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# Of Dark Clouds and Their Silver Linings: Crisis as Opportunity in the Economic and Social Rigths Jurisprundence of the European Court of Human Rights

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## Abstract

We live in a world in crisis.
These crises are experienced globally, regionally, by individual States and mostly by individuals themselves. Despite our differences, we are all united by crisis. However, adopting a regional outlook, this paper focuses on Europe, which, like much of the rest of the world, has in recent times been buffeted by multiple crises ranging from the financial and economic crisis that begun in 2008, to the climate change crisis, to the migrant and refugee crisis, to the Brexit crisis, to the COVID-19 pandemic that has rocked the entire globe.
In times of crisis, it is commonplace to turn to legal and institutional frameworks in the hopes of finding some reprieve. Within Europe, one such institution is the European Court of Human Rights (ECtHR). This Court, also known as the Strasbourg court, was established in 1959 under Article 19 of the European Convention on Human Rights (ECHR). Despite its primarily Civil and Political Rights (CPRs) mandate, the ECtHR has in numerous cases proven to be fertile ground for planting the seeds of Economic and Social Rights (ESRs) protection,[1] which is/was inevitable, given the widely accepted indivisible, interdependent and interrelated nature of all human rights, whether CPRs or ESRs.[2]
The ECtHR explicates that "the Convention is a living instrument which […] must be interpreted in the light of present-day conditions."[3] In the present day conditions of numerous crises that have only exacerbated the already precarious conditions of numerous vulnerable rightsholders in the family of European States, the question then becomes what jurisprudential trends, prospects and pitfalls exist for the ECtHR in its dynamic interpretation of the ECHR to include ESRs. In seeking answers to this question, this paper analyzes the ESRs jurisprudence of the ECtHR with the intention of illuminating how the Court has, and ought to utilize its institutional role as an enforcer of human rights in general and ESRs in particular in the quest to mitigate the effects on rightsholders, of the crises being experienced within Europe. At the heart of this inquiry lies the assertion that in line with the ECtHR's ESRs jurisprudence thus far, which evinces a willingness on the part of the Court to vindicate ESRs in order to bring these rights to life for the vulnerable rightsholders who


1 I. Leijten, *Core Socio-Economic Rights and the European Court of Human Rights* (2018), 1.
2 *The Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN Doc A/CONF.157/23, 12 July 1993.
3 *Tyrer v. The United Kingdom*, ECtHR Application No. 5856/72, Judgment of 25 April 1978, para. 31.

need them the most,[4] the myriad crises currently plaguing Europe continue to create opportunities for the ECtHR to craft a principled and consistent ESRs jurisprudence while simultaneously respecting the margin of appreciation enjoyed by the respective European States.

This paper does not analyze State responses under Article 15 of the ECHR, which specifically allows the High Contracting Parties to derogate from their obligations under the Convention in times of war or other public emergency threatening the life of the nation. Rather, the analysis will be restricted to the ESRs jurisprudence of the ECtHR in times of the specific crises outlined below and where the States in question have not made an Article 15 derogation.

The paper will proceed in three parts. Part A will give a brief overview of how the ECtHR has vindicated ESRs through its interpretation of the primarily CPRs found in the ECHR. Part B will thereafter briefly analyze three specific crises that have shaped the more recent ESRs jurisprudence of the Court: the financial and economic crisis, the migrant and refugee crisis and the COVID-19 pandemic. Finally, Part C will offer some tentative recommendations on the way forward, arguing that while some progress has been made by the ECtHR in centering ESRs as a very necessary part of its response to contemporary European and global crises, the battle is far from won.

Key Words:
European Convention on Human Rights (ECHR); European Court of Human Rights (ECtHR); Economic and Social Rights (ESRs); Crisis

4 E. Palmer, 'Protecting Socio-Economic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights', 2 *Erasmus Law Review* (2009) 4, 397.

# A. Reading Between the Lines: How the ECtHR has Developed a Robust ESRs Jurisprudence from the Primarily CPRs Provisions of the ECHR

## I. Background

The key treaty internationally for the protection of ESRs is the International Covenant on Economic, Social and Cultural Rights (ICESCR), which catalogues a number of ESRs including rights such as right to work, right to social security, right to highest attainable standard of health, right to adequate housing and right to education.[5] These rights are more or less also provided for in the European human rights system within the ambit of the European Social Charter[6] as well as (through the interpretation of) the ECHR.[7] In fact, these two latter instruments precede the ICESCR which only came into force in 1966, while the ECHR came into force in 1953, and its European Social Charter counterpart in 1965 (with the revised 1996 version entering into force in 1999).

The scope of this paper will be limited to an analysis of ESRs protection only under the ECHR as well as its pertinent protocols. This restriction is justified by the fact that the jurisdiction of the ECtHR extends only to matters concerning the interpretation and application of the ECHR and any applicable additional protocols.[8] Applications to the Court may be made either by State parties[9] or by persons, non-governmental organizations or groups of individuals who claim to be victims of violations.[10] The European Social Charter and its implementation mechanisms are therefore excluded from the assessment that follows.

With the exception of its First Protocol (Article 1 and 2 of which concern the right to property and the right to education), it is widely accepted that at first glance, a strict reading of the ECHR discloses a preoccupation with CPRs[11]

5 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 6-8 [ICESCR].

6 *European Social Charter* (Revised), 3 May 1996, 163 ETS 1, 2-3 [ESC].

7 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 5 ETS 5, 6, 8 (*as amended by Protocols Nos. 11, 14 and 15*) [ECHR].

8 *Ibid.*, Art. 32.

9 *Ibid.*, Art. 33.

10 *Ibid.*, Art. 34.

11 Palmer, *supra* note 4, 398; Leijten, *supra* note 1, 1; C. O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights', 5 *European Human Rights Law Review* (2008), 583.

reminiscent of the rights contained within the International Covenant on Civil and Political Rights (ICCPR).[12] The Court itself has even on occasion reiterated the fact that "although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights."[13] Specifically, Section 1, articles 2–15 of the ECHR enumerate the following rights: the right to life (Article 2); the prohibition of torture (Article 3); the prohibition of slavery and forced labour (Article 4); the right to liberty and security (Article 5); the right to a fair trial (Article 6); the right to be free from punishment without law (Article 7); the right to respect for private and family life (Article 8); the freedom of thought, conscience and religion (Article 9); freedom of expression (Article 10); freedom of assembly and association (Article 11); the right to marry (Article 12); the right to an effective remedy (Article 13); the prohibition of discrimination (Article 14) and derogations in time of emergency (Article 15).

Nevertheless, in spite of these prima facie CPRs provisions and despite the obvious hurdles of crafting common standards for the protection of ESRs in member states with very different cultural, political and socio-economic histories as well as current realities, the ECtHR should be lauded for its evolutionary interpretation of certain provisions of the ECHR to uphold and implement ESRs. A brief caveat is necessary at this point. Despite the Court's acknowledgement that the ECHR is a living instrument, there is only so much the ECtHR can do in vindicating ESRs. The Court does not have carte blanche to always implement ESRs, and instead must find a way to strike "the right balance between providing effective individual rights protection and deferring to the national authorities whose (democratic) decisions – especially in a field like social policy – need to be respected."[14]

## II. ESRs Protection Under Specific ECHR Provisions

### 1. Article 2 and a Right to Health?

As already mentioned above, Article 2 of the ECHR provides that "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his

12 *International Covenant on Civil and Political Right*, 16 December 1966, 999 UNTS 171 [ICCPR].

13 *N v. The United Kingdom*, ECtHR Application No. 26565/05, Judgment of 27 May 2008, 17, para. 44.

14 Leijten, *supra* note 1, 1.

conviction of a crime for which this penalty is provided by law. Even though the Court has received its fair share of criticism for not venturing too far from an "orthodox conception of 'life protection' aimed at protecting individuals against unlawful killings in the traditional contexts of national security and policing,"[15] it is necessary to point out that the ECtHR has exhibited a willingness to expand the interpretation of this provision to include ESRs such as the right to health in certain circumstances.

In one case against Romania, the Court confirmed the possibility of imposing a positive obligation on States to prevent violations of the right to life capable of including under the scope of Article 2 the right to health, and finding a violation of this right where there was a failure by the State to provide adequate medical care to Mr. Câmpeanu, a mentally disabled and HIV positive man, who lived his entire life in the hands of the State authorities having been abandoned at birth.[16]

In another case, this time against Turkey, the ECtHR acknowledged the possibility of Article 2 being implicated where "the authorities of a Contracting State put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally,"[17] even though the Court considered it unnecessary to examine "the extent to which Article 2 of the Convention may impose an obligation on a Contracting State to make available a certain standard of health care."[18]

The Court has also conceded that the right to life may be infringed in situations where an applicant claims that the denial of a refund for the full price of life-saving medication violated Article 2 even though the applicant in this case was ultimately unsuccessful.[19] A successful application was however raised in another similar case, where the ECtHR held that Romania had violated Article 2 by failing to provide life-saving cancer medication to the applicant's father (even after being ordered to do so by the national courts) resulting into his deterioration and eventual death.[20] The Court even stressed that "the acts

15 Palmer, *supra* note 4, 409.

16 *Center of Legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECtHR Application No. 47848/08, Judgment of 17 July 2014, 50-53, para. 134-144.

17 *Cyprus v. Turkey*, ECtHR Application No. 25781/94, Judgment of 10 May 2001, 54, para. 219.

18 *Ibid.*

19 *Nitecki v. Poland*, ECtHR Application No. 65653/01, Judgment of 21 March 2002, 4-6, para. 1-3.

20 *Panaitescu v. Romania*, ECtHR Application No. 30909/06, Judgment of 10 April 2012, 8-11, para. 27-38.

and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under Article 2."[21]

## 2. Article 3 and the Rights to Housing and Health?

Article 3 of the ECHR provides in absolute terms that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." The ECtHR has clarified that the ill treatment prohibited here "is that which attains a minimum level of severity."[22] The assessment of what constitutes this minimum is relative and depends on all the circumstances of the case. Where a State fails to treat persons with dignity in relation to their basic needs such as shelter, it is possible for this right to be successfully invoked. For instance, in a case against Romania where the applicants' homes had been destroyed, resulting into them living in a severely overcrowded and unsanitary environment for ten years, the Court found that there had been an interference with the applicants' human dignity which amounted to degrading treatment and thus a breach of Article 3.[23]

Article 3 has also been successfully relied upon within the (very specific and extreme) context of a State party's obligation to provide for the elementary health and welfare needs of individuals in their jurisdictions. In a case against the United Kingdom, where the applicant suffered from AIDS and challenged the proposal by the UK government to deport him to his country of origin which had a low standard of healthcare and where treatment for AIDS sufferers was virtually non-existent, the ECtHR concluded that the proposed deportation amounted to a violation of Article 3.[24] This case must however be understood within its special and urgent context: the applicant was in the final stages of his illness and potentially would even have lacked a hospital bed in his country of origin. The Court was clear that the circumstances in the instant case were exceptional and that aliens who are supposed to be expelled from a Contracting State's territory are not entitled to remain there for the sole purpose of continuing to benefit from medical, social or other forms of assistance.[25] In fact, in a number

21 *Ibid.*, 9, para. 28.

22 *Pretty v. United Kingdom*, ECtHR Application No. 2346/02, Judgment of 29 April 2002, 31, para. 52.

23 *Moldovan and Others v. Romania*, ECtHR Application Nos. 41138/98 and 64320/01, Judgment of 12 July 2005, 25, para. 113-114.

24 *D v. The United Kingdom*, ECtHR Application No. 30240/96, Judgment of 2 May 1997, 15, para. 53-54.

25 *Ibid.*, 15, para. 54.

of subsequent and similar cases[26] the Court failed to find a violation. In one 2008 case against the United Kingdom with broadly similar facts, the applicant was a foreign national diagnosed as being HIV positive and was facing deportation, the ECtHR held that there were no exceptional circumstances justifying a finding of a violation of Article 3 of the ECHR. The Court was of the opinion that "[…] the applicant is not, however, at the present time critically ill. The rapidity of the deterioration which she would suffer and the extent to which she would be able to [obtain] access [to] medical treatment, support and care, including help from relatives, must involve a certain degree of speculation […]".[27]

## 3. Article 8 and the Right to Housing?

This Article provides that "Everyone has the right to respect for his private and family life, his home and his correspondence" and has been primarily associated with the right to housing. More specifically, these situations have involved questions of the legitimacy of interference rather than of the State's failure to provide housing. In a case against Italy where the applicant complained that local authorities both evicted him and subsequently failed to provide him with accommodation adequate to his illness, the Court reiterated that although Article 8 does not create a right to a home, a State nevertheless retains certain responsibilities in respect of housing needs.[28] Even though the applicant in this instance was unsuccessful, the ECtHR was adamant that "a refusal to provide [housing] 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."[29]

In a case against the United Kingdom concerning the forced eviction of a family of gypsies from a local authority caravan site, the ECtHR held that "the serious interference with the applicant's rights under Article 8 requires […] particularly weighty reasons of public interest by way of justification and the margin of appreciation to be afforded to the national authorities must be

26 *S.C.C. v. Sweden*, ECtHR Application No. 46553/99, Judgment of 15 February 2000, 6-10, para. 1-3 ; *Bensaid v. The United Kingdom*, ECtHR Application No. 44599/98, Judgment of 6 January 2001, 11, para. 41.

27 *N v. The United Kingdom*, *supra* note 13, 18, para. 50.

28 *Marzari v. Italy*, ECtHR Application No. 36448/97, Judgment of 4 May 1999, 8-9, para. 1.

29 *Ibid.*

regarded as correspondingly narrowed."[30] In finding a violation of Article 8 the Court ruled that the eviction of the applicant and his family was not done in compliance with the required procedural safeguards and consequently could not be regarded as justified by either a pressing social need or as proportionate to the legitimate aim being pursued.

## 4. Articles 6 and 14 and the Rights to Social Security and Housing?

Article 6 on the right to a fair trial and Article 14 on the prohibition of discrimination have been argued to be capable of providing for ESRs only incidentally, or "[…] as a by-product. They do not protect substantive socio-economic interests; rather, the protection of these interests flows from ensuring procedural safeguards or combating discrimination".[31]

In two separate 1986 cases, one against The Netherlands[32] and the other against Germany[33] the ECtHR opened the door for the protections under Article 6 to extend to the area of social security benefits.[34] The former case involved a complainant's right to health insurance allowances while the latter dealt with the right to a widow's supplementary pension on the basis of compulsory insurance against industrial accidents. Soon thereafter, in a case against Italy, the Court confirmed that "[…] today the general rule is that Article 6 para. 1 (art. 6-1) does apply in the field of social insurance".[35] This position was reiterated in a case against Switzerland where the Court held that "Article 6 para. 1 does apply in the field of social insurance, including even welfare assistance".[36]

With reference to Article 14 on the other hand, discriminatory actions by States may sometimes result into violations of ESRs. However, the Court has stressed that this Article "complements the other substantive provisions of the Convention and its protocols. It has no separate existence, since it has effect

30 *Connors v. The United Kingdom*, ECtHR Application No. 66746/01, Judgment of 27 May 2004, 26, para. 86.

31 Leijten, *supra* note 1, 42.

32 *Feldbrugge v. The Netherlands*, ECtHR Application No. 8562/79, Judgment of 29 May 1986.

33 *Deumeland v. Germany*, ECtHR Application No. 9384/81, Judgment of 29 May 1986.

34 *Feldbrugge v. The Netherlands*, *supra* note 32, 9, para. 27; *Deumeland v. Germany*, *supra* note 33, 17, para. 61.

35 *Salesi v. Italy*, ECtHR Application No. 13023/87, Judgment of 26 February 1993, 5, para. 19.

36 *Schuler-Zgraggen v. Switzerland*, ECtHR Application No. 14518/89, Judgment of 24 June 1993, 11, para. 46.

solely in relation to the 'rights and freedoms' safeguarded by those provisions".[37] In one case against France,[38] the ECtHR held that the difference in treatment with respect to entitlements to social benefits between French nationals and other foreign nationals was not based on any objective and reasonable justification and was thus a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. Similarly, in a case against the United Kingdom, the Court confirmed that while there is no right under Article 8 of the Convention to be provided with housing, "[…] where a Contracting State decides to provide such benefits, it must do so in a way that is compliant with Article 14".[39]

## 5. Article 8 and the Right to Water?

The ECtHR has recognized the possibility of a right to access safe drinking water and sanitation existing under the ECHR. In a 2020 case against Slovenia, the applicants, Slovenian nationals of Roma origin, claimed violations of Article 3, Article 8 and Article 14 as a result of the Slovenian government's failure to provide adequate access to drinking water and sanitation to the Roma community.[40] Unfortunately, the Court ruled against the applicants finding that Slovenia enjoys a wide margin of appreciation in socio-economic matters and that "[…] the level of realization of access to water and sanitation will largely depend on a complex and country-specific assessment of various needs and priorities […]",[41] However, despite this setback, this case holds promise for the present discussion on ESRs because even though the ECtHR may have closed the door on an explicit right to water, it nevertheless cracked open a window of possibility, by holding that even though access to safe drinking water is not overtly protected by Article 8 of the ECHR, "a persistent and long-standing lack of access to safe drinking water can therefore, by its very nature, have adverse consequences for health and human dignity effectively eroding the core of private life and the enjoyment of a home within the meaning of Article 8".[42]

37 *Koua Poirrez v. France*, ECtHR Application No. 40892/98, Judgment of 30 September 2003, 10, para. 36.

38 *Ibid.*, 12-13, para. 49-50.

39 *Bah v. The United Kingdom*, ECtHR Application No. 56328/07, Judgment of 27 September 2011, 16, para. 40.

40 *Hudorovič and Others v. Slovenia*, ECtHR Application Nos. 24816/14 and 25140/14, Judgment of 7 September 2020, 25, para. 106.

41 *Ibid.*, 38, para. 144.

42 *Ibid.*, 30, para. 116.

### 6. Article 1 Protocol No. 1 and the Rights to Housing and Social Security?

This provision is titled *protection of property* and provides for the right of every natural or legal person to the peaceful enjoyment of his possessions. The term *possessions* has been expansively interpreted to include specific ESRs in certain instances. For example, in one case the ECtHR included the housing rights of internally displaced persons within the meaning of the term possessions in light of the applicant's continued possession of a cottage for more than 10 years as well as the authorities' manifest tolerance.[43] Additionally, where an individual has an assertable right under domestic law to a welfare benefit, the ECtHR has also confirmed that such an interest is capable of protection within the ambit of Article 1 of Protocol No. 1.[44]

## III. Conclusion

The analysis in the preceding section II was carried out with the intention of illuminating the different possible avenues for ESRs to be read into the CPRs provisions of the ECHR. As is apparent, it is impossible to say that certain ESRs (whether right to housing, or water, or health or social security) will always be read into the various ECHR provisions. At the end of the day the circumstances of each individual case will dictate the outcome. Despite this uncertainty however, what the jurisprudence clearly highlights is the fact that despite the CPRs origins of the Convention, it is safe to say that the ECHR, and by extension the ECtHR, protects both CPRs and ESRs. In fact, as early as 1979 the Court explicitly stated that,

> "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation;

[43] *Saghinadze and Others v. Georgia*, ECtHR Application No. 18768/05, Judgment of 27 May 2010, 27, para. 108.

[44] *Stec and Others v. The United Kingdom*, ECtHR Application Nos. 65731/01 and 65900/01, Judgment of 12 April 2006, 14, para. 43, 53.

> there is no water-tight division separating that spherefrom the field covered by the Convention".[45]

This is a view that has been reaffirmed by the Court in numerous subsequent cases. For instance, in one 2005 case the ECtHR reiterated that,

> "whilst the convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature.The mere fact that an interpretation of the convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no watertight division separating that sphere from the field covered by the Convention".[46]

In these ESRs cases however, the ECtHR faces the difficult and often delicate task of trying to balance the protection of individual rights on the one hand, against the democratic decisions of national authorities on the other without overstepping its mandate or facing accusations of overreach. These difficult choices are only magnified in the face of crisis, where the various national authorities put in place measures to deal with whatever crisis is being faced.

Before delving into the ESRs jurisprudence of the ECtHR in the context of crises, it is necessary to highlight one final concern at this introductory point that may help to clarify the often hesitant approach of the Court in ESRs cases. A parallel can be drawn between the protection of ESRs at the domestic/national level and the protection of ESRs at the regional level through the ECtHR. Specifically, within the domestic context, concerns have been raised about the proper role of courts in adjudication of ESRs. There is a fear that the judicial protection of ESRs raises separation of powers concerns by requiring the judiciary to venture into the realm of constitutional tasks more properly the domain of the elected branches. Such tasks include *inter alia*, resource allocation decisions and matters of policy.[47]

45 *Airey v. Ireland*, ECtHR Application No. 6289/73, Judgment of 9 October 1979, 11-12, para. 26.

46 *Stec and Others v. The United Kingdom*, ECtHR Application Nos. 65731/01 and 65900/01, Decision on Admissibility of 6 July 2005, 14, para. 52.

47 P. O'Connell, *Vindicating Socio-Economic Rights: International Standards and Comparative Experiences* (2012), 2.

Turning now to the ECtHR, the Court's operation has to be understood within the context of

> "[…] the subsidiary nature of the supervisory mechanism established by the Convention and in particular the primary role played by national authorities […] and their margin of appreciation in guaranteeing and protecting human rights at [the] national level".[48]

Consequently, as a result of this margin of appreciation doctrine the ECtHR must navigate between "[…] ensuring effective fundamental rights protection while at the same time taking a deferential stance towards member states".[49] Because "[…] the way a state shapes its welfare policies lies at the heart of its democratic prerogatives, and involves a plethora of budgetary and other interests […]",[50] if in enforcing ESRs the Court issues far reaching judgements that encroach upon the democratic decisions of national authorities, tensions may arise. These concerns may partly explain the ECtHR's well-founded hesitance to find violations in all ESRs cases that may involve questions of redistribution of public resources within a State.

## B. ESRs in a Time of Crises: Situating the ESRs Jurisprudence of the ECtHR Within the Context of Specific Crises

### I. The Global Financial and Economic Crisis

#### 1. Contextualizing the Crisis

2008 was a defining year for Europe and the rest of the world. What began in the United States as a meltdown of the real estate and then the banking sector, quickly metamorphosed into a financial crisis of global proportions that catalyzed ramifications throughout the world.[51] Despite the varied responses of

48 Council of Europe, *Brussels Declaration, Adopted at the High-Level Conference on the "Implementation of the European Convention on Human Rights, Our Shared Responsibility."* (last visited 27 March 2015), 1, available at https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf

49 Leijten, *supra* note 1, 214.

50 *Ibid.*

51 Council of Europe Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis* (2013), 7.

different governments in a bid to contain the effects of the crisis, the world entered into a period of economic recession[52] and in multiple countries human rights were the sacrificial lamb offered upon the altar of fiscal austerity measures and macro-economic discipline.

Fiscal austerity measures typically fall into the following categories, each with its own unique consequences for the enjoyment of human rights, "severe cuts to social expenditure, regressive tax hikes, pension and other social welfare reforms, and the stripping away of labour rights protections".[53] In many Council of Europe member States, public social spending was the primary target of austerity measures. This occurred

> "[…] through wage bill cuts or caps, especially for education, health and other public sector workers, the rationalisation of social protection schemes, the elimination or reduction of subsidies on fuel, agriculture and food products, stricter accessibility conditions for a number of social benefits, and other cuts to education and health-care systems".[54]

Reforms of the tax regime were also a major part of the austerity tool kit as governments sought to reduce budget deficits experienced as a result of the economic crisis. In addition, many governments engaged in labour reforms that had the effect of eroding collective bargaining powers, easing dismissals, slowing or reversing salary adjustments to inflation and altering other employment protection regulation in a questionable bid to drive business development.[55]

As a result of the implementation of these austerity measures the enjoyment of both CPRs and ESRs was severely curtailed. Unsurprisingly, already vulnerable and marginalised groups of people were hit disproportionately hard, compounding the already pre-existing patterns of discrimination in the political, economic and social spheres. The Council of Europe Parliamentary Assembly even criticized the austerity measures implemented by some member States pointing out that

52 S. Verick & I. Islam, 'The Great Recession of 2008-2009: Causes, Consequences and Policy Responses', *IZA Discussion Paper* (2010) 4934, 5.

53 I. Saiz & L. Holland, 'Under the Knife: Human Rights and Inequality in the Age of Austerity', *5 State of Civil Society Report* (2016), 148.

54 Council of Europe Commissioner for Human Rights, *supra* note 51, 16.

55 International Labour Organization (International Institute for Labour Studies), "World of Work Report 2012: Better Jobs for a Better Economy" (2012), 35-36.

> "[…] the restrictive approaches currently pursued, predominantly based on budgetary cuts in social expenditure, may not reach their objective of consolidating public budgets, but risk further deepening the crisis and undermining social rights as they mainly affect lower income classes and the most vulnerable categories of the population".[56]

Human rights should always be respected and upheld by all States, even in (and especially in) times of crises.

> "Periods of financial dire straits […] should not be seen as emergency situations that automatically entail the curtailment of social and economic rights and the deterioration of the situation of vulnerable social groups. On the contrary, such periods of time should be viewed by states as windows of opportunity to overhaul their national human rights protection systems and reorganise their administration in order to build or reinforce the efficiency of national social security systems, including social safety nets that should be operational when necessary".[57]

Where States fail in their obligations in this regard, it becomes necessary to turn to courts such as the ECtHR for vindication of rights.

## 2. The ECtHR and Cases Relating to Austerity Measures

Since the onset of the financial and economic crisis and the subsequent European sovereign debt crisis, the ECtHR has had multiple occasions to render judgements on the difficult questions that arise when austerity measures are argued to unjustifiably impact the enjoyment of ESRs. The cases in this section were selected on the basis of their reference both to austerity measures within the context of the financial and economic crisis, as well as ESRs as conceptualized in Part A above. Most of these cases primarily challenged the austerity measures on the basis of the protection of property provision under Article 1 Protocol No. 1 of the ECHR which provides that "every natural or legal person is entitled to

56 PA Resolution 1884 of 26 June 2012, 'Austerity Measures – a Danger for Democracy and Social Rights'.

57 N. Muižnieks, `Report by Commissioner for Human Rights of the Council of Europe, Following his Visit to Spain from 3 to 7 June 2013´ (2013), available at https://rm.coe.int/16806db80a (last visited 3 February 2022), 10, para. 38.

peaceful enjoyment of his possessions".[58] By and large these applications opposed the reduction of pensions and other social security benefits in the wake of the financial crisis.

## a. Cases Where the Application was Found to be Inadmissible

This paper posits that despite the ECtHR's willingness to vindicate ESRs in times of financial crisis, the jurisprudence appears to indicate that in these situations the Court gives States a wider margin of appreciation to deal with the crisis, and consequently only issues judgements favorable to the applicants in exceptional situations as will be further elaborated upon in Part C.

In one 2013 case against Greece, the applicants alleged that the austerity measures introduced by the Greek government in response to the financial crisis violated their rights under Article 1 of Protocol No. 1 (among others).[58] These measures included reductions in the remuneration, benefits, bonuses and retirement pensions of public servants, with a view to reducing public spending. The ECtHR held that the restrictions introduced by the legislation in question should not be considered as a deprivation of possessions as was claimed by the applicants. Rather this was a justifiable interference with the right to peaceful enjoyment of possessions. The Court stressed that the "[…] adoption of the impugned measures was justified by the existence of an exceptional crisis without precedent in recent Greek history"[59] and that there is "[…] no reason to doubt that [,] in deciding to cut public servants' wages and pensions [,] the legislature was acting in the public interest".[60]

In another 2013 case, this time against Portugal, the ECtHR rendered a judgement very similar to the one in the Greek case above. Here, the applicants alleged that the cuts imposed on certain pension entitlements as part of austerity measures under the Portuguese State budget of 2012 were a violation of their rights under the ECHR.[61] Ruling against the applicants the Court held that the complaint was inadmissible by reason of being manifestly ill-founded since the applicants had not been made to bear an excessive and disproportionate burden. Again, the Court emphasized that "the cuts in social security benefits provided by the 2012 *State Budget Act* were clearly in the public interest within

58 *Koufaki and ADEDY v. Greece*, ECtHR Application Nos. 57665/12 and 57657/12, Judgment of 7 May 2013, 9, para. 20.

59 *Ibid.*, 12, para. 37.

60 *Ibid.*, 13, para. 41.

61 *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, ECtHR Applications Nos. 62235/12 and 57725/12, Judgment of 8 October 2013, 10, para. 12.

the meaning of Article 1 of Protocol No. 1". They also reiterated that "Like in Greece, these measures were adopted in an extreme economic situation, but unlike in Greece, they were transitory".[62]

In a case against Romania, the applicants were retired court officials who raised a challenge to the recalculation of their pension payments which resulted into the reduction of their overall pension because of the elimination of the state-funded non-contributory portion from the total.[63] This was a consequence of the enactment of Law no. 119/2010 which intended to maintain a balanced State budget at a time of economic crisis. Relying on Article 6 and Article 14, the applicants complained of a breach of the principle of legal certainty as a result of the conflicting decisions of the courts of appeal in Romania, some of which had upheld claims brought by people in an identical position to them. In ruling against the applicants, the ECtHR held that the present case did not involve any discrepancy in the practice adopted by the courts in similar situations, but rather the application of clearly defined statutory provisions to circumstances that varied according to the applicants' personal situation. In addition, the Court pointed out that it had deemed acceptable a period of two years, or even longer, of divergent practice by national courts before a mechanism was introduced to ensure consistency.[64]

In a 2015 case against Portugal the complaint was based on the reduction of retirement pensions pursuant to the implementation of austerity measures in Portugal.[65] One such measure was the extension of the application of an already existing extraordinary solidarity contribution (CES) to include pensioners receiving a gross amount of EUR 1,350 and later even EUR 1,000. The applicant alleged that these measures had breached her right to protection of property under Article 1 of Protocol No. 1. The ECtHR declared the application inadmissible as being manifestly ill-founded. The Court held that though there was an interference with the right in question it had clearly been done in the public interest since the measures intended to reduce public spending and achieve medium term economic recovery had been adopted in an extreme economic situation as a transitory measure. The Court also noted that the applicant had not herself suffered a substantial deprivation of income.

62 *Ibid.*, 13, para. 26.

63 *Frimu and four other applications v. Romania*, ECtHR Application Nos. 45312/11, 45581/11, 45587/11 and 45/588/11, Judgment of 13 November 2012, para. 29.

64 A.M. Rosu, *The European Convention on Human Rights in Times of Economic Crisis and Austerity Measures* (2015), 36.

65 *Da Silva Carvalho Rico v. Portugal*, ECtHR Application No. 13341/14, Judgment of 1 September 2015, 10, para. 25.

A similar holding of inadmissibility on the grounds of the claim being manifestly ill-founded was made in a case against Lithuania.[66] The case arose after the reduction of welfare benefits during the economic crisis in Lithuania. Here, the applicant was a former officer of the prison's department who complained that her service pension had been reduced by 15% when new legislation was in force in Lithuania between January 2010 and December 2013. The challenge was based on Article 1 Protocol No. 1 and Article 14. The ECtHR declared the application inadmissible and held that the State had not failed to strike a fair balance between the applicant's fundamental rights and the general interest of the community. The Court further stressed that there was no indication that Ms. Mockienė had had to bear an individual and excessive burden at a time of serious economic difficulties faced by Lithuania during the global financial crisis.

In a 2018 decision against Italy the ECtHR again declared the application inadmissible observing that the legislature had been obliged to intervene in a difficult economic context.[67] The legislative decree in question, that reformed the uprating of State pension payments for 2012 and 2013, had sought to provide for redistribution in favor of lower pensions while preserving the sustainability of the social welfare system. The Court found that the effects of the reform were not so severe that the applicants` rights under Article 1 Protocol No. 1 had been violated.

## b. Cases Where a Finding of Violation was Rendered

In two cases, both against Hungary,[68] applications were made to the ECtHR against a Tax Act adopted by the Hungarian Parliament introducing a new retroactive tax on certain payments to public sector employees whose employment had been terminated. The Hungarian government argued that the tax was justified because "in the midst of a deep world-wide economic crisis, additional burdens should be borne not only by the State but also by other market participants"[69] and that "a wide margin of appreciation should be left

66 *Mockienė v. Lithuania*, ECtHR Application No. 75916/13, Judgment of 27 July 2017, 4, para. 15.

67 *Aielli and Others v. Italy*, ECtHR Application Nos 27166/18 and 27167/18, Judgment of 10 July 2018.

68 *N.K.M. v. Hungary*, ECtHR Application No. 66529/11, Judgment of 14 May 2013; *R. Sz. v. Hungary*, ECtHR Application No. 41838/1, Judgment of 2 July 2013.

69 *Ibid.*, 12, para. 27.

to the national authorities in this respect".[70] The Court however found that the impugned provisions violated Article No. 1 of Protocol No. 1 and could not be justified by the legitimate public interest relied upon by the government. The Court was particularly concerned by the fact that the measures complained of entailed an excessive and individual burden on both applicants, and could therefore not be reasonably proportionate to the aim sought to be realized.

## II. The Migrant and Refugee Crisis

### 1. Contextualizing the Crisis

In 2015 and 2016 Europe experienced its largest migration crisis since the Second World War.[71] The year 2015 was even described as "a year of unprecedented forced displacement"[72] precipitated by ethnic violence, armed conflict, civil war and persecution all around the world.[73] In that year alone European Union States reported that 1,255,600 individuals registered as first time asylum seekers, a number more than double that of the previous year,[74] with over a third of the total registering in Germany alone.[75] To put these numbers into perspective, a comparison can be made with the approximately 335,290 applications received in 2012, 431,090 received in 2013 and 626,960 received in 2014.[76] A vast majority of the asylum seekers who sought refuge in the European

70 *N.K.M. v. Hungary*, *supra* note 68, 12, para. 28.

71 V. Modebadze, 'The Refugee Crisis, Brexit and the Rise of Populism: Major Obstacles to the European Integration Process', 5 *Journal of Liberty and International Affairs* (2019) 1, 92.

72 M. Fullerton, 'Refugees and the Primacy of European Human Rights Law', 21 *UCLA Journal of International Foreign Affairs* (2017) 1, 45, 46.

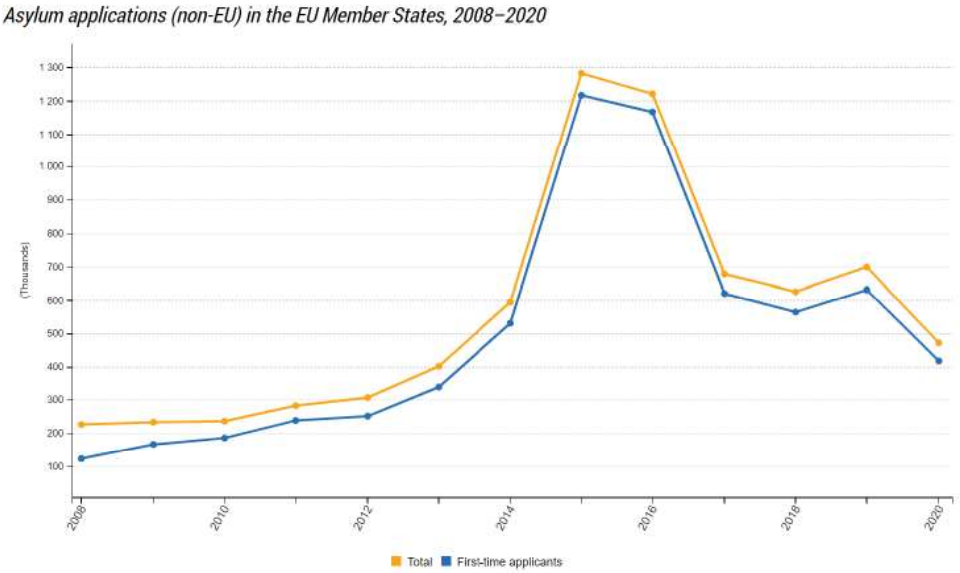
73 UNHCR, 'Global Trends: Forced Displacement in 2015' (2016), available at https://www.unhcr.org/statistics/unhcrstats/576408cd7/unhcr-global-trends-2015.html (last visited 27 September 2021).

74 Eurostat, 'Asylum in the EU Member States', Eurostat News Release 44/2016 (2016), available at https://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6 (last visited 27 September 2021).

75 *Ibid.*

76 European Parliament, 'A Welcoming Europe? Evolution of the Number of Asylum Seekers and Refugees in the EU' (2019), available at https://www.europarl.europa.eu/infographic/welcoming-europe/index_en.html#filter=2019 (last visited 27 September 2021).

States originated from Syria, Afghanistan and Iraq.[77] Most of these people made their way into Europe by crossing the Mediterranean Sea, specifically departing from Turkey and arriving in Greece.[78]




Source: Eurostat[79]

Refugees arriving in Europe have to contend with two overlapping legal regimes: the Council of Europe regime (including the ECHR and the case law developed by the ECtHR) as well as the European Union regime (pertinent regulations and directives as well as the *EU Charter of Fundamental Rights*). In light of this paper's already articulated sole focus on the ESRs jurisprudence of the ECtHR through its enforcement of the ECHR, the analysis in section 2 below will be restricted to the protection given to refugees within the ambit of the ECHR. Unlike the EU regime which expressly guarantees a right to

77 P. Connor, 'Number of Refugees to Europe Surges to Record 1.3 million in 2015' (2016), available at https://www.pewresearch.org/global/2016/08/02/1-asylum-seeker-origins-a-rapid-rise-for-most-countries/ (last visited 27 September 2021).

78 Fullerton, *supra* note 72, 50.

79 Eurostat, 'Asylum applications (non-EU) in the EU Member States, 2008-2020' (2021), available at https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Asylum_statistics (last visited 20.01.2022).

asylum,[80] the ECHR does not contain such a right. However, as demonstrated by the jurisprudence of the ECtHR refugees and asylum seekers have been able to secure certain ESRs protections of the ECHR despite this absence.

## 2. The ECtHR and Cases Relating to the ESRs of Migrants and Asylum Seekers

Even before the 2015 migrant and refugee crisis the ECtHR had occasion to deal with a number of cases potentially touching upon the ESRs of migrants and asylum seekers. The most common avenue for the burgeoning of the ESRs of migrants and asylum seekers is the expansive interpretation of Article 3 of the ECHR to include the living conditions of migrants and asylum seekers. While living conditions is a broad term, I argue that it is broad enough to encompass ESRs. This is in line with Article 25 (1) of the *Universal Declaration of Human Rights* (UDHR) which recognizes that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family" and which goes on to identify elements of this right to include ESRs such as food, clothing, housing, medical care as well as necessary social services. The cases in this section were selected on the basis of their explicit mention of both the migrant/refugee crisis and ESRs as conceptualized as a part of living conditions.

### a. Cases Where a Finding of Violation was Rendered

In a seminal 2011 case against Belgium and Greece,[81] the ECtHR for the first time examined the compatibility of the then *Dublin II* Regulations (a European Union law that determines which EU State is responsible for the examination of an asylum application) with the ECHR. In this case, the applicant, an Afghan asylum seeker, entered the European Union through Greece and then traveled to Belgium where he applied for asylum. Pursuant to the *Dublin II* regulation, Greece was held to be the responsible member State for his asylum application, resulting into his transfer to Greece by the Belgian authorities. Consequently, the applicant faced detention in what he described as appalling conditions, before living on the streets without any material State support. He alleged violations of Article 2 (right to life), Article 3 (prohibition of inhuman or degrading treatment or punishment) and/or Article 13 (the right to

[80] *Charter of Fundamental Rights of the European Union* of 14 December 2007, OJ 2007 C 303/01, Article. 18.

[81] *M.S.S. v. Belgium and Greece*, ECtHR Application No. 30696/09, Judgment of 21 January 2011.

an effective remedy). The Court found a violation of Article 3 by Greece due to numerous factors including poor living conditions and a violation by Belgium for exposing the applicant to the risks arising from the deficiencies in the asylum procedure in Greece. Pertinent to the discussion at hand, on the ESRs of migrants and asylum seekers, is the reiteration of the ECtHR that Article 3 cannot be interpreted as obliging the European States to provide everyone within their jurisdiction with a home[82] or to give refugees financial assistance to enable them to maintain a certain standard of living.[83] However, the Court went on to acknowledge that "the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered positive law"[84] and that considerable importance should be attached to "the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection".[85]

After *M.S.S.*, the ECtHR found Greece liable for violations of Article 3 in four other complaints involving the poor living conditions of asylum seekers. In three of these cases[86] the judgments of the Court borrowed heavily from the findings in the *M.S.S.* case. Here, the Court highlighted the limited availability of facilities in Greece to receive and house tens of thousands of asylum seekers and also noted the practical obstacles for these asylum seekers to access the labour market. The fourth case[87] was a little different from the others because it concerned an unaccompanied minor. While finding violations partly based on the living conditions of the applicant after his release from detention, the Court also emphasized the applicant's vulnerability as an unaccompanied minor who was illegally present in an unfamiliar foreign country.

In a 2012 case against Italy[88] the applicants (11 Somalian and 13 Eritrean nationals) travelling from Libya had been intercepted at sea by the Italian authorities and sent back to Libya. The Court found the State liable for two

82 *Chapman v. United Kingdom*, ECtHR Application No. 27238/95, Judgment of 18 January 2001, 27, para. 99.

83 *Tarakhel v. Switzerland*, ECtHR Application No. 29217/12, Judgment of 4 November 2014, 42, para. 95.

84 *M.S.S. v. Belgium and Greece*, *supra* note 81, 51, para. 250.

85 *Ibid.*, 51, para. 251.

86 *F.H. v. Greece*, ECtHR Application No. 78456/11, Judgment of 31 July 2014; *AL.K. v. Greece*, ECtHR Application No. 63542/11, Judgment of 11 March 2015; *Amadou v. Greece*, ECtHR Application No. 37991/11, Judgment of 4 February 2016.

87 *Rahimi v. Greece*, ECtHR Application No. 8687/08, Judgment of 5 July 2011.

88 *Hirsi Jamaa and Others v. Italy*, ECtHR Application No. 27765/09, Judgment of 23 February 2012.

violations of Article 3 because the applicants had been exposed to the risk of ill treatment in Libya and of repatriation to Somalia or Eritrea. Specific to the discussion on ESRs, the Court was concerned about "many cases of torture, poor hygiene conditions and lack of appropriate medical care".[89] Interestingly, and unlike the cases arising out of the financial and economic crisis in Section I above, the ECtHR stressed that the existence of the refugee crisis and its attendant burden on States did not absolve them from their obligations under Article 3. The Court observed:

> "[…] that the States which form the external borders of the European Union are currently experiencing considerable difficulties in coping with the increasing influx of migrants and asylum-seekers. It does not underestimate the burden and pressure this situation places on the States concerned, which are all the greater in the present context of economic crisis […]. It is particularly aware of the difficulties related to the phenomenon of migration by sea, involving for States additional complications in controlling the borders in southern Europe. However, having regard to the absolute character of the rights secured by Article 3, that cannot absolve a State of its obligations under that provision".[90]

As highlighted in Section I above, the ECtHR appeared willing to give States a higher margin of appreciation where challenges on the basis of Article No. 1 of Protocol No. 1 were made to State actions in times of exceptional financial crisis. In the case of the refugee crisis however, even though the Court acknowledges the exceptional difficulties faced by States in this regard, the ECtHR stresses that where absolute rights such as Article 3 are involved the margin of appreciation given to States is correspondingly narrower.

In one 2016 case against Russia[91] the ECtHR again found a violation of Article 3 of the ECHR in the context of migrants' poor living conditions. The applicants were a heavily pregnant Georgian woman together with her four young children, who were compelled to leave Russia because of their illegal presence. In the course of their exit they were detained for two weeks during which period they lived in very poor conditions with no assistance from the

89 *Ibid.*, 35, para. 125.
90 *Ibid.*, 35, para. 122.
91 *Shioshvili and Others v. Russia*, ECtHR Application No. 19356/07, Judgment of 20 December 2016.

Russian authorities. The Court emphasized the vulnerable condition of the applicants in the context of the mother's pregnancy, the young age of the children and the limited resources at their disposal.[92]

In July 2020[93] the Court found France liable for violations of Article 3 of the ECHR on the basis of the poor living conditions experienced by homeless asylum applicants as a result of the failures of the French authorities. The application concerned 5 asylum seekers (although one applicant, G.I. dropped out of the proceedings and his case was struck off the list) who complained that they had been unable to receive the material and financial support which they were entitled to as asylum seekers under French law. As a result they had been compelled to live in inhuman and degrading conditions for several months: sleeping rough, no access to sanitary facilities, having no means of subsistence and constantly being in fear of being attacked or robbed. The ECtHR held for three of the applicants (N.H., K.T. and A.J.) such living conditions combined with the lack of an appropriate response from the French authorities had exceeded the severity threshold required for Article 3 of the ECHR to be violated. For the fourth applicant S.G. the Court held that his circumstances did not reach the severity threshold because he had received a temporary allowance after only 63 days as compared to 95, 131 and 90 days respectively for the other applicants mentioned above.

## b. Cases Where the Application was Found to be Inadmissible

In a 2016 case against Italy[94] which concerned the migration journey of three Tunisian applicants, the ECtHR was called upon to decide on a number of issues including whether the applicants had suffered inhuman and degrading treatment, on the basis of the living conditions experienced by them, during their detention on the Island of Lampedusa and on board two ships moored in Palermo harbor. The Court found that there had been no violation of Article 3 of the ECHR given the short duration of confinement. Interestingly, the Court held that "the applicants, who were not asylum seekers, did not have the specific vulnerability inherent in that status, and did not claim to have endured

92 *Ibid.*, 14, para. 83.

93 *N.H. and Others v. France*, ECtHR Application Nos 28820/13, 75547/13 and 13114/15, Judgment of 2 July 2020.

94 *Khlaifia and Others v. Italy*, ECtHR Application No. 16483/12, Judgment of 15 December 2016.

traumatic experiences in their country of origin".[95] The Court also stressed that "they belonged neither to the category of elderly persons nor to that of minors".[96]

A noteworthy case against the Netherlands[97] provided the ECtHR with an opportunity to highlight situations where the poor living conditions of an asylum seeker would not be capable of amounting to a violation of Article 3. In this case the applicant was a failed asylum seeker squatting in an indoor car park who complained that he had been forced to live in inhuman conditions. The Court was emphatic that the applicant was not entitled to any social assistance in the Netherlands. Differentiating this case from the *M.S.S.* one, the Court elaborated that "unlike the applicant in *M.S.S.* who was an asylum-seeker, the applicant in the present case was at the material time a failed asylum-seeker under a legal obligation to leave the territory of the Netherlands."[98] The relevant authorities has not shown ignorance towards the applicant's situation: He was granted a four week grace period after the final rejection of his asylum application during which time he retained his right to reception benefits, he had the option of applying for reception benefits at a centre where his liberty would be restricted, the Netherlands had set up a special scheme providing for the basic needs of irregular migrants. In these circumstances the State had not violated its obligations under Article 3.

### c. Cases Involving ESRs of Migrants and Asylum Seekers Outside the Context of Living Conditions

Other than in the context of living conditions of asylum seekers and persons due to be removed from the territory of a State, the ECtHR has also dealt with ESRs of migrants and asylum seekers primarily through the anti-discrimination provision of Article 14.[99] Where a Contracting State decides to provide social benefits, it must do so in a way that does not contravene Article 14.

> "A State may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programs, public

95 *Ibid.*, 67, para. 194.
96 *Ibid.*
97 *Hunde v. Netherlands*, ECtHR Application No. 17931/16, Judgment of 5 July 2016.
98 *Ibid.*, 16, paras 55-56.
99 ECtHR, 'Guide on the Case-law of the European Convention on Human Rights – Immigration' (2020), available at https://echr.coe.int/Documents/Guide_Immigration_ENG.pdf (last visited 27 September 2021).

> benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding. It may also, in certaincircumstances, justifiably differentiate between different categories of aliens residing in its territory."[100]

In this case against Bulgaria however, the applicants argued that the requirement for them to pay school fees for their secondary education was unjustified and thus contrary to Article 14 of the ECHR in conjunction with Article 2 of Protocol No.1. The Court agreed that in the specific circumstances of this case (the applicants were not living in Bulgaria unlawfully, the authorities had no substantive objection to their remaining in Bulgaria and had no serious intention of deporting them, the applicants had not tried to abuse the Bulgarian educational system, they were fully integrated in Bulgarian society and spoke fluent Bulgarian) the requirement for the applicants to pay fees on account of their nationality and immigration status was not justified and thus there had been a violation of the pertinent provisions.

## III. The COVID-19 Pandemic

### 1. Contextualizing the Crisis and State Responses

Coronavirus disease (COVID-19), which is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) was first identified in December 2019 in Wuhan, China.[101] On 11th March 2020 the World Health Organization (WHO) declared the coronavirus (COVID-19) outbreak a global pandemic[102] and urged States to implement urgent measures to deal with the virus. Since then, and for almost a year now, European States (and indeed, States all around the world) have adopted and implemented numerous measures in an effort to counter the pandemic and to cope with increasing pressures on their respective public health systems. The most common measures implemented across the board include cancellations of mass gatherings; closure of public

100 *Ponomaryovi v. Bulgaria*, ECtHR Application No. 5335/05, Judgment of 21 June 2011, 15, para. 54.

101 WHO, 'Listings of WHO's Response to COVID-19' (2020), available at https://www.who.int/news/item/29-06-2020-covidtimeline (last visited 27 September 2021).

102 WHO, 'Director-General's opening remarks at the media briefing on COVID-19' (2020), available at https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited 27 September 2021).

spaces such as restaurants, entertainment venues and other non-essential shops; closure of educational institutions; stay at home recommendations for both the general population as well as for particularly vulnerable groups; mandatory use of protective masks in public spaces including public transport; and also recommendations for teleworking or home office rather than physical presence at workplaces.[103]

Inevitably, some of these measures have interfered with the enjoyment of human rights and will eventually be challenged first, in national courts and subsequently at the ECtHR. For instance, lockdown requirements can be argued to clash with and restrict a number of fundamental liberties under the ECHR, in particular freedom of movement and freedom of peaceful assembly. The right to family life may also be implicated due to restrictions on movement of persons.[104] In fact, the ECtHR has already had occasion to hear and finally determine one such case brought against Romania[105] where the applicant challenged the lockdown imposed by the Romanian government from 24 March to 14 May 2020 to tackle the COVID-19 pandemic and which entailed restrictions on leaving one's home. The Court ruled against the applicant holding that the level of restrictions on his freedom of movement could neither be equated with house arrest nor deemed to constitute a deprivation of liberty within the meaning of Article 5 (1) of the Convention.

Within the specific sphere of ESRs, questions are also likely to arise about the scope of positive State obligations under the right to health within the context of a pandemic. This could include concerns about the sufficiency of health care facilities available in a State and how access to them is controlled, access to personal protective equipment and access to and distribution of vaccines.

## 2. The ECtHR and ESRs Dimensions of COVID-19 Regulations

It is too early to engage in any meaningful and comprehensive assessment of the ECtHR jurisprudence on COVID-19. Undoubtedly, in the coming months and years the Court will have more opportunities to rule on the human

103 European Centre for Disease Prevention and Control, 'Data on Country Response Measures to COVID-19' (2021), available at https://www.ecdc.europa.eu/en/publications-data/download-data-response-measures-covid-19 (last visited 27 September 2021).

104 S. Jovičić, 'COVID-19 Restrictions on Human Rights in the Light of the Case Law of the European Court of Human Rights', 21 *ERA Forum Journal of the Academy of European Law* (2021) 4, 545.

105 *Cristian-Vasile Terhes v. Romania*, ECtHR Application No. 49933/20, Judgment of 13 April 2021.

rights impacts of the various measures implemented by European States in combatting the pandemic.[106] Some applications have already been made to the Court.[107]

Thus far however, only one ESRs case[108] has been decided by the Court on the COVID-19 measures. Here, the applicant unsuccessfully invoked Articles 2 (right to life), 3 (the prohibition of torture), 8 (right to respect for private life) and 10 (freedom of expression) of the ECHR, challenging the French government's response to the outbreak of the coronavirus. Specifically, rather than complaining about how the measures interfered with the various ECHR rights and freedoms, the focus here was based on omissions of the State in the management of the COVID-19 crisis. Invoking the positive obligations of the State, the applicant alleged a violation of the right to life of the French population because of the limitations on access to diagnostic tests, prophylactic measures and certain treatments. He also alleged a violation of the privacy of people who die alone from the virus.[109]

It is noteworthy for the present discussion that the ECtHR interpreted the applicant's complaint in terms of the right to health. The Court held that while the right to health is not one of the rights guaranteed under the ECHR, States nevertheless have a positive obligation to take the necessary measures to protect the life and physical integrity of persons within their jurisdiction, including in the field of public health. However, the Court did not go further to decide on whether the State had failed to fulfill these positive obligations because the application was found to be inadmissible.[110] The application was considered to amount to an actio popularis and the applicant could not be regarded as a victim of the alleged violation within the meaning of Article 34 of the ECHR. In particular, he had failed to provide any information about his own condition and had failed to explain how the alleged shortcomings of the French authorities might have affected his health and private life.[111]

106 K. Zehtsiarou, 'COVID-19 and the European Convention on Human Rights' Strasbourg Observers Blog (2020), available at https://strasbourgobservers.com/2020/03/27/covid-19-and-the-european-convention-on-human-rights/ (last visited 27 September 2021).

107 *Toromag, S.R.O. v. Slovakia and Four Other Applications*, ECtHR Application No. 41217/20, communicated on 5 December 2020.

108 *Le Mailloux v. France*, ECtHR Application No. 18108/20, Judgment of 5 November 2020.

109 *Ibid.*, 2, para. 7.

110 *Ibid.*, 3, para. 9.

111 *Ibid.*, 3, para. 10.

While only time will reveal the direction that the ECtHR's COVID-19 jurisprudence will take, this paper speculates that various dimensions of the ESR to health are likely to be front and centre in these future cases. One potentially provocative issue that may arise in this regard is the question of compulsory COVID-19 vaccinations and whether the imposition of such an obligation by States would amount to a violation under the ECHR. Even though the jury is still out on this question, the recent judgment in the case against the Czech Republic[112] offers some useful insights into how the ECtHR is likely to approach questions of compulsory vaccinations. Here, the Court observed that compulsory vaccination, as an involuntary medical intervention, represents an interference with physical integrity and thus concerns the right to respect for private life protected by Article 8.[113] However, the Court affirmed that the Czech policy in question pursued the legitimate aim of protecting health as well as the rights of others and reiterated that "healthcare policy matters come within the margin of appreciation of the national authorities"[114] and in this case the margin should be a wide one.

## C. The Way Forward: the Lingering Potential of the ESRs Jurisprudence of the ECtHR to Mitigate the Effects of Crises on Individuals

### I. Some Reflections on the ESRs Jurisprudence of the ECtHR in Times of Crises

Despite the dark clouds that loom when crises abound, there are some silver linings to be found in these situations. Like many courts, the ECtHR is reactive rather than proactive. It cannot take up a case on its own initiative, and is only capable of exercising jurisdiction where complaints or applications concerning alleged violations of the ECHR by a State party to the convention are submitted to it by aggrieved applicants. This paper posits that in times of crises, even more than usual, individual rights are likely to be violated as States grapple with new problems and how to resolve them. State responses in these situations have the potential to inadvertently or otherwise expose already vulnerable groups to additional hardship, thereby creating more instances where rightsholders

112 *Vavřička and Others v the Czech Republic*, ECtHR Applications Nos 47621/13, 3867/14, 73094/14, 19306/15, 19298/15 and 43883/15, Judgment of 8 April 2021.

113 *Ibid.*, 58, para. 263.

114 *Ibid.*, 63, para. 280.

may claim violation and seek recourse in both national courts and (thereafter) supranational courts such as the ECtHR. For instance, it has been argued that the global financial and economic crisis together with the increased acceptance of ESRs in general, has led to an increased number of ESRs complaints and proceedings at the ECtHR.[115]

As illustrated by the analysis in Part B above, since the commencement of both the financial and economic crisis as well as the migrant and refugee crisis (and even before that), the ECtHR has shown its willingness to intervene in certain situations and hold States liable for ESRs violations under the ECHR. However, there is no consistent or uniform practice that can be gleaned from the jurisprudence. The Court's case law is largely characterized by incremental, case by case reasoning.[116]

While this is unsurprising given the interaction between the ECtHR and national authorities in light of the margin of appreciation doctrine, and the Court's judicial role that requires a focus on "individual redress rather on general lawmaking,"[117] it is nevertheless disappointing that the ECtHR has thus far failed to "tackle social rights issues according to a coherent theory of adjudication, instead of having recourse to case-by-case solutions that lack comprehensive reasoning."[118] The Court has even been criticized for promising more than it is willing or able to deliver: "the ECtHR's interpretation generally allows prima facie protection of economic and social interests, but eventually these are frequently outbalanced by other (general) interests."[119] Is it fair to accuse the Court of "talking the talk but not walking the walk"? Clearly, the ECtHR finds itself between a rock and a hard place. "There is an inherent tension between this reality of indivisibility (of CPRs and ESRs) on the one hand, and, on the other, the need for the Court to draw the line somewhere with regard to its competence to deal with social rights."[120]

Despite these concerns, and on the basis of the cases reviewed in Part B above, this paper tentatively proposes that the ECtHR is likely to find violations

115 Leijten, *supra* note 1, 81.

116 *Ibid.*, 81.

117 *Ibid.*

118 V. Mantouvalou, 'Work and Private Life: Sidabras and Dziautas v. Lithuania', 30 *European Law Review* (2005) 1, 573, 584.

119 Leijten, *supra* note 1, 81.

120 E. Brems, 'Indirect Protection of Social Rights by the European Court of Human Rights', in D. Barak-Erez & A. M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (2007), 135, 165.

of ESRs under the ECHR in times of crisis when the following criteria are present in any given case:

The jurisprudence in Part B reveals that the ECtHR is likely to find ESRs violations of the ECHR by State parties whenever the actions implemented by the national authorities result into the imposition of an excessive burden on the applicant. This has been held in *Koufaki and Adedy v. Greece* and reiterated in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* as well as in *Da Silva Carvalho Rico v. Portugal* and *Mockienė v. Lithuania*. The existence of precisely this kind of unacceptable excessive burden on the individual applicants formed part of the reasoning behind findings of violations in *N.K.M. v.Hungary* as well as in *R.Sz. v. Hungary*. The question of what constitutes an excessive burden or not is basically one that requires the court to balance individual interests against the public interest. As elaborated upon in one case,

"Any interference must also be reasonably proportionate to the aim sought to be realized. In other words, a fair balance must be struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The requisite balance will not be found if the person or persons concerned have had to bear an individual and excessive burden."[121]

Another recurring theme militating in favor of findings of ESRs violations is the vulnerability of the applicant. This concept of vulnerable groups was first introduced in 2001, in a case against the United Kingdom[122] to refer to the Roma minority. Since then the term has been extended to numerous different groups including persons with mental disabilities, people living with HIV and asylum seekers.[123] Although each case is assessed on the basis of its individual merits, the ECtHR has recognized that some applicants are in need of special protection because they belong to inherently vulnerable groups. For instance, in the *M.S.S.* case the Court stressed that it "must take into account that the applicant, being an asylum seeker was particularly vulnerable because of everything he had been through..."[124] and the fact that considerable importance must be attached to the applicant's status as "a member of a particularly underprivileged and vulnerable

121 *Koufaki and ADEDY v. Greece*, *supra* note 60, 6, para. 32.

122 *Chapman v. United Kingdom*, ECtHR Application No. 27238/95, Judgment of 18 January 2001.

123 L. Peroni & A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights convention Law', 11 *International Journal of Constitutional Law* (2013) 4, 1057.

124 *M.S.S. v. Belgium and Greece*, *supra* note 83, 47, para. 232.

population group in need of special protection."[125] Such vulnerable groups may be minorities who have been systematically subjected to ill-treatment, or special groups such as minors as was the case in *Rahimi v. Greece*, pregnant women as was the case in *Shioshvili and Others v. Russia*, disabled persons or the elderly. In Juxtaposition, in situations where the Court finds that the applicant does not belong to a vulnerable group, the chances of a finding of violation are correspondingly lower as was the case in *Khlaifia and Others v. Italy*.[126]

The ECtHR has continuously stressed that the ECHR does not impose any obligations upon State parties to provide any particular ESRs. However, where a State chooses to provide ESRs, this must be done in a way that does not unjustifiably violate the prohibition against discrimination. For instance, the Court has confirmed that "although Article 1 Protocol No. 1 does not include the right to receive a social security payment of any kind, if a State does decide to create a benefits scheme it must do so in a manner compatible with Article 14."[127] A similar holding was made in the context of the right to housing under Article 8.[128] Thus, where a State has undertaken to provide a particular benefit to the population generally, and fails to provide it to a particular applicant without reasonable justification, the Court is likely to find an ESRs violation as was the situation in *Ponomaryovi v. Bulgaria* concerning the right to education, and outlined in greater detail in Part B above.

Conversely, the cases analyzed in Part B also seem to suggest that there are certain factors likely to reduce the willingness of the ECtHR to find ESRS violations even in times of crisis. These include:

## 1. The Exceptionality of the Crisis Situation

This paper, rather provocatively, argues that when first confronted with a crisis situation the ECtHR is reluctant to find violations by State parties to the ECHR, whether or not these States make an Article 15 derogation. This may be partly attributed to the acceptance that in times of crisis there is a need for swift action which reduces the time available for deliberation, thus a wider margin of appreciation is likely to be given to States. In numerous cases, in issuing a finding of no violations, the Court emphasized the exceptional circumstances facing the State in question. For instance, in *Koufaky and ADEDY v. Greece* the

125 *Ibid.*, 51, para. 251.
126 *Khlaifia and Others v. Italy*, *supra* note 96.
127 *Stec and Others v. The United Kingdom*, *supra* note 44, 15, para. 55.
128 *Bah v. United Kingdom*, *supra* note 39, 16, para. 40.

Court highlighted the existence of an exceptional crisis without precedent in recent Greek history. Similarly, in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal*, the Court reiterated that "these measures were adopted in an extreme economic situation." These sentiments were subsequently echoed in *Da Silva Carvalho Rico v. Portugal, Mockienė v. Lithuania*, as well as in *Aielli and Others and Arboit and Others v. Italy*. However, despite the willingness of the Court to widen the margin of appreciation in light of exceptional crisis situations, this paper additionally posits that this depends on the legal basis of the violation claimed. On one hand, where the right in question is non-absolute in nature (for example, the right to property under Article 1 Protocol No. 1) and therefore capable of limitation where the necessary requirements are met, the Court is unlikely to find violations so long as the State's actions were justifiable in light of the exceptional context. On the other hand, where the right in question is an absolute right such as the right to be free from inhuman and degrading treatment and punishment under Article 3, the exceptionality of the situation will not allow any justifications for violations as was the case in *Hirsi Jamaa and Others v. Italy*.[129]

## 2. The Transitory Nature of the Measures Implemented

Additionally, the cases surveyed suggest that in making a final decision on whether violations exist or not, the ECtHR assesses the duration of the impugned measures. Where these measures were only temporary or transitory the Court is likely to render a finding of no violation as was the case in *Da Conceição Mateus v. Portugal and Santos Januário v. Portugal* as well as in *Da Silva Carvalho Rico v. Portugal*. A similar holding was made in a case against Lithuania[130] where the Court found that given the temporary nature of the measure implemented the State had not overstepped its margin of appreciation. On the contrary, the longer the duration of interference with the applicants' ESRs the more likely the Court is to find a violation under the ECHR.

# II. Some Concluding Thoughts

The ECtHR is undoubtedly equal to the task of protecting ESRs especially in times of crisis. However, as has already been alluded to in preceding sections of this article, there appears to be a mismatch between how much the Court

[129] *Hirsi Jamaa and Others v. Italy*, *supra* note 90.

[130] *Savickas v. Lithuania*, ECtHR Application No. 66355/09, Judgment of 15 October 2013, 24, para. 94.

seems willing to do in the vindication of ESRs and how much it has actually done through its jurisprudence. This paper has sought to begin a conversation on the potential role that ESRs within the ECHR have to mitigate the effects of crises on rightsholders. The intention has been to analyze the prospects and challenges of ESRs implementation by the ECtHR in times of crisis.

What is apparent is that the Court has a rich "crisis jurisprudence" that will undoubtedly keep growing as more and more cases touching on the various different crises currently plaguing Europe (and the World) are decided upon. However, there is a need for the ECtHR to be more deliberate and consistent in its reasoning in these cases in order to develop a principled jurisprudence and safeguard itself from attacks that its approach "has been flawed by a deep-seated reluctance[…]to define appropriately the parameters of its own adjudicative role in shaping the normative content of resource-intensive rights through the development of the values and principles embodied in the ECHR."[131]

Even though in certain instances States enjoy a wide margin of appreciation, and "unless it is arbitrary or unreasonable, the legislator's dec ision at a time of crisis falls within this latitude",[132] it is necessary for the ECtHR to utilize its unique position to more boldly uphold ESRs within Europe generally, and more particularly in times of crises. Dark clouds do not last forever, in times of crisis it is still possible for the ECtHR to remain a ray of hope.

131 Palmer, *supra* note 4, 399-400.

132 L. Sicilianos, 'The European Court of Human Rights at a Time of Crisis in Europe', SEDI/ESIL Lecture at the European Court of Human Rights (2015), available at https://esil-sedi.eu/wp-content/uploads/2018/04/Sicilianos_speech_Translation.pdf (last visited 27 September 2021).