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Housing Rights and Human Rights

FEANTSA

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HOUSING RIGHTS AND HUMAN RIGHTS

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Foreword

The year 2005 will be remembered as a year when many tens of thousands of people became homeless as a result of natural disasters. Whether in South-East Asia, New Orleans or the recent tragedies in Paris, many questions have been raised in relation to the rights of these homeless households. Indeed, their chances of being re-housed in decent housing may largely be dictated by what housing rights they have. The responsibilities of States depends on the extent of such housing rights. It is also clear that the continued reliance on the private market to meet the housing needs of the most vulnerable in society has now become a global phenomenon. Therefore, the disengagement of many States from intervening directly in the housing market to meet the needs of vulnerable households has compounded the difficulties for many low-income people in gaining access to housing.

This is the first time a detailed book has been produced on the issue of Housing Rights and Human Rights. As well as outlining the various legal instruments that are currently in place to advance housing rights, it also provides a critical analysis of such instruments, and how they have been used in different countries, particularly in the European Union. Whilst there has been much discussion in recent times on rights based approaches to housing, this book provides a clear explanation and critique of the issues involved. It also illuminates the complex and lengthy processes in the European Union in relation to social inclusion policies, demonstrating how homelessness has not yet been properly addressed.

Access and rights to housing in many countries have never been accorded the same level of priority as access to other forms of social protection or health care. Yet, it could be argued that access to decent housing is fundamental to ensuring proper access to other social goods.

On behalf of FEANTSA, I would like to express thanks to Dr. Padraic Kenna, Chair of the FEANTSA Expert Group on Housing Rights in providing his services on a voluntary basis to produce this publication, as well as the other members of the FEANTSA Expert Group on Housing Rights. This is an invaluable publication by FEANTSA in its continued campaign to advance the housing rights of homeless people.

Donal McManus

President FEANTSA

Brussels September 2005.

Abbreviations

CoE	Council of Europe
CSR	Council of Europe, Committee on Social Rights
EAPN	European Anti-Poverty Network
ECB	European Central Bank
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EHRLR	European Human Rights Law Review
EU	European Union
EUCFR	European Union Charter of Fundamental Rights
EU-SILC	EU Statistics on Income and Living Conditions
FEANTSA	European Federation of national Organisations working with Homeless People
JIM	Joint Memoranda on Social Inclusion
NAPsincl	EU National Action Plans on Social Inclusion
NGO	Non-governmental organisation
NPM	New Public Management
OMC	Open Method of Co-ordination
RESC	Revised European Social Charter
SPC	Social Protection Committee
UN	United Nations
UNCESCR	UN Committee on Economic, Social and Cultural Rights
UNHCHR	UN High Commissioner for Human Rights
US	United States of America

HOUSING RIGHTS AND HUMAN RIGHTS

Introduction

The right to housing is a basic human right. This has been established in a range of international human rights instruments and is regularly monitored at United Nations (UN) and Council of Europe level. Homelessness is about the absence or denial of housing rights. FEANTSA has always advanced housing rights to address the needs of homeless people. Aspects of the right to housing are regularly adjudicated upon in courts throughout the world.¹ At a national level, at least 40% of the world's Constitutions refer to housing or housing rights.²

The impact of globalisation - pressures from large transnational corporations, to reduce public services and rights across the world is enormous. Many States are facing pressures to privatise and commercialise basic and essential services, such as housing. This can affect the most vulnerable and homeless people. There are many countries where States are not ensuring that adequate and affordable housing is available to all. There are moves towards neo-communitarianism and segregated housing across Europe, with policies and practices approved by public authorities. The policies of engineering social mix, such as those which seek to integrate owner-occupiers and renters in fixed proportions, and restrict numbers of poor people in areas or towns, are reminiscent of the Middle Ages. Also in Europe, the impetus towards market integration in all sectors is leading to a sharp definition between services of general interest and services, which are suitable for market approaches.³ Housing provision is increasingly being seen as a market issue. Equally, incalculable housing need and homelessness among immigrants, migrants, asylum-seekers and refugees in Europe is an area of growing concern for housing rights advocates.

It is important to advance justiciable human rights to housing. Campaigning and social movements for housing rights in the United States (US) have found that framing homelessness within the legal rights approach is valuable. This gives homeless people and their advocates a right of action, rather than having homelessness considered simply as a political issue, or a bureaucratic issue that relies entirely on administrative or discretionary managerial action.⁴

For too many people the law has become identified with the State and divorced from concerns of humanity. The time has come to uncouple law from the State and give people the sense that the law is theirs. Human rights are the privileged ground where we can bring the law back to the common conversation of humankind.⁵

¹ Despite the claims that socio-economic rights cannot be enforced in modern societies, many States are developing such rights. See Centre on Housing Rights and Evictions. (2003) *Litigating Economic, Social and Cultural Rights*, Geneva: COHRE; UN Centre on Human Settlements (UNCHS), *Housing rights legislation: Review of international and national legal instruments*, at website:

www.unhabitat.org/programmes/housingrights/; See Scheinin, M. (2002) 'Protection of Economic, Social and Cultural Rights in Finland – A Rights-Based Variant of the Welfare State,' in *The Welfare State and Constitutionalism in Nordic Countries*. Nordic Council of Ministers; Melish, T. (2002) *Protecting Economic, Social and Cultural Rights in the Inter-American Human Rights System*. Connecticut: Yale Law School.

² Leckie, S. (2000) *Legal Resources for Housing Rights*. Geneva: COHRE.

³ See European Commission, White Paper on services of general interest. COM (2004) 374 final, 12.5.2004. See website: http://europa.eu.int/eur-lex/en/com/wpr/2004/com2004_0374en01.pdf

⁴ See Harris, B. (2004) *Defending the Right to a Home*, Aldershot: Ashgate, p. 74.

⁵ See Klug, F. (2000) *Values for a Godless Age*, Foreword by Helena Kennedy QC. London: Penguin.

At an international level, the right to adequate housing must be framed in the context of today's reality, where between one fifth and one quarter of the world's population live in absolute poverty. Of the world's 6 billion people, 2.5 billion live on less than two US dollars per day.⁶ Most of the poor are forced to live without access to such basic amenities as food, clothing and shelter. Women comprise 70% of those living in absolute poverty. Between 30 and 70 million children worldwide are living on the streets. Available statistical estimates suggest that there are at least 100 million people in the world living with no shelter at all.⁷ However, the US has maintained its objection to any rights to housing being developed either for its citizens or throughout the world.⁸ Indeed, the US has maintained its outright opposition to a specific right to housing at the UNCHS (Habitat) Conference in New York in 2001, and in relation to women's rights to ownership of property and adequate housing.⁹ This appears all the more ironic in the light of revelations of poverty and homelessness following the hurricane at New Orleans in 2005.

Human rights approaches arising from internationally agreed instruments can influence the way in which States assist homeless people, in the face of other competing influences. Indeed, there are a plurality of normative systems within the decision-making environment of State bodies. The advancement of human and housing rights competes with pressures for profits, market competitiveness, efficiency and cost-effectiveness in the neo-liberal climate.¹⁰ However, the human rights approach allows those working in State and public service roles to measure their work in the context of human rights standards, and thus resist neo-liberal pressures to reduce State roles in public welfare. Equally, it can act as a means of empowerment to complement social movements advancing the rights of those suffer exclusion and discrimination.

This report also addresses the emerging forms of governance in the EU, which involve a growing shift away from a legal rights approach to co-ordinating common objectives in social policy, involving voluntaristic approaches, such as the Open Method of Co-ordination (OMC). Such developments have enormous consequences for the advancement of housing rights. Of course, all EU States have already committed themselves to housing and other rights within the International Covenant on Economic, Social and Cultural Rights, European Social Charter and Revised Charter, EU Charter of Fundamental Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, EU Treaties, Regulations and Directives. Many have justiciable rights to housing in national law.

In the context of such contemporary theories as the 'architecture of rights,'¹¹ the need to advance the right to housing is critical. Thus, this report considers some of the New Public Management (NPM) and other administrative based approaches which have great importance for the implementation of housing rights. Indeed, some

⁶ See UN *Human Development Report 2005*.

⁷ UN Doc. E/CN.4/2001/5. Economic, Social and Cultural Rights. *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*. (Mr. Miloon Kathari) (2001).

⁸ Alston, 'Opinion: The US and the Right to housing – A funny thing happened on the way to the forum,' (1996) *EHRLR*. Issue 2, 120.

⁹ See *Netherlands Quarterly of Human Rights*, Vol. 19, No. 3, September 2001. Part C: Appendix. A Review of the 57th Session of the UN Commission on Human Rights, pp. 333-67.

¹⁰ See Hertogh, M. & Halliday. (eds) (2004) *Judicial Review and Bureaucratic Impact*. Cambridge: CUP.

¹¹ See Daly, M. (2003) *Access to Social Rights in Europe*. Strasbourg: Council of Europe Publishing.

of the terminology of public management systems, which can involve consultation, action plans, charters, indicators, benchmarks, etc. is also often used by human rights advocates. Of course, human rights organisations are using these terms also in relation to the implementation of rights, such as the references to action plans in the *Vienna Declaration and Plan of Action 1993*¹², and the UN Action Plans in relation to the realization of the right to health and other areas.¹³ This overlap of language confuses public management approaches, involving to outputs and services driven by managerial and efficiency objectives, with the implementation of rights, driven by international human rights instruments and values. Indeed, the use of similar terms as 'indicators' and 'benchmarks' by rights advocates and public management agencies can lead to very serious misunderstandings on the nature of rights. Modern public management approaches have developed appeal systems, complaints systems and even remedies (albeit not judicially enforceable) for breaches of standards etc. But there is usually a clear desire to exclude the courts and international human rights agencies from the definition and implementation of rights. This has enormous consequences for advocates of housing rights in areas of inadequate State provision.

Measuring the implementation of housing and other rights through indicators 'borrowed' from other 'systems' is a nonsense. A clear example is the use of statistics for housing production as an indicator of the development of housing rights, such as access to housing. In some countries, such as Ireland and Spain there has been a huge increase in housing production, driven by favourable State support to producers, high profits and increased demand. None of this increase is derived from a housing rights approach. Using such statistics as indicators or proxies of housing rights is a fallacy. Equally, other indicators for measuring housing rights implementation may, in fact, have nothing to do with housing rights, but are predicated on other factors completely, such as market forces, policies of lending institutions and corporations etc.

The right to housing has often been interpreted as a right to State provision of a house or adequate housing for all.¹⁴ Increasingly, new housing is provided by the market in European countries, and a smaller and smaller level of social housing is provided by the State. This 'enabling approach', largely involving the purchase of mass-produced housing as a commodity, provided by large scale and international developers, is gaining currency world-wide, and is promoted by the World Bank and others.¹⁵ Indeed, the role of European States is geared predominantly towards facilitating the market as the producer and allocator of housing, except in areas of market failure. Of course, housing rights also apply within the market. Housing rights in relation to equality of access to housing for rent or purchase, access to mortgage finance, security of tenure, standards of fitness for occupation, affordability, accessibility and other matters are becoming increasingly important. But key questions arise in relation to the willingness of some European States to promote and implement housing rights in the market context.

This collation of human and housing rights examines the contemporary situation in the development of housing rights internationally, but particularly in Europe. It emerged from the work of the FEANTSA Expert Group on Housing Rights - Marc Uhry, Jane Ball, Peter Frederiksson and Dr. Padraic Kenna. The contribution of Mr Freek Spinnewijn, Director of FEANTSA, Christine Lambert and other

¹² UN Doc. A/CONF.157/23.

¹³ See OHCHR. (2002) *Handbook on National Human Rights Plans of Action*. HR/P/PT/10.

¹⁴ See COHRE, *Common Myths about Housing Rights* at website: <http://www.cohre.org/hrbody6.htm>

¹⁵ See Angel, S. (2000) *Housing Policy Matters – a Global Analysis*. OUP.

FEANTSA staff has been invaluable. Many texts have been reproduced in part or in full in order to facilitate the reader, as well as to highlight the availability of these helpful materials. Sources, including website addresses, have been provided for those who wish to further access these documents directly, for research, campaigning, advocacy or litigation purposes. In the era of participation and consultation I trust that this publication will lead to a more informed and confident level of participation by homelessness and housing rights organisations.

The promotion and development of housing rights offers a valuable source of inspiration, as well as an established corpus of law and standards to counter 'the race to the bottom', where States compete for foreign direct investment, low taxation on capital and 'competitive labour markets', by reducing rights. Equally, internationally established human rights standards offer some protection to those excluded from political power and administrative consultative systems, such as immigrants, asylum-seekers and refugees and other minority and discriminated groups. This report identifies the origins and extent of housing rights from the relevant international instruments of the Council of Europe, UN and EU. Hopefully, it will assist homeless people, those in housing need, their advocates and social movements to ensure that housing rights are fully recognised and implemented in the new Europe and beyond.

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Galway August 2005.

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Chapter 1. The United Nations

(a) Relevant UN Housing and Human Rights Instruments

Housing rights have grown within the development of international human rights. These rights are specifically included in most UN human rights instruments and are seen as an integral part of economic and social rights.

The advancement of human rights is often traced from the European Enlightenment, the republican constitutions of England, France and America, as well as international reactions to the horrors of wars and genocide in the mid-twentieth century.¹ Of course, the growth of labour, welfare and equality rights after the industrial revolution and urbanisation of European and other States provided a basis for many of these human rights developments. After the second World War (1939-45) the nations of the world set out in the *Universal Declaration of Human Rights*, 1948, (UDHR), the first clear articulation of all these rights, civil and political, as well as socio-economic. The story of that historical breakthrough, where henceforth human rights would become the currency of international standards and comparisons, offered an inspiration for all the people of the world, regardless of the political regime in place or the level of industrial or political development. Indeed, at the time the US was a major promoter of the development of all these rights.²

The adoption by the UN General Assembly in 1948 of the UDHR,³ marked a milestone in the development of human rights and fundamental freedoms.⁴ Article 25 states:

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, **housing** and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

The Cold War froze the debate on the inter-divisibility of human rights, leading to an ideological division between civil and political rights claimed by the 'West' as theirs, and the priority given to socio-economic rights in socialist States. Indeed, the two UN Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights arose from that artificial division of human rights. However, the Cold War is now more than a decade in the past, and it is today legitimate to place socio-economic rights firmly within the human rights debate in our social democratic and liberal democracies, sitting alongside the civil and political rights publicly cherished by political leaders.⁵ Indeed, it is not possible to have full citizenship rights, social solidarity or social inclusion without socio-economic rights, such as the right to housing.

¹ See Craven, M. (1995) *The International Covenant on Economic, Social and Cultural Rights* (Oxford: Clarendon Press). In the UK the *Magna Carta*, the republican period of the 1600s and the rise of liberalism and later socialism are often seen as the basis for human rights.

² See Eide, A. et al. (ed.), (2001) *Economic, Social and Cultural Rights – a Textbook*. (2nd ed.) Dordrecht: Martinus Nijhoff Publishers.

³ *Universal Declaration of Human Rights* UNGA Resolution 2200A (XXI) UN Doc A/810 (1948).

⁴ Adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

⁵ See UN Doc. A/CONF 157/24 (1993) *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna.

(b) The International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 has been ratified by almost 150 States.⁶ Article 11 states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing**, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

This obligation of States to recognize the right to housing manifests itself in several key areas.⁷ Firstly, all countries must recognize the human rights dimensions of housing, and ensure that no measures of any kind are taken with the intention of eroding the legal status of this right. Second, legislative measures, coupled with appropriate policies geared towards the progressive realization of housing rights, form part of the obligation 'to recognize'. Any existing legislation or policy which clearly detracts from the legal entitlement to adequate housing would require repeal or amendment. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of those in greater need. Specifically, housing rights issues should be incorporated into the overall development objectives of States. In addition, a national strategy aimed at progressively realizing the right to housing for all, through the establishment of specific targets should be adopted. Thirdly, a genuine attempt must be made by States to determine the degree to which this right is not in place, and to target housing policies and laws towards attaining this right for everyone in the shortest possible time. In this respect, States must give due priority to those social groups living in unfavourable conditions by according them particular consideration.⁸

When a State ratifies one of the Covenants, it accepts a solemn responsibility to apply each of the obligations embodied therein and to ensure the compatibility of their national laws with their international duties, in a spirit of good faith. Through the ratification of human rights treaties, therefore, States become accountable to the international community, to other States which have ratified the same texts, and to their own citizens and others resident in their territories.⁹

States obligations translate to a requirement to meet a minimum core obligation in terms of the rights concerned, without discrimination. This concept has been used to provide a minimum threshold approach, below which no person should have to endure. The minimum core obligation has narrowed the problem of distributive justice to that of assessing the evenness of the distribution of socially guaranteed minimal levels of certain goods and benefits among individual groups within a country.¹⁰ In terms of housing rights the minimum core obligations of States

⁶ For details of ratifications see websites: http://www.unhchr.ch/html/menu3/b/a_cescr.htm and <http://www.unhchr.ch/pdf/report.pdf>

⁷ Alston, P. & Quinn, G. 'The Nature and Scope of States Parties Obligations under ICESCR,' 9 *HRQ* 156-229 (1987).

⁸ *Ibid.*

⁹ See UNCESCR website: <http://www.unhchr.ch/html/menu6/2/fs16.htm>

¹⁰ See Skogly, S. 'Human Rights Reporting: The "Nordic" Experience', 12 *HRQ* 513-528 (1990).

would involve a guarantee that everyone enjoyed a right to adequate shelter and a minimum level of housing services, without discrimination.

If a State claims that it is unable to meet even its minimum obligations because of a lack of resources, it must at least be able to demonstrate that every effort has been made to use all resources that are at its disposal to satisfy, as a matter of priority, those minimum obligations. International assistance should be sought if a State is not in a position to meet this minimum core obligation. However, lack of resources can never be used to justify failure of a State to fulfil its obligation to monitor non-enjoyment of the rights set out in the Covenant. In essence, the obligation of States is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right to adequate housing for every individual in the shortest possible time, using the maximum available resources. The discretion of a State here is not unlimited, but:

...while the Covenant itself is devoid of specific allocational benchmarks, there is presumably a process requirement by which States might be requested to show that adequate consideration has been given to the possible resources available to satisfy each of the Covenant's requirements.¹¹

Appropriate policies and laws geared towards the progressive realization of housing rights, form part of the obligation 'to recognize' the right to housing. Progressive realization involves meeting the rights obligations to a higher standard to the maximum of its available resources. The term 'to the maximum of its available resources' has been interpreted to mean that both the resources within a State, and those provided by other States or the international community must be utilized for the fulfilment of each of the rights found in the Covenant.¹² The term has been interpreted to include money, natural resources, human resources, technology and information.¹³ Even when 'available resources' are demonstrably inadequate, States must still strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances. The drafters of the section originally were inclined to address this obligation to the resources of the country, and not just to budgetary appropriations.¹⁴ Significantly, this principle requires an equitable and effective use of and access to the resources available. Although the alleged lack of resources is often used to justify non-fulfilment of certain rights, the UN Committee on Economic, Social and Cultural Rights (UNCESCR) has emphasized that even in times of severe economic contraction and the undertaking of measures of structural adjustment within a State, vulnerable members of society can, and indeed, must be protected by the adoption of relatively low-cost targeted programmes.

The Progress Report of the UN Special Rapporteur on Housing in 1993 pointed out that the definition of 'maximum of available resources':

...represents perhaps the core issue in the perception and practice of States vis-à-vis economic, social and cultural rights. In practice, States continue to exhibit an

¹¹ Alston, P. & Quinn, G. 'The Nature and Scope of States Parties Obligations under ICESCR,' 9 *HRQ* 156-229 (1987), p. 180.

¹² UN Doc. E/C.12/1991/4. UNCESCR *General Comment No. 4. The Human Right to Adequate Housing*. Geneva.

¹³ Robertson, 'Measuring State Compliance with the Obligation to Devote the Maximum Resources to Realizing Economic, Social and Cultural Rights,' 16 *HRQ* 693-714 (1994).

¹⁴ Alston, P. & Quinn, G. 'The Nature and Scope of States Parties Obligations under ICESCR,' 9 *HRQ* 156-229 (1987), p. 178.

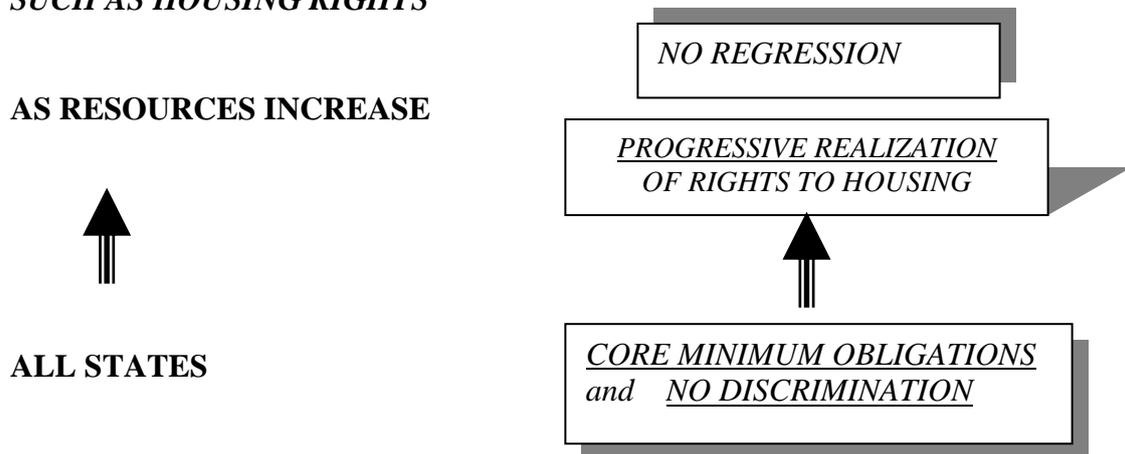
overarching tendency to rely on this principle in seeking to rationalize failures to ensure these rights. At the most rudimentary level, this phrase means that both the resources within a State and those provided by other States or the international community must be utilized towards the fulfilment of each of the rights found in the Covenant.¹⁵

The term ‘to achieve progressively’,¹⁶ imposes an obligation on States to move as quickly and effectively as possible towards the goal of realizing fully each of the rights contained in the Covenant, rather than any indefinite postponement. The concept of progressive achievement is ‘in many ways the linchpin of the Covenant’.¹⁷ The UN Special Rapporteur has pointed out that;

This principle imposes an obligation on States to move as expeditiously and effectively as possible towards the goal of realizing fully each of the rights found in the Covenant. Put simply, States cannot defer indefinitely efforts to ensure the full realization of the Covenant. Not all rights under this text, however, require progressive realization. The adoption of legislation relating to the non-discrimination clauses of the Covenant and monitoring of the status of realization of the rights in question must occur immediately following ratification. This obligation must be read in the light of Article 11.1 of the Covenant, in particular, the phrases ‘an adequate standard of living’ and the ‘continuous improvement of living conditions’.

Conversely, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources. The obligation of progressive realization, moreover, exists independently of the increase in resources. Above all, it requires effective use of resources available, both from domestic and external sources.¹⁸

OBLIGATIONS OF STATES IN RELATION TO SOCIO-ECONOMIC RIGHTS – SUCH AS HOUSING RIGHTS



Compliance by States parties with their obligations under the Covenant and the level of implementation of the rights and duties in question is monitored by the

¹⁵ UN Doc. E/CN.4/Sub.2/1993/15. paras. 54-57.

¹⁶ UN Doc. E/C.12/1771/4. UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing*. Geneva.

¹⁷ Alston, P. & Quinn, G. ‘The Nature and Scope of States Parties Obligations under ICESCR,’ 9 *HRQ* 156-229 (1987), p. 172.

¹⁸ UN Doc. E/CN.4/Sub.2/1993/15. paras. 58-60.

UNCESCR.¹⁹ The Committee works on the basis of many sources of information, including reports submitted by States parties and information from UN specialized agencies, UN Centre for Human Settlements (UNCHS) and others. It also receives information from non-governmental and community-based organizations working in States, which have ratified the Covenant, from international human rights and other non-governmental organizations, from other UN Treaty bodies, and from generally available literature. National homeless organisations can submit reports (known as shadow reports) on the implementation of the rights set out in the Covenant to the UNCESCR at Geneva.²⁰

The UNCESCR, through its periodic monitoring of States Parties has established a corpus of jurisprudential principles in relation to the implementation of the ICESCR and the right to housing. On a number of occasions, the UNCESCR has concluded that violations of the ICESCR had taken place, and subsequently urged States parties to desist from any further infringements of the rights in question.²¹

In 1996, the UNCESCR²² proposed a draft optional protocol for individual complaints under the ICESCR to be made.²³ This would allow any individual to make a complaint directly to the UNCESCR in relation to an area of socio-economic rights violation, similar to the system now being developed under the Inter-American Human Rights system established under the San Salvador Protocol.²⁴ So far, a number of States have agreed to support the Protocol, and housing organisations can encourage States to support this valuable development.²⁵

(c) General Comments 4 & 7

The UNCESCR *General Comment No. 4. on the Right to Adequate Housing*²⁶ spells out the elements of housing policy which States must address in meeting the housing obligations of the ICESCR. It sets out in detail the elements of adequate housing which the international community have recognised. Viewed in their entirety, these entitlements form the minimum core guarantees which, under public international law, are legally vested in all persons.

1. Legal security of tenure

All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure

¹⁹ *Ibid.*

²⁰ UN Committee on Economic, Social and Cultural Rights, Office of the High Commissioner for Human Rights, Palais des Nations, 8-14 avenue de la Paix, 1211 Genève, Switzerland. Tel. (41)(22) 917-93-21; Fax: (41)(22)917-90-22.

²¹ UN Doc. E/C.12/1994/20. Dominican Republic.

²² UN Doc. E/C.12/1996/SR. paras. 44-49 and 54.

²³ UN Doc. E/CN.4/1997/105. 18 December 1996. Commission on Human Rights. Fifty-third session. *Draft optional protocol to the ICESCR.*

²⁴ The report of the Independent Expert, Mr Hatem Kotrane (UN Doc. E/CN.4/2003/53, 13 January 2003; UN Doc. E/CN.4/2003/53/Corr.2, 7 April 2003), provides commentary on: the nature and scope of States parties' obligations under the Covenant; the justiciability of economic, social and cultural rights; the benefits and practicability of a complaint mechanism and the issue of complementarity between different mechanisms.

²⁵ See website: <http://www.unhchr.ch/html/menu2/6/cescr.htm#protocol>

²⁶ UN Doc.E/1991/23. (1991) UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing.*

upon those households currently lacking such protection. Such steps should be taken in genuine consultation with affected persons and groups.

2. Availability of services, materials and infrastructure

All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

3. Affordable housing

Personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States to ensure the availability of such materials.

4. Habitable housing

Adequate housing must be habitable. In other words, it must provide the inhabitants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of occupants must also be guaranteed.

5. Accessible housing

Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups.

6. Location

Adequate housing, must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

7. Culturally adequate housing

The way housing is constructed, the building materials used and the policies underlying these must appropriately enable the expression of cultural identity and diversity. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.

These extensive obligations from *General Comment No. 4*, reveal some of the complexities associated with the right to adequate housing. They also show the many areas which must be fully considered by States to satisfy the housing rights obligations. Any person, family, household, group or community living in conditions in which these entitlements are not fully satisfied, could reasonably claim that they do not enjoy the right to adequate housing, as enshrined in international human rights law.

Following from *General Comment No. 4*, and with increasing reports of forced evictions, *General Comment No. 7 on The Rights to Adequate Housing – forced evictions* was issued in 1997.²⁷

The term ‘forced evictions’ as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or

²⁷ UN Doc. E/1998/22 Annex IV.

communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights²⁸.

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership), or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.²⁹

The UNCESCR considers that the procedural protections which should be applied in relation to forced evictions include:

- (a) an opportunity for genuine consultation with those affected;
- (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- (e) all persons carrying out the eviction to be properly identified;
- (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- (g) provision of legal remedies; and
- (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

References to the right to housing are also contained in many other UNCESCR General Comments. In *General Comment No. 5*, on persons with disabilities, there is a reference to housing rights for people with disabilities.³⁰ In *General Comment No. 6*, on the economic, social and cultural rights of older people, there is a reference to the type and quality of housing to be provided.³¹ In *General Comment No. 14*, on the right to the highest attainable standard of health, the link between health and housing is clearly set out.³²

(d) Other relevant UN Instruments

The UN *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) adopted by the UN General Assembly (Resolution 34/180 of 18

²⁸ *Ibid.*, para. 3.

²⁹ *Ibid.*, para. 10. See also Farha, L. (1998) *Is there a woman in the house? Women and the right to adequate housing. A Resource Guide to Women's International Human Rights*. New York: Transnational Publishers.

³⁰ UN Doc. E/1995/22.

³¹ UN Doc. E/1996/22.

³² UN Doc. E/C.12/2000/4.

December 1979) entered into force on 3 September 1981. Some 180 States are parties to the Convention as of March 2005.³³ Article 13 states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:

- (a) The right to family benefits;
- (b) The right to bank loans, mortgages and other forms of financial credit;

Article 14 (2) states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:

... (h) To enjoy adequate living conditions, particularly in relation to **housing**, sanitation, electricity and water supply, transport and communications.³⁴

In relation to the right to adequate housing there is a powerful argument that an understanding of women's actual housing experiences must inform a definition of women's right to housing.³⁵

Despite the fact that, worldwide, women are the primary users of housing and are therefore the most effected by housing, women have been excluded from virtually every aspect of the housing process, be it policy development, planning and design, ownership, construction and even housing movements. And so, though the house is a 'woman's place', in most communities she is not permitted to control it.³⁶

Key issues in the realization of a right to adequate housing are land ownership/tenure, equality in access to land, housing and credit, inheritance rights and protection from domestic violence. The violation of the right to adequate housing may have different meanings for women and men.

A majority of the world's 1 billion people living in conditions of abject poverty are women. They make up the plurality of the world's 50,000 inhabitants who die daily from disease resulting from inadequate housing... An average of 50-60% of all homeless women report that they are homeless because they are fleeing domestic violence. Eight-one per cent of all homeless women have at some time in their lives experienced either sexual assault or physical abuse, and 65% reported physical violence by a current partner...³⁷

There have been a number of UN resolutions on women and housing rights and these include the following which are available on the UNCHS website:³⁸

³³ See website: <http://www.un.org/womenwatch/daw/cedaw/states.htm>

³⁴ See website: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

³⁵ Farha, L. (1998) *Is there a woman in the house? Women and the right to adequate housing. A Resource Guide to Women's International Human Rights* New York: Transnational Publishers.

³⁶ *Ibid.*, p. 6.

³⁷ UN Doc. E/CN.4/1999/NGO/95. Commission on Human Rights. *Integration of the Human rights of Women and the gender Perspective. Written Statement submitted by Human Rights Advocates, - a non-governmental organisation in special consultative status.*

³⁸ Available on website: http://www.unchsh.org/programmes/housingrights/unhrp_resolutions.asp

- The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1998/15, entitled ‘Women and the Right to Land, Property and Adequate Housing’³⁹
- The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1997/19 entitled, ‘Women and the Right to Adequate Housing, Land and Property’⁴⁰
- UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1998/26 entitled, ‘Housing and Property Restitution in the Context of the return of Refugees and Internally Displaced Persons’⁴¹
- Women's equal ownership, access to and control over land and the equal rights to own property and to adequate housing -Commission on Human Rights resolution 2003/22⁴²

The *Convention on the Rights of the Child*⁴³ at Article 27(1) points out that States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. Article 27(3) states:

States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and **housing**.

Many international instruments setting out rights to housing have been ratified by countries around the world.⁴⁴ These include:

- *The Declaration on the Rights of Disabled Persons* (1975) of UNGA resolution 2542 (XXIV) on 11 December 1975
- *The Vancouver Declaration on Human Settlements* (1976) adopted by the United Nations Conference on Human Settlements in 1976
- *The UN Global Strategy for Shelter to the Year 2000* adopted by the UN General Assembly in resolution 43/181 on 20 December 1988
- The UN World Conference on Environment and Development (UNCED) of Rio de Janeiro in 1992, which adopted *Agenda 21*
- *ILO Recommendation No. 115 on Worker's Housing* 1961

The growth of asylum-seekers and refugees worldwide is having a major impact on housing and homelessness issues. European and other States have accepted obligations under the 1951 *Convention Relating to the Status of Refugees* and its Protocol to take a share of the world's refugees, who are fleeing from persecution and violence.⁴⁵ The *Geneva Convention Relating to the Status of Refugees*,⁴⁶ has been signed and ratified by all European States.⁴⁷

³⁹ UN Doc. E/CN.4/SUB.2/RES/1998/15.

⁴⁰ UN Doc. E/CN.4/SUB.2/RES/1997/19.

⁴¹ UN Doc. E/CN.4/SUB.2/RES/1998/26.

⁴² See website: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2003.22.En?](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2003.22.En?)

⁴³ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entered into force 2 September 1990. See website:

<http://www.unhcr.ch/html/menu3/b/k2crc.htm>

⁴⁴ For a fuller compilation of these instruments see Leckie, S. (2000) *Legal Resources for Housing Rights* (Geneva: COHRE). See website: <http://www.cohre.org>

⁴⁵ UN General Assembly resolution 429 (V) of 14 December 1950, entry into force 22 April 1954. See website: http://www.unhcr.ch/html/menu3/b/o_c_ref.htm

The Convention parties agreed to grant certain benefits to refugees, including non-discrimination as to race, religion or country of origin, freedom to practice religion equal to that pertaining in the State, rights regarding the acquisition of property, freedom of association, access to the courts, right to work and self-employment, education, public relief and assistance, freedom of movement and transfer of assets, labour rights and social security.⁴⁸

Article 21 of the 1951 Geneva Convention states that:

As regards **housing**, the Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.

The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families was adopted by UN General Assembly resolution 45/158 of 18 December 1990, and entered into force in July 2003.⁴⁹ The Convention addresses the needs of more than 150 million migrants, including migrant workers, refugees, asylum seekers, permanent immigrants and others, who live and work in a country other than that of their birth or citizenship. They represent 2% of the world's population. None of the EU States have ratified the Convention as at September 2005.⁵⁰ Persons who qualify as migrant workers under the provisions of the Convention are entitled to enjoy their human rights regardless of their legal status. There are important housing policy issues in relation to the housing rights of live-in servants, family reunification and migrant women working to support children at home.⁵¹ Leaving the workplace for immigrant women employed in the private home means losing their home as well as their employment. The Convention reflects an up-to-date understanding of migratory trends as seen from the point of view of both States of origin and host States of migrant workers and their families.⁵² Article 43 states:

1. Migrant workers shall enjoy equality of treatment with nationals of the State of employment in relation to:
... (d) **Access to housing, including social housing schemes, and protection against exploitation in respect of rents;**
2. States Parties shall promote conditions to ensure effective equality of treatment to enable migrant workers to enjoy the rights mentioned in paragraph 1 of the present article whenever the terms of their stay, as authorized by the State of employment, meet the appropriate requirements.
3. States of employment shall not prevent an employer of migrant workers from

⁴⁶ *Convention relating to the Status of Refugees*, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 entered into force 22 April 1954, in accordance with Article 43, as amended by the New York Protocol of 31 January 1967.

⁴⁷ See website: <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>

⁴⁸ Articles 2 – 29, Geneva Convention on the Status of Refugees, 1951.

⁴⁹ See website: http://www.unhcr.ch/html/menu3/b/m_mwctoc.htm

⁵⁰ See website: <http://www.ohchr.org/english/countries/ratification/13.htm>

⁵¹ See Ehrenreich & Hochschild, (2002) *Global Woman*, London: Granta.

⁵² See website:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/B87E9E85C7147498C1256CEF00385E50?opendocument>

establishing housing or social or cultural facilities for them. Subject to article 70 of the present Convention, a State of employment may make the establishment of such facilities subject to the requirements generally applied in that State concerning their installation.

In addition to being included in the various treaties and declarations, the right to adequate housing has also been addressed in many resolutions adopted by all types of UN decision-making organs. Such resolutions articulate internationally accepted standards. This method of recognition reveals the sustained global attention and support given to the right to adequate housing by the international community of States.

The *Limburg Principles*, 1986,⁵³ and the *Maastricht Guidelines*⁵⁴ have provided clarification on States obligations in the area of socio-economic rights, such as housing. These have defined further the detail of effective implementation and the nature of violations of these rights, as well as proposing the types of remedies which should be available in the case of violations. The *Maastricht Guidelines* recommend that any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.⁵⁵

In relation to adequate reparation, all victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.⁵⁶ No official sanctioning of violations requires that national judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned.⁵⁷ States should develop effective measures to preclude the possibility of impunity of any violation of economic, social and cultural rights and to ensure that no person who may be responsible for violations of such rights has immunity from liability for their actions.⁵⁸ In order to further clarify the contents of States obligations to respect, protect and fulfil economic, social and cultural rights, States and appropriate international bodies should actively pursue the adoption of new standards on specific economic, social and cultural rights, in particular the right to work, to food, to housing and to health.⁵⁹

The *Draft International Convention on Housing Rights*⁶⁰ (set out in the Appendix to this report) prepared by the UN Special Rapporteur is one of the most informed and complete statements on housing rights. This has yet to be promoted by many NGOs seeking to promote rights to housing.

All of this shows that there is a consistent and progressive development of housing as a right permeating the international and national legal arenas. This provides an internationally accepted legal foundation for further action towards ensuring the effective realization of the right to housing for all people. Indeed, there is

⁵³ UN Doc. E/CN.4/1987/19. The Limburg Principles on the Implementation of the ICESCR. *Human Rights Quarterly* 16 (1987) 37-40.

⁵⁴ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. *20 Human Rights Quarterly* 20 (1998) 691-704.

⁵⁵ *Ibid.*, para. 22.

⁵⁶ *Ibid.*, para. 23.

⁵⁷ *Ibid.*, para. 24.

⁵⁸ *Ibid.*, para. 27.

⁵⁹ *Ibid.*, para. 30.

⁶⁰ UN Doc. E/CN.4/Sub.2/1994/20.

a vital role for homeless people, organisations and advocates to ensure that the human rights obligations accepted by States at international level are vindicated at national, regional and local level.

Chapter 2. The Council of Europe

The Council of Europe (CoE) is the continent's oldest political organisation, founded in 1949. It groups together 46 countries, including 21 countries from Central and Eastern Europe. It is distinct from the 25-nation European Union, but no country has ever joined the Union without first belonging to the Council of Europe.¹ The Council was set up to defend human rights, parliamentary democracy and the rule of law, develop continent-wide agreements to standardise member countries' social and legal practices and promote awareness of a European identity, based on shared values and cutting across different cultures. While the *European Social Charter* (and Revised Charter) and *Convention on Human Rights and Fundamental Freedoms* are widely associated with the Council, it also addresses housing rights issues in other ways.

In 2000, the CoE Committee of Ministers adopted a Recommendation on the *Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*.² This acknowledged that:

... the satisfaction of basic human material needs (as a minimum: food, clothing, **shelter** and basic medical care) is a requirement intrinsic to the dignity of every human being and constitutes the condition for the existence of all human beings and their well-being.

The Recommendation considered that the recognition of an individual, universal and enforceable right, for persons in situations of extreme hardship, to the satisfaction of those needs, is a condition for the exercise of other fundamental rights and an indispensable element in a democratic State based on the rule of law. It recommended that the governments of the Member States recognise, at national level, an individual universal and enforceable right to the satisfaction of basic material needs (as a minimum: food, clothing, shelter and basic medical care) for persons in situations of extreme hardship.

Of course, the Council of Europe has established significant legal instruments, which promote housing rights. These are the *European Social Charter* 1961 and Revised Charter (RESC) 1996 and the *European Convention on Human Rights and Fundamental Freedoms* 1950.

(a) The European Social Charter

The *European Social Charter* (ESC) of 1961³ sets out a number of rights and freedoms and establishes a supervisory mechanism guaranteeing their respect by the States Parties.⁴ Following its revision, the *Revised European Social Charter* (RESC), which came into force in 1999, is gradually replacing the initial 1961 Charter.⁵

¹ See website: http://www.coe.int/T/e/Com/about_coe/

² Council of Europe, Recommendation No. R (2000) 3 of the Committee of Ministers to the member states on the *Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*. Adopted 19 January 2000.

³ Turin, 18.X.1961, Council of Europe, European Treaty Series - No. 35.

⁴ Council of Europe. *Revised Social Charter*, Article 31. For up to date details on signatures, ratifications and reservations on the Charter and Revised Charter see Council of Europe website: <http://www.coe.int>.

⁵ See Harris, D. & Darcy, J. (2001) *The European Social Charter: The Protection of Economic and Social Rights on Europe*, New York: Transnational.

The *European Social Charter* of 1961 at the Preamble states:

The governments signatory hereto, being members of the Council of Europe, Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms... Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin... Have agreed as follows:

The Contracting Parties accept as the aim of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised...

Thus, the countries which have ratified and signed the Charter or RESC have committed themselves to the effective realization of a number of human rights. These include housing rights, within Articles 13, 16, and 19 of the Charter and Articles 15, 16, 19, 30 and 31 of the RESC.

There is a monitoring procedure based on regular national reports on compliance with the provisions of the Charter. The Committee of Social Rights (CSR) ascertains whether countries have honoured the undertakings set out in the Charter. Its 15 independent, impartial members are elected by the CoE for a period of 6 years, renewable once. Every year the States Parties submit a report indicating how they implement the Charter or RESC in law and in practice, ensuring that their citizens and residents are receiving the protection of the Charter. Each report concerns some of the accepted provisions of the Charter or RESC. Housing and homelessness organisations can submit information and reports to the CSR, which can then be considered alongside the State reports.⁶

The CSR examines the State and other reports and decides whether or not the situation is in conformity with the obligations of the Charter or RESC. The Reports from each country together with the Conclusions of the CSR are published and available to housing organisations and individuals.⁷ If a State takes no action on a CSR decision to the effect that it does not comply with the Charter or RESC, the Committee of Ministers addresses a recommendation to that State, asking it to change the situation in law and/or in practice.⁸

Article 13 of the Charter contains important rights for homeless people. The Article grants the right to social and medical assistance and states:

With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

⁶ Secretariat of the European Social Charter, Directorate General of Human Rights, Council of Europe F – 67075 Strasbourg Cedex. Email: social.charter@coe.int

⁷ See website: http://www.coe.int/T/E/Human_Rights/Esc/6_Survey_by_country/

⁸ The Charter database at website: <http://huDoc.esc.coe.int/esc/search/default.asp>, which can be accessed online or on CD Rom, makes it easy to find out about the case-law of the European Committee of Social Rights. All housing rights issues including Reports, Conclusions and Collective Complaints addressed here can be accessed at the CoE website. See also Samuel, L. (2002) *Fundamental social rights – case law of the European Social Charter*, Strasbourg: Council of Europe Publishing.

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.

Throughout all the supervision cycles the CSR has insisted that social assistance should be granted as a ‘subjective right (*droit subjectif*)’. This means that it should not depend solely on a decision at the administration’s discretion, and such a right must be supported by a right of appeal to an independent body.⁹ The phrase ‘without adequate resources’ has not been defined expressly by the CSR. But its assessment in national situations suggests that a person comes within the scope of this paragraph when he or she lacks sufficient resources to provide for the necessities of life, as determined by reference to the prevailing cost and standard of living within the State concerned. The CSR examines critically any restrictions to these entitlements on length of residency or other grounds.

Article 16 of the Charter on the right of the family to social, legal and economic protection states:

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, **provision of family housing**, benefits for the newly married, and other appropriate means.

There is a clear obligation to arrange for the provision of family housing.¹⁰ In the case of Finland, the CSR noted that the construction of subsidised housing had been halved, whereas non-subsidised housing construction has increased.¹¹ In relation to Austria, the CSR found that the State was not in conformity with the obligation to promote the social protection of the family required under Article 16, because nationals of Contracting States to the Charter, but who were not members of the European Economic Area, did not benefit from assistance for housing construction.¹² Residency requirements in Norway, while formally equal, were found to create inequality in substance, and were not in conformity with the Article.¹³ Similarly, the CSR found that Spain was not in conformity with the Article where ‘public promotion

⁹ Samuel, L. (2002) *Fundamental social rights – Case law of the European Social Charter*. Strasbourg: Council of Europe Publishing, p. 307.

¹⁰ *Ibid.*, p. 351.

¹¹ Council of Europe. (2000) *European Social Charter. European Committee of Social Rights. Conclusions XV – I. Finland*.

¹² *Conclusions. XV – I. Austria*.

¹³ Council of Europe. (2000) *European Social Charter. European Committee of Social Rights. Conclusions XI – I. Norway*, p. 159.

housing' was allocated only to nationals of the country.¹⁴

Article 19 on the right of migrant workers and their families to protection and assistance states:

With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting Parties undertake:

...(4) to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:

- a. remuneration and other employment and working conditions;
- b. membership of trade unions and enjoyment of the benefits of collective bargaining;
- c. **accommodation;**

...(6) to facilitate as far as possible the reunion of the family of a foreign worker permitted to establish himself in the territory;

From the first cycle the CSR has expressed the view that accommodation is a matter of 'primary importance' affecting the situation of the migrant worker and his/her family. Portugal was found to be in contravention of the provisions of Article 19 (4)(c),¹⁵ since a legislative Decree of 11 August 1977 stated that only Portuguese nationals were entitled to apply for local authority housing, even though the country report stated that this was not applied in practice. The residency requirement of five years for access to social housing in the Balearic Islands, which applied to nationals and foreigners, was held to affect the Conclusion of the CSR, as to whether Spain was in compliance with Article 19 of the Charter.¹⁶ In the case of Finland the CSR pointed out that for equal treatment in access to housing, the lack of an appeal process to the courts against a decision to refuse accommodation was preventing the effectiveness of Article 19(4). This Article required an independent body to hear appeals on equal access to housing. An administrative procedure before the local authority, or an appeal to the Minister of the Environment, which was the only possible appeal mechanism in relation to equal access to housing for both nationals and foreigners, was insufficient.¹⁷ The CSR has criticized Norway for making suitable housing a requisite for family reunion, while at the same time preventing a worker from applying for family housing, as long as he was living alone in the country.¹⁸

Article 19(6) of the RESC sets out the meaning of 'family of foreign worker' as at 'least his wife and dependent children under the age of 21 years'. The CSR speaks of the link between family rights and housing rights in terms of the 'fundamental importance for family reunion of adequate housing'. This justifies the CSR reading Article 19(4)(c) and Article 19(6) in tandem so as to oblige a State to take special measures to aid foreign workers to find accommodation, unless conditions on the housing market are such that no steps are necessary. Thus, a special

¹⁴ Council of Europe. (2000) *European Social Charter. European Committee of Social Rights. Conclusions XI – 2. Spain*, p. 147.

¹⁵ *Conclusions XV – 1. Portugal*.

¹⁶ *Conclusions XV – 1. Belgium*.

¹⁷ *Conclusions XV – 1. Finland*.

¹⁸ Council of Europe. (1975) *European Social Charter. European Committee of Social Rights. Conclusions IV Norway*, p. 126.

positive right to housing for migrant workers is also assisted by the CSR viewing Article 19(6) right to family reunion as a concrete manifestation of Article 16's general right to protection of all families, including the provision of family housing.¹⁹

(i) The Revised European Social Charter 1996

The Revised European Social Charter (RESC) of 1996 added some new rights in relation to the right to protection against poverty and social exclusion and the right to housing.²⁰ A new Article 31 obliges States to take certain actions in order to ensure the effective exercise of rights to housing. States which had ratified the RESC at 1st June 2005 were: Albania, Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Croatia, Estonia, Finland, France, Ireland, Italy, Lithuania, Moldova, Norway, Portugal, Romania, Slovenia and Sweden.²¹

Once again the commitment of States to the effective implementation of rights is set out clearly in Part 1:

The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:

Article I of the RESC on the implementation of the undertakings given by States demonstrates the methods which can be used to address the housing rights set out in the Charter:

1. Without prejudice to the methods of implementation foreseen in these articles the relevant provisions of Articles 1 to 31 of Part II of this Charter shall be implemented by:
 - a. laws or regulations;
 - b. agreements between employers or employers' organisations and workers' organisations;
 - c. a combination of those two methods;
 - d. other appropriate means.

Certain Articles of the RESC include a right to housing:

- Article 15: Disabled persons have the right to independence, social integration and participation in the life of the community
- Article 16: The family as a fundamental unit of society has the right to appropriate social, legal and economic protection to ensure its full development
- Article 19: Migrant workers who are nationals of a Contracting State Party and their families have the right to protection and assistance in the territory of any other State Party
- Article 23: Every elderly person has the right to social protection
- Article 30: Everyone has the right to protection against poverty and social exclusion

¹⁹ Scott, 'Reaching Beyond (Without Abandoning) the Category of 'Economic, Social and Cultural Rights'', 21 *HRQ* (1999), p. 658.

²⁰ *European Social Charter. (Revised)* Council of Europe Strasbourg 3.5.1996. See Council of Europe website: <http://www.coe.int>.

²¹ See website:

http://www.coe.int/T/F/Droits_de_l%27Homme/Cse/1_Pr%27sentation_g%27n%27rale/Sig+rat01Jun e05.pdf

- Article 31: Everyone has the right to housing

Part V of Article E of the RESC sets out the obligations to prevent discrimination in implementing rights to housing and other rights:

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Article 15 of the 1961 Charter was revised in the RESC of 1996 to oblige States to enable people with disabilities to access to housing in order to promote their full social integration and participation in the life of the community

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular...

... (3) to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, **housing**, cultural activities and leisure.

Article 23 of the RESC incorporated the right of elderly persons to social protection, previously set out in Article 4 of the Additional Protocol of 1988:

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

... - to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- (a) provision of housing suited to their needs and their state of health or of adequate support for adapting their **housing**;
- (b) the health care and the services necessitated by their state;

... - to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Article 30 of the RESC was also new and obliged States to implement the right to protection against poverty and social exclusion.

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

(a) promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, **housing**, training, education, culture and social and medical assistance...²²

²² Council of Europe. *Revised Social Charter*. Article 30. Strasbourg: CoE. (1999).

The first round of Conclusions of the CSR, which examined this Article in the case of 6 countries, took place in 2003.²³ In relation to the housing and homelessness element of Article 30 the Conclusions of the CSR on this new measure linked the obligations under the right to housing (Article 31) with the requirements to protect against poverty and social exclusion (Article 30).

By introducing into the Revised Charter a new Article 30, the Council of Europe member states considered that living in a situation of poverty and social exclusion violates the dignity of human beings. With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion Article 30 requires States parties to adopt an overall and coordinated approach...

The measures taken in pursuance of the approach must promote access to social rights, in particular employment, **housing**, training, education, culture and social and medical assistance.²⁴

In relation to France the CSR addressed the issue of housing under Article 30:

The report gives no details on measures taken in the other areas mentioned by Article 30: housing, training, education, culture, social and medical assistance. With respect to housing, including the issues of homelessness and evictions, the Committee refers to its comments in the conclusion under Article 31 of the Revised Charter. In the Committee's view housing is a critical policy area in fighting poverty and it is particularly interested to know what measures have been taken to ensure an appropriate spatial distribution of (social) housing so as to avoid 'ghettoising' poverty and social exclusion.²⁵

In relation to Sweden the Committee again addressed the connection between housing rights and Article 30.

More particularly as regards housing, the Committee refers to its conclusion under Article 31 of the Revised Charter. In the Committee's view housing is a critical policy area in fighting poverty and it is particularly interested to know what measures have been taken to ensure an appropriate spatial distribution of (social) housing so as to avoid 'ghettoising' poverty and social exclusion.²⁶

Clearly, the link between poverty, social exclusion and housing need is becoming increasingly connected at the level of human rights monitoring at the Council of Europe.

Article 31 of the RESC was also new and created a right to housing within the RESC:

With a view to ensuring the effective exercise of the **right to housing**, the Parties undertake to take measures designed:

²³ Council of Europe. European Committee on Social Rights, European Social Charter (revised) *Conclusions 2003 – Volume 1 (Bulgaria, France, Italy)* Strasbourg: Council of Europe Publishing October 2003. Council of Europe. European Committee on Social Rights, European Social Charter (revised) *Conclusions 2003 – Volume 2 (Romania, Slovenia, Sweden)* Strasbourg: Council of Europe Publishing October 2003.

²⁴ Council of Europe. *Conclusions 2003 – Volume 1*, p. 214.

²⁵ *Ibid.*, p. 218.

²⁶ Council of Europe. *Conclusions 2003 – Volume 2*, pp. 648-649.

- (i) to promote access to housing of an adequate standard;
- (ii) to prevent and reduce homelessness with a view to its gradual elimination;
- (iii) to make the price of housing accessible to those without adequate resources.

The monitoring process of the UNCESCR involves a detailed questionnaire for the State Parties covering housing rights, policy measures, eligibility grounds, actions to reduce homelessness and procedures for challenge of unfavourable decisions.²⁷ A short example will illustrate the type of questions.

ARTICLE 31. Para. 3.

Question A.

Please describe the measures taken in your country to make the price of housing accessible to those without adequate resources (housing benefit, reduced rate loans, tenancy buy-out options etc.) Please indicate the amounts of public funds reserved for this purpose.

Question B.

*Please indicate the criteria applied to persons without adequate resources. Please indicate whether, where a person meets the criteria, they are entitled to assistance in accessing **housing as a right**. Please indicate whether they may challenge an unfavourable decision before the courts on both procedural and substantive grounds. Please indicate the number of persons who apply for such assistance and the number who benefit.*

The Conclusions of the CSR in 2003 in relation to the States obligations under Article 31 illustrate the application of a new set of benchmarks to national housing law and policy.²⁸ The Committee considered reports by France, Slovenia and Sweden, and has clarified the obligations within Article 31. These are now reproduced here for ease of access to readers and because of their significance as a potential new set of benchmarks for national housing and homelessness policies.²⁹

Paragraph 1 – Adequate housing

Under Article 31§1 of the Charter, the Committee considers that the Parties shall guarantee to everyone the right to housing and to promote access to adequate housing. In addition, Parties shall guarantee equal treatment with respect to housing on the grounds of Article E of the Revised Charter. Equal treatment must be assured to the different groups of vulnerable persons, particularly low-income persons, unemployed, single parent households, young persons, persons with disabilities including mental health problems, persons internally displaced due to wars or natural disasters etc. The principle of equality of treatment and nondiscrimination covers not only paragraph one but the rest of Article 31 as well.

²⁷ The full questionnaire for reports to be submitted in pursuance of the revised European Social Charter was adopted by the Committee of Ministers in 17th January 2001. See website: http://www.coe.int/T/E/Human%5FRights/Esc/4%5FReporting%5Fprocedure/1_State_Reports/Form%20-%20Revised%20European%20Social%20Charter.pdf

²⁸ See Kenna, P. 'Housing Rights - the New Benchmarks for Housing Policy in Europe?' *The Urban Lawyer*, Winter 2005. Volume 37, Number 1. 87-111.

²⁹ Council of Europe. *Conclusions 2003 – Volume 1*, pp. 221-240; Council of Europe. *Conclusions 2003 – Volume 2*, pp. 554-565 and pp. 650-659.

The Committee considers that, for the purpose of Article 31§1, the Parties must define the notion of adequate housing in law. The Committee considers that ‘adequate housing’ means a dwelling which is structurally secure, safe from a sanitary and health point of view and not overcrowded, with secure tenure supported by the law.

This definition means that:

- a dwelling is safe from a sanitary and health point of view if it possesses all basic amenities, such as water, heating, waste disposal; sanitation facilities; electricity; etc and if specific dangers such as, for example, the presence of lead or asbestos are under control.
- over-crowding means that the size of the dwelling is not suitable in light of the number of persons and the composition of the household in residence.
- security of tenure means protection from forced eviction and other threats, and it will be analysed in the context of Article 31§2.

According to the Committee, the standards of adequate housing shall be applied not only to new constructions, but also gradually, in the case of renovation to the existing housing stock. They shall also be applied to housing available for rent as well as to housing occupied by their owners.

Responsibility for adequate housing

The Committee considers that it is incumbent on the public authorities to ensure that housing is adequate through different measures such as, in particular, an inventory of the housing stock, injunctions against owners who disregard urban development rules and maintenance obligations for landlords. Public authorities must also guard against the interruption of essential services such as water, electricity and telephone.

Individual rights of the tenant

The Committee considers that effectiveness of the right to adequate housing implies its legal protection. This means that tenants or occupiers must have access to affordable and impartial judicial and other remedies.

Paragraph 2 – Reduction of homelessness

With regards to homelessness, the Committee considers that, for the purpose of Article 31§2, Parties shall take reactive and preventive measures. The Committee considers as homeless those individuals not legally having at their disposal a dwelling or other forms of adequate shelter. The temporary supply of shelter, even adequate, cannot be held as satisfactory by the Committee and the individuals living in such conditions and who wish so, shall be provided with adequate housing within a reasonable period.

Measures reacting to homelessness

The Committee considers that Article 31§2 obliges Parties to gradually reduce homelessness with a view to its elimination. Reducing homelessness implies the introduction of measures, such as provision of immediate shelter and care for the homeless and measures to help such people overcome their difficulties and prevent a return to homelessness.

Measures aimed at providing housing and preventing the loss of housing

The Committee considers that the Parties must act to prevent categories of vulnerable people from becoming homeless. This implies that the States shall implement a housing policy for all disadvantaged groups of people to ensure access to social housing and housing allowances. It also requires that procedures be put in place to

limit the risk of evictions and to ensure that when these do take place, they are carried out under conditions which respect the dignity of the persons concerned.

Forced eviction

Forced eviction can be defined as the deprivation of housing which a person occupied due to insolvency or wrongful occupation. Legal protection for persons threatened by eviction must include, in particular an obligation to consult with the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need to seek redress from the courts. Compensation for illegal evictions must also be provided. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned.

Paragraph 3 – Affordable housing

The Committee considers that, for the purpose of Article 31§3, Parties shall ensure an adequate supply of affordable housing. The Committee considers housing to be affordable when the household can afford to pay the initial costs (deposit, advance rent), the current rent and/or other costs (utility, maintenance and management charges) on a long-term basis and still be able to maintain a minimum standard of living, as defined by the society in which the household is located. The Committee considers that, under Article 31§3, Parties are required, in order to increase the supply of social housing and make it financially accessible:

- to adopt appropriate measures for the construction of housing, in particular social housing, where their own direct involvement is complemented by that of other partners;
- to introduce housing benefits for the low-income and disadvantaged sectors of the population.

(ii) Collective Complaints Protocol

The *Additional Protocol of 1995 providing for a system of collective complaints* resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter. This Protocol came into force in 1998.³⁰ The States which have ratified the Collective Complaints Protocol of 1995 (at 1st June 2005) were Belgium, Croatia, Cyprus, Finland, France, Greece, Ireland, Italy, Norway, Portugal and Sweden.³¹

Organisations entitled to lodge complaints with the CSR, in the case of all States that have accepted the procedure, include the ETUC, UNICE, IOE, Non-governmental organisations (NGOs) (participative status with the Council of Europe which are on a list drawn up for this purpose by the Governmental Committee); Employers' organisations and trade unions in the country concerned and national NGOs, where the State concerned has agreed to this. FEANTSA is an NGO with the appropriate status to make a Collective Complaint.

The complaint file must contain the following information:

³⁰ See website: <http://conventions.coe.int/treaty/en/Treaties/Html/158.htm>

³¹ Bulgaria and Slovenia have made a declaration to be bound by the Protocol under Article 2D of the RESC. See website: http://www.coe.int/T/F/Droits_de_l%27Homme/Cse/1_Pr%20E9sentation_g%20E9n%20E9rale/Sig+rat01Jun e05.pdf.

- a. the name and contact details of the organisation submitting the complaint;
- b. proof that the person submitting and signing the complaint is entitled to represent the organisation lodging the complaint;
- c. the State against which the complaint is directed;
- d. an indication of the provisions of the Charter that have allegedly been violated;
- e. the subject matter of the complaint, i.e. the point(s) in respect of which the state in question has allegedly failed to comply with the Charter, along with the relevant arguments, with supporting documents.

Under this Protocol complaints of violations of the Charter may be lodged with the CSR, which firstly examines the admissibility of the complaint in line with the Protocol, and then its merits. The CSR examines the complaint and, if the formal requirements have been met, declares it admissible. Once the complaint has been declared admissible, a written procedure is set in motion, with an exchange of memorials between the parties. The CSR may decide to hold a public hearing. It considers the submissions of the parties and other relevant information and takes a decision on the merits of the complaint, which it forwards to the parties concerned and the Committee of Ministers in a report, which is made public within four months of its being forwarded.³² Finally, the Committee of Ministers adopts a resolution. If appropriate, it may recommend that the State concerned take specific measures to bring the situation into line with the Charter.³³

To date some important housing related Collective Complaints have been considered by the CSR. In *European Roma Rights Center (ERRC) v. Greece*³⁴ it was claimed that the Greek Government failed to apply Article 16 in a satisfactory manner, in the light of the Preamble, on the grounds that the Roma are denied an effective right to housing. Legislation discriminates against the Roma in housing matters, and in practice there is widespread discrimination against Roma who are often the subject of forced evictions. The CSR considered the relevant domestic law in Greece, and Article 16 of the (1961) Charter, as well as the non-discrimination part of the Preamble.³⁵

The CSR set out in detail the scope of human rights protection contained in Article 16:

The Committee emphasises that one of the underlying purposes of the social rights protected by the Charter is to express solidarity and promote social inclusion. It follows that States must respect difference and ensure that social arrangements are not such as would effectively lead to or reinforce social exclusion. This requirement is exemplified in the proscription against discrimination in the Preamble and in its interaction with the substantive rights of the Charter.

This imperative to respect difference, avoid discrimination and social exclusion, was recently the subject of an important judgment given by the European Court of Human Rights, (*Connors v United Kingdom* of 27 May 2004 at para 84) where it stated that:

'The vulnerable position of gypsies as a minority means that some special

³² See Churchill, R.R. & Khaliq, U. 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic, Social and Cultural Rights', *EJIL* (2004), Vol. 15 No. 3, 417-456.

³³ See website: http://www.coe.int/T/E/Human_Rights/Esc/1_General_Presentation/

³⁴ Complaint No. 15/2003.

³⁵ See paras 19-26 of the Decision on its Merits of the Committee of Social Rights. 8 December 2004.

consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (Buckley judgment cited above, pp. 1292-95, §§ 76, 80 and 84). To this extent, there is thus a positive obligation imposed on the Contracting States by virtue of Article 8 to facilitate the gypsy way of life (see Chapman, cited above, § 96 and the authorities cited, mutatis mutandis, therein)’ (at para 84).

The Committee’s case law has responded in a like manner on the question of how human difference should be appropriately accommodated. In its decision in Collective Complaint No. 13 which involved the interaction between Article E and Articles 15 (The right of persons with disabilities to social integration and participation in the life of the community) and 17 (The right of children and young persons to social, legal and economic protection) it stated:

‘The Committee recalls, as stated in its decision Complaint No 1/1998 (International Commission of Jurists v. Portugal, §32), that the implementation of the Charter requires the State Parties to take not merely legal action but also practical action to give full effect to the rights recognised in the Charter. 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. States Parties must be particularly mindful of the impact their choices will have for groups with heightened vulnerabilities’ Complaint No. 13/2002, Autism Europe v France decision on the merits, November 2003, §53.

...The right to housing permits the exercise of many other rights – both civil and political as well as economic, social and cultural. It is also of central importance to the family. The Committee recalls its previous case law to the effect that in order satisfy Article 16 States must promote the provision of an adequate supply of housing for families, take the needs of families into account in housing policies and ensure that existing housing be of an adequate standard and include essential services (such as heating and electricity). The Committee has stated that adequate housing refers not only to a dwelling which must not be sub-standard and must have essential amenities, but also to a dwelling of suitable size considering the composition of the family in residence. Furthermore the obligation to promote and provide housing extends to security from unlawful eviction.

The implementation of Article 16 as regards nomadic groups including itinerant Roma, implies that adequate stopping places be provided, in this respect Article 16 contains similar obligations to Article 8 of the European Convention of Human Rights.

The important question of the responsibility of the State, especially where duties are devolved to regional, local, non-governmental bodies and other organizations, was addressed by the CSR.

Responsibility of the state

The Committee recalls that even if under domestic law local or regional authorities, trade unions or professional organisations are responsible for exercising a particular function, States Party to the Charter are still responsible, under their international obligations to ensure that such responsibilities are properly exercised. Thus ultimate responsibility for implementation of official policy lies with the Greek State.

In common with some other European States the Greek Government had developed many new public management administrative approaches to the provision of housing for Roma:

The Government in response draws attention to and provides details of the measures that it has taken to improve the situation of the Roma in Greece, notably the adoption of the Integrated Action Plan (Integrated Action Plan for the Social Integration of the Roma People) (IAP) formulated by an Inter-ministerial Committee to promote the social inclusion of the Roma and which includes the field of housing. It was adopted in 2001 for a period of 8 years. The IAP is divided into two priority axis the first concerns housing; development of new settlements, improvement of existing residences, improvement of existing settlements and organization of housing for nomadic populations.

Further the Government highlights that a programme of housing loans has been introduced by the Ministry of the Interior, Public Administration and Decentralisation whereby Roma families can obtain a loan for housing up to 60,000 euros guaranteed by the Greek state. The Government submits that to date 14,151 applications for loans have been made and 4,797 loans have been granted.

The ERRC submitted that a major barrier to improving the housing situation of the Roma was the intransigent attitude of the local authorities, and no measures had been taken to address this. The CSR assessment of the situation viewed the inadequacy of the administrative measures taken and the need for positive action by the State in relation to the inadequate approach of local authorities.

The Committee finds that Greece has failed to take sufficient measures to improve the living conditions of the Roma and that the measures taken have not yet achieved what is required by the Charter, notably by reason of the insufficient means for constraining local authorities or sanctioning them. It finds on the evidence submitted that a significant number of Roma are living in conditions that fail to meet minimum standards and therefore the situation is in breach of the obligation to promote the right of families to adequate housing laid down in Article 16.

In light of the excessive numbers of Roma living in substandard housing conditions, even taking into account that Article 16 imposes obligations of conduct and not always of results and noting the overarching aim of the Charter is to achieve social inclusion, the Committee holds that the situation is in violation of Article 16 of the Charter.

The conclusion of the CSR³⁶ was that that the insufficiency of permanent dwellings constituted a violation of Article 16 of the European Social Charter. The lack of temporary stopping facilities the forced eviction and other sanctions of Roma also constituted a violation of Article 16 of the European Social Charter.

In Collective Complaint No. 27/2004, *European Roma Rights Center (ERRC) v. Italy*,³⁷ the ERRC complained that the housing situation of Roma in Italy amounted to a violation of Article 31 of the RESC. In addition, it alleged that policies and practices in the field of housing constitute racial discrimination and racial segregation, both contrary to Article 31, read alone, or in conjunction with Article E.

³⁶ By a majority of 8 votes to 2.

³⁷ Decision on Admissibility, 6 December 2004.

Collective Complaint No. 31/2005 *European Roma Rights Center (ERRC) v. Bulgaria*, lodged on 22 April 2005, relates to Article 16 alone or in combination with Article E (non-discrimination) of the Revised European Social Charter. The complaint alleges that the situation of Roma in Bulgaria amounts to a violation of the right to adequate housing.

Clearly, the use of the Collective Complaint system offers a valuable avenue for advancing and clarifying housing rights and is creating a valuable corpus of jurisprudence on the obligations of States in relation to the ESC and RESC. It is now open for homelessness organisations to raise the situation in their countries through this mechanism to highlight and clarify breaches of the rights guaranteed to homeless people and other groups in housing need.

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).³⁸

The ECHR of the Council of Europe was:

... the first international human rights instrument to aspire to protect a broad range of civil and political rights both by taking them in the form of a Treaty legally binding on its High Contracting Parties, and by establishing a system of supervision over the implementation of rights at a domestic level. Its most revolutionary contribution perhaps lies in its inclusion of a provision under which a High Contracting Party may accept the supervision of the European Court of Human Rights in instances where an individual, rather than a State, initiates the process. One measure of the Convention's success is the acceptance by all the High Contracting Parties of this right of individual petition.³⁹

Article 1 of the ECHR provides that the rights set out will be available to 'everyone within the jurisdiction' of the States Parties to the Convention. This means that all persons in any of the States, regardless of status, can avail of the protections of the Convention. Compared to other human rights enforcement treaties the Convention has very strong enforcement mechanisms.⁴⁰ Article 35 points out that the Court will deal with a matter after all domestic remedies have been exhausted. However, it is for the respondent State to raise an objection that a given applicant has not exhausted domestic remedies. But it is also for the respondent State to meet the burden of proving the existence of available and sufficient domestic remedies.⁴¹

There is a 'margin of appreciation' in the interpretation of the Convention by States, subject to Convention based supervision, when taking legislative, administrative or judicial action in an area of a Convention right.⁴² In the housing related cases, interference with the privacy of the home was found to be justified on the grounds of legitimate social and economic policies, and the implementation of social justice, where eviction orders were suspended and rents frozen.⁴³ It is usually

³⁸ See website: <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>

³⁹ Council of Europe. (1998) *Short Guide to the European Convention on Human Rights*. Strasbourg: Council of Europe Publishing, p. 6.

⁴⁰ Harris et al. (1995) *Law of the European Convention on Human Rights*. London: Butterworths, p. 5.

⁴¹ Council of Europe. *Short Guide to the European Convention on Human Rights*. Strasbourg, 1998. Council of Europe Publishing. p. 145.

⁴² Harris et al. (1995) *Law of the European Convention on Human Rights*. London: Butterworths, p. 290-301.

⁴³ *Spadea and Scalabrino v. Italy* (1995) 21 EHRR 482.

left to the national authorities to determine the margin of appreciation, as they are better placed than an international Court to evaluate local needs and conditions. This was also considered in the case of *Connors v. UK* in 2004.⁴⁴

This margin will vary according to the nature of the Convention right in issue, its importance for the individual and the nature of the activities restricted, as well as the nature of the aim pursued by the restrictions. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A no. 45, p. 21, § 52; *Gillow v. the United Kingdom*, judgment of 24 November 1986, Series A, no. 104, § 55).

It is established in Strasbourg jurisprudence that a State cannot evade its obligations to safeguard Convention rights by delegation to private bodies or individuals.⁴⁵ A State or public body cannot escape liability simply by asserting that an individual or body entrusted with public functions acted *ultra vires*,⁴⁶ or where the State has facilitated or colluded in acts, such as granting planning permission and subsidising a private waste treatment plant responsible for pollution.⁴⁷

Over the years, the Convention has been amended by 11 Protocols. By November 2001, some 43 States had signed the Convention and 41 had ratified it. The most relevant sections of the Convention to housing issues are Articles 3, 6, 8, 13, 14 and Article 1 of Protocol No. 1.⁴⁸

Article 3 of the Convention states that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. A State has positive obligations to prevent a person suffering inhuman and degrading treatment where there is a direct and immediate link between the measures sought by the applicant and the applicant's private life. The scope of Article 3 has been interpreted by the ECtHR to encompass a wide range of matters.⁴⁹

Where treatment humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance it may be characterised as degrading and also fall within the prohibition of Article 3.⁵⁰

The ECtHR has also considered the responsibility of the State once it is accepted that Article 3 is potentially in play. This was clarified in *Pretty*⁵¹ where

...The Court has held that the obligation of the high contracting parties under Article 1 of the Convention is to secure to everyone within the jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires states to

⁴⁴ *Case of Connors v. UK*. ECtHR Judgement 27 May 2004. (Application no. 66746/01).

⁴⁵ See *Van der Musselle v. Belgium* (1983) 6 EHRR 163; *Costello-Roberts v. UK* (1993) 19 EHRR 112.

⁴⁶ See Oliver, 'The Frontiers of the State: Public Authorities and Public Functions under the Human Rights Act,' *Public Law*, Autumn 2000, pp. 477-93.

⁴⁷ *Lopez-Ostra v. Spain* (1995) 20 EHRR 277.

⁴⁸ Protocol 12 was recently introduced to prohibit discrimination by public bodies in areas not covered by Article 14.

⁴⁹ See *Price v. United Kingdom* (33394/96) [2001] ECHR 453 (10 July 2001); *R (Q) v. Secretary of State* [2003] 2 All ER 905.

⁵⁰ *Pretty v. UK* (2002) 35 EHRR 1. at para. 52.

⁵¹ *Pretty v. UK* (2002) 35 EHRR 1.

take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment...⁵²

In the case of *Moldovan and Others v. Romania*⁵³ the ECtHR concluded that the applicants living conditions and the racial discrimination to which they had been publicly subjected by the way their grievances were dealt with by the various authorities, constituted an interference with their human dignity. In the special circumstances of the case this amounted to ‘degrading treatment’ within the meaning of Article 3.

The Court considered that the applicants’ living conditions over the last ten years, and its detrimental effect on their health and well-being, combined with the length of the period during which they had had to live in such conditions and the general attitude of the authorities, must have caused them considerable mental suffering, thus diminishing their human dignity and arousing in them feelings of humiliation and debasement.⁵⁴

In the UK the obligations of the State to asylum-seekers whose applications had been rejected, but who remained in the State, was considered by the courts there.⁵⁵ Carnwarth L.J. pointed out in one case that the ‘question raised by the present appeals, in its starkest form, is to what level of abject destitution such individuals must sink before their suffering or humiliation reaches the “minimum level of severity” to amount to “inhuman or degrading treatment” under Article 3 of the European Convention of Human Rights’.⁵⁶

Article 6 of the ECHR states:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

Housing rights are often interpreted as civil rights in the sense that the deprivation of a home requires a fair and public hearing and the procedural requirements of Article 6.

The ECtHR has considered some obligations under Articles 6 and 8 in relation to housing rights. The absence of any opportunity to defend summary possession proceedings in relation to the home was considered in *Connors v. UK* in 2004.⁵⁷ In that case the ECtHR found that the eviction of the applicant was not attended by the requisite procedural safeguards, namely the requirement to establish proper justification for the serious interference with his rights.⁵⁸ The ECtHR held that the existence of procedural safeguards is of crucial importance in assessing the proportionality of the interference. The necessity for a statutory scheme of summary

⁵² *R. ex parte Adam and others v. Secretary of State for the Home Department* [2004] EWCA Civ. 540. at para 120.

⁵³ Judgement 12 July 2005. (Applications 41138/98 and 64320/01).

⁵⁴ See website: [http://press.coe.int/cp/2005/397a\(2005\).htm](http://press.coe.int/cp/2005/397a(2005).htm)

⁵⁵ See *Anufrijeva v. Secretary of State* [2003] EWCA 1406; *R (Limbuella) v. Secretary of State* [2004] EWHC (Admin). 4 February 2004; *R. ex parte Adam and others v. Secretary of State for the Home Department* [2004] EWCA Civ. 540

⁵⁶ *R. ex parte Adam and others v. Secretary of State for the Home Department* [2004] EWCA Civ. 540. at para. 84.

⁵⁷ *Case of Connors v. UK*. ECtHR Judgement 27 May 2004. (Application no. 66746/01).

⁵⁸ *Ibid*, para. 95.

eviction and the power to evict ‘without the burden of giving reasons liable to be examined as their merits by an independent tribunal has not been convincingly shown to respond to any specific goal’.⁵⁹ In relation to Article 6, the ECtHR held that ‘there was no equality of arms and he was denied any effective access to Court against the very serious interference with his home and family’.⁶⁰

Article 8 has particular significance in relation to housing with its protection of respect for the home:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 8(1) protects the right of individuals to ‘respect’ for their private life, family life and ‘home.’ There is a right to access to, occupation of and peaceful enjoyment of the home. ‘Home’ is an autonomous concept, which does not depend for classification under domestic law.⁶¹ The concept of a home is not confined to dwellings or land, which are lawfully occupied or owned.⁶² All proceedings for possession of a home engage Article 8.⁶³ Although the Article may be engaged, 8(2) in relation to lawful interference is satisfied in certain cases. The justification for such interference can be on the grounds that it is ‘in accordance with the law,’ or necessary in a democratic society, and proportionate to the aim sought to be achieved.⁶⁴

All of the decisions of the ECtHR reflect a Convention view of home. This involves more than a permanent or temporary dwelling, but includes the human dimension of living and having relationships.⁶⁵ Indeed, the concept of home has been widely researched in many disciplines, and it is held that there is hardly a more emotionally loaded word, since it epitomises situations of family, affection, love and other human experiences. Of course, the idea of house is usually central in the legal treatment of home,⁶⁶ but there is also a further set of factors which distinguishes the home from a physical structure which provides shelter and experience. It has been suggested that home needs to be conceptualised as house plus an *x factor*. This *x factor* represents the social, psychological and cultural values which a physical structure acquires through use as a home.

Home as a physical structure offers material shelter; home as territory offers security and control, a locus in space, permanence, security and privacy; home as a centre for self-identity offers a reflection of one’s ideas and values and acts as an indicator of

⁵⁹ *Ibid*, para. 94.

⁶⁰ *Ibid*, para. 102.

⁶¹ See *Chapman v. UK* (2001) 33 EHRR.

⁶² See *Buckley v. UK* (1996) 23 EHRR 101; *O’ Rourke v. UK* 26 June 2001 (Application No. 39022/97).

⁶³ *Lambeth LBC v. Howard* [2001] EWCA Civ. 468.

⁶⁴ See *Case of Connors v. UK*. ECtHR Judgement 27 May 2004. (Application no. 66746/01); *Chapman v. UK* (2001) 33 EHRR 413; *Beard v. UK* (2001) 33 EHRR 442.

⁶⁵ Fox, ‘The Meaning of Home: A Chimerical Concept or a Legal Challenge?’ *Journal of Law and Society*, Vol. 29, No. 4, December 2002, pp. 580-610.

⁶⁶ ECHR jurisprudence on home includes caravans and temporary dwellings.

personal status; and home as a social and cultural unit acts as the locus for relationships with family and friends, and as a centre of activities.⁶⁷

The concept of 'home' is therefore much wider than a legal concept, and involves important subjective, cultural, emotional, social status and social relational issues.

While there is no obligation under the Convention for universal State housing provision, the combination of obligations under Articles 3 and 8 can lead to increased obligations in this area. In *Marzari v. Italy*,⁶⁸ the obligation on public authorities to provide assistance to an individual suffering from a severe disability, because of the impact of such refusal on the private life of the individual was considered.

The Court considers that, although Article 8 does not guarantee the right to have one's housing problem solved by the authorities, a refusal of the authorities to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under Article 8 of the Convention because of the impact of such refusal on the private life of the individual. The Court recalls in this respect that, while the essential object of Article 8 is to protect the individual against arbitrary interference by public authorities, this provision does not merely compel the state to abstain from such interference: in addition, to this negative undertaking, there may be positive obligations inherent in effective respect for private life. A State has obligations of this type where there is a direct and immediate link between the measures sought by the applicant and the latter's private life.⁶⁹

Compliance with Article 3 requires the State to provide minimum levels of support and combined with the obligations of Article 8 can lead to positive obligations. Similarly, Article 6 combined with Article 8 can lead to new standards in relation to State interference with a person's home, as well as positive obligations.

The landmark case under Article 8, *Botta v. Italy*,⁷⁰ established that a State had a positive obligation to people with disabilities to enable them to enjoy, so far as possible, a normal private and family life.

In *R. (Bernard) v. Enfield L.B.C.*⁷¹ the High Court of England and Wales found that the authority had acted unlawfully and incompatibly with Article 8 in failing for over two years to provide suitable accommodation for a family. The mother was severely disabled and wheelchair bound, and was housed in temporary accommodation by the authority, which meant that she was confined to the lounge room. The conduct of the authority not only engaged, but breached Article 8 obligations, since it condemned the claimants to living conditions which made it virtually impossible to have any meaningful private or family life in the sense of the Article. The claim for breach of Article 3 in relation to inhuman and degrading treatment failed on the grounds that the authority's 'corporate neglect' was not intended to deliberately inflict such suffering. The judgment relied on the *Botta*⁷² case and reasoned:

⁶⁷ *Ibid.*

⁶⁸ *Marzari v. Italy* (1999) 28 EHRR CD 175.

⁶⁹ *Ibid.*, at 179.

⁷⁰ (1998) 26 EHRR 241.

⁷¹ [2002] EWHC 2282 (Admin).

⁷² *Botta v. Italy* (1998) 26 EHRR 241.

... Respect for private and family life does not require the state to provide every one of its citizens with a house. However, those entitled to care under section 21 [of a UK Act] are a particularly vulnerable group. Positive measures have to be taken (by way of community care facilities) to enable them to enjoy, so far as possible, a normal private and family life. The Council's failure to act . . . showed a singular lack of respect for the claimants' private and family life. It condemned the claimants to living conditions which made it virtually impossible for them to have any meaningful private or family life for the purposes of Article 8.

The future development of the protections under Article 8 in relation to respect for the privacy of the home may encompass many new situations.

The Court [ECtHR] is notoriously unwilling to elaborate general statements of rights. In relation to Article 8, this has had an advantage as well as the usual drawback of making it difficult for an account of the case-law to rise above the single instances before the Court. The advantage is that the Court has been able to develop the interests protected to take into account changing circumstances and understandings without being confined by an established theoretical framework...⁷³

In the case of *Moldovan and Others v. Romania*⁷⁴ the ECtHR found a serious breach of Article 8 of a continuing nature.

... it was clear from the evidence submitted by the applicants and the civil court judgments, that police officers were involved in the burning of the Roma houses and tried to cover up the incident. Having been hounded from their village and homes, the applicants were then obliged to live, and some of them still live, in crowded and unsuitable conditions – cellars, hen-houses, stables, etc. - and frequently changed address, moving in with friends or family in extremely overcrowded conditions. Having regard to the direct repercussions of the acts of State agents on the applicants' rights, the Court considered that the Government's responsibility was engaged regarding the applicants' subsequent living conditions. There was no doubt that the question of the applicants' living conditions fell within the scope of their right to respect for family and private life, as well as their homes. Article 8 was thus clearly applicable to those complaints.⁷⁵

Article 13 on the right to an effective remedy and housing states:

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

In the absence of the incorporation of the Convention into domestic law, this means that where an individual considers himself to have been prejudiced by a measure possibly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided, and if appropriate, to obtain redress.⁷⁶

Article 14 on the prohibition of discrimination states .

⁷³ Harris et al. (1995) *Law of the European Convention on Human Rights*. London: Butterworths, p. 353.

⁷⁴ Judgement 12 July 2005. (Applications 41138/98 and 64320/01).

⁷⁵ See website: [http://press.coe.int/cp/2005/397a\(2005\).htm](http://press.coe.int/cp/2005/397a(2005).htm)

⁷⁶ Harris et al. (1995) *Law of the European Convention on Human Rights*. London: Butterworths, p. 446

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This provision applies only to non-discrimination in relation to the rights and freedoms set out in the Convention and Protocol 12 covers all areas of discrimination by public bodies.⁷⁷ In *Larkos v. Cyprus*⁷⁸ a tenant of the State enjoyed less security than he would have if he were the tenant of a private landlord, under domestic law. This engaged both Articles 8 and 14. The ECtHR held that no reasonable and objective justification had been given by the State for not extending these protections to State tenants.

In *Moldovan and Others v. Romania*⁷⁹ the Court observed that the applicants' Roma ethnicity appeared to have been decisive for the length and the result of the domestic proceedings. Among other things, it took note of the repeated discriminatory remarks made by the authorities throughout the whole case and their blank refusal until 2004 to award non-pecuniary damages for the destruction of the family homes. The Court observed that the Romanian Government had provided no justification for the difference in treatment of the applicants. It concluded accordingly that there had been a violation of Article 14 taken in conjunction with Articles 6 and 8.

The First Article of Protocol 1 of the ECHR states:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The term 'possessions' includes immovable and moveable property, contractual rights, all forms of legal interest in land and other rights to property, leases and tenancy agreements, licences to occupy, right to buy enjoyed by some tenants, and any other pre-existing right under national law to be protected. There is a long line of ECtHR cases showing that entitlements to social assistance can amount to a property right, enjoying the protection of Article 1 of Protocol 1.⁸⁰ Indeed, the case of *Stretch v. UK*⁸¹ held that the notion of 'possessions' included the tenant's interest in the continuation of a tenancy. Once this property right is established then any interference with that right must satisfy the requirements of Article 1 of Protocol 1 and also Article 14 in relation to non-discrimination.

Deprivation of possessions in this area could include eviction or compulsory purchase, partial reduction in rights, challenges to rent controls and legislation

⁷⁷ *PROTOCOL No. 12 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS*. Entered into force April 2005. See website:

<http://www.humanrights.coe.int/Prot12/Protocol%2012%20and%20Exp%20Rep.htm>

⁷⁸ (1999) 30 EHRR 597.

⁷⁹ Judgement 12 July 2005. (Applications 41138/98 and 64320/01).

⁸⁰ See *X v. Sweden* (1986) 8 EHRR 252; *Muller v. Austria* (1975) 3 DR 25; *Gaygusuz v. Austria* (1996) 23 EHRR 364; *Feldbrugge v. The Netherlands* (1986) 8 EHRR 425; *Koua Poirrez v. France* ECtHR Case No. 40892/98.

⁸¹ (2004) 38 EHRR 12.

restricting recovery of possession or prohibiting eviction. The case of *James v. United Kingdom*,⁸² pointed out that Article 1 of Protocol 1 does not guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest,' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than reimbursement of full market value.

In *Mellacher v. Austria*⁸³ rent control legislation which reduced contractually agreed rents was regarded a justified interference with a landlords enjoyment of his rights. Where a landlord is unable to regain control of his property through State action, there may be a cause of action under Article 1 of Protocol 1. Italian legislation at various times has involved rent freezes, extensions of leases and suspension of enforcement and staggering of eviction actions. These have been judged appropriate to achieve the legitimate aim of dealing with chronic housing shortages.⁸⁴ The landlords inability to recover possession due to these State actions creates a cause of action under Article 1 of Protocol 1,⁸⁵ and the inflexibility of the approach may in some cases create an unfair balance between the protection of the right to property and the requirements of the general interest.⁸⁶

The repossession of a house by a mortgagee after a default on payments was considered in *Wood v. UK*.⁸⁷ Here, the Commission pointed out that the repossession was in accordance with the terms of the loan and the domestic law, and it was necessary for the protection of the rights and freedoms of others, namely the lender. It stated that this is in the public interest in ensuring the payment of contractual debts.

Clearly, the ECtHR is addressing housing rights within the Articles of the Convention on a regular basis, and European States are facing challenges to their responsibilities and actions in the field of housing rights protecting citizens and residents. One the valuable benefits of the ECHR is the protection it gives to everyone resident in the contracting State. This effectively means that not just citizens or EU nationals, but immigrants from third countries, asylum-seekers and refugees and other immigrants can enjoy these human rights protections.

⁸² (1986) 8 EHRR 123

⁸³ (1990) 12 EHRR 391.

⁸⁴ *Spadea & Scalabrio v. Italy* (1995) 21 EHRR 481. See also *X v. Austria* (1979) 3 EHRR 285 & *Mellacher v. Austria* (1990) 12 EHRR 391.

⁸⁵ *Immobiliaire Saffi v. Italy* (App. 22277/93)

⁸⁶ *Tassanari v. Italy* (App. 47758/99) Judgement 16 October 2003.

⁸⁷ (1997) 24 EHRR CD 69.

Chapter 3. The European Union

While all European States have accepted the right to housing at international level and some at constitutional and legislative level, the development of housing rights in the EU is at a critical stage. New governance arrangements are taking the place of legal rights developments, and the historical role of the EU in enhancing the rights of excluded groups at national level (albeit indirectly and largely in relation to market integration) appears to be at an end. This raises important questions in relation to the future role of the EU in the promotion of international human and housing rights. Indeed, there is a hierarchy of rights developing, where the important factor is status, based loosely on citizenship or the absence of citizenship, rather than level of need.

At the same time, national governments across Europe face pressures to resort to economic measures to attract or retain mobile industries and investments that are threatening to locate to countries with lower production costs and higher post tax incomes from capital – classic race to the bottom. Similarly, generous welfare States are tempted to reduce the availability of tax financed social transfers and social services in order to avoid the immigration of potential welfare clients.

Taken together, these pressures and temptations are in conflict with the political aspirations and commitments of countries which, in the post-war decades, had adopted a wide range of market correcting and redistributive policies, creating ‘social market economies’ in which the effects of the capitalist mode of production were moderated through regulations of production and employment conditions, and in which the unequal distribution effects of capitalist economies were modified through public transfers and services financed through progressive taxation.¹

The European Social Model recognises that social protection provides not only safety nets for those in poverty, but it also contributes to ensuring social cohesion by protecting people against a range of risks. However, while part of the rationale is that social protection can facilitate adaptability in the labour market, and thus contribute to improved economic performance, the scope and market reasoning for extending social protection to housing has yet to be properly addressed. In the housing arena, there are many who are excluded from full rights in market and social systems of housing provision. Poor people, immigrants and others find themselves at the bottom of the housing system in terms of poor housing conditions, poor neighbourhoods, expensive rents and mortgages, and in some cases homelessness.

While some areas of housing are superficially considered within the National Action Plans in relation to social exclusion, there is a great need for a housing rights approach to be developed within the EU. Further development of a European social policy would also need to incorporate rights for refugees and asylum seekers, victims of racism and xenophobia, lesbians and gay men, people with disabilities and in the area of environmental, cultural and language rights.²

The development of EU social policy has been slow, and fears of encroaching on the competences and political balances within individual States have led to few directly binding social legislative measures.

¹ See Scharpf, F.W. ‘Legitimate Diversity: The New Challenge of European Integration’, in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, p. 92.

² De Burca, "The Language of rights and European Integration," in Shaw & More, *New Legal Dynamics of European Union* (1995), p. 38.

European social policy has always been *sui generis*, in that it relates to the social dimension or preconditions to a particular kind of market, namely a transnational market. It is geared primarily at providing the social preconditions necessary to make that particular market work. While it has always been evident that such preconditions are necessary, it has nearly always been resisted because it is often perceived as an indirect way of reaching into the domains that lie properly within the exclusive province of Member States, and as a way of ratchetting upwards the level of social provision available within Member States. Hard powers in the social field were therefore wanting and Articles 117-122 EEC (now Articles 136 – 145) gave the Institutions little or no competence to enact legislation unless Article 100 (now 113) or 235 (now 308) was invoked.³

This highly charged bailiwick approach of Member States was demonstrated clearly in relation to the opposition to the Poverty 4 programme funding 86 model projects designed to combat social exclusion in 1995. The UK, Germany and Denmark challenged the competence of the Commission to incur expenditure of ECU 6,000,000 on small-scale pilot projects seeking to overcome social exclusion.⁴ The ECJ found that an act of secondary legislation (a basic act) authorising such expenditure (unless it is some non-significant act such as a pilot project or preparatory action) was necessary to render the Commission spending legal.

Indeed, there was no great discussion of social rights in the early days of the EU. The 'rights talk' legal system established by the EEC Treaties of the 1950s was heavily market driven, and other moral or social considerations were at best of secondary or subsidiary relevance.⁵ The development of a common policy on homelessness, or housing generally, within the EU has largely been avoided on the grounds of subsidiarity.⁶ While EU institutions have not adopted any specific initiatives directly concerning national housing policies,⁷ major EU pressures on national housing systems are springing from the growth of international markets in goods, services and labour, as well as a convergence of mortgage interest rates linked to Economic and Monetary Union (EMU). Significant other influences arise from the freedom of movement of workers, rights of establishment, consumer protection, social inclusion policies, equality and non-discrimination provisions, standardisation of construction products, public procurement arrangements and the energy and environmental standards being advanced within the EU.

As the meeting of the European Housing Ministers in Padua in 2003 described it:

Although housing is not under the direct competence of the EU, it has complex links with many important issues with EU policies such as: building norms and energy

³ Quinn, G. 'The Human Rights of People with Disabilities under EU Law', in Alston et al, (ed.) *The EU and Human Rights*. (1999). pp. 281-326.

⁴ Case C-106/96, *UK v. Commission* [1998] ECR I-2729.

⁵ De Burca, "The Language of rights and European Integration," in Shaw & More, *New Legal Dynamics of European Union* (1995), p. 29.

⁶ See '*Housing in EU policy making, Background paper*' FEANTSA Working Group Housing at website: www.feantsa.org/files/DOCS/housing_eu_policymaking_draft.Doc. See also de Schutter, O. et Bocadoro, N. *Le droit au logement dans l'Union Européenne*. Cridho Working paper series 2005/2 at website: <http://www.cedr.ucl.ac.be/cridho/index.php?pageid=9>

⁷ See Mertens, C. '*Interactions between National Housing Policies and the Legislation, Initiatives and Decisions of the European Union.*' Reflections and summary report (31 October 2003), 15th meeting of the Housing Ministers of the European Union. See website: http://mrw.wallonie.be/dgatp/logement/logement_euro/Dwnld/RAPPORT%20EUROPEEN%20En_2003.pdf (last visited 28 May 2005).

conservation, competition rules, consumer policies, taxation, for instance rules on VAT, finance policies (i.e. Basel II), social inclusion, NAPincl and Joint Inclusion Memorandums for the accession countries, social and economic rights, statistics, structural funds, and promotion of research and technological development.⁸

In the light of increasing immigration, migration and refugee housing need and homelessness across Europe, advancing the housing rights of people, as human rights, is critical. These amount to much more than specific entitlements to housing services with localised residency or other conditions. The advancement of housing rights in the EU involves the European Parliament, Treaty and EU law, convergence of housing policies, EU human rights approaches, the development of the EU *Charter of Fundamental Rights* and the new governance approaches, such as the open method of co-ordination. It must operate in the context of the commitments by EU States to international human rights, which include housing rights.

(a) European Parliament

There have been a number of significant resolutions and reports from the European Parliament in relation to European housing policy issues.⁹

The *Resolution on the Social Aspects of Housing* of 1997 expressed the Parliament's desire to have the development of a housing policy at European level, based on efforts to provide adequate housing for all.¹⁰ The Resolution called on Member States to include within the Treaty provisions on fundamental social rights of people living in Europe, the right to decent and affordable housing for all.

The *Opinion of the Committee of the Regions on 'Housing and the homeless'* in 1999,¹¹ stated that 'homelessness is one of the core issues in Community discussions on housing'.¹² It provided a historical European perspective on the issue, which has a resonance today in the context of the movement of asylum-seekers and immigrants:

Ever since the birth of Europe's towns, the question of vagrancy has been a prominent concern for local authority managers. In the Middle Ages, assistance to vagrants — the attitude to which varied in line with the local social and political set-up — could be provided for an entire town. No town, however, could alone provide such relief at regional level. Towns had a choice: to take in the indigent before their doors, or to send them away. But if one community, for religious or political reasons, decided to take them in, it had no way of knowing whether other local authorities would do likewise, or whether they would take advantage of this willingness to provide shelter and send wanderers their way. A tension was therefore created between the regional scale of cooperation between local authorities at a time and the local character of relief. This tension was exacerbated by the increasing numbers of the poor and vagrants at the beginning of the modern period. Central authorities took action everywhere in Europe to bind the poor to a given territory. Relief resources

⁸ See Communiqué Final – Meeting of European Housing Ministers, Padua, 2003 at website: www.eu2004.ie/templates/document_file.asp?id=4785

⁹ See MacLennan, D., Stephens, M. & Kemp, P. (1997) *Housing Policy in the Member States*. European Parliament Social Affairs Series W-14.PE 166.328.

¹⁰ A4-0088/97 OJ C182/70, 16.6.97.

¹¹ OJ C293/07, 13.10.1999.

¹² *Ibid.*, para. 1.1.

were however inadequate, and the system could easily be thrown out of balance by a war, epidemic or poor harvest.¹³

But, of course, we now have strengthened national policies and are developing many EU-wide approaches. The Opinion of the Committee highlighted the development of contemporary rights to housing across Europe, at the time, in 1999.

The fifteen Member States have ratified all international texts on human dignity. They implicitly recognize the right to adequate accommodation as a fundamental human right, as an essential element in respect for human dignity. Since the Habitat II Conference in June 1996, which witnessed some disagreement between the US and the EU over the right to housing, a European vision of the right to housing has emerged, reflecting an undertaking by states to move towards implementation of this right, although national circumstances, approaches and laws may differ.¹⁴

The right to housing has been incorporated into the constitutions of some Member States (Belgium, Finland, the Netherlands, Portugal, Spain and Sweden). In France it is regarded as an aim worthy of incorporation in the constitution. UK and Irish laws, which do not recognize the right to housing, do respond specifically to the problem of the homeless by requiring local authorities to house certain priority categories of people (United Kingdom) or simply to list the homeless and draw up housing priorities (Ireland). In Germany, it is the responsibility of the *Länder* to ensure that no-one sleeps in the street. They may, in the interests of public order, requisition empty housing. In Denmark local authorities must provide suitable accommodation.¹⁵

The Committee called upon the European institutions to give further consideration to the principle of the right to adequate housing. Of course, Union citizens and non-Community residents in a country of the European Union have the right to petition the European Parliament.¹⁶

(b) Citizens, immigrants, migrant workers, third-country nationals, asylum-seekers and refugees

Housing rights are now enjoyed by people in Europe at a number of levels, depending on the status of the person claiming such rights. These levels are becoming more stratified as the EU expands and deals with the influx of non-EU nationals. From the national housing rights of citizens of Member States to the housing rights of migrant workers, third country nationals, asylum seekers and illegal immigrants, there is a developing hierarchy of levels of housing rights protection. For those at the 'bottom of the ladder' there are major risks arising from lack of housing rights protection. In the wake of the terrible fires in Paris in 2005, FEANTSA has raised the crisis of housing for those who are excluded in Europe:

[F]or very poor people the terrible pressure of the housing market increasingly leads to social exclusion and, in some cases, to a situation of social emergency, where people find themselves without resources, reduced to sleeping in the street. The figures speak for themselves: rough sleeping is increasing in major cities across Europe. It's not just Paris -- almost all large urban areas are finding themselves face

¹³ *Ibid.*, para. 4.3.2.

¹⁴ *Ibid.*, para. 4.2.2.

¹⁵ *Ibid.*, para. 4.4.3.

¹⁶ See website: http://www.europarl.eu.int/petition/help_en.htm

to face with similar problems. The horrors that the Paris fires showed up is tip of the iceberg; there is worse. Increasing numbers of people sleep in doorways, squats, abandoned buildings and other places not meant for habitation. What is more, the profile of these people is changing. They are not only the middle aged, often alcoholic men who are associated with rough sleeping and who are often held to be to blame for their own situation. Nowadays, it is frequently women, families with children, migrants and young people who find themselves homeless or in a situation of social and housing emergency. The trigger of their plight is usually housing affordability, leading to a spiral of exclusion, affecting health, employment options, education of children etc. Housing exclusion due to lack of affordable housing also creates an extreme vulnerability to exploitation. It has led to a new and frightening form of housing exploitation: mattress rental by so-called “sleep dealers”. In effect, exploitative landlords rent out mattresses in overcrowded conditions for eight hour shifts at exorbitant prices. It is migrant workers that are the main victims of such practices – indeed the cockle-pickers of Morecambe bay were housed in similar conditions.

The housing crisis in Europe is reaching unprecedented levels. The fires in Paris have brought public attention to the problem of inadequate housing in a prosperous European capital– housing that is not simply outside standard safety and sanitary norms, but that is actually a threat to the health and to the very lives of its inhabitants. However, this shockingly inadequate housing is symptomatic of the underlying problem of housing affordability that is growing across Europe. Quite simply, there is no housing available for the limited financial resources that poor and vulnerable groups have at their disposal. This problem of affordability affects all actors - naturally poor people are the most visible victims - but middle-income groups are increasingly affected and NGOs and the State are also feeling the repercussions.¹⁷

Citizens

Article 17 of the TEU states:

Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

European citizenship is a set of rights additional to those of national citizenship. This grants a number of rights to all nationals of European Union Member States:

- the right to move and reside freely within the EU;
- the right to vote for and stand as a candidate at municipal and European Parliament elections in whichever Member State an EU citizen resides;
- access to the diplomatic and consular protection of another Member State outside the EU;
- the right to petition the European Parliament and to complain to the European Ombudsman;
- the right to contact and receive a response from any EU institution in any one of 12 languages;
- the right to access Parliament, European Commission, and Council documents under certain conditions;

¹⁷ FEANTSA Press Release 2.9.2005. See website: www.feantsa.org

- the right to non-discrimination on grounds of nationality within the scope of Community law;
- the guarantee of fundamental rights as upheld by the European Convention on Human Rights and the Charter of Fundamental Rights of the EU;
- protection from discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation;
- equal access to the Community civil service.¹⁸

In terms of social rights, nationals of the 15 Member States have increased protection.

The provisions of EC Treaty on citizenship, together with other treaty provisions and secondary legislation on rights of non-discrimination, gender equality, and transparency have extended the social, civil and political inclusion of individuals within the project of European integration suggesting something more than a right to inclusion according to the particularistic national laws and traditions of 'host states' by providing a set (albeit limited) of minimum European standards.¹⁹

Individuals have been able to rely on their status as 'citizens of the Union' to obtain access to social benefits in other Member States, such as minimum subsistence and maternity benefits.²⁰

Migrants workers and their families:

The principle of the freedom movement of workers in Europe was established in the *Treaty of Rome* in 1957. Social rights for such workers and their families have followed the EU internal market project in many areas, including housing.

While market rationale required the extension of free movement rights to ever-larger categories of Community nationals, social rights followed suit to allow as well as encourage greater mobility. The main principle was to ensure the social protection of the mover in a non-discriminatory way.²¹

Regulations in the 1960s and 1970s ensured that non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of Member States, on the principle of non-discrimination. Regulation 1612/68 pointed out, at Article 9, the significance of access to housing for European migrant workers.²²

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of **housing**, including ownership of the housing he needs.
2. Such worker may, with the same right as nationals, put his [sic] name down on the housing lists in the region in which he is employed, where such lists exist; he shall

¹⁸ See website: http://europa.eu.int/comm/justice_home/fsj/citizenship/fsj_citizenship_intro_en.htm

¹⁹ See Armstrong, K.A. 'Tacking Social Exclusion through OMC: Reshaping the Boundaries of European Governance', in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, p. 176.

²⁰ Case C-184/99, *Rudy Grzelcyck v. Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193; Case C-85/96, *Martinez Sala* [1998] ECR I-2681; Case C-274/96, *Bickel and Franz* [1998] ECR I-7637.

²¹ See Pomoell, J. (2000) *European Union Citizenship in Focus. The Legal Position of the Individual in EC Law* (University of Helsinki), p. 48.

²² For further information see website: <http://europa.eu.int/scadplus/leg/en/cha/c00004.htm>

enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.²³

Article 10 dealt with the housing issues of the migrant worker's family who wish to join him or her:

1. The following shall, irrespective of their nationality, have the right to install themselves with a worker who is a national of one Member State and who is employed in the territory of another Member State:
 - (a) his spouse and their descendants who are under the age of 21 years or are dependants;
 - (b) dependent relatives in the ascending line of the worker and his spouse.
2. Member States shall facilitate the admission of any member of the family not coming within the provisions of paragraph 1 if dependent on the worker referred to above or living under his roof in the country whence he comes.
3. For the purposes of paragraphs 1 and 2, the worker must have available for his **family housing** considered as normal for national workers in the region where he is employed; this provision, however must not give rise to discrimination between national workers and workers from the other Member States.²⁴

In one case, the European Court of Justice (ECJ) held that a German law making the grant of a residence permit conditional on a workers having continual housing in the host State was in breach of EC law.²⁵ In the case of *Commission v Italy*²⁶ a restriction of access to reduced mortgage rates and other access to social housing, based on a requirement of Italian nationality, residence qualifications, and the granting of social housing for those near to their place of work, was held in breach of rules on rights to establishment under Article 52 and Article 59 of the Treaty of Rome. The ECJ held that the benefits of Article 43 EC, in relation to a self-employed person included conditions that a non-national be able to obtain housing in conditions equivalent to those enjoyed by his competitors who were nationals of the Member State. The Court held that that a national of another Member State providing services in Italy could also be entitled to social housing on the same terms as nationals.²⁷

Migrant workers and their families from the new Accession States

In May 2004, the EU expanded from 15 to 25 Member States when the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Cyprus and Malta joined the Union. The Accession Treaty allows Member States to restrict

²³ Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, (amended by Regulation No. 2434/92. OJ L245, 26.8.1992.) OJ L257, 19.10.1968. For cases on this Regulation see website: <http://curia.eu.int/jurisp/cgi-bin/form.pl>. See also COM (2001) 257 final of 23.5.2001 and COM (2003) 199 final of 15.04.2003.

²⁴ This Article is repealed as from 30 April 2006. See Directive 2004/58/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L229/35. 29.6.2004.

²⁵ Case 249/86 *Commission v. Germany* [1989] ECR 1263.

²⁶ Case 63/86 *Commission v. Italy* [1988] ECR 29: 2 CMLR 601.

²⁷ See Moore, (2005) 'National Ethnic Origin Discrimination – Free Movement of persons,' in Mooney, Cotter & Moffat, *Discrimination Law*, Dublin: Law Society of Ireland.

the right of accession country nationals (except those from Cyprus or Malta) to freedom of movement as workers for a transitional period of up to seven years. The *Report on the Free Movement of Workers in the EU 25*²⁸ shows the extent of movement between the Member States since May 2004.

The Accession Treaty and process have created new conditions for housing rights for citizens of the new Accession States.²⁹ In terms of housing rights for all EU citizens, the applicant Member States have sacrificed a great deal. Major restrictions on the rights of migrants workers to freedom of movement and entitlements in the host States have been introduced, particularly in relation to the 8 eastern European States. There have been derogations in relation to the rules on freedom of movement of workers. Articles 1-6 of Regulation 1612/68 can be suspended for two years and up to five years. Articles 7-9 will apply if a host Member State authorises the person to enter as a worker. Even those States which apply full freedom of movement of workers have a special safeguard for seven years. There are a variety of arrangements now in place between Member States and there is not space to examine all of these in this report.³⁰

The Directive on the right of citizens of the Union to move and reside freely within the Member States,³¹ which must be transposed by 30 April 2006, further weakens the housing and other rights of migrant workers and EU citizens. The Directive amends Regulation 1612/68 and associated legislation. Rights of residence of more than six months are subject to certain conditions, such as being engaged in economic activity, having sufficient resources to ensure that the person does not become a burden on the social services of the host State and other factors. After five years of uninterrupted legal residence a right of permanent residence can be obtained. This right is not subject to any conditions and can be renewed every ten years.

Equal treatment with host country nationals is available to migrants when permanent residence status has been acquired, except for employed and self-employed workers and members of their families who qualify for the more favourable migrant worker status. The 2004 Directive on the right of citizens of the Union and family members to move and reside freely within the EU also states:

However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.³²

A somewhat ironic clause in the Directive states:

Member States should implement this Directive without discrimination between the beneficiaries of this Directive on grounds such as sex, race, colour, ethnic or social

²⁸ See European Active Citizen Service, website: http://www.ecas.org/file_uploads/786.pdf

²⁹ See website:

http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/index.htm

³⁰ For details see website: <http://europa.eu.int/scadplus/leg/en/s17000.htm>

³¹ See Directive 2004/58/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. OJ L229/35. 29.6.2004.

³² *Ibid.*, para. 21.

origin, genetic characteristics, language, religion or beliefs, political or other opinion, membership of an ethnic minority, property, birth, disability, age or sexual orientation.³³

Asylum seekers:

Whereas national States dealt with asylum and refugees issues separately, there is now a developed EU wide policy in relation to asylum seekers.³⁴ Since the Regulation in 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, a common policy on asylum has been developed.³⁵ A Directive based on Article 63(1) of the Treaty establishing the European Community, sets out minimum standards in relation to information, residence and freedom of movement, documentation, families, medical screening, schooling and education of minors, employment, vocational training and general rules on material reception conditions and health care.³⁶ However, not all EU States have adopted this Directive.³⁷

Article 8 of the Directive in relation to families states:

Member States shall take appropriate measures to maintain as far as possible family unity as present within their territory, if applicants are provided with housing by the Member State concerned. Such measures shall be implemented with the asylum seeker's agreement.

Article 14 in relation to the modalities for material reception conditions states:

1. Where housing is provided in kind, it should take one or a combination of the following forms:

- (a) premises used for the purpose of housing applicants during the examination of an application for asylum lodged at the border;
- (b) accommodation centres which guarantee an adequate standard of living;
- (c) private houses, flats, hotels or other premises adapted for housing applicants.

2. Member States shall ensure that applicants provided with the housing referred to in paragraph 1(a), (b) and (c) are assured:

- (a) protection of their family life;
- (b) the possibility of communicating with relatives, legal advisers and representatives of the United Nations High Commissioner for Refugees (UNHCR) and non-governmental organisations (NGOs) recognised by Member States.

Member States shall pay particular attention to the prevention of assault within the premises and accommodation centers referred to in paragraph 1(a) and (b).

³³ *Ibid.*, para. 31.

³⁴ See Givens, T. & Luedtke, A. 'EU Immigration Policy: From Intergovernmentalism to Reluctant Harmonisation', in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP

³⁵ See Council Regulation EC 343/2003, OJ L50/1, 25.2.2003.

³⁶ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. OJ L031, 06.2.2003. See also *Communication from the Commission of 3 June 2003 Towards more accessible, equitable and managed asylum systems*. COM(2003) 315 final OJ C76/21, 25.03.2004; *Communication from the Commission of 26 March 2003 on the common asylum policy and the Agenda for protection* COM(2003) 152 final OJ C76/2, 25.03.2004; See also website: <http://www.statewatch.org/news/NEWSINBR/05migration.htm>

³⁷ For details of all EU instruments relating to asylum seekers see website: http://europa.eu.int/comm/justice_home/doc_centre/asylum/doc_asylum_intro_en.htm

3. Member States shall ensure, if appropriate, that minor children of applicants or applicants who are minors are lodged with their parents or with the adult family member responsible for them whether by law or by custom.
4. Member States shall ensure that transfers of applicants from one housing facility to another take place only when necessary. Member States shall provide for the possibility for applicants to inform their legal advisers of the transfer and of their new address.
5. Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality principle as defined in the national law in relation to any information they obtain in the course of their work.
6. Member States may involve applicants in managing the material resources and non-material aspects of life in the center through an advisory board or council representing residents.
7. Legal advisors or counsellors of asylum seekers and representatives of the United Nations High Commissioner for Refugees or non-governmental organisations designated by the latter and recognised by the Member State concerned shall be granted access to accommodation centres and other housing facilities in order to assist the said asylum seekers. Limits on such access may be imposed only on grounds relating to the security of the centres and facilities and of the asylum seekers.
8. Member States may exceptionally set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
 - an initial assessment of the specific needs of the applicant is required,
 - material reception conditions, as provided for in this Article, are not available in a certain geographical area,
 - housing capacities normally available are temporarily exhausted,
 - the asylum seeker is in detention or confined to border posts.
 These different conditions shall cover in any case basic needs.

In 2001, The European Council issued a Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.³⁸ Article 13 states:

The Member States shall ensure that persons enjoying temporary protection have access to suitable accommodation or, if necessary, receive the means to obtain **housing**.

Third country nationals:

There are many third country nationals in the EU who are not asylum seekers. The European Parliament resolution on integrating migration issues in the European Union's relations with third countries,³⁹ pointed out that a common approach must be taken to immigration, given that Member States are confronted with similar and inter-related problems that cannot be solved at national level. Directive 2003/109/EC concerning the status of third-country nationals⁴⁰ points out that in order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the

³⁸ Directive 2003/9/EC, OJ L212, 7.8.2001.

³⁹ COM (2002) 703 - C5-0233/2003 - 2002/2181(COS). A5-0224/2003.

⁴⁰ OJ L16/44, 23.1.2004.

Member State in a wide range conditions defined by this Directive.⁴¹ Indeed, it also states at paragraph 3 that:

This Directive respects the fundamental rights and observes the principles recognised in particular by the European Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union.

Member States shall grant long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years immediately prior to the submission of the relevant application.⁴²

However, there is a lower level of housing rights protection available to these EU residents. While the Directive states that long-term residents shall enjoy equal treatment with national as regards social security, social assistance and social protection as defined by national law,⁴³ and access to goods and services and the supply of goods and services made available to the public and to procedures for obtaining housing,⁴⁴ Member States may limit equal treatment in respect of social assistance and social protection to core benefits.⁴⁵ The restriction on housing eligibility is spelt out specifically.

...the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.⁴⁶

A Regulation in 2003 set out to ensure that all third-country nationals who legally resided within the Community and met certain other requirements have the right to social security benefits when they move to another Member State in order to stay, live or work there. This Regulation recognises the obligations of Article 34(2) of the EUCFR in relation to social security, but does not refer to Article 34(3) on the right to social and housing assistance.⁴⁷

Third country nationals who have not lived in the EU for five years or who may have illegal status, have few housing rights, and yet constitute a significant proportion of those at risk of homelessness.

Refugees:

The *Geneva Convention Relating to the Status of Refugees*,⁴⁸ has been signed and ratified by all European States.⁴⁹ Article 21 states that as regards housing, the

⁴¹ *Ibid.*, preamble, para. 12.

⁴² *Ibid.*, chapter 1, para. 1.

⁴³ *Ibid.*, chapter 1, para. 11(1)(d).

⁴⁴ *Ibid.*, chapter 1, para. 11(1)(f).

⁴⁵ *Ibid.*, chapter 1, para. 11 (4).

⁴⁶ *Ibid.*, chapter 1, para. 11 (2).

⁴⁷ Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality. OJ L124, 20.5.2003.

⁴⁸ *Convention relating to the Status of Refugees*, Adopted on 28 July 1951 by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened under General Assembly resolution 429 (V) of 14 December 1950 entered into force 22 April 1954, in accordance with Article 43, as amended by the New York Protocol of 31 January 1967.

Contracting States, in so far as the matter is regulated by laws or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances. The Common European Asylum System will include an approximation of asylum policy and ensure that a minimum level of benefits is available in all Member States. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted⁵⁰ states at Article 31:

The Member States shall ensure that beneficiaries of refugee or subsidiary protection status have access to accommodation under equivalent conditions as other third country nationals legally resident in their territories.

Illegal Immigrants:

There are many illegal immigrants in EU States and their housing position is often precarious. They have few established rights at EU level. Some may have arrived outside the system of legal admission, while others may be asylum seekers whose applications have been rejected or who have ‘overstayed’.⁵¹ It has to be recognised that the possibility to have access to undeclared work might be perceived as the most important ‘pull factor’ for potential illegal immigrants.

Measures relating to the fight against illegal immigration have to balance the right to decide whether to accord or refuse admission to the territory to third country nationals and the obligation to protect those genuinely in need of international protection. This concerns, in particular, obligations for protection arising from the European Convention on Human Rights, particularly in Art. 3, and the Geneva Convention on Refugees, most notably Articles 33 and 31. The latter article states that “*states shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorisation, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence*”.⁵²

The situation in the UK where asylum seekers whose applications had failed and were homeless, was considered in a number of cases involving the obligations of States to prevent inhuman and degrading treatment, as set out in Article 3 of the ECHR.⁵³ Similarly, States obligations under the ICESCR and the *Convention on the Rights of the Child* are also relevant.

Clearly, there are emerging variations in the levels of housing rights available to EU residents based on status, despite references to human rights principles. There are signs across Europe of a diminution of housing rights for migrant workers and

⁴⁹ See website: <http://www.unhcr.ch/html/menu3/b/treaty2ref.htm>

⁵⁰ OJ L304, 30.9.2004.

⁵¹ See *Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration*. COM (2001) 672 final Brussels, 15.11.2001.

⁵² *Ibid.*, para. 3.2.

⁵³ See *Anufrijeva v. Secretary of State* [2003] EWCA 1406; *R (Limbuela) v. Secretary of State* [2004] EWHC (Admin). 4 February 2004; *R. ex parte Adam and others v. Secretary of State for the Home Department* [2004] EWCA Civ. 540.

their families, immigrants, asylum-seekers and refugees, including third country nationals. Yet, the development of common EU standards and legislation could allow the issue to be examined comparatively and in the context of international human rights obligations.

Indeed, a further category of people whose housing rights are denied are often ethnic and minority groups within national States. The experience of Roma, gypsies, traveller and other minority groups as well as poor people, have come to rely on EU and international instruments to enhance their rights position. Measures such as the Race Directive⁵⁴ have addressed discrimination in relation to access to housing services in both public and private sectors. However, there are limitations to this protection and the EU Network of Experts on Fundamental Rights has proposed a Directive specifically on Roma integration.⁵⁵ Equally, in countries like Ireland where Travellers/gypsies are not recognised as an ethnic minority the Race Directive is insufficient. Poor people and other minority groups may not have a race or ethnic aspect to their exclusion from housing, and require specific human rights protection to ensure that the State guarantees adequate housing. An EU Directive on the provision of adequate and affordable housing, or on the ending of homelessness, based on international instruments already accepted by EU States would be a valuable development. It could act to counter the growing stratification of housing rights based on status, for people living in EU States, set minimum core obligations and standards, and allow individuals to use the law to secure their rights, in a similar way to those who experience discrimination.

(c) Housing and homelessness policies across the EU

Today, while there is a political reticence at national level to accept that housing policy is determined by European influences, there is a common pattern emerging across Europe.⁵⁶ Kleinman has pointed out that

Housing policy in the traditional sense has virtually collapsed. It has bifurcated, that is, split apart, leaving behind two separate but related sets of policy issues. On the one hand there is a set of issues, which relate to concentrations of poverty, associated with economic restructuring and social disintegration. These are not fundamentally bricks and mortar issues, nor even about housing management and housing finance. They are increasingly about social dysfunction, and the collapse of communities, about the impacts of mass unemployment and poverty on everyday life. At the same time, we have a second set of issues, which are far removed from this grim picture, but equally distant from the earlier concerns of targets and physical standards. These issues revolve mainly around the continuing expansion of owner-occupation as a visible sign of economic and social success, both for the traditional household and for society as a whole, including maintaining the value of asset to the households, which have purchased it. The key development is the normalisation of property ownership as a route to social stability.⁵⁷

⁵⁴ Directive 2000/43/EC.

⁵⁵ See *Report on the Situation of Fundamental Rights in the EU for 2003* at website: www.europa.eu.int/comm/justice-home/index-en

⁵⁶ MacLennan, Stephens & Kemp. (1997) *Housing Policy in the Member States*. European Parliament Social Affairs Series W-14.PE 166.328.

⁵⁷ Kleinman, M. (ed.) (1998) *European Integration and Housing Policy*. London: Routledge, p. 249.

National housing policies, almost regardless of the political perspectives of governments, have adopted this path. As Kleinman again points out

...while there will continue to be debate among elites, between political parties and among the public too, about the specifics of housing policy in each country – where the limit of owner-occupation is, the balance between means tested and general support, what the most effective ways of targeting diminishing resources are, and so on – there seems little scope for changing the broad limits which have been imposed.⁵⁸

Housing policy has become a facilitator and adjunct to the primary role of housing markets, which have been accorded that primary role in the production and allocation of new homes. This is supported by a range of government systems, from registration of titles, to mortgage finance systems, planning, standards and regulatory controls, as well as range of tax incentives. Financial market liberalisation has developed a pattern across Europe, with abolition of interest rate ceilings, relaxation of credit controls and the ending of restrictions on entry into mortgage markets.⁵⁹ The total size of the EU housing finance market at the end of 2003 was more than €4.2 trillion. This is twice the amount of ten years ago and the average annual growth for the last ten years has been about 8%. It is an important part of the European economy, accounting for approximately 42% of EU GDP.⁶⁰

The main role in the production and allocation of housing is deferred to this enormous market structure. At national level, States ensure the sustainability of the housing market by limiting and correcting the its dysfunctions (and in some cases supplanting the market through direct provision). But there are increasing EU based pressures acting on national housing systems in such areas as consumer legislation, environmental and energy standards, EU market competition in construction services and professional services, public procurement rules and other matters.

Indeed, housing markets are not always measuring up to the ideals promoted by their neo-liberal advocates. There are growing problems of affordability for new households in almost all larger European cities, and land markets have driven house prices beyond the reach of many low-income workers and others.⁶¹ A report in 2004 to the informal annual meeting of EU Housing Ministers included a chart on 'disequilibrating factors in housing markets in European countries'.⁶² The report pointed out that 'in the vast majority of European countries the housing market as a whole, or specific segments of it, are in disequilibrium at the current time'.⁶³

Further market integration is encroaching on national housing policies, such as in the area of services of general interest.⁶⁴

All Member States, because of the deficiencies in their housing markets, need to

⁵⁸ *Ibid.*

⁵⁹ See ECB, (2003) *Structural Factors in the EU Housing Markets*, (Frankfurt, ECB), p. 42.

⁶⁰ International Union for Housing Finance (IUHF), World Congress 2004, *Conference Report*, p. 16.

⁶¹ See ECB (2003) *Structural Factors in the EU Housing Markets*. Frankfurt: ECB; Needham, B. (2000) *Land for Social Housing*. Brussels: CECODHAS.

⁶² Norris, M. and Shiels, P. (2004) *Regular National Report on Housing Developments in European Countries. Synthesis Report for EU Housing Ministers*. Dublin: The Housing Unit. p. 148.

⁶³ *Ibid.*, p. 147.

⁶⁴ See *Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of the regions. White paper on services of general interest*. COM(2004) 374. For up to date position in this area see EU website: http://europa.eu.int/comm/secretariat_general/services_general_interest/index_en.htm

intervene in order to combat the exclusion of persons or families affected by social problems or living in certain geographical areas. Such State aid, although not allocated on a non-discriminatory basis, is a legitimate element of public policy. In so far as it is limited to what is strictly necessary (the principle of proportionality) and does not affect trade between Member States in a proportion contrary to the Community interest, it is fully in line with the basic objectives of the Treaties and is in the interests of the Community. (Commission Decision: State Aid N 209/2001 – Ireland – guarantee for borrowings of the Housing Finance Agency.)⁶⁵

But housing policy has not always been so distant from EU policies, and it is interesting to trace the original role of the European Coal and Steel Community (ESCS) in funding the provision of housing. After the *Treaty of Paris* (1952), the fore-runner to the EU Treaties, and although the construction of subsidized housing was seen as a national responsibility, ‘the High Authority of the ESCS did not shy away from the objectives laid down’.⁶⁶ Many workers were living away from their families in makeshift or rundown accommodation. Although there was no mention of housing or housing construction in the *Treaty of Paris*, the legal basis for the ESCS subsidized housing loans of some 306,500,000 ECU, towards the construction of 200,000 homes between 1954 and 1989, was discerned in the ‘cause-effect relationship between the tenor of certain Articles and these concepts’.⁶⁷

While there is an official reluctance to accept that the EU influences or sets housing policies, regular national reports on changes to housing policies presented to the informal annual meetings of EU Housing Ministers now facilitate a comparison of developments across Europe.⁶⁸ Of course, the widespread investment in second and holiday homes in Eastern and Southern European countries is adding a new dimension to their housing policies. Equally, the migration of workers and their dependants from the new Accession States presents new challenges for national housing policies. The poor accommodation at the bottom end of the market available to immigrants, asylum-seekers, refugees and poor people is exposing the weak housing rights protection in many EU States.

Housing law and policy within EU Member States has become divided into two strands. On the one hand are the sets of measures which relate to concentrations of poverty and social disintegration, social inclusion, collapse of communities and homelessness. On the other hand, the maintenance of owner-occupation as a route to social stability and the normalisation of property ownership, has become the predominant force in housing law policy in EU Member States.

Despite the rhetoric about the fight against social exclusion, the reality is that the European political economy is now founded in practice on the acceptance at a more or less permanent level, of a continuing divide between the haves and the have-nots, in each country. In housing policy, this underlying belief finds expression in the retreat of national government from responsibility for achieving more equal outcomes. As the divide grows, policy bifurcates between, on the one hand measures to maintain market stability for the majority, either in terms of mass owner

⁶⁵ See *Joint Report on Social inclusion summarising the results of the examination of the National Action Plans for Social Inclusion (2003-2005)*. COM(2003)773 final Brussels, 12.12.2003, p. 58.

⁶⁶ European Commission, (1990) *ESCS Subsidized Housing Loans. An Appraisal Presented on the Completion of the 200,000th Subsidized Home*.

⁶⁷ *Ibid.*, p. 22. Contrast this with the 6m. ECU towards combating social exclusion in 1995.

⁶⁸ Completed questionnaires from national States on housing policies are available at <http://mrw.wallonie.be/dgatp/housing2003> (accessed 15 March 2005). See also Norris & Shiels, (2004) *Regular National Report on Housing Developments in European Countries*.

occupation or a more balanced private renting/owner-occupation split, and, on the other hand, to alleviate some of the worst excesses for the poor, while transferring responsibility from national to local, or even community level.⁶⁹

The issue of rights to housing must be interpreted within this contemporary context. Housing rights are a valuable method for the 'have nots' to assert a claim on the housing resources of States. In market systems many housing rights involve consumer rights, and indeed some property rights can be considered as housing rights. In some countries housing rights are the legacy of rights-based welfare or redistributive systems. However, it is clear that at EU level a new dialectic is emerging between market integration in all areas of housing, construction, mortgage finance, equity markets, products and equipment on the one hand, and fundamental rights, including housing rights, on the other. The housing market, with its integral elements of finance, planning, production and commodification of housing, stands in marked contrast to the values, social and human rights protection of housing rights.

It is significant, however, that some European States have a right to housing within their constitutions and legislation. In a report prepared for the French Presidency in 2000 the situation across the then EU States was examined.⁷⁰ Pointing out that European citizens still have unequal rights to housing, the report showed that a right to housing was enshrined in the constitutions of 7 out of 15 countries, and set out in legislation in 7 States. This guarantee of housing as a human right could be further developed within the EU Housing Ministers meetings and reports. It could provide a balance to the market norms being increasingly promoted in this area by the EU. Since common and single market norms are widely promoted through EU law, it is questionable why there is so little movement towards a harmonisation of housing rights protection (outside consumer and non-discrimination rights) across the EU. One may ask why citizens in any one EU State do not have equal housing rights with other EU citizens, in terms of affordability, access, quality, amenities and other matters, when both are largely relying on a steadily integrating housing market system within a European Common Market? Why are we accepting harmonisation in housing markets, but not in housing rights?

(d) Human rights and housing rights in the EU

Housing rights as human rights have a clear basis in the EU, since the Union seeks to respect and promote universal human rights.

The European Union is a community of shared values, founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. The European Union seeks to respect and promote universal human rights as laid down in the Universal Declaration of Human Rights of 1948 and the subsequent International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights of 1966. Besides these and other UN human rights instruments, the human rights policy and positions of the EU are also based on regional human rights instruments, such as the European Convention on Human Rights of 1950. The EU adheres to the principles of universality, interdependence and

⁶⁹ Kleinman, M. (ed.), (1998) *European Integration and Housing Policy*. London: Routledge. p. 250.

⁷⁰ See BIPE, (2000) *European public policy concerning access to housing*, at website: www.bipe.fr

indivisibility of all human rights and democratic freedoms, which these international legal instruments enshrine – as reaffirmed at the 1993 World Conference on Human Rights held in Vienna.⁷¹

Indeed, from the landmark judgements of the 1970s – the *Handelsgesellschaft*⁷² and *Nold*⁷³ cases, the European Court of Justice (ECJ) has held that fundamental rights form an integral part of the general principles of law, whose observance the ECJ ensures. It draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated, or to which they are signatories. The ECHR has special significance in that respect. The ECJ has also stated that not only the institutions of the Union, but also the States, where they act within the scope of Community law, are required to respect fundamental rights under the supervision of the ECJ.⁷⁴

For the first time the human rights basis of the EU was expressed in Article 6 of the 1997 Treaty of Amsterdam (TEU), which proclaimed that the ‘Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law’. Article 7 (now Article I-59 of *Treaty establishing a Constitution for Europe*) permits the EU to adopt an initiative where there appears to be a clear risk of a serious violation of the values on which the EU is founded. The Preamble and Article 136 of the EC Treaty mentions fundamental social rights, specifically referring to the European Social Charter of 1961 and the 1989 Community Charter.

The *Treaty establishing a Constitution for Europe*⁷⁵ at Article I-2 on the Union’s values states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article I-9 of the Draft Constitution states that the Union shall recognise the rights, freedoms and principles set out in the *EU Charter of Fundamental Rights*. The Union shall accede to the *European Convention on Human Rights and Fundamental Freedoms en bloc* if or when the Draft Constitution is ratified. Fundamental rights as guaranteed by the Convention, and as they result from the constitutional traditions common to the Member States shall constitute the general principles of the Union’s law.

As de Schutter has points out:

Fundamental rights were imported and developed in the legal order of the Union to respond to the fear that the transferral of powers from the European Union to the

⁷¹ EU *Annual Report on Human Rights 2004*, p. 8. See website:

http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-2004_en.pdf

⁷² Case 11/70 (17 December 1970).

⁷³ Case 4/73 (14 May 1974).

⁷⁴ See European Convention, Working Group on ‘Incorporation of the Charter/Accession to the ECHR’ Brussels, 18 June 2002, CONV 116/02. WG II 1, p. 2.

⁷⁵ OJ C310/4, 16.12.2004. See also de Schutter, O. et Bocadoro, N. *Le droit au logement dans l’Union Européenne*. CRIDHO Working paper series 2005/2.

Member States would result in diminishing the level of protection enjoyed by the individual under national legal systems. This explains both the initial development of fundamental rights as general principles of EC law by the European Court of Justice, and the interpretation by the Court of the secondary legislation which seeks to offer a minimal level of protection of fundamental rights at the level of the Union or vis-à-vis the institutions of the Union.⁷⁶

The application of EU law in the Member States has advanced greatly since the ECJ established the supremacy of EU law over national law and its direct effect on all legal subjects in the Union. By the 1990s the process of legal integration gave national judges the means of guaranteeing the effective application of EU law at local level. National judges must interpret existing national law in conformity with EU law, even in the context of Directives which have not yet been transposed, or incorrectly transposed, nationally. From 1990, the principle of government liability was established. This means that a national court can hold a Member State liable for damage caused through not properly implementing or applying a Directive. All of this grants individuals, the ultimate bearers of rights, a system of rights protection in key areas, which they can enforce against their national States in the event of violations. Thus, the development of rights, including housing rights, in EU law has the potential to facilitate a dramatic enhancement of the rights of homeless people at local level, across the EU. It is a measure which would transcend the obstacles and barriers to housing rights locally and nationally, and which could overcome political and administrative apathy, discrimination and denial of access to housing resources.

(e) Non-discrimination

Article 13 of the Amsterdam Treaty provided that within the limits of the powers conferred by the Treaty upon the EU, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination in key areas. This Article conferred to the European Community the powers to take measures to fight discrimination on grounds of sex, race/ethnic origin, religion/belief, disability, age and sexual orientation.⁷⁷ Arising from this Article an important legal development has taken place with powerful consequences for those who face discrimination in relation to access to housing. Council Directive 2000/43/EC of June 2000⁷⁸ promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin and specifically:

Shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

...(h) access to and supply of goods and services which are available to the public, including housing.⁷⁹

In order to comply with the Directive Member States shall take the necessary measures to ensure that:

⁷⁶ See de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, at p. 3. See website: <http://jeanmonnetprogram.org/papers/04/040701.html>.

⁷⁷ See website: http://europa.eu.int/comm/employment_social/fundamental_rights/index_en.htm

⁷⁸ Council Directive 2000/43/EC. OJ. L180/22, 19.7.2000.

⁷⁹ *Ibid.*, Article 3 (1).

Any laws, regulations, and administrative provisions contrary to the principle of equal treatment are abolished.⁸⁰

Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19th July 2003...⁸¹

Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European parliament and the Council on the application of this Directive.⁸²

The Directive requires Member States to designate a body to promote equal treatment and provide practical and independent support to victims of racial discrimination. The deadline for EU Member States to transpose this Directive was 19 July 2003 – except for the 10 new Member States, who had to ensure that their legislation complied with the Directives by their accession to the EU on 1 May 2004. As this Directive demonstrates, Member States are and will remain the principal guardians of human rights within their own territories.⁸³ However, the ECJ will enforce these justiciable and meaningful rights. In May 2005, the ECJ ruled that Austria had breached EU law by failing to transpose fully Directive 2000/43/EC.⁸⁴

In 2004, the ‘Gender Directive’ – Council Directive implementing the principle of equal treatment between women and men in the access to and supply of goods and services, addressed housing.⁸⁵ In this respect, the Directive takes the same approach to the area as Council Directive 2000/43/EC. It applies to the provision of ‘goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies, and which are offered outside the area of private and family life and the transactions carried out in this context’.⁸⁶ Member States must transpose the Directive by 21 December 2007 at the latest. One interesting aspect of the Directive is the shifting of the burden of proof to the respondent from the plaintiff, as set out in Article 9(1):

Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment.

The use of a Directive in this area, rather than a voluntary common policy objective, can provide a valuable pointer for potential future action in other areas. In this case the justification for the use of a Directive is to ensure a common high level

⁸⁰ *Ibid.*, Article 14.

⁸¹ *Ibid.*, Article 16.

⁸² *Ibid.*, Article 17.

⁸³ Alston, P. and Weiler, J.H.H. ‘An “Ever Closer Union” in Need of a Human Rights Policy: The European Union and Human Rights’, in Alston et al, (1999) *The EU and Human Rights*. OUP, p. 7.

⁸⁴ See website:

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/543&format=HTML&aged=0&language=EN&guiLanguage=en>

⁸⁵ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services. OJ L373, 21.12.2004.

⁸⁶ *Ibid.*, Article 3(1).

of protection against discrimination in all Member States, which cannot be achieved by Member States themselves:

Since the objectives of this Directive, namely to ensure a common high level of protection against discrimination in all the Member States, cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.⁸⁷

Of course, the objective of the prevention and resolution of homelessness has not yet been adopted as an objective of the Union. However, if it were to be so adopted, and it was clear from reports at various levels that Member States were failing to achieve this, it might be necessary to create a similar Directive to achieve the objective at Community level.

(f) EU Charter of Fundamental Rights (EUCFR)

The need for a European social dimension and fundamental rights protection arose in the 1980s to counteract the dangers of a deregulated market system with potential 'race to the bottom' policies by some Member States to gain competitive advantage. In the absence of EU institutional competence (outside labour legislation) to introduce minimum standards in areas of social policy the Community began to explore an alternative approach based on 'fundamental social rights'.⁸⁸

The *Community Charter of Fundamental Rights for Workers*, 1989 marked the first attempt at such EU measures.⁸⁹ It had no legislative effect, but provided the basis for a later 'Social Policy Agreement', which was incorporated into Article 17 of the TEU, and is now being referred to in the EUCFR. In relation to housing, the Charter of 1989 obliged the Commission to draw up a memorandum on the integration of migrants from countries outside the Community (education, housing etc). Article 26 of the Charter proposed measures, including housing, for disabled persons aimed at improving their social and professional integration.

In 1996, the *Comite des Sages* report, *For a Europe of Civic and Social Rights*,⁹⁰ called for a bill of rights encompassing both civic and social rights. This was followed by a Commission report on affirming fundamental rights in the EU in 1999.⁹¹ It proposed that a comprehensive approach to the guarantee of fundamental rights be urgently developed and an express guarantee should be included in the Treaties. The report recommended that fundamental rights must be visible in a way which permitted individuals to know and access them. Fundamental rights can only fulfil their function if citizens are aware of their existence and conscious of their

⁸⁷ *Ibid.*, preamble, para. 28.

⁸⁸ See Kenner, J. 'Economic and Social Rights in the EU Legal Order', in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart. p. 7.

⁸⁹ Commission of the European Communities. *The Community Charter of Fundamental Rights for Workers*. May 1990. Brussels 6/90.

⁹⁰ Luxembourg: European Commission.

⁹¹ European Commission. (1999) *Affirming Fundamental Rights in the European Union - Time to Act*. Luxembourg: European Commission. See website: http://europa.eu.int/comm/employment_social/labour_law/docs/affirmingfundamentalrights_en.pdf

ability to enforce them. In relation to the need for justiciability, the report pointed out that:

In order for rights to have any real impact, those seeking to assert them within the European Union have to know who is exactly covered and whether the right is justiciable. Efficient safeguard of fundamental rights as a rule presupposes judicial protection... While judicial protection is undoubtedly a crucial element in safeguarding fundamental right, it is by no means its only prerequisite. Legal remedies have to be complemented by legislative or administrative activities intended to implement and secure individual rights... Judicial protection and corrective action must be seen as part of one regulatory system which integrates both approaches. To dissociate them is to reduce the individual's chance of exercising his or her rights. It is therefore vital to establish genuine justiciable rights that entail more than a passive obligation of non-violation.⁹²

The report recommended that any attempt to recognise fundamental rights must include both civil and social rights.

The Cologne European Council of 1999 decided to establish a Charter of Fundamental Rights, referring to a citizens guarantee of economic and social rights, inspired by the 1996 Council of Europe *Revised European Social Charter* (RESC) and the 1989 *Community Charter of Fundamental Rights for Workers*. A wide consultative drafting approach was undertaken and submissions were made by homelessness advocates such as FEANTSA, for the inclusion of a right to housing.⁹³ A draft Article, similar to Article 31 of the Revised European Social Charter (RESC) was proposed by the housing NGOs to be included in the draft EUCFR in 1999:

With a view to ensuring the effective exercise of the right to housing, the parties undertake to take measures designed:

1. To promote access to housing of an adequate standard.
2. To prevent and reduce homelessness with a view to its gradual elimination.
3. To make the price of housing accessible to those without adequate resources.

It is significant that the UN Committee on Economic, Social and Cultural Rights (UNCESCR) supported the development of justiciable socio-economic rights in the EUCFR. The Committee pointed out that:

... if economic and social rights were not to be integrated in the draft Charter on an equal footing with civil and political rights, such negative signals would be highly detrimental to the full realization of all human rights at both the international and domestic levels, and would be regarded as a retrogressive step contravening the existing obligations of Member States of the European Union under the International Covenant on Economic, Social and Cultural Rights. In such a case, the Committee might have to raise this issue when examining reports by States parties, as a violation of the obligation under article 2, paragraph 1, of the Covenant to 'achieving the full realization of the rights recognized' in that Covenant, i.e. taking measures geared to progressively realize and promote economic, social and cultural rights. The Committee wishes to emphasize that only a Charter which will be fully binding on member States of the European union, and which would give every individual a

⁹² *Ibid.*, p. 11/12.

⁹³ FEANTSA - European Federation of National Organisations Working with the Homeless - *Open letter to the Convention and statement given at the hearing on 27 April 2000 (CONTRIB 164)* See website: http://www.europarl.eu.int/charter/civil/civil0_en.htm

justiciable right of complaint about violations of civil and political, as well as economic and social, rights, can fully secure the protection of all human rights. ...The Committee expresses its hope that the Convention in drafting economic and social rights provisions in the charter, will take the opportunity to remind member States of their obligation to domestically apply the rights of the International Covenant on Economic, Social and Cultural Rights.⁹⁴

(g) Article 34(3) - the right to social and housing assistance

In December 2000 the EUCFR was ‘jointly and solemnly proclaimed’ at Nice by the Presidents of the European Parliament, the Council and the Commission, following submissions from NGOs and interested parties.⁹⁵ While the EUCFR does not include a specific right to housing, there is an important right to social and housing assistance contained in Article 34(3).⁹⁶

In order to combat social exclusion and poverty, the Union recognises and respects **the right to social and housing assistance** so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the procedures laid down by Community law and national laws and practices.⁹⁷

The wording of Article 34(3) is distinctive in the EUCFR, in that it states that **a specific right** to social and housing assistance is recognised and respected. For instance, Article 34(1) in relation to social security, merely states that the ‘Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age...’⁹⁸

Article 34(3) draws on point 10 of the EU *Community Charter of the Rights of Workers 1989*, Article 13 of the *European Social Charter* and Articles 30 and 31 of RESC. The Union must respect it in the context of policies based on Article 137(2) of the Treaty establishing the European Community.⁹⁹ Since paragraph 34(3) draws on a number of other texts these can provide clarification on the obligations contained in the section.

Point 10 of the EU *Community Charter of the Rights of Workers 1989* states:

Every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits. Persons who have been unable either to enter or re-enter the labour market and have

⁹⁴ UN Doc. E/C.12/2000/21. Committee on Economic, Social and Cultural Rights, *Report on the 22nd, 23rd and 24th Sessions, Supplement No. 2. Annex VIII.*

⁹⁵ *Charter of Fundamental Rights of the European Union*, OJ C364/01, 18.12.2000. See also website: <http://www.fundamental.rights@consilium.eu.int>.

⁹⁶ This has now been incorporated as Article II-94 (3) of the *Treaty establishing a Constitution for Europe*.

⁹⁷ See website: http://www.europarl.eu.int/charter/pdf/text_en.pdf

⁹⁸ See Tooze, J. ‘Social Security and Social Assistance’, in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart.

⁹⁹ See explanations to the Charter on website: http://www.europarl.eu.int/charter/pdf/04473_en.pdf. It is pointed out that these explanations have been prepared at the instigation of the Praesidium. They have no legal value and are simply intended to clarify the provisions of the Charter.

no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation.

Article 13 of the European Social Charter states:

With a view to ensuring the effective exercise of the right to social and medical assistance, the Contracting Parties undertake:

1. to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition;
2. to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights;
3. to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want;
4. to apply the provisions referred to in paragraphs 1, 2 and 3 of this article on an equal footing with their nationals to nationals of other Contracting Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11th December 1953.¹⁰⁰

These provisions have been interpreted by the Council of Europe CSR, which has established from the first reporting cycle that Article 13(1) binds Contracting Parties to recognise that persons in need were entitled to public assistance as of right.¹⁰¹ The Contracting Parties are under an obligation which they may be called on in court to honour. Throughout all the supervision cycles the CSR has insisted that social assistance should be granted as a ‘subjective right (*droit subjectif*)’. It should not depend solely on administrative discretion, and should be supported by a right of appeal to an independent body.¹⁰²

Article 30 of the RESC on the right to protection against poverty and social exclusion states:

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

- a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;
- b. to review these measures with a view to their adaptation if necessary.

Article 31 of the RESC on the right to housing states:

¹⁰⁰ For an examination of these entitlements in detail see Tooze, J. ‘Social Security and Social Assistance’, in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart. See Collective Complaint No. 14/2003, *International Federation for Human Rights v. France*. See website: http://www.coe.int/T/E/Human_Rights/Esc/4_Collective_complaints/List_of_collective_complaints/R_C14_on_merits.pdf

¹⁰¹ See Samuel, L. (2002) *Fundamental social rights – case law of the European Social Charter*, Strasbourg: Council of Europe Publishing. p. 306.

¹⁰² *Ibid.*, p. 307.

With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

1. to promote access to housing of an adequate standard;
2. to prevent and reduce homelessness with a view to its gradual elimination;
3. to make the price of housing accessible to those without adequate resources.

The obligations set out in these Articles have been examined by the CSR in recent years and the Conclusions of the CSR are set out in the section of this report on the European Social Charter below.¹⁰³ There is also a developing jurisprudence through the *Collective Complaints Protocol* of the CSR and one Complaint relates to Article 31 - *European Roma Rights Center (ERRC) v. Italy*¹⁰⁴ (considered below). There is clearly a wide source of jurisprudence in this area for the interpretation of Article 34(3) of the EUCFR.

However, the scope of the Charter is limited by its Article 51, which states:

1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.
2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.¹⁰⁵

Thus, the EUCFR is not directly applicable to national law in the way Directives are, but will have to be interpreted under the background of international treaties, which prevent a decrease in its protective level.¹⁰⁶ Indeed, there is much debate about the legal effects of the Charter.

In the context of globalisation, post-Fordism and other challenges and changes to the post-war European labour law and welfare settlement, could the expression of economic and social rights in the Charter actually make a difference in terms of embedding values of community and solidarity within the EU's legal order?¹⁰⁷

The aim of Article 51 is to determine the scope of the EUCFR. It seeks to establish clearly that the EUCFR applies primarily to the institutions and bodies of the Union, in compliance with the principle of subsidiarity.

This provision is in keeping with Article 6(2) of the Treaty on European Union, which requires the Union to respect fundamental rights, and with the mandate issued

¹⁰³ Council of Europe. European Committee on Social Rights, European Social Charter (revised) *Conclusions 2003 – Volume 1 (Bulgaria, France, Italy)* Strasbourg: Council of Europe Publishing October 2003. Council of Europe. European Committee on Social Rights, European Social Charter (revised) *Conclusions 2003 – Volume 2 (Romania, Slovenia, Sweden)* Strasbourg: Council of Europe Publishing October 2003.

¹⁰⁴ Collective Complaint No. 27/2004. Decision on Admissibility, 6 December 2004.

¹⁰⁵ This has been slightly altered in the Draft EU Constitution Article II-111.

¹⁰⁶ See Hervey, T. & Kenner, J. (eds.) (2003) *Economic, Social and Cultural rights under the EU Charter of Fundamental Rights. A Legal Perspective*. Oxford: Hart; Peers, S & Ward, A. (2004) *The EU Charter of Fundamental Rights*. Oxford: Hart.

¹⁰⁷ See Hervey & Kenner, (2003), p. viii.

by Cologne European Council. The term 'institutions' is enshrined in the EC Treaty, Article 7 of which lists the institutions. The term 'body' is commonly used to refer to all the authorities set up by the Treaties or by secondary legislation (see Article 286(1) of the Treaty establishing the European Community). As regards the Member States, it follows unambiguously from the case law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the context of Community law (judgment of 13 July 1989, Case 5/88 *Wachauf* [1989] ECR 2609; judgment of 18 June 1991, ERT [1991] ECR I-2925). The Court of Justice recently confirmed this case law in the following terms: 'In addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules...' (judgment of 13 April 2000, Case C-292/97, paragraph 37 of the grounds, not yet published). Of course this principle, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law. Paragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Community and the Union. Explicit mention is made here of the logical consequences of the principle of subsidiarity and of the fact that the Union only has those powers which have been conferred upon it. The fundamental rights as guaranteed in the Union do not have any effect other than in the context of the powers determined by the Treaty.¹⁰⁸

Article 34(3) sets out as its purpose the combating of social exclusion and poverty, and in this context undertakes that the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. This aligns Article 34(3) with the combating of poverty and social exclusion, which has been promoted in the EU by the Decision of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage co-operation between Member States to combat social inclusion.¹⁰⁹ Thus, the recognition and respect for the right to social and housing assistance has now become an integral part of the policies for combating social exclusion and poverty. Yet, this is not widely developed in the EU States or at EU level, and few States have addressed this obligation in the National Action Plans on social inclusion. Indeed, it was not specifically promoted in the guidance on preparing the National Action Plans or widely discussed in the Commission synthesis reports. Could it be that the Union institutions in the area of social inclusion policy do not, in fact, recognise and respect the right to social and housing assistance?

FEANTSA has expressed regret that the EUCFR did not include all of the rights set out in the RESC of the Council of Europe (1996). It recommended that the contents of the EUCFR should therefore be revised and strengthened, including an explicit reference to the right of access to decent and sanitary housing for all. The EUCFR should then be given a stronger legal status, with a clear reference added to the European Union Treaty, so that all of the EU Institutions and Member States would be expected to respect and uphold all of the rights described in the Charter. Individuals and groups should be able to take legal action, in order to seek redress

¹⁰⁸ See website: http://www.europarl.eu.int/charter/pdf/04473_en.pdf

¹⁰⁹ Decision No. 52/2002/30. OJ L10/1. 12.1.2002.

and/or compensation from any EU institution or Member State which has failed to respect and uphold their fundamental rights.¹¹⁰

(h) The effects of the EUCFR

Altogether the Charter and its Article 34(3) could have important effects at a number of levels:

As the Commission said in the European Parliament on 3 October 2000, it is clear that it would be difficult for the council and the commission, who are to proclaim it solemnly, to ignore in the future, in their legislative function, an instrument prepared at the request of the European Council by the full range of sources of national and European legitimacy acting in concert. Likewise it is highly likely the Courts of Justice will seek inspiration in it, as it already does in other fundamental rights instruments. *It can reasonably be expected that the Charter will become mandatory through the Court's interpretation of it as belonging to the general principles of Community law.*¹¹¹

There have been numerous judicial reference to the EUCFR at the ECJ.¹¹² Advocate General Jacobs made reference to Article 41 of the EUCFR in his Opinion in Case C-270/99 *P Z v. European Parliament*.¹¹³ Reference was made to the Charter in interpreting European legislation in *BECTU v. Secretary of State for Trade and Industry*.¹¹⁴

However, de Burca points out that the ECJ remains cautious about the legal status of the Charter:

The fact that not a single judgement of the ECJ has yet followed suit suggests that the members of the Court have collectively taken a decision not to cite any provision of the Charter, presumably while its legal status has not yet been agreed – more particularly, in view of the fact that a political decision was made at the Nice IGC to postpone the question of its legal effect for the Convention and the subsequent IGC to decide... it might well be argued that that the ECJ has entered a phase of deference to the political decision-making process to the detriment of its previous attitude of protection of individual rights.¹¹⁵

The *European Social Agenda* – as presented by a Communication of the Commission in 2000¹¹⁶ mentioned the importance of the EUCFR for the future development of social policy in the Union. The political meaning of the EUCFR is not limited to its legal scope. 'As a receptacle for values considered to be fundamental

¹¹⁰ FEANTSA. *Position Paper.Promoting Social Inclusion through Access to Housing*. Presented to the 13th European Meeting of Housing Ministers Brussels, 1 October 2001.

¹¹¹ See *Communication from the Commission on the legal nature of the Charter of Fundamental Rights of the European Union*. COM (2000) 644 final 11.10.2000. pp. 5-6.

¹¹² See Morijn, J. *Judicial Reference to the EU Fundamental Rights Charter, First experiences and possible prospects*. Working paper No. 1. of the Ius Gentium Conimbrigae Institute. See website: http://www.fd.uc.pt/hrc/working_papers/john_morjin.pdf

¹¹³ Judgement 22 March 2001, para. 40.

¹¹⁴ AG Tizzano, Opinion of 8 February 2001. Judgement 26 June 2001.

¹¹⁵ See de Burca, G. 'The European Court of Justice and the Evolution of EU Law', in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, p. 68.

¹¹⁶ COM (2000) 379 final 30.6.2000

within the Union, the EUCFR is also intended to guide the direction in which Union law is developed.’¹¹⁷

...the Charter’s natural aim is to influence the development of European Union secondary legislation. It must constitute the basis for a genuine *fundamental rights* policy within the European Union. The institutions of the European Union are already obliged to *respect* fundamental rights but, by exercising the competences allocated to them, they must ensure the *progressive development* thereof, by building on fundamental rights as a source of inspiration to guide their initiatives.¹¹⁸

Since 2001 there is a requirement on the Commission to accompany all legislative proposals which could have an impact on fundamental rights with an indication that the proposals were considered to be compatible with the requirements of the EUCFR.¹¹⁹ The Commission will defend the standards for the protection of fundamental rights laid down in its proposals for legislation and will ward against any unjustified violation of them by the legislature.

Thus, Directive 2004/58/EC, on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States at paragraph 31 contains the standard Charter recital:

This Directive respects the fundamental rights and freedoms and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.

Indeed, the Commission has already identified the Charter as significant for the rights of third-country nationals as it

...constitutes the very essence of the European *acquis* in terms of fundamental rights. Respecting the principle of universalism, most of the rights enumerated in the Charter are conferred on all persons regardless of their nationality or place of residence; the Charter thus enshrines a number of rights conferred on the nationals of the Member States and on third-country nationals residing there.¹²⁰

The obligations of the Charter could be addressed within the new EU governance machinery, where the use of Impact Assessments was established from 2003, to address all policy decisions of the EU. Impact Assessments identify the likely positive and negative impacts of proposed policy actions, enabling informed political judgements to be made about the proposal and identify trade-offs in achieving competing objectives.¹²¹

The principle is that all Commission legislative and all other policy proposals proposed for inclusion in the Annual Policy Strategy or the Commission and Work

¹¹⁷ See EU Network of Independent Experts in Fundamental Rights. *Report on the situation of Fundamental Rights in the European Union and its Member States in 2002*. Luxembourg: European Communities, p. 11.

¹¹⁸ *Ibid.*, p. 12.

¹¹⁹ See Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, p. 4.

¹²⁰ Commission of the European Communities. *Proposal for a Council Directive concerning the status of third-country nationals who are long term residents*. COM (2001) 127 final. para. 1.6.

¹²¹ See *Communication* from the Commission on Impact Assessment. COM(2002) 276 final, 5.6.2002.

Programme as established in the context of the strategic planning and programming cycle¹ will be subject to the impact assessment procedure, provided that they have a potential economic, social and/or environmental impact and/or require some regulatory measure for their implementation.¹²²

A formal Impact Assessment is required for items on the Commission's Work Programme and since 2005 all legislative and major policy-defining proposals contained in its annual Legislative and Work Programme will be subject to Impact Assessment. All regulatory proposals, White Papers, expenditure programmes and negotiating guidelines for international agreements (with an economic, social or environmental impact) put on the Work Programme are concerned. In addition, the Commission may, on a case by case basis, decide to carry out an impact assessment of a proposal which does not appear on the Work Programme.¹²³ Green Papers and proposals for consultation with Social Partners are exempted. Member States should submit an impact analysis of draft national rules that they notify to the Commission. In addition, Member States should also be encouraged to define standards for consultation and impact assessment for the transposition of those Directives that leave them broader margins for implementation.¹²⁴

The Impact Assessment provides a common set of basic question, minimum analytic standards and a common reporting format. There are two stages, a preliminary assessment carried out in the early phase of policy formulation, and an extended Impact Assessment. This latter is required if the proposal will result in substantial economic, environmental and/or social impacts on a specific sector or several sectors, and whether the proposal will have a major impact on major interested parties. It also applies where the proposal represents a major policy reform in one or several sectors. The extended Impact Assessment involves an in-depth analysis of the potential impacts on the economy, on society and on the environment, as well a consultation with interested parties and relevant experts. The Impact Assessment will outline the reasons for the preferred policy option, choosing between regulatory action, co-regulatory approaches (social dialogue), market based instruments, financial interventions, self-regulation, Framework Directives and the OMC.

The Impact Assessment should identify both direct and indirect impacts of the preferred option, and should make explicit the possible difficulties with the identification of impacts.¹²⁵ Among the social impacts to be considered is the compatibility of the measure with the Charter of Fundamental Rights, social exclusion and poverty, impacts on health, safety and consumer rights etc. This effectively requires the Commission to examine the impact on the EUCFR, including Article 34(3) on its proposed measures. For example, in relation to market integration measures, which could impact on social housing provision and other areas, the protection of Article 34(3) must be considered.

¹²² *Ibid.*, para. 2

¹²³ European Commission - *Impact Assessment Guidelines* (15 June 2005) SEC(2005) 791 at website: http://europa.eu.int/comm/secretariat_general/impact/docs/SEC2005_791_IA%20guidelines_annexes.pdf, p. 6.

¹²⁴ COM(2002) 276 final, 5.6.2002, para. 1.5.

¹²⁵ *Ibid.*, para. 4.1.

In 2005, the issue of compliance with the EUCFR in Commission legislative proposals was the subject of a communication from the Commission.¹²⁶ The methodology has three objectives:

- to allow Commission departments to check systematically and thoroughly that all the fundamental rights concerned have been respected in all draft proposals;
- to enable Members of the Commission, and the Group of Commissioners on Fundamental Rights, Anti-discrimination and Equal Opportunities in particular, to follow the results of the scrutiny and to promote a “fundamental rights culture”;
- to make the results of the Commission’s monitoring of fundamental rights more visible to other institutions and to the general public. The Commission should be seen to set an example, which will also give it credibility and authority in monitoring respect for fundamental rights in the activities of the two branches of the legislature.¹²⁷

The main aim of the methodology is to allow the Commission to check all Commission legislative proposals systematically and rigorously to ensure that they respect all the fundamental rights concerned in the decision making process. This is additional to the checks for compliance with the legality of the EUCFR in place since 2001. However, fundamental rights will be addressed in the impact assessments, which should include as full and precise a picture as possible of the different impacts on individual rights. In the explanatory memorandum attached to the Impact Assessment a section on the legal basis for compliance with fundamental rights will be included. The Charter recital adopted in 2001 will still be used in legislative instruments, but where used the explanatory memorandum must include a section briefly summarizing the reasons pointing to the conclusion that fundamental rights have been respected.

In relation to monitoring, the Commission’s responsibility as guardian of the Treaties and of fundamental does not end when it presents a proposal to the legislature.

The Commission, and especially the Group of Commissioners, will also monitor the work of the two branches of the legislative authority in order to determine compliance with fundamental rights, in particular in very sensitive cases involving such rights or where fundamental rights arguments are raised in the legislative process. The Commission will defend the standards for the protection of fundamental rights laid down in its proposals for legislation and will warn against any unjustified violation of them by the legislature.

As a last resort, the Commission will reserve the right, on the basis of a case-by-case political scrutiny, to initiate annulment proceedings in the event of an infringement of fundamental rights where it considers a breach has occurred but there is no possibility of interpreting the act adopted as being compatible with fundamental rights.¹²⁸

The *EU Annual Report on Human Rights 2004* pointed out that:

¹²⁶ See Communication from the Commission, *Compliance with the Charter of Fundamental rights in Commission legislative proposals – Methodology for systematic and rigorous monitoring*, COM(2005) 172 final, 27.5.2005.

¹²⁷ *Ibid.*, p. 3.

¹²⁸ *Ibid.*, p. 7.

With its proclamation at the Nice European Council in December 2000, the Charter of Fundamental Rights acquired significant prominence. It is a reference document enabling citizens of the Union and of the candidate countries for accession to acquaint themselves with their rights and with the values on which the Union is being built. Although it is not yet legally binding, citizens are increasingly invoking the Charter in their mail, appeals or petitions addressed to the Union's institutions.

Lawyers are also invoking the Charter more frequently before the Union's judicial bodies, while the Advocates-General at the Court of Justice of the Communities make reference to it in their conclusions on a regular basis, while nonetheless stressing that it is not legally binding.

Moreover, the Commission considers it necessary to draw practical conclusions from the proclamation of the Charter and to make respect for the rights contained therein its guiding principle. With this in mind, any proposal for a legislative act or any regulatory act adopted by the college will henceforth automatically be checked for its compatibility with the Charter, as evidenced by the inclusion of a standard recital in proposals linked to fundamental rights.

It should be noted that the Charter highlights the existing rights on which the Union is founded and which it observes in accordance with Article 6 of the TEU. It contains various categories of rights:

- the rights and freedoms and procedural guarantees as they result from the European Convention for the Protection of Human Rights and Fundamental Freedoms, and from the constitutional traditions common to the Member States;
- the rights linked to European citizenship, to be found in particular in part two of the Treaty establishing the European Community (TEC), entitled 'Citizenship of the Union';
- the economic, social and cultural rights which correspond to the provisions of labour law, on the one hand, and social law, on the other;
- the 'modern' rights, aimed, in particular, at meeting the challenges of the current and future development of information technologies or of genetic engineering.¹²⁹

The EUCFR has now been incorporated into Part II of the *Treaty establishing a Constitution for Europe*,¹³⁰ with Article 34 becoming Article II-94 using the same wording. This has received Parliamentary approval in Austria, Belgium, Cyprus, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia and Spain, which has ratified the Treaty through a referendum.¹³¹ On this basis, it would appear that Article II-94 (Article 34 of the EUCFR) is widely accepted throughout Europe, and the right to social and housing assistance must be upheld in further market integration and other EU legal and policy developments.

In terms of the interpretation of the Charter, the Working Group on the Convention proposed that in the interests of the smooth incorporation of the Charter as a legally binding document, Article 52 of the EUCFR (now Article II-112 (4)) be amended.¹³² This Article on the scope and interpretation of rights and principles of the Charter now reads:

¹²⁹ EU Annual Report on Human Rights 2004, p. 35. See website:

http://europa.eu.int/comm/europeaid/projects/eidhr/pdf/eu-annual-report-2004_en.pdf

¹³⁰ OJ C310, 16.12.2004.

¹³¹ See website: http://europa.eu.int/constitution/ratification_en.htm.

¹³² Final report of Working Group II 'Incorporation of the Charter/accession to the ECHR. CONV 353/02. p. 7.

Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

Article II-111 on the field of application of the Charter states:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution.
2. This Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks defined in the other Parts of the Constitution.

Olivier de Schutter points out that there is now no restriction on the ECJ from considering the EUCFR as part of the ‘respect for human rights’.¹³³ He points to recent cases where the ECJ considered that a citizen comes within the *ratione personae* of the provisions of the Treaty in terms of European citizenship, in relation to Article 12 EC, preventing discrimination on grounds of nationality. De Schutter suggests that the EUCFR could be similarly invoked from the Treaty provisions¹³⁴.

This use of terms such as ‘respecting rights’ and ‘observing principles’ has led to much debate on the actual justiciability of the provisions of the EUCFR.¹³⁵ But whatever the justiciable nature of these, it is clear that neither the EU or a Member State, acting within the scope of EU law, would be permitted to adopt a measure which is clearly inconsistent with any of the principles recognized in the EUCFR.¹³⁶ However, there is a danger that the phrase ‘in accordance with national law and practice’, could be interpreted by States to advance a lower level of rights protection than that which is accepted by other States. It could also be used to justify a regression of rights, contrary to the obligations of the ICESCR. Indeed, some new approaches are developing in the EU, which could lead to a reformulation and revised perception of housing rights.

(i) Open Method of Coordination (OMC)

(i) Origins

Article 137 (2)(a) of TEU 1992 refers to the Council adopting measures designed to encourage co-operation between Member States, initiatives, and innovative approaches, etc. The Council:

¹³³ Article 46 of the EU Treaty limited the ECJ role in considering the justiciability of Article 6(1) EC, but no such restriction exists in the *Treaty establishing a Constitution for Europe*.

¹³⁴ See de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, at website: <http://jeanmonnetprogram.org/papers/04/040701.html>

¹³⁵ See Alston, P. ‘The Contribution of the EU Fundamental Rights Agency to the Realization of Economic, Social and Cultural Rights,’ in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart.

¹³⁶ *Ibid.*, p. 170.

... may adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States;

In June 2000, the European Commission announced a five-year programme of action to 'shape a new Europe,' setting out a new *Social Policy Agenda*.¹³⁷ This did not seek to harmonise social policies. It would work towards common European objectives and increase co-ordination of social policies in the context of the internal market and the single currency. Furthermore, the implementation of the Agenda did not require additional funding, but rather implied the re-direction of public expenditure to improve efficiency and investment in people. The means of achieving the *Social Policy Agenda* were the Open Method of Co-ordination (OMC), legislation, the Social Dialogue, the Structural Funds (particularly the ESF), Commission programmes, the use of mainstreaming, policy analysis and research.¹³⁸

The OMC was established by the European Council of Lisbon in 2000.

It is a new form of coordination of national policies consisting of the Member States, at their own initiative or at the initiative of the Commission, defining collectively, within the respect of national and regional diversities, objectives and indicators in a specific area, and allowing those Member States, on the basis of national reports, to improve their knowledge, to develop exchanges of information, views, expertise and practices, and to promote, further to agreed objectives, innovative approaches which could possibly lead to guidelines or recommendations.¹³⁹

The OMC is a voluntary process that all Member States have committed themselves to pursuing in the context of the Lisbon Strategy. This method can be a way of creating greater visibility, encouraging a strategic and integrated approach, mainstreaming the issue of poverty and social exclusion, mobilising all relevant actors and finally to encourage mutual learning. The OMC is supported by a Community Action Programme (2002-2006) to encourage cooperation in fighting social exclusion, which provides funding to a wide range of activities.¹⁴⁰

While this report seeks to examine how housing rights as human rights can be developed, in the EU context where human rights values have been established as the basis of the Treaties, the development of rights takes place within the context of the changing nature of EU governance.¹⁴¹ This governance, originally based on the 'Community method' of Treaties, Regulations and Directives, has now been broadened to include many 'soft law' measures, such as Framework Directives, common policy initiatives and the OMC.¹⁴²

¹³⁷ European Commission, *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and Committee of the Regions. Social Policy Agenda*. Brussels, 28.6.2000 COM (2000) 379 final.

¹³⁸ European Commission, Brussels, 28.6.2000 COM (2000) 379 final, p. 14-15

¹³⁹ The European Convention, *Final report of Working Group XI 'Social Europe'* CONV 516/1/03. p. 17.

¹⁴⁰ See EU Employment, Social Affairs and Equal Opportunities website: http://europa.eu.int/comm/employment_social/social_inclusion/index_en.htm

¹⁴¹ See Scott, J. & Trubeck, D. (2002). 'Mind the gap: Law and new approaches to Governance in the European Union.' *ELJ* 8(1): 1-18.

¹⁴² See *Communication from the Commission, European Governance: Better Lawmaking*, COM (2002) 275 final, 5.6.2002; *Communication from the Commission - Towards a reinforced culture of*

The transfer of the experience of management tools, such as the convergence strategy, used in connection with the EMU, to other fields, such as employment or other non-economic themes (such as the fight against social exclusion) to achieve a new and original method for advancing the European project, has led to the appearance of the OMC.¹⁴³ This method seems to have become a panacea for solving the complex problems of governance, particularly in fields where the powers of the EU are weak or non-existent. Indeed, it is claimed that dissatisfaction with the 'command and control' mode of EU governance through Regulations and Directives, as well as the weakened legitimacy of EU law making and a new approach to EU policy based on policy outcomes within diverse national systems, have all led to the growth of the OMC.¹⁴⁴

Member governments have acknowledged that improved competitiveness whilst preserving the European model(s) of welfare capitalism may require common responses in areas where legal competences rest with the member states. Arguably, this situation (that the integration is approaching the core areas of the welfare state, but that member states are not prepared to compromise their sovereignty over social policy areas) has accentuated the need for alternatives to the Community method.¹⁴⁵

Following the European *White Paper on European Governance* in 2001¹⁴⁶ the EU sought to combine different policy tools such as legislation, social dialogue, structural funding and action programmes. Community action may be complemented or reinforced by the use of the so-called 'open method of co-ordination'.

It is a way of encouraging co-operation, the exchange of best practices and agreeing common targets and guidelines for Member States, sometimes backed up by national action plans as in the case of employment and social exclusion. It relies on regular monitoring of progress to meet those targets, allowing Member States to compare their efforts and learn from the experience of others.¹⁴⁷

Many studies have examined this new form of governance. It is based on the more nebulous and locally defined best practices and public management paradigms. It does not require any transfer of competencies, and is policy driven, seeking to ensure harmonisation with common goals and targets across Europe with national diversities in approaches. Most studies address the operation, actors and novelty of the approach. There is as yet, little examination of effective benchmarking, evidence of improved best practices, detailed examination and analysis of participation by those citizens with a stake in the policy concerned, or abandonment of poor practices.¹⁴⁸

consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission, COM (2002) 704 final, 11.12.2002.

¹⁴³ See Mertens, C. 'Interactions between National Housing Policies and the Legislation, Initiatives and Decisions of the European Union.' Reflections and summary report (31 October 2003), 15th meeting of the Housing Ministers of the European Union, p. 6. See website: http://mrw.wallonie.be/dgatlp/logement/logement_euro/Dwnld/RAPPORT%20EUROPEEN%20En_2003.pdf

¹⁴⁴ See *European Governance - A White Paper*, COM (2001) 428 final, 25.7.2001.

¹⁴⁵ See Borrás, S. & Jacobsson, K. 'The open method of co-ordination and new governance patterns in the EU', *Journal of European Public Policy* 11:2 April 2004: 185-208 at p. 186.

¹⁴⁶ See *European Governance A White Paper*, COM (2001) 428 final, 25.7.2001.

¹⁴⁷ *Ibid.*, p. 21.

¹⁴⁸ See Elissaveta Radulova. *The Open Method of Coordination as a New Mode of EU Governance*. Paper to the First PCE Conference 29 June 2005, Maastricht; Borrás, S. & Jacobsson, K. 'The open

(ii) Positive and negative critiques of OMC

The proponents of the OMC point to the transparency and openness in its consultative approach to policy making, its involvement of State and non-State ‘actors’, its treatment of diverse national systems and other issues. Thus:

...the OMC appears well-suited for pursuing common European concerns while respecting legitimate national diversity because it commits Member States to work together in reaching joint goals and performance targets without seeking to homogenize their inherited policy regimes and institutional arrangements. Such capacity for reconciling European action with national diversity has become more vital than ever with the recent enlargement of the EU to include ten new Member States, which differ widely both from one another and from the original fifteen in their labour market institutions and social welfare regimes, as well as in their levels of economic development and rates of employment, unemployment, and income poverty. In social policy more specifically, some leading proponents of the OMC have also hailed its potential as a cognitive and normative tool for defining and building consensus around a distinctive ‘European’ (or perhaps more accurately ‘EU’) ‘Social Model’ and policy paradigm based on shared values and objectives.¹⁴⁹ Insofar as the OMC systematically and continuously obliges Member States to pool information, compare themselves to one another, and reassess current policies and programmes in light of their relative performance, it likewise appears to be a promising mechanism for promoting experimental learning and deliberative problem solving across the EU. Diversity within Europe, on this view, should be regarded ‘not as an obstacle to integration but rather as an asset...a natural laboratory for policy experimentation’, which enhances opportunities for cross-national learning through comparison of different approaches to similar or related problems.¹⁵⁰ For each of these reasons, this method has rapidly become the governance instrument of choice for EU policymaking in complex, domestically sensitive areas where diversity among the Member States precludes harmonization but inaction is politically unacceptable, and where widespread strategic uncertainty recommends mutual learning at the national as well as the European level.¹⁵¹

The interaction between the EU institutions and national agencies and NGOs, based on EU objectives, is also seen as a valuable innovation.

Within OMC processes, the common objectives play a pivotal role in linking EU policymaking upwards to the core values and goals of the Union (as set out in the

method of co-ordination and new governance patterns in the EU’, *Journal of European Public Policy* 11:2 April 2004: 185-208; de la Porte, C. & Pochet, P. (2003) ‘The OMC Intertwined with the Debates on Governance, Democracy and Social Europe’, *Report prepared for the Belgian Ministry of Social Affairs*, at website: <http://www.ose.be/files/docPP/researchOMC.pdf>; de la Porte, C. (2002) ‘Is the Open Method of Coordination appropriate for organising activities at European Level in Sensitive Policy Areas?’, *European Law Journal*, Vol. 8(1), pp. 38-58; de Burca, G. ‘The Constitutional Challenge of New Governance in the European Union’, 28 *ELR* (2003) 814.

¹⁴⁹ See Vandenbroucke, Ferrera, Matsaganis & Sacchi, ‘Open Coordination Against Poverty: The New EU ‘Social Inclusion Process’’, 12 *JESP* (2002) 226.

¹⁵⁰ See Cohen & Sabel, ‘Sovereignty and Solidarity: EU and US’, in Zeitlin, J. & Trubek, D. M. (eds), (2003) *Governing Work and Welfare in a New Economy: European and American Experiments*. OUP, p. 368.

¹⁵¹ See Zeitlin, J. ‘Social Europe and Experimental Governance: Towards a New Constitutional Compromise?’ in de Burca, G. (2005) *EU Law and the Welfare State: In Search of Solidarity*. OUP, p. 7.

Treaties and the Charter of Fundamental Rights) on the one hand, and downwards to more specific policy approaches and programmes pursued by the Member States on the other.¹⁵²

Many NGOs who are involved in consultation work have been very generous in their praise of the OMC:

The OMC has also provided an added value through stimulating activities at the national level in relation to the fight against poverty and social exclusion. This has included:

- Providing important inspiration for the Government resulting in establishing some multi annual projects on social inclusion.
- Assisting to the clarification and coordinating of policies against poverty and social exclusion and to assisting various ministries and departments to coordinate their work.
- strengthening the principle (which existed in some countries but was new for others) that all areas of Government must work against poverty and social exclusion
- creating structured opportunities for dialogue between different actors, especially NGOs and Government
- providing information and ideas from other countries in a co-ordinated way¹⁵³

On the other hand, the OMC has been seen as a ‘soft law’ option, which *dumbs down* or displaces the use of hard law instruments, even in areas where the EU has competence.¹⁵⁴ Thus, in some countries where excluded and discriminated groups anticipated EU wide measures to enhance their rights at national level, the OMC is viewed with disdain. In Ireland, for example, where the EU has largely been responsible for advancing equality and non-discrimination legislation, this weakening of the EU role in social policy through the OMC has been criticised:

This is a non-legislative approach to creating EU frameworks in certain public policy areas - an alternative to... Regulations and Directives. The process involves a common set of guidelines, indicators, guidelines for Members States to submit National Action Plans outlining strategies and objectives in the area. A process of monitoring, evaluation and sometimes peer review takes place. It is inadequate and inappropriate and should not be used to replace Directives and Regulations which have the force of law. This is particularly important where issues around the establishment and protection of individual rights are concerned and in areas relating to labour and trade union rights.¹⁵⁵

Another important criticism of the use of the OMC is its exclusivity, unaccountability and tokenist approach. The process tends to be dominated by State officials, often with only non-critical NGOs and individuals being consulted. State funded service-provider NGOs are often the primary ‘social partners’ or ‘actors’ in

¹⁵² *Ibid.*, p. 10.

¹⁵³ EAPN - Response to OMC questionnaire on Social Protection and Social Inclusion. See website: <http://www.socialplatform.org/module/FileLib/FinalEAPNResponseOMCQuestionnaireEn.doc>

¹⁵⁴ See Trubek, D. & Trubek, L. (2003) ‘Hard and Soft Law in the Construction of Social Europe’, *Paper prepared for SALTSA*, OSE, UW Workshop on ‘Opening the Open Method of Coordination’, EUJ, Florence, at website: <http://www.wisc.edu/wage/trubek/publications/hardsoftlaw.htm>

¹⁵⁵ SIPTU. (2003) *Globalising Equality, Proceedings of SIPTU’S National Women’s Forum*. Dublin: SIPTU, p. 64.

the process. Criticisms of the OMC at national level can lead to the exclusion of groups and individuals from the ‘participation’ process, and only those within the ‘sphere of influence’ may be consulted, or allowed to take part. Indeed, the ‘actors’, as they are termed, can be chosen for ‘participation’ in the OMC process by State officials without any need for inclusivity, equality or representative status. There is no corollary to the legal principle that everyone is equal before the law. There is no legal requirement for equality in the OMC consultation process.

Of course, the OMC process grants no enforceable rights to individuals. It seeks only to establish administrative standards with no actual rights of consultation, participation, veto or challenge by those who are affected by the policies created. The OMC final documents, actions plans, etc, are not presented to the citizens who will rely on them for services or basic needs, but rather approved by officials and examined by the Commission Social Protection Committee (made up of civil servants from Member States).¹⁵⁶ Thus, the ultimate stakeholders in the process, i.e. those who will be the recipients of services or beneficiaries of policies are often ignored. However, there may be occasions where tokenist involvement of ‘poor’ or ‘excluded’ groups is arranged, but these are widely viewed as cosmetic gestures. In any case, there is also a clear avoidance of the national and European political processes, with political parties being largely excluded.

A further criticism is that the OMC actually legitimises inaction by Member States and allows States to dress up, in a new rhetoric, their existing (and often poor) policies and practices. State officials can describe their existing policies in a new language, in order to satisfy the relevant EU objectives. There is little evidence that the OMC has actually had any impact in the development of better or new policy approaches at national level.¹⁵⁷ The sanction of ‘peer pressure’ suggested by some writers is weak, especially where State officials, who are apparently the main ‘peers’ in the process, move to other areas of work.¹⁵⁸ ‘States’ as abstract entities do not feel peer pressure. Unless Ministers, politicians or officials are defined clearly as the peers to be compared, this concept is meaningless.

The control of the process by the officials who are mandated to provide the very services being reviewed, creates a clear conflict of interest, and prevents a rational, objective and people-centred approach. As Zeitlin points out:¹⁵⁹

Since Member State representatives continuously participate in the definition of objectives, guidelines, and indicators for OMC processes, which do not necessarily result in new legislation or justiciable obligations, standard approaches to assessing the domestic effects of ‘Europeanization’ based on ‘goodness of fit’, adaptational pressures, and compliance with EU law cannot be directly applied. Member State governments may also have political reasons of their own for playing up or down the domestic influence of OMC processes in National Action Plans and evaluation reports. Hence statements about the sources of policy change in such official

¹⁵⁶ See Armstrong, K.A. ‘Tacking Social Exclusion through OMC: Reshaping the Boundaries of European Governance’, in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, p. 181.

¹⁵⁷ See Scharpf, F. (2002) ‘The European Social Model: Coping with the Challenges of Diversity’, *MPIfG Working Paper 02/8*, Max-Planck-Institute for the Study of Societies, Cologne, at website: <http://www.mpi-fg-koeln.mpg.de/pu/workpap/wp02-8/wp02-8.html>.; Radaelli, C. (2003) ‘The Open Method of Coordination: A New Governance Architecture for the European Union?’, *Rapport No. 1*, Swedish Institute for European Policy Studies, at website: www.sieps.su.se

¹⁵⁸ See Borrás, S. & Jacobsson, K. ‘The open method of co-ordination and new governance patterns in the EU’, *Journal of European Public Policy* 11:2 April 2004: 185-208 at p. 194.

¹⁵⁹ See Zeitlin, (2005), p. 18.

documents cannot be taken at face value but must be carefully contextualized and triangulated with other evidence.¹⁶⁰

Indeed, this could lead to a situation similar to the bizarre position in Ireland after the Disability Act 2005, where public service providers act as definers, providers and reporters of the human rights of consumers/citizens with disabilities. Similarly, the use of such consultative approaches as ‘social partnership’ with policies ‘agreed’ by the partners, has led to the dominant ‘actors’ rejecting a rights approach on behalf of all the groups involved. In Ireland, the government and the employers federation have quoted their social partnership system as the reason why an inclusive EUCFR was not necessary.¹⁶¹

The OMC is clearly a method which avoids the use of hard law, but consequently reduces the powers of citizens to challenge discriminatory, exclusionary or other policies which breach international human rights standards. The capacity of the EU judicial process to apprehend soft law measures, such as the OMC, is extremely limited.¹⁶² In contrast to the use of soft law in the supranational method, the ECJ is not implicated in the OMC, neither in the definition of its contents or in its practical interpretation or implementation. The Court is marginalized owing to the OMC’s strong political logic.¹⁶³

(iii) Improving the OMC system

In February 2005, the European Commission published a ‘Questionnaire for the evaluation of the open method of co-ordination (OMC) in order to prepare the streamlining in the field of social protection’. Many NGOs and agencies responded to this. The Platform of European Social NGOs published its contribution in July 2005.¹⁶⁴ One general comment was that ‘if these OMC processes are truly to contribute to goals such as combating poverty and social exclusion in the EU, it is important that they are more than mere reporting mechanisms’. The Platform strongly urged that fundamental rights be at the heart of the OMC process.

¹⁶⁰ For discussions of these methodological problems, see Büchs, ‘Methodological and Conceptual Issues in Researching the Open Method of Coordination’, in Hantrais, L. (ed), (2003) *Researching the European Social Model from a Comparative Perspective* at website: <http://www.xnat.org.uk/Seminar%201%20Researching%20the%20European%20Social%20Model%20from%20a%20Comparative%20Perspective.pdf>; Barbier, J.C. ‘Research on ‘Open Methods of Coordination’ and National Social Policies: What Sociological Theories and Methods?’, unpublished paper presented to the RC 19 International Conference, (Paris, 2004); Barbier, J.C. *La stratégie européenne pour l’emploi: genèse, coordination communautaire et diversité nationale*, (report for the DARES, Ministère du travail, January, (2004); López-Santana, M. ‘Unpacking’ the Policy-Making Process: The European Employment Strategy and Europeanization’, unpublished paper presented to the 14th International Conference of Europeanists, (Chicago, IL, March 11-13, 2004); Borrás, S. & Greve, B. ‘Concluding Remarks to Special Issue on ‘The Open Method of Co-ordination in the European Union: New Method or Just Cheap Talk?’, 11 *JEPP* (2004) 329.

¹⁶¹ See McCormack, I. ‘Fundamental Social Rights – a trade union perspective’, in Costello, C. (ed.) (2001) *Fundamental Social Rights*. Dublin: Irish Centre for European Law, p. 13.

¹⁶² See Bernard, N. ‘New Governance Approach to Economic, Social and Cultural Rights’, in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart, p. 257.

¹⁶³ See Borrás, S. & Jacobsson, K. ‘The open method of co-ordination and new governance patterns in the EU’, *Journal of European Public Policy* 11:2 April 2004: 185-208 at p. 199.

¹⁶⁴ Platform of European Social NGOs. *Social Platform Contribution to the Evaluation of the Open Method of Coordination (OMC) on Social Protection & Social Inclusion*. See website: http://www.socialplatform.org/module/FileLib/05-07OMCEvaluationContribution_FinalEN.pdf

Access for all to fundamental rights. At the core of the OMC must be a fundamental-rights approach to the policy areas covered, in line with the Charter of Fundamental Rights. This means putting human needs at the heart of each of the three strands. Fundamental rights are violated not only when people do not have access to basic means for survival, but also when they are unable to live in dignity due to poverty and social exclusion. The OMC should endeavour to contribute to creating a Europe where each person can have access to the rights, resources, goods, services, information and opportunities they need to participate fully in all aspects of life and to make a positive contribution to society. Logically, therefore, one of the key overall objectives must be to ensure that every person in the EU is able to access basic rights, such as access to health care.¹⁶⁵

To improve the accountability and transparency of the OMC system the European Convention Working group on social protection proposed that the Commission would be responsible for analysing and evaluating the national action plans, and the outcome would be discussed within the European Parliament and national parliaments.

The Commission would have the power to make recommendations to Member States' governments and to inform national parliaments directly of their opinions in order to trigger a 'peer review' procedure and to a national debate, the aim being to allow Member States, within the Union framework, to set themselves common objectives while retaining national flexibility in their implementation.¹⁶⁶

The European Convention Working group also recommended that the OMC should be incorporated into the *Treaty establishing a Constitution for Europe* within the Chapter on Union instruments, which constitute non-legislative measures.¹⁶⁷ A more defined approach was recommended:

This provision should define the aims of the open method of coordination and the basic elements to be applied. These would include the identification of common objectives, establishing a timetable for action as well as, where appropriate, outcome indicators making it possible to assess whether national actions are able to achieve the objectives, and facilitating exchanges of experience between Member States. The precise nature of any Open Method of Coordination procedure would be guided by the nature of the issue involved, rather than be specified in detail in the Treaty... The open method of coordination constitutes an instrument which supplements legislative action by the Union, but which can under no circumstances replace it. It enables the Union to support and supplement Member States' actions.¹⁶⁸

However, the OMC was not included in the draft EU Constitution. But in certain areas including social policy, public health and industry:

...the Commission ('in close contact with the Member States') is charged with taking 'initiatives aimed at the establishment of guidelines and indicators, the organization and exchange of best practice, and the preparation of the necessary elements for

¹⁶⁵ *Ibid.*, p. 4.

¹⁶⁶ The European Convention, *Final report of Working Group XI 'Social Europe'* CONV 516/1/03. p. 20.

¹⁶⁷ *Ibid.*, p. 19.

¹⁶⁸ *Ibid.*

periodic monitoring and evaluation', about which the European Parliament 'shall be kept fully informed' (Articles III-213, 250, 278, 279).¹⁶⁹

The OMC has been used in relation to policies across Europe in the fields of employment policies, social inclusion and pensions. Despite the uncertainties that prevail concerning the actual effects of the process it has now been extended to health and long-term care, research/innovation, information society/eEurope, enterprise promotion, structural economic reform and education and training. The potential outcomes from these developments could include 'masking a lack of action? enabling everyone to go their own way/ really restricting divergences or achieving convergence/ and with regard to the impact on the Community legal system – movement from Community law to the concept of soft law'.¹⁷⁰

It is interesting to note that in the Commission *White Paper on European Governance* in 2001, the circumstances for the use of the OMC were originally narrowly defined:

The use of the open method of coordination must not dilute the achievement of common objectives in the Treaty or the political responsibility of the institutions. It should not be used when legislative action under the Community method is possible; it should ensure overall accountability in line with the following requirements:

- It should be used to achieve defined Treaty objectives
- Regular mechanisms for reporting to the European Parliament should be established
- The Commission should be closely involved and play a co-ordinating role

The data and information generated should be widely available. It should provide the basis for determining whether legislative or programme-based action is needed to overcome particular problems highlighted.¹⁷¹

Similarly, while the OMC has been proposed in relation to the development of a Community immigration policy and the coordination of European immigration policy, methods and instruments, a European parliament resolution

[S]tresses that an open method for the coordination of national policies cannot under any circumstances take the place of the legislative measures called for, and that the method could prove difficult to introduce if it were to be misused for the purpose of further delaying the legislative process or concealing the fact that deadlock has been reached.¹⁷²

¹⁶⁹ See Zeitlin, J. 'Social Europe and Experimental Governance: Towards a New Constitutional Compromise?' in de Burca, G. (2005) *EU Law and the Welfare State: In Search of Solidarity*. OUP, p. 32.

¹⁷⁰ See Mertens, C. 'Interactions between National Housing Policies and the Legislation, Initiatives and Decisions of the European Union.' *Reflections and summary report* (31 October 2003), 15th meeting of the Housing Ministers of the European Union, p. 6. See website: http://mrw.wallonie.be/dgatlp/logement/logement_euro/Dwnld/RAPPORT%20EUROPEEN%20En_2003.pdf.

¹⁷¹ *European Governance - A White Paper*, COM (2001) 428 final Brussels, 25.7.2001, p. 22.

¹⁷² European Parliament resolution on the Commission communication to the Council and the European Parliament on an open method of coordination for the Community immigration policy COM (2001) 387 - C5-0337/2002 - 2002/2181(COS)) and on the Commission communication to the Council and the European Parliament on integrating migration issues in the European Union's relations with third countries COM (2002) 703 - C5-0233/2003 - 2002/2181(COS). A5-0224/2003.

Thus, while the OMC may appear attractive where States cannot agree on legislative measures, there seems to be strong political resistance to the OMC displacing the historic legislative function of Parliament. One wonders whether soft law is used to develop social rights while hard law secures property rights. There is no attempt to introduce the OMC into consumer law or intellectual property law.

(j) The EUCFR and the OMC

The protection of human rights must be taken into account by the institutions of the Union and national States implementing Union laws. But there are signs that in areas of social policy it is becoming more difficult to establish binding EU legal measures which will protect citizens across all States, in the same way as consumer protection, freedom of movement, equality or non-discrimination measures have evolved in the past.¹⁷³ While the Gender Directive of 2004 proves that this is not always the case, the example of Article 51 of the EUCFR (now Article II-111 of Draft Constitution), which confines its effects to the institutions, bodies or agencies of the Union and Member States when they implement Union law, with due respect for subsidiarity, illustrates this approach. Bernard points out in relation to the EUCFR that lack of binding effect does not necessarily mean lack of legal effect.

Some writers are advocating that socio-economic rights, such as the right to social and housing assistance, as set out in the EUCFR, should be developed through the OMC (as well as or instead of judicial mechanisms).¹⁷⁴ But could the advancement of fundamental rights through the OMC process act to displace the legal basis of rights already granted, such as housing rights?

... the existence of a specific (political) process to evaluate compliance with guidelines clearly excludes the existence of a concurrent judicial process of enforcement.¹⁷⁵

Professor de Schutter suggests that:

... the open method of coordination could be an adequate means of better reconciling the requirements of market (economic) freedoms constitutive of the internal market with fundamental rights, especially social rights, which the Member States are bound to protect and implement under their jurisdiction.¹⁷⁶

He highlights the classical view that fundamental rights were imported and developed in the legal order of the Union to respond to the fear that the transferral of power from Member States to the Union would result in diminishing the level of protection enjoyed by the individual under the national legal system. Fundamental

¹⁷³ See Bernard, N. 'New Governance Approach to Economic, Social and Cultural Rights', in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart.

¹⁷⁴ See de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, at website: <http://jeanmonnetprogram.org/papers/04/040701.html>; Bernard, N. 'New Governance Approach to Economic, Social and Cultural Rights', in Hervey, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart; de Burca, G. 'The Constitutional Challenge of New Governance in the European Union', 28 *ELR* (2003) 814.

¹⁷⁵ *Ibid.*, p. 256.

¹⁷⁶ de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, p.1.

rights have been imposed as checks on the exercise of their powers by the EU institutions, and by extension on the acts adopted by Member States when they implement Union law, acting as a decentralized administration for the Union. This is becoming increasingly important as market integration measures expand into areas of social policy and protection. These fundamental rights act as external limits to the exercise of power, rather than as EU objectives or mandates. Fundamental rights were also imported into the EU legal order to prevent the lowering of the protection of the rights which individuals enjoyed under the national legal systems – a ‘race to the bottom’ as it was known.

It is in this context that the EUCFR, and especially Article 51 should be interpreted. Thus, the EUCFR may be invoked vis-à-vis the EU institutions as well as Member States when they implement Union law. When Member States act outside the domain of Union law they are not bound to respect the EUCFR. Equally, the EUCFR does not establish any new power or task for the Union. The rights in the EUCFR have a purely defensive function.

An alternative to the classical view would amount to the promotion of fundamental rights as an objective of the Union. This would involve attributing to the Union a general power to realize fundamental rights, but with the unanimous approval of Member States.

Once it is recognised that the EUCFR may be the source of positive obligations in the institutions of the Union or on the member States when they implement Union law, deep consequences follow which, even within the existing constitutional structures, may facilitate overcoming the apparent tension between the obligation to respect the Charter and the neutrality of the Charter on the existing allocation of resources.¹⁷⁷

Professor de Schutter suggest that such a positive obligation exists where, in the absence of action at the level of the EU, we may witness a ‘race to the bottom’ by Member States tempted to diminish the level of protection of fundamental rights within their jurisdiction. But the Union may only act in conformity with principles of subsidiarity and proportionality. However, de Shutter points out that ‘beyond its symbolic significance as a solemn statement of fundamental values, the Charter will be endowed with a legal significance as a catalogue of rights contained in the Constitution’. He suggests that its political significance can also be recognised, and it is mentioned in the European Social Agenda.¹⁷⁸

De Schutter suggests that the OMC represents a mechanism through which the exercise the Member States make of their competences under the EUCFR can be monitored. He accepts the need for judicial supervision of Member States to prevent violations of the EUCFR where they act within the scope of Union law. However, this supervision is *post hoc*, and:

[W]hat we require therefore is a mechanism comprising regular exchanges of information on the fundamental rights policies pursued by each Member State, to ensure that where such situations emerge the Union may take an initiative, either by the adoption of a binding legal instrument in the exercise of its attributed powers, or by the adoption of a non-binding recommendation to the State the mode of

¹⁷⁷ *Ibid.*, p. 16.

¹⁷⁸ COM (2000) 379 final.

implementation of fundamental rights of which is at the source of the problem identified.¹⁷⁹

This proposal, if accepted, would place the right to housing assistance as set out in Article 34(3) (now Article II-94(3)) squarely within any new OMC approach to human rights monitoring. It presents a number of possibilities to promote and advance the rights set out, and to provide comparative and qualitative analysis, as well as a learning process for State officials and NGOs.

A separate but aligned step forward would be the inclusion of the EUCFR within the existing OMC approaches to social inclusion. This could have the effect of giving a fundamental rights basis to the range of diverse social protection approaches across Europe. Since homeless is now part of such OMC considerations, the right to housing assistance would then become one of the indicators to be measured in the process. Of course, the wording of Article 34(3) of EUCFR places the obligation to recognise and respect the right to social and housing assistance squarely within the EU social inclusion OMC process at present, but this appears to have had little impact.

There are, however, a number of difficulties with the approach of using the OMC to advance fundamental rights, especially housing rights. Aside from the problem of the OMC process ignoring existing rights, many of these have already been outlined above, and concern the conflicts of interest inherent in the national OMC where State officials direct the process. Civil servants who make contract and grant funding available to NGOs are in a position to dominate the OMC system in key areas. This is especially serious where significant positive obligations on State resources are being advanced by NGOs in order to meet human rights obligations. The development of NPM approaches across Europe places the onus on officials to manage resources efficiently and effectively, and human rights obligations are but one of the competing factors in decision-making. As in all legal obligations imposed on State agencies and other bodies, the weight of this factor can only be adequately advanced in situations where legal sanctions apply.¹⁸⁰

In the context of judicial deference to State agencies in relation to the enforcement of socio-economic rights across many European States, placing the EUCFR obligations entirely within the OMC process would lead to a weakening of the protection of the Charter. It will almost certainly lead to a *dumbing down* of human rights protections. Indeed, National Action Plans with weak commitments to rights could be used to counter demanding judicial or supervisory body interpretations of national human rights obligations. Political and administrative systems can easily be cleverly manipulated to undermine legal standards and protection based on human rights norms.

A third risk inherent in this approach is the exclusion of NGOs and groups who advocate strong human and housing rights. There is no obligation to include all views, or indeed, representative or minority views. Which are the 'actors' who would be involved in a fundamental rights OMC? Would the beneficiaries of fundamental rights be involved/ Which NGOs should be involved? Would the legal profession as one of the service providers in this area be involved? Is the absence of legal aid a clear limitation on the whole approach?

¹⁷⁹ de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, p. 38.

¹⁸⁰ See Hertogh, M. & Halliday. (eds.) (2004) *Judicial Review and Bureaucratic Impact*. Cambridge: CUP.

A fourth area of concern is the development of a rights rhetoric by State officials to describe existing policies. This has taken place in other OMC areas, and there appears to be little evidence that the OMC has improved the level of protection or provision of services, despite the language of inclusion, participation and other terms used. The use of rights rhetoric within administrative systems acts as a barrier to the effectiveness of human rights social movements. The language of rights is now regularly appropriated within State service provision terminology. NGOs involved in social movements advancing human and housing rights are increasingly absorbed in the extensive administrative-level consultative process, driven by State officials at national level. Of course, social movements are widely acclaimed as the main instigators of political and rights development.¹⁸¹ Indeed, almost the developments of human rights in history have been advanced through social movements.¹⁸² This conflict of roles among NGOs may well lead to tensions between proponents of the OMC and activists within social movements for human rights. Indeed, some of the negative reactions to the *Draft Treaty establishing a Constitution for Europe* could stem from this rejection or *dumbing down* of international human rights within the new EU governance structures, and administrative-centred consultative processes.

Ultimately, the point will be reached where the advancement of fundamental rights will require legal action. But political calculations in relation to the balance between national competitiveness and social protection standards may override the process, rendering it tokenistic and confined to administrative service rights.¹⁸³ In any case, there is no binding requirement for States to address critical Commission reports on their policies. Of course, the proposals for a revamped OMC set out in the European Convention Working group could advance the use of rights approaches across the Commission and national parliaments.¹⁸⁴

Armstrong considers an alternative route which EU policy might have taken. This involves the development of a rights discourse that could extend to include rights to social inclusion or social protection.

EU legal discourse has often emphasised the inclusion of EU citizens within the project of European integration through the possession of legal rights. That inclusion developed initially in the context of the economic law of the Treaty. More recently, individuals have been able to rely on their status as 'citizens of the Union' to seek access to social advantages in other Member States such as minimum subsistence or maternity benefits.¹⁸⁵

He also points out that the provisions of the EC Treaty on citizenship, together with other provisions on rights of non-discrimination, gender equality and transparency, have suggested something like a set of limited minimum European rights. The reliance on the OMC for social inclusion represents a different approach. Combating poverty and social exclusion is to be operationalised, not through traditional legal mechanisms of courts and adjudication, but instead, through a

¹⁸¹ Stammers, N. 'Social Movements and the Social Construction of Human Rights', 21 *HRQ* 980-1008 (1999).

¹⁸² Hilson, C. 'New social movements: the role of legal opportunity,' *Journal of European Social Policy*, 9: 2 April 2002, pp. 238-55.

¹⁸³ See Armstrong, K.A. 'Tacking Social Exclusion through OMC: Reshaping the Boundaries of European Governance', in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP.

¹⁸⁴ The European Convention, *Final report of Working Group XI 'Social Europe'* CONV 516/1/03.

¹⁸⁵ See Armstrong (2003), p. 176

political process.¹⁸⁶ There is a clear tension between the development of a universality of rights involving some form of legal uniformity across European States on the one hand, and a reliance on nation States to respond to policy encouragements to address social inclusion and poverty, on the other.

What is evident, however, is a tension between an ideal of civil and political inclusion based on equality guarantees and uniform EU entitlements, and a conception of social inclusion premised on pathways out of exclusion and policy diversity between States.¹⁸⁷

(k) The challenge to housing rights development

All of this raises a particular problem in relation to housing rights. The development of housing rights is varied across Europe. Some States have powerful and effective housing rights. For instance, in June 2005 the Belgian Court rejected an appeal against one of the provisions of the Belgian Housing Code, and affirmed the competence of the Brussels regional government to guarantee the right to housing for all, as set out in Article 23 of the Belgian Constitution. The Court insisted on the competence of the State to guarantee the right to housing for all by effective taking over the management and ownership of unoccupied housing stocks that are suitable for renting.¹⁸⁸ However, future attempts to develop EU-wide housing rights protections may rely on local administrative measures rather than legal standards. Reducing housing rights to administrative approaches, defined at local level, creates a barrier to the development of EU-wide rights and major obstacles for rights based social movements operating at EU level. There has never been a greater need for a levelling up rather than a levelling down of housing rights in Europe. Indeed, human rights depend for their protection 'on adequate legislation and regulatory frameworks, as well as on the possibility of effective judicial enforcement'.¹⁸⁹

De Burca levies three criticisms at the approach of developing human rights, such as housing rights, through the OMC type system.

One should question whether the so-called new modes of governance, with their emphasis on non-binding, non-justiciable instruments and on coordinating and informational mechanisms, are appropriate for the area of human rights protection, given that what is generally said to differentiate 'rights' in law from other claims or interests is the availability of a legal remedy, usually a remedy which can be individually enforced, usually in judicial proceedings. Is there a risk that the shift towards new modes of governance for the protection and implementation of human rights could denude them of their character as rights, undermining the idea of a core content, and rendering the standards of protection ultimately fluid and flexible?... Secondly, a human rights model places importance on a degree of definition and clarity in the content of the commitment in question, while a new governance approach prioritises revisability and open-endedness in the specification of goals, with an emphasis on the role of ongoing processes to give content to those goals in changing circumstances. Thirdly, the human rights model posits a significant role for courts in enforcing the content of the legal commitment, while in the governance

¹⁸⁶ Perhaps it is really an administrative or technocratic-based process, rather than one with the traditional political characteristics of competing ideals, parties and elections.

¹⁸⁷ See Armstrong (2003), p. 178.

¹⁸⁸ See FEANTSA news at http://www.feantsa.org/code/en/pg.asp?Page=7&pk_id_news=488

¹⁸⁹ See Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, p. 1.

model the role of courts is at best a residual one to monitor the adequacy of the processes established and to allow for their disruption where they are malfunctioning.¹⁹⁰

Another difficulty lies in the limited interpretation of housing rights within the social inclusion approach. Since an increasing level of access to housing in Europe takes place through the purchase and rental markets, the 'State welfare' approach is not fully appropriate. The social inclusion approach confines its focus largely to social housing, its extent, access arrangements and costs. Of course, the need for supported social housing is clearly part of the requirement of a social inclusion approach, but this is only a small portion of total housing stock. The housing needs of low income and increasingly middle-income households (often described as key workers) are being increasingly excluded from the housing market in most European cities. But the social inclusion approach assumes the dominance and neutrality of market forces, and seeks only to increase State efforts in subsidising parts of the market for social housing through market transfers. The OMC process fails to address the integral components of the housing market, such as landowners power and control of land, the power of financial corporations targeting housing equity markets across Europe, developers monopoly positions, enforcing compliance with standards and consumer rights, and the role and relative power of other stakeholders in the housing market. Increasingly, in this market context, (both free enterprise and social arenas) housing rights involve consumer protection rights, in terms of standards, mortgage finance, and unfair contracts terms in renting agreements and purchases.¹⁹¹ In relation to supported and social housing many consumer related issues and contract terms are defined in consumer law terms. Indeed, the Unfair Contract Terms Directive¹⁹² is creating a body of jurisprudence across Europe in relation to house purchase and tenancy agreements.¹⁹³

Housing rights development involves cross-cutting issues. The range of social partners or 'actors' to be included in a housing rights OMC is likely to be very wide. It is also likely to be politically resisted, since many of the key players in national housing systems already have unrivalled access to the centres of political power at local level. House-builders, planners, mortgage financiers, technical standards experts, local authorities, lawyers, real estate agents, supported housing providers, disability organisations, and of course, housing consumers and those in housing need are all stakeholders. But would the interests and rights of homeless people, asylum seekers, refugees, poor people and others excluded from housing markets be adequately and equally represented, or would the position of suppliers and providers dominate? Can anyone envisage a large house-building and development company agreeing an action plan with homeless NGOs? This raises questions in relation to the limits of the OMC in developing policies where private enterprise and market forces are involved. It challenges the OMC and other 'social partnership' approaches, dominated in many cases by international corporations, State agencies, producers and suppliers, to embrace the other developments in EU law, such as consumer rights. The

¹⁹⁰ See De Burca, G. 'New Modes of Governance and the Protection of Human Rights', in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, p. 31.

¹⁹¹ See Communication from the Commission 7 May 2002 to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions - *Consumer Policy Strategy 2000-2006*. COM (2002) 208 final. OJ C137/2, 8.6.2002.

¹⁹² Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹⁹³ See website: <http://europa.eu.int/clab>

OMC process may, in fact, reinforce the weak position of excluded groups in national housing systems. In the arena of housing rights this presents the ultimate challenge, and the efforts to deal with housing and homelessness with the OMC system to date clearly illustrate this.

(I) EU Social Policy, Social Inclusion and Housing Rights

The Decision of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between member States to combat social exclusion was a significant development.¹⁹⁴

Under Articles 136 and 137 of the Amsterdam Treaty, in the fight against exclusion among the social policy provisions, the European Council of Lisbon in 2000, agreed on the need to take steps to make a decisive impact on the eradication of poverty by 2010. Member States' policies for combating social exclusion should be based on an open method of co-ordination, combining common objectives, national action plans, and a programme presented by the Commission to encourage co-operation in this field.¹⁹⁵

In relation to modernising and improving social protection it was proposed to establish and support a Social Protection Committee (SPC), by providing input, with a view to developing objectives and indicators, as well as exchange of experiences and good practices, including on the gender dimension of social protection. This would develop adequate indicators, targets and benchmarking mechanisms to monitor the evolution and the success of these policies and plans, both in terms of mainstreaming and of integration of specific groups, including those with disabilities.¹⁹⁶

(i) Indicators and Benchmarks

The essential elements of the OMC method in social protection are common objectives, National Action Plans for social inclusion (NAPsincl) with a two-year cycle and a joint report drawn up by the Commission and the Council to summarise and analyse all such National Action Plans.¹⁹⁷

A set of statistical concepts and definitions was created to represent a 'toolbox' of instruments to allow Member States to use a common language in relation to poverty and social inclusion.¹⁹⁸ In relation to housing and homelessness, the foreword to the Atkinson *et al* Report in 2002, by Frank Vandembroucke, the Belgian Minister for Social Affairs and Pensions, was promising in its vision. However, the inclusion of critical voices for the poor was to take place in the development of indicators, rather than in assessing the substance of the National Action Plans. The diverting of the energy of NGOs from campaigning and advocacy into circular statistical debates on indicators was clearly anticipated. However, it is interesting to note that the purpose of housing indicators was to provide a global and

¹⁹⁴ Decision No. 50/2002/EC. OJ L10/1, 12.1.2002.

¹⁹⁵ *Communication from the Commission to the Council, The European parliament, the European Economic and Social Committee and the Committee of the Regions Strengthening the Social Dimension of the Lisbon strategy: Streamlining open coordination in the field of social protection.* COM (2003) 261 final, 27.5.2003.

¹⁹⁶ See website:

http://europa.eu.int/comm/employment_social/social_protection_committee/spc_topics_en.htm#inclusion_docs

¹⁹⁷ COM (2003) 261 final, 27.5.2003, para. 1.3.

¹⁹⁸ See Atkinson et al. (2002) *Social Indicators – The EU and Social Inclusion*. OUP. p. viii.

comparative picture of the housing market (macro availability of affordable and adequate housing relative to need, the latter being particularly difficult to measure), and of housing conditions, particularly in relation to poor households (quality of dwellings and the housing environment, price, security of tenure).¹⁹⁹

It is clear that indicators should cover the living conditions of the poorest, which means that all reasonable investments should be made to include hard-to-reach groups (such as ethnic minorities, travellers, the homeless and those living in institutions) in the samples. Involving non-governmental organisations as critical partners in the statistical process may be seen as an additional guarantee that the poorest will definitely be included in the statistics. Another mission of these organizations is to give a *voice* to those living in poverty, which should allow them to participate in the further development of the indicators. Indeed, it is essential that the victims of social exclusion can co-determine how exclusion and inclusion should be measured – not only in terms of degree of deprivation, but also in terms of participation, social power, etc.²⁰⁰

The Atkinson Report recommended that as a matter of urgency the Commission should examine different approaches to the definition and measurement of homelessness and precarious housing in a comparable way across Member States so that appropriate indicators could be developed for use in the EU monitoring process.²⁰¹ In December 2001, the Laeken European Council adopted a report of the SPC²⁰² with 18 indicators of Social Exclusion, but housing need and homelessness were not among them.²⁰³ The section on indicators for housing in this important European approach to social exclusion are revealing.

It is clear that reporting on housing standards was a necessary part of any systematic coverage of factors affecting social exclusion. Our discussion revealed that it would not be possible or desirable to agree an EU wide definition of a minimum housing standard. We considered that national conditions (as determined by culture, climate etc.) were too disparate and that national definitions of a minimum acceptable standard should be used. A special concern was raised in our discussions – homelessness. It is a specific example of a wider issue about indicators that could miss the most vulnerable... Our key indicators on poverty are based on data from household panel data sets... People in institutional accommodation and people who are homeless or living in very precarious and temporary accommodation tend not to be included in household surveys. We agreed that all countries should report on this issue and give an account of the data available and any plans there are to improve data coverage of these vulnerable groups.

We therefore concluded that National Action Plans should contain quantitative information covering three issues – decent housing, housing costs, homelessness and other precarious housing conditions. As far as homeless people and people living in institutions were concerned, it was agreed that it would be necessary to have better information on these groups. On the basis of survey work already carried out in Member States, Eurostat and the Commission should explore the possibility of better

¹⁹⁹ *Ibid.*, p. 158.

²⁰⁰ *Ibid.*, p. ix.

²⁰¹ *Ibid.*, p. 165.

²⁰² See Social Protection Committee, Indicators Sub-Group. October 2001. See website:

http://europa.eu.int/comm/employment_social/news/2002/jan/report_ind_en.pdf.

²⁰³ *Ibid.*, p. 4.

comparable data across the EU on homeless people and people living in precarious housing conditions.²⁰⁴

Of course, the European Commission publishes an annual report on *Housing Statistics in the European Union* through Eurostat.²⁰⁵ This publication sets out comparable statistical indicators of the quality of housing stock (fifteen indicators), availability of dwellings (thirty indicators) and affordability of housing (thirty eight indicators).

FEANTSA expressed its disappointment at the lack of housing or homelessness indicators, and the EU asked EUROSTAT to set up a task force on homelessness.²⁰⁶ In 2005, EUROSTAT published its lengthy report of over 400 pages on homelessness and housing deprivation data in the EU.²⁰⁷ Over the past 2 years FEANTSA and the European Observatory on Homelessness have developed a European Typology for data collection on homelessness and housing exclusion (ETHOS). It contains 4 conceptual categories to provide a definition of housing insecurity and homelessness. FEANTSA has also created a definition of homelessness and housing exclusion, which seeks to translate the legal, physical and social context of homelessness into measurable concepts.²⁰⁸

CONCEPTUAL DEFINITION ON HOMELESSNESS and HOUSING EXCLUSION

Conceptual Category	Physical Domain	Social Domain	Legal Domain
Rooflessness	No dwelling (roof)	No private space for social relations	No legal title to a space for exclusive possession
Houseless	Has a place to live	No private space for social relations	No legal title to a space for exclusive possession
Insecure housing (adequate housing)	Has a place to live	Has space for social relations	No security of tenure
Inadequate housing (secure tenure)	Inadequate dwelling (dwelling unfit for habitation)	Has space for social relations	Has legal title and/or security of tenure
Unaffordable housing	To be defined	To be defined	To be defined

This type of approach recognises that there are different systems in operation in relation to definitions of homelessness. Equally, indicators of housing rights in the legal domain are not easily definable in other domains, and the use of statistical or

²⁰⁴ *Ibid.*, paras. 56-58.

²⁰⁵ See website: <http://www.iut.nu/EU/HousingStatistics2004.pdf> website:

²⁰⁶ See *Homelessness in Europe*, FEANTSA Newsletter, Spring 2002. Numbers and Indicators: How do we count the homeless in Europe?

²⁰⁷ See EUROSTAT. (2005) *The production of data on homelessness and housing deprivation in the European Union: survey and proposals*. See website: http://epp.eurostat.cec.eu.int/portal/page?_pageid=1073,46587259&_dad=portal&_schema=PORTAL&p_product_code=KS-CC-04-008

²⁰⁸ See FEANTSA (2005) *Policy Statement – How to measure homelessness and housing exclusion*. at website: http://www.feantsa.org/files/indicators_wg/policystatemens/indicators_policystatement.pdf.

other indicators may or may not indicate the presence or absence of housing rights and *vice versa*.

(ii) National Action Plans (NAPsincl) and Housing Rights

The Nice European Council in December 2000 adopted the social inclusion strategy set out in the Lisbon Summit. It was organised around four objectives in the fight against social exclusion and poverty:

- to facilitate participation in employment and access by all to the resources, rights, goods and services;
- to prevent the risks of exclusion;
- to help the most vulnerable;
- to mobilise all relevant bodies.²⁰⁹

The Member States agreed to pursue the objectives of fighting social exclusion and poverty; underline the importance of mainstreaming equality between men and women in all actions aimed at achieving those objectives; develop their priorities within the framework of those overall objectives and present a national action plan by June 2001, covering a period of two years. States were invited to develop, at national level, indicators and monitoring mechanisms capable of measuring progress in regard to each of the objectives elaborated in their National Action Plans. The Member States and the Commission were invited to undertake cooperation at European level in order to bring about a better understanding of the problem of exclusion, to promote exchanges of good practice and to seek to develop common approaches and compatibility in regard to indicators.

National Action Plans were submitted to the Commission in June 2001 and its first draft report of October 2001 provided a summary, comparisons and examples of best practice.²¹⁰ The report was rejected by the Council, and a subsequent report was endorsed in December 2001. This *Joint Report on Social Inclusion 2001*, which examined the National Action Plans contained the following statements on housing, which are included here for easy of access for readers.²¹¹

All Member States recognise the importance of access to decent quality housing in their NAPs/incl as a key condition for social integration and participation in society. The housing situations in Member States differ greatly but generally function quite well. Most people in the European Union live in a decent to good quality house, which they either rent or own and have access to a reliable supply of water, electricity and heating.

When it comes to low-income sections of the population, however, the market is performing less satisfactorily in most Member States, and increasingly so. The declining supply of reasonably priced houses at the lower end of the housing market tends to push a rising number of households without adequate purchasing power into the residual segment of the market. Housing quality in this residual segment is low

²⁰⁹ See website: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/approb_en.pdf

²¹⁰ European Commission. *Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Draft joint report on social inclusion.*

²¹¹ See Council of the European Union, (2001) *Draft Joint Report on Social Inclusion - Part I: the European Union, including Executive Summary*. See website: http://europa.eu.int/comm/employment_social/social_inclusion/docs/15223_part1_en.pdf

and declining, often lacking basic provisions and the trend in price and rents is generally upward as a result of rising demand pressure.

New precarious forms of accommodation include renting of furnished rooms or mattresses in overcrowded rooms, squatting in buildings, stations and other public spaces and living in informal dwellings such as caravans, shacks, boats and garages. Given the importance of housing expenditure in the total household budget (on average 25% in the EU) higher rents have particularly strong knock-on effects on residual incomes of lower income households, often pulling them far below the poverty line. The use of indicators which track the share of the net rent in disposable income as well as net disposable income after total expenditure on housing, as proposed by Netherlands, is a welcome development.

The thrust of initiatives by Member States in their NAPs/incl is geared essentially at overcoming the deficiencies in their national housing markets in order to assure lower-income sections of the population access to decent and affordable housing. Most efforts can be grouped under three key policy approaches:

- Increasing the supply of affordable housing and accommodation: measures to complement and stimulate supply of low cost housing and to renovate existing dilapidated housing stock. This includes measures targeted at disadvantaged areas and neighbourhoods.
- Guaranteeing quality and value for money at the lower end of the housing market: measures to better control and regulate the housing market, particularly where it tends to act exploitatively or exclude.
- Improving access and protecting vulnerable consumers: measures to strengthen the position of low-income and other particularly vulnerable consumers on the housing market.

Increasing the supply of affordable housing and accommodation

All NAPs/incl report weaknesses and deficiencies in the commercial supply of decent quality housing which is affordable to low income households. In Ireland, Sweden, Finland, Portugal and to some extent Belgium access is particularly constrained due to structural factors. Member States make use of a range of measures to stimulate and increase the supply of decent low cost housing. These include: provision of social housing subsidies in the majority of Member States, both for building as well as directly to individuals; investments to renovate and enhance housing stock in disadvantaged urban areas (Denmark, Finland, Portugal, Spain, Sweden and UK) as well as in rural areas (Portugal and Spain); incentives for developing special housing, for example, small and affordable flats for young people (Luxembourg and Spain), accommodation for Travellers (Ireland), disability-friendly housing (Austria, Denmark, Germany and UK) and housing for older people (Denmark and UK); earmarking land for low-cost housing (France and Portugal); tax and other incentives for renovation of old housing stock (Belgium, Germany, Finland, France, Portugal and UK); taxing and seizure of vacant housing (Belgium and France).

Guaranteeing quality and value for money at the lower end of the housing market

Most Member States recognise the need for measures that protect and empower weaker consumers in the housing market against possible misuses and exploitation in the commercial housing market.

The following four measures emerge from the NAP/incl as being most prominent:

- Demolition of indecent housing and housing estates (barracks, bidonvilles etc) in combination with rehousing of inhabitants in better quality accommodation (Belgium, Spain and Portugal);

- Better protection of the rights of low-income renters and owners by improving regulation and information (Belgium, Denmark, Finland, Ireland, Luxemburg and Sweden);
- Regulating, monitoring and controlling housing standards (Belgium and France);
- Monitoring and controlling the link between rents and (minimum) housing standards (Belgium, France and the Netherlands).

Improving access and protecting vulnerable consumers

Member States develop a wide variety of measures to address the growing precariousness at the bottom end of their housing markets. These include:

- Efforts aimed at better mapping and understanding 'le mal du logement' (Finland, France and Netherlands);
- Public/Non-Profit/Cooperative 'facilitation agencies' which render information and broker services to weak consumers in the housing market (Belgium, Denmark, Finland, France, Germany, Luxembourg, Spain and Sweden);
- Rental subsidies and/or tax advantages for low-income groups (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Luxembourg, Netherlands, Portugal and Sweden);
- Housing assistance to young people (Denmark, France, Luxembourg, Portugal and Spain);
- Improving access to bank loans and bank guarantees (Luxembourg)

Several Member States provide shelters for particularly vulnerable groups in the form of refuge homes for women and children who are victims of domestic violence (France, Germany and Spain), special housing schemes for homeless people (Denmark, Luxembourg, Greece, Spain and Sweden), preventing cutting utility supplies (France), rehabilitation of accommodation of migrant workers (France), developing supported housing, i.e. housing plus care and services (Denmark, Germany, Netherlands and UK), and housing assistance to single mothers (Greece).²¹²

The *Draft Joint Report on Social Inclusion 2001*, Part II, provided a summary and evaluation of the National Actions Plans, while Part III provided examples of good practices. The Joint Report contained a significant section on the development of rights in the context of social exclusion. In relation to the objective of facilitating access to resources, rights, goods and services for all, the Joint Report pointed out that 13 Member States had developed a universal social assistance policy aimed at guaranteeing all legal residents a minimum income, although with limitations in certain cases.

In relation to justice the Joint Report pointed out:

Perhaps surprisingly given the emphasis in the Nice objectives on access to rights, the issue of access to the law and justice only features in a few NAPsincl (Germany, Italy, France and Netherlands). However, it is also implicitly included in a number of other NAPsincl, such as Belgium, Finland, Greece and Ireland, in the context of equal status and non-discrimination measures. In addition to an absence of clear objectives and targets, there is a general lack of information and data in relation to the access that people living in poverty and social exclusion have to the law.

²¹² *Ibid.*, Section 3.1.2.2.

Access to law and justice is a fundamental right. Where necessary citizens must be able to obtain the expert legal assistance they require in order to obtain their rights. The law is thus a critical means of enforcing people's fundamental rights. For some vulnerable groups access to the law can be particularly important but also problematic. Groups identified in the NAPsincl include ethnic minorities, immigrants, asylum seekers, victims of domestic violence, ex-offenders, prostitutes and low-income people living in rented housing.²¹³

Two key approaches to strengthening access to justice stood out from the NAPsincl - improving access to legal services and justice, and developing laws and mechanisms to promote equality and counter discrimination.²¹⁴ While the Joint Report defined the terms poverty and social exclusion as referring:

... to when people are prevented from participating fully in economic, social and civil life and/or when their access to income and other resources (personal, family, social and cultural) is so inadequate as to exclude them from enjoying a standard of living and quality of life that is regarded as acceptable by the society in which they live. In such situations people often are unable to fully access their fundamental rights.²¹⁵

Remarkably, there is no reference to the commitment of the Union to 'recognise and respect the right to social and housing assistance' as set out in Article 34(3) of the EUCFR.

In relation to homelessness, which is recognized as the most extreme form of social exclusion, the Joint Report states that information provided by States in the NAPsincl reports was generally poor.²¹⁶

Homelessness is perhaps the most extreme form of social exclusion. The information on homelessness in the NAPs/incl however is generally poor. Moreover, whenever indicators are available, they often reflect administrative concerns and outputs (people dealt with by homelessness services) instead of focusing on outcomes. Most Member States admit that they know (too) little about both the magnitude and the nature of the problem, which also prevents them from developing more strategic and preventive measures against homelessness.

The Joint Report pointed out that primary emphasis of National Action Plans was on lack of accurate data on the extent of the issue, rather than the extension of rights to housing.

A few Member States provide an estimate of the number of homeless: Denmark (4,500), Austria (20,000 of which 3,000 are sleeping rough and the remainder is in supported housing), Finland (10,000 single persons and 800 families) and the Netherlands (20,000-30,000), Italy (17,000). Some Member States (Luxembourg, Ireland, Spain, France, Denmark, Belgium) recognise that homelessness may be increasing, but this perception is not shared by all. The UK asserts that the numbers of people sleeping rough have fallen significantly over the last few years. There are indications that homeless populations comprise rising proportions of women, young people, people of foreign origin, persons with mental health and/or addiction problems.

²¹³ *Ibid.*, Section 3.1.2.4.

²¹⁴ *Ibid.*, Section 3.1.2.1.

²¹⁵ *Ibid.*, p. 11.

²¹⁶ *Ibid.*, Section 3.2.2.

Five Member States (Belgium, France, Netherlands, the UK and Finland) indicate in their NAPsIncl a commitment to strengthen indicators and their information systems on homelessness. The suggestion by Belgium to improve methodologies as well as to promote more harmonised data collection through European cooperation is particularly welcome.

FEANTSA and CECODHAS expressed concern at the first round of National Action Plans.

During the first round of National Action Plans (NAPsIncl), the Member States failed however to turn the common objectives into concrete action. They are general and vague, thus most NAPsIncl (2001) have had little or no effect on the precarious situation of the most excluded... FEANTSA and CECODHAS are concerned in particular about the lack of attention to the importance of access to housing to combat and prevent poverty... Access to housing for all is one of the common objectives of the EU strategy. And rightly so, because access to housing is one of the keys to social inclusion... Therefore CECODHAS and FEANTSA call for more and stronger housing measures in the next NAPsIncl (2003). We call for specific measures, which address the housing problems of the most excluded. We want Member States to explain how measures proposed in the NAPsIncl will improve access to housing for the most excluded... We believe that the hesitation of Member States to include housing policies in their NAPsIncl is unacceptable and goes against the interests of the most excluded for whom (access to) housing is a daily problem. Without any serious initiative on the part of the Member States in the area of housing, the EU strategy risks becoming irrelevant for a large portion of the poor people.²¹⁷

Despite the deficiencies, however, one valuable outcome of the first Joint Report was that the various States activities in relation to homelessness were examined and summarized. This represented an important development, since it incorporated indicators and time frames in some cases, but most of all, provided the first EU-wide State sponsored comparison of homelessness and housing policies across Europe.

(m) Joint Memoranda on Social Inclusion (JIM)

Prior to accession, the applicant States prepared a JIM, with the purpose of preparing the country for full participation in the OMC on social inclusion. The JIMs outlined the principal challenges in relation to tackling poverty and social exclusion, presented the major policy measures taken in the light of the agreement to start translating the EU's common objectives into national policies, and identified the key policy issues for monitoring and review. The JIMs provided a sound basis for the new Member States to prepare their first NAPsIncl in 2004 after accession. The JIMs for the 10 countries joining the Union in 2004 were formally signed by the Commission and the national authorities on 18th December 2003.²¹⁸ The process offered a valuable examination of housing situations in the Accession States and received positive endorsement in a

²¹⁷ *Common Statement of FEANTSA and CECHODHAS on the EU Strategy against poverty and the next round of NAPsIncl.* See website:

http://www.feantsa.org/files/DOCS/EN/cecodhas_feantsa_housing_naps_statement_spring_2003en.doc

²¹⁸ The reports are available at website: http://www.europa.eu.int/comm/employment_social/soc-prot/soc-incl/jim_en.html

number of States from housing advocacy NGOs, such as the European Roma Rights Centre.²¹⁹

The EU Commission Working paper on the JIMs highlighted the difficulties in relation to housing and basic services.²²⁰

The privatisation of the housing market during the transition period and the partial liberalisation of the market in some countries brought about a change in the ownership structure. As a result, a large share of the population own their home in countries like Cyprus (68%), Estonia (90%), Hungary (92%), Latvia (79%), Lithuania (80%), Malta (68%), and Slovenia (88%). However, in some cases, a stratum of owners is unable to pay the utility bills, the interest on their bank loans – which results in an accumulation of debts – and the renovation costs of their buildings and the corresponding deterioration and devaluation of their properties.

In all new Member States, the housing sector still faces serious problems, which mainly concern the lack of affordable quality housing and, more particularly, quality social housing. Also worrying are the poor conditions of the flats, poor standard of dwellings equipment, high costs of the utilities and flat maintenance, and the financial difficulties to pay the rent faced by the tenants, which in many cases result in high indebtedness of the tenants and constitute an additional risk of poverty, not to mention the existence of overcrowded dwellings with no appliances, which can be described as "housing poverty". Poorer housing conditions and infrastructures are highlighted in the case of the Roma minority, but also for other most vulnerable groups such as homeless, people living in disadvantaged areas, refugees, certain categories of immigrants, ex-prisoners, etc.

All new Member States have identified the provision of decent housing as a key challenge. There is insufficient public building land and insufficient public supply of social houses and apartments, dwellings, hostels, etc. is low. Countries such as Estonia, Hungary, Latvia, Lithuania, Malta, and Slovenia, have underlined that the stock of public – namely municipal – social houses and apartment rented is very small. Further, the financial capacity of public institutions, namely the municipalities, is very limited in comparison with the housing problems to be faced. The housing market has been privatised in Estonia or increasingly based on free market regulations in Poland. In Poland and (prior to the liberalisation reform in 1995) in Malta, the relative wide scope of tenant protection (frozen housing rents) does not create any incentive for rational purchase or rent of a dwelling. In Poland, in order to develop the rental market and to popularise renting with a contract, work is being carried out on an amendment of the Law on protection of tenant rights which will be important to monitor with a view to avoid that the new situation implies a increased risk for the low-income tenants.

The Commission Working paper pointed out that:

In several of the new Member States, a well-defined nation-wide housing strategy – namely, social housing – including the set up of housing funding institutions is missing. They follow a piecemeal approach and housing schemes are sometimes numerous, fragmented and with little coordination among them.²²¹

²¹⁹ See Letter from European Roma Rights Centre to Dr. Kokeny, Minister for Health, Social and Family Affairs, Hungary, April 5, 2004.

²²⁰ Working paper, *Social Inclusion in the new Member States, A synthesis of the joint memoranda on social inclusion*. SEC (2004) 848 Brussels, 22.6.2004. See website:

http://www.europa.eu.int/comm/employment_social/soc-prot/soc-incl/sec_04_848_en.pdf

²²¹ *Ibid.*, para. 4.2.

FEANTSA produced a report on the JIMs in April 2004. This pointed out that was a general feeling among NGOs that policy measures outlined in the JIMs were not implemented, and that the very non-binding nature of the JIMs meant that policies proposed may not necessarily be enforced.

The failure to adapt to the transition to a market economy in these countries has greatly contributed to increasing the extent of homelessness in these countries. The number of rough sleepers in these countries is much higher than in EU15 – up to an estimated 15,000 in Hungary compared to 1,850 people in England. The size and nature of homelessness in the Accession Countries present new characteristics compared to the situation in EU15 countries.

A new phenomenon is the increasing presence of street children – the number of orphans and abandoned children is alarmingly high. Another difference is the extent of the Roma problem compared to EU15. The Roma population in the Accession Countries has high rates of unemployment and poverty, and the housing situation is particularly alarming in countries like Slovakia. The high number of ethnic minorities also contributes to homelessness due to cultural and linguistic factors. Lack of knowledge of the official language of the country causes problems when job searching or when dealing with registration forms for social assistance, etc (as is the case in Slovenia and the Baltic countries).

Access to healthcare for rough sleepers is problematic in Accession Countries due to lack of an ID document, and therefore lack of social insurance, which means the most excluded (who generally suffer from bad health) have little access to medical care or are simply denied access altogether. House ownership is generally high in most Accession countries - even the poorest families are often home owners. However, the quality of housing is very poor and deteriorating rapidly due to bad maintenance. Indeed as a result of the high housing maintenance costs, large sectors of the population are now considered “risk groups”. The issue of social housing appears to be urgent in most countries with long waiting lists contributing to the increasing numbers of homeless people. The housing and homelessness situation in the New Member States presents a series of new challenges – immediate action is needed to address these problems.²²²

(n) National Action Plans (NAPsincl) 2003-2005

A new set of National Action Plans for 2003-2005 were prepared by EU Member States. The Common Objectives for the OMC process were revised in 2002. Again there is no reference to the obligation of the Union to recognise and respect the right to social and housing assistance as set out in Article 34(3) of the EUCFR. The common objectives were to include:

- need for Member States to set targets in their National Action Plans for significantly reducing the number of people at risk of poverty and social exclusion by 2010;
- to emphasise the importance of taking the role of gender fully into account in the development, implementation and monitoring of National Action Plans;
- to highlight more clearly the high risk of poverty and social exclusion faced by some men and women as a result of immigration.²²³

²²² FEANTSA: *Joint Inclusion Memoranda, FEANTSA Reaction Report*. See website: http://www.feantsa.org/files/social_inclusion/joint_inclusion_memoranda/jimreaction.pdf

²²³ Council of the European Union, November 2002. *Fight against poverty and social exclusion: common objectives for the second round of National Action Plans – Endorsement*. See website: http://europa.eu.int/comm/employment_social/social_inclusion/docs/counciltext_en.pdf

The SPC published a Common Outline for the 2003/2005 NAPs/incl – National Action Plans.²²⁴ This proposed a more focussed approach to targets and ‘SMART’ management systems. There is a strong emphasis on setting targets which need to be ambitious, achievable, relevant, intelligible, quantified, measurable and time specific.

The 15th Annual Meeting of Housing Ministers of the EU States in Rome in October 2003 stated that in view of the determining role of housing policy in the promotion of the European integration and social inclusion, housing should be dominant in the National Action Plans for Social Inclusion 2003-2005.

The National Action Plans from Member States for 2003-2005 have now been published by the Commission.²²⁵ The 10 new Member States submitted their first National Action Plans for 2004-2006 against poverty and social exclusion in July 2004 in response to the common objectives. Following examination by the European Commission SPC and endorsement by the Member States, the *Draft Joint Report on Social Inclusion* was formally adopted as a Joint Council/Commission text by the Council in March 2004. This Commission and Council Joint Report urged Member States to give particular attention to six key policy areas, which were seen as especially relevant in the context of a continuing uncertain global economic and political climate.

1. Promoting investment in and tailoring of active labour market measures to meet the needs of those who have the greatest difficulties in accessing employment;
2. Ensuring that social protection schemes are adequate and accessible for all and that they provide effective work incentives for those who can work;
3. Increasing the access of the most vulnerable and those most at risk of social exclusion to decent housing, quality health and lifelong learning opportunities;
4. Implementing a concerted effort to prevent early school leaving and to promote smooth transition from school to work;
5. Developing a focus on eliminating poverty and social exclusion among children;
6. Making a drive to reduce poverty and social exclusion of immigrants and ethnic minorities.²²⁶

The Joint Report also highlighted important issues in relation to housing and basic services and criticized the failure of States to set targets for eradicating housing problems.²²⁷

The 2003-2005 NAPs/incl all agree that decent housing, at an affordable price for households and in a safe, dynamic environment offering appropriate social support and an environment where children can grow up in good conditions, is a central plank in the fight against poverty and social exclusion.

The social and economic cost of the absence of decent housing, though not yet evaluated at European level as the absence of social protection has been, appears to seriously compromise the dynamism of a country or region.

The Joint Report on Social Inclusion, adopted in December 2001 and presented at the

²²⁴ Social Protection Committee, *Common Outline for the 2003/2005 NAPs/inclusion*. See website: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/commonoutline2003final_en.pdf

²²⁵ Available at website: http://europa.eu.int/comm/employment_social/social_inclusion/naps_en.htm

²²⁶ See *Joint Report on Social Inclusion* 2004, p. 8. at website: http://europa.eu.int/comm/employment_social/social_inclusion/docs/final_joint_inclusion_report_2003_en.pdf

²²⁷ *Ibid.*

Laeken-Brussels European Council, had stressed that for all Member States the need to guarantee everyone access to decent housing was one of the eight core challenges of their policies against poverty and social exclusion. It stated that: "Access to good quality and affordable accommodation is a fundamental need and right. Ensuring that this need is met is still a significant challenge in a number of Member States. In addition, developing appropriate integrated responses both to prevent and address homelessness is another essential challenge for some countries."

On the question of access to housing, in the absence of common indicators and in their failure to present any national indicators in spite of the request formulated at the Laeken-Brussels European Council, the 2003-2005 NAPs/incl tend to be little more than reports emphasising certain elements of the policies introduced at national or regional level.

While most Member States (Belgium, Denmark, Finland, France, Greece, Ireland, Luxembourg, Portugal and United Kingdom) emphasise the acuteness of their unmet housing needs, they fail to set any objectives for eradicating their existing housing problems by 2005, or even 2010, or even further down the line. The sole exception is the United Kingdom, which guarantees that by 2010 all social housing will be decent. While measures for combating the situations of penury, degradation or squalor reported are mentioned, it is therefore difficult in most cases to assess them against the Nice objective of access for all to decent and sanitary housing.

For certain Member States, such as Belgium, France, Ireland and Luxembourg, which are experiencing a steep increase in unmet demand for affordable housing for persons on low incomes, it is a particularly important challenge.

For others, such as Greece, Portugal and the United Kingdom, the paramount challenge between now and 2010 is to combat the dilapidation and squalor which affects a large part of the housing stock for people on low incomes and promote the social integration of the families concerned, notably by rehousing them. France also plans to make this a big priority for the next five years.

Finally, for countries such as Denmark, Finland, the Netherlands, Spain and Sweden, the main challenge is still to help target groups such as young persons, single persons, the elderly, disabled people, immigrants, Roma, travellers and the homeless to obtain accommodation appropriate to their specific needs. These Member States also give priority to improving the neighbourhood and the surrounding areas.

Significantly, the Joint Report addressed the issue of consumer rights in relation to rented housing, demonstrating the disparate elements of housing rights and the fact that some housing rights are unwittingly addressed in the National Action Plans.

Consumer protection

In the first instance, the Member States need to ensure compliance with the standards defining the concept of decent housing and a fair balance between the rights and responsibilities of tenants and landlords.

Avoiding exploitation or abuses on the property market and preventing the expulsion of tenants or owners who have got into social difficulties (separation, unemployment, illness, etc) is a concern expressed by most of the Member States (Austria, Belgium, Finland, France, Germany, Spain, Sweden), although it is not possible to evaluate the situation prevailing in the other countries.

Several new initiatives in this area are described in the 2003-2005 NAPs/incl.

- Support for tenants throughout all stages of the expulsion procedure: obligation to be put in contact with the social services, specifications relating to the social investigation to be carried out by the social services, training social workers in the legal and welfare aspects of the expulsion procedure,

- liaison with the Debt Commissions, paying off of rent arrears for persons with no ability to pay these sums back (France, Sweden, Germany).
- Statutory obligation to attempt to reach an amicable settlement in disputes relating to requests for rent adjustments, recovery of unpaid rent or demands for expulsion from the accommodation. Development of social mediation services (Austria, Belgium, France, Ireland and Spain).
 - Encouraging owners' associations and tenants' associations to co-operate in preventing unfair rent increases and implementation of expulsion procedures (Finland).
 - Development of accommodation advice and information services, especially for immigrants (Austria, France).
 - Giving disadvantaged persons more legal protection against accommodation unfit for habitation and against "sleep merchants", i.e. owners who rent furnished rooms or mattresses in overpopulated rooms or insalubrious buildings (France, Belgium).

Access to decent, affordable housing

All Member States, because of the deficiencies in their housing markets, need to intervene in order to combat the exclusion of persons or families affected by social problems or living in certain geographical areas. Such State aid, although not allocated on a non-discriminatory basis, is a legitimate element of public policy. The Member States describe a series of measures designed to give low-income households better access to decent housing appropriate to their needs. These measures are essentially social transfers in favour of low-income groups and thus contribute significantly towards reducing poverty and social exclusion.

Aid for social housing:

- Modulation of subsidies for social housing managed by public or private not for-profit bodies:
- New subsidies for public or not-for-profit bodies for the construction of social housing, increasingly targeted on geographical areas where shortages have been noted, on small flats for single people where a significant demand is not being met, on accommodation for young people, elderly people, disabled people and immigrants (Austria, Denmark, Finland, France, Germany Ireland, Luxembourg, Spain, Sweden).
- Earmarking of land or imposition of obligations on local authorities for the construction of new social housing (France, Ireland, Portugal and Spain).
- Payment of compensation to local authorities for structural cost differences linked to the needs of services and specific factors such as changes in the structure of populations or influxes of immigrants (Finland).
- Transparency in the allocation of social housing, through the widespread introduction of a single registration number (France).
- Sale of social housing to existing occupants, thus creating cash for new investment and a better social mix (France, Ireland, United Kingdom).
- Adjustment of the means-tested income limits for tenants and of the rules fixing social housing rents (Denmark, France, Luxembourg and Spain).

Aid for private investment with a social aim:

- Aid for investment and to cover the possible rental risks incurred by private owners who undertake to rent accommodation to persons on low incomes for a certain duration and at capped rents (France, Luxembourg).
- Tax measures to encourage owners to put vacant property back on the rental market (France).

State aid for tenants and property acquirers of modest means:

- National objective of limiting the proportion of net rent in the disposable income of low-income households and the net disposable income after total expenditure on housing (Netherlands).
- Housing allowances or tax incentives for persons on modest incomes or certain target groups, such as young people or the elderly (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Luxembourg, the Netherlands, Portugal, Sweden).
- Aid funds for situations where essential services have not been paid and adjustment of electricity and water tariffs for the very poor (Belgium, France).

Public programmes for the renovation or demolition of housing plus rehousing:

- Programmes for the transformation or the eradication of housing falling below the minimum standards of decency (Belgium, Spain, France, Portugal and United Kingdom).

Aid for persons and families with income, disability, health or social integration problems.

The housing component in policies for the social protection of persons and families with income, disability, health or social integration problems is the third justification for State intervention in this field.

In the 2003-2005 NAPs/incl, a major priority is to focus State intervention in the housing field on the most vulnerable groups and on the regions in the greatest difficulties.

In addition to this priority, a number of new initiatives are described:

- Programme of co-operation between the social housing agencies, the social services and the care services for the integration of disabled people, the elderly, immigrants, refugees, travellers, Roma, the homeless (Finland, United Kingdom).
- Refocusing of urban development policy on the most vulnerable groups and most disadvantaged regions (Denmark).
- Coverage of the additional housing costs for disabled people (Austria, France, Luxembourg)
- Programme of local advisers for the co-ordination of local social initiatives, support for the development of residents' networks, social prevention measures (Denmark, Finland).
- Development of mediation bodies (public agencies, not-for-profit associations and cooperatives) which offer information and brokerage services for the renting of accommodation, accessible to disadvantaged persons (Belgium, France, Luxembourg).
- Development of supported housing (which includes the support of a social work professional or health professional) for elderly persons, disabled persons, homeless persons, etc (Denmark, France, Germany, Luxembourg, Netherlands, Sweden, United Kingdom).²²⁸

In relation to homelessness the Joint Report points out that:

The 2003-2005 NAPs/incl make it clear that homelessness can stem from a variety of factors: over-indebtedness, family break-up (often preceded by domestic violence), unemployment, drug addiction, alcoholism, release from prison, mental illness.

"Those who live on the streets are no longer the traditional marginalised members of society, beggars and vagabonds. A new generation of homeless,

²²⁸ *Ibid.*, Section 5.2.

including more and more women and young people, is now emerging, among whom are people with mental disorders, drug addicts, alcoholics, ex-prisoners and others who, whether due to structural or personal reasons, find themselves cut off from the usual standards and institutions – social links broken, absence of rules and routines, self-marginalisation, estrangement from work, reduced cognitive capacity – and with no social, psychological or financial support", states Portugal's NAPincl.

In the absence of clear, common definitions, and given the difficulties of counting a population which slips under the radar of the normal censuses, it is difficult to establish precise and comparable figures. The efforts made since 2001 by certain Member States (Austria, Belgium, Finland, France, Netherlands, United Kingdom) and by Eurostat have still not yielded harmonised statistics, and despite the recommendations of the Laeken European Council many Member States do not present "tertiary indicators" of homelessness in their NAPs/incl.

The estimates are therefore based more on administrative data (numbers of persons dealt with by the homelessness services) than on exhaustive data. And assessment is made even more difficult by the massive influx into certain Member States of asylum seekers or immigrants in irregular situations, with no specific abode.

Homelessness is a multidimensional problem which calls for an integrated and holistic approach straddling a number of domains, not only housing but also health (especially mental health), employment, training, justice and social protection.²²⁹

There is clearly some effort to recognize that housing rights apply in both State agencies and within the market, primarily as consumer rights. The Joint Report also emphasized that 'access to good quality and affordable accommodation is a fundamental need and right'.²³⁰ But, once again, there is no attempt to address the EU obligations set out in article 34(3) of the EUCFR to recognize and respect the right to social and housing assistance.

However, the Joint Report is valuable in the way it reviewed the demand for a rights-based approach in social exclusion policies by NGOs in Ireland in the consultation process.²³¹ The National Action Plan for 2003-2005 from Ireland had set out a statement on rights in its section on facilitating access to resources, rights, goods and services:²³²

Citizenship rights encompass not only the core civil and political rights and obligations, but also social, economic and cultural rights, obligations that underpin equality of opportunity, the accommodation of diversity and policies on access to education, employment, health, housing and social services. Key determinants of social inclusion are the further development of public services, which are quality, performance and results driven and take full account of the increasingly diverse nature of our society.

The strategy on access to services being pursued over the period to 2007 includes:

- The development of more formal expressions of entitlements across the range of public services and the setting of standards and guidelines regarding the standard of service delivery that can be expected by the customer, taking into account the Council of Europe recommendations on access to social rights;

²²⁹ *Ibid.*, Section 6.3.

²³⁰ *Ibid.*, Section 5.5. at p. 56.

²³¹ *Ibid.*, p. 177.

²³² *National Action Plan against Poverty and Social Exclusion, 2003-2005. Ireland.* Section 3.3.1.

Available at website:

http://www.europa.eu.int/comm/employment_social/news/2001/jun/napsincl2001_en.html

- Monitoring, by means of indicators, access to services of a given standard and working to improve performance over time;
- Continuing to pursue a much greater focus on effective outcomes and on indicators to monitor outcomes, particularly in relation to the drive for integrated approaches to the problems of disadvantage at local level; and
- Driving forward, in a comprehensive way, the range of proofing mechanisms (poverty, equality and others) necessary to ensure that policies and programmes are developed in such a way as to achieve the maximum impact in reducing and eliminating poverty and social exclusion.

The Joint Report addressed the statement in relation to rights in the Irish NAPsincl:

Although developing standards of access goes some way to meet the type of rights based approach called for in the consultation process, it does not fully address the issue... Demands in the consultation process for a right-based approach in social exclusion policies, are only addressed in terms of developing standards of access to quality public services.²³³

There is clearly an awareness at the level of the SPC and Commission of the possibility of human rights and housing rights being *dumbed down* to public management issues and standards. However, one is left with the unfortunate conclusion that were the obligations of Article 34(3) of EUCFR to be included in the NAPsincl process they might be confined to these types of issues, i.e. solely in terms of standards of access to public services?

(o) Community Action Programme to Combat Social Exclusion 2002-2006

In the context of the OMC, this programme is meant to support cooperation which enables the Community and the Member States to enhance the effectiveness and efficiency of policies to combat social exclusion by:

- improving the understanding of social exclusion and poverty with the help in particular of comparable indicators;
- organising exchanges on policies which are implemented and promoting mutual learning in the context of national action plans
- developing the capacity of actors to address social exclusion and poverty effectively, and to promote innovative approaches²³⁴

The development of housing rights in the EU requires an understanding and context of the new governance arrangements, as well as the role of the EUCFR, now incorporated into the *Draft Treaty establishing a Constitution for Europe*. The concentration on statistical and administrative/management indicators is creating a whole new discourse, in which rights have little place. Yet, the Union is founded on human rights values and housing rights emerge at all levels of European integration.

²³³ COM (2003) 773 final 12 December 2003, p. 175-177.

²³⁴ *Community Action Programme to Combat Social Exclusion 2002-2006*. See website: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/ex_prog_en.htm

Chapter 4. Conclusions

There are legally binding housing rights in EU law in relation to migrant workers and their dependants, for consumers of housing in the public and private sectors, in relation to non-discrimination and in respect of the right to social and housing assistance in the EUCFR. But advancing housing rights in the context of new forms of EU governance, based on non-legal measures, presents a challenge for housing rights advocates in Europe. The emerging central position of social inclusion measures within the European Social Model, based on the OMC has created a new climate for EU and national homelessness legislation. The detailed National Action Plans completed by Member States and monitored by the Commission, are placing homelessness, housing need and housing rights within the concept of social inclusion approaches. It is now clear, in the context of two rounds of National Action Plans and synthesis reports that States or indeed, the EU, pay little attention to housing rights obligations within this process, even when enshrined within an EU legal instrument – the EUCFR.

While human rights in the EU context can act as valuable benchmarks to evaluate policy initiatives, such as housing policy, these rights are potentially being downgraded to ‘soft policies in favour of this or that social objective’.¹ In relation to homelessness, there is a tendency for EU policy to focus towards measures designed to promote ‘social protection’ or to overcome ‘social exclusion’ rather than focussing on enforceable social rights.² The most clear example of the shift from individually enforceable rights based on Treaties, Regulations and Directives to a ‘new mode of governance’ largely related to administrative measures, has come about with the expansion of the OMC. There has been a dramatic shift in emphasis from defining the legal obligations of States to in many areas to a pre-occupation with measurement of services, benchmarks, indicators and other management oriented issues. States are conceding the role of defining rights to ‘social partners’, producer groups, powerful providers of services and administrators. This means that people in Europe will no longer be able to expect the protection of legal rights (many arising from the common market approach) through the principles of legal direct effect, supremacy of EU law and preliminary rulings enforceable at local level against local agencies, both State and non-State. In the past, many valuable rights in areas such as equality and non-discrimination, freedom of movement with social benefits were developed in this way. In relation to housing rights, this shift means that individuals who could rely on enforceable rights may, in future, lack the benefits of EU sanctioned legal protection.³ Not surprisingly, this is leading to much disillusionment with the EU and in some cases to a rejection of its further development.

The indicators and benchmarks for homelessness, housing need and housing rights are far from agreed and appear to have presented the OMC process with an

¹ Koskenniemi, M. ‘The Effect of Rights on Political Culture’, in Alston et al, (1999) *The EU and Human Rights*. OUP, p. 113.

² Alston, P. and Weiler, J.H.H. ‘An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights. in Alston et al, (1999) *The EU and Human Rights*. OUP, p. 31.

³ Some writers are advocating that socio-economic rights such as are set out in the EUCFR should be developed through the OMC, and this is considered below. See de Schutter, O. *The Implementation of the EU Charter of Fundamental Rights through the Open Method of Coordination*. Jean Monnet Working Papers No.7/04, at website: <http://jeanmonnetprogram.org/papers/04/040701.html>.; Bernard, N. ‘New Governance Approach to Economic, Social and Cultural Rights’, in Herve, T, & Kenner, J. (2003) *Economic and Social Rights in the EU Charter of Fundamental Rights*. Oxford: Hart; de Burca, G. ‘The Constitutional Challenge of New Governance in the European Union’, 28 *ELR* (2003) 814.

issue which is beyond its capacity to address, or even clearly conceptualise. The tautological reports on statistical issues, the voluminous report of over 400 pages by Eurostat on housing indicators and the studied avoidance of the legal definitions and obligations of housing rights, all demonstrate the limitations of the OMC approach in this area.

The Commission and Council Joint Reports on the National Action Plans have at least addressed housing policies and practices but most Member States failed to address their housing rights obligations in any meaningful way in the NAPs incl reports.

However, legislative action is not seen the main EU method for advancing housing or any socio-economic rights in the future. In adapting the European Social Model to the pressures of globalisation, changing demographics and other pressures, the OMC, Social Dialogue and the European Social Fund will be the main instruments used, particularly in the period 2006-2010. As the High Level Group on the future of social policy in the EU pointed out in 2004:

Legislative action is more behind us than before us for several structural reasons:

- The top priority for the new Member States is to transpose fully and to implement effectively the "acquis communautaire".
- The European Union has already legislated in many fields in industrial relations and there does not seem to be large legislative gaps.
- New directives should in the future result more easily from the implementation of agreements between the European social partners than from a negotiation between the 25 Member States.
- The social partners have adopted an ambitious work program including for example action on stress at work and harassment. Past experience proves that agreements reached by the social partners are very often more concrete, simple and closer to the economic and social needs.

However, for those areas for which the Treaty provides a legal base to regulate through legislation, the EU should remain vigilant and extend the legislation where appropriate to provide the basic rights and minimum standards, as called for in the Treaty, and establish a level playing field for businesses throughout the enlarged European Union. There may be a need to complete legislation in some areas, for example in health and safety, to face new risks. At the same time, updating or simplifying legislation, where possible, should be further pursued.⁴

In the light of the absence of housing rights references in the National Action Plans on social inclusion, and the references to housing rights as fundamental rights in the Joint Reports synthesis of National Action Plans, there is clearly a need for defined housing rights involving State obligations, minimum standards and remedies. This could avoid a 'the race to the bottom', or reductions of standards of State entitlements for housing assistance. In the context of varying and often poor levels housing rights protection for vulnerable groups, such as immigrants, asylum-seekers and refugees, people with disabilities, poor people, some ethnic minorities and others, the need for clear housing rights is becoming critical.

However, the OMC is seen as fitting well in an enlarged Europe.

⁴ European Commission, (May 2004) Directorate-General for Employment and Social Affairs, *Report of the High Level Group on the future of social policy in an enlarged European Union*. p. 71. See website: http://europa.eu.int/comm/employment_social/news/2004/jun/hlg_social_elarg_en.pdf

The open method of coordination is all the more important in the prospect of enlargement since it is based on catching-up and benchmarking. It can foster convergence on common interest and on some agreed common priorities while respecting national and regional diversities. It is an inclusive method for deepening European construction. But enlargement also calls for the implementation of the “acquis communautaire”.⁵

The role of the OMC is central to the EU social inclusion process. The Report *Taking Forward the EU Social Inclusion Process* in 2005,⁶ proposes changes to the Joint Reports, which will be shortened. However, there is an acknowledgement of the weakness of the OMC approach in relation to homelessness and housing need. Again, the retreat into statistical categorisations serves to obscure and avoid the legal obligations already established in the EU. This extract from the Report is reproduced to illustrate the difficulties of advancing housing rights in the EU social inclusion OMC process, in the years ahead.

There is not at present an agreed definition of the underlying concept of homelessness, an indispensable starting-point for a statistical framework for gathering data relating to that concept. The most useful data on homelessness at national level are generally gathered by public bodies in the course of administration of housing policies, and the nature of the data consequently varies with the institutional setting. It is simply not valid to place figures derived in such a fashion in a comparative table. Household surveys, the primary source for many of the common social inclusion indicators, miss those who are currently homeless because they are either not in the sampling frame in the first place or if in the frame will not be contacted (although retrospective questions about episodes of homelessness in the past can yield some interesting information.) Special surveys of the homeless in particular countries, while producing very useful information, adopt different definitions and procedures and rarely produce data that is comparable across time, and even less so between countries.⁷

Despite this point of departure and the difficulties in making progress, a measure of homelessness on a harmonised basis would be valuable and its production should be adopted as an objective. Progress can then be made incrementally. The first step would be an agreement on a common definition of what constitutes homelessness. The debate here largely centres on how narrowly or broadly the net is cast, with the range of views illustrated by the consultation process carried out as part of the aforementioned Brousse report. Some respondents argued for a definition that focuses purely on those sleeping rough or in emergency accommodation, and not for example those living with friends or relatives, in short-stay accommodation, or in unsuitable/unacceptable housing. On the other hand, others argued for a definition that encompasses not only all those groups but also those threatened with eviction, or in insecure tenancy arrangements. (The range of different circumstances one might consider is illustrated for example in the typology put forward by FEANTSA ranging from rooflessness at one extreme to forms of insecure and inadequate housing at the other.) The Brousse report puts forward an interim working definition which seems a sensible point of departure and would allow progress to be made. This would focus on those who are sleeping rough, in shelters or short-stay hostels, or other temporary accommodation because they do not have access to

⁵ *Ibid.*, p. 36.

⁶ Atkinson, A.B., Cantillon, B., Marler, E. & Nolan, B. (2005) *Taking Forward the EU Social Inclusion Process*. Luxembourg: Le Gouvernement du Grand-Duché de Luxembourg.

⁷ *Ibid.*, p.125.

acceptable accommodation. It would not count as homeless those in insecure housing situations, such as without legal tenancy agreements or facing eviction orders, or those living in unfit or overcrowded housing – though insecure or inadequate housing could be measured separately. The next stage would be to agree on the preferred measure – providing for example a count of the number of persons experiencing homelessness on a given night or nights, which could be expressed as a homelessness rate.

The best approach to producing data relating to this agreed definition and measure, whether it be via the Census of Population, administrative sources or special surveys, could then be investigated. Although EU-SILC itself is not a suitable vehicle for data on homelessness, the philosophy underlying it - that harmonised target variables are tightly specified at EU level but national statistical offices have freedom to decide how best to collect the required information – is directly relevant. It is important that there be clear official responsibility, to ensure oversight of the collection of appropriate data in close collaboration with the organisations working in the area. As progress is made towards a harmonised measure that would serve as a Primary Indicator, Member States should in the meantime have to report on the basis of national statistics as a “level 3” indicator (as is already required under the December 2001 Laeken agreement), i.e. a national rather than common (EU) indicator.

Housing Quality and Adequacy

EU-SILC, like the ECHP before it, will produce harmonised measures relating to housing quality and housing deprivation that will also be important in a social inclusion context. In particular, this covers not only the presence or absence of basic amenities (such as a shower/bath and an indoor flushing toilet) and density/overcrowding, but also whether the household perceives problems in terms of the presence of damp walls, leaking roof, rot in windows, adequacy of lighting, exposure to noise, exposure to pollution, exposure to vandalism and crime. One useful approach to employing this information would be to construct an aggregate measure of poor or inadequate housing, based on an index counting the number of different types of housing-related “bads” the household reports. In the absence of a suitable alternative at present, such an indicator may be worth considering as a Primary Indicator, though there are significant issues to be addressed in constructing and using it which we discuss shortly when we come to the use of non-monetary deprivation indicators.

... Concern has also been expressed about the burden imposed by housing costs, and the desirability of capturing situations where an “excess burden” is being imposed on the household by these costs. Such a concept needs to be interpreted and used with care. On the housing expenditure side, measures of financial “burden” associated with housing can be constructed by taking expenditure on housing (principal residence) as a proportion of total income. However, a household in the top half of the income distribution spending a substantial proportion of its income on housing may be regarded as having a significant burden, but not one that is directly relevant from a social inclusion perspective. In considering the situation of those further down the distribution but spending a sizeable proportion of their income on housing, the institutional context is all-important: in some cases that expenditure may be fully covered by social transfers included in income, in which case they do not represent an immediate burden for the household. Reliance on crude financial measures of “burden” can therefore be hazardous. It is worth exploring whether a measure of the “uncompensated burden” of housing costs that focuses on those on low incomes could be constructed in a way that is meaningful across countries. One way of approaching this would be to subtract cash transfers aimed at covering

housing costs from total household income, and calculate the proportion that the “uncovered” housing costs (that is, expenditure on housing less support received to cover it) comprise of that income. Those with income “net of housing support” falling below some income threshold whose uncovered housing costs comprise more than a certain proportion of income (net of housing assistance) could be identified as seriously at risk of poverty/exclusion due to housing costs – with the appropriate income threshold and critical proportion themselves the subject of analysis. The difficulty may well arise that support for housing costs is not always distinguished from other forms of social transfer, but such an approach is well worth investigation, particularly with enhanced data that will become available from EU-SILC.⁸

In the light of these statements there is little optimism that housing rights can be effectively addressed within the OMC system.⁹ Even more worrying is the suggestion that such rights as they exist with the EUCFR should be monitored through this process, or a variant of it, through a ‘Fundamental Rights Agency’.

Since the OMC approach is provided for in the *Draft Treaty establishing a Constitution for Europe*, it is clear that its role has been clearly established in European law. However, in the light of the **widely reported discrimination** against minorities, immigrants, women, people with disabilities, gypsies and travellers, poor people and others across Europe, is it realistic to expect that a new form of participation will involve these people in preparing and monitoring National Action Plans which will result in human rights being fully implemented? Will the OMC prompt a progressive redistribution of resources at national level to powerless groups where local political action can not? Will the OMC continue to deny the existence of housing rights obligations at national level and at EU level?

(a) Are there four parallel ‘monitoring’ systems and two courts for housing rights in Europe ?

It is significant that all of the 25 EU States have signed up to the European Social Charter and many have adopted the Revised Charter. These contain a range of socio-economic rights, which European States have agreed to implement. Equally, all EU States have ratified the ICESCR. This obliges States to respect, protect, promote and fulfil socio-economic rights progressively as resources permit, based on non-discrimination and a State minimum core obligation. Many issues covered by the NAPs incl are addressed in these three human rights instruments. In relation to these obligations, EU States provide regular reports to the UNCESCR and CSR as monitoring bodies for these human rights instruments. Indeed, the supervisory bodies for these areas all recognize the ‘diversity of systems’ between States, the need for indicators and benchmarks for public policy, different levels of resources in States, participation of civil society and the benefit of best practices. The EU Network of Independent Experts on Fundamental Rights also produces an annual report of fundamental rights in the EU and its Member States, since being established by the Commission in 2002.¹⁰ This network enables the implementation of the EUCFR to be assessed both by the Union’s institutions and Member States. The development of housing rights in relation to Article 34(3) of the CFR across Europe are monitored and promulgated through this valuable initiative. Other monitoring systems which address

⁸ *Ibid.*, pp. 125-128.

⁹ See Kenna, P. ‘What are we talking about when it comes to indicators on homelessness?’ *FEANTSA Newsletter, Homeless in Europe*, Spring 2002.

¹⁰ See website: http://www.europa.eu.int/comm/justice_home/cfr/index_en.htm

housing rights include the UN Committees on the *Convention on the Elimination of Racial Discrimination*, *Convention on the Elimination of Discrimination against Women* and the *Convention on the Rights of the Child*.

The Network of Independent Experts on Fundamental Rights is now being abolished and its role is being incorporated into the European Monitoring Centre on Racism and Xenophobia (EUMC), to be known as the 'Fundamental Rights Agency'.¹¹ There are concerns that this will be a 'lightweight' agency in terms of staff and resources and over the independence of its board members from manipulation by Member States. The generally applicable institutional solution for pursuing human rights monitoring is the establishment of a multi-member expert body where the members have a different background as to nationality and legal system and serve in a judicial or otherwise independent capacity.¹² There are fears that the Agency will be confined to data collection and analysis and 'communication and dialogue'. Indeed, it cannot be assumed that the Agency will concern itself with social and economic rights in any systematic and comprehensive way, and thus housing rights may be relegated to issues of consultation and dialogue.¹³

With the advent of the OMC social inclusion process based on National Action Plans reported to the EU Commission, there are, arguably, four parallel supervisory or 'monitoring' systems in relation to similar socio-economic rights, including housing rights in Europe.¹⁴ The UNCESCR, the CSR, the EU SPC and the EU Network of Independent Experts on Fundamental Rights (or Fundamental Rights Agency if it engages in actual monitoring) address housing rights obligations, in relation to how these rights for people are promoted and protected by States. This may lead to some valuable clarifications, even if there are many dichotomies. For instance, how does the reduction of housing rights for EU citizens following accession correspond to States obligations under the ICESCR in respect of the progressive realization of rights? De Schutter suggests that aligning EU law with international and European human rights law would present advantages even in the absence of a legal obligation for the Union to do so.¹⁵

At another level, all EU States are involved in cases in the ECtHR where the positive obligations of States in relation to Articles 3, 6, 8, 13 and 14 of the ECHR are being adjudicated. Increasing importance is being given to positive obligations on States in areas of socio-economic rights, such as housing. The examination of housing rights obligations in the ECJ arising from Treaty and other jurisprudence also adds to the range of housing rights in Europe. In this context, the development at EU level, of the OMC, where States agree to adopt on a voluntary level commitments they have

¹¹ The Agency will have no powers to examine individual complaints, give regulations or carry out normative monitoring for the purposes of Article 7. See website: http://europa.eu.int/comm/justice_home/news/consulting_public/fundamental_rights_agency/index_en.htm

¹² Scheinin, M. 'The Relationship between the Agency and the Network of Independent Experts' in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, at p. 75.

¹³ See Alston, P. 'The Contribution of the EU Fundamental Rights Agency to the Realization of Economic and Social Rights,' in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, at p. 160.

¹⁴ Scheinin points out that the scope and comprehensiveness of the EUCFR is broader than that of human rights treaties, and thus EUCFR monitoring is beyond a duplication of other human rights monitoring systems. See Scheinin, M. 'The Relationship between the Agency and the Network of Independent Experts' in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, at p. 81.

¹⁵ De Schutter, O. 'Mainstreaming Human rights in the European Union,' in Alston, P. & De Schutter, O. (2005) *Monitoring Fundamental Rights in the EU*. Oxford: Hart, at p. 42.

already made, or which have been legally defined in international law, could indeed appear as an administrative ‘re-invention of the wheel’ in terms of human rights development. Instead of legally defined obligations, a range of managerialist and administrative standards, which grant no legally enforceable rights to the citizen or user of services are advanced. There is no mechanism by which the Commission can issue recommendations against individual States and thus, ‘what we have is a process of indirect steering and co-ordination of national policies’.¹⁶

There is some risk that this development may lead to conflict with the norms and standards developed through the UN and Council of Europe systems. Indeed, it could already be the case that some Member States are approving National Action Plans endorsing policies and practices which are in breach of ECJ, ECtHR, UNCESCR and CSR jurisprudence. One example is the prevalence of residency and other ‘subjective’ requirements in policies for access to public housing across Member States. These policies are reviewed by the SPC for compatibility with the social inclusion objectives, but not in terms of their compliance with international legal obligations. Indeed, it may come about that the managerial and administrative standards and benchmarks developed under OMC may be used to counter any findings of non-compliance by the international human rights monitoring bodies.

(b) Moving housing rights away from law?

There are various pressures and efforts to interpret international human rights legal standards in non-legal ways. Some States, such as Ireland seek to interpret socio-economic rights purely in terms of formal expressions of entitlement in public services. Others have defined the lacuna of rights in Europe primarily as a lack of awareness within complex bureaucratic systems. Thus:

The fact that people experiencing poverty and social exclusion do not know their rights or have problems enforcing them is of great concern in many countries. This is being addressed through policies to heighten awareness, simplify government forms, think how user’s views can be taken into account in the running of local public services, training for voluntary workers and professionals involved in the fight against exclusion.¹⁷

The move towards the de-legalisation of human rights is exemplified in the ‘Malta Declaration’ of the Council of Europe of 2002.¹⁸ The Conference called on governments and other political, social and business partners to develop and implement policies promoting access to social rights on the basis of the following principles:

- Equality of treatment, with particular attention to gender equality;
- Service delivery oriented to the needs of users;
- User involvement and empowerment of users;
- Solidarity;
- Partnership;

¹⁶ See Armstrong, K.A. ‘Tacking Social Exclusion through OMC: Reshaping the Boundaries of European Governance’, in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, at p. 185.

¹⁷ European Anti-Poverty Network. *Combating poverty and social exclusion: A new momentum in the European Union*. Brussels: May 2000. p. 15.

¹⁸ Council of Europe, Conference on Access to Social Rights, Malta, 14 and 15 November 2002.

- Optimal use of available resources;
- Integration of benefits and services;
- Quality and accessibility of services;
- Transparency;
- Monitoring and evaluation.

The ‘declaration’ avoided the principle that States are the guarantors of international human rights. The ‘declaration’ called for the provision of ‘an adequate legal framework and appropriate mechanisms for the effective implementation of social rights’. Thus, the established legal enforcement of rights through the existing courts and legal systems and the internationally accepted bodies is not acknowledged. The ‘declaration’ calls for the maintenance of a ‘well-run social protection system’, and calls on the parties to ‘consider establishing minimum levels of resources that enable people to live in accordance with human dignity’ – an obligation already accepted by European States since the 1950s. There is no reference to the existing obligations of European States under the ICESCR in relation to their ‘minimum core obligations’ and ‘progressive realization’ of rights. Equally, the positive obligations of States under the ECtHR or CSR jurisprudence is not addressed. The ‘declaration’ recommends that the Committee of Ministers of the Council of Europe ‘give full support’ to the Council of Europe’s work on promoting recognition of and effective access to social rights, ‘giving preference to integrated approaches’. This may dilute the responsibility of States and disperse accountability for enforcement of human rights protection.

One approach appropriates the language of human rights and incorporates it into the management of services, again with little reference to the enforceability of human rights or CoE or UN systems.¹⁹ It identifies seven barriers impeding access to ‘social rights’ in Europe, claiming that these barriers arise from problems within the following areas:

- Specification of rights and adequacy of legal and other provision;
- Inadequate monitoring and enforcement;
- Resource shortage;
- Management and procedural;
- Information and Communication;
- Psychological and socio-cultural obstacles;
- Inadequate attention to vulnerable groups and regions.

This approach, which seeks to place international human rights norms within a local and national ‘architecture of rights’, reduces rights to managerialist concerns about the delivery of services. Indicators, benchmarks, action plans, strategies and other managerialist approaches become the terms of discussion. Indeed, the use of managerial indicators and benchmarks are proclaimed as the means of defining and implementing rights. There is no sanction on States who do not meet such benchmarks, and there is no avenue for complaint or appeal from citizens who suffer a violation of their rights as a result. Indeed, there is often no specific, measurable, time-limited or relevant objective included in the administrative based management benchmarks.²⁰

¹⁹ Daly, M. (2002) Council of Europe. *Access to Social Rights in Europe*. Strasbourg:

²⁰ However, the EU Social Protection Committee proposed that the 2003-2005 National Action Plans comply with the SMART analysis. See *Common Outline for the 2003/2005 NAPs/inclusion*. See

The development of rights rhetoric into the public management systems has effectively committed many NGOs seeking to advance human rights approaches to non-specific and indeterminate outcomes, as the price of participation in the process. There 'is a danger that NGOs, in their engagement with EU processes, will become increasingly "governmentalised" and in doing so compromise their own communicative and deliberative potential'.²¹ The process of consultation by NGOs does not always mean participation in decision-making, and there no guarantee that issues raised by NGOs will be included in the NAPsincl and other policies.

The influences of NPM approaches have not always been recognised.²² This approach which originated in New Zealand, Australia and UK, is concerned with the political and organisational processes through which policy change takes place, as well as the analysis of public management contextual approaches. The growth of NPM, which views the role of the State as not simply providing services, but acting as a catalyst for the public, private and voluntary sectors, encouraging competitive public service provision and turning clients and citizens into customers, creates a new scenario for traditional rights based approaches.

The focus has shifted from probity and due process in meeting statutory and other obligations to performance (financial) competitiveness, contractual and managerialist approaches in public services.²³ While much of this is about efficiency and effectiveness, with values such as quality, consultation, citizens as customers of services and value for money, the language used often refers to rights. These 'rights' are, of course, not the same as rights derived from international agreements and implemented by States. The 'minimum core obligation' of States and 'progressive realization' principles, involving the allocation of increased resources to those in need as the affluence of countries progresses, are not part of NPM deliberations.

UN bodies supervising States compliance with their international human rights obligations have consistently emphasised that effective independent monitoring systems are an indispensable foundation upon which domestic human rights policies must be constructed. In General Comment No. 10²⁴ on the role of human rights institutions in the protection of economic, social and cultural rights, the UNCESCR notes that the Covenant obliges each State party 'to take steps...with a view to achieving progressively the full realization of the Covenant rights...by all appropriate means'. Among the types of activities that can be undertaken by these institutions in relation to the achievement of these rights is 'the identification of national level benchmarks against which the realization of Covenant obligations can be measured'.²⁵

Of course, international human rights agencies have recognised that market systems and managerialist approaches can be involved in States actions which address or implement human rights.

website: http://europa.eu.int/comm/employment_social/soc-prot/soc-incl/commonoutline2003final_en.pdf

²¹ See Armstrong, K.A. 'Tacking Social Exclusion through OMC: Reshaping the Boundaries of European Governance', in Borzel, T.T. & Cichowski, R.A. (2003) *The State of the European Union – Law Politics and Society*. OUP, at p. 193.

²² See Barzelay, M. (2001) *The New Public Management*. University of California. NPM is widely accepted as a form of economic rationalisation or 'economism' in public service provision.

²³ See Halliday, S. (2004) *Judicial Review and Compliance with Administrative Law*. Oregon: Hart Publishing. Chapter 6.

²⁴ UNCESCR, *General Comment No. 10*. para. 1.

²⁵ *Ibid.*, para. 3(d)

Since the end of the Cold War, there has been a trend in all regions of the world to reduce the role of the state and to rely on the market to resolve problems of human welfare, often in response to conditions generated by international and national financial markets and institutions and in an effort to attract investments from the multinational enterprises whose wealth and power exceed that of many states. It is no longer taken for granted that the realization of economic, social and cultural rights depends significantly on action by the state, although, as a matter of international law, **the state remains ultimately responsible for guaranteeing the realization of these rights**. While the challenge of addressing violations of economic, social and cultural rights is rendered more complicated by these trends, it is more urgent than ever to take these rights seriously and, therefore, to deal with the accountability of governments for failure to meet their obligations in this area.²⁶

It is now undisputed that all human rights are indivisible, interdependent, interrelated and of equal importance for human dignity. Therefore, states are as responsible for violations of economic, social and cultural rights as they are for violations of civil and political rights.²⁷

Consideration has been given to administrative approaches such as action plans, indicators and benchmarks within human rights approaches,²⁸ and in terms of housing rights.²⁹ In one working paper to the UNHCHR on the realization of economic, social and cultural rights, the need for legal consistency and the need for a comparable and consistent methodology on the use of indicators was emphasised.³⁰ It was stressed that any indicators chosen for use in this manner must be in line with the legal definitions and content given to certain rights by the UN as a whole, and the Treaty or monitoring bodies in particular.

There is a critical difference between administratively defined benchmarks, or targets, and human rights implementation.³¹ In any case 'benchmarks should be linked to mechanisms of accountability in the sense that failure to reach a given benchmark should trigger an appropriate remedial response'.³² Failure to meet a human rights benchmark by a State results in a violation, whereas in administrative systems there is no such outcome. Equally, managerial systems can change priorities depending on political influences, favoured groupings, discriminatory approaches or

²⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. 20 *Human Rights Quarterly* 691-704. (1998) para. 2.

²⁷ *Ibid.*, para. 4.

²⁸ UN Doc. E/CN.4/Sub.2/1990/19. *The new international economic order and the promotion of human rights. Realization of Economic, Social and Cultural Rights. Progress Report.*

²⁹ See UNCHS (Habitat). (2001) *Position Paper on Housing Rights; Report of the Expert Group Meeting on Housing Rights Monitoring*, 26-28 Nov. 2003, UN-HABITAT and OHCHR.

³⁰ UN Doc. E/CN.4/Sub.2/1991/WP.3; *Benchmarks for the realization of Economic, Social and Cultural Rights*, A Round-Table Discussion Organized by the High Commissioner for Human Rights, Geneva, 25 March, 1998; UN Doc. E/EN4/2000/47. *Report of the Secretary-General on Economic, Social and Cultural Rights*; UN Doc. E/C.12/1994/11. *UNCESCR Report of the 19th Session. State obligations, indicators, benchmarks and the right to education*; OHCHR (2002) *Handbook on National Human Rights Plans of Action*. Geneva: UN.

³¹ Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 HRQ 81. Robertson, 'Measuring State Compliance with the Obligation to Devote the 'Maximum Available Resources' to Realizing Economic, Social and Cultural Rights' (1994) HRQ 693; Chapman, 'A 'Violations Approach' for Monitoring the International Covenant on Economic, Social and Cultural Rights' (1996) HRQ 23.

³² Conclusion by Phillip Alston, *A Round-Table Discussion Organized by the High Commissioner for Human Rights*, Geneva, 25 March, 1998. Report Office of the High Commissioner for Human Rights, Geneva, 1998.

other reasons. Human rights approaches have universal, interdependent, interrelated, people-centred and holistic characteristics which go far beyond immediate and convenient prioritisation of resources.

At its Eight Session, the UNCESCR discussed the Expert Seminar on Indicators held in Geneva in January 1993:

...human rights indicators should be based on respect for human dignity, equity, social justice, non-discrimination, freedom of choice and empowerment, victims of human rights violations as well as others excluded from human dignity³³...in the end the results of evaluation of compliance with human rights standards was a balanced assessment and largely a matter of legal analysis.³⁴

(c) Without a remedy there is no right

It is perhaps worth emphasising that the legal dictum *ubi jus ibi remedium* – where there is a right, there is a remedy – is a basic principle of law. The converse is also true, i.e. without a remedy, there is no right in existence. A clear difference, therefore, exists between non-compliance with administrative targets, variously described as benchmarks, action plans etc, and violations of human rights. For those who need the protection of international human rights customer feedback systems are not adequate. **Without a remedy there is no right. The clear defining characteristic of a rights based benchmark is the presence of a remedy for violations.**

The UN has, of course, developed a detailed set of principles for dealing with violations of human rights, which accepts that managerial benchmarks and other systems may be involved in the implementation of human rights. *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights*³⁵ addressed these issues.

6. The achievement of economic, social and cultural rights may be realized in a variety of political settings. There is no single road to their full realization. Successes and failures have been registered in both market and non-market economies, in both centralized and decentralized political structures.

8. Although the full realization of the rights recognized in the Covenant is to be attained progressively, the application of some rights can be made justiciable immediately while other rights can become justiciable over time.

³³ UN Doc. E/C.12/1991/SR.21. *Report of the Sixth Session.* para 17.

³⁴ UN Doc. A/CONF.157/PC/73. UNGA. *Report of the Seminar on appropriate indicators to measure achievements in the progressive realization of economic, social and cultural rights.* (Geneva, 25-29 January 1993), para 150.

³⁵ UN Doc. E/CN.4/1987/17. A group of distinguished experts in international law, convened by the International Commission of Jurists, the Faculty of Law of the University of Limburg (Maastricht, the Netherlands) and the Urban Morgan Institute for Human Rights, University of Cincinnati (Ohio, US), met in Maastricht on 2-6 June 1986 to consider the nature and scope of the obligations of States Parties to the ICESCR, the consideration of States Parties reports by the newly constituted ECOSOC Committee on Economic, Social and Cultural Rights, and international co-operation under Part IV of the Covenant. The 29 participants came from Australia, the Federal Republic of Germany, Hungary, Ireland, Mexico, Netherlands, Norway, Senegal, Spain, United Kingdom, United States of America, Yugoslavia, the UNCHS, ILO, UNESCO, WHO, the Commonwealth Secretariat, and the sponsoring organizations.

9. Non-governmental organizations can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level.
10. States Parties are accountable both to the international community and to their own people for their compliance with the obligations under the Covenant.
11. A concerted national effort to invoke the full participation of all sectors of society is, therefore, indispensable to achieving progress in realizing economic, social and cultural rights. Popular participation is required at all stages, including the formulation, application and review of national policies.
16. All States Parties have an obligation to begin immediately to take steps towards full realization of the rights contained in the Covenant.
17. At the national level States Parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.
18. Legislative measures alone are not sufficient to fulfil the obligations of the Covenant. It should be noted, however, that Article 2(1) would often require legislative action to be taken in cases where existing legislation is in violation of the obligations assumed under the Covenant.
19. States Parties shall provide for effective remedies including, where appropriate, judicial remedies.
25. States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.
72. A State Party will be in violation of the Covenant, *inter alia*, if:
- it fails to take a step which it is required to take by the Covenant;
 - it fails to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right;
 - it fails to implement without delay a right which it is required by the Covenant to provide immediately;
 - it wilfully fails to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
 - it applies a limitation to a right recognized in the Covenant other than in accordance with the Covenant;
 - it deliberately retards or halts the progressive realization of a right, unless it is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or *force majeure*;
 - it fails to submit reports as required under the Covenant.

The *Maastricht Guidelines*,³⁶ established some ten years after the *Limburg Principles*, set out a range of remedies for violations of socio-economic rights. The *Guidelines* point out that violations of economic, social and cultural rights can occur through the direct action of States or other entities insufficiently regulated by States. Examples of such violations include:

³⁶ Maastricht Guidelines on Violations of Economic, Social and Cultural Rights. 20 HRQ 20 691-704 (1998).

- (a) The formal removal or suspension of legislation necessary for the continued enjoyment of an economic, social and cultural right that is currently enjoyed;
- (b) The active denial of such rights to particular individuals or groups, whether through legislated or enforced discrimination;
- (c) The active support for measures adopted by third parties which are inconsistent with economic, social and cultural rights;
- (d) The adoption of legislation or policies which are manifestly incompatible with pre-existing legal obligations relating to these rights, unless it is done with the purpose and effect of increasing equality and improving the realization of economic, social and cultural rights for the most vulnerable groups;
- (e) The adoption of any deliberately retrogressive measure that reduces the extent to which any such right is guaranteed;
- (f) The calculated obstruction of, or halt to, the progressive realization of a right protected by the Covenant, unless the State is acting within a limitation permitted by the Covenant or it does so due to a lack of available resources or force majeure;
- (g) The reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights and is not accompanied by adequate measures to ensure minimum subsistence rights for everyone.

The *Guidelines* also point out that violations can also occur through the omission or failure of States to take necessary measures stemming from legal obligations.

Examples of such violations include:

- (a) The failure to take appropriate steps as required under the Covenant;
- (b) The failure to reform or repeal legislation which is manifestly inconsistent with an obligation of the Covenant;
- (c) The failure to enforce legislation or put into effect policies designed to implement provisions of the Covenant;
- (d) The failure to regulate activities of individuals or groups so as to prevent them from violating economic, social and cultural rights;
- (e) The failure to utilize the maximum of available resources towards the full realization of the Covenant;
- (f) The failure to monitor the realization of economic, social and cultural rights, including the development and application of criteria and indicators for assessing compliance;
- (g) The failure to remove promptly obstacles which it is under a duty to remove to permit the immediate fulfilment of a right guaranteed by the Covenant;
- (h) The failure to implement without delay a right which it is required by the Covenant to provide immediately;
- (i) The failure to meet a generally accepted international minimum standard of achievement, which is within its powers to meet;
- (j) The failure of a State to take into account its international legal obligations in the field of economic, social and cultural rights when entering into bilateral or multilateral agreements with other States, international organizations or multinational corporations.

The *Maastricht Guidelines* emphasise that responsibility for these violations are in principle imputable to the State within whose jurisdiction they occur. As a consequence, the State responsible must establish mechanisms to correct such violations, including monitoring investigation, prosecution, and remedies for victims. There is an obligation in relation to acts by non-state entities.

18. The obligation to protect includes the State's responsibility to ensure that private entities or individuals, including transnational corporations over which they exercise jurisdiction, do not deprive individuals of their economic, social and cultural rights. States are responsible for violations of economic, social and cultural rights that result from their failure to exercise due diligence in controlling the behaviour of such non-state actors.

The *Maastricht Guidelines* offer great clarity in relation to States roles as they take part in international organisations such as the European Union, Council of Europe, World Bank etc.

19. The obligations of States to protect economic, social and cultural rights extend also to their participation in international organizations, where they act collectively. It is particularly important for States to use their influence to ensure that violations do not result from the programmes and policies of the organizations of which they are members. It is crucial for the elimination of violations of economic, social and cultural rights for international organizations, including international financial institutions, to correct their policies and practices so that they do not result in deprivation of economic, social and cultural rights. Member States of such organizations, individually or through the governing bodies, as well as the secretariat and nongovernmental organizations should encourage and generalize the trend of several such organizations to revise their policies and programmes to take into account issues of economic, social and cultural rights, especially when these policies and programmes are implemented in countries that lack the resources to resist the pressure brought by international institutions on their decision-making affecting economic, social and cultural rights.

The *Guidelines* set out the range of remedies which should be available for violations.

22. Any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels.

23. All victims of violations of economic, social and cultural rights are entitled to adequate reparation, which may take the form of restitution, compensation, rehabilitation and satisfaction or guarantees of non-repetition.

24. National judicial and other organs must ensure that any pronouncements they may make do not result in the official sanctioning of a violation of an international obligation of the State concerned. At a minimum, national judiciaries should consider the relevant provisions of international and regional human rights law as an interpretive aide in formulating any decisions relating to violations of economic, social and cultural rights.

These human rights instruments can be used to address the development of human and housing rights in the EU. The shift away from State responsibility for the advancement, promotion, protection and enforcement of housing rights to discretionary and managerially defined provision, can be effectively assessed in the context of the *Limburg Principles* and *Maastricht Guidelines*. Advancing human

rights in the housing context can also create valuable benchmarks to evaluate policy initiatives, such as the way the Council of Europe is using Article 31 of the RESC.³⁷

But while the effective denial of housing rights within the OMC process does not bode well for housing rights development within the new EU governance, there are positive signs in relation to the role of the Commission in promoting the EUCFR. The inclusion of the EUCFR in the factors to be considered in the legislative and policy proposals of the Commission is a significant development. Of course, these policy proposals could result in the chosen method of implementation being a soft law one, such as the OMC or social dialogue. It is worth recounting in this context that respecting fundamental rights in their fullest sense requires the existence of a remedy for their violation. There are a number of established instruments, which outline the extent, nature and operation of such remedies. In this context, the weakness of these soft law measures, such as the OMC, in upholding and respecting fundamental rights becomes obvious. Nevertheless, the Commission has regularly emphasised its responsibility as guardian of the Treaties and its commitment to monitor compliance of with fundamental rights. It has emphasised that it will warn against any unjustified violation of them, and will initiate annulment proceedings in the event of an infringement, where it considers a breach has occurred, and there is no possibility of interpreting the act adopted as being compatible with fundamental rights. Clearly, the place of fundamental rights, such as Article 34(3), has now been mainstreamed in the EU, and it remains to be seen what level of protection the obligations will provide. In balancing the rights of powerful corporations to finance, produce and exchange housing in European housing markets, and in the marketisation of social housing there will be some difficult decisions to reconcile with fundamental rights.

However, it is worth emphasising that rights approaches can also inspire programmes ‘to create pathways for the marginalized back into public space’.³⁸ Individualising housing rights within the EU context can advance the social protection of individuals, and can work towards the greater autonomy of individuals in need of welfare and housing services.³⁹ Rights approaches can become a heuristic device where campaigning groups conceptualise their demands in an acceptable, universal and coherent way. Since the EU is based on human rights, the development of housing rights is possible. Whether housing rights will offer the open and accessible balance or anti-thesis to the values and operations of housing markets, or whether other social movements adopt that role, is a matter of great importance for the development of the EU.

³⁷ See Kenna, P. ‘Housing Rights - the New Benchmarks for Housing Policy in Europe?’ *The Urban Lawyer*, Winter 2005. Volume 37, Number 1. 87-111.

³⁸ Quinn, G. ‘Human Rights of People with Disabilities’, in Alston et al, (1999) *The EU and Human Rights*. OUP, p. 289.

³⁹ See Communication from the Commission (1998) *Modernising and Improving Social protection in the European* at website: <http://europa.eu.int/comm/dg05/jobs/forum98/en/texts/socprot.html>