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The European Social Charter:
a Social Constitution
for Europe

La Charte sociale européenne :
une constitution sociale
pour l'Europe

Coord.

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EXTRAIT

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CHAPTER 1
THE TWO LIVES
OF THE EUROPEAN SOCIAL CHARTER

BY
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I. - Introduction

The European Social Charter occupies an unusual position in international human rights law. When it was adopted in 1961 (2), it was intended to be the counterpart, in the field of economic and social rights, to the European Convention on Human Rights, the major achievement of the Council of Europe in the field of human rights. Yet, the European Social Charter has been largely overshadowed by the Convention, and largely ignored, even within specialized circles, until the mid 1990s. This was due to a number of factors. Although rich in substance, the Conclusions adopted by the Committee of Independent Experts tasked with supervising compliance with the Charter were relatively obscure and hardly publicized. The Committee of Independent Experts remained largely subordinated to the Governmental Committee of the Social Charter and, ultimately, to the Committee of Ministers of the Council of Europe, resulting in an ambiguous mechanism of control, neither fully judicial nor purely political. The system provided neither for individual nor for collective complaints, relying solely instead on the reports the States parties were to submit on their implementa-

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(2) The European Social Charter was signed by thirteen member States of the Council of Europe in Turin on 18 October 1961 (OETS n° 35; 529 UNTS 89). It entered into force on 26 February 1965, after the number of 5 ratifications was attained. For early comments, see David HARRIS, 'The European Social Charter', 13 *International and Comparative Law Quarterly* 1076 (1964); Nicolas VALTICOS, 'La Charte sociale européenne: sa structure, son contenu, le contrôle de son application', *Droit social*, n° 26 (1963), pp. 466-482; H. WIEBRINGHAUS, 'La Charte sociale européenne', *Annuaire français de droit international*, vol. 9 (1963), pp. 709-721.

tion of the Charter. The Charter seemed to explicitly exclude that it could be invoked before national bodies, particularly judicial bodies, severely limiting the attractiveness of the instrument for potential litigants. Finally, the Charter presented certain characteristics which seemed to definitively set it apart from other human rights instruments implementing the Universal Declaration of Human Rights: it had a scope of application *ratione personae* limited to the nationals of the States parties; it adopted an *à la carte* approach, allowing each State, within certain limits, to select the provisions of the Charter which it will accept to be bound by, upon acceding to the Charter; and certain of its guarantees were considered to be satisfied if the great majority of the intended beneficiaries were protected, even though some might not be. Much of this changed in the 1990s. A 'revitalization' of the Charter was launched in by the Ministerial Conference on Human Rights held in Rome in November 1990 (3). The objectives were both to breathe new life into the European Social Charter and to re-establish the preeminence of the Council of Europe in setting human rights standards for the European continent in a context in which, as an accompanying measure to the establishment of the internal market, the European Community (then European Economic Community) had adopted its own Community Charter of Fundamental Social Rights of Workers (4). In addition, the fall of the Berlin Wall, and the launch of the process of transformation of Central and Eastern European countries into liberalized market economies, gave a renewed urgency to improving the protection of economic and social rights on the European continent. The 'revitalization' process led to the formation of an *ad hoc* committee (CHARTE-REL) which first prepared a Protocol Amending the European Social Charter. The Protocol was opened for signature in Turin on 21-22 October 1991, on the occasion of the thirtieth anniversary of the Charter (5). Although the

(3) See particularly David HARRIS, 'A Fresh Impetus for the European Social Charter', 41 *International and Comparative Law Quarterly* 659 (1992); and David HARRIS & John DARCY, *The European Social Charter* (2nd ed., Transnational Publ., New York, 2001), pp. 12-14.

(4) This Charter was proclaimed, as a political, non-legally binding document, by 11 of the then 12 Member States of the European Communities at the Strasbourg European Council of 11-12 December 1989. See Bob HEPPLE, 'The Implementation of the Community Charter of Fundamental Social Rights' [1990] *Modern Law Review* 643; and, on the relationship to the European Social Charter, Jeff KENNER, *EU Employment Law. From Rome to Amsterdam and Beyond* (Oxford, Hart Publ., 2003), at pp. 110-115.

(5) Protocol amending the European Social Charter (CETS, n° 142, opened for signature in Turin on 21 October 1991). See Manfred MOHR, 'The Turin Protocol of 22 October 1991: A Major

Turin Protocol has never entered into force (since it did not secure all the ratifications required), the clarifications it intended to bring to the relations between the Committee of Independent Experts and the Governmental Committee – reserving to the former, in effect, the exclusive competence to interpret and apply the Charter – have in fact been implemented in practice, to the extent that this did not necessarily require an amendment of the Charter, but rather an understanding, by each of these bodies, of its role in the supervisory system of the Charter (6). Other changes to the supervisory system proposed under the Turin Protocol, including the increase in the number of members of the Committee of Independent Experts, the abolition of the role of the Parliamentary Assembly of the Council of Europe in the supervision of the Charter, the changes in the Committee of Ministers' voting rules for recommendations addressed to the States parties, or the improved role of social partners and non-governmental organizations in the supervisory system, were also implemented in practice.

The other results of the revitalization process were even more impressive. In 1995, an Additional Protocol to the European Social Charter Providing for a System of Collective Complaints was adopted (7). This instrument allows non-governmental organizations and organizations of employers and of workers to seek a declaration that certain laws and policies of the States parties are not compatible with their commitments under the Charter, without having to exhaust any local remedies which may be available to those aggrieved by such measures. Despite its many innovative features, the Protocol entered into force already on 1 July 1998, after the number of 5 initial ratifications was

Contribution to Revitalizing the European Social Charter', *European Journal of International Law*, vol. 3 (1992), pp. 362-370.

(6) The provisions of the Turin Protocol are to be applied even 'before its entry into force, in so far as the text of the Charter will allow', according both to the final resolution of the Turin Ministerial Conference and to the decision adopted by the Committee of Ministers on 11 December 1991.

(7) CETS n° 158, opened for signature in Strasbourg on 9 November 1995. For initial commentaries, see Régis BRILLAT, 'A New Protocol to the European Social Charter Providing for the Collective Complaints', 1 *E.H.R.L.R.* 52 (1996); Markus JÄGER, 'The Additional Protocol to the European Social Charter Providing for a System of Collective Complaints', 10 *Leiden J. of International Law* 69 (1997). For an evaluation of the first years of functioning, see Robin CHURCHILL and Urfan KHALIQ, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?', *European Journal of International Law*, vol. 15 (2004), pp. 417-456.

reached (8). Finally, in 1996, agreement was reached on a Revised European Social Charter (9). The Revised Charter does not bring changes to the control mechanism of the original Charter. But it enriches the list of the rights protected: the Revised Charter includes the 19 original guarantees listed in the 1961 instrument, sometimes with certain reformulations (articles 1-19 in Part II of the Revised Charter); it adds to this list the four guarantees contained in a 1988 Additional Protocol which had ensured a first, still relatively minor, update of the rights of the European Social Charter (10) (articles 20-23); and (in articles 24-31) it completes the list by adding seven other rights, including rights such as the right to protection against poverty and social exclusion (article 30) and the right to housing (article 31) which clearly place the Revised European Social Charter at the forefront of instruments protecting economic and social rights in international law (11). To this date, 24 member States of the Council of Europe have ratified the Revised Charter (19 other States have signed it). 16 of these States were parties to the 1961 European Social Charter which, in total, 27 States have ratified. 35 States are therefore bound under either the 1961 Charter (11) or the 1996 Revised Charter (24). For the States parties to both instruments, the undertakings accepted under the 1996 Revised Charter supersede those accepted under the 1961 Charter, although if a State accedes to the Revised Charter without accepting a provision corresponding to a provision it had accepted under the 1961 Charter, it shall remain bound by the latter undertaking (12).

This chapter describes the monitoring of the European Social Charter, which now consists both in State reporting and, for the States parties having ratified the 1995 Additional Protocol, in the collective complaints mechanism (section 1). It then comments on

(8) On 1 March 2008, the Protocol had been ratified by 12 member States of the Council of Europe, parties either to the European Social Charter or to the Revised European Social Charter; 6 other States have signed the Protocol but have not ratified it yet.

(9) CETS n° 163, opened for signature in Strasbourg on 3 May 1996. The Revised European Social Charter entered into force on 1 July 1999, after the initial 3 ratifications.

(10) Additional Protocol to the European Social Charter (CETS n° 128, opened for signature in Strasbourg on 5 May 1988, entered into force on 4 September 1992).

(11) For the full list of the guarantees contained in the European Social Charter, see section III.

(12) See Article B, in part III of the Revised European Social Charter. This ensures that a State will not evade commitments made under the 1961 European Social Charter upon acceding to the revised instrument.

certain aspects of the case-law of the European Committee of Social Rights – as the Committee of Independent Experts decided to rename itself in 1998, in order to mark more clearly its development into a quasi-judicial human rights body. Those comments will highlight how the European Social Charter is not only escaping the relative marginalization of its beginnings, by clearly establishing itself among international human rights treaties, but also, in some respects, showing the direction other bodies should follow in the future (section 2).

II. – The monitoring of the European Social Charter

Both the 1961 Charter and the 1996 Revised Charter make a distinction between the list of principles enumerated in Part I of each instrument, and the specific guarantees, concretizing the said principles, enumerated in Part II (13). By acceding to the Charter, a State party agrees to consider Part I as 'a declaration of the aims which it will pursue by all appropriate means' (14): it undertakes thereby to attain the conditions in which the rights and principles enumerated in Part I may be effectively realized, 'by all appropriate means both national and international in character' (15). This undertaking, however, was not originally considered to be the source of legal obligations, and indeed it is not subject to any form of monitoring, although the objectives enumerated in Part I may guide the interpretation of the rights listed in Part II (16). Only

(13) For the sake of clarity, unless, mention is made specifically to the 1961 Charter, references to the Charter in the remainder of this chapter are to be understood as referring to the provisions of the 1996 Revised European Social Charter.

(14) Article A of the Revised European Social Charter. The Revised European Social Charter is divided in six parts, numbered from I to VI, and includes, in addition, an Appendix. Part I is not divided in articles. Part II contains the list of substantive articles. It comprises 31 articles, numbered from 1 to 31. Parts III to VI describe the nature of the undertakings of the States parties and the relationship between the Revised European Social Charter and other instruments, including the supervisory mechanism set up by the 1961 Charter; Part V, more specifically, contains a number of 'horizontal' provisions relating to all the substantive provisions listed in Part II. Parts III to VI have articles listed by alphabetical order, from A to O. The result is that, for instance, Article E (non-discrimination) may be combined with Article 31 (the right to housing) of the Revised Charter.

(15) Introductory paragraph of Part I.

(16) See, on the basis of his reading of the *travaux préparatoires* to the 1961 Charter, David HARRIS, *The European Social Charter* (Univ. Press of Virginia, Charlottesville, 1984), at pp. 16-17 (the author adds, with characteristic honesty, that he had earlier adopted the view that there

Part II is, strictly speaking, binding upon the States. Yet, in both the 1961 Charter and in the 1996 Revised Charter, the State may decide to accept only a limited number of articles contained in Part II of the instrument, within certain limits. This constitutes the *à la carte* system which has done so much ill to the reputation of the Charter. Thus, under the Revised Charter, a State must consider itself bound by at least six of the nine articles of Part II of the Charter which are referred to as constituting its 'hard core' (17); in addition, a State must consider itself bound by 'an additional number of articles or numbered paragraphs of Part II of the Charter which it may select, provided that the total number of articles or numbered paragraphs by which it is bound is not less than sixteen articles [out of a total of 31] or sixty-three numbered paragraphs [out of a total of 98]'. Thus, in order to accede to the Charter, it is not compulsory to be bound by any single of its provisions (18). The fact that only a handful of the 24 States parties to the Revised Charter have accepted all of its provisions (19) may be seen either as proof of the validity of the proposition that, without an *à la carte* system, many States would be hesitant to ratify the Charter; or instead as a demonstration that such a system constitutes an open invitation to States to limit the scope of their commitments, putting in jeopardy the integrity of the instrument concerned. It is in fact doubtful however whether the *à la carte*

was a legal obligation (referring to D. HARRIS, 'The European Social Charter', cited above n. 1, at p. 1080) – but this was, he says, 'before having the opportunity of reading the travaux préparatoires' (p. 17, n. 10)). This position is reiterated in the 2nd edition of the book, published in 2001 with John DARCY (cited above, n. 2; see p. 36, n. 10). It should be noted however that, according to the Explanatory Report to the Revised European Social Charter, the declaration of aims of Part I is binding as an objective to be pursued: article A, para. 1, a, 'obliges States to consider themselves bound by all the aims put forward in Part I' (para. 120).

(17) These are articles 1 (right to work), 5 (right to organise), 6 (collective bargaining), 7 (right of children and young persons to protection), 12 (right to social security), 13 (right to social and medical assistance), 16 (right of the family to social, legal and economic protection), 19 (right of migrant workers and their families to protection and assistance), and 20 (right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex).

(18) It had been proposed to the Charte-Rel Committee, when it was working on the draft Revised European Social Charter, to make articles 5 and 6 compulsory. This proposal was made jointly by the employers and by the workers' representatives. However, the Committee finally decided against this proposal, 'in order not to detract from the existing flexibility of this legal instrument, which is entirely constructed on an *à la carte* basis [and in order not to] slow down the ratification of the Revised Charter' (Explanatory Report to the Revised European Social Charter, para. 124).

(19) These States are Denmark, France, the Netherlands, and Portugal. However, with the sole exception of France, these States have made certain reservations concerning the provisions they accepted.

approach has been an obstacle to the adequate functioning of the system. Although the difference between accepted and non-accepted provisions is important in the context of the collective complaints mechanism, it may be hoped that in time, the more systematic use of Article 22 of the Charter providing for the submission of reports on the provisions States have not accepted (see hereunder, 1.2., b)), could attenuate the difference between accepted and non-accepted provisions, and lead States to re-examine their choice not to accept the full range of rights listed in the Charter.

1. – *The reporting by States*

The reporting under the European Social Charter relies mainly on the *European Committee of Social Rights (ECSR)*, which the Charter refers to as the Committee of Independent Experts. The Committee now comprises 15 members (20). These are 'experts of the highest integrity and of recognised competence in national and international social questions' (21) elected by the Committee of Ministers (22) in order to ensure a wide geographical representation of the different member States of the Council of Europe. The *Governmental Committee*, to which the conclusions adopted by the ECSR are submitted, is composed of representatives of each of the States parties, although representatives of international organisations of employers and workers (presently the European Trade Union Confederation (ETUC), the International Organization of Employers (IOE) and the Union of the Confederations of Industry and Employers of Europe (UNICE)) attend their meetings in a consultative capacity and take an active part in the discussions. Neither the ECSR nor the Governmental Committee are full-time bodies: the ECSR meets eight to ten times a year for one-week sessions, and the Governmental Committee at even less regular intervals. Finally, the *Committee of Ministers* of the Council of Europe receives the report

(20) The 1991 Turin Protocol decided that the Committee would comprise 'at least nine' members. This was implemented in 1994. Since 2002, the number of experts has risen from nine to fifteen: see Committee of Ministers, Increase in the number of members of the European Committee of Social Rights (GR-H(2002)19), GR-H(2002/CB16), 816th meeting of the Ministers' Deputies, 13 November 2002.

(21) Art. 25(2) of the 1961 Charter, as amended by the Turin Protocol.

(22) Although the Turin Protocol provides for the election of the members of the Committee by the Parliamentary Assembly of the Council of Europe, following a procedure similar to that for the election of judges to the European Court of Human Rights, this cannot be implemented under the Turin Protocol enters into force.

of the Governmental Committee on the basis of which it adopts recommendations addressed to individual States or resolutions.

a) *Reports on the accepted provisions*

Originally, States submitted biennial reports on the full range of the provisions they had accepted (1965-1989). The system then evolved, in order to alleviate the working load of the supervisory organ, into one consisting in reports being submitted every two years for the accepted provisions belonging to the 'hard core' of the Charter and for half of the other accepted provisions of Part II of the Charter, grouped in two separate cycles, so that the implementation of each 'non-hard core' provision was examined by the ECSR every four years.

Although the system had been working relatively well, particularly as regards the diligence of the States in meeting their reporting obligations (23), the division in 'cycles' and the different periodicities for the 'hard core' and 'non-hard core' provisions made the system difficult to follow for the external observer. Therefore, the Committee of Ministers decided in 2006 to clarify and streamline the system of reporting (24). According to the new system, which has been inaugurated in 2007, States are to submit one annual report on 31 October of each year, covering in turn employment, training and equal opportunities (group 1 of the provisions of the Charter: articles 1, 9, 10, 15, 18, 20, 24 and 25); health, social security and social protection (group 2: articles 3, 11, 12, 13, 14, 23 and 30); labour rights (group 3: articles 2, 4, 5, 6, 21, 22, 26, 28 and 29); and children, families, migrants (group 4: articles 7, 8, 16, 17, 19, 27 and 31). This division of the substantive rights into four thematic groups, allowing a reporting by States each year and ensuring that each provision of the Charter will be reported on once every four years, brings a welcome clarity into the system. The additional advantage is that, by the comparison between the 35 reports it will receive annually, all covering the same areas, the European Committee of Social Rights will gain an understanding of emerging

(23) The ECSR however, has frequently had to defer adopting conclusions on certain provisions because of the lack of adequate information in the State report.

(24) New system for the presentation of reports on the application of the European Social Charter Proposal of the Governmental Committee (CM(2006)63), adopted at the 963d meeting of the Ministers' Deputies, on 3 May 2006.

problems and tendencies, and will be able to compare States' approaches to new problems in a much more systematic way. It can be hoped that such a comparison will lead in time to a benevolent competition between States, whose performances may be ranked against one another rather than against the fixed metric provided by the Charter itself (25).

Divided mostly in working groups – something the expansion of the number of members of the Committee made possible after 1994 –, the ECSR adopts conclusions on the reports submitted by States parties to the Charter on the implementation of the provisions they have accepted. The adoption of those conclusions may be preceded by a meeting between the Committee and the State concerned, a procedure which may be necessary to obtain certain clarifications and which may also allow a contradictory debate with the social partners, although this has not become routine as it has before the UN human rights treaty bodies. In adopting its conclusions, the ECSR frequently uses sources other than those of the State reports and the comments made upon those reports by organisations of workers and employers, including in particular information from the International Labour Organisation (26). The conclusions of the ECSR are to provide an assessment 'from a legal standpoint [of] the compliance of national law and practice with the obligations arising from the Charter for the Contracting Parties concerned' (27). These conclusions in turn are submitted to the Governmental Committee, whose role it is, not to overrule such assessment, but to select, giving reasons for its choice, on the basis of social,

(25) While stating its support for the new system, which it said would 'facilitate communication of the Committee's activities, which in turn will make it more visible and increase its impact at national level', the European Committee of Social Rights at the same time noted that 'the proposed system departs from the text of the Charter, thus reducing the Committee's scope for exercising its responsibility for deciding whether countries are in compliance with the Charter (in its original 1961 or revised 1996 versions), since the Committee will receive reports less frequently than under the current system'. It is true that, under the new system, all provisions, whether or not they belong to the 'hard core' group, will be examined only every four years. Yet, the Committee recognized that 'the proposed system will enable the Committee to achieve a better balance between consideration of collective complaints and its examination of national reports. Ideally, then, the new system's entry into force should be conditional on acceptance of the collective complaints procedure, including national non-governmental organisations' right to submit complaints, by a significant number of Council of Europe member states' (Opinion of the European Committee of Social Rights on the new system for the presentation of reports, adopted at its 214th meeting (Strasbourg, 27 February – 3 March 2006)).

(26) This is done in accordance with article 24 of the Charter. In addition, it is provided that one representative of the ILO sits as an observer in the ECSR's meetings.

(27) Article 24(2) of the 1961 Charter, as revised by the Turin Protocol.

economic and other policy considerations the situations which should, in its view, be the subject of recommendations to each Contracting Party concerned' by the Committee of Ministers (28). The Governmental Committee decides by vote whether or not to make such a recommendation. A two-thirds majority of the votes cast, including the simply majority of the parties to the Charter, is required. This division of tasks between the ECSR (in charge of the legal assessment) and the Governmental Committee (offering a political evaluation about the consequences of findings of non-compliance) was the single most important result of the 1991 Turin Protocol.

On the basis of the report of the Governmental Committee, the Committee of Ministers votes, by a two-thirds majority of the votes cast – the vote being reserved to the States parties to the Charter –, 'a resolution covering the the entire supervision cycle and containing individual recommendations to the Contracting Parties concerned' (29). Since the implementation of the Turin Protocol in the voting practice of the Committee of Ministers, it has adopted a limited number of recommendations addressed to individual States for failure to comply with the Charter (30). Typically, such recommendations request that the government concerned 'takes account, in an appropriate manner, of the conclusion of the European Committee of Social Rights and requests that it provide information in its next report on the measures it has taken to bring the situation into conformity with the Charter'. The compliance level of the States concerned has been generally satisfactory, although there are exceptions (31).

(28) Article 27(3) of the 1961 Charter, as revised by the Turin Protocol. On the criteria used by the Governmental Committee, see D. HARRIS and J. DARCY, *The European Social Charter*, cited above, pp. 336-340.

(29) Article 28(1) of the 1961 Charter, as revised by the Turin Protocol.

For instance, only three such recommendations were adopted between 2002 and 2008 (concerning Turkey, the United Kingdom, and Ireland); two were adopted in 2001, following the 15th supervision cycle (Malta and Ireland); three were adopted in 1999, following the 14th supervision cycle (Ireland, Austria and Turkey); five were adopted in 1998, following the 13th supervision cycle (France, Turkey, Germany, Italy, Portugal). Clearly, far from increasing as could have been expected, the number of individual recommendations decreases through the years.

(31) See, for a generally favourable assessment, D. HARRIS, 'Lessons from the reporting system of the European Social Charter', in Philip ALSTON and James CRAWFORD (eds.), *The Future of UN Human Rights Treaty Monitoring*, Cambridge Univ. Press, 2000, pp. 347-360.

b) *Reports on the non-accepted provisions*

In addition to the reports they submit on accepted provisions, Article 22 of the Charter provides that the States parties must submit reports 'at appropriate intervals as requested by the Committee of Ministers', on the provisions of the Charter which they have not accepted. This procedure was used only relatively rarely since 1978, when – mostly upon the suggestion of the European Committee of Social Rights – the Committee of Ministers first requested a report on certain such provisions which only a limited number of States had ratified. The procedure then evolved towards ensuring that the 'hard core' provisions, or those particularly relevant to certain new developments, would be reported upon even by the limited number of States which had not accepted them. But those exercises had a fairly limited impact and, according to Harris and Darcy, 'there is no evidence that contracting parties have accepted more paragraphs of the Charter as a result of the Article 22 exercise being completed' (32).

This may change in the future. In 2002, the European Committee of Social Rights proposed a new use of Article 22 of the Charter, as regards States parties to the Revised Charter. Taking into account that States have adopted widely diverging approaches as the provisions they should accept or not, it considered a State-by-State approach to be more coherent than a provision-by-provision approach. It also considered that, while it would not be useful to request from a State a report on provisions not accepted upon ratification before a reasonable period following ratification – since the process of ratification itself necessarily entails detailed consideration by states as to the selection of provisions of the Revised Charter –, requesting such a report five years after the date of ratification from each Party to the Revised Charter would be justifiable. The proposal was approved by the Governmental Committee at its 102d meeting, held on 14-18 October 2002, and then by the Committee of Ministers, which, acting under Article 22 of the European Social Charter, decided that States having ratified the Revised European Social Charter should report on the non-accepted provisions every five years after the date of ratification, and invited the

(32) D. HARRIS and J. DARCY, *The European Social Charter*, cited above, at p. 315.

European Committee of Social Rights to arrange the practical presentation and examination of reports with the States concerned (33).

2. - *The collective complaints mechanism*

In 1998, the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (CCP) entered into force. In conformity with one of the objectives of the revitalization process of the Charter, which was to 'strengthen the participation of management and labour and of non-governmental organisations' in the supervisory mechanism, the CCP provides for the possibility for social partners and non-governmental organisations to file complaints alleging the unsatisfactory application of the Charter. The organisations which may use this mechanism are: a) international organisations of employers and trade unions (the ETUC, the UNICE and the IOE); b) other international non-governmental organisations which have consultative status with the Council of Europe and have been put on a list established for this purpose by the Governmental Committee, comprising at present 67 organisations (34); and c) 'representative' national organisations of employers and trade unions within the jurisdiction of the Contracting Party against which they have lodged a complaint, such 'representativeness' being determined by the ECSR, 'in the absence

(33) 821 Meeting of the Ministers' Deputies, 11 December 2002.

(34) Following the decision adopted by the Committee of Ministers on 22 June 1995, international NGOs having consultative status with the Council of Europe and competent in one or more areas covered by the European Social Charter may request to be included on this special list. Such applications, appropriately documented in order to demonstrate the competence and reliability of the organisation, are transmitted to the Governmental Committee, accompanied by an opinion of the Secretary General which reflects the degree of interest and participation shown by the NGO in its normal dealings with the Council of Europe; an application is considered accepted by the Governmental Committee unless it is rejected by a simple majority of votes cast. The decision to place an NGO on the special list is valid for a period of four years, before the expiration of which the concerned organisation should request a renewal of its status, following the same procedure as for the initial inclusion on the list. At the time of writing (1 March 2008), 67 international non-governmental organisations with Council of Europe consultative status were put on this special list, including both organisations with a very general mandate (such as Amnesty International, the International Centre for the Legal Protection of Human Rights (INTERIGHTS) or the International Federation for Human Rights (FIDH)) and others whose competence relate only to one or a limited number of the provisions of the Charter (for instance, the World Organisation against Torture (OMCT), the Centre on Housing Rights and Evictions (COHRE) or Médecins du Monde - International). Any particular sector or concern can fall under the competence of more than one of the listed organisations. For instance, for the sector of disability alone, 11 organisations are competent, ranging from the more generalist such as the European Disability Forum (EDF) to the more specialist such as the Mental Disability Advocacy Center (MDAC) or International Association Autism-Europe (IAAE).

(35) Explanatory report to the CCP, para. 23.

(36) See, for instance, Collective Complaint No. 14/2003, *International Federation of Human Rights Leagues (FIDH) v. France*, which followed a request made by the GISTI (Groupe d'information et de soutien aux travailleurs immigrés), a French NGO, to the FIDH; or Collective Complaint No. 42/2007, *International Federation of Human Rights (FIDH) v. Ireland*, where the FIDH endorses the concerns of the Free Legal Advice Centre, a national Irish NGO.

(37) Explanatory report to the CCP, para. 31.

of any criteria on a national level, [on the basis of] factors such as the number of members and the organisation's actual role in national negotiations' (35) (CCP, art. 1).

In addition, States may, either when ratifying the Collective Complaints Protocol or later, declare that they recognise the right of any other representative national non-governmental organisation within their jurisdiction which has particular competence in the matters governed by the Charter, to lodge complaints against them in the area in which they have such competence (CCP, art. 2). When making such a declaration, the State concerned does not identify which NGOs it considers sufficiently 'representative' and qualified for the purposes of this provision. This is a matter for the European Committee of Social Rights to decide, when examining the admissibility of the complaint. While few States have at yet made such a declaration, this does not constitute in practice an obstacle for the organisations who would benefit from this to have their concerns raised under the collective complaints procedure. Such organisations routinely have those concerns 'endorsed' by an international NGO put on the list of the Governmental Committee, in order for the complaint to be presented in the name of that INGO (36).

Remarkably, and in contrast to most similar procedures for the settlement of disputes between private parties and States, the CCP does not require that the local remedies available to the complainant organisation be exhausted before a collective complaint is filed with the ECSR. The explanation is that the collective complaints procedure - which is modelled on the procedure established within the ILO before the Freedom of Association Committee - is not meant to address specific (or individual) instances of violation of the European Social Charter. Instead, 'complaints may only raise questions concerning non-compliance of a state's law or practice with one of the provisions of the Charter. Individual situations may not be submitted' (37): it is to this feature, and not to nature of the

organisations authorized to file a complaint, that the adjective 'collective' refers. For the same reason, a complaint may be declared admissible 'even if a similar case has already been submitted to another national or international body'; and 'the fact that the substance of a complaint has been examined as part of the "normal" government reports procedure does not in itself constitute an impediment to the complaint's admissibility' (38). This has been confirmed in the admissibility decision adopted on the first collective complaint to have been filed under the CCP, where the ECSR noted:

The object of [the collective complaints] procedure, which is different in nature from the procedure of examining national reports, is to allow the Committee to make a legal assessment of the situation of a state in the light of the information supplied by the complaint and the adversarial procedure to which it gives rise. Neither the fact that the Committee has already examined this situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent supervision cycles do not [*sic*] in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party (39).

When a complaint is filed under the CCP, the ECSR first examines whether it is admissible under the conditions summarized above. Following the decision on admissibility, it examines the evidence and arguments presented by the complainant organisation and the defending State, taking also into account any observations submitted by other States parties to the Protocol or by the ETUC, the UNICE or the IOE. The Committee then adopts a report containing its conclusions as to whether or not the State concerned has complied with the Charter. This report is transmitted to the Committee of Ministers and made public either when the Committee of Ministers adopts a resolution on the basis of the report, or no more than four months following the transmission of the report. The resolution of the Committee of Ministers based on the report drawn up by the ECSR is adopted by a majority of the States parties to the

(38) *Id.*

(39) *International Commission of Jurists v. Portugal*, Complaint No. 1/1998, decision on the admissibility of 10 March 1999, para. 10. In addition, the Committee noted that the provision at stake (article 7(1) of the Charter) was only examined every four years under the reporting mechanism, and that the information provided by the International Commission of Jurists related to events subsequent to the period examined during the previous cycle of control. The Committee concluded that 'The legal principles *res judicata* and *non bis in idem* relied on by the Portuguese Government do not apply to the relation between the two supervisory procedures' (para.13).

Charter voting (40). While the Committee of Ministers must act on the basis of the determinations of the ECSR concerning the merits of the complaint, the resolution 'may be based on social and economic policy considerations' (41).

In addition, Article 9(1) of the CCP provides that if the ECSR finds that the Charter has not been complied with, 'the Committee of Ministers shall adopt, by a majority of two-thirds of those voting, a recommendation addressed to the Contracting Party concerned'. In fact, and in violation of the clear wording of this provision which suggests that this should be automatic (42), only once did the Committee of Ministers adopt an individual recommendation following a finding of non-compliance with the Charter based on a collective complaint (43). That is not the say however that the decisions adopted by the ECSR on collective complaints are not adequately followed upon. Rather, the follow-up to such recommendations is ensured by the complementarity between the collective complaints procedure and the periodical state reporting mechanism described above: the States whose legislation or policies are found to have violated to Charter are to provide information on the measures taken to comply with the recommendation of the Committee of Ministers in their next periodical report submitted under Article 21 of the Charter.

Over a period of ten years since the entry into force of the CCP, 47 collective complaints have been filed. The procedure is remark-

(40) The Governmental Committee may be consulted in the course of this procedure, upon the request of the State party to the procedure, under the conditions set out in Article 9(2) of the CCP. One of these conditions is that the report of the ECSR raises 'new issues', i.e., that the ECSR has taken a position on a new question of interpretation of the Charter. The motives for consulting the Governmental Committee are not clear since it would clearly run against the division of tasks between the ECSR and the Governmental Committee as agreed in the Turin Protocol to allow the latter to give its opinion about the soundness of the interpretation of the Charter by the ECSR. Thus, 'it must be that the purpose of a reference to the Governmental Committee is to allow it to give an opinion as to the policy considerations that the Committee of Ministers might take into account when deciding on what course of action it should adopt following the [ECSR's] report on the complaint' (D. HARRIS and J. DARCY, *The European Social Charter*, cited above, p. 368).

(41) Explanatory Report, para. 46.

(42) This author shares the view expressed in this regard by D. HARRIS and J. DARCY, *The European Social Charter*, cited above, p. 367.

(43) Recommendation RecChS(2001)1 on Collective complaint No. 6/1999, Syndicat national des Professions du tourisme against France (adopted by the Committee of Ministers on 31 January 2001 at the 738th meeting of the Ministers Deputies) (concerning a discrimination, in violation of Article 1(2) of the Charter, against interpreter guides and national lecturers with a state diploma, who cannot conduct guided tours on certain sites).

ably fast, with a decision on the merits generally adopted within 18 months of the initial filing of the complaint. It is cheap. And, in comparison to many other procedures before human rights bodies, it is relatively effective. Even more remarkable, however, has been the impact of the collective complaints procedure on the substantive law of the Charter. Not only did the CCP provide the Charter with an important visibility, which it would have been unable to achieve if the supervisory mechanism has remained limited to State reporting. It also illustrated, in practice, how the rights of the Charter could be justiciable, and how a 'violations approach' could be adopted in situations which hitherto did not seem to lend themselves to such a development.

III. - The undertakings under the European Social Charter

The full list of the undertakings of the States parties to the Revised Charter is the following (44) :

<i>Right of the Charter (in the wording of the Revised ESC)</i>	<i>Introduced by</i>	<i>Group for the purposes of State reporting</i>
Article 1 - The right to work	European Social Charter (1961) (45)	Group 1 : employment, training and equal opportunities
Article 2 - The right to just conditions of work		Group 3 : labour rights
Article 3 - The right to safe and healthy working conditions		Group 2 : health, social security and social protection
Article 4 - The right to a fair remuneration		Group 3 : labour rights

(44) The provisions belonging to the hard core are in bold. The distinction between hard core and non hard core provisions, however, has lost much of its importance since the streamlining of the reporting procedure : see above, text corresponding to nn. 22-30.

(45) Although Articles 1-19 of the (Revised) European Social Charter replicate the rights originally listed in the 1961 European Social Charter, certain rights have been reformulated. Particularly, the requirement of gender equality has been taken into account in all the provisions; the protection of maternity, the social protection of mothers, and the social, legal and economic protection of employed children have been improved; and article 15, on the rights of persons with disabilities, has been rewritten in order to emphasize the values of autonomy and independence.

<i>Right of the Charter (in the wording of the Revised ESC)</i>	<i>Introduced by</i>	<i>Group for the purposes of State reporting</i>
Article 5 - The right to organise		Group 3 : labour rights
Article 6 - The right to bargain collectively		Group 3 : labour rights
Article 7 - The right of children and young persons to protection		Group 4 : children, families, migrants
Article 8 - The right of employed women to protection of maternity		Group 4 : children, families, migrants
Article 9 - The right to vocational guidance		Group 1 : employment, training and equal opportunities
Article 10 - The right to vocational training		Group 1 : employment, training and equal opportunities
Article 11 - The right to protection of health		Group 2 : health, social security and social protection
Article 12 - The right to social security		Group 2 : health, social security and social protection
Article 13 - The right to social and medical assistance		Group 4 : children, families, migrants
Article 14 - The right to benefit from social welfare services		Group 2 : health, social security and social protection
Article 15 - The right of persons with disabilities to independence, social integration and participation in the life of the community		Group 1 : employment, training and equal opportunities
Article 16 - The right of the family to social, legal and economic protection		Group 4 : children, families, migrants
Article 17 - The right of children and young persons to social, legal and economic protection		Group 4 : children, families, migrants

<i>Right of the Charter (in the wording of the Revised EESC)</i>	<i>Introduced by</i>	<i>Group for the purposes of State reporting</i>
Article 18 – The right to engage in a gainful occupation in the territory of other Parties		Group 1 : employment, training and equal opportunities
Article 19 – The right of migrant workers and their families to protection and assistance		Group 4 : children, families, migrants
Article 20 – The right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex	Rights included in the Additional Protocol of 5 May 1988	Group 1 : employment, training and equal opportunities
Article 21 – The right to information and consultation		Group 3 : labour rights
Article 22 – The right to take part in the determination and improvement of the working conditions and the working environment		Group 3 : labour rights
Article 23 – The right of elderly persons to social protection		Group 2 : health, social security and social protection
Article 24 – The right to protection in cases of termination of employment	New rights added in the 1996 Revised European Social Charter	Group 1 : employment, training and equal opportunities
Article 25 – The right of workers to the protection of their claims in the event of the insolvency of their employer		Group 1 : employment, training and equal opportunities
Article 26 – The right to dignity at work		Group 3 : labour rights
Article 27 – The right of workers with family responsibilities to equal opportunities and equal treatment		Group 4 : children, families, migrants

<i>Right of the Charter (in the wording of the Revised EESC)</i>	<i>Introduced by</i>	<i>Group for the purposes of State reporting</i>
Article 28 – The right of workers' representatives to protection in the undertaking and facilities to be accorded to them		Group 3 : labour rights
Article 29 – The right to information and consultation in collective redundancy procedures		Group 3 : labour rights
Article 30 – The right to protection against poverty and social exclusion		Group 2 : health, social security and social protection
Article 31 – The right to housing		Group 4 : children, families, migrants

It is of course not possible, within the confines of this chapter, to review the extensive jurisprudential developments under the European Social Charter (46). Instead, the remainder of this section will highlight three important contributions of the European Committee of Social Rights to the general theory of economic and social rights.

1. – *The European Social Charter as a human rights instrument*

It deserves emphasis first of all that the ECSR has sought to read the Charter as a *human rights instrument*, leading it not only to adopt a dynamic reading of the Charter, but also to base its interpretation taking into account other human rights treaties including similarly worded provisions. The impact of such reading was particularly remarkable in the case of *FIDH v. France*, where the Committee went so far as to set aside the explicit restriction of the scope of application of the Charter to the nationals of the States parties in the name of human dignity and because the 1989 Convention on the Rights of the Child, which it cited, does not contain

(46) See, for the most recent compendium, Lenia SAMUEL, *Fundamental Social Rights. Case law of the European Social Charter*, Council of Europe Publ., 2nd ed. 2002. However, this volume presents the views adopted by the Committee without any critical commentary or analytical framework.

a similar restriction (47). As already noted, paragraph 1 of the Appendix to the Revised European Social Charter provides that a wide range of social rights protected under the Charter, including the right to social and medical assistance (Article 13 para. 1) and the right to the protection of the child (Article 17), at stake in the *FIDH v. France* case, covers foreigners 'only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned'. The complaining non-governmental organization nevertheless considered that the Revised European Social Charter had been violated by France, since French law excluded the provision of medical assistance to children of undocumented migrants on French territory, except as regards treatment for emergencies and life threatening conditions. In its decision on the merits of 8 September 2004, the ECSR noted that 'as a human rights instrument to complement the European Convention on Human Rights', the Charter should be read, in accordance with the Vienna Convention on the Law of Treaties, as 'a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity'. It also noted that the restriction to the scope of application *ratione personae* of the Charter 'treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being', and that it 'impacts adversely on children who are exposed to the risk of no medical treatment'. Since 'health care is a prerequisite for the preservation of human dignity', it concluded, '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'.

The case of *Marangopoulos Foundation for Human Rights v. Greece* provides us with another example. In that case, the ECSR

(47) *International Federation for Human Rights (FIDH) v. France*, Complaint No. 14/2003, decision on the merits of 8 September 2004. There is no suggestion here that this case would have inaugurated this practice. Indeed, the ECSR already made clear under the State reporting mechanism that it reads the European Social Charter as a human rights instrument, which implies, in particular, that it examines not only the legal framework in the States parties, but also the implementation in practice (see, e.g., Conclusions XIII-3, pp. 283 and 286). In *ICJ v. Portugal*, the first collective complaint it had to deal with, the Committee recalled that 'the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact' (*ICJ v. Portugal*, complaint No. 1/1998, decision on the merits of 9 September 1999, para. 32).

was asked to consider whether Greece had failed to comply with Article 11 of the European Social Charter, which guarantees the right to protection of health, due to what the complainant organisation considered to be its failure to take sufficient account of the environmental effects or to develop an appropriate strategy to prevent and combat public health risks in the main areas where lignite is mined. The Committee considered that Article 11 of the Charter includes a right to a healthy environment. It cited in this respect the case-law of regional human rights bodies (the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Commission on Human and People's Rights), as well as the position of the UN Committee on Economic, Social and Cultural Rights. It went on:

202. Under Article 11 of the Charter, everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable. The Committee sees a clear complementarity between Article 11 of the Charter and Article 2 (right to life) of the European Convention on Human Rights, as interpreted by the European Court of Human Rights (General Introduction to Conclusions XVII-2 and 2005, statement of interpretation of Article 11, §5). Measures required under Article 11 should be designed, in the light of current knowledge, to remove the causes of ill-health resulting from environmental threats such as pollution (this link was established in Conclusions XV-2, Poland, Article 11 §1, pp. 446-449).

203. In order to fulfil their obligations, national authorities must therefore:

- develop and regularly update sufficiently comprehensive environmental legislation and regulations (Conclusions XV-2, Addendum, Slovakia, pp. 201-205);
- take specific steps, such as modifying equipment, introducing threshold values for emissions and measuring air quality, to prevent air pollution at local level and to help to reduce it on a global scale (Conclusions 2005, Moldova, Article 11§3, pp. 452-457);
- ensure that environmental standards and rules are properly applied, through appropriate supervisory machinery (see, *mutatis mutandis*, International Commission of Jurists v. Portugal, aforementioned decision, §33);
- inform and educate the public, including pupils and students at school, about both general and local environmental problems (Conclusions 2005, Moldova, Article 11§2, pp. 450-452);
- assess health risks through epidemiological monitoring of the groups concerned.

On the basis of this standard, the ECSR found that Greece had not complied with its obligations under the Charter (48). What is

(48) Greece was found not to be in compliance with the European Social Charter also as regards other provisions of the Charter.

noteworthy in this case is not only that the Committee identified a right to a healthy environment in the Charter, following a tendency of other human rights bodies on which it explicitly relies. It is also that the Committee goes at great lengths to provide the States parties with precise guidance about their obligations under the Charter, offering, in para. 203 of its decision, a recapitulation of the case-law on the basis of which it assesses the situation in Greece. This pedagogical approach is equally visible in the reporting mechanism, particularly by the adoption of general introductions preceding the presentation of conclusions relating to specific national situations.

2. – *The non-discrimination provision as a bridge towards the justiciability of social and economic rights*

Another equally remarkable feature of the case-law resides in the uses of the non-discrimination clause, inserted in the Revised European Charter. With the adoption of the Revised European Social Charter in 1996, Article E was included in Part V of the Revised Charter, which contains the 'horizontal' clauses applicable to the generality of its substantive clauses (49). This provision, modeled on Article 14 of the European Convention on Human Rights, prohibits discrimination in the enjoyment of the rights set forth in the Charter. A first characteristic of the jurisprudence developed by the ECSR on the basis of that provision concerns the question of the burden of proof. The Committee imposes a shifting of the burden of proof when the complainant organisation brings forward facts which lead to establish a presumption of discrimination: according to the Committee, 'when credible evidence is adduced alleging discrimination it becomes incumbent on the State party concerned to answer to the allegations by pointing to, for example, legislative or other measures introduced, statistics and examples of relevant case-law' (50).

Even more importantly, the non-discrimination clause was used in order to affirm the justiciable nature of social rights which, in principle, are subject to progressive realization. In its decision on

(49) See above, n. 14, on the structure of the Revised European Social Charter.

(50) *OMCT v. Greece*, Complaint No. 17/2003, decision on the merits of 7 December 2004, para. 46, and *ERRC v. Greece*, Complaint No. 15/2003, decision on the merits of 8 December 2004, para. 50.

the merits of Collective complaint n° 13/2002 directed by Autisme-Europe against France, the European Committee of Social Rights concluded that France had violated Articles 15(1) (obligation to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes whenever possible) and article 17(1) (right to education by the provision of institutions and services sufficient and adequate) of the revised European Social Charter, either alone or in combination with Article E (non-discrimination), because the proportion of children with autism being educated in either general or specialist schools was much lower than in the case of other children, whether or not disabled, and because of the chronic shortage of care and support facilities for autistic adults. The Committee cited the judgment of the European Court of Human Rights in *Thimimenes v. Greece* (51) to the effect that the principle of non-discrimination 'is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different'. Indirect discrimination, the Committee noted, 'may arise by failing to take due and positive account of all relevant differences or by failing to take adequate steps to ensure that the rights and collective advantages that are open to all are genuinely accessible by and to all' (para. 52). While acknowledging that the realisation of certain rights having important budgetary implications could require an effort in time, the ECSR considered – clearly inspired here by the approach adopted by the UN Committee on Economic, Social and Cultural Rights with respect to the obligations of the Covenant on Economic, Social and Cultural Rights which are to be progressively realized (52) – that

When the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of avail-

(51) Eur. Ct. HR (GC), *Thimimenes v. Greece*, Appl. No. 34369/97, judgment of 6 April 2000.

(52) See in particular CESCR, General comment No. 5: Persons with disabilities, adopted at the 11th session of the Committee (1994) (UN doc. E/1995/22), in *Compilation of general comments and general recommendations adopted by human rights treaty bodies* (UN doc. HRI/GEN/1/Rev.7, 12 May 2004), p. 26: 'since the Covenant's provisions apply fully to all members of society, persons with disabilities are clearly entitled to the full range of rights recognized in the Covenant. In addition, insofar as special treatment is necessary, States parties are required to take appropriate measures, to the maximum extent of their available resources, to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, flowing from their disability'.

able resources. States must be particularly mindful of the impact that their choices will have for groups with heightened vulnerabilities as well as for others persons affected including, especially, their families on whom falls the heaviest burden in the event of institutional shortcomings (53).

The Committee found that, 'notwithstanding a national debate going back more than twenty years about the number of persons concerned and the relevant strategies required', France had failed to achieve sufficient progress in advancing the provision of education for persons with autism. It therefore was in violation of the Revised European Social Charter, not simply because of its failure to achieve a particular result, but because it had not proven that it had adopted measures to the maximum extent of its available resources in order to address as a matter of priority the situation of vulnerable groups such as persons with disabilities. The decision illustrates how the requirement of non-discrimination may lead to guide the realisation of socio-economic rights by identifying the categories which, because of their particular vulnerability, deserve special attention.

While *Autisme-Europe v. France* concerned the right to education, other decisions concerned, for instance, the right to housing: in *ERRC v. Bulgaria* (54), the Committee confirmed its view that, while 'States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter' (para. 35), 'the measures taken must meet the following three criteria: (i) a reasonable timeframe, (ii) a measurable progress and (iii) a financing consistent with the maximum use of available resources' (para. 37). In that case, Bulgaria was found to have violated the Charter because 'notwithstanding the clear political will (...) to improve the housing situation of Roma families, [the programmes adopted to improve the housing conditions of the Roma segment of the population] have not yet yielded (*sic*) the expected results' (para. 38).

The decisions which have just been described illustrate the point made above, that the entry into force of the CCP in fact has a much more important impact on the substantive case-law than had been anticipated at the time of its adoption. Indeed, it is one character-

(53) At para. 53.

(54) *ERRC v. Bulgaria*, Complaint No. 31/2005, decision on the merits of 18 October 2006. But see also, for instance, *ERRC v. Italy*, Complaint No. 27/2005, decision on the merits of 7 December 2005, para. 21.

istic of the introduction of the collective complaints procedure that obligations which, previously, might have been seen as obligations of means imposed on the States parties to the Charter, are being increasingly understood as obligations of result – leading the Committee to find that a situation demonstrates a failure to comply with the Charter even when efforts are made in good faith, where such efforts are misdirected or fail to achieve measurable progress. The decision on the merits adopted in the *ICJ v. Portugal* case already provided an illustration of this: although acknowledging that 'the Government, especially in recent years, has taken many legal and practical measures to combat child labour, tackling its many diverse and complex causes', and that such measures 'have brought about a progressive reduction in the number of children working illegally', the ECSR nevertheless found Portugal to be in violation of the Charter because 'the problem has not been resolved' (55).

3. – Data collection as a condition of effective monitoring

Finally, mention should be made of the issue of statistics to be collected and presented by the States parties to the Charter. This has been contentious within the system of the Charter, both under the reporting mechanism and in the context of collective complaints. It has been noted above that one of the characteristics of the Charter, setting it apart from other human rights instruments in this regard, is that certain undertakings of the States are considered to be complied with if the guarantees in question benefit 'the great majority of the workers concerned' (56). A 'great majority' has been interpreted by the ECSR to mean 80 % of the workforce concerned (57). However, in order to decide whether those undertakings are complied with, the Committee per necessity must

(55) *ICJ v. Portugal*, complaint No. 1/1998, decision on the merits of 9 September 1999, para. 40. In his dissent, one member of the Committee, Mr Alfredo Bruto Da Costa, regrets that 'the Committee adopts a static and narrow concept of "legality", ignoring the natural and unavoidable viscosity of social changes, and the need of taking account of the dynamic aspect of social problems. Hence the fact that the progress achieved in the area (child work) in Portugal is mentioned but is not properly evaluated by the Committee'.

(56) See Article 33 of the European Social Charter. This concerns provisions which in many jurisdictions are implemented through the conclusion of collective agreements.

(57) Concl. XIII-5, p. 47 (Finland); Concl. XIII-5, p. 158 (Portugal).

receive statistical data from the States parties, allowing it to verify whether that figure is attained. The States have resisted this obligation to produce statistics for the Committee when such statistics are not readily available, however, in particular because of the costs and burden of collecting them. The Governmental Committee in fact went so far as to question 'the propensity of the Independent Experts to ask for statistics' and to 'emphasize once more that there may be cases where it is difficult to bring such data together and often impossible to provide figures that are recent' (58); and it denied that States should be obliged to collect statistics not readily available (59).

This has not deterred the ECSR from emphasizing the importance of data collection even in other domains, in particular in order to identify the existence of discrimination (60). In *European Roma Rights Centre v. Italy* for instance, where Italy flatly stated that it could not evaluate whether the Roma were at great risk of being homeless since it does not collect data on this issue, the Committee emphasized that 'when it is generally acknowledged that a particular group is or could be discriminated against, the state authorities have a responsibility for collecting data on the extent of the problem (...). The gathering and analysis of such data (with due safeguards for privacy and against other abuses) is indispensable to the formulation of rational policy. Similarly, if homelessness is to be progressively reduced as required by Article 31§2 of the Revised Charter, states will need the necessary factual information to deal with the problem. The regular collection of detailed information and statistics is a first step towards achieving this objective (...)' (61).

IV. – Conclusions

It can safely be asserted that, within the next few years, with the development of the collective complaints mechanism and the pro-

(58) Governmental Committee, V, 3.

(59) Governmental Committee, XIII-1, 162. See D. HARRIS and J. DARCY, *The European Social Charter*, cited above n. 2, p. 312, from whom I borrow these references.

(60) Concl. 2005 (France), Article 31(2), p. 268.

(61) Collective complaint No. 27/2004, *ERRC v. Italy*, decision on the merits of 7 December 2005, §23. See also *ERRC v. Greece*, Collective complaint No. 15/2003, decision on the merits of 8 December 2004, §27.

gressive 'judicialization' of the monitoring performed by the European Committee of Social Rights, the importance of the European Social Charter will continue to grow. In time, it will not only have a deep impact on the educational, social and employment policies of the member States of the Council of Europe. Its significance will also be important for the development of international and comparative jurisprudence in the field of economic and social rights, at a time when certain domestic courts are recognizing the justiciability of these rights and when the International Covenant on Economic, Social and Cultural Rights is moving in this same direction. We are far from the low-profile, bureaucratized, and almost invisible instrument the European Social Charter has been for the first thirty years of its existence. The Charter is leading an entirely new life, following its rebirth in the 1990s. This spectacular revival shall be complete when, in its methods of interpretation, the European Committee of Social Rights will develop tools and doctrines which will be both inspired by comparative and international jurisprudence, and serve as a source of inspiration both for regional and international human rights bodies, and for domestic courts (62). Then, the Charter will have definitively broken away from its origins, and will have arrived fully at maturity.

(62) See particularly, for a study of this development, International Commission of Jurists, *Courts and the Legal Enforcement of Economic, Social and Cultural Rights. Comparative experiences of justiciability*, Geneva, 2008, 121 pages.