

Chapter One

Collective Complaints under the European Social Charter: Encouraging Progress?

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I. INTRODUCTION

The right of collective complaint under the European Social Charter is one of the few international remedies for violations of economic, social and cultural rights. The intention in this chapter is to review the progress made in the first decade or so of its operation. In particular, the focus will be on the approach to the interpretation of the Charter that the European Committee of Social Rights (the Committee) has followed. The paper will then reflect upon what may be learnt from the Committee's practice that may be relevant to the adoption of a right of communication under the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹ a matter currently under consideration.²

Before considering the Committee's decided cases, it may be helpful to outline the background to the collective complaints procedure. The European Social Charter³ is the regional counterpart within the Council of Europe

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¹ 999 UNTS 3.

² A Working Group established by the UN Human Rights Council is in the process of drafting an Optional Protocol providing for a right of communication. It held its 4th Session in July 2007. For the draft text under consideration and other information, see [www.ohchr.org/english/issues/escr/group4 .htm](http://www.ohchr.org/english/issues/escr/group4.htm).

³ ETS 35. The Charter was adopted in 1961. It was updated by the Revised European Social Charter 1996: ETS 163, which adds to the rights guaranteed. 16 Council of Europe members are parties to the 1961 Charter; 23 are parties to the Revised Charter, making a total of 39 Charter parties. Of the other Council members, Russia has yet to ratify either instrument, as have Switzerland, the mini States of Liechtenstein, Monaco and San Marino and the new Council members Bosnia and Herzegovina, Montenegro and Serbia. On the Charter, see

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human rights system to the ICESCR. It imposes obligations in respect of most economic and social rights; it extends to cultural rights only in so far as it applies to the cultural rights of minorities.⁴ From the beginning, States have been obliged to report periodically under the Charter, but no complaints procedure was included when it was adopted in 1961. One was introduced only by the 1995 Additional Protocol to the Charter.⁵

The procedure provides for collective, not individual complaints.⁶ It is collective in two senses. First, only certain categories of trades unions, employers' organisations and NGOs may bring complaints;⁷ individual victims of a violation may not do so. Second, the complaint may concern only a general situation (for example, that education is not provided for autistic persons generally): 'individ-

Harris and Darcy, *The European Social Charter* (Second edition), Ardsley, New York, 2001; and Samuel, *Fundamental Social Rights: Case Law of the European Social Charter* (Second edition), Strasbourg, 2002. In this chapter, 'Charter' refers to either or both instruments; 'Revised Charter' is used where its text differs from that of the 1961 Charter.

⁴ See *infra*, note 5.

⁵ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints (Additional Protocol) 1995, ETS 158; 3 (1996) *IHRR* 2000; in force since 1998, the treaty has 12 Parties. On the Protocol, see Birk, 'The Collective Complaint: A New Procedure in the European Social Charter', in Engels and Weiss (eds.), *Labour Law and Industrial Relations at the Turn of the Century Liber Amicorum in Honour of Roger Blanpain*, The Hague, 1998, p. 261; Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints', 1 (1996) *EHRLR* 52; Churchill and Khaliq, 'The Collective Complaints of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights', 15 (2004) *EJIL* 417; Cullen, 'The Collective Complaints Mechanism of the European Social Charter', 25 (2000) *ELRHR* 18; Harris, 'The Collective Complaints Procedure', in *The Social Charter of the 21st Century*, Council of Europe Publication, 1997, p. 113 *et seq.*; Jaeger, 'The Additional Protocol to the European Social Charter Providing for A System of Collective Complaints', 10 (1997) *Leiden JIL* 69; Novitz, 'Are Social Rights Necessarily Collective Rights? A Critical Analysis of the Collective Complaints Protocol to the European Social Charter', 2002 *EHRLR* 50; and Sudre, 'Le Protocol Additionnel a la Charte Sociale Européenne Prévoyant un Système de Réclamations Collectives', 100 (1996) *RGDIP* 715.

⁶ The procedure was based on the collective complaints procedure of the ILO Freedom of Association Committee which allows trades unions and employers organisations to bring complaints alleging violations of the right to freedom of association. The Council of Europe Parliamentary Assembly has proposed the establishment of a working group to consider the introduction of a Charter right of individual petition: Recommendation 1795 (2007). It was adopted 24 May 2007. For text see www.assembly.coe.int

⁷ Article 1, Additional Protocol. The categories referred to above are (i) international organisations of employers and trades unions that have observer status with the Charter Governmental Committee; (ii) international NGOs with consultative status with the Council of Europe where they have been and put on a list for this purpose; and (iii) representative national employers and trade union organisations. A State may separately make a declaration allowing representative national NGOs to bring a complaint against it: Article 2, *ibid.* Only Finland has done so.

ual situations may not be submitted.⁸ The complaint must comply with certain admissibility criteria.⁹ If satisfied that these are met, the Committee decides on the merits of the complaint. The Committee's decision, which is not legally binding, goes to the Committee of Ministers of the Council of Europe which must adopt a resolution closing the procedure. This resolution may include a recommendation, which again is not legally binding, to a State found in default calling upon it to take certain action.¹⁰ By June 2007, 43 complaints had been registered against the 12 Charter parties that had accepted the Additional Protocol. The Committee had decided 30 of these on their merits, finding a breach of the Charter in 21 of them.¹¹

Although the procedure has a number of limitations,¹² it has already proved its worth, to judge from the number of complaints that have been submitted from a limited number of possible complainants, the variety of the subject matter of the complaints, the contribution of some of the Committee's decisions to the substance of international human rights law and the precedent that they set as an example of a workable international system for the consideration of complaints concerning economic, social and cultural rights.

II. THE COMMITTEE'S APPROACH TO THE INTERPRETATION OF THE CHARTER

1. *General Approach*

The Committee has established or confirmed a number of rules concerning the interpretation of the Charter in the course of considering collective complaints.¹³ Its general approach was most fully spelt out in *International Federation of Human Rights Leagues (FIDH) v France*.¹⁴ There the Committee indicated that, as a treaty, the Charter was to be interpreted on the basis of the Vienna Convention on the Law of Treaties 1969, Article 31(1) of which provides

⁸ Explanatory Report, 3 (2006) *HRR* 204, paragraph 31.

⁹ See Articles 3, 4 and 6, Additional Protocol; and see the Explanatory Report, *ibid*, paragraphs 29 to 33 and paragraph 35. There is no requirement to exhaust local remedies.

¹⁰ Article 9, Additional Protocol.

¹¹ The other complaints had been admitted for consideration on the merits (6), declared inadmissible (4) or were awaiting an admissibility decision (3).

¹² See Churchill and Khaliq (note 5), p. 445 *et seq.*

¹³ Much of the Committee's approach to interpretation had already been developed in the reporting process: see Harris (note 3), pp. 24–31.

¹⁴ 12 (2005) *IHRR* 1153, paragraphs 27–29. All Committee decisions may also be found on the Council of Europe website www.coe.int

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that a treaty is to be interpreted ‘in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. The Committee continued:

The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights. Indeed, according to the Vienna Declaration of 1993, all human rights are ‘universal, indivisible and interdependent and interrelated (para 5)’. The Committee is therefore mindful of the complex interaction between the two sets of rights. Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows *inter alia* that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.¹⁵

In the *FIDH* case, the Committee applied this approach as follows. The case concerned a restriction in French law by which illegal immigrants with very low incomes did not qualify for free medical assistance in the same way as others with very low incomes did. 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’.¹⁶ The Committee reached this conclusion despite the fact that the Revised Charter guarantee extends generally *ratione personae* only to nationals of other contracting parties who are ‘lawfully resident’ in the territory of a contracting party¹⁷ or, in the case of the guarantee of the right to social assistance in Article 13 (4), to nationals of other contracting parties who are ‘lawfully within’ the territory of a contracting party (*italics added*). Despite this clear wording, the Committee decided that Article 13 (4) and Article 17 (on the rights of children and young persons, to which the general *ratione personae* rule applies), did extend to persons illegally present in a State’s territory. In taking this decision, the Committee relied upon its approach to interpretation whereby restrictions upon human rights (in this case *ratione personae* restrictions) should be interpreted narrowly and whereby respect for human dignity was central to the object and purpose of the Charter.

As to human dignity, the Committee stated that ‘human dignity was the fundamental value and indeed the core of positive European human rights law’ under both the Charter and the European Convention on Human Rights and

¹⁵ Ibid, paragraphs 27, 28 and 29.

¹⁶ *Supra* (note 14), paragraph 32.

¹⁷ Appendix to the Revised Charter.

that ‘health care is a prerequisite for the preservation of human dignity’.¹⁸ It scarcely needs saying that this a very strong teleological and human rights minded interpretation of the Charter which reaches the limits of what a body whose role is to interpret a text may properly do.¹⁹ But, having decided that illegal immigrants were protected by the Charter in respect of medical assistance, the Committee nonetheless found, by 9 votes to 4, no breach of Article 13 (4) because medical assistance was provided to illegal immigrants in cases of emergency or of life threatening conditions or where they had been resident for three months or more. It did, however, find, by just 7 votes to 6, a breach of Article 17: children and young persons who were illegal immigrants were entitled to medical assistance without such limits.

2. *Effective Guarantee of Rights*

In addition to its general approach spelt out in the FIDH case, the Committee has indicated its approach to interpretation in other particular respects in the FIDH and other cases. Thus it has stressed the need to look beyond the letter of the law to see how effectively it operates in practice. As stated in *International Commission of Jurists v Portugal*,²⁰ ‘the aim and purpose of the Charter, being a human rights protection instrument, is to protect rights not merely theoretically, but also in fact.’ Accordingly, a State party may be found to be in breach of its obligations where its laws are in order, but in reality the position is unsatisfactory. In this case, the defendant State was found in breach of Article 7 (1) on this basis when a large number of under-age children were illegally employed contrary to Portuguese law in circumstances in which there was evidence that the Labour Inspectorate was not enforcing the law, which was satisfactory on its face, as efficiently as might have been expected. The Committee’s insistence in *European Roma Rights Centre v Italy*²¹ on legal remedies and legal aid to challenge forced evictions as an aspect of the right to housing may also be seen as an element of the obligation to guarantee rights effectively.

¹⁸ Supra (note 14), paragraph 31.

¹⁹ For criticism of the Committee’s approach to the matter, see the Dissenting Opinions of Mr. Evju, joined by Mrs. Koncar and Mr Francois, and Mr Birk.

²⁰ 7 (2000) *IHRR* 525, paragraph 32.

²¹ 14 (2007) *IHRR* 239. The Committee has read a requirement of judicial or other national remedies into several provisions of the Charter in its reporting practice: see Harris (note 3), p. 30. See also *Marangopoulos Foundation for Human Rights v Greece*, Council of Europe website www.coe.int: 2006, paragraph 207.

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As the Committee stated in the *FIDH* case, the Charter is a ‘living instrument’, the meaning of which may evolve with changing standards and values. This dynamic nature of the Charter was important in a series of cases concerning the corporal punishment of children.²² Acting on the basis that the Charter absolutely prohibited all physical violence against children, the Committee held that the prohibition of corporal punishment that this demanded of States parties called for a legislative basis and appropriate sanctions. In doing so, the Committee stated that the Charter was ‘a living instrument which must be interpreted in the light of developments in the national law of the member States of the Council of Europe as well as relevant international instruments’,²³ which had clearly moved in this direction on the matter of corporal punishment of children. Similarly, in *Marangopoulos Foundation for Human Rights v Greece*,²⁴ the Committee invoked the ‘living instrument’ doctrine as a justification, ‘in the light of current conditions’²⁵ for interpreting the guarantee of the right to health in Article 11 of the Charter as including ‘the right to a healthy environment’.²⁶

4. *Reliance on National and International Standards*

The Committee has drawn upon national and international standards generally when determining what may be expected of States parties, not only in situations where these standards signal a change in standards or values. Thus in *Centrale generale des service public v Belgium*,²⁷ the Committee rejected the applicant trade union’s complaint that the absence of any proposal for consultation with trades unions on amendments to draft legislation in the course of parliamentary debate was a breach of Article 6 (1) (2) (the right to consultation and negotiation). In

²² *World Organisation against Torture v Ireland*, 13 (2006) *IHRR* 288; *World Organisation against Torture v Greece*, 13 (2006) *IHRR* 274; *World Organisation against Torture v Portugal*, 13 (2006) *IHRR* 299; *World Organisation against Torture v Italy*, *Complaint No. 20/2003*, Council of Europe website www.coe.int; *World Organisation against Torture v Belgium*, *Complaint No. 21/2003*, *ibid*; *World Organisation against Torture v Portugal*, *Complaint No. 19/2003*, *ibid*.

²³ *World Organisation against Torture v Ireland* (note 22), paragraph 63. As to international instruments, the Committee referred to Article 19, UN Convention on the Right of the Child; Article 3, European Convention on Human Rights and recommendations of the Committee of Ministers and the Parliamentary Assembly of the Council of Europe.

²⁴ Council of Europe website www.coe.int: 2006. See further on this case: text to notes 53 and 72.

²⁵ *Ibid*, paragraph 194.

²⁶ *Ibid*, paragraph 195.

²⁷ 13 (2006) *IHRR* 1181, paragraph 39. The Committee did not limit itself to European practice in this case, but presumably this would be particularly relevant.

doing so, it relied upon the absence of any such provision in States that provide for consultation prior to the initiation of legislation and the fact that it is ‘traditional legal practice in democratic States’ to regard parliamentary debate as negating the need for consultation. In other cases, the Committee has also referred to international standards in UN human rights treaties to support its conclusions.²⁸

5. Margin of Appreciation

The Committee has applied a ‘margin of appreciation’ doctrine in its collective complaints decisions, though not as regularly as the European Court of Human Rights.²⁹ Thus the Committee has allowed States a certain discretion as to the manner in which an objective required by the Charter is realised, using ‘margin of appreciation’ language when doing so. For example, in *Syndicat des Agréges de l’Enseignement Supérieur v France*,³⁰ the Committee held, by 8 votes to 6, that whereas the right to form and join a trade union in Article 5 of the Charter includes for trades unions the possibility of membership of consultation bodies established by the government that are relevant to the protection of their members’ interests, States parties had a ‘wide margin of appreciation’ in determining the composition of such bodies so that a trade union could not, as was claimed in the case, insist upon a particular election procedure.

The Committee has also used ‘margin of appreciation’ language in some cases of restrictions upon rights. For example, in *Quaker Council for European Affairs v Greece*,³¹ the question was whether alternative civilian service for conscientious objectors that was 18 months longer than the military service which they were unable to undertake gave rise to a breach of the prohibition of forced labour in Article 1 (2) of the Charter. Viewing this as a restriction on freedom to work voluntarily, the Committee acknowledged that the State enjoyed ‘a certain margin of appreciation in this area’ but concluded, by 6 votes to 3, that ^{■non-matching quote} ‘this additional duration, because of its excessive character, amounted to a ‘disproportionate’ restriction in breach of Article 1(2). To take another example, in *European Roma Rights Centre v Bulgaria*,³² provision was made by planning law for illegal housing to be legalised, but subject only to very strict conditions

²⁸ See, for example, the *FIDH* case (note 14), *supra*.

²⁹ Thus none was applied in *Confederation of Independent Trade Unions in Bulgaria et al v Bulgaria*, Council of Europe website www.coe.int (2006); or in the *FIDH* case (note 14), paragraph 34.

³⁰ 13 (2006) *IHRR* 1188, paragraph 38.

³¹ 8 (2001) *IHRR* 1158, paragraphs 24 and 25.

³² Council of Europe website www.coe.int: 2006, paragraphs 54 and 55. See also *Marangopoulos Human Rights Foundation v Greece*, *infra*, text to notes 53 and 72.

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that were disadvantageous for those whose dwellings had been in existence and tolerated for a long time. The Committee found a breach of Article 16 (right to family life, including family housing) and Article E (non-discrimination) of the Revised Charter. Although States have a ‘wide margin of appreciation’ as to their planning law rules, they must strike a ‘balance between the general interest and the fundamental rights of the individuals’. In this case, the Greek law on the legalisation of dwellings had affected the right to housing of Roma families in ‘a disproportionate manner’.

6. *Restrictions upon Rights*

This ‘proportionately’ language echoes that of the European Court of Human Rights when that Court looks to see whether a restriction upon a Convention right is permitted. The Charter permits restrictions upon all Charter rights using the same formula as is found in some Convention articles. Article G of the Revised Charter permits restrictions to any Charter right where these are ‘prescribed by law and are necessary in a democratic society’ to protect specified heads of public interest. These are to be restrictively interpreted³³ and are also subject to a requirement of proportionality. A case in which the Committee applied precisely the European Court’s proportionality approach in assessing the compliance with the Charter of a restriction upon a right when applying Article G is *Confederation of Independent Trade Unions in Bulgaria et al v Bulgaria*.³⁴ In that case, the Committee concluded that various prohibitions or restrictions in Bulgarian national law on the right to strike were in breach of the guarantee of that right in Article 6 (4).

Thus the general prohibition by law of strikes in the electricity, communications and health care sectors was not ‘necessary in a democratic society’: although some limitation on the right of workers in such essential services might be proportionate to the legitimate purpose pursued, a general ban upon the withdrawal of their labour by all workers in these sectors was not. Similarly, the general prohibition of the right to strike of all civil servants ‘irrespective of their duties and function’ was disproportionate.³⁵ Finally, a restriction upon the right to strike by railway workers by which they had to ensure a satisfactory transport service while they were on strike of at least 50% of the normal service was held to be too vaguely worded to be ‘prescribed by law’ and had not been

³³ See the *FIDH* case (note 14).

³⁴ *Supra* (note 29).

³⁵ *Ibid*, paragraph 46. Civil servants were only allowed to engage in symbolic action, by wearing arm bands, badges and the like without withdrawing their labour.

shown by the defendant government to have a 'legitimate purpose'. What is interesting is that the Committee does not apply a 'margin of appreciation' approach in this case when assessing the legitimacy of the purpose being pursued or the proportionality of the restriction, as the European Court of Human Rights would almost certainly have done.³⁶

7. *Financial Resources*

With regard to positive obligations involving public expenditure, when considering national reports that States make on their compliance with the Charter, the Committee has not used language suggesting that a State may claim lack of financial resources as a justification for not making the necessary provision.³⁷ However, it has taken a different stand in the context of collective complaints, where it has indicated its willingness to make some such allowance.

Before looking at the cases in which the Committee has taken this stand, it should be noted that no allowance for financial constraints is made in the text of the Charter. The structure of the Charter is different from that of the ICESCR in this regard. There is no article in the Charter by which States parties subject themselves to a general obligation to realise all of the rights in the Charter – an article which might be drafted so as to limit that obligation to 'available resources'. As is well known, the ICESCR has such an article and this article does contain such a limitation.³⁸ Instead, in each Charter article that guarantees a particular right, the State parties undertake to take appropriate or necessary measures or other action to realise that right. While the formula varies, no express allowance is made for financial resources, even in the case of expensive social rights such as health, social security and assistance, education and housing.³⁹ An exception is Article 12 (3) of the Charter. Whereas in Article 12 (2) states parties undertake 'to maintain the social security system at a satisfactory level at least equivalent to that required for ratification of International Labour Convention (No. 102) Concerning Minimum Standards of Social Security', in Article 12 (3) the obligation is only to 'endeavour to raise progressively the system of social security to a higher level' than that required by Convention No. 102. Clearly financial resources are relevant when deciding whether the required 'endeavour' has been forthcoming.⁴⁰ Otherwise,

³⁶ See for example *Tum Haber Sen and Cinar v Turkey*, Judgment of 21 February 2006.

³⁷ See Harris (note 3), p. 26.

³⁸ Article 2 (1), ICESCR, as to which see text to notes 62 to 65, *infra*.

³⁹ See Articles 11, 12, 13, 17 and 31 of the Revised Charter.

⁴⁰ See also Article 31 (2), Revised Charter, by which States Parties undertake to take measures designed to 'reduce homelessness with a view to its gradual elimination'.

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in accordance with the normal rule concerning treaty obligations,⁴¹ the Charter imposes an immediate obligation upon States parties to adopt the required measures or other action to realise the right concerned, making no allowance for cost.

The reason why States agreed to this strict approach when drafting the Charter may have been because they were West European States which operated, when viewed in a world-wide context, at a level of relative affluence and anticipated that they would be judged by a common European standard of fulfilment of social rights which they would generally be able to satisfy as well as their neighbours could. This situation was, of course, never perfectly as just described in that the gross national products and the resulting ability to fund social rights has always varied markedly from the richest to the poorest West European States. In any event, it has changed dramatically with the arrival of States parties from other parts of Europe – first Turkey and then post Soviet States in Central and Eastern Europe – which has widened the range of financial resources available for social rights and other national purposes in Charter State parties as a whole. Some recognition of the cost issue may also have been an element in the process of drafting the Charter when it was decided that, in contrast with the ICESCR, parties to the Charter do not have to accept all of the articles of the Charter: they may instead become a party by accepting no more than approximately sixty per cent of them.⁴²

However, as indicated, the Committee has deviated from the strict reading of the Charter just posited when deciding complaints. In particular, it has shown itself prepared to take financial resources into account, though seemingly not in all cases,⁴³ when assessing whether States have ‘done enough’ to meet their Charter obligations. At the same time, as will be seen, this dispensation has not proved important in practice, with no State as yet seemingly reliant upon it or benefiting from its application so as not to be found in breach of the Charter.

The Committee first spelt out its approach on this matter in *Autism-Europe v France*.⁴⁴ In that case, the complainant organisation claimed that insufficient provision had been made by France for the education of autistic children

⁴¹ See Aust, *Modern Treaty Law and Practice*, Cambridge, 2000, p. 144.

⁴² See Article 20, Charter.

⁴³ There are cases involving public expenditure, as for example the *FIDH* case (note 14) in which the Committee did not refer to the ‘available resources’ dispensation even in the abstract. *Cf.* the UK case of *Szoma v Secretary of State for Work and Pensions*, 2006 1 AC 564, in which regulations concerning income support that were adopted in part to implement Article 13 (4) of the Charter were interpreted widely by the House of Lords without mention of the financial cost.

⁴⁴ 11 (2004) *IHRR* 843.

and adults in special or mainstream schools, in violation of Articles 15 and 17 of the Revised Charter, concerning the rights of disabled persons and of children respectively.⁴⁵ It asserted, *inter alia*, that only ten per cent of those in need of special education had places, and that the percentage of such children in mainstream schools was even less. On its calculation, government action would take many years to rectify the situation. The defendant government acknowledged that its ‘catch up’ plans had ‘fallen short of real needs’, but pointed to recent increases in resources. The Committee explained its approach to such a case as follows:

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

It added that States parties must be ‘particularly mindful’ of the impact their choices had for vulnerable groups, such as autistic persons.

Applying this approach, the Committee decided, by 11 votes to 2, that the defendant State was in breach of both Articles 15 and 17, whether these were read alone or together with the non-discrimination guarantee in Article E of the Revised Charter. The Committee noted that, despite a national debate that had lasted over more than 20 years and the enactment of disabled persons legislation as long ago as 1975, France had ‘failed to achieve sufficient progress in advancing the provision of education for persons with autism’.⁴⁶ As was acknowledged or not contested by the defendant State, the proportion of children with autism being educated either in general or specialised schools was ‘much lower than in the case of other children, whether or not disabled’ and there was ‘a chronic shortage of care and support facilities for autistic adults’.⁴⁷ Clearly the Committee had in mind its ‘reasonable time’ dispensation when it took into consideration the (too) many years during which France had had the matter on its agenda as a pressing issue. Otherwise, as to the provision for autistic

⁴⁵ Article 15 (1) reads: ‘... the parties undertake ... to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private.’ By virtue of Article 17 (1) (a), ‘the parties undertake ... to take all appropriate and necessary measures designed ... to ensure that children and young persons ... have the ... education and the training they need’. The claim also relied in the non-discrimination guarantee in Article E, Revised Charter.

⁴⁶ *Supra* (note 44), paragraph 54.

⁴⁷ *Ibid.* In its Resolution closing the case, the Committee of Ministers took note of the French Government’s undertaking ‘to bring the situation into conformity with the Revised Charter and that measures are being taken in this respect (see Appendix to this Resolution): CM Res ChS (2004); and 11 (2004) *IHRR* 856.

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persons the defendant State could be expected to make, the Committee did not spell out the criteria that it was applying, beyond its reference in the abstract to rights that are ‘particularly expensive to achieve’ and to ‘available resources’. However, the defendant State did not argue lack of resources: instead it referred to the resources that it had put in place and that it had committed itself to providing in the future.

The Committee did not apply its ‘available resources’ criterion *proprio motu*, making no reference to priorities in State expenditure or the large cost of making provision for the education of autistic persons in particular. The Committee’s approach basically would appear to have been a somewhat impressionistic one, taking into account (a) the large number of autistic children and adults for whom appropriate education was not provided on the evidence before it; (b) what a Contracting Party with the resources of a West European State could reasonably be expected to provide and (c) the length of time during which the problem had been known and remained unsolved.

The issue of resources was next raised by the *Committee in European Roma Rights Centre v Greece*.⁴⁸ In this case the Committee found, by 8 votes to 2, a violation of the obligation in Article 16 of the Charter to ‘promote the economic, legal and social protection of family life by such means as ... provision of family housing’ in the arrangements made for the housing of members of the Roma community. The obligation had been infringed on three fronts, in respect of each of which there was a separate violation. First, there was insufficient provision of permanent housing for Roma. The allegation made by the complainant organisation, which the Committee found was supported by the concluding observations of more than one UN treaty monitoring body,⁴⁹ that approximately 100,000 Roma lived in sub-standard housing and had done so for many years was not denied by the defendant State. Noting that the ‘overarching aim of the Charter is to achieve social inclusion’, the Committee found a breach of Article 16 on the basis of these ‘excessive numbers’. In so far as the defendant State argued that the problem was a lack of unwillingness on the part of local authorities to act, the Committee noted that the defendant State was required by Article 16 to take steps to cause them to act.

⁴⁸ 13 (2006) IHRR 895. See also *European Roma Rights Centre v Italy* (note 21); and *European Roma Rights Centre v Bulgaria* (note 32). For other non-Roma housing cases, see *International Movement ATD Fourth World v France*, Council of Europe www.coe.int: 2006; *ibid*, and *European Federation of National Organisations Working with the Homeless v France*, *ibid*; both cases are pending on merits.

⁴⁹ *Supra* (note 48), paragraph 40. The UN treaty monitoring bodies were the Committee on Economic, Social and Cultural Rights and the Committee against Torture.

Second, the Committee found that insufficient provision was made for temporary campsites for Roma to comply with Article 16. Third, the Committee found that the forced evictions of Roma from sites or dwellings which they had occupied illegally was in breach of Article 16. Whereas illegal occupants of land may be forcibly evicted, 'the criteria of illegal eviction must not be unduly wide, the eviction should take place in accordance with the applicable rules of procedure and these should be sufficiently protective of the rights of the persons concerned'.⁵⁰ The question of financial resources was relevant to the first two of these grounds of violation. The Committee quoted its statement in the *Autism-Europe* case requiring States to take measures to realise the aims of the Charter 'within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources'.⁵¹ However, as in the *Autism-Europe* case, the defendant Government did not argue lack of resources. Instead it sought to justify its position by reference to the funding it had put in to Roma housing and its adoption of an integrated action plan for them. The Committee found these arguments unconvincing on the basis that the situation had not improved despite the adoption of the State's integrated action plan as long ago as 2001: as in the *Autism-Europe* case, not enough had been done, as judged by the level of lack of housing provision on the evidence before the Committee.⁵²

Resources were also relevant in the important environmental case of *Marangopoulos Foundation for Human Rights v Greece*.⁵³ In this case the complainant organisation claimed a breach of Article 11 of the Charter, which guarantees the right to health. It was claimed that the defendant State had not done enough to counter the adverse environmental effects and risks to public health resulting from lignite mining on its territory. The defendant State countered by arguing that lignite mining was justified in the general interest as enabling the country to maintain its energy independence and providing electricity at reasonable cost for industry and the private consumer.⁵⁴ It argued further that it was following a coherent and progressive emissions reduction strategy in accordance with its obligations under EU environmental directives and the Kyoto Protocol. The Committee found a breach of Article 11, by 9 votes to 1.⁵⁵ It first noted that

⁵⁰ Ibid, paragraph 51.

⁵¹ Ibid, paragraph 20.

⁵² Cf. the approach and findings in *European Roma Rights Centre v Bulgaria* (note 32), *supra*.

⁵³ *Supra* (note 24).

⁵⁴ As the Committee noted lignite had been the main form of fuel for energy production in Greece for 40 years and was likely to continue to be such in the near future: *ibid*, paragraph 197.

⁵⁵ It also found breaches of Article 2 (4) (reduced working hours for workers in dangerous occupations) and Article 3 (2) (health and safety at work).

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Article 11 includes a right to a ‘healthy environment’. As a ‘living instrument’, the Charter took account of the link that is now made by States and by other international human rights treaty bodies⁵⁶ between the ‘protection of health and a healthy environment’. A consequence was that the obligation in Article 11 (1) ‘to remove as far as possible the causes of ill health’ included a requirement to reduce air and other pollution that could impair good health. As to how far this requirement went, the Committee again relied as a point of reference on its dictum in the *Autism-Europe* case. It stated:

Admittedly, overcoming pollution is an objective that can only be achieved gradually. Nevertheless, states parties 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 (see ... *Autism-Europe v France* ...).⁵⁷

Examining the defendant State’s plans for emission reductions, the Committee concluded that ‘they do not offer real evidence of Greece’s commitment to improving the situation within a reasonable time or making such an outcome plausible.’⁵⁸ This conclusion was supported by the only recent introduction of an inspectorate to monitor operator compliance with environmental regulations, as well as the low number of inspectors and the limited fines imposed for non-compliance. Also relevant was the lack of proof by the defendant State of its commitment to the EU ‘best available practice’ requirement and its tolerance of the continued operation of power stations on the basis of temporary licences without prior approval of the environmental criteria. In addition, Government acknowledged that very little had been done to organise systematic epidemiological monitoring to reveal the health implications of lignite mining on the population.

In conclusion, while acknowledging the general interest of the State in ensuring energy independence and economic progress, the Committee stressed that Article 11 required the government to ‘strike a reasonable balance’ between the right to health of persons living in the lignite mining area and that general interest, and this had not been done.⁵⁹ No express reference was made to the resource implications for the defendant State, which would have included the financial cost for the economy of having to resort to other more expensive forms of energy and/or the cost of reducing pollution from lignite mines.

⁵⁶ The treaty bodies identified by the Committee were the European Court of Human Rights, the Inter-American Court of Human Rights, the African Commission on Human and Peoples’ Rights, the European Court of Justice and the UN Committee on Economic, Social and Cultural Rights.

⁵⁷ *Supra* (note 24), paragraph 204.

⁵⁸ *Ibid*, paragraph 207.

⁵⁹ *Ibid*, paragraph 221.

Considering the cases just discussed as a whole, what is interesting is that, with the possible exception of the ‘general interest’ argument by Greece in the *Marangopoulos* case, none of the – as yet few – cases in which the Committee has referred to ‘available resources’ has a government relied upon this argument.⁶⁰ It was not to be expected that the French Government would do this in the *Autism-Europe* case, as the Committee’s prior practice had given no sign of it making any such allowance. But no defendant Government has relied upon it since. Thus no such argument was put in the Roma housing cases. Nor has the Committee applied it *proprio motu* to the benefit of a State on the facts. Nonetheless, the ‘available resources’ dispensation is there, and both arguments bring the Charter into line with the ICESCR and provide thereby a precedent of relevance to the question of justiciability when assessing the feasibility of a right of communication under the Covenant.

As a final comment concerning the cost of social rights, it may be mentioned that some social rights cases⁶¹ involve obligations that are no more expensive than those of a positive kind that are imposed upon States to enact and enforce legislation in respect of civil rights. For example, as noted above, there has been a series of cases in which the corporal punishment of children has been found (or in some cases not found) to be in breach of Article 17 of the Charter, which guarantees the rights of the child. The Committee in these cases takes the stand that Article 17 requires a clear, legislative prohibition of all forms of corporal punishment, whether within the family, in educational institutions, in residential care or otherwise, and sanctions that are adequate, dissuasive and proportionate. The positive obligation in such cases entails no cost other than that of legislation and enforcement.

III. LESSONS FOR A POSSIBLE RIGHT OF COMMUNICATION UNDER THE INTERNATIONAL COVENANT ON ECONOMIC AND POLITICAL RIGHTS

Rights of complaint concerning economic, social and cultural rights in international human rights treaties are scarce, much more so than for civil and political rights. A glaring absentee is a right of individual complaint under the ICESCR,

⁶⁰ In *FIDH v France*, *supra* (note 14), the defendant government argued that the *ratione personae* point strongly, but made no reference to the cost of providing medical assistance. The issue of resources will also be relevant in *International Movement ATD Fourth World v France*, Council of Europe website www.coe.int, pending on the merits, concerning violations of the right to housing of persons in extreme poverty.

⁶¹ *Cf.* the position concerning most economic rights cases, see below, section III; and text to notes 74 *et seq.*

although this is a gap that may shortly be filled. The failure to provide for such a right at the outset when the ICESCR was adopted in 1966, whereas such a right was already established in the International Covenant on Civil and Political Rights (ICCPR), has been attributed to several causes.⁶² One was the fact that States within the Soviet bloc, which were most supportive of international guarantees of economic, social and cultural rights, were generally opposed to any intrusion upon State sovereignty, and they saw a right of individual complaint as such an intrusion. Western States, however, which were more likely to favour a right of individual complaint, lacked enthusiasm for an international guarantee of such rights. Another was the ‘programmatically nature’ of the obligations of States under the ICESCR. Craven observes that not only was it considered that there was a lack of criteria to evaluate State compliance, it was argued that: ‘complaints relating to that Covenant could only refer to insufficient programmes in the attainment of certain goals and it would be impossible for the committee to determine what rate of progress in any particular should be.’⁶³

The first of these reasons has lost most of its force, although it is still the case that some Western States are strongly opposed to a right of individual communication under the ICESCR, or are at best neutral in their approach to the idea. The second has remained problematic, translated, as it has been, into an argument that economic, social and cultural rights are not justiciable.⁶⁴ In the context of the ICESCR, this argument has been linked to the wording of the basic obligation that States parties accept. By Article 2 (1), ICESCR, a State party undertakes to ‘take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised’ in the ICESCR.⁶⁵ It is the allowance for resources (which include, above all, financial resources), together with the obligation to achieve only progressively

⁶² See Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on Its Development*, Oxford, 1995, p. 35.

⁶³ Ibid, p. 36. The quotation is from UN Doc A/2929, cited by Craven *supra* (note 62). Another argument was that a complaint procedure would overlap with existing ILO and UNESCO complaint procedures.

⁶⁴ For academic discussion of the argument, see Addo, ‘Justiciability Re-Examined’, in Hill and Beddard (eds.), *Economic, Social and Cultural Rights*, London, 1992, Chapter 5; Craven, ‘The Justiciability of Economic, Social and Cultural Rights’, in Burchill, Harris and Owers (eds.), *Economic, Social and Cultural Rights: Their Implementation in UK Law*, Nottingham, 1999, Chapter 1; Steiner and Alston, *International Human Rights in Context* (Second edition), Oxford, 2000, pp. 275 *et seq.*; Van Hoof, ‘The Legal Nature of Economic, Social and Cultural Rights: A Rebuttal of Some Traditional Views’, in Alston and Tomaševski (eds.), *The Right to Food*, Boston, 1984, p. 97; and Vierdag, ‘The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights’, 9 (1978) *NYIL* 69.

⁶⁵ Emphasis added.

the realisation of the rights recognised, that forms the basis for the claim that ICESCR rights are not justiciable.

But recent developments have taken away much of the force of the non-justiciability argument. Cases concerning economic, social and cultural rights have proved justiciable before other UN⁶⁶ and regional treaty monitoring bodies,⁶⁷ including cases having financial implications, and awareness has grown from cases decided by national courts, particularly some high profile cases in the South African Constitutional Court.⁶⁸ These have shown that while the closeness or legal basis for judicial control of State action in fulfilment of positive obligations involving the large public expenditure associated with (particularly) social rights⁶⁹ might differ from that involving compliance with the typically negative obligations (or positive obligations with less, or less obvious, expenditure) associated with civil and political rights, and while the nature

⁶⁶ See for example *Broeks v Netherlands 2* (1987) *Selected Decisions HRC* 179 (ICCPR: discrimination in social security law); *Yilmaz Dogan v Netherlands 2* (1988) *IHRR* 348; (CERD: discrimination in employment law); *AS v Hungary* (14 (2007) *IHRR* 997) (CEDAW: health care); and *Dung Thi Thuy Nguyen v Netherlands*, (14 (2007) *IHRR* 987) (CEDAW: maternity benefits). The CERD and CEDAW decisions are on the UN website. On the controversial nature of the *Broeks* case, see Joseph, Schlutz and Castan, *The International Covenant on Civil and Political Rights* (Second edition), Oxford, 2004, p. 686.

⁶⁷ See the cases decided by the African Commission on Human and Peoples' Rights: *Purohit and Moore v Gambia*, 11 (2004) *IHRR* 257 (right to health); and *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, 10 (2003) *IHRR* 282 (right to health, housing and food). On the relevant jurisprudence of the European Court of Human Rights, see Warbrick, 'Economic and Social Interests and the European Convention on Human Rights', in Baderin and McCorquodale (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, 2007, Chapter 10. On economic and social rights claims before the Inter-American Commission on Human Rights and the right of petition under the 1988 Protocol on Economic, Social and Cultural Rights to the American Convention on Human Rights, see Craven, 'The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights', in Harris and Livingstone (eds.), *The Inter-American System of Human Rights*, Oxford, 1998, p. 289, at p. 305 and p. 307. There have long been ILO Freedom of Association Committee cases: see Valticos and Potobsky, *International Labour Law*, Deventer, 1995, pp. 295 *et seq.*

⁶⁸ See *Soobramoney v Minister of Health, KwaZulu-Natal* (1998) 1 S.A. 965; *Government of the Republic of South Africa v Grootboom* (2001) 1 S.A. 46; and *Minister of Health v Treatment Action Campaign* (2002) 5 S.A. 721; 13 B.H.R.C. 1. See Liebenberg, 'The Protection of Economic and Social Rights in Domestic Legal Systems', in Eide, Krause and Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook* (Second edition), Dordrecht, 2001, p. 55.

⁶⁹ The argument was never strong or much relied upon in respect of economic rights. There have long been ILO Freedom of Association Committee cases: see Valticos and Potobsky (note 67), pp. 295 *et seq.*, and national courts are well used to adjudicating on individual or collective claims under employment or trade union law, see further, text to notes 75 to 86, *infra*. The argument has not focused upon cultural rights, either in the sense of Article 15 of the ICESCR or of the cultural rights of minorities.

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of the remedy may differ (in some cases a public law remedy declaring a programme illegal rather than a right to damages), there is a valuable role for adjudication in the protection of social rights and that this can be provided through a right of individual communication under the ICESCR,⁷⁰ perhaps supplemented by a public interest communication procedure such as that in the collective complaints system of the European Social Charter.⁷¹

This conclusion is supported by the experience of the collective complaints system of the European Social Charter. While the Charter system is one of collective complaints, a review of the cases that have been brought under it suggest that there is no reason why they could not have been presented as complaints alleging a breach of the Charter by individual applicants. For example, a complaint could have been lodged in the case of *Autism-Europe v France* by an autistic person who could not obtain appropriate education. Among the cases decided by the Committee to date, the one possible exception is *Marangopoulos Foundation for Human Rights v Greece*, in that it would have required a victim whose health had suffered from the pollution caused by lignite mining, who might not have been easy to find.⁷² In such a case, a collective communications remedy such as that of the European Social Charter has its attractions.

As far as a right of individual communication under the ICESCR for *social* rights is concerned, the European Committee of Social Rights has, as noted, formulated an approach to evaluating compliance with the Charter that addresses these concerns for *social* rights. As articulated in the *Autism-Europe* case, the Committee requires a State party to ‘take measures that allow it to achieve

⁷⁰ Most States now seem to accept this. They are, however, wary of a procedure that might result in adverse decisions with large financial implications which, although not legally binding, would bring pressure to bear upon them to act. There is also concern (i) as to whether the Committee on Economic, Social and Cultural Rights is the proper body to be entrusted with competence to rule upon what are seen essentially as budgetary matters within a State’s discretion and (ii) about the reference to ‘international assistance and cooperation’ in Article 2 (1) of the ICESCR.

⁷¹ Article 3 of the draft Protocol to the ICESCR, under consideration by the Working Group in 2007 included, controversially, in addition to the right of individual communication, a collective communications right for NGOs with ECOSOC consultative status comparable to the Charter collective right. It also includes an inter-state communications procedure (Article 9) and an inquiry procedure (Article 10). As the Charter collective complaints regime shows, there is a role for public interest litigation in the protection of economic and social rights.

⁷² Cf. *Lopes Ostra v Spain* A 303-C (1994); 20 *EHRR* 277 in which the nuisance, caused by pollution from a waste processing plant, effected the health of the applicant’s daughter, forcing her to move away from her family home, and which thereby made her a victim of a breach of the right to respect one’s home and private and family life as provided in Article 8 of the European Convention on Human Rights.

the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum available resources'. The 'within a reasonable time' and 'measurable progress' parts of this formula equate to the obligation in Article 2 (1) of the ICESCR to realise the rights recognised 'progressively'. The reference to the 'available resources' of the particular State in that formula then interprets the Charter obligation in social rights cases involving public expenditure so that it is identical to that in Article 2 (1) of the ICESCR. While both of these requirements may be seen as dispensations when set against a strict textual interpretation of the Charter, the result of the Committee's interpretation of the obligation of States parties to the Charter in (particularly) social rights cases is to equate it with that in the ICESCR, so that the cases decided under the Charter are an instructive precedent – one that leads to the positive conclusion that there should be no problem of justiciability should similar claims that be brought under a right of individual communication under the ICESCR.

More particularly, with regard to the 'progressive', or programmatic, character of the obligation in Article 2(1), the Committee's approach under the Charter of determining whether a programme or plan has been put in place and implemented within a reasonable time in order to resolve a serious and known problem would be relevant and transferable to the ICESCR. As to 'available resources', the Committee would, not unreasonably, appear to place the onus upon the State to raise this as a problem, and not to consider the matter if it does not do so, although there may be an implicit assumption that the defendant European State in question must have had the resources needed. In the cases decided to date, no State has raised the issue of resources, so that the Committee has decided the case essentially on the basis of the first requirement – enough has not been done way of planning and implementation within a reasonable time to tackle a serious and known deficiency in the guarantee of a social right.

A separate element of the Committee's approach to the Charter that would be relevant to social rights cases that might arise under the ICESCR is the indication that discrimination in the allocation of resources may in itself be a basis for a breach of the Charter. This was particularly noticeable in *European Roma Rights Centre v Italy*⁷³ where the Committee decided the defendant State's failure to show that its criteria for access to permanent social housing was not discriminatory towards the Roma and to take into account the particular housing needs of the Roma amounted to a breach of Articles 31 (housing) and E (non-discrimination) of the Revised Charter taken together. One can easily

⁷³ *Supra* (note 21). See also *Autism-Europe v France* (note 44) in re discrimination against autistic persons.

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imagine such an approach being adopted without difficulty in an individual communication under the ICESCR.

If, next, one examines the Committee's practice in dealing with collective complaints concerning *economic* rights, there is certainly no indication of any problem of justiciability in such cases. These complaints have mostly raised issues concerning trade unions. They focus on the right to form and join a trade union (Article 5) and aspects of the right to bargain collectively (Article 6). Article 5 complaints have concerned the prohibition in national law of members of the armed forces joining a trade union;⁷⁴ restrictions on the right of members of police forces to do so;⁷⁵ and pre-entry closed shop requirements,⁷⁶ as well as limitations on the functioning of trades unions in the protection of the interests of their members.⁷⁷ Article 6 claims have concerned the entitlement of trade unions to take part in consultation and negotiation arrangements on behalf of their members,⁷⁸ and also the right to strike.⁷⁹

Other economic rights complaints have mainly concerned the prohibition of forced labour or discrimination guarantees in Article 1 (2), or elements of the right to reasonable working hours in Article 2.⁸⁰ Breaches of the forced labour prohibition were found in respect of the length of time (25 years) a member of the armed forces could be made to remain in employment⁸¹ and of penal sanctions preventing all merchant seamen from going on strike.⁸² Such a breach was also found in respect of the length of time that a conscientious objector to military service had to serve in alternative civilian employment,

⁷⁴ *European Federation of Employees in Public Service v France* 8 (2001) IHRR 564.

⁷⁵ *European Council of Police Trade Unions v Portugal* 10 (2003) IHRR 572.

⁷⁶ *Confederation of Swedish Enterprise v Sweden* 11 (2004) IHRR 832.

⁷⁷ *Syndicat Occitan de l'Education v France* 12 (2005) IHRR 1146; and *Syndicat des Agregés de l'Enseignement Supérieur v France* 13 (2006) IHRR 1188.

⁷⁸ *Autism-Europe v France* (note 44); *Syndicat Occitan de l'Education v France* (note 77); *Centrale Generale des Services Publics v Belgium* 13 (2006) IHRR 1181.

⁷⁹ *European Trade Union Confederation et al v Bulgaria* Council of Europe website www.coe.int: 2006. See also *Confederation Française de l'Encadrement v France* 10 (2003) IHRR 559; and *Confederation Française de l'Encadrement v France* 12 (2005) IHRR 1164 (deductions from strikers' pay). On the right to strike in the Charter, see Kovács, 'The Right to Strike in the European Social Charter', 26 (2005) *Comparative Labor Law and Policy Journal* 445.

⁸⁰ Issues have also been raised in a few cases concerning the rights to safe and healthy working conditions (Article 3): see *Marangopoulos Foundation for Human Rights v Greece* (note 24); for the right to fair remuneration (Article 4), see *Confederation Française de l'Encadrement v France* (note 79); and *Confederation de l'Encadrement v France* (note 79); for the prohibition of child labour, see *International Commission of Jurists v Portugal*, 7 (2000) IHRR 525; and for the right to vocational training, *Syndicat National de Professions des Tourisme v France* 8 (2001) IHRR 554.

⁸¹ *International Federation of Human Rights Leagues v Greece* 8 (2001) IHRR 1153.

⁸² *Ibid.*

thus restricting unduly his freedom to take employment of his own choice.⁸³ A breach of the non-discrimination guarantee in Article 1 (2) was found in respect of unjustified discrimination between different categories workers in respect of vocational training.⁸⁴ As to the right to reasonable hours of work, the exclusion of managerial staff from the limit on the number of hours of work in French law was found to be a breach of Article 2(1) as read with Article E of the Revised Charter, which prohibits discrimination in respect of Charter rights.⁸⁵

What is striking about all of these cases is that they echo claims that could be brought by trade unions (acting to defend their own legal rights, not on the collective complaint basis available to them in the Charter) or by individuals in national courts applying national trade union or employment law guarantees that are common to most national legal systems. What they confirm is that it perfectly possible to imagine them being brought under an international complaints procedure that allowed for individual complaints, as opposed to collective complaints in the Charter sense.

As far as a right of individual communication under the ICESCR for the economic rights in Articles 6–8 of the Covenant is concerned, which tend to be disregarded in the dialogue about the establishment of a Covenant right of individual communication, the allowances in Article 2 (1) ICESCR for ‘available resources’ and progressive implementation concerning ‘resources’ do not have much relevance for them. As the Charter cases demonstrate, the question of financial cost is generally not such a large issue in economic right cases as it is in cases concerning social rights and the time, if any, reasonably required for their realisation – not being dependent upon any or large scale financial resources – will expire within a few years of ratification. In some economic rights cases, there will be just a negative obligation on the part of the State not to intervene, as, for example, in the case of the obligations to allow workers to form and join trades unions and to permit those organisations to function in the interests of the members (subject to permissible basic registration requirements and the like).

In other cases, the State will have a direct obligation of a negative or a positive kind concerning its own employees (for example, to leave the armed forces within a reasonable time or to be protected by health and safety measures), which again will not raise large questions of cost or time. In many cases, it will be a positive obligation to provide and enforce a legal framework

⁸³ *Quaker Council for European Affairs v Greece: supra* (note 31).

⁸⁴ *Syndicat National de Professions des Tourisme v France* (note 80), *supra*. 8.

⁸⁵ *Confederation Francaise de l'Encadrement v France* and *Confederation Francaise de l'Encadrement v France* (note 79); and *Confederation General du Travail v France* 13 (2006) IHRR 599.

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for private employment in which economic rights are respected, including the rights to reasonable working hours, safe and healthy working conditions, fair remuneration, protection from child labour and non-discrimination in employment. In all of these cases, the financial cost will be of a kind which exists for positive obligations in respect of many civil and political rights also (including legislation, inspections, investigation and court proceedings) and is not at the level that applies to the protection and fulfilment of social rights such as health, housing, education and social security:⁸⁶ it is the cost of social rights, coupled with the need for time to implement programmes to realise them, that is the source of most of the concerns for States in the dialogue about a system of complaints under the ICESCR.

IV. CONCLUSION

The Committee's practice under the Collective Complaints Protocol is encouraging for those who are concerned to see it stay the course. Despite the limited number of possible complainants, the disappointingly few States parties that have ratified the Protocol, the restrictions that flow from the collective nature of any complaint and the lack of enthusiasm shown so far by the Committee of Ministers to support the collective complaints procedure, the Committee has made considerable progress in having it take its allotted place. It is the common experience that international complaints procedures require time to take root, so that it is not surprising for this reason alone that the number of complaints has not yet been large. What is encouraging for the Charter complaint procedure is that the Committee has developed an approach to the interpretation of the Charter in a complaints context that is fully in keeping with the Charter's human rights character and generally establishes a sound basis for the Committee's future work. What is also welcome is the evidence that the Committee's practice provides that economic and social rights may be satisfactorily adjudicated before an international treaty monitoring body. This can only add force to the momentum now building for the introduction of a right of individual – and possibly collective – communication under the ICESCR.

⁸⁶ Some economic rights, such as vocational guidance and training, may also have large financial implications, not unlike the economic rights dimensions of the right to social security, as for example, maternity leave and industrial injury benefits.