III. DERECHO PÚBLICO EUROPEO

PROTECTION OF REFUGEES AND OTHER VULNERABLE PERSONS UNDER THE EUROPEAN SOCIAL CHARTER

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SUMMARY

PROTECTION OF REFUGEES AND OTHER VULNERABLE PERSONS UNDER THE EUROPEAN SOCIAL CHARTER

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1. PRELIMINARY REMARKS. THE EUROPEAN SOCIAL CHARTER: THE MOST IMPORTANT PAN-EUROPEAN TREATY OF SOCIAL RIGHTS

First of all, it is worthwhile to recall that, like the European Convention on Human Rights (ECHR), the European Social Charter (ESC) is derived from the Universal Declaration of Human Rights. Both the Convention and the Charter were adopted within the Council of Europe (currently composed of 47 Member States) in order to effectively guarantee civil and political as well as social, economic and cultural rights. Both the Convention and the Charter are international treaties and, therefore, they are legally binding. In addition, each of these legal instruments established specific monitoring bodies (the European Court of Human Rights —ECtHR— and the European Committee of Social Rights - ECSR) to ensure such a compulsory character and effectiveness.

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Admittedly, the ECHR is the most symbolic treaty of the Council of Europe. However, the ESC remains the most important social rights treaty of the organization. In fact, the ECHR was not conceived as a social rights instrument, explicitly excluding in general this category of fundamental rights, even if at the same time it included several mixed nature rights, such as the right to organise and the prohibition of forced labour, which reinforce the idea of indivisibility. In parallel, although considered the flagship of the Council of Europe, the ECtHR was not conceived as a European jurisdiction of social rights[1], being the ECSR the body which is modestly and increasingly trying to play this role.

In this line of reasoning, the ESC and the case law of the ECSR are resources to be exploited[2]. Under these premises, the neglect of the ESC and the ECSR among the activities and priorities of university researchers and civil society organizations finds no justification at all. Such exclusion of the Charter and the Committee is detrimental to the effectiveness of social rights and, therefore, to the many persons entitled to exercise them in their daily lives.

As is well known, the Social Charter of 1961 recognised a first list of social rights related to work and non-discrimination, social protection and vulnerable people, as well as the so-called reporting system as a mandatory monitoring mechanism. In its evolution through the last fifty years, the Charter has been improved by two Protocols and one revision. In 1988, a first Protocol extended the range of protected social rights. In 1995, another Protocol established a collective complaints procedure to strengthen the level of guarantees. Finally, in 1996 the revised Charter not only added other important rights (for example, Articles 30 and 31 on the protection against poverty and social exclusion as well

[1] See Frédéric Sudre, "La protection des droits sociaux par la Cour Européenne des Droits de l'Homme: un exercice de «jurisprudence fiction»?", *Revue Trimestrielle des Droits de l'Homme*, No. 55, 2003, pp. 755-779. Indeed, the significant "evolutive interpretation" and social case law of the ECtHR is unable to satisfy all expectations (not only from potential victims but also from academicians) in the field of social rights. From this point of view, exclusively focusing on the possibilities of justiciability before the ECtHR, by neglecting other theoretically more modest monitoring mechanisms, may lead to disappointing illustrations: for example, when tackling the protection of people with disabilities [see judgment of 24 February 1998, case of *Botta vs Italy*; judgment of 14 April 2006, case of *Molka vs Poland*, or decision on (in)admissibility of 14 May 2002, case of *Zehnalova and Zehnal vs Czech Republic*] or in the field of protection against poverty and social exclusion [see decision on (in)admissibility of 18 June 2009, case of *Budina vs Russia*].

[2] Jean-Pierre Marguénaud and Jean Mouly, "Le Comité Européen des Droits Sociaux: un laboratoire d'idées sociales méconnu", *Revue du droit public et de la science politique en France et à l'étranger*, No. 3, 2011, pp. 685-716.

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as the right to housing) but it also established a consolidated version of the Charter including the whole catalogue of rights and the clauses incorporating the two mechanisms (national reports and collective complaints)[3].

In particular, the collective complaints procedure has profoundly changed the image of the ECSR, whose functions are becoming more and more judicial. The independence and impartiality of the Committee and its members, its methods of interpretation, the format of its decisions, the external impact of its case law and the examples of implementation of its decisions confirm this increasingly judicial image[4]. The collective complaints procedure is adversarial in nature and guarantees due process of law. It also provides for the possibility of holding public hearings. By the end of 2014, 113 complaints have been registered (since the entry into force of the procedure in 1998). The average duration of the admissibility stage was 4-5 months, while the average duration of the phase on the merits was less than 11 months. This represents a very reasonable duration of the procedure.

Unfortunately, it is evident that in many situations, including cases of serious violations of fundamental rights, it may take a substantial amount of time before actual measures are taken to remedy the problem. Nevertheless, the problematic of enforcement and compliance also affects the judgments of the Court, as illustrated by "classical" examples[5] and each annual report of the Committee of Ministers of the Council of Europe on the supervision of the execution of judgments

[3] At present, among the 47 Member States of the Council of Europe, 43 have accepted the Social Charter, 10 are bound by the 1961 original Charter and 33 by the 1996 revised Charter. In addition, 15 Member States accepted the collective complaints procedure.

[4] See Luis Jimena Quesada, "Profils juridictionnels et effectivité des décisions du Comité européen des Droits sociaux", in Diane Roman (dir.), *La justiciabilité des droits sociaux: vecteurs et résistances* (Pedone, Paris, 2012), pp. 165-177. From an International and Comparative Human Rights Law perspective, see also extensively Greg T. Chatton, *Vers la pleine reconnaissance des droits économiques, sociaux et culturels* (Schulthess, Geneva, 2013).

[5] See ECtHR, judgment of 13 June 1979, case of *Marckx vs Belgium* (national authorities spent more than a decade to amend the Belgium Law in order to suppress discrimination against children born outside marriage in the field of inheritance rights — see also the ulterior judgment of 29 November 1991, case of *Vermeire vs Belgium*). By contrast, the respondent State enforced the judgment of 21 October 2013, case of *Del Río Prada vs Spain* ("to ensure that the applicant is released at the earliest possible date") the same day of its adoption. In this same line, even during the development of the procedure before the ECSR concerning two collective complaints (*International Movement ATD-Fourth World vs France*, Complaint No. 33/2006 and *FEANTSA vs France*, Complaint No. 39/2006), the national authorities reacted by adopting the new 2007 Law on the right to housing (*Loi n.º 2007-290 du 5 mars 2007 instituant le droit opposable au logement*): the ECSR took note of this new legislation in its decisions of the merits of 5 December 2007 (respectively, §54 and §53).

of the ECtHR. By contrast, the practice shows significant examples of national implementation of the ECSR's decisions by legislative, executive or judicial authorities[6]. These examples, give visibility and credibility to the work of the ECSR and demonstrate that the ESC is a binding and living instrument. Of course, potential justiciability, without real effectiveness, is meaningless.

With these preliminary remarks in mind, my essay will focus on three aspects: firstly, the current status of refugees and other vulnerable persons under the ESC in view of its explicit personal scope and the case law of the ECSR on substantial provisions; secondly, the recent developments of the case law of the ECSR in the framework of the collective complaint procedure; thirdly, the new challenges for the ESC in relation to the interpretation and the enforcement of legal standards regarding the protection of refugees and other vulnerable persons.

2. PERSONAL AND SUBSTANTIAL POSITION OF REFUGEES AND OTHER VULNERABLE PERSONS UNDER THE EUROPEAN SOCIAL CHARTER

The only explicit reference to refugees in the Social Charter appears in its Appendix when dealing with *the scope of the Social Charter in terms of persons protected*:

> "Each Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed in Geneva on 28 July 1951 and in the Protocol of 31 January 1967, and lawfully staying in its territory, treatment as favourable as possible, and in any case not less favourable than under the obligations accepted by the Party under the said convention and under any other existing international instruments applicable to those refugees" (paragraph 2).

This is the wording of the 1996 Revised Charter, which updated the citation of the 1951 Geneva Convention by adding the 1967 Protocol[7]. Furthermore, in

[6] See the following examples of enforcement by legislative authorities (*European Roma Rights Centre vs Bulgaria,* Complaint No. 48/2008, decision on the merits of 18 February 2009: amendment of the Social Security Act in order not to suspend or suppress access to unemployment benefits to people in precarious situations), executive authorities (*Interights vs Croatia,* Complaint No. 45/2007, decision on the merits of 20 March 2009: withdrawal from the educational system of a textbook containing discriminatory statements on the grounds of sexual orientation) or judicial authorities (*International Federation of Human Rights Leagues vs France,* Complaint No. 14/2003, decision on the merits of 7 September 2004: enjoyment of the right to medical assistance by children of illegal immigrants - French State Council).

[7] The appendix of the 1961 Social Charter states: "Each Contracting Party will grant to refugees as defined in the Convention relating to the Status of Refugees, signed at Geneva on 28th July 1951, and lawfully staying in its territory, treatment as favourable as possible, and in any case not

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comparison with the original 1961 Charter, the Revised Charter has included a new paragraph dealing with stateless persons[8]. However, the Revised Charter keeps the restrictive formula "lawfully staying in its territory" which, it is worth noting, is also used in paragraph 1 in both Social Charters when referring to the inclusion of "foreigners only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned".

I will come back (section 4, *infra*) to this restrictive wording of paragraph 1 of the Appendix and the way the ECSR has interpreted it, in order to consider the possibility of applying the ECSR's interpretation to refugees and other persons in need of protection and the relationship of paragraph 1 with paragraphs 2 and 3 of the Appendix.

In the light of the Appendix, the case law of the ECSR is characterised by the development of the principle of non-discrimination in relation to refugees and other displaced persons on the enjoyment of social security and social protection rights (Articles 12, 13 and 14 ESC).

From this perspective, the ESCR has clearly stated that the scope of Article 12§4 ESC (the right to social security) extends to refugees and stateless persons[9]. In line with this statement, the ECSR has noted

> "that foreign workers are excluded from the scope of Act No. 1479 of 2 September 1971 on the social insurance of self-employed workers and that refugees and stateless persons have no social security coverage, in clear violation of the principle of equal treatment laid down by Article 12§4a"[10].

As far as the personal scope of Article 13 ESC (the right to social and medical assistance) is concerned, the ECSR has considered that paragraph 4

> "extends the scope of the first three paragraphs and covers not only foreigners who are nationals of other Contracting Parties lawfully resident or working regularly within the territory of the Contracting Party concerned, but also those who are simply staying in the territory of another Contracting Party without residing (including refugees within the meaning of the Geneva Convention of 28 July 1951). To date therefore, the situation of all nationals of other Contract-

less favourable than under the obligations accepted by the Contracting Party under the said Convention and under any other existing international instruments applicable to those refugees".

[8] Paragraph 3 of the Appendix reads as follows: "Each Party will grant to stateless persons as defined in the Convention on the Status of Stateless Persons done in New York on 28 September 1954 and lawfully staying in its territory, treatment as favourable as possible and in any case not less favourable than under the obligations accepted by the Party under the said instrument and under any other existing international instruments applicable to those stateless persons".

[9] *Digest of the Case Law of the European Committee of Social Rights*, September 2008, p. 93.

[10] *Conclusions XIV-1*, Turkey, p. 769.

> ing Parties in relation to social and medical assistance has been examined by the Committee under Article 13 paragraph 4, and the situation of nationals under paragraphs 1 to 3 of Article 13"[11].

In relation to Article 14 ESC (the right to benefit from social welfare services), the ECSR has held that

> "the provision of social welfare services concerns everybody lacking capabilities to cope, in particular the vulnerable groups and individuals who have a social problem. Groups which are vulnerable —children, the family, the elderly, people with disabilities, young people with problems, young offenders, refugees, the homeless, alcohol and drug abusers, victims of domestic violence and former prisoners— should be able to avail themselves of social services in practice. Since many of these categories are also dealt with by more specific provisions of the Charter, under Article 14 the Committee reviews the overall availability of such services and refers to those other provisions for the detailed analysis of the services afforded"[12].

From a material perspective, social services covered by Article 14 include in particular counselling, advice, rehabilitation and other forms of support from social workers, home help services (assistance in the running of the home, personal hygiene, social support, delivery of meals), residential care, and social emergency care (shelters). Issues such as childcare, childminding, domestic violence, family mediation, adoption, foster and residential childcare, services relating to child abuse, and services for the elderly are primarily covered by Articles 7, 16, 17, 23 and 27. Co-ordination measures to fight poverty and social exclusion are dealt with under Article 30 of the Revised Charter, while social housing services and measures to combat homelessness are dealt with under Article 31 of the Revised Charter.

On this subject, the Committee takes into consideration cases of double or multiple vulnerabilities and, therefore, potential double or multiple discrimination, such as refugee children and similar situations. Under Article 17 (the right of children and young persons to social, legal and economic protection), equal access to education must be ensured for all children. In this respect particular attention should be paid to vulnerable groups such as children of minorities, children seeking asylum, refugee children, children in hospital, children in care, pregnant teenagers, teenage mothers, children deprived of their liberty and so on. Children belonging to these groups must be integrated into mainstream

[11] *Digest*…, p. 285.

[12] *Conclusions 2005*, Statement of Interpretation on Article 14§1.

educational facilities and ordinary educational schemes. Where necessary, special measures should be taken to ensure equal access to education for these children[13].

3. RECENT DEVELOPMENTS OF THE CASE LAW OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

3.1. The case of Cohre vs Croatia: vulnerability of forcibly displaced families

The most important example in which the case law of the ECSR has tackled the economic and social protection of forcibly displaced persons is Complaint No. 52/2008 (*Centre on Housing Rights and Evictions -COHRE- vs Croatia*, decision on the merits of 22 June 2010)[14]. COHRE alleged that Croatia had violated Article 16 ESC (the right of the family to social, legal and economic protection), read alone or combined with the non-discrimination clause of the Preamble to the Charter, on the grounds that the "ethnic Serb" population displaced during the conflict in the former Yugoslavia were subjected to disproportionate discriminatory treatment regarding their housing needs, since the families, who belonged to this category of persons, were not allowed to recover the dwellings in which they lived in before the conflict, nor were they granted financial compensation for the loss of their homes. The continuing denial of adequate restitution or compensation allegedly constituted a violation of their housing and human rights.

As preliminary issues, the respondent Government raised two main objections to the admissibility *ratione temporis* (COHRE had allegedly failed to establish any connection between their allegations and any act of destruction, forced evacuation or similar act which occurred after the ratification of the Charter which should be remedied) and *ratione materiae* (COHRE had allegedly failed to demonstrate the "family perspective" of the victims in connection with an adequate supply of housing under Article 16 of the Charter, whereas the main

[13] *Conclusions 2003*, Statement of interpretation on Article 17, France, p. 174. Also *Mental Disability Advocacy Center vs Bulgaria*, Complaint No. 41/2007, decision on the merits of 3 June 2008, § 34.

[14] See Mark Gibney and Wouter Vandehole (eds.), *Litigating Transnational Human Rights Obligations: Alternative Judgments* (Routledge, London, 2014), and in particular, in relation to these extraterritorial dimensions of social rights within the European project, the chapter by Matthias Santana "Enforcing Extraterritorial Social Rights in the Eurozone Crisis (European Committee of Social Rights)", 302-324. From a substantial perspective (an emerging human right to housing restitution), see a comparative approach in Antoine Buyse, "Home Sweet Home? Restitution in Post-Conflict Bosnia and Herzegovina", *Netherlands Quarterly of Human Rights*, Vol. 27, No. 1, 2009, pp. 9-26.

issues at stake allegedly dealt with Article 31 of the Revised Charter, not yet ratified by Croatia) of the complaint.

In relation to the admissibility *ratione temporis* of the complaint, and in the light of the judgments of the Grand Chamber of the ECtHR in the cases of *Blečić vs Croatia* (Application No. 59532/00, Judgment of 8 March 2006) and *Šilih vs Slovenia* (Application No. 71463/01, Judgment of 9 April 2009), the ECSR considered that the notion of a continuing violation had to be applied in the following way: whilst certain factual issues at stake occurred in the mid-1990s, that is before the Charter entered into force in respect of Croatia[15], the alleged breaches continued after ratification and could even progressively worsen if sufficient measures were not taken to put an end to them[16]. Consequently, the Committee held its competence *ratione temporis* to consider all the facts raised in this complaint.

With regard to the admissibility *ratione materiae* of the complaint, the ECSR reiterated that Article 16 guarantees a right to decent housing only from a family perspective, and focuses on the right of families to an adequate supply of housing. The complaint demonstrated that the victims also included families, which led the ECSR to conclude that this complaint fell within the material scope of application of Article 16 ESC. More specifically, the ECSR held that Article 16 ESC imposed obligations upon the Government of Croatia in respect of those families who had expressed a clear wish to return to Croatia, or those for whom the lack of an effective and meaningful offer of housing and other forms of economic, legal or social protection had constituted an obstacle to return. In contrast, families who chose not to return to Croatia fell outside the material scope of application of Article 16.

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[15] Article 16 ESC is a provision accepted by Croatia when it ratified this treaty on 26 February 2003 and to which it is bound since its entry into force on 28 March 2003.

[16] See *Marangopoulos Foundation for Human Rights vs Greece*, Complaint No. 30/2005, decision on the merits of December 2006, §193. On the principle of progressiveness and non-regression, see §27 of the Decision on the Merits of 25 June 2010 (Complaint No. 58/2009, *COHRE v. Italy*). Read also a profound analysis in Christian Courtis (comp.), *Ni un paso atrás. La prohibición de regresividad en materia de derechos sociales*, Buenos Aires, Editores del Puerto, 2006. In particular, Ingo Wolfgang Sarlet, "Los derechos sociales a prestaciones en tiempos de crisis", in Miguel Ángel Presno Linera (coord.), *Crisis económica y atención a las personas vulnerables*, Oviedo, Universidad de Oviedo/Procuradora General del Principado de Oviedo, 2012, p. 41: "Although there are a lot of differences in the way countries recognize, protect and promote social rights, the provision of social rights in international law and the diffusion in regional and national contexts provides a common grammar of rights, a common patrimony of humanity. In this field, instruments as the prohibition of regressivity, the protection of the minimum core of rights and the existential minimum, could be, especially if taking into consideration the so legal and economic limitations, a counter-weight against the erosion of the social rights in time of crisis".

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The ECSR found a violation of Article 16 in the light of the non-discrimination clause of the Preamble on two grounds:

a) *On the ground of a failure to implement the housing programme within a reasonable timeframe.* In respect of the housing programme an extensive period of time had elapsed since the housing aid programme was launched in 2003. In addition, displaced families who expressed their wish to return to Croatia and applied for housing aid in the programme had been obliged to remain without security of tenure for an unreasonably long period of time due to the slow processing of applications. These factors taken together meant that, for many displaced families who wished to return to Croatia, the absence of an effective and timely offer of housing constituted a serious obstacle to return. The housing programme was therefore not implemented within a reasonable timeframe.
b) *On the ground of a failure to take into account the heightened vulnerabilities of many displaced families and of ethnic Serb families in particular.* The delays and uncertainty associated with the implementation of the housing programme since 2003 failed to accommodate the heightened vulnerability of displaced families, who constitute a distinctive group suffering from a particular disadvantage. This also constituted a failure to accommodate the situation of ethnic Serb families in particular, who accounted for the bulk of the families affected by the non-satisfaction of their housing needs and who constituted a particularly vulnerable group on account of their ethnicity.

There is no doubt that proper and effective implementation of this decision needed to be ensured. In the relevant Resolution[17], the Committee of Ministers of the Council of Europe took note of the statement made by the respondent government and the information it communicated on the follow-up to the decision of the ECSR and welcomed the measures already taken by the Croatian authorities and the authorities' commitment to bring the situation into conformity with the Charter. In this connection, the Croatian authorities underlined their reconstruction efforts by providing concrete figures on housing activities[18],

[17] Resolution CM/ResChS(2011)6, Complaint No. 52/2008 (adopted by the Committee of Ministers on 5 May 2011, at the 1113th meeting of the Ministers' Deputies).

[18] According to the information provided by the respondent government, "the funds in the State Budget for 2010 have been increased (by 64%) for these purposes. In June last year, the program has also been supplemented with a Revised Action Plan (benchmark for 2009 which targets 2,070 former OTRHs), providing for clearly set measurable targets and increased implementation transparency. The first part of the revised Action Plan was accomplished by the end of

including the problem of the existence of a number of housing units that, although allocated, had not been occupied and effectively used by the applicants. Under these conditions, the Croatian Government emphasised both its budgetary commitment to continue the implementation of the housing aid programme[19] and the measures already taken to encourage the return of many displaced families including ethnic Serb families[20].

3.2. The case of Dci vs Belgium: vulnerability of asylum-seeking unaccompanied foreign minors

Once again, from a double or multiple vulnerability perspective (children's rights and refugees' rights), another important complaint (No. 69/2011) was lodged by *Defence for Children – International (DCI) against Belgium*. The complainant organisation alleged that foreign children living accompanied or not, either as illegal residents or asylum seekers in Belgium, were excluded from social assistance in breach of different provisions of the ESC. In its decision on the merits (23 October 2012), the ECSR concluded that there was a violation of Article 17, of Article 7§10 and of Article 11§§1 and 3 of the Revised Charter. In particular, the ECSR held that

> "the persistent failure to accommodate these minors shows, in particular, that the Government has not taken the necessary and appropriate measures to

2010 and the housing care was provided for a total of 1,275 families of former OTR holders. The Action Plan targets will be fully met by the end of June 2011, by when appropriate housing will be allocated to the remaining 795 applicants".

[19] This was the commitment of the Croatian authorities: "After the fulfilment of the 2007-2009 Action Plan, the Croatian Government will continue to implement the housing aid programme for applications received afterwards and the funds in the State Budget for this purpose will be secured".

[20] In order to enable further returns, the government adopted in September 2010 a decision providing for the option to buy the apartments under privileged conditions that also covers property of important value in the capital and other major cities. Although the price is determined by several factors, the government offers special personal discount for refugees: every year spent in refugee is multiplied by a coefficient of 1.5. Since many returnees will not be able to purchase apartments in a single payment, they will be offered a possibility to buy off the flats paying in instalments for the next 20 years. All recipients of housing aid outside the Act on Areas of Special State Concern (ASSC) have been informed by letter that they now have the option available to purchase their allocated housing units. The Croatian Government will also re-open the deadline for applying for housing care outside the ASSC (in ASSC there is no deadline for applying). In a six month period, all those former OTRHs who failed to apply for housing aid will be able to do so soon. In a final effort to attract more returns, an information campaign will also be conducted in Serbia.

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> guarantee the minors in question the care and assistance they need and to protect them from negligence, violence or exploitation, thereby posing a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity" (§§ 82, 97 and 117).

In the follow-up of this decision, the memorandum submitted by the Representative of Belgium[21] acknowledged that "it was impossible to offer all the unaccompanied foreign minors who approached FEDASIL (the Federal Agency for the Reception of Asylum Seekers) satisfactory accommodation". For this reason, the respondent government announced that, even before the adoption of the decision of the merits, "various measures taken in 2012 by both FEDASIL and the Belgian State have fulfilled their purpose, which was to ensure that the reception facilities for unaccompanied foreign minors would no longer be saturated".

Among such measures were included the acceleration of the procedure set up by the Office of the General Commissioner on Refugees and Stateless Persons (CGRA), the increase in the number of reception places for unaccompanied foreign minors, the "winter plan" (from 24 December 2012 to 31 March 2013)[22] or the increase in the number of guardians[23]. Finally, the Representative of Belgium said that "FEDASIL has established means of preventing any future infringements of these rules, particularly by increasing its accommodation capacity through enhanced co-operation between the bodies concerned in the event that a new accommodation crisis were to arise".

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[21] See Appendix to Resolution CM/ResChS(2013)11 (adopted by the Committee of Ministers on 11 June 2013 at the 1173rd meeting of the Ministers' Deputies).

[22] As part of the winter programme set up by the government for the reception of vulnerable people, FEDASIL undertook to reserve 200 places for unaccompanied foreign minors over the winter months. 100 places were provided through FEDASIL's ordinary network and the other 100 could be made available thanks to its co-operation with reception partners or by means of temporary over-occupation in existing centres.

[23] According to the information provided by the Representative of Belgium, "the Guardianship Department has certified some 100 guardians since the beginning of 2012. In late 2012 and early 2013, recruitment was stepped up as 52 independent guardians and two guardians employed by the Red Cross were certified by the Guardianship Department. There are currently 319 guardians certified by the Guardianship Department and hence capable of providing support for unaccompanied foreign minors. For 2013, the Guardianship Department plans to continue to recruit independent guardians, particularly those employed by associations which have experience in assisting unaccompanied minors. It is also planned to set up a system of coaching and support for other guardians by employed guardians in 2013".

In light of this last point, it is worth underlining the real impact or effectiveness of the decisions of the ECSR and their preventive nature. Under this angle, a "leading case" before the ECtHR is important in terms of justiciability (obviously, if the judgment is correctly executed) and potential application to other similar cases by national authorities. But still more important is the possibility to avoid the long and uncertain road towards the jurisdiction of Strasbourg (the filter of admissibility before the ECtHR is overcome by less than 2% of the individual applications which are registered).

In contrast, the advantage of the collective complaints procedure is the absence of the rule of exhaustion of domestic remedies. To this end, the active role of organizations entitled to lodge complaints is essential together with the possible contributions of "amici curiae". This latter third intervention mechanism was introduced in the Rules of the Committee in 2011 (Rule 32A) and was precisely put into practice for the first time in the framework of Complaint No. 69/2011 (in particular, observations by the United Nations High Commissioner for Refugees, UNHCR, and by the Platform for International Cooperation on Undocumented Migrants, PICUM).

3.3. The cases of Cohre vs Italy and Cohre vs France: vulnerability and collective expulsion of persons on account of their ethnicity

Another important decision was taken by the ECSR during the same week that the decision on Complaint No. 52/2008 was adopted. On 25 June 2010, the ECSR adopted a decision on the merits in Complaint No. 58/2009 (*COHRE vs Italy*). Even if this decision did not specifically focus on refugee law, its approach was closely connected with the protection of forcibly displaced persons in so far as it dealt with collective expulsions of particularly vulnerable persons on account of their ethnicity (Roma people). The ECSR concluded there was a violation of Article 19§8, in the light of Article 4 of Protocol No. 4 ECHR and the case law of the ECtHR (*Conka vs Belgium*, judgment of 5 February 2002).

Moreover, in this context the ECSR added that

> "in the instant case the Committee considers that the contested 'security measures' represent a discriminatory legal framework which targets Roma and Sinti, especially by putting them in a difficult situation of non-access to identification documents in order to legalise their residence status and, therefore, allowing even the expulsion of Italian and other EU citizens (for example, Roma from Romania, Czech Republic, Bulgaria or Slovakia)" (§ 158).

In fact, this lack of access to identification documents (which additionally may generate and worsen situations of statelessness), not only implies the risk of expulsion from the national territory but also the risk of social exclusion within the country[24].

This was one of the main issues at stake in a previous collective complaint (*European Roma Rights Centre vs Italy*, Complaint No. 27/2004, decision on the merits of 7 December 2005). The complainant organisation argued that the Italian authorities' policy of dismantling inadequate and overcrowded camping sites was not accompanied by any measures to offer the displaced Roma alternative accommodation. It also contended that Roma people were largely denied access to social housing. Since access is regulated by a points system based on criteria such as the nature and length of the residence permit or the type of previous dwelling which were hard for the Roma to meet; similarly, it was not much easier for the Roma who had been granted refugee status to obtain housing. On the other hand, the Government denied that the Roma were discriminated against in the allocation of social housing since anyone fulfilling the objective criteria was entitled to such accommodation, but without specifying what form these criteria took.

Under these conditions, the ECSR reiterated that Article 31§1 guarantees access to adequate housing, whereas under Article 31§3 it is incumbent on States Parties to adopt appropriate measures for the construction of housing, in particular social housing. Furthermore, they must ensure access to social housing for disadvantaged groups, including equal access for nationals of other Parties to the Charter lawfully residents or regularly working on their territory. Accordingly, the conclusion reached by the ECSR was as follows:

> "The Committee acknowledges that the State Party is committed to the principle of equal treatment for Roma as regards access to social housing, but has failed to provide any information to show that this right of access is effective in practice or that the criteria regulating access to social housing is not discriminatory. The Committee recalls that the principle of non-discrimination in Article E also includes indirect discrimination. Its failure to take into consideration the different situation of Roma or to introduce measures specifically aimed at improving their housing conditions, including violation of Article 31§§1 and 3 taken together with Article E".

More recently, the Committee dealt with Complaint No. 63/2010 (*COHRE vs France*), which concerned the eviction and expulsion of Roma from their

[24] See Laura Van Waas, "The Children of Irregular Migrants: A Stateless Generation", *Netherlands Quarterly of Human Rights*, Vol. 25, No. 3, 2007, pp. 437-458.

homes and from France during the summer of 2010. In its decision on the merits of 28 June 2011, the ECSR concluded that the conditions in which the forced evictions of Roma camps took place in the summer of 2010 were incompatible with human dignity and constituted a violation of Article E taken in conjunction with Article 31§2 of the Revised Charter; and, on the other hand, that

> "Roma consented to repatriation under constraint and against a background of racial discrimination. Since the Roma of Romanian and Bulgarian origin were forced to give their consent, therefore, they cannot be assumed to have waived their right to freedom of movement and their right of residence under Article 19§8 of the Revised Charter, rights that are also considered fundamental in EU law (Article 45 of the Union's Charter of Fundamental Rights). The Committee therefore concludes that the expulsion of Roma to Romania and Bulgaria in the summer of 2010 constitutes a violation of Article E in conjunction with Article 19§8 of the Revised Charter" (§§ 78-79).

It is interesting to note that the ECSR decided for the first time, in accordance with its Rule 26 *in fine* and "in view of the seriousness of the allegations", to give precedence to both complaints (No. 58/2009 and No. 63/2010) and thus to set time limits for the proceedings which "will not be extended". Together with this kind of urgent procedure, the ECSR also used for the first time the notions of "aggravated violation" and "aggravated responsibility" which were borrowed from the Inter-American Court of Human Rights[25]. This is an excellent example of positive judicial dialogue and synergy[26].

[25] *COHRE vs Italy*, Complaint No. 58/2009, decision on the merits of 25 June 2010: "75. […] the Committee considers that, the lack of protection and investigation measures in cases of generalized violence against Roma and Sinti sites, in which the alleged perpetrators are officials, implies for the authorities an aggravated responsibility (see, *mutatis mutandis*, the Inter-American Court of Human Rights in *Myrna Mack Chang v. Guatemala*, judgment of 25 November 2003, § 139; *Las Masacres de Ituango v. Colombia*, judgment of 1 July 2006, § 246; *Goiburú and others v. Paraguay*, judgment of 22 September 2006, §§ 86-94; or *La Cantuca v. Peru*, judgment of 29 November 2006, §§ 115-116). 76. The Committee considers that an aggravated violation is constituted when the following criteria are met: on the one hand, measures violating human rights specifically targeting and affecting vulnerable groups are taken; on the other, public authorities not only are passive and do not take appropriate action against the perpetrators of these violations, but they also contribute to such violence". See also *COHRE vs France*, Complaint No. 63/2010, decision on the merits of 28 June 2011 (§§ 53-54).

[26] These synergies between both the Inter-American and the European systems for the protection of human rights (in particular, social rights), have been recently emphasised by Laurence Burgorgue-Larsen, "Los derechos económicos y sociales en la jurisprudencia de la Corte Interamericana de los Derechos Humanos", in Manuel Terol Becerra and Luis Jimena

Nevertheless, the background of Complaint No. 63/2010 suggested a divergent approach between the Council of Europe (decision on the merits of 28 June 2011 of the ECSR) and the EU, insofar as the French government stated that evictions and expulsions of Roma in the summer of 2010 were declared to be compatible with EU law by the European Commission under the pretext that the latter decided not to undertake any procedure of infringement against France[27]. In any case, such discriminatory practices prompt us to consider the need to deal with other people in equally vulnerable positions under the Social Charter[28].

4. NEW CHALLENGES ON THE INTERPRETATION AND ENFORCEMENT OF LEGAL STANDARDS FOR THE PROTECTION OF REFUGEES AND OTHER VULNERABLE PERSONS

4.1. Exploiting opening clauses

As already mentioned, the Social Charter defines in its Appendix a restrictive personal scope that covers nationals of other Parties lawfully resident or working

Quesada (dir.), *Tratado sobre protección de derechos sociales* (Tirant lo Blanch, Valencia, 2014), pp. 469-490.

[27] In this regard, see Tawhida Ahmed, "The Treaty of Lisbon and Beyond: The Evolution of EU Minority Protection?, *European Law Review*, Vol. 38, No. 1, 2013, p. 38: The EU Charter "is thus not only a legally binding source of (minority) rights protection, but also provides benchmarks from which to derive the content of the rights enunciated therein. Where these sources provide extensive protection for minorities, this is a positive situation for minorities. However, these provisions may simply pave the way for the acceptance of situations which are detrimental to minority protection. […] In relation to the ECHR, although the adoption by the EU of a higher level of protection is not prohibited by the [EU] Charter, the application of a stronger set of rights for minorities is not mandated and would not result from an automatic application of the [EU] Charter. It would instead require the application of positive will on the part of the EU institutions (including the Courts) and the EU member states". In my view, the same line of reasoning must be applied in the relationship between the EU Charter and the ESC.

[28] The challenge of defining the scope of "vulnerable irregular migrants" in Alexander Betts, "Towards a 'Soft Law' Framework for the Protection of Vulnerable Irregular Migrants", *International Journal of Refugee Law*, Vol. 22, Issue 2, 2010, pp. 209-236: the author highlights two main groups of vulnerable irregular migrants for whom there are significant protection gaps: a) those whose protection needs arise during transit (trafficked persons, stranded migrants, those who suffer trauma and violence during transit), and b) those whose protection needs arise from reasons other than conflict or persecution (those fleeing severe economic and social distress, such as state collapse, environmental change or natural disaster).

regularly within their territory, as well as refugees and stateless persons lawfully staying in their territory. This formal restriction in terms of the personal scope is an anomaly clearly opposed to the conception of the other human rights international treaties (which refer to "everyone within their jurisdiction" —Article 1 ECHR— , "all persons subject to their jurisdiction" —Article 1 of the American Convention on Human Rights— , "every individual" —Article 2 of the African Charter on Human and People's Rights).

The drafters of the Charter who seemed to be conscious of this stark difference added to the general restriction what could be called a "positive contradiction", by including two specific opening clauses:

a) In paragraph 1, it is stated that the exclusion of foreign nationals of other countries and/or those unlawfully present "would not prejudice the extension of similar facilities to other persons by any of the Parties" (we know that in some countries not only legislation but also the case law of their supreme courts have extended the set of aliens' rights by putting them in connection with human dignity and human rights international treaties)[29]. This exception, according to the Committee, "does not simply confirm parties' obligations under these conventions regarding equal treatment for refugees and stateless persons but also invites states to go further by offering them treatment as favourable as possible"[30].
b) In paragraph 2, it is stated that the favourable treatment of refugees (lawfully staying in the territory of the Parties) under the 1951 Geneva Convention and the 1967 Protocol must be extended according to "any other existing international instruments {accepted by the Party} applicable to those refugees" (we also know that there is a tendency in some European countries towards extending the definition of the status of refugee both by harmonising it with subsidiary protection and by

[29] For example, concerning the Spanish evolving judicial practice see Ana Salinas, "Pertenencia a un grupo social y solicitud de asilo: el largo camino de la protección frente a la mutilación genital femenina", *Revista Europea de Derechos Fundamentales*, No. 14, 2009, pp. 59-91. Some interesting judicial precedents in Pablo Santolaya Machetti and Miguel Pérez-Moneo Agapito, *El derecho de asilo en la jurisprudencia.* (Julio 2005-Junio 2006), CIBOD, 2007. This is also a positive outcome of the *numerus apertus clause* included in the new Spanish Law on Asylum and Subsidiary Protection (in particular, Art. 6), as highlighted by Rosario García Mahamut, "El nuevo régimen del derecho de asilo y de la protección subsidiaria en España a la luz de la Ley 12/2009, de 30 de octubre: principales novedades y desafíos", in *Régimen jurídico del derecho de asilo en la Ley 12*/2009, Madrid, Centro *de Estudios Políticos y Constitucionales,* 2010, p. 49.

[30] *Digest*…, p. 182.

including other grounds such as gender or sexual orientation[31], in line with the recent developments within the EU[32]).

These two clauses could play an important role when facing new waves of refugees and other third countries nationals coming to States Parties to the Charter (for instance, thousands of refugees fleeing the violence in Libya from the outset of the Libyan conflict on 17 February 2011 as well as immigrants working in Libya from Bangladesh, the Philippines, Nigeria, Mali, Liberia, and other countries). These new waves imply new challenges for the interpretation of the Charter. Moreover, it appears that these two opening clauses are consistent with the spirit of the *favor libertatis* principle set forth in the Charter (Article 32 of the 1961 Charter and Article H of the 1996 revised Charter). In addition, the interplay of these two clauses may favour in general the protection of asylum seekers (not only minors, *supra*) under the Charter, without prejudice to

[31] See this general favourable evolution in José Díaz Lafuente, "La protección de los derechos fundamentales frente a la discriminación por motivos de orientación sexual e identidad de género en la Unión Europea", *Revista General de Derecho Constitucional*, No. 17, 2013, pp. 41-43. A more specific approach in José Díaz Lafuente, "El derecho de asilo por motivos de orientación sexual e identidad de género" *Revista de Derecho Político*, No. 89, 2014, pp. 345-388. See also the issue of gender identity in Strasbourg jurisprudence in Iina Sofia Korkiamäki, "Legal Gender Recognition and (Lack of) Equality in the European Court of Human Rights", *The Equal Rights Review*, Vol. 13, 2014, pp. 20-50.

[32] In particular, the inclusion of mechanisms to identify vulnerable asylum seekers on the grounds of sexual orientation and gender identity has been made possible through the adoption of the EU "asylum package" (which encompasses the recast Asylum Procedures and Reception directives, and the Dublin and Eurodac Regulations, as well as the recast Qualification Directive already adopted in 2011 —see OJ L189, 29 June 2013). However, in practice, rigid notions of homosexual identity may consciously or subconsciously shape decision-makers' approaches in this field: Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants", *Journal of Refugee Studies,* Vol. 22, No. 2, p. 217. With such a spirit, see also "Ensuring Protection to LGBTI Persons of Concern", *International Journal of Refugee Law,* Vol. 25, No. 1, p. 129: "As long as societies and communities continue to shun, abuse and criminalize LGBTI individuals, refugee protection will be a necessity and, in fact, the only means to realize their fundamental human dignity. It will be doubly important that both the asylum systems and the institutions underpinning them (including UNHCR and NGOs working in partnership) are sensitive to the specific rights and particular needs of LGBTI asylum-seekers and refugees". In this context, see the significant recent judgment adopted by the Court of Justice of the EU (Fourth Chamber) on 7 November 2013, *Minister voor Immigratie en Asiel v X* (C-199/12) *and Y* (C-200/12) *and Z v Minister voor Immigratie en Asiel* (C-201/12) concerning the impact of criminal laws which specifically target homosexuals in terms of acts of persecution and the possibility for asylum seekers to conceal their homosexuality in their country of origin or to exercise reserve in the expression of their sexual orientation.

the particular protection needs of those asylum seekers whose applications have been rejected and then are unlawfully present in the territory of the Parties.

This approach is illustrated in recent conclusions of the ECSR. For example, in 2009, dealing with specific emergency assistance for non-residents, the ECSR

> "notes that pursuant to the Asylum Act (Official Gazette No 79/07) the asylum seekers have a right to health care including emergency medical treatment. However, the report and the additional information provided by the Government do not establish that emergency medical assistance is provided to unlawfully present foreigners, including those whose claim for asylum status has been rejected. In this connection, the Committee recalls that the personal scope of Article 13§4 differs from that of other provisions of the Charter. The beneficiaries of the right guaranteed by this provision are foreign nationals who are lawfully present in a particular country but do not have resident status, and also foreign nationals who are unlawfully present in that country. The Committee further recalls that legislation or practice which denies entitlement to emergency medical assistance to foreign nationals within the territory of a State Party, even if they are there illegally, is contrary to the Charter (*International Federation of Human Rights —FIDH— vs France*, Complaint No.14/2003, decision on the merits of 8 September 2004). As regards emergency social assistance, the Committee notes that the report and the supplementary information provided by the Government does not establish that all persons whether or not legally present in Croatia have a right to the satisfaction of basic human material need (food, clothing, shelter) in situations of emergency, as again required by the Charter"[33].

With these parameters the ECSR has more generally interpreted that

> "States Parties to the Charter can extend its scope beyond the minimum laid down in the Appendix. The Committee notes that the Parties to the Charter (in its 1961 and revised 1996 versions) have guaranteed to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties —in particular the ECHR— or by adopting domestic rules whether constitutional, legislative or otherwise without distinguishing between persons referred to explicitly in the Appendix and other non-nationals. In so doing, the Parties have undertaken these obligations. Whereas these obligations do not in principle fall within the ambit of its supervisory functions, the Committee does not exclude that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member States, Party to the Charter"[34].

[33] *Conclusions XIX-2*, Croatia, Article 13§4.

[34] *Conclusions 2004*, Statement of Interpretation, p. 10.

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4.2. Consolidating interpretation rules and new protecting measures

Indeed, in spite of the formal exclusion of foreign national of other countries and/or those unlawfully present (those who have been denied status as refugees or stateless persons belong to this category of foreigners in an irregular situation), the ECSR has developed its case law towards recognition of certain rights in the context of the judicial collective complaint procedure. In its above mentioned decision on the merits of 8 September 2004 (*FIDH vs France*) the ECSR stated for the first time that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter". In reaching this conclusion, the Committee held the following reasoning:

- Firstly, the ECSR made it clear that, when it has to interpret the ESC, it does so on the basis of the 1969 Vienna Convention on the Law of Treaties: interpretation 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;
- Secondly, the ECSR opted for a broad concept of human rights based on the notion of human dignity. When determining the object and purpose of the ESC it takes account of the fact that the latter is a living human rights instrument dedicated to the values of dignity, autonomy, equality and solidarity, and closely complements the ECHR. The ECSR concludes from this that the ESC must be interpreted so as to give life and meaning to fundamental social rights, and that restrictions on rights must therefore be read restrictively; and
- Thirdly and finally, it considered the importance of the right in question for individuals. In this case the restrictions impinge on a right of fundamental importance to individuals since they concern the right to life itself and thus to human dignity, a fundamental value at the core of positive European human rights law. When interpreting the Appendix, therefore, the ECSR considers that denying foreigners the right to medical assistance, even if they are there illegally, is contrary to the ESC.

It is worthwhile remembering that this first decision has been confirmed by unanimity by a later one adopted on 20 October 2009 (*Defence for Children International —DCI— vs The Netherlands,* Complaint No. 47/2008) in which the right to adequate shelter for children unlawfully present in the territory of a State is recognised for as long as they are within its jurisdiction, and this includes a ban on evicting them from a shelter on the ground that this would

place them in a situation of extreme helplessness which is contrary to the respect for their human dignity.

Two recent cases represent a new challenge for the protection of human dignity insofar as the situation of also adults unlawfully present in a State Party to the Charter is at stake. In the case of *FEANTSA vs The Netherlands* (Complaint No. 86/2012) the complainant organisation alleged that The Netherlands' legislation, policy and practice regarding sheltering the homeless is not compatible with several provision of the Revised Social Charter (Articles 13, 16, 17, 19, 30 and 31, taken alone or in conjunction with Article E); in the case of *Conference of European Churches (CEC) vs the Netherlands* (Complaint No. 90/2013), the complainant organisation alleged that the Dutch government has failed to fulfil its obligations under the ESC (Articles 13 and 31) to respect the rights of undocumented adults to food, clothing and shelter.

Both complaints have been declared admissible on 1 July 2013 and, without prejudice of the final decision on the merits (adopted on 1 and 2 July 2014), the ECSR has for the first time applied its new Rule 36 by taking two important decisions on immediate measures on 25 October 2013. On the one hand, these immediate measures are somehow similar to the interim measures under Rule 39 of the ECtHR but, on the other hand, they have a broader potential scope of application (in relation to the follow-up of the decision on the merits)[35]. In spite of their controversial legal nature (the Dutch Conseil d'État - *Raad van State* - has recently expressed its reservation on their legally binding character[36]), the truth is that these immediate measures have already had a significant positive impact in the mass media and, above all, in practice[37]. From this last point of view,

[35] Rule 36 of the ECSR reads as follows: "1. Since the adoption of the decision on the admissibility of a collective complaint or at any subsequent time during the proceedings before or after the adoption of the decision on the merits the Committee 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 European Social Charter. […]".

[36] The opinion of the *Raad van State* of 13 December 2013 states, on the one hand, that the immediate measures adopted by the ECSR are not binding on State Parties because the decision on the merits would not be binding either and, on the other hand, that the immediate measures do not confer any direct rights to individuals and ordinary judges may decide how to refer to these measures. The original version of the opinion states: "*Conclusie*. Het ligt niet voor de hand om aan onmiddellijke maatregelen van het ECSR een bindend karakter toe te kennen, nu de definitieve uitspraken van het ECSR geen bindend karakter hebben ten opzichte van de verdragspartij(en). Onmiddellijke maatregelen van het ECSR hebben geen onmiddellijk gevolg voor individuele personen. Zij kunnen daaraan dan ook geen rechtstreekse aanspraak ontlenen".

[37] See a comparative analysis in Clara Burbano Herrera and Yves Haeck, "Letting States off the Hook? The Paradox of the Legal Consequences following State Non-Compliance with Provi-

several municipalities have passed motions encouraging central authorities to find a solution to the basic needs of foreigners without a resident status[38].

5. FINAL REFLECTIONS

The general restrictive approach to refugees under the Appendix to the ESC has been eased by the case law of the ECSR in the framework of both the reporting system and the collective complaint mechanism in several ways. Firstly, the ECSR has taken into account the equal treatment clause explicitly established in several provisions of the ESC concerning social protection (Articles 12 or 13). Secondly, the ECSR has also protected the problematic right to housing of forcibly displaced persons in the framework of the right of the family to social, legal and economic protection (Article 16) and in connection with the general clause of non-discrimination (Preamble of the 1961 Charter and Article E of the 1996 Revised Charter). Thirdly, the ESC has focused on the vulnerable position of refugees with regard to the enjoyment of several rights (for example, access to social services —Article 14— , or access of refugee children to education —Article 17— , including children seeking asylum). Fourthly, the ECSR has paid attention to other vulnerable situations (for example, Roma people) where several rights (access to identification documents in order not to suffer from social exclusion —Article 30— or from arbitrary and collective expulsion —Article 19) were at stake. Fifthly and more recently, the ECSR has extended the material scope of protection of stateless persons under the ESC[39].

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sional Measures in the Inter-American and European Human Rights Systems", *Netherlands Quarterly of Human Rights,* Vol. 28, No. 3, 2010, pp. 332-360.

[38] For example, in a common motion of 29 November 2013, the municipalities of Utrecht, Rotterdam, Amsterdam and The Hague (gathered at the *Buitengewone Algemene Ledenvergadering*) "find this provisional decision [on immediate measures] of the great importance. The residence of this target group is not a task of the municipalities, but sometimes is needed because of the humanitarian aspects".

[39] See *Conclusions 2013*, General Introduction, Statement of interpretation on the rights of stateless persons under the ESC, January 2014, pp. 12-13: "[…] noting that 2014 will be the 60th anniversary of the 1954 United Nations Convention on the Status of Stateless Persons the Committee takes the opportunity to clarify the rights of stateless persons under the European Social Charter. […] the Committee emphasises that the Charter's protection of stateless persons goes beyond social security and social and medical assistance extending also to the other social rights referred to in the 1954 Convention. The Committee thus considers that treatment on an equal footing with nationals and with nationals of other States Parties, as the case may be, must be guaranteed to stateless persons as defined by the 1954 Convention in respect of matters covered by the Charter and for which the 1954 Convention requires the same treatment as accorded to

Furthermore, there are two aspects under the ECS and the case law of the ECSR which allow for the improvement of the protection of forcibly displaced persons: A) specifically the opening clause contained in paragraph 2 of the Appendix with regard to the extension of protection of refugees to "any other existing international instruments applicable to those refugees"; B) the evolving interpretation of the ESC whereby the ECSR declared that social rights linked to life and dignity have to be enjoyed by everyone (including refugees and asylum seekers, even if their claims were rejected).

Finally, in connection with these two aspects, I would like to underline two challenges. The first one consists in strengthening synergies and positive will between the relevant international instruments and guarantees, and this means not only mutual influence at an interpretative level but also close collaboration in solving specific situations. From this point of view, the already existing collaboration between the UNHCR and the ECSR could be improved and intensified in the framework of the judicial procedure of collective complaints[40]. The second challenge has to do with complex situations concerning persons in need of protection (such as asylum seekers or persons benefiting from subsidiary pro-

nationals, such as education, labour legislation, fiscal charges and access to courts. In matters covered by the Charter where the 1954 Convention requires treatment not less favourable than that accorded to aliens generally, such as housing, freedom of movement, trade union membership, access to wage-earning employment and self-employment, transfer of assets and expulsion, the Committee considers that stateless persons must be guaranteed the protection of the Charter on an equal footing with nationals of other States Parties to the Charter. Furthermore, recalling that the Charter is a living instrument which must be interpreted in the light of its object and purpose based on the notion of human dignity, persons who are *de facto* stateless (for example, because they are unable to obtain proof of their nationality or because they have for valid reasons renounced the protection of the State of which they are a national) must enjoy the same treatment as de jure stateless persons as recommended in the Final Act of the 1954 Convention".

[40] Jean-Michel Belorgey,"Final deliberations", in *Round Table on the Social Rights of Refugees, Asylum-Seekers and Internally Displaced Persons: A Comparative Perspective* (UNHCR/Council of Europe, Strasbourg, 2009), p. 15: "[…] collective complaints currently seem the most effective way to enforce these rights. UNHCR, unfortunately, cannot bring a complaint before the ESCR; this would require a modification of the ECS. However, this does not mean that there is no collaboration between the two institutions; UNHCR is asked for information by the ECSR, and can itself always receive information from the ECSR". An illustration of this synergy between the UNHCR and the ECSR is provided by decision on the merits of 20 October 2009 (*DCI vs The Netherlands*, Complaint No. 47/2008): "60. (…) the Committee notes from observations and recommendations of July 2003 by the UNHCR on the implementation of the Aliens Act 2000, that after its entry into force more than 60% of all asylum applications were rejected in the accelerated procedures according to figures provided by the Ministry of Justice (TK 2002-2003, 19 637, no 731). UNHCR highlights that material support is terminated immediately following a negative first instance decision in accelerated procedures. Such material support includes shelter".

tection), who are not recognised under the Social Charter at the same level as nationals of States Parties or refugees but at least (and certainly *a fortiori*) are entitled to enjoy the same economic and social rights linked to life and dignity which are granted to everyone (including foreigners in an irregular situation). From this perspective, "the need to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural" (as stated in the Preamble of the Revised Social Charter) has to be read in terms of the "indivisibility" of the personal scope of all international human rights instruments.

Título:

PROTECCIÓN DE REFUGIADOS Y OTRAS PERSONAS VULNERABLES EN LA CARTA SOCIAL EUROPEA

Sumario:

Resumen:

El presente artículo sostiene la necesidad prestar atención a instrumentos jurídicos europeos infrautilizados, en particular la Carta Social Europea y el Comité Europeo de Derechos Sociales, con objeto de mejorar las garantías de los derechos de los refugiados y otras personas vulnerables necesitadas de protección. Desde este punto de vista, el autor postula que una potencial justiciabilidad, sin real efectividad, carece de sentido. De modo similar, el discurso sobre la indivisibilidad de los

derechos humanos queda vacío si no se toma en consideración la indivisibilidad de sus garantías. En este sentido, el trabajo ilustra el estadio actual de los refugiados y otras personas vulnerables en el ámbito de la Carta Social Europea suministrando ejemplos de impacto práctico de decisiones adoptadas por el Comité Europeo de Derechos Sociales a través de los recientes desarrollos de su innovadora actividad (procedimientos de urgencia, amicus curiae, medidas inmediatas) y su jurisprudencia en el marco del mecanismo judicial de reclamaciones colectivas. Finalmente, se someten a análisis crítico los principales desafíos para la Carta Social Europea en relación con la interpretación y aplicación de los estándares jurídicos de protección a favor de los refugiados y otras personas vulnerables defendiendo la idea de reforzar las sinergias positivas entre los niveles constitucional e internacional de garantía.

Abstract:

The article argues the need to focus on underexploited European legal instruments, in particular the European Social Charter (ESC) and the European Committee of Social Rights (ECSR), in order to better guarantee the rights of refugees and other vulnerable persons in need of protection. From this point of view, the author suggests that potential justiciability, without real effectiveness, is meaningless. Similarly, the discourse on indivisibility of human rights is empty without taking into account the indivisibility of their guarantees. In this sense, the essay illustrates the current status of refugees and other vulnerable people under the ESC providing examples of the practical impact of the decisions adopted by the ECSR through recent developments of its innovative activity (urgent procedures, third-party interventions, immediate measures) and its case law in the framework of the judicial collective complaint mechanism. Finally, the main challenges for the ESC in relation to interpretation and enforcement of legal standards in favour of refugees and other vulnerable persons are submitted to critical scrutiny under the idea of strengthening positive synergies between constitutional and international levels of guarantee.

Palabras clave:

Personas vulnerables – justiciabilidad y efectividad – derechos sociales – sinergias positivas – interpretación evolutiva.

Keywords:

Vulnerable Persons – Justiciability and Effectiveness; Social Rights; Positive Synergies; Evolutive Interpretation.