State obligations in relation to housing rights - views of the ECSR

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On reading the FEANTSA Report, "*Housing-related binding obligations on States*", it can be noted that a large majority of the European case law creating positive obligations comes from the decisions and conclusions adopted by the European Committee of Social Rights (hereinafter "*ECSR*" or "*Committee*"), the watchdog body of the European Social Charter. This is hardly surprising: the revised European Social Charter, adopted in 1996, is the only European normative instrument that guarantees the right to housing as a human right, as a fundamental social right, in Article 31.[1]

No mention is made of the right to housing either in the European Convention on Human Rights (hereafter the "*Convention*") - which concerns civil and political rights, as well as fundamental freedoms - or in the Charter of Fundamental Rights of the European Union - which timidly refers to the right to housing assistance in the third paragraph of its Article 34, in connection with the social assistance often necessary to ensure a dignified existence for those without sufficient resources. This partly explains why the case law of the ECSR, in relation to the right to housing, hardly refers to the decisions or judgements of other European courts.

Certainly, the Committee shows great sensitivity to the case law of the European Court of Human Rights. This holds true for the use of the concept of "*discrimination*" applied to the right to housing; for the consideration of the vulnerability of the "*Roma*" group, in law and in fact, and the preservation of cultural diversity; for the respect of procedural safeguards in relation to forced evictions. In general, the Committee stresses that its interpretation of Article 31 must be consistent with the Court's interpretation of the relevant provisions of the Convention applicable to the subject under consideration. This was the approach taken, for example, in the decision on the merits of complaint No. 53/2008, *FEANTSA v Slovenia*, (8 September 2009), which considered certain restrictions on the rights of private property owners to be legitimate.

> "*34. In this respect, it is clear from several Court judgments that not all interference by a state in the relationship between landlord and tenant can be regarded as contrary to the Convention. For example, in the case Mellacher and Others v Austria, the Court held that the amendments made to Austrian legislation on housing, which provided for a number*

1. *"Article 31 – The right to housing*
With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
1 to promote access to housing of an adequate standard;
2 to prevent and reduce homelessness with a view to its gradual elimination;
3 to make the price of housing accessible to those without adequate resources."

> *of restrictions on the rights of private landlords with regard to existing leases (rents had been strictly controlled and it had been prohibited to terminate existing leases) did not, contrary to what the applicants maintained, amount to a de facto expropriation but amounted merely to a control of the use of the property with a view to finding a solution to the housing problems of a significant number of citizens, in the public interest, the interference being proportionate in terms of the balance to be struck between the public aim pursued and the interests of the owners concerned.*
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> *35. Likewise, in the case of Thörs v Iceland, the Court, when assessing on the right of pre-emption conferred on tenants by existing Icelandic law, at a purchase price that was, moreover, regulated by statute, dismissed the owner's application as being manifestly ill-founded*".

With regard to the content and scope of states' housing obligations, the ECSR refers more usefully to international UN jurisprudence and, in particular, to the decisions of the UN Committee on Economic, Social and Cultural Rights relating to the right to housing as an element of the right to an adequate standard of living under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). For example, regarding the notion and elements of "*adequate or suitable housing*", see the decision on the merits of claim No. 33/2006, *International Movement ATD Fourth World v France* (5 December 2007) or, more recently, claim No. 110/2014, *International Federation of Human Rights Leagues (FIDH) v Ireland* (12 May 2017). The latter reads:

> *"118. The Committee has repeatedly held that the right to housing for families encompasses housing of an adequate standard and access to essential services (see §106 above). In this respect the Committee takes into account General Comment No. 4 of the UN Committee of Economic, Social, and Cultural Rights Committee which provides that 'Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well' and that 'An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services'."*

But what are the obligations of European States in relation to housing under the Revised Social Charter system?

First of all, it is necessary to specify that the right to housing, as protected by Article 31 of the Revised Social Charter, is not yet unanimously ratified at European level. Seven States remain party to the 1961 Social Charter (unrevised) which does not contain this article.[2] Moreover, of the thirty-five States parties to the Revised Social Charter, which is subject to an "*à la carte*" ratification mechanism for its provisions, most of them have not yet accepted the three paragraphs of Article 31: hardly a dozen States are bound by this article.[3] This does not mean that other states do

2. Croatia, Czech Republic, Denmark, Iceland, Luxembourg, Poland, United Kingdom.

3. Finland, France, Greece, Italy, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden and Turkey (who accepted all three paragraphs of Art. 31), Andorra and Ukraine (who accepted two paragraphs of this article), and Latvia and Lithuania (who accepted only the first paragraph of the article).

not have obligations in relation to the right to housing, as these can be derived from other articles, as will be seen below.

Secondly, Article 31 does not guarantee the right to housing as an individual subjective right of each person to enjoy a dwelling of an adequate standard for oneself or one's family. The Revised Social Charter does not impose an obligation of results in relation to housing, or an obligation of immediate implementation (like the right to vote in relation to political rights, or the right to emergency medical assistance in the field of social rights).

Rather, the Social Charter places obligations on States to take positive measures to achieve the legal, economic, administrative, practical and operational conditions necessary to ensure that people have effective access to, and can live in, housing of an adequate standard, and that they are not illegitimately deprived of this opportunity. In most cases, these are "*progressive realisation*" obligations: States are committed to act to progressively realise the conditions necessary for the effective enjoyment of the right to housing. This is clear from the text of Article 31. Indeed, according to this article, States Parties undertake, inter alia, "*1 to promote access to housing of an adequate standard; 2 to prevent and reduce homelessness with a view to its gradual elimination; 3 to make the price of housing accessible to those without adequate resources*".

This is not to say that States can afford to neglect the right to housing and not to take seriously the legal obligations arising from the Social Charter. On the contrary, they are obliged to strive, with continuity, to put in place all the necessary conditions and adopt all the necessary measures to make the right to housing effective. The Social Charter requires each State party to make progress towards this goal, "*within a reasonable timeframe, through measurable progress, using the best resources available*". Failure to make progress means failing to comply with the Social Charter and violating the obligation to ensure the effective implementation of the right to housing.

It is precisely in this sense that the ECSR has interpreted and applied the provisions of the Social Charter relating to the right to housing and has been able - thanks to the Charter's supervisory procedures - to clarify and develop the content of State obligations in relation to housing. This refers, of course, to the procedure for evaluating State reports, but most of all to the collective complaints procedure. The latter - accepted so far by sixteen states - gives the international and national social partners, as well as international non-governmental organisations (INGOs) with consultative status with the Council of Europe, the possibility to address the Committee directly to decide on possible violations of the Social Charter in the countries concerned.

This is a quasi-judicial procedure, characterised by the principle of adversarial proceedings between the complainant organisation and the state concerned, essentially in writing, during which several forms of voluntary intervention are possible. Unlike cases brought before the European Court of Human Rights, it is not open to individual applications. Its purpose is to obtain a legal assessment of matters of "*collective importance*". When the Committee finds a violation of the Charter, the States concerned are obliged to follow up its decision by submitting to it and to the Committee of Ministers of the Council of Europe the measures taken to remedy the situation.

A dozen of decisions adopted by the ECSR over the last twenty years have been specifically related to the right to housing, thanks to the activism and the crucial role played by some INGOs which have submitted to the Committee well-detailed complaints concerning the situation of several

European States: FEANTSA, of course, but also the International Movement ATD Fourth World, the Centre on Housing Rights and Evictions (COHRE), the International Federation of Human Rights Leagues (FIDH), the European Roma Rights Centre (ERRC) and the Conference of European Churches.

Here are some examples of the possible content of positive obligations of European States in relation to housing rights.

The Committee first underlined[4] that this right must take a practical and effective, rather than purely theoretical, form:

> "*54. This means that, for the situation to be compatible with the treaty, states party must:*
>
> *a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;*
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> *b. maintain meaningful statistics on needs, resources and results;*
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> *c. undertake regular reviews of the impact of the strategies adopted;*
>
> *d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;*
>
> *e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.*"[5]

This general approach to the operational content of the State's housing obligations has been endorsed and clarified by the Committee on several occasions. However, there is a need to agree on the legal value of the different points made. In its decision *International Federation of Human Rights Leagues (FIDH) v Ireland* (12 May 2017), the Committee stated in this respect that:

> "*... failure to comply with each and all of the above requirements does not per se necessarily amount to a violation of the right to family housing. Nor does the fulfilment of more or all requirement necessarily exclude that in a given situation the State obligation to ensure the right to family housing is not properly satisfied. The Committee will rather consider each situation on its merits and specificity, on a case by case analysis, taking into account all the factors relevant to the circumstances of the case. (§ 110)*"

This decision is very interesting, in my view, for several reasons. Firstly, the FIDH alleged that Ireland was failing to respect the right to housing of families, primarily on the grounds that some social housing was inadequate and that various aspects of the programmes for the rehabilitation of the social housing stock were not in conformity with the obligations set out in the Revised Social Charter. The case concerned the content of State obligations to provide an adequate standard of housing.

In order to answer, the Committee first clarified the meaning of "*adequate housing*" with "*essential services (such as heating and electricity). Adequate housing refers not only to a dwelling, which*

4. For the first time on 5 December 2007, in the decision on the merits of complaint no. 33/2006, *International Movement ATD Fourth World v France*. The complaint concerned the lack of affordable housing in France and the way in which social housing was allocated to the poorest people, and the eviction procedure for unauthorised occupants, which led to homelessness because, among other things, no authority was responsible for finding a prior solution for where the evicted families could live.

5. European Committee of Social Rights, Complaint No. 39/2006, Decision on the Merits of 5 December 2007, para. 53-54.

must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence" (§ 106).

The Committee therefore considered that *"sewage invasions, contaminated water, dampness, persistent mould etc. go to the core of adequate housing, raising serious concerns from the perspective of both habitability and access to services"* (§ 119).

The Committee also noted that:

> "*...no complete statistics on the condition of local authority housing have been collected since 2002 by the Irish authorities and that in Ireland no national timetable exists for the refurbishment of local authority housing stock. It also takes into consideration the fact that a significant number of regeneration programmes adopted by the Government for local authority estates in the last decade have not been completed with the effect that a number of local authority tenants remain living in substandard housing conditions. (§ 120).*"

And held in conclusion, that *"the Government has failed to take sufficient and timely measures to ensure the right to housing of an adequate standard for not an insignificant number of families living in local authority housing and therefore holds that there is a violation of Article 16 of the Charter in this respect"* (§ 121), hence, a violation of the Revised Social Charter.

This decision is also interesting in that it shows that the protection of the right to adequate housing under the Revised Social Charter system extends beyond Article 31. The complaint concerned a violation of Article 16 (the right of the family to social, legal and economic protection). The Government raised a preliminary objection that the claim, which related to matters which in substance fell within Article 31, which had not been accepted by Ireland, should be held inadmissible. The ECSR rejected this objection, noting that Article 16 required the promotion of the protection of the family through the provision of adequate housing.

> "*25. (...) The fact that the right to housing is stipulated under Article 31 of the Charter, does not preclude a consideration of relevant housing issues arising under Article 16 which addresses housing in the context of securing the right of families to social, legal and economic protection (European Roma Rights Center (ERRC) v Bulgaria, Complaint No. 31/2005, Decision on admissibility 10 December 2005, §9, European Roma and Travellers Forum (ERTF) v The Czech Republic, Complaint No. 104/2014, decision on the merits of 27 May 2016, §§67-68.)*"

> "*107. (...) Article 16 partially overlaps with Article 31 of the Charter, in the sense that the notion of adequate housing and forced eviction are identical under Articles 16 and 31 (see Centre on Housing Rights and Evictions (COHRE) v Italy, Complaint No. 58/2009, decision on the merits of 25 June 2010, (§158).)*"

Thus, States parties that have not recognised Article 31, but have accepted Article 16, are also bound to provide housing of an adequate standard to families.

Another aspect where ECSR decisions have highlighted the character and content of the State's positive obligations in relation to the right to housing is the prevention and alleviation of homelessness.

Although deprivation of housing for non-payment of rent or illegal occupation is considered legitimate, and although states have a wide margin of appreciation to take measures in relation to urban planning, the obligation to prevent and alleviate homelessness requires them to take measures to prevent those threatened with eviction from becoming homeless.

This means that in the event of eviction, public authorities shall endeavour to seek alternative solutions in advance, give reasonable notice of the date of eviction and carry out the eviction in conditions that respect the dignity of the persons, as the ECSR has affirmed in a series of decisions concerning the violation of the housing rights of Roma individuals or families.[6] This also means that where the public interest or law enforcement justifies eviction, public authorities must ensure that the persons concerned are provided with alternative housing or financial assistance to find accommodation. Otherwise, the obligation to alleviate homelessness would not be satisfied, which was very clearly upheld by the Committee in a decision concerning evictions for non-payment of rent or unlawful occupation in France (Complaint No. 39/2006, *FEANTSA v France*, 5 December 2007, §§ 85-91).

The ECSR considers that the right not to be homeless and the right to adequate housing, protected by Article 31 §2, as well as by Article 16 in relation to the protection of the family, are so fundamental and inherent to the respect for human life and dignity, that States parties are exceptionally obliged to guarantee it to persons who do not fall within the personal scope of the Charter. This includes "*foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned, subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles 18 and 19.*"[7] However, several decisions have found violations of the right to adequate shelter and accommodation of unaccompanied foreign minors and foreign nationals who are illegally present in the territory of the respondent State.[8]

Finally, the ECSR has also held on the positive obligations to make Article 31 §3 effective, i.e. to make the cost of housing accessible to those without sufficient resources. I am referring in particular to the decisions of the International *Movement ATD Fourth World v France* of 5 December 2007 and *FEANTSA v Slovenia* of 8 September 2009, which show, inter alia, that States are obliged to promote the construction of social housing intended primarily for the most disadvantaged, to reduce the excessively long delays in the granting of social housing, and to provide housing subsidies for people on low incomes and disadvantaged categories of the population.

To conclude, these examples illustrate the direction in which the right to housing must be realised, under the Revised European Social Charter, which requires the respect and implementation of positive obligations by States and public authorities. They show the usefulness of a European normative system - such as the Social Charter - and its quasi-judicial monitoring procedure - such as that of collective complaints - in addressing and resolving the serious problems that

6. *European Roma Rights Centre (ERRC) v Greece*, Complaint No. 15/2003; *European Roma Rights Centre (ERRC) v Bulgaria*, Complaint No. 31/2005; *European Roma Rights Centre (ERRC) v France.* Claim No. 51/2008; *Centre on Housing Rights and Evictions (COHRE) v Italy*. Complaint No. 58/2009.

7. Scope of the Revised European Social Charter in terms of persons protected. Appendix to the Revised European Social Charter 1996. Available at: https://www.refworld.org/pdfid/3ae6b3678.pdf.

8. *Defence for Children International v The Netherlands*, Complaint No. 47/2008, decision on the merits of 20 October 2009; *Conference of European Churches (CEC) v The Netherlands*, Complaint No. 90/2013, decision on the merits of 1 July 2014; *International Commission of Jurists (ICJ) and European Council on Refugees and Exiles (ECRE) v Greece*, Complaint No. 173/2018, decision on the merits of 26 January 2021.

afflict the enjoyment of the right to housing in European countries. However, I would insist that the results are only beneficial and substantial if - and to the extent that - organised and committed civil society is able to make these tools available to it work effectively, calling the European States to account for their responsibilities in the field of housing. We can also hope that, in the near future, the European Pillar of Social Rights (EPSR), whose Principle 19 deals with housing and homelessness, will advance the content of EU secondary legislation on housing rights.