The contribution of the European Convention on Human Rights to the poverty issue in times of crisis

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Introduction

1. First of all, I would like to say that I am very happy and honoured to be here with you. The European Convention on Human Rights is more than ever our common heritage (“patrimoine commun”) and we share in this respect a common responsibility at national and international level, between judges and scholars. That is why I really appreciate this kind of meeting since it gives us an opportunity to discuss the rights and freedoms enshrined in the Convention as they are interpreted by the European Court of Human Rights in the context of our contemporary society. That’s really the intelligence of the Convention: through the Court’s interpretation, the rights written in 1950 can have a meaning today in 2013. As legal theorists have observed, the law must be stable yet it cannot stand still\(^1\). Adaptation and modification have been constant features of the Convention since 1950 and continue to be so today.


2. In this lecture, I will examine the contribution of the European Court of Human Rights to the fight against poverty and social exclusion. I argue in favour of a reading of the European Convention on Human Rights that is aligned with the necessities of the times.

3. In the face of the global financial and economic crisis that developed since 2008, this does not mean sacrificing human rights in the name of austerity and macro-economic discipline; it means improving the protection of the most vulnerable and marginalized segments of the population, in a context in which the rights to access to courts, to housing or to social security have further gained in relevance and importance.

4. I will start by saying a few words about crisis, and particularly economic crisis, and human rights (I), before examining different aspects of the European Court of Human Rights’ case-law addressing the question of poverty (II).

I. Crisis and human rights

5. Clearly, economy and human rights are closely linked, even if their relationship is not necessarily always harmonious. On the one hand, human rights, and especially those guaranteed by the Convention, are a *sine qua non* condition for effective economic activity. On the other hand, we must be mindful of the risks that powerful economic players may pose for rights and freedoms.

6. I would like to begin with a few thoughts on the notion of crisis itself. The crisis is real, serious and lasting, as we hear frequently – I’m almost tempted to say hundreds of times per day – in the newspapers and on radio and television. The crisis has infiltrated every debate and is becoming the prism through which everything is viewed. I mean the economic crisis of course, but also an ecological and energy, political, social and institutional crisis, a crisis of authority and of democracy. A “never-ending crisis”, as M. Revault d’Allonnes observes, robs us

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of the future dimension. This is a strange reversal, given that modernists have tended, by
contrast, to view the crisis as a dynamic period of transition between one era and another⁵.

7. So, the crisis today is perhaps no longer a crisis but rather the sign of a transition or
shift. A geopolitical and economic shift, undoubtedly, but also a digital shift, with our entry into
the virtual “sixth continent” (the Web), a biotechnological shift in the new degree of control we
exert over “life” and procreation, and also an ecological shift, with the awareness of the limits
imposed on our development models by the finite nature of the world’s resources. We are
experiencing a “historic bifurcation point” to borrow the expression used by Ilya Prigogine, the
(Belgian) winner of the Nobel Prize in Chemistry. This “bifurcation point” holds as many threats
as promises. It is not the end of the world, but the end of a world. Contemplating it face-on leads
us not to be pessimistic but to be determined⁶.

8. But let us now look more specifically at economic crisis, the one we are currently
experiencing and the impact of which on human rights is very well illustrated by many authors
and scholars. An impact which is diffuse but undeniable and which pervades everything, even
the most remote and unexpected areas⁷. Not only does economic crisis “expose vulnerable
people (women, children, migrants) and minorities to special hardship” but it “also tends to
encourage recourse to extremism of different forms [and] is often accompanied by a search for
scapegoats”. But, as history has taught us, “[t]hese trends threaten to undermine the twin pillars
on which the Convention is based: democracy and the rule of law”.

9. “Many governments in Europe imposing austerity measures have forgotten about their
human rights obligations, especially the social and economic rights of the most vulnerable, the
need to ensure access to justice, and the right to equal treatment. Regrettably, international
lenders have also neglected to incorporate human rights considerations into many of their
assistance programmes,” states N. Muiznieks, Council of Europe Commissioner for Human

⁶. Interview with J.-C. GUillebaud, “Cette crise multiple révèle une prodigieuse mutation”, La Libre Belgique, 29 December
(rapporteur), Committee on Foreign Affairs, 1 March 2013. See also M.-L. BASILIEN-GAINCHE, “Rapport annuel 2012 de
l’Agence des droits fondamentaux de l’Union européenne : les droits fondamentaux, victimes de la crise”, in Lettre
Rights, in a recent research paper about the impact of the economic crisis on the protection of human rights.  

10. In reality compliance with human rights standards is not only even more necessary in times of economic crisis because of increased vulnerability, it also makes a contribution to recovery by establishing the conditions necessary for stability and the proper functioning of the rule of law, both essential for economic growth.

11. In this respect, it seems to me that the European Court of Human Rights has always held that insufficient resources of a State will not normally justify failure to secure Convention rights and freedoms, notably when considering Article 3 issues. Thus, for instance, in relation to prison conditions the Court has taken note of the serious socio-economic problems faced by countries in transition and recognised the economic pressure confronting Contracting States. It has however confirmed that lack of resources cannot in principle justify prison conditions which are so poor as to reach the threshold of treatment contrary to Article 3 of the Convention. The same principle was applied to other provisions of the Convention. So, for instance, to Article 6, concerning the execution of judicial decisions imposed on the public authority itself. In fact, the Court does not readily accept arguments based on economic or financial distress put forward by the respondent Governments to avoid or to meet their obligations under the Convention. Recently, in the Nencheva and Others v. Bulgaria judgment of 18 June 2013, the Court found a violation of Article 2 (right to life) in a situation of economic crisis where 15 disabled children and young adults placed in care had died, during the winter of 1996-1997, for lack of food, heating and basic care.

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9. On transition see, against the background of German reunification, ECHR (GC), Jahn and Others v. Germany judgment of 30 June 2005.
11. ECHR, Burdov v. Russia judgment of 7 May 2002, § 35. In this well-known case concerning the non-payment of compensation awarded to an applicant who had suffered health problems as a result of taking part in emergency operations at the site of the Chernobyl nuclear disaster, the Court held that a State authority could not cite lack of funds as an excuse for not honouring a judgment debt. The applicant should not have been prevented from benefiting from the success of the litigation on the ground of alleged financial difficulties experienced by the State. The Court found violations of Article 6 § 1 and Article 1 of Protocol No. 1. See also ECHR, De Luca v. Italy and Pennino v. Italy, judgments of 24 September 2013.
12. The Court is now faced, in some countries, with the consequences of austerity programmes and the adoption of stringent budgetary measures. The case-law is still in evolution. In the *Koufaki and Adedy v. Greece* case, the Greek Government had adopted a series of austerity measures designed to cut public spending. Such measures, of a permanent and retroactive nature and applied without distinction to all public servants, included 20% cuts in public sector workers’ salaries and pensions and the curtailment of other financial benefits and allowances such as holiday pay and bonus month payments. The applicants contest the compatibility of these draconian measures with their rights under Article 1 of Protocol No. 1. On 7 May 2013, the Court declared the application inadmissible, having regard to the public interest considerations which underpinned the adoption of the measures and the wide margin of appreciation enjoyed by States in the formulation of economic policy, in particular when it comes to tackling a financial crisis which threatened to overwhelm the country. It observed that the effect of the cuts on the applicants’ livelihoods was not such as to threaten their well-being. A fair balance had been struck.

13. The Court’s solution in the Greek case is to be contrasted with the approach followed in the *N.K.M. v. Hungary* judgment of 14 May 2013 concerning the unexpected imposition of a high rate of tax on severance payment. The applicant, a civil servant with thirty years’ service, was dismissed. She had a statutory entitlement to severance pay on dismissal, amounting to eight months salary. Some weeks before receiving notice of her dismissal new legislation was introduced imposing a 98% tax on severance pay exceeding a certain threshold. For the applicant, this represented an overall tax burden of approximately 52% on the entirety of the severance, about three times the general personal income tax rate. She complained mainly under Article 1 of Protocol No. 1 to the Convention. The case is noteworthy in that, notwithstanding its established case-law recognising the Contracting States’ wide margin of appreciation in the area of taxation, the Court found that in the circumstances of the instant case, the applicant had been required to bear an excessive and individual burden. She had to suffer a substantial loss of income at a time when she had been made redundant, which was at variance with the very aim of a severance package, namely to help those dismissed to get back into the job market. Moreover, the new legislation was introduced very shortly before the
applicant’s dismissal, leaving her with little time to adjust to a new and extremely difficult financial situation, which situation she could never have anticipated. The Court also criticised the fact that the law was targeted at a defined group of government employees and that the majority of citizens were not obliged to contribute to the same extent to the State budget. The Court also highlighted in its finding that the applicant’s statutory entitlement to severance pay amounted to "possessions", that the law should protect the trust placed in statutory commitments. It observed that good government depends upon trust between the governed and the governor, and unless that trust is sustained and protected, governments will not be believed and civil servants will not order their affairs on that assumption as required by their heightened loyalty.

14. However, in its decision of 8 October 2013 in the cases of Da Conceição Mateus v. Portugal and Santos Januário v. Portugal, which concerned the payment of the applicants’ public sector pensions, which were reduced in 2012 as a result of cuts to Portuguese Government spending, the Court declared the applications inadmissible. Examining the compatibility of the reductions of the applicants’ pension payments with Article 1 of Protocol No.1 to the Convention, the Court held that the pension reductions had been a proportionate restriction on the applicants’ right to protection of property. In light of the exceptional financial problems that Portugal faced at the time, and given the limited and temporary nature of the pension cuts, the Portuguese Government had struck a fair balance between the interests of the general public and the protection of the applicants’ individual right to their pension payments 14.

15. The case-law of the Court is at the same time moving forward and moving backward, an opening and a closing. Today, no need to hide it, the Court is not untouched by the dominant austerity discourse and the famous margin of appreciation can result in situations of concern. In light of Article 8 of the Convention, the McDonald v. the United Kingdom judgment of 20 May 2014 is, to my mind, worrying. In this case, the applicant, an elderly woman with severely limited mobility, complained about a reduction by a local authority of the amount allocated for her weekly care. The reduction was based on the local authority’s decision that her night-time toileting needs could be met by the provision of incontinence pads and absorbant sheets

instead of a night-time carer to assist her in using a commode. The Court declared inadmissible, as manifestly ill-founded, the applicant’s complaints concerning the period after 4 November 2009, because the State had considerable discretion when it came to decisions concerning the allocation of scarce resources and, as such, the interference with the applicant’s rights had been “necessary in a democratic society”. More specifically, in carrying out that balancing act, the Court bore in mind that States had considerable discretion (“a wide margin of appreciation”) in issues involving social, economic and health-care policy, especially when deciding how to allocate scarce resources. It was therefore not for the Court to substitute its own assessment of the merits of the contested measure for that of the competent national authorities. In this regard, the Court found that both the local authority (via regular care reviews) and the national courts (including the Court of Appeal and the Supreme Court) had balanced the applicant’s need for care with its social responsibility for the well-being of other care-users in the community at large. Therefore, despite the very distressing situation the applicant was facing, the Court held that from 4 November 2009 onwards the interference with her right to respect for private life had been both proportionate and justified as “necessary in a democratic society” and rejected this part of her complaint as inadmissible.

16. Against this background, to what extent does the protection which the Convention affords “to everyone” (Article 1) encompass the severe hardship caused by economic crisis? Today, the relationship between poverty and human rights is on the political agenda at both international\(^\text{15}\) and European level\(^\text{16}\). I will therefore deal, in this context, with certain aspects of

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\(^{16}\) European Union Agency for Fundamental Rights (FRA), Protecting fundamental rights during the economic crisis, Working paper, December 2012; Council of Europe, Poverty and Inequalities, Paradoxes in Societies of Human
the contribution made by the Court's case-law in dealing with situations of poverty and extreme poverty. Understanding and applying the instincts (l'intuition) which underpin the principle of indivisibility of fundamental rights, the Court soon realised that the effectiveness of the civil and political rights it sought to protect was possible in certain cases only if the social implications of those rights were taken on board. Thus, by acknowledging the “porous” nature (perméabilité) of the Convention vis-à-vis social rights17, the Court has achieved impressive breakthroughs. Even if this movement is not limitless and uncritical, it is not unreasonable to believe that there could in future be new developments in the case-law. The Convention, indeed, is a living instrument to be interpreted in the light of present-day conditions.

17. Social democracy is not another form of democracy; it is an inherent part of any democratic system18. As A. Touraine has said in Qu’est ce que la démocratie ?, “the recognition of fundamental rights would be devoid of substance unless it helped to provide security for everyone and continually enlarged the domain of legal guarantees and State intervention that protect the weakest”19. That is precisely why at times talk about human rights becomes intolerable, if not insulting, for some. Is the genuine “human right” not, ultimately, “the possibility of acquiring rights”? Conversely, it might also be argued that the violation of 1st generation fundamental civil rights “certainly affects the – fragile and random – exercise of economic, social and cultural rights”20. For example, Amartya Sen, the Nobel Prize for Economics in 1998, does not hesitate “to establish a parallel between the non-democratic nature of a political system and

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Rights and Democracy? Proposals for an inclusive society, conference organised by the Council of Europe in partnership with the European Union, Strasbourg, 21-22 February 2013 (http://rights-poverty.eu/conference/). The results of the work conducted in the context of the project “Human Rights of people experiencing in poverty” that served as a basis for this Conference are developed in two publications of the Council of Europe: Living in dignity in the XXIst century. Poverty and inequalities in societies of human rights: the paradox of democracies, Strasbourg, Council of Europe Publishing, 2013 (this publication was written collectively by actors from different backgrounds including academics, members of associations and networks of people experiencing in poverty; it provides a critical review of the current situation, analyzing inequalities and poverty through the prism of human rights, democracy and redistributive policies, and also explores paths for a renewed strategy to fight poverty based on common goods and the sharing of social responsibilities); and Redefining and Combating Poverty: Human Rights, Democracy and Common Goods in Today’s Europe, Trends in social cohesion Series, no. 25, Strasbourg, Council of Europe Publishing, 2012.


famines” and even he argues that “it is the diverse positive freedoms that are available in a
democratic state, including the right to hold free elections, the exercise of freedom of the press
and of freedom of speech without censorship, that must be seen as the real force behind the
elimination of famines”21.

18. However, let us be clear. Some are opposed, if not strongly hostile, to the “social”
openness of the European Convention on Human Rights. To overcome the opposition between
the categories of rights, some authors have been suggesting for long to look at things from a
different perspective, which involves shifting from an individual rights point of view of the
obligations of the State22. Human rights that the State is internationally committed to recognize
impose three obligations: to respect human rights (not to interfere with the exercise of a right
guaranteed); to protect human rights (not to accept abuses); to fulfil human rights (to provide the
means for an effective exercise of human rights). It is what is called the tripartite typology23. As
a consequence, it follows that to affirm that the State has an obligation not only to respect rights
and to ensure their protection but also to ensure their realization is to affirm simply that the State
cannot remain indifferent to the circumstances of life that separate the guarantee of the
individual’s freedoms from his or her effective capacity to enjoy these freedoms”24. As such, the
State is bound to an obligation of progressive realization. Therefore, where an obligation of
progressive realization of an individual’s right is at issue, the decisive criterion becomes whether
or not State authorities have made all efforts that could reasonably be expected from them”25.

22. O. DE SCHUTTER, “L’interdépendance des droits et l’interaction des systèmes de protection : les scénarios du système
européen de protection des droits fondamentaux”, Droit en Quart-Monde, September-December 2000, pp. 3 et seq. See
also, concerning the EU Charter of Fundamental Rights, Fr. TULKENS, “Coexistence et complémentarité de la Charte
des droits fondamentaux de l’Union européenne et de la Convention européenne des droits de l’homme”, paper
delivered at a hearing of the European Parliament’s Committee on Civil Liberties, Justice and Home Affairs (LIBE) on
“The implementation of the EU Charter of Fundamental Rights two years after the Lisbon’s Treaty entry into force”,
Brussels, 10 November 2011.
23. See QUB BUDGET ANALYSIS PROJECT, Budgeting for Economic and Social Rights: A Human Rights Perspective, Belfast,
Queen’s University Belfast School of Law, 2010, pp. 31-49.
européen de protection des droits fondamentaux”, op. cit., p. 5.
25. Ibid., p. 10.
19. The advantage of this typology is that it can be applied to all rights and therefore supports the integrated nature of economic / social rights and civil / political rights\textsuperscript{26}. As I.E. Koch rightly points out, basing analysis on the tripartite level of obligations reinforces the equal nature of all human rights, the interdependence of all duties and scope of State duties\textsuperscript{27}.

20. Finally, while situations of poverty may result in violations of civil and political rights, persons affected by poverty are also limited in their capacity to assert the rights guaranteed by the Convention\textsuperscript{28}. But, as E. Decaux put it, “the aim should not be to invent new rights for those living in poverty but to ensure that the rights proclaimed are genuinely effective for everyone”\textsuperscript{29}.

21. Two consequences follow. First, fighting poverty not only requires improving income levels and access to housing, food, education, health services and water and sanitation, but also that persons living in poverty have the resources and capabilities to enjoy the whole spectrum of human rights. Access to justice plays a crucial role in all parts of this equation. Second, the content of a right must be the same for all. Some use the concept of integrity in the content of human rights. In short, human rights have no meaning unless they apply equally to everyone.

II. Poverty in the European Court of Human Rights’ case-law\textsuperscript{30}

A. Access to justice

22. As the UN Special Rapporteur on extreme poverty and human rights pointed out, lack of access to justice is a major reason why people fall into and remain in extreme poverty, and

\textsuperscript{26} QUB BUDGET ANALYSIS PROJECT, \textit{Budgeting for Economic and Social Rights: A Human Rights Perspective}, op. cit., p. 32.


therefore effective access to justice is not only a human right in itself but also an essential tool to tackle poverty and inequality.  

23. “Without equal access to justice, persons living in poverty are unable to claim their rights, or challenge crimes, abuses or violations committed against them, trapping them in a cycle of impunity, deprivation and exclusion. ... Moreover, the relationship between poverty and obstructed access to justice is a vicious circle: the inability of the poor to pursue justice remedies through existing systems increases their vulnerability to poverty and violations of their rights, while their increased vulnerability and exclusion further hampers their ability to use justice systems.”

24. The Council of Europe Commissioner for Human Rights says exactly the same thing, stressing the urgent need to reinvigorate the European social model based on the foundations of human dignity, intergenerational solidarity and access to justice for all.

25. Technically, what are the elements that matter in access to justice? In the context of due process and independence/impartiality of justice, we have the famous “four A’s”: availability, accessibility, adequacy, adaptability.

26. Concerning availability and accessibility, the *Airey v. Ireland* judgment of 9 October 1979 affirmed that, from the standpoint of Article 6 of the Convention and in certain circumstances, the State had an obligation, even in civil matters, to provide free legal aid to those most in need. This principle was subsequently confirmed and fine-tuned by the European Court, but also broadened to encompass the entire issue of access to justice.

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34. For a summing-up of the applicable principles, see ECIHR, *Laskowska v. Poland*, judgment of 13 March 2007.
27. Of course, the Court never intended that an unconditional right of access to justice completely free of charge should be derived from Article 6\textsuperscript{35}. Nevertheless, that provision has, on a case-by-case basis, acted as a bar to disproportionate financial obstacles preventing economically vulnerable individuals from gaining access to justice, whether on account of excessive court fees\textsuperscript{36}, either laid down in advance\textsuperscript{37} or adjusted depending on the amount of the claim\textsuperscript{38}, or on account of the refusal to admit ordinary appeals or appeals on point of law to the detriment of persons whose lack of resources made it impossible for them even to begin to pay the amount ordered by the judgment in question\textsuperscript{39}. Recently, the Court did not rule out the possibility that a decision ordering the losing party in proceedings to reimburse the winning party’s legal costs might result in a violation of Article 6 of the Convention if the amount concerned was grossly disproportionate to the financial resources of the unsuccessful party\textsuperscript{40}.

28. Lastly, in the case of \textit{Guidi v. Italy}, the Court decided to apply Rule 39 of the Rules of Court (interim measures) in order to speed up payment of a sum of 14,500 euros owed by the State (Pinto compensation) to the applicant and his daughter, whose situation of severe financial hardship was known to the State.

29. This issue of access to justice also features on the European Union’s agenda. “The crisis is putting existing structures, including our justice systems, under increased pressure”, says M. Schulz, the President of the European Parliament. “While we are all in a prolonged global economic slowdown that forces governments to stringent budgetary cuts, those values guaranteed in the Lisbon Treaty should in no way be undermined”. And these values are respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights (Art. 2 TEU).

\textsuperscript{35} ECtHR, \textit{Kreuz v. Poland} judgment of 19 June 2001, § 59.

\textsuperscript{36} For a summing-up of the applicable principles, see ECtHR, \textit{Bakan v. Turkey} judgment of 12 June 2007, §§ 66 et seq.

\textsuperscript{37} ECtHR, \textit{Mehmet and Suna Yiğit v. Turkey} judgment of 17 July 2007. In that case the Court held that the requirement for the applicants, who had no income, to pay court fees amounting to four times the minimum monthly wage at the time amounted to a disproportionate restriction of their right of access to a court (§ 38).


\textsuperscript{39} For a summing-up of the applicable principles, see ECtHR, \textit{Cour v. France} judgment of 3 October 2006.

\textsuperscript{40} See ECtHR, \textit{Collectif National d’information et d’opposition à l’usine Melox-Collectif stop Melox et Mox v. France} judgment of 12 June 2007, § 15. It should be recalled that the reimbursement of court costs by the losing party was traditionally presented, including within the Council of Europe (Recommendation No. R (81) 7 of the Committee of Ministers of the Council of Europe to member States on measures facilitating access to justice of 14 May 1981), as a means of promoting access to justice for the least well-off.
30. The topic of the 2012 Fundamental Rights Conference organised by the Fundamental Rights Agency is significant: “Justice in austerity – challenges and opportunities for access to justice”. In M. Kjaerum’s view, the conclusion is clear: access to justice should be strengthened in times of crisis. Cutting budgets during such times simply shows a lack of long-term vision; the crisis should be used to encourage innovative solutions, capable of contributing to the shaping of future policies. In this respect, class actions mechanisms or other collective redress mechanisms should be seriously envisaged.

31. But, ultimately, as O. De Schutter explains, ensuring meaningful access to justice for persons living in poverty does not depend only on legal tools or access to legal services, lawyers and courts, but also requires a more holistic approach that takes into account broader structural, social and economic factors. The causes of this limited access are the lack of expression, education and access to decision-making and also political disempowerment as a result of a lack of accountability. To improve access to justice and reduce poverty, States must tackle all these obstacles in a holistic manner, creating the conditions to enable those who are socially or economically disadvantaged to enjoy a real opportunity for justice or the benefits of due process of law in an equal manner. So “access to justice”, rule of law and legal empowerment are the key ingredients in poverty reduction.

B. Right to the peaceful enjoyment of possessions

32. Paradoxically, the Court’s constructive interpretation of Article 1 of the First Additional Protocol to the European Convention on Human Rights has resulted in some remarkable advances being made in the field of social protection.

33. The leading decision in Stec v. the United Kingdom summarised and expanded upon the existing case-law, accepting that the notion of “possessions” contained in that Convention

41. O. DE SCHUTTER, “Closing Speech: The contribution of access to justice to the post-2015 agenda”, How access to justice can help reduce poverty, op. cit.
provision could extend to all social security benefits, whether contributory or non-contributory. Significantly, the Court observed that in the modern democratic State "many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. ... Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No. 1 to be applicable".

34. Of course, this does not mean that the States Parties to the Convention are henceforth required to guarantee social security benefits that do not exist within their legal system. However, Article 1 of Protocol No. 1, read in conjunction with Article 14 of the Convention, precludes refusing such benefits, where they exist, on grounds of sex, marital status or nationality. This combination is all the more effective since, in a parallel development, the recent case-law of the European Court has produced an interpretation of Article 14 particularly favourable to the protection of groups that are structurally vulnerable, whether by accepting the legitimacy of positive action, asserting the prohibition of indirect discrimination or ruling that the burden of proof regarding discrimination must be shared.

C Right to private and family life and respect for the home

35. Article 8 of the European Convention, which enshrines the right to respect for private and family life, has also proved to be of particular benefit to the least well-off as regards social implications.

36. In its judgment in Moldovan v. Romania, the Court examined, from the standpoint of Article 8 and the right to respect for private life, the extremely precarious situation of persons...
whose houses had been burned down, and found a violation of that provision. In the Stankova v. Slovakia judgment of 9 October 2007, the Court found a violation of Article 8 of the Convention concerning the obligation on the applicant to leave the flat where she had lived without being provided with any alternative accommodation.54.

37. With regard to respect for family life, the Wallova and Walla v. the Czech Republic judgment of 26 October 2006 is significant. In this case, the applicants and their children had been separated following court decisions ordering that the children be placed in residential care. The Court found a violation of Article 8. It noted that the domestic courts had admitted that the fundamental problem for the applicants was how to find housing suitable for such a large family. Neither the applicants’ capacity to bring up their children or the affection they bore them had ever been called into question, and the courts had acknowledged the efforts they had made to overcome their difficulties. In the Court’s view, the underlying problem were thus material difficulties, which the authorities could have made up for by means other than the total separation of the family, which seemed to be the most drastic measure and could be applied only in the most serious cases. To comply with the requirement of proportionality in this case, the authorities should have had recourse to less drastic measures than the taking into care of the children. Indeed, the role of social welfare authorities is precisely to help people in difficulties who lack knowledge of the system, to guide them through the necessary steps and to advise them, among others, on the different form of social allowances, on the opportunities of obtaining social housing or on other means to improve the situation and find a solution to their problems.55.

38. This is not an isolated judgment. The R.M.S. v. Spain judgment of 18 June 2013 reflects exactly the same philosophy. The Court noted that in August 2005, the applicant’s daughter, aged three years and ten months at the time, had been taken away from her mother, who had been to the social services office with her companion and their daughter to ask for assistance due to her distress situation. Some days later, the girl was placed in a children’s home. In the present case, the Court observed that the administrative authorities had motivated

53. ECHR, Moldovan and Others v. Romania (no. 2) judgment of 12 July 2005
54. ECHR, Stankova v. Slovakia judgment of 9 October 2007, §§ 57 et seq.
55. ECHR, Walla and Wallova v. the Czech Republic judgment of 26 October 2006, §§ 73-74. In the same vein, see also ECHR, Havelka and Others v. the Czech Republic judgment of 21 June 2007, esp. § 61.
their decision finding that a situation of child abandonment existed by basing themselves on the lack of resources of the applicant, who was living in extreme poverty. In contrast to other cases the Court has already had occasion to examine, the applicant’s daughter had been exposed neither to a situation of violence or of physical or mental ill-treatment, nor to sexual abuse. The courts had not noted any affective disorders, worrying state of health of the child, or psychic instability of the parents. While it is true that in some cases that have been declared inadmissible by the Court, the placement of the children may have been motivated by unsatisfactory living conditions or material deprivation, this had however never been the only reason on which the national courts’ decision had been based, in that other elements had come into play, such as the parents’ psychological state or their affective, educational or pedagogical inability. The Court found that the Spanish administrative authorities should have considered less radical measures than to take the child into care. It held that the role of social welfare authorities was precisely to help people in difficulties who lack knowledge of the system, to guide them through the necessary steps and to advise them, among others, on the different form of social allowances, on the opportunities of obtaining social housing or on other means to overcome their difficulties, which is what the applicant had initially sought to do. Therefore, the time elapsed, which had been the result of the inertia of the authorities, and the own inertia of the domestic courts, which had not found unreasonable the reasons given by the administration to deprive a mother from her daughter solely on the basis of economic grounds, had contributed decisively to the absence of any possibility of family reunion between the applicant and her daughter.

39. With regard to respect for the home, I would mention the McCann v. the United Kingdom judgment of 13 May 2008, in which the Court stated, on the subject of the applicant’s eviction from a local authority-owned dwelling, that “[t]he loss of one’s home is a most extreme form of interference with the right to respect for the home”, with the result that any such

56. ECtHR, R.M.S. v. Spain judgment of 18 June 2013, § 84.
57. Ibid., § 86. See also ECtHR, Zhou v. Italy judgment of 21 January 2014, concerning the placement in a foster family, with a view to adoption, of the applicant’s son, after domestic courts had found that the applicant did not have the resources needed to foster the development of the child and was not in a position to look after him.
58. Ibid., § 92.
measure was permissible under the Convention only if it was possible to have its proportionality effectively reviewed by the courts.\(^{59}\)

40. In contrast, in the context of Article 8, in the *Bah v. the United Kingdom* judgment of 27 September 2011, the Court found no violation of Article 14 in conjunction with that provision in respect of a refusal to grant the immigrant applicant priority for the allocation of social housing, noting that the provision of housing to those in need being predominantly socio-economic in nature, the margin of appreciation accorded to the Government was relatively wide.\(^{60}\)

41. However, taking another direction, the Court has in the *Yordanova and Others v. Bulgaria* judgment of 24 April 2012 indicated that an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases.\(^{61}\) This case-law is confirmed in the recent and long awaited (the application was lodged in June 2007) judgment *Winterstein and Others v. France* of 17 October 2013 concerning Article 8 of the Convention and the eviction of French travellers from private land where they had been living for a long time. To be precise, the applicants had lived on the land for between five and thirty years, or had been born there, in a zone that had more recently been classified by the “land use plan” as a “protected natural zone”, in a sector where camping or caravanning was permitted, subject to development or authorisation. The French courts found that the applicants' settlement on the land was in breach of the "land use plan" and ordered them to leave, on pain of a fine per day of delay. The order has not yet been enforced, but a significant number of the applicants have had to leave under the coercion of the fine, which continues to be payable by those remaining. In addition, the authorities initiated an urban and social study of the situation (maîtrise d'œuvre urbaine et sociale), following which four of the families were re-housed in council housing. As to the others, no satisfactory solution has yet been found. The judgment is noteworthy in that it confirms the case-law in *Yordanova and Others*, in accordance with which the proportionality principle requires that situations where an entire community and a long period of time are involved should be treated very differently from everyday situations where an individual is


\(^{60}\) ECtHR, *Bah v. the United Kingdom*, judgment of 27 September 2011, §§ 47-49.

evicted from a property that he is occupying illegally, and the fact of belonging to a vulnerable minority should be taken into account in this connection. Moreover, it applies the Yordanova case-law to a situation where the land in question was not municipal property but private land, of which the applicants were mainly tenants or even owners. This leads us naturally to the next question: a right to housing.

D. Towards a right to housing

42. The issue of the position occupied by the right to housing in the law of the European Convention on Human Rights is worth raising. It is true that, as matters stand, the Convention does not protect a “right to housing” as such, although the possibility of a change in that situation cannot be discounted should the Court be called upon to examine cases that might permit it to extend or fine-tune its case-law. However, it would be just as much an overstatement to say that, because it has not attained that status, housing is simply consigned to a legal limbo where the Convention is concerned, beyond the reach of the European human rights judges. In the space between full-blown personal rights and pure facts we have, as pointed out by F. Ost, legally protected interests. It seems indisputable, in the light of the case-law of the European Court of Human Rights, that housing already enjoys that status.

43. The recognition of the right to housing as an interest protected by the Convention emerges very clearly from the case-law concerning the limits that may be imposed on property rights. As far back as the landmark judgment of 21 February 1986 in James and Others v. the United Kingdom, the Court did not hesitate to state: “Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern

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63. See in this respect J. HOHMANN, “Provoking debate: the UN Special Rapporteur and the right to housing in the UK”, Oxford Human Rights Hub, 27 September 2013, available at: http://ohrh.law.ox.ac.uk


societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces.”

44. *Mutatis mutandis*, the same motivation underlay the judgments and decisions which found to be justified, or at least justifiable *a priori* from the standpoint of Article 1 of Protocol No. 1, measures restricting property rights, such as those freezing or reducing rents or staying the enforcement of court eviction orders — provided that the measures concerned did not extend beyond a reasonable period. In the case of *Mellacher and Others v. Austria* of 19 December 1989, where rent reduction measures were contested as violating Article 1 of Protocol No. 1 to the Convention, the Court considered that “such laws are especially called for and usual in the field of housing, which in our modern societies is a central concern of social and economic policies.” In a convergent line of reasoning, the European Commission on Human Rights found it legitimate that a legislature should enact measures regulating the market in order to better respond to social need for housing during periods of a market crisis in this sector.

45. The *Hutten-Czapska v. Poland* judgment of 19 June 2006, which concerned rent control measures in the context of a housing crisis situation, is significant. With regard to Article 46 of the Convention on the binding force and execution of judgments, the Court first reiterated that “the pilot-judgment procedure is primarily designed to assist the Contracting States in fulfilling their role in the Convention system by resolving such problems at national level, thereby securing to the persons concerned their Convention rights and freedoms as required by Article 1 of the Convention, offering to them more rapid redress.” Next, the Court turned to general measures. In this respect, “as regards the general measures to be applied by the Polish State in order to put an end to the systemic violation of the right of property identified in the present case, and having regard to its social and economic dimension, including the State’s duties in relation to the social rights of other persons ..., the Court considers that the respondent State must above all, through appropriate legal and/or other measures, secure in its

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66. ECtHR, *James and Others v. the United Kingdom* judgment of 21 February 1986, § 47.
domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community – including the availability of sufficient accommodation for the less well-off – in accordance with the principles of the protection of property rights under the Convention”72.

46. More recently, in its judgment in Almeida Ferreira and Melo Ferreira v. Portugal of 21 December 2010, the Court found that a statutory bar to terminating a long-term lease did not infringe the applicants' property rights because, in that specific case, the impugned legislation was based on concern to protect a section of society deemed by the State to require special protection73. In a different context, in the Société Cofinco v. France decision of 12 October 2010, the Court declared inadmissible a complaint under Article 6 § 1 and Article 1 of Protocol No. 1 alleging that the public authorities had refused to enforce a final court ruling ordering the clearing of a block of flats, on the grounds, inter alia, that the squatters were in a precarious and vulnerable situation and therefore deserved enhanced protection74.

47. Lastly, in the case A.M.B. and Others v. Spain which was brought before the Court on 6 December 2012, the President of the Third Section decided to indicate to the Spanish Government, under Rule 39 (interim measures) of the Rules of Court, not to carry out the applicant and her children’s eviction from the home they occupy75. More recently, in the case Ceesay Ceesay and Others v. Spain lodged on 4 October 201376, the Court similarly decided on 15 October to indicate to the Spanish Government, under Rule 39 of the Rules of Court, that the applicants, two families who had been squatting in a block of flats in northeastern Spain owned by a company responsible for managing assets transferred by the four nationalized Spanish financial institutions, should not be evicted until the end of October. The Court at the same time requested the Spanish Government to provide information on the future housing status of the applicant families. On 5 November 2013, the Spanish Government having informed the Court

72. Ibid., § 239 (our accent).
73. ECtHR, Almeida Ferreira and Melo Ferreira v. Portugal judgment of 21 December 2010, § 33.
74. ECtHR, Société Cofinco v. France decision of 12 October 2010.
75. On 28 January 2014, having regard to the observations submitted by the Spanish Government, arguing that if the applicant was evicted and did not wish to return to live with her parents, with whom she had been living previously, she could make use of the possibilities offered by the authorities, the Court took the view that the maintaining of the interim measure under Rule 39 was no longer justified and thus lifted it. As regards the remainder of the application, the Court observed that the amparo appeal lodged by the applicant before the Spanish Constitutional Court was still pending. Consequently, it found that the application was premature and declared it inadmissible.
76. Application no. 62688/13, Ceesay Ceesay and Others v. Spain.
that alternative housing measures in that respect would be taken at local level, so the Court
decided to lift the interim measure indicated under Rule 39 of the Rules of Court in this case.

48. Studying these different examples, we see that the issue of housing has already
been given a certain weight in the balancing exercise, in cases which entailed restricting all or some
of the classic property-related prerogatives on that account. It may be that even greater weight
will be attached to it, thanks to a more fundamental change in the way that we perceive property
itself and the reasons traditionally advanced to justify protecting it. “Property entails obligations”,
as Article 14 § 2 of the German Constitution states.

E. Inhuman and degrading treatment

49. From the point of view of Article 3 of the Convention, we can and should raise
questions as to the suitability of this provision as a basis for a State duty towards persons in
difficulty. It would be unthinkable not to consider that extreme poverty “humiliates the individual
in his own eyes and in the eyes of others” and “is such as to arouse feelings of fear, anguish
and inferiority”. As P.-H. Imbert put it: “Is it really so ridiculous to think that if corporal
punishment in schools is considered to be degrading, the same should apply to the situation of
someone who ‘lives’ in a slum?”

50. That said, the absolute nature of the prohibition contained in Article 3 – it means that
the situations coming within the ambit of that provision are not normally justified on any grounds,
including budgetary grounds – calls, almost as a matter of necessity, for a certain degree of
restraint in applying it in practice, in other words, for a raising of the threshold of human
suffering beyond which Article 3 will be held to apply. The decision of the European Commission
of Human Rights of 9 May 1990 in Van Volsem v. Belgium, which was severely criticised,
was

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78. With regard to situations contrary to human dignity in a prison setting (overcrowding etc.), see ECtHR, Khoklich v.
Ukraine, judgment of 29 April 2003, § 181.
sécurité sociale et aide sociale, Brussels, Bruylant, 1992, pp. 134 et seq.
partly echoed ten years later in the case of O’Rourke v. the United Kingdom. Here again, this time in relation to an ex-prisoner forced to live on the streets after being evicted by the local authority from the temporary accommodation he had obtained, the Court held that there had been no violation of Article 3, as the suffering which the applicant had experienced as a result of his eviction had not attained the requisite threshold of severity. However, had the applicant’s situation been the result of State inaction rather than his own choice (he had refused all temporary accommodation as well as two offers of permanent housing), the Court’s conclusion would have been different.

51. However, this line of case-law was subsequently qualified, not to say superseded, by the Larioshina v. Russia decision of 23 April 2002, which states as follows: “[T]he Court recalls that, in principle, it cannot substitute itself for the national authorities in assessing or reviewing the level of financial benefits available under a social assistance scheme .... This being said, the Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman and degrading treatment”81. In the Budina v. Russia decision of 18 June 2009, the Court pursued the same line and addressed the arguments which, in the view of some observers, weigh in favour of a change in the case-law82. The Court did not rule out the possibility that the State’s responsibility could be engaged on account of the treatment meted out to the applicant, who was wholly dependent on State support and found herself faced with official indifference despite living in a state of great hardship incompatible with human dignity83.

52. Lastly, another consequence of the economic crisis which the Court has dealt with in the context of Article 3 is the increasing influx of migrants and asylum seekers. Thus, in the M.S.S. v. Belgium and Greece judgment of 21 January 2011, in which an asylum seeker, because of the authorities’ inaction, had found himself living on the streets for several months with no resources or access to sanitary facilities and without any means of providing for his essential needs, the Court found that the applicant had been the victim of humiliating treatment showing a lack of respect for his dignity and that the situation had aroused in him feelings of

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80. ECtHR, O’Rourke v. the United Kingdom decision of 26 June 2001.
81. ECtHR, Larioshina v. Russia decision of 23 April 2002 (italics added).
83. ECtHR, Budina v. Russia decision of 18 June 2009.
fear, anguish or inferiority capable of inducing desperation. The Court considered that such living conditions, combined with the prolonged uncertainty in which he had remained and the total lack of any prospects of his situation improving, had attained the level of severity required to fall within the scope of Article 3 of the Convention.\textsuperscript{84}

53. In the \textit{Hirsi Jamaa and Others v. Italy} judgment of 23 February 2012, the Court observed that “[t]he economic crisis and recent social and political changes have had a particular impact on certain regions of Africa and the Middle East, throwing up new challenges for European States in terms of immigration control”\textsuperscript{85}. In that case, the Court did not hesitate to assert that “having regard to the absolute character of the rights secured by Article 3, that [situation] cannot absolve a State of its obligations under that provision\textsuperscript{86}.

Conclusion

54. This last judgment takes me back to my starting point. If we accept the idea that crisis and economic crisis are not just cyclical but are the sign of an underlying shift, then I believe that, as far as human rights are concerned, this should prompt us to lend greater meaning, scope and effect to the indivisibility of fundamental human rights which is without doubt the guiding line (\textsl{l’horizon régulateur}) for the international protection of those rights.

55. As President Bratza reminded us in January 2012, in his opening speech of the judicial year of the European Court of Human Rights, in times of crisis, the protection of human right is not a luxury, but it is, more than ever, a necessity\textsuperscript{87}. Conversely, the paradox of our democracies today would be to make poverty the place of inequality in fundamental human rights\textsuperscript{88}.

\begin{flushright}
84. ECtHR (GC), \textit{M.S.S. v. Belgium and Greece} judgment of 21 January 2011, § 263.
85. ECtHR (GC), \textit{Hirsi Jamaa and Others v. Italy} judgment of 23 February 2012, § 176.
86. \textit{Ibid.}, § 122.
\end{flushright}
56. To conclude, I would like to refer to this essential but criticized notion of human dignity. Hannah Arendt’s criticism of reference to human dignity is based on experience of the Holocaust. She says that the invoking of dignity risks being tragically useless if certain conditions are not fulfilled. A person cannot have rights, and cannot therefore see his or her dignity respected, unless he or she is part of a political and legal community. If human rights were not able to prevent extermination camps, it is because the human beings who perished there no longer had any legal status. Human rights and dignity cannot content themselves with concerning an abstract man but must necessarily refer to the person included in a political community. It is essential to recognize men and women, all equal beings, the quality of “subjects of dignity”: the poor, foreigners, those excluded.

57. That’s the reason why those who have accepted the daunting function of judging must restore vulnerable people’s quality of subjects of dignity.