

(Re)discovering the European Social Charter to Protect the Health of People on the Move in Times of Backsliding

By *Kamilla Galicz**

Abstract: This article engages in a critical analysis of the European Social Charter’s scheme to safeguard the health of people on the move, including refugees, asylum-seekers and irregular migrants. It aims to assess how the European Committee of Social Rights has mobilised health-related rights to enhance the Charter’s protective potential against restrictive migration and asylum policies. By doing so, this article seeks to contribute to the debate on the relevance of social rights in the context of “human rights backsliding”. Accordingly, Section A outlines the state of the art and unpacks the research parameters. Section B reconstructs the Charter’s general scheme, personal scope and monitoring mechanisms, as well as its structure of health protection. Against this backdrop, Section C investigates the Committee’s interpretative techniques to safeguard the target group’s health in collective complaints. The qualitative case-law analysis demonstrates that the Charter protects the well-being of people on the move in a “doubly composite” way: from an internal perspective, health falls under multiple rights and their operationalisation requires an assessment of overlapping material scopes; from an external perspective, the Committee enhances the Charter’s potential by embedding it in its wider legal environment and fostering its linkages with the European Convention on Human Rights and other human rights treaties. Section D concludes with some critical reflections on the Charter’s role in Europe’s human rights architecture.

Key words: European Social Charter; Health; Human Rights Backsliding; Migration; Social Rights

A. Introduction: Social Rights Protection in Times of Backsliding

On 31 July 2025, a new collective complaint against Spain was registered by the European Committee of Social Rights (ECSR, Committee), the supervisory body of the European Social Charter signed in 1961 and revised in 1996 (ESC, RevESC, Charter).¹ Submitted by

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1 European Committee of Social Rights [ECSR], *Unión General de Trabajadores (UGT) v. Spain*, Complaint No. 250/2025, available in Spanish at <https://www.coe.int/en/web/european-social-charter/-/new-complaint-concerning-spain-3> (last accessed on 29 March 2026).

the *Unión General de Trabajadores* (UGT), it alleges the violation of several provisions² due to gaps in Spanish law and practice concerning prostitution and trafficking for sexual exploitation resulting in a serious lack of effective protection of the most vulnerable women and girls, such as young immigrants and those at risk of social exclusion. Since the 1995 Additional Protocol on the system of collective complaints entered into force in 1998, this has been the 250th complaint alleging breaches of social rights, including the right to protection of health. The growing number of complaints proves that it is indeed worth starting a dialogue about social issues in the Council of Europe (CoE). For long, the Charter has been deemed as a list of programmatic principles secondary to the rights and freedoms enshrined in the European Convention on Human Rights (ECHR). Moreover, the ECHR is equipped with an apparently far stronger monitoring mechanism guaranteed by the European Court of Human Rights (ECtHR), while the European Committee of Social Rights does not possess equally powerful tools to effectively enforce compliance with the Charter.³

To question such a stereotyped vision, this article engages in a critical analysis of the European Social Charter's scheme to safeguard the health of people on the move, including refugees, asylum-seekers and irregular migrants.⁴ It aims to assess how the Committee has mobilised health-related rights to enhance the Charter's protective potential against restrictive migration and asylum policies. By doing so, this article seeks to contribute to the debate on the relevance of social rights in the global context of "human rights backsliding", i.e., resistance to and misuse of the universal human rights doctrine.⁵ Forms

2 Alleged Charter breaches include Articles 1 §§ 2 and 4 (the right to work), 3 (the right to safe and healthy working conditions), 11 (the right to protection of health), 17 (the right of children and young persons to social, legal and economic protection), 19§ 1 (the right of migrant workers and their families to protection and assistance), 30 (the right to protection against poverty and social exclusion) and 31 (the right to housing) as well as Article E (non-discrimination) read in conjunction with Articles 1 § 2, 3, 11, 16, 20, 30 and 31 of the Revised Charter.

3 See discussion in *Infra* Section B.

4 To better reflect the complexity of migration patterns, this article endorses the umbrella term 'people on the move' as encompassing refugees, asylum-seekers and migrants arriving in Europe through irregular channels (given the lack of legal pathways) or those finding themselves in an irregular stay. However, this terminological choice does not intend to ignore or deny the differences between the statuses. Accordingly, the case-law analysis will take account the legal status of the groups of individuals whose Charter rights have been violated. See *Annick Pijnenburg / Conny Rijken*, *Moving beyond refugees and migrants: reconceptualising the rights of people on the move*, in *Interventions* 23 (2021), pp. 282-284.

5 Many critical theories have emerged arguing that e.g., "human rights law has failed to accomplish its objectives." *Eric Posner*, *The Twilight of Human Rights Law*, Oxford 2014, p. 7. To reaffirm the importance of human rights, see *Antonio Cassese*, *A Plea for a Global Community Grounded in a Core of Human Rights*, in *Antonio Cassese* (ed.), *Realizing Utopia: The Future of International Law*, Oxford 2012, pp. 136-138; *Frédéric Mégret / Philip Alston*, *Introduction: Appraising the United Nations Human Rights Regime*, in: *Frédéric Mégret / Philip Alston* (eds.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford 2020, pp. 1-36; *Gráinne de Búrca*, *Reframing Human Rights in a Turbulent Era*, Oxford 2021, Chapter 2; *Gráinne de Búrca / Katharine G. Young*,

of contestation and misappropriation, such as open defiance to courts and non-judicial monitoring bodies, subtle pressure to undermine their authority or abusive interpretation of human rights treaties have spread all over the globe.⁶ Such voices are even harsher when it comes to migrants' and refugees' rights that have been progressively curtailed by measures to securitise and externalise migration control.⁷ This paper claims that the existing human rights toolbox is indeed able to offer powerful counter-narratives to tackle backsliding, but coherence among the single instruments should be strengthened to foster each one's protective scope.

Crucially, this is the case of the European Social Charter. Accordingly, the paper is structured as follows. Section B outlines the Charter's structure, personal scope and monitoring mechanisms (para. I) and reconstructs the dynamic network of health-related rights (para. II). Against this backdrop, Section C investigates the Committee's interpretative techniques to operationalise Charter rights so as to safeguard the health of people on the move in collective complaints.⁸ The qualitative case-law analysis shows that the Charter protects the well-being of people on the move in a "doubly composite" way: from an internal perspective, health falls under multiple rights and their operationalisation requires an assessment of overlapping material scopes; from an external perspective, the ECSR embeds the Charter's interpretation in its wider legal environment and fosters its linkages with the ECHR and other International Human Rights Law (IHRL) instruments. This two-pronged interpretation method is a valuable tool but needs some adjustments to unlock the Charter's true potential. In light of these findings, Section D critically reflects on the Charter's role in Europe's human rights architecture.

B. The Charter's Variable Geometry of Protection

I. From a List of Principles to Enforceable Social Rights

To understand the Charter's structure, some contextualising remarks are in order. Initially, the ESC had been considered as merely containing long-term principles rather than enforceable entitlements. The reform process launched in the late Eighties and culminating in the 1996 revision amplified the scope of some rights and added new ones to address recently emerging social needs; yet, several CoE Member States have not ratified the revised ver-

The (mis)appropriation of human rights by the new global right: An introduction to the Symposium, in *International Journal of Constitutional Law* 21 (2023), pp. 205-223.

6 Janna Wessels, Reverse Strategic Litigation by Governments? Negotiating Sovereignty and Migration Control before the European Court of Human Rights, *American Journal of International Law Unbound* 118 (2024), pp. 214-218.

7 For a critical overview, see Michal Cenker / Daniel Holder, Migration and refugees: applying human rights to 'everyone'?, in: Gerard McCann / Félim Ó hAdhmaill (eds.), *International Human Rights, Social Policy and Global Development: Critical Perspectives*, Bristol 2021, pp. 129-139.

8 For the parameters of case selection, see the introductory paragraph of Section C.

sion.⁹ Also, the Charter has a structure different from other human rights treaties: after a short Preamble, Part I enshrines a list of 31 general undertakings regarding the effective realisation of the rights and principles protected thereof, which guides the interpretation of Part II containing the provisions on the concrete measures to be taken.¹⁰ Furthermore, it has a distinct personal scope compared to other IHRL treaties: pursuant to § 1 of the Appendix foreigners are included “only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.”¹¹ Exception is provided under § 2 to refugees and stateless persons as defined in the 1951 Refugee Convention relating to the Status of Refugees and the 1954 Convention on the Status of Stateless Persons.¹²

This limited *ratione personae* has been progressively widened by the Committee. In the 2004 Conclusions, the ECSR reminded the Contracting Parties of their human rights obligations vis-à-vis foreign nationals not protected by the Charter, including those unlawfully present on their territory.¹³ Crucially, it emphasised that State Parties “have guaranteed

- 9 For general analysis, see *David Harris, John Darcy*, The European Social Charter. Second Edition. Transnational Publishers, Ardsley, New York 2001, pp. 1-31; *Olivier De Schutter*, The Two Lives of the European Social Charter, in: Olivier De Schutter (ed.), The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l'Europe, Brussels 2010, pp. 11-17; *Karin Lukas*, The Revised European Social Charter: An Article by Article Commentary, Cheltenham 2021, pp. 2-9. For the updated status of ratifications: <https://www.coe.int/en/web/european-social-charter/signatures-ratifications> (last accessed on 29 March 2026).
- 10 Article A of the revised Charter distinguishes between hard core provisions and additional ones, among which State Parties may select which they consider to be bound by. States must select at least six of the nine hard core provisions (Articles 1, 5, 6, 7, 12, 13, 16, 19 and 20), and additional ones, provided that the total number of articles or numbered paragraphs by which they are bound is not less than sixteen articles or sixty-three numbered paragraphs. For the list of accepted provisions: <https://www.coe.int/en/web/european-social-charter/provisions-of-the-charter> (last accessed on 29 March 2026).
- 11 This may be explained by the fact that the Charter was the very first instrument of social protection, its original main focus was on labour rights and the drafters hence followed the convention models of the International Labour Organization (ILO). *Philip Alston*, Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System, in: Gráinne de Búrca / Paul Craig (eds.), Social Rights in Europe, Oxford 2005, p. 61. Likewise, the collective complaints procedure was inspired by Article 24 of the ILO Constitution. *Robin R. Churchill / Urfan Khaliq*, Violations of Economic, Social, and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter, in: Mashood Baderin / Robert McCorquodale (eds.), Economic, Social, and Cultural Rights in Action, Oxford 2007, p. 199.
- 12 Accordingly, under Articles 18 and 19 states are required to implement a flexible immigration policy towards each other's nationals with measures, e.g., liberalisation of regulations on the employment of foreign workers and facilitation of family reunification. Cf. *Matti Mikkola*, Social Human Rights of Migrants under the European Social Charter, in *European Journal of Social Security* 10 (2008), pp. 36-52; *Yana Litinska*, Healthcare Services for Asylum-Seekers: Untangling the European Social Charter, in *Medical Law Review* 32 (2024), pp. 3-5.
- 13 ECSR, Conclusions 2004, Statement of Interpretation, in CoE, Digest of the European Committee of Social Rights, Council of Europe, Strasbourg, June 2022, p. 212.

to foreigners not covered by the Charter rights identical to or inseparable from those of the Charter by ratifying human rights treaties—in particular the European Convention on Human Rights (ECHR)—or by adopting domestic rules whether constitutional, legislative or otherwise [...]”¹⁴. The approach to underscore the interrelatedness of human rights enshrined in human rights law instruments and domestic legal provisions was finetuned later on. In 2015, the Committee issued a statement of interpretation on refugees’ rights to promote an inclusive interpretation of the exception clause.¹⁵ Stressing “the urgent and unconditional need to treat with solidarity and dignity the men, women and children who arrive on European territory”,¹⁶ the Committee recalled that under the 1951 Geneva Convention refugee protection does not depend on the status determination procedure. On this basis, it underscored that asylum seekers fall within the Charter’s personal scope,¹⁷ which shall be interpreted in light of its object and purpose, i.e., “so as to give life and meaning to fundamental social rights.”¹⁸ Moreover, it stressed that “the Charter should also so far as possible be interpreted in harmony with other rules of international law”,¹⁹ including the Universal Declaration of Human Rights.²⁰

Remarkably, these statements of interpretation endorsed the reasoning of decisions taken in collective complaints, showing the Committee’s strategy to ensure coherence between the different monitoring mechanisms.²¹ Its decisions taken in complaints proceedings are not legally binding in the traditional meaning of the term, yet this does not imply that they are devoid of any legal consequence. First, under international law states shall implement these decisions in good faith.²² Second, the Committee has been appraised for its

14 Ibid.

15 ECSR, Statement of interpretation on the rights of refugees under the European Social Charter (elaborated during the 280th session of the European Committee of Social Rights in Strasbourg, 7-11 September 2015).

16 Ibid., para. 1.

17 Ibid., para. 6.

18 Ibid., para 7. In the 2011 Conclusions, it invited states to adopt unilateral declarations to extend the Charter’s scope of application to everyone within their jurisdiction. ECSR, Conclusions 2011, Personal Scope of the Charter, p. 9. Sadly, this initiative was not successful: only two States (Lithuania and the Netherlands) replied to the Committee’s letter, and both rejected the invitation to extend the Charter’s application. See *Giuseppe Palmisano*, The Rights of Asylum Seekers in Europe beyond the EU Charter of Fundamental Rights: Shortcomings and Potential of the European Social Charter, in: *Andrea Crescenzi / Rosita Forastiero / Giuseppe Palmisano* (eds.), *Asylum and the EU Charter of Fundamental Rights*, Napoli 2018, pp. 252-257.

19 ECSR, note 15, para. 7.

20 Ibid., para. 8. The decisions cited thereof will be analysed in Section C.

21 Originally, its supervisory function had covered statements of interpretation (similar to UN bodies’ general comments) and periodic reports, while the collective complaints procedure was introduced precisely to improve the effective enforcement of social rights. See Second preambular recital of the 1995 Additional Protocol.

22 *Andrea Spagnolo*, They Are not Enforceable, but States Must Respect Them: An Attempt to Explain the Legal Value of Decisions of the European Committee of Social Rights, in: Giovanni

“quasi-judicial”²³ working method and for the articulateness of its decisions that have been growingly appreciated by domestic courts as well.²⁴ Third, in the follow-up procedure the Committee of Ministers cannot reverse the ECSR’s legal assessment. If the decision finds non-compliance with the Charter, the Committee of Ministers shall issue a recommendation to the state involved and the next periodic report shall address what measures have been taken to remedy the situation.²⁵ Notwithstanding these points of strength, several lacunae of the supervision mechanism have been identified.²⁶ In particular, such gaps concern the low number of ratifications of the 1995 Protocol,²⁷ the lack of individual application channel (compared to the ECHR and other IHRL treaties),²⁸ the restricted group of organisations

Boggero / Francesco Costamagna / Lorenza Mola (eds.), *The European Social Charter Turns 60: Advancing Economic and Social Rights Across Jurisdictions*, European Papers 7 (2022), pp. 1500-1506.

- 23 *De Schutter*, note 9, pp. 36-37 on “progressive judicialization” of the Committee’s supervision; *Régis Brillat*, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in de Búrca / Craig (eds.), note 11, p. 32 on its “judicial procedure”; *Claudio Panzera*, *The Personal Scope of the European Social Charter: Questioning Equality*, in Jörg Luther / Lorenza Mola (eds.), *Europe’s Social Rights under the ‘Turin Process’ / Les droits sociaux de l’Europe sous le ‘Processus de Turin’*, Napoli 2016, pp. 179-188 on the ECSR’s “quasi (judicial) activism”.
- 24 On the Italian Constitutional Court, see *Spagnolo*, note 22; on the case study of dismissal reforms in Italy, France and Greece, see *Nikolaos A. Papadopoulos*, *Assessing the Effectiveness of the European Social Charter: A Case Study on Dismissal Reforms*, in: Giovanni Boggero / Francesco Costamagna / Lorenza Mola (eds.), *The European Social Charter Turns 60: Advancing Economic and Social Rights Across Jurisdictions*, European Papers 7 (2022). For a general discussion on epistemic authority, see *Jan Klabbers*, *Soft authority in global governance*, in: Mariolina Eliantonio / Emilia Korkea-aho / Ulrika Mörtz (eds.), *Research Handbook on Soft Law*, Cheltenham 2023, pp. 162-176.
- 25 Comments to Articles 8-10 of the Explanatory Report to the Additional Protocol to the European Social Charter. Cf. *Spagnolo*, note 22, pp. 1509-1510, *Giuseppe Palmisano*, *Collective Complaints as a Means for Protecting Social Rights in Europe*, London 2022, pp. 42-46.
- 26 *Alston*, note 11, pp. 49-67; *Churchill / Khaliq*, note 11, pp. 227-240, *Palmisano*, note 25, pp. 59-64; *Papadopoulos*, note 24, pp. 1587-1592.
- 27 In this regard, the main problem may not be that only 16 states have ratified the 1995 Protocol in 30 years, but the very fact that in the last 10 years only one country—Spain in 2022—has proceeded with the ratification and it has done so with a reservation excluding the Charter’s extension to irregular migrants. See Spain’s Declaration contained in the instrument of ratification of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaint deposited on 6 October 2022.
- 28 Since 2013, also the UN Committee on Economic, Social and Cultural Rights accepts individual and inter-state complaints. For an updated analysis of the UN’s monitoring system, see Part III in *Frédéric Mégret / Philip Alston* (eds.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford 2020.

that have a right to submit complaints,²⁹ and the political nature of the follow-up procedure left in the hands of the Committee of Ministers.³⁰

To wrap up, the Committee's innovative methods of interpretation have enhanced the Charter's potential to extend social rights to foreigners initially not covered by the ESC's personal scope. Nevertheless, its institutional position to ensure compliance is still rather weak and the low ratification rate of the 1995 Protocol contributes to ossifying the variable geometry of social rights protection both in terms of acceptance of Charter rights and their "(quasi-)justiciability" in collective complaints. Against this backdrop, paragraph II narrows down the scrutiny to reconstruct the network of health-related provisions.

II. Health as a Matter of Intertwined Charter Rights

The Charter has been the first regional instrument to frame health as a human rights issue inspired by the Constitution of the World Health Organization (WHO). The ECSR interprets health on the basis of the WHO concept, i.e., as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."³¹ The endorsement of the WHO notion reflects a distancing from ILO Conventions that have been the Charter's traditional sources of inspiration and brings it closer to the human rights-based approaches (HRBAs) to health.³² Indeed, since the late Eighties HRBAs have played a major role in clarifying key questions on health and human rights; namely, whether the safeguard of well-being may qualify as an individual entitlement, how the material scope of related rights should be set, what added value health rights have compared to other rights and what duties they impose on states.³³ Under the Charter, health is protected by several rights, including Article 11 on the right to protection of health, Article 13 to social and medical assistance, Article 17 on the right of children and young persons to social, legal and economic protection, Article 31 on the right to adequate housing. Here, the focus is on Article 11 with some remarks on the other rights.

Inspired by the second preambular recital of the WHO Constitution, Article 11 proclaims everyone's fundamental right "to benefit from any measures enabling him to enjoy

29 See Articles 1 and 2 of the Additional Protocol.

30 For a negative critique, see *Churchill / Khalig*, note 11, pp. 229-230, 238. For more balanced discussions, cf. *Colm O' Cinneide*, Social Rights and the European Social Charter: New Challenges and Fresh Opportunities, in: Olivier De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe / La Charte sociale européenne: une constitution sociale pour l'Europe*, Brussels 2010, pp. 177-178; *Palmisano*, note 25, pp. 42-46; 61.

31 Paragraph 1 of the Preamble of the Constitution of the World Health Organisation. See e.g., *ECSR, Transgender Europe and ILGA Europe v. Czech Republic*, Complaint No. 117/2015, Decision on the merits of 15 May 2018, para. 71; *Lukas*, note 9, p. 172.

32 UN Development Group, *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies*, September 2003. On the distinction between HRBAs and the right to health,

33 See Chapter 2 in *John Tobin*, *The right to health in international law*, Oxford 2012, pp. 44-74.

the highest possible standard of health attainable.”³⁴ During the drafting process the wording underwent substantial changes: initially, a strong emphasis was placed on the protection of children’s health, and the improvement of a wide range of health determinants, such as nutrition, housing, education and environmental factors formed a separate paragraph. Subsequently, these factors were grouped into the umbrella-term of causes of ill-health in § 1.³⁵ Compared to the original Charter, the 1996 revision introduced accidents in § 3, requiring states to follow a policy of accident prevention.³⁶ The ECSR has underscored that health is a prerequisite for human dignity; therefore, its protection under Article 11 is complementary to and inextricably linked with Articles 2 and 3 ECHR.³⁷ It comprises the entitlements to the highest possible standard of health (including the right to physical and mental integrity) and access to health care, conferring both positive and negative duties to states.³⁸

Accordingly, states shall refrain from any direct or indirect interference and shall adopt positive and proactive measures to that end, ensuring the best possible state of health not only for individuals, but also for the population as a whole according to existing knowledge.³⁹ The right of access to health care comprises the entitlement for access to effective, affordable and quality health care without discrimination, based on the patient’s informed consent, as well as the possibility to seek remedies and to effectively assert one’s rights. The main health indicators are life expectancy, the principal causes of death, infant and maternal mortality.⁴⁰ Based on the joint reading of Article 11 with Article E on non-discrimination, states shall ensure adequate protection of the health of vulnerable groups, including the homeless, the elderly, persons living in poverty or with disabilities, detainees and irregular migrants.⁴¹ § 2 gives special role to education and awareness-raising, especially with respect to sexual and reproductive health.⁴² Similar to the approach developed by UN bod-

34 Like Article 12 (2) ICESCR, Part II of Article 11 RevESC provides for a non-exhaustive list of measures to take by states directly or in cooperation with public or private organisations to ensure the right to protection of health, such as: 1) to remove as far as possible the causes of ill-health; 2) to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health; 3) to prevent as far as possible epidemic, endemic and other diseases, as well as accidents.

35 Parliamentary Assembly, Draft European Social Charter, Report by the Committee of Ministers, Doc. 927, 12 January 1959, p. 4. *Lukas*, note 9, pp. 161-162.

36 Explanatory report to the European Social Charter (Revised), para. 56.

37 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the merits of 3 November 2004, para. 31.

38 CoE, Digest, note 13, pp. 111-112; *Lukas*, note 9, pp. 162-163; *Claire Lougarre*, What Does the Right to Health Mean?: The Interpretation of Article 11 of the European Social Charter by the European Committee of Social Rights, *Netherlands Quarterly of Human Rights* 33 (2015), pp. 328-329.

39 CoE, Digest, note 13, pp. 113-114; *Lukas*, note 9, pp. 162-164.

40 For a thorough analysis of indicators, see *Lougarre*, note 38, pp. 336-353.

41 CoE, Digest, note 13, pp. 114-116; *Lukas*, note 9, pp. 164-166. See discussion Section C.

42 CoE, Digest, note 13, pp. 116-118; *Lukas*, note 9, pp. 166-168.

ies and the Inter-American Court of Human Rights on human rights and environmental protection, the Committee interprets Article 11 § 3 in joint reading with the right to life as comprising the right to a healthy environment.⁴³

One may raise the question of whether state duties under the Charter are to be interpreted as guided by the principle of progressive realisation. Indeed, neither the ESC nor its revised version contain a provision similar to Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which may be explained by the fact that both have a limited geographical scope, implying that the social systems of CoE Member States have been operational for some time and resource constraints are presumed to be relatively limited.⁴⁴ And while the ECSR has deduced this principle from the joint reading of paragraphs 1 and 3 of the Preamble,⁴⁵ its understanding of progressiveness is different from the approach taken by the UN Committee on Economic, Social and Cultural Rights (CESCR).⁴⁶ Under the Charter, states cannot invoke the lack of financial resources to justify non-compliance even in times of severe economic crisis,⁴⁷ while claims to progressive realisation are accepted only insofar as “it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter.”⁴⁸ Article G contains the horizontal limitation clause inspired by Articles 8-11 and 18 ECHR. Accordingly, any restriction to Charter rights is subject to three conditions: it shall be prescribed by law, pursue a

43 States have the duty to overcome pollution, including air, water, noise and soil pollution, with special regard to minimising nuclear hazards and risks relating to the use, production and sale of asbestos. The ECSR has stressed that “states party must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal.” ECSR, Marangopoulos Foundation for Human Rights (MFHR) v. Greece, Complaint No. 30/2005, Decision on the merits of 6 December 2006, para. 204.

44 Lukas, note 9, p. 8. See most recently, ECSR, Review of States Parties’ ad-hoc reports: Social rights and the cost-of-living crisis, March 2025, <https://rm.coe.int/prems-068925-gbr-2005-cost-of-living-crisis-web-final-layout/1680b678f0> (last accessed on 29 March 2026).

45 ECSR, *Centre on Housing Rights and Evictions v. Italy*, Complaint No. 58/2009, Decision on the merits of 25 June 2010, para. 27: “[S]uch realisation of the fundamental social rights recognised by the Revised Charter is guided by the principle of progressiveness, which is explicitly established in the Preamble and more specifically in the aims to facilitate the “economic and social progress” of State Parties and to secure to their populations “the social rights specified therein in order to improve their standard of living and their social well-being.”

46 CESCR, General Comment No. 3: The Nature of States Parties’ Obligations (Art. 2, para. 1 of the Covenant), UN Doc. E/1991/23, adopted at the 5th Session, on 14 December 1990; Tobin, note 33, pp. 225-253.

47 ECSR, General introduction to Conclusions XIX-2 (2009), para. 15: “the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most.” Cf. ECSR, Activity Report 2009. 25 June 2010, pp. 14-17.

48 ECSR, *European Roma Rights Centre v. Bulgaria*, Complaint No. 31/2005, Decision on the merits of 18 October 2006, para. 37; *Mental Disability Advocacy Centre (MDAC) v. Bulgaria*, Complaint No. 41/2007, Decision on the merits of 3 June 2008, para. 39.

legitimate purpose and shall be necessary in a democratic society. Following the ECtHR's approach, the Committee has endorsed a restricted reading of Article G, applying a strict proportionality test to assess Charter limitations.⁴⁹

Furthermore, health is protected by other provisions as well. Article 13 enshrines the right to social and medical assistance of those who lack adequate resources needed to live a decent life and to meet most basic needs.⁵⁰ It covers the entitlement to obtain medical assistance in the form of free or subsidised health services or payments that enable those without resources to access the necessary care. The range of services is not limited to specific types of assistance or in time, the only criterion is adequateness. Medical assistance is not confined to emergency treatment, nor it depends on the seriousness of health conditions.⁵¹ Article 17 on the right of children and young persons to social, legal and economic protection confers a wide range of duties upon states to ensure that everyone below the age of 18 has the care, assistance, education and training they need with a view to eradicating child poverty.⁵² § 1 covers the right to receive protection appropriate to their age and the risks they are exposed to, including medical care and appropriate accommodation that ensures health determinants in terms of adequate nutrition, sanitary and hygienic conditions.⁵³ Article 31 enshrines the right to adequate housing (§ 1), to temporary shelter (§ 2), and to accessible housing for those who lack adequate resources (§ 3).⁵⁴ Under the principle of progressiveness, § 2 only guarantees an emergency solution to ensure accommodation equipped with the basic amenities, while states shall provide adequate housing within reasonable time to take a further step and comply with § 1.⁵⁵

To sum up, the ECSR has anchored the interpretation of Article 11 and other health-related rights within IHRL, fostering the linkages between the Charter and other instruments starting from (Articles 2 and 3) ECHR. As a result, health falls within the material scope of multiple Charter rights, and indeed, the Committee has taken a flexible approach under which right to assess the complaints. This also helps overcome the Charter's structural limitations discussed above (i.e., the variable geometry of state acceptance): for instance, if the respondent state accepted both Articles 17 and 31 § 2, the ECSR usually grounds its analysis on the latter provision. All 16 states that have ratified the 1995 Protocol have accepted Articles 11 and 13, while 15 of them have accepted Article 17, and only 10 have accepted Article 31.⁵⁶ Against this backdrop, Section C analyses how the Committee

49 *Lukas*, note 9, pp. 346-351.

50 CoE, Digest, note 13, pp. 124-125. On the drafting process, see *Lukas*, note 9, pp. 185-190.

51 CoE, Digest, note 13, pp. 127-128; *Lukas*, note 9, pp. 191-192.

52 CoE, Digest, note 13, pp. 149-150; *Lukas*, note 9, pp. 223-226.

53 CoE, Digest, note 13, pp. 154-155; *Lukas*, note 9, pp. 229-231.

54 CoE, Digest, note 13, pp. 201-203; *Lukas*, note 9, pp. 328-333.

55 CoE, Digest, note 13, pp. 204-205; *Lukas*, note 9, pp. 334-336.

56 Bulgaria has accepted 17 § 2, while Cyprus has not accepted the whole provision. The declining states are: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic and Ireland.

has operationalised these rights to safeguard the health of people on the move in collective complaints.

C. The Committee's Case Law on Health, Social Rights and Migration

This Section offers a qualitative case-law analysis of eight collective complaints brought before the ECSR against one of the 16 Member States that have ratified the 1995 Protocol (since its entry into force in 1998 until today). The selection of cases has been guided by two key parameters: collective complaints concern the alleged violation of one or more of the health-related Charter rights analysed above (*ratione materiae* criterion); people on the move—including refugees, asylum-seekers, migrants in an irregular situation (after the rejection of their asylum claim or the expiry of their residence permit)—are either the victims of alleged rights violations or form one of the target groups (*ratione personae* criterion). The complaints are divided into two sets comprising children (para. I) and adults (para. II). The main goal is to identify the Committee's interpretative methods and assess their potential to overcome the Charter's variable geometry of social rights protection.

I. Children's Rights under the Charter and Beyond

The first case (*FIDH v. France*)⁵⁷ concerned the 2002-2003 French reform on medical assistance: the new rules ended the exemption of irregular migrants with very low incomes from all charges, requiring beneficiaries to pay a flat-rate charge for out-patient medical care and a daily charge for in-patient treatment.⁵⁸ Irregular migrants had to spend an uninterrupted period of three months to be entitled to state medical assistance and emergency care was restricted to life-threatening situations. The complainant organisation argued that the new rules constituted a violation of Articles 13 and 17 RevESC: first, the fact that irregular migrants were not entitled to the same treatment as nationals did not imply that they could be deprived of all medical assistance. Second, children of irregular migrants were not required to have a stay permit so they could not be considered as unlawfully staying. Their distinct treatment in relation to specific services, their admission to assistance after a certain time and the restriction of medical care to life-threatening situations amounted to a breach of Article 17 in conjunction with Article E.⁵⁹ The French government argued that irregular migrants, including minors, did not fall within the Charter's personal scope: first, the conditions for Article 13 § 4 (most importantly, to prove one's lawful presence and to be a national of one of the State Parties) were not met and even so, the three-months' time limit was not contrary to this provision. Second, the fact that children of irregular migrants were

57 ECSR, *International Federation of Human Rights Leagues (FIDH) v. France*, Complaint No. 14/2003, Decision on the merits of 8 September 2004.

58 On the new rules, see *Ibid.*, paras. 7-15.

59 *Ibid.*, paras. 16-17, 20, 22-23, 25-26.

not required to have a residence permit did not make their stay lawful, implying their exclusion from the Revised Charter's personal scope.⁶⁰

As regards the admissibility exam, the Committee first focused on the personal scope of the Appendix based on a complex interpretative method composed of the following elements: Article 31 § 1 of the 1969 Vienna Convention on the Law of the Treaties (VCLT), the "complex interaction" between the Charter and the ECHR based on the 1993 Vienna Declaration on the indivisibility of human rights, and the living instrument doctrine "borrowed" from the ECtHR.⁶¹ It recalled that the Charter complements and interacts with the ECHR and is inspired by the values of dignity, autonomy, equality and solidarity. Hence, it shall be interpreted in light of its specific object and purpose; i.e., "to give life and meaning to fundamental social rights", which implies that any restriction shall be set narrowly "in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter."⁶² Crucially, this is the case of rights of fundamental importance, like the right to health care, "a prerequisite for the preservation of human dignity."⁶³ The Committee held that "legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a State Party, even if they are there illegally, is contrary to the Charter."⁶⁴

On this basis, the ECSR proceeded with the assessment of the claim in its merits. As regards the complaint under Article 13 § 4, it pointed out that the range of emergency care services was not precisely set, the competent body was not clearly appointed and the monitoring compliance with the three-months' time limit raised practical difficulties. Nevertheless, it 'gave the benefit of the doubt' to France by acknowledging that some form of medical assistance did indeed exist even for irregular migrants.⁶⁵ On the contrary, the Committee found the violation of Article 17: it noted that this provision was "directly inspired" by the UN Convention on the Rights of the Child (CRC); therefore, the restriction of medical care to life-threatening situations and the three months' time limit were not in conformity with Article 17.⁶⁶ While this finding may be welcome, the Committee's rather laconic reasoning left unaddressed a number of questions; e.g., what the precise connection between the Charter and IHRL is or what justifies the distinct protection of minors. This landmark decision, taken by no means unanimously,⁶⁷ nonetheless paved the way for a growing list of complaints.

60 Ibid., paras. 18-19, 21, 24.

61 Ibid., paras. 26-28.

62 Ibid., para. 29.

63 Ibid., para. 31.

64 Ibid., para. 32.

65 Ibid., paras. 33-34.

66 Ibid., paras. 33-38.

67 The Committee found by 9 votes to 4 the violation of Article 17, and by 7 votes to 6 the lack of violation of Article 13 § 4. Cf. the dissenting opinions attached to the decision.

In *DCI v. the Netherlands*,⁶⁸ the complaint concerned Dutch law that denied children unlawfully staying access to adequate housing. The complainant organisation stated that the exclusion of irregular migrant children amounted to a breach of Article 31, as well as Articles 11, 13, 16, 17 and 30 RevESC, to be read in light of the CRC.⁶⁹ The Dutch government argued that irregular migrant children do not fall within the Charter's personal scope and expressly rejected the Charter's compound interpretation with the CRC.⁷⁰ In this decision, the Committee elaborated a more thorough reasoning with respect to the Charter's role as a living instrument and the protection of children's rights. As a preliminary issue, it stated that the Charter shall be interpreted in light of its current circumstances and "of relevant international instruments that served as inspiration for its authors or in conjunction with which it needs to be applied."⁷¹ Reminding that the CRC is one of the most ratified IHRL treaties across the globe of which all CoE Member States are parties, it argued that this instrument and, especially, the principle of the child's best interests—as interpreted by the UN Committee on the Rights of the Child in General Comment (GC) No. 5—shall guide the interpretation of children's rights under the Charter.⁷² Recalling Article 31 § 3 (c) VCLT, the ECSR held that:

*"Indeed, the Charter cannot be interpreted in a vacuum. The Charter should so far as possible be interpreted in harmony with other rules of international law of which it forms part, including in the instant case those relating to the provision of adequate shelter to any person in need, regardless whether s/he is on the State's territory legally or not."*⁷³

The language resembling the ECtHR's reasoning may be evinced from other passages of the decision. As regards the complaint under Article 31, the Committee relied on the Strasbourg jurisprudence to acknowledge states' right to immigration control that nonetheless shall be reconciled with the protection of fundamental rights.⁷⁴ Assessing the situation under § 2, the ECSR reminded that the aim of this provision (i.e., to eradicate homelessness) requires states to provide to *all* children under their jurisdiction adequate shelter that meets the basic standards of safety, health and hygiene.⁷⁵ Implicitly reflecting the Strasbourg

68 ECSR, *Defence for Children International (DCI) v. the Netherlands*, Complaint No. 47/2008, Decision on the merits of 20 October 2009.

69 Ibid., paras. 6-7.

70 Ibid., paras. 8-9.

71 Ibid., paras. 19-27, citation in para. 27.

72 Ibid., paras. 28-29.

73 Ibid., para. 35. Similarly, the interpretation of the ECHR "does not take place in a vacuum." Cf. *George Letsas*, Strasbourg's Interpretive Ethic: Lessons for the International Lawyer, in *The European Journal of International Law* 21 (2010), pp. 521, 541.

74 Ibid., paras. 41-42.

75 Ibid., paras. 46-48.

Court's judgment in *M.S.S. v. Belgium and Greece*,⁷⁶ the Committee established that any eviction from shelter of irregular migrants should be banned, as it would place these persons "in a situation of extreme helplessness which is contrary to the respect for their human dignity," especially in case of children who are "particularly vulnerable."⁷⁷ In light of the foregoing, the Committee found the violation of Articles 31 § 2 and 17 § 1.c.⁷⁸

Similarly, the complaint in *DCI v. the Belgium*⁷⁹ concerned the alleged breach of Articles 7 § 10, 11, 13, 16, 17 and 30 RevESC with respect to accompanied foreign minors in an irregular situation or seeking asylum, to whom Belgium did not provide any form of accommodation in reception centres since 2009, as well as unaccompanied minors who also lacked the necessary care and assistance due to the saturation of these centres.⁸⁰ The Committee recalled that all CoE Member States have ratified the CRC, which justifies the need to take into account this treaty as interpreted by the respective UN Committee.⁸¹ Intriguingly, the ECSR added that the state duty to preserve the right to life and to integrity is a peremptory norm of international law and denying the enjoyment of these rights by irregular migrant children would be incompatible with international *jus cogens* (sic).⁸² The Committee clarified that the application of the Charter to irregular migrants is exceptional and serves the purpose to safeguard their fundamental rights to life, to the preservation of human dignity, to psychological and physical integrity and to health.⁸³ Accordingly, migrants in an irregular stay (including unlawfully present minors, whether accompanied or not) are:

*"[...] not covered by all the provisions of the Charter, but solely by those provisions whose fundamental purpose is closely linked to the requirement to secure the most fundamental human rights and to safeguard the persons concerned by the provision in question from serious threats to the enjoyment of those rights."*⁸⁴

The decision placed particular attention to health protection in light of several Charter rights: the ECSR interpreted Article 17 as comprising minors' right to immediate assistance which shall address their material needs, their need for medical and psychological assistance, including a child support plan with a view to giving them effective access to asy-

76 ECtHR (GC), *M.S.S. v. Belgium and Greece*, Application no. 30969/09, Judgment of 21 January 2011.

77 ECSR, *Defence for Children International (DCI) v. the Netherlands*, paras. 58-64, citation in para. 63. Cf. ECtHR (GC), *M.S.S. v. Belgium and Greece*, paras. 252, 254.

78 Ibid., para. 65.

79 ECSR, *Defence for Children International (DCI) v. Belgium*, Complaint No. 69/2011, Decision on the merits of 23 October 2012.

80 For the parties' arguments, see Ibid., paras. 24-27; 40-67 (Article 17); 87-93 (Article 7 § 10); 103-114 (Article 11); 123-127 (Article 13).

81 Ibid., paras. 31-34.

82 Ibid., para. 33.

83 Ibid., para. 35.

84 Ibid., para. 36.

lum.⁸⁵ The Committee found that Belgium's failure to ensure appropriate accommodation forced a large number of minors to live on streets, exposing them to the risks of trafficking, begging and sexual exploitation and ultimately "to a serious threat to the enjoyment of their most basic rights, such as the rights to life, to psychological and physical integrity and to respect for human dignity" in breach of Articles 7 § 10 and 17 § 1.⁸⁶ With respect to Article 11, the Committee reminded that states have a duty to ensure access to health care for irregular migrant children to protect their human dignity, life and integrity. The total lack of reception facilities for accompanied minors and the partial lack of centres for unaccompanied ones undermined their access to health care in breach of § 1, and exposed them to risks of epidemic and endemic diseases in violation of § 3.⁸⁷ As regards Article 13, the ECSR affirmed the right of irregular migrant children to medical assistance that extends beyond emergency treatment and covers primary and secondary care, as well as psychological assistance. However, it pointed out that some form of medical assistance was guaranteed by law and operated effectively, while no data showing serious shortcomings was available, concluding that there was no violation of Article 13.⁸⁸

In *EUROCEF v. France*,⁸⁹ the claim alleged a number of violations of unaccompanied migrant children's rights, including Articles 7 § 10, 11, 12, 14, 17, 30 and 31 § 2, read alone or in conjunction with the non-discrimination clause. The complainant organisation argued that the French reception system presented serious shortcomings that were not in conformity with the Charter: first reception services were defective, centres were saturated, unaccompanied foreign minors did not receive shelter or guidance, were systematically detained in airport transit zones and subjected to abusive age assessment tests and had no access to health care, education or social protection.⁹⁰ As regards the admissibility of the complaint, the ECSR reiterated its line of reasoning constructed in the previous cases, including references to the UN Convention's role, the Charter's intertwinement with the ECHR and the state obligation to ensure irregular migrant children's fundamental rights as a rule of international *jus cogens*.⁹¹

As regards the complaint in its merits, the ECSR unanimously found the violations of Articles 7 § 10, 11 and 17 § 1, as well as the breaches of Articles 13 § 1, 17 § 2 and 31 § 2. For the purposes here, the focus is on those health-related issues regarding which the Committee reached its conclusions based on unanimous decision. First, it assessed the shortcomings of the reception system (including delays in appointing guardians, systematic detention

85 Ibid., paras. 68-81.

86 Ibid., paras. 82 and 97.

87 Ibid., paras. 115-118.

88 Ibid., paras. 128-132.

89 ECSR, *European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v. France*, Complaint No. 114/2015, Decision on the merits of 24 January 2018.

90 Ibid., paras. 12-13.

91 Ibid., paras. 49-57.

in waiting areas and hotels, the use of bone testing for age assessment and the lack of access to effective remedies) under Article 17 § 1. While most of these questions may arguably well raise issues related to this ‘umbrella’ right, the assessment of bone testing might seem exceptional and deserves a closer look. In this respect, the Committee conducted a thorough scrutiny of French law and practice based on multiple sources, such as a decision of the French Court of Cassation, national medical and human rights bodies, as well as the periodic report of the Committee on the Rights of Child.⁹² It admitted that under EU law France may have recourse to medical examinations to determine the age of unaccompanied minors, while under domestic law such examinations constitute a measure of last resort and cannot prevail over civil status documents. Nonetheless, the ECSR pointed out that bone testing may have serious consequences for minors, their use is highly contested for two reasons: practically, they are unreliable (especially for those aged between 16-18); substantially, they undermine children’s dignity and physical integrity; therefore, they amount to a breach of Article 17 § 1.⁹³

The Committee proceeded with the assessment of the other claims based on the findings reached with respect to Article 17 § 1. It assessed the issue of inappropriate accommodation due to the saturation of reception facilities and the lack of reception homes and their exposure to life on the street, including the risks of trafficking and exploitation under Article 7 § 10 that enshrines children’s and young person’s right to special protection against physical and moral hazards. The ECSR pointed out that the responding government had not taken the necessary measures to protect unaccompanied migrant children from these dangers, “causing a serious threat to their enjoyment of the most basic rights, such as the right to life, to psychological and physical integrity and to respect for human dignity” in violation of Article 7 § 10.⁹⁴ Conversely, the sanitary and hygienic conditions of reception facilities, as well as the health problems arising from children’s exposure to street life (including fatigue, infections, hypothermia and mental issues) were assessed under the right to protection of health. In this respect, the Committee found the breach of Article 11 due to the lack of access to health care by children living on streets and by those who are erroneously declared adults.⁹⁵

Finally, in *ICJ, ECRE v. Greece*,⁹⁶ the complaint concerned the systemic flaws of the Greek asylum system which deprived unaccompanied children seeking asylum both in the mainland and in the Aegean islands of the effective enjoyment of multiple rights in breach

92 Ibid., paras. 104, 109, 112.

93 Ibid., paras. 105-113.

94 Ibid., paras. 135-139, citation in para. 138.

95 Ibid., paras. 152-155.

96 ECSR, *International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v. Greece*, Complaint No. 173/2018, Decision on the merits of 26 January 2021.

of Articles 7 § 10, 11, 13, 16, 17 and 31 RevESC⁹⁷ and was condemned by multiple organisations, as well as the ECtHR.⁹⁸ The ECSR confirmed the violation of all these rights; here, the focus is on two elements: the issue of emergency context and the interpretation of Article 11. First, the Committee acknowledged the Greek government's objection that it was faced with an extremely high number of arrivals; yet, it reminded that under Part I of the Charter states have the duty of international assistance and cooperation to effectively ensure the enjoyment of rights protected thereof, especially for children, who are "extremely vulnerable".⁹⁹ This is indeed an important remark, and places under a different light the issue of emergency measures, a recurrent state argument to shoulder off their human rights obligations. Unfortunately, the Committee did not add any further clarification yet one may argue that this duty requires host states to sufficiently demonstrate that they have sought for international cooperation to manage the arrival and reception of high numbers of persons.

Second, when assessing the complaint under Article 11 §§ 1 and 3, the Committee reminded that this provision complements Articles 2 and 3 ECHR, as well as Article 24 CRC.¹⁰⁰ In this respect, the ECSR relied on the Joint GC No. 23 of the UN Committee on the Rights of the Child and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, according to which every child should have access to health care under the same conditions with nationals, regardless of migration status.¹⁰¹ In addition, the ECSR recalled the GCs No. 14 of the CESC and No. 15 of the Committee on the Rights of the Child to stress the importance of the underlying determinants of health, namely, appropriate accommodation and housing to ensure well-being and to find that the situation in Greece was in breach of Article 11.¹⁰² A last remark on the "vulnerability argument": recalling the ECtHR's case law, the ECSR repeatedly stressed the "extreme" or "particular" vulnerability of asylum seeking children.¹⁰³ While children on the move are indeed exposed to multiple risks and dangers, the academic debate has pointed out that in the ECtHR's case law the excessive emphasis has led to the "inflation" of this argument, which has ultimately become exclusionary vis-à-vis those who cannot demonstrate to be 'more vulnerable among the vulnerable.'¹⁰⁴ On the contrary, the approach to in-

97 See *Ibid.*, Conclusion. For the parties' arguments, see *Id.* paras. 12-14; 100-111 (Article 31); 148-155 (Article 17 § 1); 179-183 (Article 7 § 10); 194-198 (Article 17 § 2); 211-217 (Article 11); 232-235 (Article 13).

98 See the list of ECtHR's rulings cited in *Ibid.*, paras. 122; 171.

99 *Ibid.*, paras. 88-89.

100 *Ibid.*, para. 220.

101 *Ibid.*

102 *Ibid.*, paras. 222-230.

103 *Ibid.*, paras. 89; 119; 133; 134; 145; 189.

104 Ben Hudson, Asylum Marginalisation Renewed: 'Vulnerability Backsliding' at the European Court of Human Rights, in *International Journal of Law in Context* 20 (2024), pp. 16-34; Ekaterina Yahyaoui Krivenko, Reassessing the Relationship between Equality and Vulnerability

interpret ESC rights in light of the ECHR and the CRC anchors the Charter within IHRL and ultimately reinforces its potential.

II. Adults' Rights Between Core Duties and Group-Based Protection

Compared to the decisions on children's rights, the Committee's case law on the health protection of adult migrants has taken a slightly different trajectory. While in *FIDH v. France* the Committee did not find violation of Article 13 § 4 with respect to adults, the following cases show that over time it has revised its findings. The complaint in *CEC v. the Netherlands*¹⁰⁵ concerned Dutch law and practice that essentially deprived undocumented adult migrants of food, clothing and shelter. As regards the Charter's applicability, the ECSR reiterated that the personal scope restriction should not be interpreted as depriving irregular migrants of their most basic rights. The assessment shall be carried out on a case-by-case basis with respect to other rules of international law of which the Charter also forms part of.¹⁰⁶ As regards the merits of the claim under Article 13 § 4, the complainant organisation argued that Dutch legislation and practice made access to emergency assistance, including food, clothing and shelter conditional upon residence permit and the majority of irregular migrants did not fall within the exceptional categories.¹⁰⁷ The government underscored the conscious choice of irregular status and the fair balancing between humanitarian concerns and interests of law enforcement (including public security and the encouragement of voluntary returns).¹⁰⁸

The ECSR recalled that under Article 13 § 4 states shall grant emergency social assistance to everyone under their jurisdiction based on the sole criterion of sufficiently urgent and serious need.¹⁰⁹ The provision of necessary food, water, shelter and clothing is "closely linked to the realisation of the most fundamental rights of these persons, as well as to their human dignity."¹¹⁰ Based on the previous report on the Netherlands which had already identified the unbearable situation of irregular migrants, the Committee found no proof that the situation had been remedied between 2009 and 2014.¹¹¹ Remarkably, the ECSR addressed the Dutch government's argument on the lack of international obligations to grant

in relation to Refugees and Asylum Seekers in the ECtHR, in *International Journal of Refugee Law* 34 (2022); pp. 192-214.

105 ECSR, *Conference of European Churches (CEC) v. the Netherlands*, Complaint No. 90/2013, Decision on the merits of 1st July 2014.

106 *Ibid.*, paras. 66-71.

107 *Ibid.*, paras. 77-94. Exceptions included irregular migrants who voluntarily decide to participate in voluntary return programmes, non-removable irregular migrants; rejected asylum-seeking families requesting to stay in reception centres; extreme winter conditions and security problems.

108 *Ibid.*, paras. 95-104.

109 *Ibid.*, paras. 62-73.

110 *Ibid.*, para. 74.

111 *Ibid.*, paras. 105-111.

assistance to the persons concerned by heavily relying on the case law of the ECtHR and the EU Court of Justice on the reception of irregular migrants and asylum seekers, including Dublin transferees,¹¹² and General Comments No. 4, 12 and 14 of the UN Committee on Economic, Social and Cultural Rights on the interpretation of Articles 11 and 12 ICESCR.¹¹³

Intriguingly, the ECSR endorsed the concept of non-derogable core obligations developed by the CESCR. In GC No. 3, the CESCR justified the introduction of this ambiguous notion with the experience gained through the analysis of state reports, as well as with the object and purpose of the ICESCR, i.e., to “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights,” comprising essential foodstuffs, essential primary health care or basic shelter and housing.¹¹⁴ In GC No. 14, the CESCR significantly amplified the range of core obligations arising from Article 12 ICESCR (without referring to a minimum level).¹¹⁵ It took a bold step by stating that states “cannot, under any circumstances whatsoever, justify the non-compliance with the core obligations”, which are non-derogable (sic).¹¹⁶ Relying on this concept, in *CEC v. the Netherlands* the ECSR observed that “these [non-derogable core] obligations include access to basic shelter and minimum essential food for everyone, regardless of residence status.”¹¹⁷ Recalling that both the Strasbourg Court and the EU Court of Justice linked the state duty to provide a minimum protection for migrants with the preservation of their human dignity as a “fundamental value” and “core” of European human rights law,¹¹⁸ the Committee established that:

“[...] the persons concerned by the current complaint undeniably find themselves at risk of serious irreparable harm to their life and human dignity when being excluded from access to shelter, food and clothing. It (...) holds that access to food, water, as well as to such basic amenities as a safe place to sleep and clothes fulfilling the minimum requirements for survival in the prevailing weather conditions are necessary for the basic subsistence of any human being.”¹¹⁹

112 Ibid., paras. 24-29, 46-49, recalled in para. 116.

113 Ibid., paras. 35-38, recalled in para. 114.

114 CESCR, *General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, UN Doc. E/1991/23, adopted at the 5th Session, on 14 December 1990, para. 10.

115 CESCR, *General Comment No. 14*, para. 43. Seemingly, the core obligation to ensure the right of access to health care on a non-discriminatory basis, especially for vulnerable groups is in line with Article 12 ICESCR, but other duties (e.g. to adopt, implement and revise an evidence-based national public health strategy in a participatory and transparent process) arguably burden the capacity of most countries, including more developed ones.

116 CESCR, *General Comment No. 14*, para. 47.

117 ECSR, *Conference of European Churches (CEC) v. the Netherlands*, para. 114.

118 Ibid., paras. 115-116.

119 Ibid., para. 122.

The ECSR underscored that both emergency medical assistance and emergency shelter are closely connected to human dignity, in light of which legislation and practice denying access to such services are contrary to Articles 13 § 4 and 31 § 2.¹²⁰ While linking the protection of irregular adult migrants to the concept of (minimum) core obligations under IHRL is a powerful argument, it is a highly contested one. To set a minimum level of state duties under the ICESCR may help clarify where the threshold of compliance may be, this primarily aims to support developing countries. However, the non-derogable nature of core obligations arising from Article 12 thereof (without a reference to a minimum level) risks increasing such threshold too high without a sufficient legal basis and may eventually backfire on the effectiveness of human rights.¹²¹ Furthermore, the structure of social rights protection under the Charter and the Covenant were distinctly designed, and ‘borrowing’ concepts from the UN Committee might not well serve the purpose of enhancing social rights in Europe. On the contrary, the argument that states shall implement treaties in good faith and seek international cooperation and aid in order to ensure a minimum level of compliance could have been further developed based on the general undertaking in Part I (to pursue the realisation of Charter rights and principles by all—national and international—means) and Article 32 ESC/Article H RevESc.

Finally, it is worth including two cases in which the situation of people on the move has not been distinctly considered but formed part of the comprehensive assessment of rights breaches involving more groups of individuals. In *FEANTSA v. the Netherlands*,¹²² the complaint concerned access to shelter of various groups, such as homeless Dutch nationals, migrant workers, and other migrants residing regularly or irregularly, including women, children and young persons. FEANTSA argued that Dutch law and practice which made access to emergency shelter conditional upon the so-called “local connection criteria” (registration at the municipalities and year-long residence) effectively deprived these persons of shelter and the amount of available emergency shelters was insufficient, which created a widespread housing problem contrary to Articles 13, 16, 17, 19, 30 and 31 of the Charter.¹²³ The Committee unanimously found the violations of Articles 31 § 2, 13 §§ 1 and 4, 19 § 4 (c) and 30 of the Charter.¹²⁴ Here, the focus is on those parts of the assessment that addressed the safeguard of underlying health determinants with respect to people on the move.

The ECSR first analysed the complaint under Article 31 § 2: it recalled that even though states are not obliged to offer alternative accommodation to irregular migrants,

120 Ibid., paras. 124-126, 144-145.

121 For a critical analysis of non-derogable core duties under Article 12 ICESCR, see *Tobin*, note 33, pp. 238-252.

122 ECSR, *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*, Complaint No. 86/2012, Decision on the merits of 2 July 2014.

123 Ibid., paras. 18-25.

124 See Conclusion.

forced evictions are contrary to human dignity and hence should be banned even with respect to this group of persons.¹²⁵ It pointed out that the economic crisis should not lead to watering down the level of social rights protection and states shall take all necessary measures for the effective safeguard of these rights especially in times of economic hardship.¹²⁶ In light of these findings, the Committee held that there was a violation of Article 31 § 2. As regards the complaint under Article 13, it first recalled that the only criterion to access social and medical assistance is to be in urgent and serious need.¹²⁷ With respect to irregular migrants, the ECSR pointed out that while immigration control is a legitimate policy aim and a state prerogative recognised by international law, the denial of emergency shelter for this group was not a necessary restriction for achieving this goal.¹²⁸ Instead, less onerous means could have been made available, but the practical and legal restrictions denying emergency assistance for irregular migrants were disproportionate and did not respect Article 13.¹²⁹ The Committee recalled the case law of the Court of Justice on the reception of asylum applicants, but reminded that the Charter's scope of application is wider compared to EU law.¹³⁰ On this basis, it held that:

*"[...] the right to emergency shelter and to other emergency social assistance is not limited to those belonging to vulnerable groups, but extends to all individuals in a precarious situation pursuant to their human dignity."*¹³¹

Intriguingly, the Committee did find the violation of Article 30 but ruled out that it was applicable to irregular migrants. It recalled that under this provision states shall adopt an overall and coordinated approach to take a series of economic, social and cultural measures to ensure the right to protection against poverty and social exclusion. Nevertheless, the ECSR succinctly held that the adoption of these positive measures was not applicable to "groups not covered by the personal scope of the Charter."¹³² Such a distinct interpretation of Article 30 seems rather ambiguous was indeed severely criticised by a dissenting Committee member who underscored the complex fabric of social rights protection based on the joint application of multiple Charter rights; here, Article 30 with Articles 13 §§ 1 and 4 and 31.¹³³

125 Ibid., paras. 58-61, 110.

126 Ibid., paras. 126-128, whereby it held that "[...] the States Parties should match the increase in need of shelter and the related social housing regardless of the economic situation in order to achieve the steady progress towards the elimination of homelessness, as required under Article 31 § 2 of the Charter."

127 Ibid., paras. 169-171.

128 Ibid., paras. 180-181.

129 Ibid., paras. 182-183.

130 Ibid., para. 184.

131 Ibid., para. 185.

132 Ibid., para. 211.

133 Cf. the partly dissenting opinion of the Committee member Luis Jimena Quesada.

Finally, in *DCI et al. v. Spain*¹³⁴ the complaint highlighted the consequences of Spain's failure to address the dire living conditions, especially the issue of power outages in districts 5 and 6 of *Cañada Real*, a shantytown near Madrid, whereby the overwhelming majority of the population is either part of the Spanish Roma community or has foreign (mostly North-African) origins.¹³⁵ The complainant organisations alleged that the unbearable situation in these districts due to frequent power outages seriously undermined the enjoyment of social rights by multiple groups, including persons with disabilities, families, the elderly, children and young persons, and amounted to a violation of Articles 11, 15, 16, 17, 20 (a), 23, 27 § 1 (a), 30 and 31.¹³⁶ The Committee unanimously found the breach of Articles 31 § 1, 16, 11 §§ 1 and 3, 17 §§ 1 and 2, 30, 23 and 15 § 3.¹³⁷ Remarkably, the ECSR did not scrutinise whether Charter rights were applicable to single groups (including migrants). Instead, it assessed the situation of the entire resident population comprehensively and focused on specific groups only in relation to Charter rights having a circumscribed personal scope (such as persons with disabilities under Article 15, families under Article 16, children under Article 17 and the elderly under Article 23). This seems indeed an efficient strategy to overcome the Charter's variable geometry protection in light of Spain's reservation excluding its applicability to irregular migrants.¹³⁸ For the purposes here, the analysis addresses the main health-related issues under Articles 11 and 30.

As regards the alleged breach of Article 11, the complainant organisations argued that the power outages caused severe physical and mental health problems (e.g., respiratory infections, dermatologic and circulatory diseases, heightened risk of exposure to COVID-19, domestic accidents, anxiety, depression) among the population, especially for the most vulnerable.¹³⁹ The government contended that the residents enjoy universal and free healthcare like all Spanish citizens (ignoring that many residents were foreigners) and targeted public health programmes aimed at assisting specific social groups, including the Roma community.¹⁴⁰ The Committee reiterated that Article 11 shall be interpreted in light of the WHO Constitution and it imposes both positive and negative duties upon states.¹⁴¹ It underscored states shall ensure the best possible state of health for the population (including underlying health determinants, such as water, electricity and heating) according to existing knowledge

134 ECSR, *Defence for Children International (DCI), European Federation of National Organisations working with the Homeless (FEANTSA), Magistrats Européens pour la Démocratie et les Libertés (MEDEL), Confederación Sindical de Comisiones Obreras (CCOO) and International Movement ATD Fourth World v. Spain*, Complaint No. 206/2022, Decision on the merits of 11 September 2024.

135 *Ibid.*, para. 42.

136 *Ibid.*, paras. 2 and 15.

137 *Ibid.*, Conclusion.

138 See note 27.

139 *Ibid.*, paras. 123-129.

140 *Ibid.*, paras. 130-132.

141 *Ibid.*, paras. 133-135.

to make the right to protection of health effective.¹⁴² Based on manifold reports of national and international organs, the ECSR considered that Spanish measures did not adequately address the particular health risks related to power outages nor did they prevent epidemics and domestic accidents, and hence did not comply with Article 11 §§ 1 and 3.¹⁴³ In addition, the ECSR found that power outages exposed residents to energy poverty which aggravated their precarious living conditions. Its remarks on energy poverty are rather innovative for two reasons: the Committee endorsed the EU law concept¹⁴⁴ and adopted a rights-based approach to assess the impact of this phenomenon on the residents of *Cañada Real*.¹⁴⁵ It concluded that the failure to address energy poverty through adequate measures exposed the population of districts 5 and 6 to a heightened risk of poverty and social exclusion contrary to Article 30.¹⁴⁶

D. Concluding Remarks: Towards the “Doubly Composite” Protection of Health

To conclude, one may agree that nowadays social rights are still suffering from a ‘double weakness.’¹⁴⁷ As regards the European Social Charter, this paper has sought to question such a stereotyped vision by assessing the case law of the European Committee of Social Rights on the health protection of people on the move. The case-law analysis has revealed that the ECSR has mobilised several Charter rights, including Articles 11, 13, 7 § 10, 17, 30 and 31 and anchored their interpretation to Articles 2 and 3 ECHR, Article 24 CRC and GC No. 15 of the UN Committee on the Rights of the Child,¹⁴⁸ and Article 12 ICESCR and GCs No. 4 and 14 of the CESCR.¹⁴⁹ This interpretative method builds a “doubly composite” protection scheme: from the Charter’s internal perspective, it brings the safeguard of health under the material scope of overlapping social rights; from an external perspective, it operationalises the Charter in joint reading with the ECHR, other IHRL instruments as in-

142 Ibid., paras. 136-138.

143 Ibid., paras. 139-152.

144 Cf. Commission Recommendation (EU) 2023/2407 of 20 October 2023 on energy poverty, cited in para. 202.

145 Ibid., paras. 205-212.

146 Ibid., para. 213.

147 I.e., in terms of their justiciability and legal recognition, see *Claudio Panzera*, Per i cinquant’anni della Carta Sociale Europea. Intervento al convegno I diritti sociali dopo Lisbona. Il ruolo delle Corti. Il caso italiano. Il diritto del lavoro fra riforme delle regole e vincoli di sistema, Reggio Calabria, 5 November 2011. https://www.gruppodipisa.it/images/rivista/pdf/Claudio_Panzera_-_Per_i_cinquant_anni_della_Carta_sociale_europea.pdf (last accessed on 2 April 2026).

148 *FIDH v. France*, para. 36; *DCI v. the Netherlands*, paras. 26-29; *DCI v. Belgium*, paras. 31-34; *EUROCEF v. France*, paras. 54-55; *ICJ, ECRE v. Greece*, paras. 120-121, 158; 164-165; 172; 202; 220; 222.

149 *CEC v. The Netherlands*, paras. 36-38, 114; *ICJ, ECRE v. Greece*, para. 222; (*FEANTSA*) *v. the Netherlands*, paras. 30-32.

interpreted by the respective monitoring bodies (and, marginally, EU law). In this respect, two final remarks are in order.

First, as regards the subject matters, a recurrent theme under Articles 11 and 13 has been the impact of saturating national reception systems on health conditions, the capacity challenges of reception facilities forcing minors to live on streets,¹⁵⁰ the living conditions in overcrowded centres adversely affecting physical and mental health, the insufficient numbers of health care facilities, goods, services and professionals.¹⁵¹ Furthermore, the Committee has affirmed that there are several other Charter rights (including Articles 17 § 1, 30 or 31) that impose duties on states to ensure underlying health determinants, e.g., adequate housing, hygiene and sanitary conditions, or protection from poverty.¹⁵² Such a technique to deploy a holistic rights-based approach is appraisable; yet, as pointed out by the former UN special rapporteur Paul Hunt, adopting HRBAs to health may risk downplaying the importance of the right to health and this may ultimately backfire on these approaches.¹⁵³ Conversely, Articles 11 and 13 have several distinctive features that are not encompassed by other rights. Overall, the best strategy would be to place these rights at the centre of the ECSR's assessment both for methodological reasons (to better clarify the material scope of each Charter right) and practical ones (because they are the most widely accepted provisions in terms of health protection).¹⁵⁴

Second, as regards the Charter's personal scope, in earlier cases the ECSR found rights breaches only with respect to children and young persons, while it has proceeded more cautiously with the recognition of the rights of adult migrants, especially of those in an irregular stay. In this respect, the international concept of (minimum) core obligations may be a valuable tool, but it is a highly contested one: on the one hand, it may help define better the Charter's net level of protection and ensure alignment between ICESCR and the Charter and hence promote consistency in human rights law. On the other hand, it reveals the difficulties of legal transplants without sufficient anchorage in the new legal contexts. Moreover, the non-derogable nature of these obligations raises further questions of both legitimacy and effectiveness and may backfire on HRBAs. It seems that the Committee is aware of these risks and after *CEC v. the Netherlands* it has dropped this concept in later cases. Instead, the comprehensive group-based assessment deployed in *FEANTSA v. the Netherlands* and fine-tuned in *DCI et al. v. Spain* seems a smart strategy to overcome the Charter's variable geometry of protection. Furthermore, the ECSR could elucidate the content of the duty of international assistance and cooperation (especially, with respect to states that are in need of aid), which is a crucial obligation in the migration context. In this

150 On Article 11 see *DCI v. Belgium*, paras. 99-102; on Article 13 see *CEC v. The Netherlands*, paras. 105-126.

151 In relation to Article 11, see *ICJ, ECRE v. Greece*, paras. 218-230.

152 *DCI v. the Netherlands*, paras. 62-64; *FEANTSA v. the Netherlands*, paras. 58-61.

153 Paul Hunt, *Interpreting the International Right to Health in a Human Rights-Based Approach to Health*, *Health and Human Rights* 18 (2016), pp. 111, 115-116.

154 *Ibid.*, pp. 116-123.

respect, the linkages between the Charter, the ICESCR, International Refugee Law and EU law could be explored to ensure coherence.¹⁵⁵

With these adjustments, the method of doubly composite protection could well enhance the Committee's interpretative authority, strengthen the Charter's role in Europe's multi-sourced protection system and ultimately contribute to reaffirming the human rights doctrine in times of contestation and resistance.



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155 CESCR, General Comment No. 3, paras. 13-14; General Comment No. 14, paras. 38-42; Global Compact for Safe, Orderly and Regular Migration, adopted by the General Assembly on 19 December 2018 (A/RES/73/195); Global Compact on Refugees, Annual Report to United Nations General Assembly, UN Doc. A/73/12 (Part II).