

With the Housing and ESC Rights Law Quarterly, the COHRE ESC Rights Litigation Programme aims to present advocates and other interested persons with information on national and international legal developments related to housing and ESC rights.

FEANTSA V. FRANCE. COLLECTIVE COMPLAINT ON HOUSING RIGHTS AT COUNCIL OF EUROPE

Dr. Padraic Kenna & Mr Marc Uhry¹

Introduction

In June 2008, a ground breaking decision was reached in Europe on the nature and extent of housing rights obligations under the Revised European Social Charter (RESC). This involved a greater definition of housing rights obligations for European States which have ratified Article 31 of the RESC. The European Committee of Social Rights (ECSR or Committee) of the Council of Europe found that France was in violation of these obligations in key areas, such as housing standards, evictions, homelessness, levels of social housing provision, allocation systems, social mix policies and discrimination. Housing rights obligations were examined in the context of French housing law, expenditure, policies and outcomes for vulnerable and other groups. An obligation of result, rather than obligation of conduct in implementation of rights, informed the outcome. This decision provides a valuable measure of housing rights across Europe and elsewhere, in evaluating housing systems from a human rights perspective. State policies on affordability, social cohesion, discrimination, housing allocation, and prevention of homelessness, are being influenced through neo-liberal pressures on commodification of housing, support for housing markets, social mix policies, and reduced public expenditure.

As this case demonstrates, these policies may need to be redefined to meet international housing rights obligations.

Article 31 of the RESC

The Council of Europe, established in 1949 and now with 47 Member States, has promoted a rights-based approach through its two Social Charters and within the European Convention on Human Rights (ECHR), along with its enforcement mechanism the European Court of Human Rights (ECtHR).² Housing rights are advanced through the Council of Europe's European Social

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- 1 The authors are the current and former Chairpersons of the FEANTSA Expert Group on Housing Rights which brought the Collective Complaint.
- 2 See Council of Europe, *About the Council of Europe*, <www.coe.int/T/e/Com/about_coe>, giving a brief summary of the Council, its history, and its aims.

2	5	7	8
• Editorial	• UN Human Rights Council Approves Legal Mechanism to Provide International Remedy for Violations of Economic, Social and Cultural Rights	• Right to water – disconnection • Case to watch: South African Constitutional Court: Various Occupants v. Thubelisha Homes and others	• Case to watch: European Social Charter: collective complaint against systematic failure to remedy housing rights abuses

EDITORIAL

This edition of the Quarterly opens with an article on a ground breaking decision from the European Committee of Social Rights under the Revised European Social Charter. The article analyses the collective complaint of the *Fédération Européenne d'Associations Nationales Travaillant avec les Sans-Abri*, or FEANTSA, against France regarding ensuring the effective exercise of the right to housing contained in Article 31 of the Revised Charter. In a unanimous decision, the Committee concluded that this article had been violated on six different counts. As the authors, Padraic Kenna and Marc Uhry, explain, important principles can be derived from this decision. The next article, by Claude Cahn, focuses on another ground breaking development. In June 2008 the UN Human Rights Council approved the text of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol includes a number of relevant provisions concerning protection mechanisms, including an individual complaint mechanism, an inter-State mechanism and an inquiry procedure. As Cahn explains, a number of obstacles remain before the Optional Protocol will enter into force. The following case note by Thorsten Kiefer outlines briefly a Dutch Court decision on the right to water, whereby the Court disallowed the disconnection of water supply because such a measure would frustrate the defendant's right to water. This edition of the Quarterly ends with two interesting cases to watch. First, there is a case before the South African Constitutional Court regarding the displacement of residents of the Joe Slovo informal settlement as a result an infrastructure project near Cape Town. The residents have appealed against an eviction order arguing that there has been no meaningful consultation with them. Second, COHRE has filed a collective complaint under the European Social Charter mechanism alleging the systematic failure by Croatia to remedy housing rights abuses of ethnic Serbs displaced in Croatia. The complaint argues that Croatia has violated Article 16 of the European Social Charter for failing to undertake to promote economic, legal and social protection of family life.

This edition of the Quarterly is the first without the hard work of Aoife Nolan as the Quarterly's coordinating editor. We thank Aoife for all her work she has done for the Quarterly as its coordinating editor. Fortunately, Aoife will stay on as a member of the Editorial Board.

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For additional information on the justiciability of ESC rights, see www.cohre.org/litigation and the Case Law Database at www.escr-net.org.

We welcome any comments, submissions of case notes and articles, as well as information on new cases and relevant events and publications. Please feel free to contact us at: quarterly@cohre.org

- » Charter³ and Revised Charter,⁴ and in an oblique way through the ECHR. Article 31 of the RESC establishes a right to housing:

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

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

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

4 *European Social Charter (Revised)* Council of Europe, Strasbourg 3/5/1996. The binding nature at national level of the Charters depends on whether a dualist or monist legal systems pertains, but many States have incorporated the Charter (or parts of it) into national law. See Harris, D. & J. Darcy, *The European Social Charter: The Protection of Economic and Social Rights on Europe*, New York: Transnational, 2001; Samuel, L., *Fundamental Social Rights, Case Law of the European Social Charter*, Strasbourg: Council of Europe Publishing, 1997; De Burca, G. & B. De Witte (eds.), *Social Rights in Europe*, OUP, 2005. There are many political statements from the Committee of Ministers of the Council of Europe. See Recommendation R (2000) 3, *on the right to satisfaction of basic material needs of persons in situations of extreme hardship*. See also *Housing Rights: The Duty to Ensure Housing for All*. CommDH/IssuePaper(2008)1, Strasbourg, 25 April 2008. Available at: wcd.coe.int/ViewDoc.jsp?id=1292391&Site=CommDH.

5 For a detailed examination of these obligations see Council of Europe, European Committee on Social Rights, *European Social Charter (revised) Conclusions 2003 - Volume 1 (Bulgaria, France, Italy); Conclusions 2003 - Volume 2 (Romania, Slovenia, Sweden)*. Strasbourg: Council of Europe Publishing, October 2003; See also Mikkola, M., *Right to Housing as Human Right in Europe*, Paper presented to Conference on housing rights organised under the Finnish EU presidency in Helsinki on 18-19 September 2006, available at: www.ymparisto.fi/default.asp?contentid=200440&lan=en. See also the Collective Complaints in relation to housing rights, such as *ERRC v. Greece* No. 15/2003 at www.coe.int/t/e/human_rights/esc/4_collective_complaints/List_of_collective_complaints/default.asp#TopOfPage. For more details, see 'A Recent European Housing Rights Case' (2005) 2(3) *Housing & ESC Rights Law Quarterly* 7.

The European Committee of Social Rights decides whether the situation in the States Parties is in conformity with the RESC, based on an examination of periodic national reports which States are bound to submit. The Additional Protocol of 1995 provided for a system of collective complaints to improve the effective enforcement of the social rights guaranteed by the Charter. Significant housing-related collective complaints have examined the housing conditions for Roma. They have dealt with issues such as standards and lack of permanent dwellings, unlawful occupation, temporary housing, forced evictions, lack of security of tenure, and the insufficiency and inadequacy of camping sites.⁶

Collective Complaint - FEANTSA v. France

In 2006, the *Fédération Européenne d'Associations Nationales Travillant avec les Sans-Aabri* or FEANTSA⁷ lodged a collective complaint claiming a violation by France of Article 31 of the RESC on the grounds that France does not ensure an effective right to housing for its residents.⁸ This complaint emerged from the work of the Housing Rights Expert Group within FEANTSA, which had been promoting a rights based approach to homelessness and monitoring the situation across the 25 EU Member States. The representative from France on the Expert Group, Mr Marc Uhry, had raised the ongoing difficulties with poor housing and homelessness, despite many court decisions within France. The implementation of the housing rights which France accepted on ratification of Article 31 of the RESC appeared to be weak, and awareness

of these obligations seemed to be poor. In any event, a number of tragedies resulting in the deaths of homeless people in Paris and elsewhere prompted the Expert Group to prepare a collective complaint. Although initially the Expert Group considered the obligations in relation to homelessness, the complaint was later expanded to cover all three areas of Article 31 obligations, since it was recognised that homelessness has become an integral part of the housing system as a whole.

Following the submission of the Complaint and requests for more information to both FEANTSA and the French Government, a hearing took place in Strasbourg in September 2007. The Committee examined relevant French legislation, including thirty-two references to laws, Codes and Circulars relating to housing, as well as policy documents, budgets and statistical data on housing need, provision, finance, allocations and homelessness.⁹

The unanimous conclusion of the Committee on the collective complaint was that:

- there was a violation of Article 31§1 of the Revised Charter on the grounds of insufficient progress as regards the eradication of substandard housing and lack of proper amenities of a large number of households;
- there was a violation of Article 31§2 of the Revised Charter on the grounds of unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions

for evicted families;

- there was a violation of Article 31§2 of the Revised Charter on the grounds that measures currently in place to reduce the number of homeless are insufficient, both in quantitative and qualitative terms;
- there was a violation of Article 31§3 of the Revised Charter on the grounds of insufficient supply of social housing accessible to low-income groups;
- there was a violation of Article 31§3 of the Revised Charter on the grounds of the malfunctioning of the social housing allocation system, and the related remedies;
- there was a violation of Article 31§3 of the Revised Charter, taken in conjunction with Article E on the grounds of the deficient implementation of legislation on stopping places for Travellers.¹⁰

Analysis of Decision

Some important principles can be gleaned from this historic decision, which define housing rights under Article 31 of the RESC in a tangible and quantifiable way. The first principle is that recognition of the obligations under Article 31, while not imposing an obligation of 'results', must take 'a practical and effective, rather than purely theoretical form'.¹¹ This means that States must adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down. They must maintain meaningful statistics on needs, resources and results and undertake regular reviews of the impact of the strategies adopted. States must establish a timetable and not defer indefinitely

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6 *European Roma Rights Centre (ERRC) v. Greece*. Complaint No. 15/2003; *ERRC v. Italy*. Complaint No. 27/2004; *ERRC v. Bulgaria*. Complaint No. 31/2005. See summaries of the decisions on the merits of collective complaints registered between 1998-2008 at <www.coe.int/t/e/human_rights/esc/7_Resources/CCSummariesMerits_en.pdf>.

7 The European Federation of National Organisations working with the Homeless, see <www.feantsa.org/code/en/hp.asp>.

8 Complaint No. 39/2006, para. 17. See also Collective Complaint *ATD v. France* No. 33/2006, on largely the same lines.

9 These included the National Housing Commitment Act 2006, Social Cohesion Act 2005, Discrimination and Equality Commission Act 2004, Discrimination Act 2001, Reception and Accommodation of Travellers Act 2000, Anti-Exclusion Act 1998, Housing Act 1994, Right to Housing Act 1990, Tenancy Act of 1989, Public Health Code, Building and Housing Code, Social and Family Action Code. The ESCR only took into account the regulations on housing applicable at the date of its decision and refrained from assessing the measures contained in the new law on the enforceable right to housing adopted in France in 2007 ("DALO Act"), given that the measures foreseen in the new Act would enter into force on 1 December 2008 (for certain categories of persons) and on 1 January 2012 (for other categories of persons).

10 Complaint No. 39/2006, Conclusion.

11 *Ibid.*, para. 55.

- » the deadline for achieving the objectives of each stage. States must pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.¹²

The RESC requires States parties to ensure the resources and operational procedures necessary to give full effect to the legal rights,¹³ within a reasonable time, with measurable progress and making maximum use of available resources.¹⁴ Statistical information must compare identified needs with resources made available, and results achieved.¹⁵

The guarantee of adequate housing for everyone means a dwelling which is safe from a sanitary and health point of view. Where statistics show that a significant number of households are deprived of basic amenities and/or are overcrowded, and where serious problems and health risks due to substandard conditions affect significant numbers of people, there will be a violation of Article 31 of the RESC.

Under Article 31(2) of the RESC, States must put in place procedures that limit the risk of evictions. Stable and accessible rehousing options and financial measures must be guaranteed by the State before evictions take place to avoid a violation.¹⁶

In relation to homelessness, there is a requirement for reliable regular collection of data on real needs and sufficient appropriate emergency shelter. People living in temporary shelters must be offered independent housing of an adequate standard within a reasonable time.¹⁷

Significant social housing provision, at more than 100,000 units per year, will not necessarily satisfy the housing rights obligations under Article 31(3) of the RESC in a situation where large numbers remain on waiting lists, and where priority is not given to the most deprived people.¹⁸ Assessment of the needs of the most deprived people must be built into the programme of providing social housing to avoid a violation of Article 31(3) of the RESC.

Social Mix Policies and Discrimination

A significant part of the decision relates to the failures within the system for allocating social housing and the impact of social mix approaches on housing rights. FEANTSA claimed that social housing is not reserved for the poorest people, owing to the concept of 'social mix'. This concept emerged in the 1980s to counter the pauperisation and ethnic concentration of social housing then being experienced. It was introduced into legislation in 1998 and became a means of screening out undesirable categories from access to housing. However, the social mix criterion can clash with that of giving priority to the poorest households.

As well as making available an adequate supply of affordable housing, the system of allocating social rental housing must ensure sufficient fairness and transparency, since social housing is not always reserved for the poorest households. Discretionary allocation approaches for social housing, including social cohesion and 'social mix' policies or laws, must be defined and operated in such a way as to demonstrate that they do not exclude poor or otherwise vulnerable people or migrants

from social housing or restrict housing rights.¹⁹ Allocation and appeals systems, which give direct or indirect veto powers to various social partners and others, can conflict with state housing rights obligations.²⁰ The failures of the social housing allocation system, and the related remedies, can constitute a violation of Article 31(3) of the RESC.

All the rights set out in the RESC, including the right to adequate housing, must be ensured without discrimination on any ground. With respect to social housing, states must guarantee that migrants have access to social housing on conditions 'not less favourable' than that of nationals. Additionally, delays in implementing legislation requiring municipalities to prepare plans for the setting up of permanent camp sites for travellers exposes them to the risk of forced evictions, and can constitute a violation of Article 31(3) of the RESC in conjunction with Article E.

Conclusion

Housing rights offer some small measure of restraint on the excesses of a globalised and commodified housing market system, which is creating major social divisions and increasing homelessness and exclusion. In Europe, the European Committee of Social Rights is developing significant new jurisprudence on housing rights which addresses squarely these international neo-liberal influences in housing law and policy. The challenge for housing rights advocates is to promote the ratification of Articles 31 of the RESC on the right to housing by the other Member States of the Council of Europe and to use the Committee's decision so as to advance housing rights globally.

12 Ibid., para. 56.

13 Ibid., paras. 57, 78, 79.

14 Ibid., para. 58.

15 Ibid., paras. 59-61.

16 Ibid., paras. 90-91.

17 Ibid., paras. 104-110.

18 Ibid., paras. 128-130 and 143.

19 Ibid., para. 144, 161. There is an important distinction in using the concept of social mix in planning law to ensure that segregation based on income is avoided, and social mix exercised through allocation policies in social housing. See further Ponce J., *Affordable Housing, Mixed Communities and Social and Territorial Cohesion*, Paper to ENHR Conference Dublin, July 2008.

20 Complaint No. 39/2006, para. 145.

UN HUMAN RIGHTS COUNCIL APPROVES LEGAL MECHANISM TO PROVIDE INTERNATIONAL REMEDY FOR VIOLATIONS OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

by Claude Cahn²¹

A structural inability to rule on social and economic rights complaints is shared by all of the individual communication mechanisms currently available under the United Nations system. The Human Rights Committee is empowered to hear individual petitions on matters arising under the International Covenant and Civil Political Rights (ICCPR). Due to the compelling matters at stake, and relying on the principle of indivisibility of human rights, the Human Rights Committee has ruled successfully on a number of economic and social rights issues through the prism of the right to life,²² the right to freedom from torture or cruel, inhuman or degrading treatment or punishment,²³ and the non-discrimination provisions of the ICCPR. Complaints about the unequal enjoyment of economic and social rights violations due to discrimination pertaining to ethnicity/race or gender may also be brought under the individual complaint mechanisms available under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁴ and the Convention on the Elimination of Discrimination of Women (CEDAW).²⁵ Similar complaints mechanisms are envisaged for migrant workers and persons with disabilities under the international conventions setting out the relevant rights in those areas, although these mechanisms are not yet in force or have not yet been used.²⁶ The lack of an international mechanism to address violations of eco-

nomical, social and cultural rights in and of themselves, however, has not only led to a lack of jurisprudence on such rights, but has contributed significantly to violations of such rights with impunity.

For at least the past two decades, governments, civil society, experts and UN human rights bodies have been working to remedy the long-term gap in human rights protection under the international system, which has arisen from the fact that the International Covenant on Economic, Social and Cultural Rights (ICESCR) lacks an individual complaint mechanism.

An inter-governmental Working Group has deliberated since 2004 on the scope and content of a draft Optional Protocol including an individual complaints mechanism. As a result of hard work of, in particular, civil society and NGOs, on 18 June 2008, the United Nations Human Rights Council took the momentous step of approving by consensus the text of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Optional Protocol). The Optional Protocol adopted by Council includes a number of relevant provisions concerning protection mechanisms. States Parties to the ICESCR joining the Protocol recognize the competence of the UN Committee on Economic, Social and Cultural Rights to receive and consider communications (Optional Protocol Article 1). Communications may be submitted

by or on behalf of individuals or groups of individuals alleging that they have suffered violations of the Covenant's provisions, provided that they have exhausted domestic remedy in the country at issue (Optional Protocol Article 2). The Protocol provides for the possibility of so-called 'interim measures' by setting out that at any time after the receipt of a communication and before a determination on the merits has been reached, the Committee may transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violations (Optional Protocol Article 5). The Protocol also creates an inter-state complaint mechanism (Optional Protocol Article 10), providing that a State Party to the Protocol may at any time declare that it recognizes the competence of the Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the ICESCR. Inter-state communications may be received and considered only if submitted by a State Party that has made a declaration recognizing in regard to itself the competence of the Committee. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration. The Protocol also creates an inquiry procedure (Optional Protocol »

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22 See, e.g., HRC, *Lantsova v the Russian Federation*, 15 April 2002, Communication No. 763/1997.

23 See, e.g., HRC, *Mukong v Cameroon*, 10 August 1994, Communication No. 458/1991.

24 See, e.g., CERD, *Ms. L. R. et al. v Slovakia*, 10 March 2005, Communication No. 31/2003.

25 See, e.g., CEDAW, *A.S. v Hungary*, 14 August 2006, Communication No. 4/2004.

26 Article 77 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides for an individual complaint mechanism but has not yet entered into force. Article 1 of the Optional Protocol to the International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities provides for an individual complaint mechanism that has not yet been used.

» Article 11). If the Committee receives reliable information indicating grave or systematic violations of the Covenant, the Committee is to invite that State Party to cooperate in the examination of the information and, to this end, to submit observations with regard to the information concerned. The inquiry may include a visit by the Committee to the territory of the State Party concerned.

The Protocol requires that States parties undertake protection measures (Optional Protocol Article 13). States Parties are obliged to take all appropriate measures to ensure that individuals under its jurisdiction are not subjected to any form of ill-treatment or intimidation as a consequence of communicating with the Committee pursuant to the Optional Protocol. The Optional Protocol also establishes a trust fund, along with other measures aimed at facilitating international assistance and cooperation, to facilitate the 'the enhanced implementation of the rights contained in the Covenant' (Optional Protocol Article 14).

The Optional Protocol has now been forwarded to the UN General Assembly, which will deliberate on the matter during the latter part of 2008. Should the General Assembly approve the Optional Protocol, a major lacuna in the international human rights system will finally be remedied.

For a number of years, and in particular since the beginning of deliberations by the inter-governmental Working Group, the Centre on Housing Rights and Evictions (COHRE) has been among a core of NGOs working to see the Optional Protocol realized. COHRE is a member of the Steering Committee of the NGO Coalition for an Optional Protocol,²⁷ a framework in which it has worked to mobilize civil society input into the proc-

ess of preparing the Optional Protocol, and consulted extensively with partners on strategy to see a strong Optional Protocol approved. We are now hopefully close to seeing this extensive work bear fruit.

Many obstacles remain however. A number of States have indicated that they will never ratify the instrument. However, these States have played a leading role in undermining, blocking, weakening or otherwise obstructing progress toward the Optional Protocol's adoption during the four-year life of the intergovernmental Working Group. The United States, Canada, Denmark, Poland, the United Kingdom, Australia and New Zealand have worked with particular vigour to hinder progress. Norway joined States posing significant difficulties during late-round deliberations, by deciding at the last minute to support only an *a la carte* approach, under which States might choose the ICESCR rights they accepted as covered by the mechanism. Switzerland similarly maintained support for a rejected *a la carte* approach even after the tabling of the Working Group's compromise text.

The period between the conclusion of the Working Group's efforts in April 2008, and discussion of the draft text at the Human Rights Council in June 2008, a compromise text for the Optional Protocol crafted on the basis of four years of intensive work almost came to pieces. In the run-up to the June 2008 Council, the delegations of Palestine, Syria, Pakistan and Algeria, with the support of Egypt (also the chair of the African Group), indicated that they could not accept the explicit exclusion of Article 1 ICESCR self-determination rights from the ambit of the complaint mechanism, as was envisioned by the final Working Group compromise text. These issues are matters which governments such

as Russia, China and India had consistently indicated that they were not prepared to accept. Portugal organized a compromise text with one amendment, based on a proposal by the government of Pakistan, providing that the Optional Protocol shall apply to all of the economic, social and cultural rights in the ICESCR. With this amendment, the text was approved by Council. The episode soured the compromise, and was the subject of many bitter interventions during the explanation of votes-after-the-vote. A number of States, including Denmark and the United Kingdom, have reserved their position for the debate in the General Assembly. Nevertheless, no States broke the consensus, not even those highly ambivalent about the endeavour as a whole.

The great difficulties that States have had in arriving at a final, durable, compromise text, as well as the huge amount of time it has taken to complete this project, is an indication of the extent to which the nature of economic, social and cultural rights is still under dispute at inter-governmental level. This is a shame, given the extent of advances made domestically in recent years, as evidenced by the matters regularly addressed in the pages of this journal. Nevertheless, the adoption of the Optional Protocol to the ICESCR by the UN Human Rights Council brings the possibility of international justice one step closer for millions of excluded persons, groups, communities and peoples worldwide. And that is genuinely good news.

For a previous article on the draft Optional Protocol, see: Nathalie Mivelaz, 'Towards an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: What Kind of Protocol is Needed?' in Housing and ESC Rights Law Quarterly, Vol 3, No. 2 July 2006.

27 See <www.opicescr-coalition.org>.

RIGHT TO WATER – DISCONNECTION

Dutch Court decision on the right water: *NV Waterleiding Maatschappij Limburg v. XXX*, Court of Maastricht, Sector Kanton, case no. 294698 CV EXPL 08-4233, judgment of 25 June 200828

This case, adjudicated by the Court of Maastricht in the first instance, concerns a consumer (the “defendant”) who apparently was unwilling to pay the outstanding water bill of approximately EUR 200 that he had incurred with the NV Waterleiding Maatschappij Limburg (“WML”). WML is a regional water supply company, which has a monopoly in the area in which the defendant lives. WML appealed to the Court to allow the disconnection of water services to the defendant as a final measure to enforce outstanding payments. Furthermore, WML asked the Court to order the defendant to pay his outstanding water bills and reimburse WML for the measures it had taken trying to enforce payment.

The Judge held as follows: (unofficial translation): ‘...the Judge notes that he shall disallow this part of the claim [the permission to disconnect the defendant’s water supply] because this measure frustrates the defendant’s right to water. In this case, the defendant cannot avoid WML, the regional monopolist, to invoke his right to water. This right is included in other rights codified and long recognised by the Netherlands, in particular the right to an adequate standard of living and the right to health (Articles 11 and 12 of the ICESCR). Recognition of the right to water and sanitation is thus an explicit expression of an element that already exists in established rights. Furthermore,

the Netherlands has recognised the right to water and sanitation as a human right at the seventh session of the Human Rights Council (3 to 28 March 2008) in Geneva.’

In sum, the Judge disallowed the disconnection of water supply because such a measure would frustrate the defendant’s right to water. Also, the Judge found that the proposed measure was not in proportion to the outstanding total sum, so that the defendant’s interest in the continuation of the provision of water had to prevail over the claimant’s interest.

The defendant was sentenced to pay his outstanding water bills plus interest and was also sentenced to the costs of the proceedings.

Case Note by Thorsten Kiefer

28 A Dutch version of the decision can be found at zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=zaak&nummerzaak=294698.

CASES TO WATCH

SOUTH AFRICAN CONSTITUTIONAL COURT: VARIOUS OCCUPANTS V. THUBELISHA HOMES AND OTHERS

The N2 Gateway Project near Cape Town, South Africa, is intended to create low-income housing. The project, however, will result in the permanent displacement of a substantial number of residents of the Joe Slovo informal settlement and the temporary displacement of the remainder to a “temporary relocation area” (TRA), a considerable distance away from the current homes and places of employment of the residents. An eviction order was obtained against the residents in the Cape High Court in terms of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE Act). The residents appealed against this order to the Constitutional Court.

The residents argued on appeal that there was no meaningful consultation with them in relation to this project, specifically in relation to the criteria for the allocation of housing in the new development as well as arrangements for their accommodation during the development process. They also argued that they had the consent of the City to reside in the Joe Slovo Settlement, and that this consent was not terminated prior to eviction proceedings being implemented. Accordingly, they were not ‘unlawful occupiers’ in terms of the PIE Act. Finally, they raised the unsuitability of the TRA, and the disruptive impact it would have on their employment situation, social sup-

port networks as well as the education of children. Poor communities such as this are particularly poorly equipped to withstand the impact of such a drastic relocation on their fragile livelihoods strategies. A major concern was the transport costs associated with being relocated to the periphery of the metropolitan area, far away from their existing formal and informal employment.

COHRE and its local partner, the Community Law Centre (UWC) intervened as *amici curie* in the appeal before the Constitutional Court. The *amici* submissions focused on two main issues – the duty to consult meaningfully with residents prior to eviction »

- » proceedings and the duty to take into account the abovementioned intangible aspects of the right to adequate housing in determining the suitability of alternative accommodation. The submissions elaborated on these two aspects through a detailed analysis of relevant constitutional and legislative standards in South Africa as well as applicable international law. The *amici* relied particularly on the detailed procedural and substantive guidelines contained in the UN Guidelines on Development-Based Evictions pioneered by the former Special Rapporteur on the Right to Adequate Housing, Mr. Miloon Kothari.

Argument was heard before the Constitutional Court on 21 August 2008 and judgment is forthcoming. This case will be a significant test case for the rights of poor communities who are evicted to make way for housing upgrades.

Case note by Bret Thiele and Sandy Liebenberg

EUROPEAN SOCIAL CHARTER: COLLECTIVE COMPLAINT AGAINST SYSTEMATIC FAILURE TO REMEDY HOUSING RIGHTS ABUSES

On 26 August 2008, COHRE filed a collective complaint under the European Social Charter mechanism, alleging systematic failure to remedy housing rights abuses of ethnic Serbs displaced in Croatia. The complaint focuses on the inadequacy of restitution arrangements in Croatia for ethnic Serbs in socially-owned housing at the time of the conflict in the former Yugoslavia. At that time, the ethnic Serbs enjoyed the status of 'occupancy rights-holder'. During and after the 1991-1995 civil war in Croatia, Croatian authorities engaged in massive, discriminatory cancellations of occupancy rights, mainly of ethnic Serbs, often in absentia. Croatia has consistently refused to consider restitution or compensation for former holders of occupancy rights. Today, these people live in highly tenuous situations, in a state of legal uncertainty and social exclusion.

The complaint argues that these facts give rise to a violation of Article 16 of the European Social Charter, according to which Croatia has undertaken to promote the economic, legal and social protection of family life by means of social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and by other appropriate means. Croatia is obliged to take both legal as well as practical action to give full effect to this right in a non-discriminatory manner (Article E). According to the complainants, the steps currently undertaken by the Croatian government to make housing available to some of the people excluded from their housing during and after the war show serious deficiencies, such as, (i) the applicant must show a desire to return to Croatia; (ii) the housing provided in the 'housing care framework' is not necessarily in the place of origin of the person concerned, or indeed in any place in the social or economic mainstream of life in Croatia; (iii) persons may not choose the place of housing allocation; (iv) the housing allocated is not assured to include adequate security of tenure in conformity with international law, or even comparable to that assured persons similarly situated; (v) the statute of 'protected lessee' granted under the housing programme is much less favourable as the one given to former occupancy rights holders who were not displaced; and (vi) the conditions under which the State given flat can be purchased are not as favourable as the ones existing at the time of privatisation of socially owned properties.

The complaint seeks a finding of infringement of the relevant provisions of the European Social Charter, in particular of Article 16 and Article E.

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