addition, under Article 22 of the Charter, following a

⁹⁵ See the website of the European Social Charter for a table on the [Evolution-Convention-and-Charter](#) providing a comparative overview of both instruments and their operation.

⁹⁶ See for the definition, for instance, O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.01.

⁹⁷ For more information on the ECSR, including its current composition see <https://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights> . It is recognised that the composition but in total numbers as well the countries represented entail a problem of legitimacy for the States parties to the Charter which are not from the EU.

⁹⁸ See also O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.61.

Comment [CS103]: Suggestion to add Protocol n°1 as it is often referred to also further in the text.

Comment [CS104]: Suggestion to add in footnote 138 a reference to the website section on the ECSR as well as the last sentence of § 237 of CDDH-SOC (2017) 001 on the legitimacy of the ECSR composition.

Comment [CS105]: Suggestion to add in this section which focusses on Conclusions and Decisions also to add a paragraph on the “Findings on the follow-up of the decisions on merits in the collective complaints procedure” and “Statements of Interpretation” as the latter two together with the Conclusions and Decisions form basically the whole of the ECSR case law. For instance § 135 below could be moved to this section

Comment [CS106]: Rather than referring in footnote to academic literature, reference could be made in footnote to the ESC website section nl. <https://www.coe.int/en/web/turin-european-social-charter/reporting-system>

decision of the Committee of Ministers in 2002, States are required to submit reports relating to the provisions of the (revised) Charter which they did not accept every five years.⁹⁹

[...]

Pages 31/32

125. However, ~~The Decisions and eConclusions of the ECSR are only declaratory: they~~ set out the law and should serve as a basis for positive developments with respect to social rights through the passing of new laws, case-law or practices at national level. The Charter's supervisory mechanism differs from that under the Convention which provides in Article 46 § 1 that the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties. Despite this and despite the absence of direct effect of the Charter provisions, these are nevertheless quite regularly referred to by national courts for the purpose of interpreting national law and these courts, at times, declare invalid or set aside domestic legislation if the ECSR has ruled that it is not in compliance with the Charter.¹⁰⁰

125bis Lastly, as with the judgments of the Court, it is possible for ECSR members to append their dissenting opinions to Conclusions and Decisions adopted by the ECSR.

[...]

Page 32

131. Also in 2014, it was also decided that all States must submit additional reports on Conclusions of non-conformity for repeated lack of information one year after adoption of such Conclusions by the ECSR.¹⁰¹ Thereby, the Committee of Ministers intended to encourage States to seriously and swiftly consider the ECSR's findings.

[...]

Page 33

133.

133bis. It should be noted the fact that the Governmental Committee is now also dealing with the European Code of Social Security has undermined the effectiveness of the Charter system, since it is devoted now only eight meetings days (on ten) of the Governmental Committee. Thus, according to an informal working method, decided in 2015, between the Governmental Committee and the ECSR, the latter selects henceforth a maximum of situations for discussion by the Governmental Committee from among its negative conclusions (currently 80 per cycle). Many negative conclusions are therefore no longer discussed and "handed over" to the ECSR's assessment four years later (in the next cycle on the articles concerned). According to the ETUC, practice demonstrates that this new working method should be improved - in particular by allowing the ECSR to select more cases and by better arguing the reasons for non-selection of cases of non-conformity with the Charter.

[...]

Comment [CS107]: Idem as in previous comment but now a link to <https://www.coe.int/en/web/turin-european-social-charter/provisions-of-the-charter>

Comment [CS108]: Suggestion to add this last sentence of §210 of the CDDH-SOC (2017) 001 report

Comment [CS109]: This comes from §2018 of the CDDH-SOC (2017) 001 and suggestion to put it in again (partially). If not accepted, it should at least be taken into consideration in the context of the "further report" based on this analysis.

⁹⁹ See Decision of the Committee of Ministers of 11 December 2002 adopted at the 821st meeting of the Ministers' Deputies; see also O. Dörr, *The European Social Charter*, in: S. Schmahl/M. Breuer, *The Council of Europe – Its Laws and Policies*, paragraph 23.65.

¹⁰⁰ See, *inter alia*, O. Dörr, *ibid.*, paragraph 23.77 with further references; and I.2.(d) below.

¹⁰¹ For example, when the ECSR finds that a situation is not in conformity owing to a lack of information after examination by Thematic Group 1, the State concerned must submit the information required when it comes to its report on Thematic Group 3.

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138. Pursuant to Rule 25 of the Rules of the ECSR, States shall be represented before the ECSR by the agents they appoint in the collective complaints procedure. It may be noted in this context that since 2014, several meetings have been held between the ECSR bureau and the Government agents during which various procedural and technical issues relating to the system of collective complaints were discussed. In 2016, the idea was discussed and, in principle, accepted by the Charter Department also to have such meetings with representatives of INGOs - at least with those submitting regularly complaints and/or observations.

Comment [CS110]: Suggestion to reintegrate (at least in footnote) this last sentence of §241 CDDH-SOC(2017)001.

138bis There are also working meetings held between the ECSR and the Governmental Committee, generally focusing on a specific issue (for example, the interpretation of specific articles of the Charter and the simplification of the reporting system.

138ter Lastly, in order to promote a better understanding of the Charter, several ECSR delegations take part each year in bilateral meetings with states to discuss the following points: the conclusions adopted during the preceding supervision cycles and examination, in the current cycle, of these countries' policies with regard to their commitments under the Charter; the non-accepted articles (see above); and ratification of the revised Charter and the Protocol providing for the system of collective complaints for states not yet Parties to these two instruments.

Comment [CS111]: Suggestion to reintegrate these paragraphs which stem from §§242 and 243 of CDDH-SOC(2017)001

[...]

Page 35

142. It should be noted that, in practice, interventions by other States that have accepted the collective complaints procedure are rare. In one such example, Finland submitted observations with a view to refuting Complaint No. 39/2006 (*FEANTSA v. France*) concerning the right to housing. In contrast, interventions by the aforementioned international social partners (ETUC, Business Europe and IOE) are more common, especially by the ETUC¹⁰² which, for example, submitted observations on Complaint No. 27/2004 (*ERRC v. Italy*) concerning the right to housing of persons of Roma origin.

Comment [CS112]: The footnote is updated reflecting developments since May 2017.

:

[...]

Page 37

152. In the decisions and conclusions, the ECSR has developed a number of general principles of interpretation of the (revised) Charter:¹⁰³ (footnote 172)

[...]

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iii) Examples of ECSR Decisions and Conclusions

[...]

¹⁰² To date, the ETUC has sent 2937 observations regarding 2744 collective complaints, while the IOE submitted comments only once and Business Europe has not yet submitted any.

¹⁰³ See for instance Lörcher, K. (2017), "Interpretation", in Bruun, N., Lörcher, K., Schömann, I. and Clauwaert, S., *The European Social Charter and the Employment Relation*, Hart Publishing, Oxford, (2017), pp. 52-62..

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163. Until 21 February 2018, the ECSR has delivered more than 100 decisions on the merits¹⁰⁴ of complaints relating to a wide range of issues – including the rights of Roma, the assistance to and the right to shelter for irregular migrants, the rights of persons with disabilities, the right to organise and the right to strike. In the vast majority of cases the ECSR has found one or more violation(s) of the Charter (in about 96% of the cases).

[...]

Page 44

175. With regard to the rights of persons with disabilities under Article 15 of the (revised) Charter the ECSR delivered two decisions against France finding a violation of Article 15 § 1 on the ground that mainstream education in ordinary schools was not a priority for children and adolescents suffering from autism (*Autism-Europe v. France* and *AEH v. France*).

178. In the State reporting procedure, in 2013 the ECSR completed its examination of rights relating to health, social security and social protection (Thematic Group 2). It is to be noted that the proportion of violations found was higher than in 2009 (when this thematic group was last examined), particularly in the following States: Albania, Georgia, Greece, Poland, Republic of Moldova, Romania and Ukraine, which could be interpreted as an effect of the recent economic crisis and austerity policies.¹⁰⁵ This rise was found to be increasingly linked to inadequate levels of social security benefits, disproportionately affecting the poor, the unemployed, the elderly and the sick, and to unequal treatment of migrants under the guise of combating “benefit tourism”.¹⁰⁶ At the same time, according to the ECSR, austerity measures put health care systems under growing pressure.¹⁰⁷

[...]

Page 45

182. Finally, it should be noted in the context of the interpretation and implementation of the Charter by the ECSR that, in order to promote a better understanding of the Charter, several ECSR delegations take part each year in bilateral meetings with States to discuss the following points: the conclusions adopted during the preceding supervision cycles and the examination, in the current cycle, of these countries' policies with regard to their commitments under the Charter; the non-accepted articles; and ratification of

Comment [CS113]: Suggestion to delete this paragraph and to replace it by a new paragraph summarizing the results of the examination of the conclusions 2017 presented in January 2018. This new paragraph could then be placed after § 181

¹⁰⁴ So far there have been only 6 inadmissibility decisions: Decision of 5 December 2006, Complaint No. 36/2006 (*Frente Comum de Sindicatos da Administração Pública v. Portugal*) – insufficient evidence that the representative of the complainant organisation had the authority to act; Decision of 14 June 2005, Complaint No. 29/2005 (*SA/IGI-Syndicat des Hauts Fonctionnaires v. France*) – the complaint did not pertain to the applicable rules but rather to the manner in which they were being applied in a particular case in a set of proceedings over a period of eight years before administrative and criminal courts and disciplinary bodies; Decision of 13 June 2005, Complaint No. 28/2004 (*Syndicat national des Dermato-Vénérologues v France* – the facts adduced were not of a nature to enable the ECSR to conclude that there had been a violation of the right guaranteed by the combination of Article E with Articles 1 § 2 and 4 § 1; Decision of 13 October 1999, Complaint No. 3/1999 (*European Federation of Employees in Public Services v. Greece*) – Greece had not accepted the provisions relied upon; decision of 18 October 2016, Complaint 120/2016 (*FFFS v. Norway*) – due to the validity of the reservation to Article 12 § 4 of the 1961 Charter to which Norway was bound before 1994, it was not obliged to grant before this date social security rights to foreign seamen not domiciled in Norway; and Decision of 24 March 2017, Complaint No. 122/2016 (*Movimento per la libertà della psicanalisi-associazione culturale italiana v. Italy*) – the activities carried out by the complainant organisation were not within the essential prerogatives of a trade union and the movement could not be considered as a trade union organisation. In general, it should be emphasised that the fact that the vast majority of complaints have been declared admissible by the ECSR – in contrast to the situation with regard to the applications lodged with the Court – can largely be explained by the fact that there is no requirement to exhaust domestic remedies in the collective complaints procedure.

¹⁰⁵ See the [ECSR's Activity Report 2013](#), p. 18.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

the Revised Charter and of the Protocol Providing for a System of Collective Complaints for States not yet Parties to these two instruments.¹⁰⁸

[...]

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216. As for further EU activities relating to the Charter it shall be recalled that the EU can make observations and/or attend hearings as a third party in the collective complaints procedure, on a proposal from the Rapporteur or the President of the ECSR in order to support a complaint or have it dismissed. The European Commission submitted observations for the first time in order to support Greece in collective complaint No. 111/2014 relating to the impact of austerity measures on numerous workers' rights.¹⁰⁹ The EU may also, if it so wishes, submit observations under the State reporting procedure, although it has not yet availed itself of this option.

[...]

Page 60

244. ~~During his mandated from April 2012 to March 2018, former~~ ~~Since taking up his duties in 2012,~~ Commissioner Mr Nils MUIŽNIEKS, in particular, has constantly promoted the indivisibility and interdependence of human rights and has regularly called upon States to honour their international commitments in this sphere.¹¹⁰ His approach has generally been to cover access to social rights of specific groups, among others children, women, elderly people, LGBTI persons, persons with disabilities, migrants, asylum seekers and refugees, Roma and other ethnic or religious minority groups, stateless persons, victims of trafficking in human beings and Internally Displaced Persons (IDPs).

[...]

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248. As regards the right to education, the Commissioner constantly stressed that there is a universal right to education for all children irrespective of their legal status. In that sense, he has frequently addressed the problem of Roma segregation in school in all its forms. Children with disabilities are also segregated in many countries, either because they attend special schools or classes or no school at all. The Commissioner regularly recalls in this respect the need to go beyond desegregation and promote inclusive education. He issued a Comment entitled "Inclusive education vital for social cohesion in diverse societies" in May 2015 on the need to promote inclusive education as a means of strengthening social cohesion.¹¹¹

248bis Suggestion to insert here a paragraph that summarises the paragraphs 386 and 387 of CDDH-SOC (2017)001 dealing with the Commissioner and social protection and conditions of migrants and refugees.

[...]

¹⁰⁸ It should be emphasised that at these meetings, the ECSR may meet with numerous stakeholders, in particular the NHRIs. For example, during its visit to Denmark in September 2014, the ECSR discussed with the Danish NHRI the possibilities of increasing NHRI involvement in monitoring the implementation of the Charter – which resulted in the submission in 2015 by that institution of a "parallel report".

¹⁰⁹ See the observations submitted by the European Commission on 26 January 2016 on Complaint No. 111/2014, *Greek General Confederation of Labour (GSEE) v. Greece*, available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805a25cb>; and the Decision adopted by the ECSR on 23 March 2017, available at: <http://hudoc.esc.coe.int/eng/?=cc-111-2014-dmerits-en>.

¹¹⁰ See, *inter alia*, the [Commissioner's Comment on "Preserving Europe's social model"](#).

¹¹¹ See the following link to the [Commissioner's Comment entitled "Inclusive education vital for social cohesion in diverse societies"](#) of 5 May 2015.

Comment [CS114]: This paragraph could be deleted if our suggestion in relation to paragraph 138ter (see above) is accepted.

Comment [CS115]: Suggestion to make here a cross reference to section III. 1 European Union (see below §§ 256-260)

Comment [CS116]: Stems from introductory sentence of §383 of CDDH-SOC(2017)001

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255. A number of non-Council of Europe actors can equally adopt measures which concern or have an impact on the protection of social rights within the Council of Europe, particularly by the European Social Charter. Therefore, a few examples of European Union actions in the field of social rights, of the impact of instruments elaborated in different international fora (in particular, instruments of the International Labour Organisation) and of civil society activities (in particular those of international organisations of employers and workers) shall be given below.

257. In September 2015 the President of the European Commission, Jean-Claude Juncker, announced the creation of a "European Pillar of Social Rights".¹¹² This Pillar is to underline the relevance of social rights in the EU institutions and policies. During the consultation process, the Secretary General of the Council of Europe, in particular, published his Opinion on the European Union initiative to establish a European Pillar of Social Rights. Welcoming this initiative, the Secretary General stressed the importance of legal certainty and coherence between European standard-setting systems protecting fundamental social rights. He further stated that ensuring that the European Social Charter was central to the Pillar would contribute to this objective and make Europe not only more prosperous, but also more equitable and united.¹¹³

257 bis. Moreover, on 19 January 2017, the European Parliament has adopted a Resolution on "The European Pillar of Social Rights". It makes explicit reference to "the European Social Charter, its Additional Protocol and its revised version, which entered into force on 1 July 1999, in particular its Part I, its Part II and Articles 2, 4, 16 and 27 of the latter, on the right of workers with family responsibilities to equal opportunities and equal treatment" and it "calls on the Member States to sign and ratify the revised European Social Charter and the European Convention on Social Security (ETS No 078); encourages the Commission to examine the steps required for accession of the European Union to the revised Charter and to propose a time-line for this objective". More generally, the Resolution calls on the Commission, the European External Action Service and the Member States to pursue external action coherent with the "European Pillar of Social Rights", by promoting, inter alia, the implementation of the relevant Council of Europe conventions.

258. The European Pillar of Social Rights was proclaimed and signed by the Council of the EU, the European Parliament and the Commission on 17 November 2017. Referring, *inter alia*, to the European Social Charter¹¹⁴ (footnote 334) its objective is to contribute to social progress by supporting fair and well-functioning labour markets and welfare systems. It sets out 20 key principles in the following three categories: 1) equal opportunities and access to the labour market; 2) fair working conditions; and 3) social protection and inclusion.¹¹⁵

[...]

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262. Regarding, in particular, the relationship between the ILO and the Charter Council of Europe, it is to be noted that the ILO has the right to participate in a consultative capacity in the deliberations of the ECSR (Article 26 of the Charter) as well as the right to submit observations on complaints submitted through the collective complaints procedure.

¹¹² President of the European Commission, Jean-Claude Juncker, State of the Union address, 9 September 2015.

¹¹³ See the following link to the [Secretary General's Opinion on the EU initiative to establish a European Pillar of Social Rights](#) of 2 December 2016.

¹¹⁴ E.g. paragraph 16 of the Pillars' Preamble states "16. The European Pillar of Social Rights shall not prevent Member States or their social partners from establishing more ambitious social standards. In particular, nothing in the European Pillar of Social Rights shall be interpreted as restricting or adversely affecting rights and principles as recognised, in their respective fields of application, by Union law or international law and by international agreements to which the Union or all the Member States are party, 8 9 including the European Social Charter signed at Turin on 18 October 1961 and the relevant Conventions and Recommendations of the International Labour Organisation."

¹¹⁵ See the following link to the text of the ["European Pillar of Social Rights"](#), in particular §§ 3 and 16 of the Preamble.

Comment [CS117]: Suggestion to integrate either a new paragraph or at least in footnote 333 what is mentioned in § 474 CDDH-SOC(2017) 001 on the Secretary General's views on the relationship between EPSR and Charter, namely

474. In the Secretary General's view, however, "it is necessary – with due regard for the competences and applicable law of the European Union – that:

1. the provisions of the European Social Charter (Revised) should be formally incorporated into the European Pillar of Social Rights as a common benchmark for states in guaranteeing these rights; (...)

Incorporating the provisions of the Revised European Social Charter in the Pillar will be a political means of promoting:

- i. An EU social strand firmly linked to an extensive and comprehensive European treaty entirely devoted to social rights, in force in all of its member states; this linkage will foster social cohesion, socially sustainable growth and, on this basis, stronger public support within the European Union for the process of European integration;*
- ii. Ratification of the Revised Charter, or acceptance of more of its provisions, by the European Union member states concerned, at least for the rights that they already have to guarantee under the European Union's primary and secondary legislation;*
- iii. Possible incorporation in the European Union's standard-setting system and its *acquis* of new rights that European Union member states have already undertaken to uphold under the European Social Charter treaty system.*

2. The collective complaints procedure (...) should be acknowledged by the European Pillar of Social Rights for the contribution that it makes to the effective realisation of the rights established in the Charter and to the strengthening of inclusive and participatory social democracies. (...)"

Comment [CS118]: Suggestion to integrate this paragraph which stems from §475 CDDH-SOC(2017)001.

263. In addition, it may be mentioned that in 2015 the Commissioner for Human Rights has recommended the swift ratification by the Council of Europe Member States of two ILO Conventions relevant for the interpretation of the social rights in the Charter, namely of the Protocol of 2014 to the 1930 ILO Forced Labour Convention (providing their victims with similar rights as the ones of human trafficking) and of the 2011 ILO Convention 189 on Decent Work for Domestic Workers.¹¹⁶

3. **International workers and employers' organisations** **Civil society**

[...]

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268. The ETUC, in particular, has been involved in the implementation of the European Social Charter from the outset and actively participated in the "Charte-Rel" Committee on the "relaunch of the 1961 Charter". More generally, the ETUC is involved in political activities of **the Council of Europe, in particular in the work of the CDDH (subgroups) and the PACE (in particular and especially its Sub-Committee on the European Social Charter). In the CDDH framework, ETUC actively contributed to many issues dealt with by the CDDH(-subgroups)**¹¹⁷. In the PACE framework, it provided input for the elaboration of resolutions concerning the "Turin Process" and austerity measures. As a human rights defender organisation, the ETUC uses the Charter and the Convention in its daily work¹¹⁸ and some topical campaigns¹¹⁹ or activities against austerity measures. This is also highlighted by references in different Resolutions, Declarations and press releases¹²⁰ as well as further awareness raising measures, *inter alia*, internal trainings and publications of the ETUC and/or its research institute, the ETUI.

ANNEX on Austerity paragraphs in CDDH-SOC 2017(007)001 of 17 May

4. Socio-economic changes deterioration of numerous social rights

30. In recent years, many institutions have condemned the impact of the economic crisis on the enjoyment of numerous economic, social and cultural rights, especially among the most vulnerable members of society.¹²¹ Developments in this area are discussed in several places in the report, in the sections focusing on the institutions in question:

¹¹⁶ See the following link to the [Commissioner's Comment on "Improving protection for victims of forced labour and human trafficking"](#) of 12 November 2015.

¹¹⁷ E.g. on

- [the Convention system in general and the reform of the Court](#);
- [the EU's accession to the Convention](#);
- [the \(draft\) recommendations on Human Rights of Older Persons \(CDDH-AGE\) and on Human rights and Business \(CDDH-CORP\)](#);
- [the place of the ECHR in the international and European legal order \(CDDH-SYSC-II\)](#);
- [this analysis on the legal protection of social rights in the framework of the Council of Europe](#).

¹¹⁸ In particular in the framework of its permanent committees; for example the works of its Advisory Group on fundamental rights and disputes.

¹¹⁹ See for example, the ETUC Campaign "Trade union rights are human rights", 2016, available at <https://www.etuc.org/campaign/turights#WoRiv3xG1aQ>; and the ETUC Campaign "Social Rights First", 2017, available at <https://socialrightsfirst.eu/>.

¹²⁰ See, for instance, the ETUC Declaration on the 50th Anniversary of the European Social Charter (19–20/10/2011); and the ETUC Position on the European Pillar of Social Rights – Working for a Better Deal for All Workers (06/09/2016).

¹²¹ [One notable example was the Declaration made on 17 October 2012 by the Committee of Ministers, the Parliamentary Assembly, the Congress of Local and Regional Authorities and the INGO Conference: "Acting together to eradicate extreme poverty in Europe," which stated that it is the people belonging to the most disadvantaged social groups who are the hardest hit by the economic crisis and often also by fiscal austerity measures.](#)

- The Court's response to the economic crisis and austerity measures (see below, Part II, A);
- The ECSR's response to the economic crisis and austerity measures (see below, Part II, B);
- Numerous texts from the Parliamentary Assembly of the Council of Europe (see below, Part III, B);
- Several documents and reports from the Commissioner for Human Rights (see below, Part III, D);
- Stances adopted on this issue at European Union level (see below, Part IV).

31. Most of these developments feature in the above mentioned CDDH feasibility study on the impact of the economic crisis and austerity measures on human rights in Europe adopted in December 2015.¹²² Apart from providing a reminder of the positions taken by numerous Council of Europe institutions on this subject (Part III), this study had the merit of focusing on a number of specific areas (Part IV): access to justice and fair trial, women/gender-related issues and the economic crisis; youth unemployment and children, the protection of migrant workers and asylum seekers, prison overcrowding and the repercussions of the economic crisis on social cohesion.¹²³ An erosion of rights has been observed across the board in these areas, against the background of the crisis, often affecting, first and foremost, these vulnerable groups. . However, as mentioned in the study, it was stated at the relevant CDDH meeting ~~The study also confirmed, however, that many of the problems linked to the economic crisis and austerity measures, including poverty, have been exacerbated, rather than caused, by the crisis (paragraph 44).~~

32. Accordingly, in February 2015, the Brussels Conference on the Future of the Protection of Social Rights in Europe (see below: "Turin Process") identified, *inter alia*, some trends within Council of Europe states in terms of the programmes developed to reform the welfare state since the mid-1990s and, more recently, to address the financial and economic crisis (Session I of the conference).

33. As regards solutions to the crisis, however, the "Brussels Document" (see below in the Appendix) makes notably the following negative observations:

"The financial and economic crises have had a significant negative impact on social rights enjoyment in Europe. Increases in unemployment, hunger, inequality and poverty among children following 2008 have posed a serious threat to the rights set out in the European Social Charter, as well as to the European social model more broadly. In Europe, cuts in health-related spending have affected the right to enjoy the highest attainable standard of health, as noted by the Council of Europe Commissioner of Human Rights. Housing and job insecurity in particular have contributed to an increase in the proportion of people at risk of poor mental health. The economic crisis has been identified as a key driver of increased homelessness in Greece, Ireland, Italy, Portugal, Spain and the UK from 2007 to 2012. Unemployment has increased in many EU Member States since 2007, and the share of individuals engaged involuntarily in part-time and temporary employment has also grown sizeably. Two thirds of the 30 European countries surveyed by UNICEF saw child material deprivation worsen between 2008 and 2012. The post-2007 fiscal consolidation has disproportionately affected women: in some EU Member States, EEA-EFTA countries and EU candidate countries, there is evidence that considerable retrenchment in employment, social transfers and social services may well be rolling back past

¹²² CDDH(2015)R84 – Addendum IV.

¹²³ See pages 15 and 16 of the study referring to the positions taken by the European Commission against Racism and Intolerance (ECRI), which criticises in particular the rise of nationalist populist parties rooted in profound hostility to ethnic, religious and cultural diversity (Annual Report of ECRI's Activities 2013, p. 8) and the legislative provisions adopted during recessions, such as employers being forced to dismiss foreign workers first when making staff cuts (ECRI report on Austria of 15 December 2009, p. 24) or even the introduction of a scheme whereby employers are given incentives to replace their third-country workers with their own or other EU nationals (ECRI report on Cyprus of 23 March 2011, p. 22).

progress in equality between women and men.

These developments represent potential regression in terms of the realisation of a range of rights protected under Council of Europe human rights instruments, including elements of Articles 1, 4, 7, 11 and 12 of the European Social Charter, as well as Articles 2, 3, 6, 8 and Article 1 of Additional Protocol 1 of the European Convention on Human Rights. Enjoyment of Articles 30 and 31 of the Revised European Social Charter, guaranteeing protection from poverty and social exclusion and the right to housing, has also been significantly affected. Some of these social rights' impacts have been attributable to specific crises-related outcomes such as market turmoil and labour opportunities. Others result from national and supranational policy responses to the crises, particularly fiscal austerity measures.

(...) The crises have resulted in an erosion of social citizenship, posing a substantial threat to Europeans' sense of solidarity and loyalty to the European project. This points to the existence of "lasting fractures", which can only be addressed through social rights (...).¹²⁴

34. It is important to note, furthermore, that in June 2015, the INGO Conference (see below, Part III, E) adopted a Recommendation on "The violation of economic, social and cultural rights by austerity measures: a serious threat to democracy".¹²⁵ This reminds us that, after almost five years' implementation, these austerity measures are considered by many national, European and international institutions and experts¹²⁶ to be counter-productive while their impact on economic, social and cultural rights has proved to be disastrous. The Recommendation criticises in particular the erosion of the following rights:

- The right to work: the employment sector has been hardest hit by the economic crisis and cutbacks. According to Eurostat data, among EU member countries, the unemployment rate is highest in Greece (25.8% and among the young: 50.6% in November 2014), in Spain (23.4% and among the young: 50.9%), in Croatia (44.1% among the young in the fourth quarter of 2014) and in Italy (41.2% among the young). This situation has made it necessary for large numbers of young people to leave their home countries and emigrate to find work abroad, while those who remain are more likely to find themselves in situations of extreme poverty or to be exploited.
- The right to health: in their 2013 report, Médecins du Monde said that the obstacles preventing access to health care included primarily financial problems (25.0%),¹²⁷ while 64.5% of patients admitted to their centres had no access at all to health care. In addition, the number of persons at risk of poor mental health increased by more than 3 million persons in the European Union from 2007 to 2011.
- The right to education: public spending on schools decreased in a third of OECD countries¹²⁸ between 2009 and 2011. The consequence has been a reduction in salaries and in the number of teachers, with an obviously negative impact on the quality and accessibility of

¹²⁴ "Brussels Document", see Appendix, February 2015, pages 2 to 4 (point 1: "Protecting Social Rights in the Time of Crisis"). See also on this topic: the General Report on the Turin I Conference (below), pp. 17 to 20 and pp. 27 to 35 and in particular the conclusions of the Turin II Forum (below).

¹²⁵ Recommendation of 25 June 2015: CONF/PLE(2015)REC1.

¹²⁶ See in particular Cephas Lumina, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights: "Report – Mission to Greece (22-27 April 2013)", A/HRC/25/50/Add.1, 27 March 2014 ; Juan Pablo Bohoslavsky, Report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights on his mission to Greece (30 November to 8 December 2015), A/HRC/31/60/Add.2, 29 February 2016.

¹²⁷ Administrative problems came second (22.8%) and lack of familiarity with or understanding of the health care system came third (21.7%). Médecins du Monde (2013). L'accès aux soins des plus précaires dans une Europe en crise sociale. Le cas des femmes enceintes et des enfants [Access to health care for the most vulnerable in Europe during the social crisis: focus on pregnant women and children], Paris, p. 27.

¹²⁸ OECD (2014), *Education at a Glance 2014: OECD Indicators*, p. 222.

education.

- The right to housing, food and water: between 2009 and 2011, demand for services for the homeless rose by 25-30% in Portugal and Spain and by 25% in Greece.¹²⁹

35. The Recommendation also criticises the wide-ranging privatisation programmes, due to their lack of transparency and democratic control, posing a constant threat to the right of access to water, electricity and health care and to cultural and natural heritage. It also condemns the impoverishment of a growing number of people and the risk of poverty and social exclusion in the European Union (24.8% in 2012, i.e. 124.2 million people¹³⁰), contributing to the growing loss of legitimacy of democratic institutions and, as a result, to the rise in political extremism in Europe.

36. Finally, according to the European Trade Union Confederation (ETUC above mentioned)¹³¹, the dangers posed to social rights come from various sources: the economic and financial crisis with its austerity measures; European Union case law (see the primacy of economic freedoms over trade-union rights) and technological developments, such as digitalisation, which can result in drastic changes in the working environment which social rights need to respond to. According to the ETUC, furthermore, other developments have a huge impact on social rights, such as the ageing society, all aspects of migration, including asylum seekers and the gender dimension, which is still absent in many respects, along with several other factors which need to be taken into account in the context of "effective enjoyment" of social rights.

a. The Court's response to the economic crisis and austerity measures

(...)

173. As shown in numerous decisions referred to above and in the aforementioned CDDH feasibility study on the impact of the economic crisis and austerity measures on human rights in Europe,¹³² the Court has handed down many decisions in which its reasoning takes account of economic and financial factors. It has also had to deal with cases directly concerned with austerity measures introduced by member states to cope with the economic crisis.

174. Most of the cases alleged violations of Article 1 of Protocol No. 1. In the case of *Mihăieş and Senteş v. Romania* (inadmissibility decision of 6 November 2011), the applicants complained that the application of an austerity programme had led to a 25% reduction in their remuneration as public service employees. The Court ruled that even if they could be deemed to have a "possession", the authorities had not exceeded their margin of appreciation. In the case of *Koufaki and Adedy v. Greece* (decision of 7 May 2013), the Court considered applications relating to a series of austerity measures, including cuts in public officials' salaries, pensions, bonuses and other allowances,¹³³ to reduce public spending and respond to the crisis facing the country. The Court declared these applications inadmissible, since the adoption of the impugned measures had been justified by the existence of an exceptional crisis without precedent in recent Greek history, necessitating an immediate reduction in public expenditure. The Court reaffirmed the principle that law makers had a wide margin of appreciation when implementing economic and social policies and that in this case the aims of the policies were in the general interest and also coincided with

¹²⁹ FEANTSA, *On the Way Home?*, Monitoring Report on Homelessness and Homeless Policies in Europe, 2012, p.

21.

¹³⁰ Eurostat,

[http://ec.europa.eu/eurostat/statistics-explained/index.php/People at risk of poverty or social exclusion](http://ec.europa.eu/eurostat/statistics-explained/index.php/People_at_risk_of_poverty_or_social_exclusion) (accessed on 30 March 2015).

¹³¹ Contribution received from the CES/ETUC in July 2016 for the purpose of compiling this report.

¹³² CDDH (2015)R84 – Addendum IV (pages 5 to 8).

¹³³ The Court held that the reduction in the first applicant's salary from €2 435.83 to €1 885.79 was not such as to place her at risk of having insufficient means to live on, in breach of Article 1 of Protocol No. 1. In the case of the second applicant, compensation had been provided for the abolition of his 13th and 14th month salary payments by the introduction of a single bonus.

those of the euro zone member states, which were required to ensure budgetary discipline and preserve the stability of the euro zone. For the same reasons, the Court has declared inadmissible applications protesting against reductions in the holiday and Christmas bonuses paid to retired public officials (decision of 8 October 2013 in *Da Conceica Mateus and Santos Januario v. Portugal* – limited and temporary nature of the measures; it was not disproportionate to reduce the state budget deficit by cutting public sector salaries and pensions with no equivalent cuts in the private sector)¹³⁴ and a temporary reduction in judges' pensions (decision of 15 October 2013 in *Savickas and Others v. Lithuania*).¹³⁵ All of these measures were adopted in response to the economic crisis.

175. From the standpoint of Article 6, in the case of *Frimu and Others v. Romania* the Court has ruled, indirectly, on a reduction in the retirement pensions of former officials of the judicial service, as a means of reducing the state budget. In its inadmissibility decision of 13 November 2012, the Court found that the fact that there had been discrepancies in the assessments of courts ruling on similar situations was not in violation of Article 6§1, since the case concerned the application of clearly expressed legal provisions to varying personal situations. Judicial practice might vary for two years, or even more, before machinery to ensure consistency was established.

176. Two cases may also be cited concerning austerity measures in the banking sector in response to the economic crisis. In its inadmissibility decision of 17 March 2015 in *Adorisio and Others v. the Netherlands*, the Court found that the restrictions on the applicants' procedural rights, in proceedings designed to ensure a rapid decision on the expropriation of their financial assets, was not in breach of Article 6 since, notwithstanding the very short time available, the applicants had had an effective remedy and the Government had been faced with the need to intervene as a matter of urgency in order to prevent serious harm to the national economy. In its *Mamatas and Others v. Greece* judgment of 21 July 2016, the Court found that there had been no violation of Article 1 of Protocol No. 1, alone or taken in conjunction with Article 14, in connection with an imposed decrease in the nominal value of bonds without the consent of the private investors concerned, to reduce the level of public debt (following negotiations between the state and international institutional investors on a reduction in their claims). The applicants' bonds had been cancelled and replaced with new securities, entailing a 53.5% capital loss. However, the Court found that since the exchange operation had resulted in a reduction of the Greek debt, the impugned interference had pursued an aim in the public interest. Moreover, the loss, which on the face of it was substantial, had not been sufficient to amount to the cancellation of or an insignificant return on the applicants' investments.

177. To date, there appears to have been only one case in which the Court has found a violation in connection with austerity measures, namely the aforementioned *N.K.M. v. Hungary* of 14 May 2013 (excessive rate of tax on severance pay following legislation to raise these rates in the public sector).

178. At a seminar in October 2015,¹³⁶ Linos-Alexandre Sicilianos, current Vice-President of the ECHR, referred to the major impact the economic crisis was having on several Convention rights, which showed that the traditional view that civil and political rights did not have a significant cost was now proving to be ever more erroneous. Several of them entailed positive obligations, and he

¹³⁴ See the inadmissibility decision of 1 September 2015 in *Da Silva Carvalho Rico v. Portugal*, which also concerned cuts in retirement pensions resulting from austerity measures, in which the Court noted in particular the general interest applicable in Portugal following the financial crisis and the limited and temporary nature of the measures introduced.

¹³⁵ See also the *Khoniakina v. Georgia* judgment of 19 June 2012 (legislation retroactively modifying the retirement pensions of Supreme Court judges was not in breach of Article 6 and Article 1 of Protocol No. 1) and the inadmissibility decision of 8 January 2013 in *Bakradze and Others v. Georgia* on the same subject.

¹³⁶ http://www.esil-sedi.eu/sites/default/files/Sicilianos_speech_Translation.pdf: The European Court of Human Rights at a time of crisis in Europe, SEDI/ESIL Lecture, 16 October 2015. His address covered the crisis in its broadest sense: the economic crisis (pages 2 to 4), the refugee and migrant crisis, the fight against terrorism and armed conflicts in Europe.

cited a number of major examples, including the negative impact of the crisis on detention conditions in numerous countries, the substantial costs of safeguarding the right to a fair trial and the general deterioration in the conditions of treatment of migrants and asylum-seekers.

179. The speaker summarised the Court's response to the economic crisis as one of both prudence and firmness. It acted prudently in so far as, particularly in a time of crisis and in accordance with the subsidiarity principle, it left national authorities a wide margin of appreciation by refusing to intervene in large-scale decisions reflecting major political choices in economic matters. However, it continued to act firmly by refusing to take account of economic considerations when it was necessary to protect non-derogable rights (for example, detention conditions must always be compatible with Article 3 – see the *Orchowski v. Poland* judgment of 22 October 2009), and principles relating to the rule of law (reasonable length of proceedings and the execution of final judicial decisions – see the aforementioned *Tchokontio Happi v. France* judgment of 9 April 2015 : lack of social housing) and non-discrimination (see the aforementioned *Ponomaryovi v. Bulgaria* judgment of 21 June 2011 – secondary education fees for foreign nationals without permanent residence permits).

a. The ECSR faced with economic crisis and austerity measures¹³⁷

266. In the general introduction to its Conclusions 2009, the ECSR stated that social rights had acquired greater importance – with respect to application of the Charter in a context of global economic crisis:

“The severe financial and economic crisis that broke in 2008 and 2009 has already had significant implications on social rights, in particular those relating to the thematic group of provisions ‘Health, social security and protection’ [...]. Increasing level of unemployment is presenting a challenge to social security and social assistance systems as the number of beneficiaries increase while [...] revenues decline. [T]he Committee recalls that under the Charter the Parties have accepted to pursue by all appropriate means, the attainment of conditions in which inter alia the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised. From this point of view, the Committee considers that the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.”¹³⁸

267. As already mentioned, the ECSR has had to deal with a number of collective complaints regarding the effects of austerity measures on implementation of the Charter. It is worth noting that they all concerned a single state, Greece, although at least two other States Parties to the collective complaints procedure – Portugal and Ireland – have also experienced stringent austerity measures.

268. The first two complaints regarding austerity measures in Greece concerned changes to the Labour Code providing for the option of dismissing workers up to one year from their hiring without having to give grounds¹³⁹ and the introduction of pay for young workers up to the age of 25 that was significantly less than that of older workers.¹⁴⁰

269. In 2012, the ECSR found on both these points that there had been a violation of the Charter

¹³⁷ On this topic, see in particular §§45, 46 and 47 of the “Nicoletti Report” mentioned above on the Turin I Conference.

¹³⁸ Conclusions 2009: General introduction, op. cit.: <http://hudoc.esc.coe.int/eng#>.

¹³⁹ Complaint No. 65/2011 (*GENOP-DEI and ADEDY v. Greece*).

¹⁴⁰ Complaint No. 66/2011 (*GENOP-DEI and ADEDY v. Greece*).

(Articles 4§4 and 4§1 in the light of the non-discrimination clause of the Preamble to the 1961 Charter) – despite the government's objective of consolidating public finances.¹⁴¹ According to the ECSR, "while it may be reasonable for the crisis to prompt changes [...] to restrict certain items of public spending or relieve constraints on businesses, these changes should not excessively destabilise the situation of those who enjoy the rights enshrined in the Charter". Accordingly "a greater employment flexibility in order to combat unemployment and encourage employers to take on staff, should not result in depriving broad categories of employees, particularly those who have not had a stable job for long, of their fundamental rights in the field of labour law, protecting them from arbitrary decisions by their employers or from economic fluctuations. The establishment and maintenance of such rights [...] is indeed one of the aims the Charter. [D]oing 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 [...], unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection."¹⁴²

270. Also in 2012, concerning five other collective complaints relating to pensions reform in Greece, the ECSR found that there had been a violation of the Charter (Article 12§3),¹⁴³ considering that "the cumulative effect of the restrictions [...] is bound to bring about a significant degradation of the standard of living and the living conditions of many of the pensioners concerned" and that "any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits".¹⁴⁴ The ECSR further stated that "the fact that the contested provisions of domestic law seek to fulfil the requirements of other legal obligations does not remove them from the ambit of the Charter" (in this case, Greece's obligations in connection with loans from EU institutions and the International Monetary Fund, below).¹⁴⁵

271. In its evaluation of Greece's follow-up to its seven decisions on austerity measures (simplified reporting procedure, see above), the ECSR considered in 2015 that the situations amounting to violations – noted in 2012 – had not yet been brought into conformity with the Charter.

272. Lastly, it's important to remind the aforementioned complaint No. 111/2014 (*GSEE v. Greece*) which also concerns the impact of austerity measures on a number of workers' rights. A hearing was held on it on 20 October 2016, with the participation, in particular, of the Greek Minister of Labour, Social Security and Social Solidarity as well ~~which also included~~ representatives of the EU, the ETUC and the IOE. The ECSR recently (March 2017) issued a decision on this complaint but it is not yet public.

273. As for the state reporting procedure, in 2013 the ECSR completed its examination of rights relating to health, social security and social protection (Thematic Group 2). Its conclusions are testimony to the effects of the crisis and austerity policies, as the proportion of violations found was higher than in 2009 (when this thematic group was last examined), particularly in the following states: Albania, Georgia, Greece, Poland, Republic of Moldova, Romania and Ukraine.¹⁴⁶ By and large, this rise is increasingly linked to inadequate levels of social security benefits, disproportionately affecting the poor, the unemployed, the elderly and the sick, and to unequal treatment of migrants under the guise of combating "benefit tourism".¹⁴⁷ At the same time,

¹⁴¹ Decisions dated 23 May 2012 on both the above complaints (65/2011 and 66/2011).

¹⁴² *Ibid.*, Complaint No. 65/2011, §§17-18.

¹⁴³ All decisions delivered on 7 December 2012: Complaints Nos. 76/2012 (*IKA-ETAM v. Greece*), 77/2012 (*POPS v. Greece*), 78/2012 (*I.S.A.P. v. Greece*), 79/2012 (*POS-DEI v. Greece*) and 80/2012 (*ATE v. Greece*).

¹⁴⁴ Complaint No. 76/2012, §§78 and 82.

¹⁴⁵ *Ibid.*, §50.

¹⁴⁶ *Activity Report 2013*, p. 18. See <https://www.coe.int/en/web/turin-european-social-charter/activity-reports>.

¹⁴⁷ *Ibid.*

according to the ECSR, austerity measures put health care systems under growing pressure.¹⁴⁸

274. Referring to these conclusions, the Secretary General of the Council of Europe noted that *“the economic crisis and austerity policies have clearly had a negative impact on social and economic rights across Europe. Benefits are being restricted and people moving between countries to live or find work are often being unfairly treated.”* He emphasised that *“the need to protect everyday rights for workers and non-working people is a core European value which becomes all the more important when times are tough”, that “all Council of Europe member states should ratify the latest version of the European Social Charter and also sign up to the complaints mechanism which helps to make sure it is put into practice” and that “international organisations – including the European Union – must take individual countries’ obligations under the Charter into account when discussing austerity measures”*.¹⁴⁹

D. The Commissioner for Human Rights

a. Main activities relating to social rights/the Charter

(...)

376. As other institutions, the Commissioner addressed the negative impact of the economic crisis and the austerity measures on human rights. In an Issue Paper on this topic (2013), the Commissioner stressed that the whole spectrum of human rights had been affected, including the rights to decent work, an adequate standard of living and social security, the right to participation, and access to justice, and that vulnerable groups had been hit disproportionately hard – *compounding pre-existing patterns of discrimination*. In this Issue Paper, the Commissioner recommended ensuring a minimum level of social protection for all, including by maintaining social security guarantees for basic income and health care to ensure universal access to essential goods and services during the crisis. According to him, States should resist any pressure to *undermine such basic guarantees by ring fencing public budgets to protect at least the minimum core levels of economic and social rights at all times*. In two Comments (2014), the Commissioner addressed the need to protect in particular women and youth – in times of crisis and austerity measures .

¹⁴⁸ *Ibid.*

¹⁴⁹ See his press release (DC011(2014) of 28 January 2014).