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The Right to Housing: International, European and National Perspectives

The right to housing was recognized already in Article 25 of the first international human rights instrument, whose 60th anniversary was recently celebrated –the Universal Declaration of Human Rights (hereinafter, UDHR)– and has been later embedded in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (hereinafter, ICESCR) and other international and regional human rights treaties. However, the broader acceptance of this right as a legally justiciable right in the UN Member States and, especially, its implementation is still a way to go. The statistics are exposing the reality: while the majority of the world’s population lives in some form of a dwelling, roughly one half of the world’s population does not enjoy the full spectrum of entitlements necessary for housing to be considered adequate. The UN estimates indicate that approximately 100 million people worldwide are without a place to live, and over 1 billion people are inadequately housed.¹

Seeing these tragic figures one might question if the right to housing is at all an enforceable right all human beings enjoy, or merely a dream for future generations. While one should admit the large scale of violations this cannot serve as an argument to deprive the right of its legally binding nature, because the same reasoning might be applied to the whole range of economic and social rights and even to most civil and political rights. As long as states and other actors treat these situations as violations the legal status of the right to housing is not challenged. Therefore, the key to improve the implementation of this right lies in the more effective use of domestic and international legal remedies to challenge the violations.

Recent developments in the international human rights law and also the jurisprudence of regional and national human rights bodies show that social and economic rights, including the right to housing, are getting a greater recognition. They are seen as an integral part of economic, social and cultural rights within the

¹ Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, 35–39, UN Doc. E/CN.4/2005/48 (3 March 2005).

UN, European, Inter-American, and African human rights instruments.² While the objections against the foundations of housing rights and other social and economic rights are still periodically raised, the interdependence between civil and political, and social and economic rights has been more and more acknowledged.³ For example, the minimum core of the housing rights is closely linked to the right to human dignity. The lack of affordable housing places poor people in the impossible position of having to choose between the most basic of human necessities: housing or food, housing or health care, housing or clothing, and so on.⁴ The relationship between homelessness, intolerable living conditions and human dignity is of vital importance from the legal point of view due to the fact that one might argue that the right to human dignity has achieved the status of international customary law and therefore is legally binding for all states regardless of their abstinence to adhere to human rights treaties granting the right to housing. Furthermore, the connection between housing rights and such civil rights as the right to family and private life, right to property, and even the right to life, have long been recognized in the case-law of different international and regional human rights bodies.

It is true that there is no consensus as regards the exact scope of this right, level of recognition and nature of state obligations. While some states clearly recognize housing rights as individual justiciable rights, others regard it as a principle, which states should strive to ensure. The UN Special Rapporteur on Adequate Housing has noted that housing rights should not be taken to imply that this right will manifest itself in precisely the same manner in all circumstances and locations.⁵ The scale of the problems, available resources and the approaches of countries certainly vary. However, despite the disagreement on the precise content of the housing rights there is an increasing consensus on the minimum core obligations for states to ensure the implementation of the most essential elements of this right. This minimum core of housing rights should be fulfilled despite the reference of the state to the inadequacy of resources. A frequent example to mention is the obligation for states to abstain from carrying out or advocating the practice of forced or arbitrary evictions of any persons or groups from their homes. The content of these core obligations derives from the synthesis of the jurisprudence of international, regional, and national human rights protection bodies, which is analyzed in the following chapters.

² Padraic Kenna: «Globalization and Housing Rights», *Indiana Journal of Global Legal Studies*, Vol. 15, No. 2 (2008), p. 436.

³ *Vienna Declaration and Programme of Action*, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 5.

⁴ Mayra Gómez, Bret Thiele, Philip Tegeler: «Housing Rights Are Human Rights», *Human Rights: Journal of the Section of Individual Rights and Responsibilities* Vol. 32, No. 3, (2005), pp. 2-5.

⁵ Scott Leckie: *The Right to Housing. Economic, Social and Cultural Rights*, Martinus Nijhoff Publishers, Dordrecht-Boston-London, 2001, p. 150.

I. INTERNATIONAL INSTRUMENTS

As mentioned above, the right to housing is proclaimed already in the UDHR. According to Article 25 (1) everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including, *inter alia*, housing. Subsequently, this right was further strengthened by its inclusion in Article 11 (1) ⁶ of the ICESCR, which lays down the duty of the States Parties to recognize the right of everyone to an adequate standard of living for himself and his family. Due to the legally binding nature of the ICESCR and the numerous explanations made by the UN Committee on Economic, Social and Cultural Rights (hereinafter, CESCR) on the state obligations and the content of the right to housing in the ICESCR, Article 11 (1) of the ICESCR is generally accepted as one of the most significant legal sources of this right. Therefore, considerations made by the UN CESCR as regards Article 11 (1) of the ICESCR may be referred to for the interpretation of housing rights in other human rights instruments.

The CESCR has expressed the most of the clarifications on the state obligations and the content of the right to housing in its General Comments ⁷ and in the Concluding Observations on state reports. As with other social and economic rights, the CESCR has identified four layers of obligations of the states in relation to the right to adequate housing: to respect, to protect, to promote and to fulfill. ⁸

At the minimum level, the state and all its organs should abstain from adopting legal measures, policies or practices leading to the deterioration of the existing situation. An example to mention is the abstention from the policy or the practice of arbitrary or forced evictions of any persons or groups from their homes. The obligation to promote is farther reaching and requires the state to take active steps at the level of policy, legislation and practice which would gradually lead to the elimination of homelessness. It is essential to underline that the measures taken at this level, like the adoption of the national housing strategy, should involve discussions and consultations with all the groups affected. Furthermore, active steps are required from the state to prevent violations of the right to housing by non-state actors. The state should provide for legal remedies and protection in the case of abuse of housing rights by landlords, property developers, landowners or other actors. Finally, the obligation to fulfill includes a

⁶ «The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.»

⁷ UN Committee on Economic, Social and Cultural Rights: General Comment 4. The right to adequate housing (Article 11 (1)), of 1991 (United Nations: Document E/ E/1992/23). General Comment 7. The right to adequate housing forced evictions (Article 11.1 of the Covenant), of 1997 (United Nations: Document E/1998/22, annex IV).

⁸ Scott Leckie: *The Right to Housing...*, cit.

number of redistributive economic measures taken by the state, like the provision of public housing, housing subsidies, and monitoring rent levels.

The CESCR has also elaborated on what the concept of «adequate» housing entails. To begin with, it encompasses such elements as the legal security of tenure and availability of services, facilities and infrastructure. For instance, the latter includes access to natural and common resources, safe drinking water, energy, sanitation and washing facilities, means of food storage, and waste disposal. Secondly, «adequate» housing also entails such components as affordability and habitability. While affordability requires housing costs to be kept at the level not threatening other basic needs of households or individuals, the habitability refers to the security demands of housing and protection of inhabitants from threats to their health caused by weather or structural hazards. Furthermore, the accessibility and location are among the factors to be considered when the «adequacy» of housing is measured. Special attention should be paid to the needs of disadvantaged groups as the elderly, children, the physically disabled, victims of natural disasters and other groups. Lastly, one should take into account the cultural adequacy of housing, which is linked to the expression of cultural identity and diversity of housing.⁹

Apart from the ICESCR many other international instruments setting out rights to housing have been ratified by countries around the world. Most of them protect the housing needs of specific social groups such as children,¹⁰ refugees,¹¹ migrant workers,¹² indigenous people,¹³ the disabled,¹⁴ and other vulnerable groups. Other instruments as the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women strengthen the application of the principle of equality and non-discrimination to ensure the enjoyment of housing rights by these disadvantaged groups. However, besides legal efforts to protect housing rights at the international level, a variety of legal instruments have also been adopted at the regional and national level. Therefore, the following sections of this paper will be devoted to the study of the content and application of the legal measures aimed to ensure housing rights within the Council of Europe (hereinafter, COE) and the European Union (hereinafter, EU).

⁹ UN Committee on Economic, Social and Cultural Rights: General Comment 4. The right to adequate housing (Article 11 (1)), of 1991 (United Nations: Document E/ E/1992/23), para.8.

¹⁰ Through the Convention on the Rights of the Child, 'opened for signature Nov. 20, 1989, 1577 U.N.T.S.3.

¹¹ Through the Convention Relating to the Status of Refugees, 'opened for signature July 28, 1951, 189 U.N.T.S. 150.

¹² Through the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, adopted by General Assembly Resolution 45/158, U.N. Doc A/RES/45/158 (Dec. 18, 1990).

¹³ Through the Declaration on the Rights of Indigenous Peoples, adopted by General Assembly Resolution 61/295 on 13 September 2007

¹⁴ Through the Convention on the Rights of Persons with Disabilities, opted by General Assembly Resolution 61/106, 76th plen. mtg., U.N. Doc. A/RES/61/106 (Dec. 13, 2006)

2. COUNCIL OF EUROPE HOUSING RIGHTS

The COE, established in 1949 and currently encompassing 47 Member States, has promoted a rights based approach in many areas, including housing rights, through the European Convention on Human Rights and Fundamental Freedoms¹⁵ (hereinafter, ECHRFF) with its allied European Court of Human Rights (hereinafter, ECHR) and also within the now revised European Social Charter¹⁶ (hereinafter, ESC). This section explores the scope of housing rights and their application under the both human rights protection mechanisms.

2.1 The European Convention on Human Rights and Fundamental Freedoms

The ECHRFF was signed on 4 November 1950 in Rome in order to secure fundamental civil and political rights to everyone within the jurisdiction of the Member States of the COE, and entered into force in 1953. It is deemed to be one of the most powerful international treaties on human rights protection as its application is controlled by the ECHR where individuals can apply directly against a Member State of the COE. The decisions of the ECHR are binding on the Member States concerned and have led governments to alter their legislation and administrative practice in a wide range of areas.¹⁷

The ECHRFF does not contain a right to housing *per se*. However, it includes civil and political rights provisions interpreted by the ECHR as leading to the development of housing rights, especially within Article 8 (respect for private life, family life, and home)¹⁸ and Article 1 of Protocol No. 1 to the ECHRFF (protection of possessions),¹⁹ which happen to be among the most frequently

¹⁵ European Convention on Human Rights and Fundamental Freedoms, Council of Europe, 4 November 1950, CETS No.005.

¹⁶ European Social Charter (Revised), Council of Europe, 3 May 1996, CETS No. 163.

¹⁷ Information on the ECHR's home page. Available at www.echr.coe.int/NR/rdonlyres/DF074FE4-96C2-4384-BFF6-404AAF5BC58510/Brochure_EN_Portes_ouvertes.pdf (viewed 29 September 2010).

¹⁸ «Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. »

¹⁹ «Protection of property

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

invoked articles before the ECHR.²⁰ Also Article 3 (prohibition of torture or inhuman or degrading treatment or punishment), Article 6 (right to fair trial) and Article 14 (prohibition of discrimination)²¹ have been interpreted by the ECHR in the context of housing.

Article 8 (1) is the closest to provide the right to housing: «Everyone has the right to respect for his private and family life, his home and his correspondence». While Article 8 seeks to protect four areas of personal autonomy, these areas are not mutually exclusive.²²

2.1.1 The scope of «home»

According to the ECHR, «home» is an autonomous concept, which does not depend on classification under domestic law. «Home» is a wide term given that the French equivalent «domicile» has a broader connotation.²³

Since the leading case on the scope of «home» –*Gillow v. United Kingdom*–²⁴ in determining the claimants' right to respect for their home, the ECHR has carried out a test whether there existed «sufficient continuing links»²⁵ with their presumed home. Moreover, the *sufficiency* of these links can be either diminished (length of absence and the establishment of another home) or strengthened (periods of habitation, ownership, presence of personal belongings, intention to take up permanent residence, emotional ties),²⁶ whereas the *continuity* of the link is not easily broken if the absence from home is caused by the respondent state.²⁷ For example, in *Zavou v. Turkey*²⁸ the ECHR held that an involuntary absence of

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

²⁰ According to the information in the ECHR's home page, Articles 2, 8 and Article 1 of Protocol No. 1 are mostly included in the applications of individuals. Available at www.echr.coe.int/ECHR/EN/Header/Case-Law/Case-law+information/Key+case-law+issues/ (viewed 26 September 2010).

²¹ Padraic Kenna: «Globalization and Housing Rights», cit. p. 446.

²² *Mentes and Others v. Turkey*, 28 November 1997, para. 73, Reports 1997-VIII; *Klass and Others v. Germany*, 6 September 1978, para. 41; Series A No. 28; *López Ostra v. Spain*, 9 December 1994, para. 51; Series A No. A303-C; *Margareta and Roger Andersson v. Sweden*, 25 February 1992, para. 72; Series A No. A226-A.

²³ *Niemietz v. Germany*, 16 December 1992; Series A No. A251-B.

²⁴ *Gillow v. United Kingdom*, 24 November 1986, Series A No. A109.

²⁵ *Ibid.*, para. 46; *Prokopovich v. Russia*, No. 58255/00, para. 36, ECHR 2004-XI (extracts); *McKay-Kopecka v. Poland (dec.)*, No. 45320/99, ECHR, 19 September 2006, *Buckley v. United Kingdom*, 25 September 1996; Reports 1996-IV.

²⁶ Antoine Buysse: «Strings Attached: the Concept of “Home” in the Case Law of the European Court of Human Rights», *European Human Rights Law Review* No. 3 (2006), p. 298.

²⁷ *Ibid.*

²⁸ *Zavou v. Turkey*, No. 16654/90, ECHR, 26 September, 2002.

more than 28 years due to the occupation of Northern Cyprus by Turkey did not sever the links between the applicants and their home.

In *Moreno Gómez v. Spain*, the ECHR developed the notion of home regarding privacy: «the home is the place, the physically defined area, where private and family life develops». ²⁹ Thus –according to Antoine Buyse– function, not form, is decisive in establishing whether a certain place can be qualified as home. ³⁰ The concept of «home» thus includes existing ³¹ homes, land, ³² but not a home region. ³³ It is not limited to traditional residences and includes, *inter alia*, caravans and other non-fixed lodgings, ³⁴ second homes or holiday homes, ³⁵ business premises in the absence of a clear distinction between one's office and private residence or between private and business activities, ³⁶ a company's registered office, branches or other business premises. ³⁷ Other examples are occupation of a house belonging to another if this is for significant periods and on an annual basis, ³⁸ one room occupied by the applicant in a building the rest of which he let to tenants, ³⁹ and both garage and garden ⁴⁰ as part of the property or tenancy. ⁴¹

The legality of tenure at the moment when the claimed violation occurred is not decisive to determine the scope of «home», since according to the ECHR's case-law ⁴² also an illegally occupied place of residence qualifies as home. It must especially be so when the illegality is claimed by the applicants to have been created by the respondent state. However, the illegality could only so far be immaterial as it did not result from the applicant's actions in the first place –e.g., there has to be a grounded legal interest in a particular dwelling. ⁴³ The factual situation is thus more important than the legal status. ⁴⁴

²⁹ *Moreno Gómez v. Spain*, No. 4143/02, para. 53, ECHR 2004-X.

³⁰ Antoine Buyse: «Strings Attached...», cit. p. 299.

³¹ *Loizidou v. Turkey*, 18 December 1996, para. 66, Reports 1996-VI.

³² *Buckley v. United Kingdom*, cit.

³³ *Loizidou v. Turkey*, cit., para. 66,

³⁴ *Buckley v. United Kingdom*, cit., para. 64; *Chapman v. the United Kingdom*, No. 27238/95, paras. 71-74, ECHR 2001-I.

³⁵ *Demades v. Turkey*, No. 16219/90, ECHR, 31 July 2003; *Gillow v. United Kingdom*, cit.; *Buckley v. United Kingdom*, cit.; *Prokopovich v. Russia*, cit.

³⁶ *Niemietz v. Germany*, cit.

³⁷ *Chappell v. United Kingdom*, 30 March 1989; Series A No. A152-A; *Niemietz v. Germany*, cit.; *Société Colas Est v. France*, No. 37971/97, para. 41, ECHR 2002-III.

³⁸ *Mentes and Others v. Turkey*, cit., para. 73.

³⁹ *Camenzind v. Switzerland*, judgment of ECHR, 16 December 1997, para. 35, Reports 1997-VIII.

⁴⁰ Jochen Abr. Frowein and Wolfgang Peukert: *Europäische Menschenrechtskonvention. EMRKKommentar* (1996), p. 359 (cited in Antoine Buyse: «Strings Attached...», cit. p. 299).

⁴¹ *Surugiu v. Romania*, No. 48995/99, para. 59, 20 April 2004.

⁴² *Gillow v. United Kingdom*, cit.; *Buckley v. United Kingdom*, cit.

⁴³ Ian Loveland, «When is a house not a home under Article 8 ECHR?» [2002] P.L. 221-231, p. 223. Cited in Antoine Buyse: «Strings Attached...», cit. p. 300.

⁴⁴ Antoine Buyse: «Strings Attached...», cit. p. 300.

Accordingly, it can be seen that the ECHR is willing accord the widest possible meaning to the notion of «home», excluding situations when putting a particular «place» within the scope of «home» would mean to interpret Article 8 (1) beyond its objective. This complies with the conviction that the ECHR is a living instrument which must be interpreted in the light of present-day conditions.⁴⁵

2.1.2 Interferences with the right to respect for home

Proceedings on the right to respect for home usually engage Article 8. Interferences with Article 8 include: eviction,⁴⁶ a deliberate destruction of the home,⁴⁷ a refusal to allow displaced persons to return to their homes,⁴⁸ searches⁴⁹ and other entries⁵⁰ by the police, planning decisions,⁵¹ compulsory purchase orders,⁵² environmental problems,⁵³ telephone tapping,⁵⁴ a failure to protect personal belongings relating to the home,⁵⁵ or noise resulting from night flights.⁵⁶ Justifications for interference by a public authority must be in accordance with Article 8 (2) and proportionate to the aim sought.⁵⁷

Further, Article I of Protocol No. I has also frequently been the basis of claims in cases of standard expropriation,⁵⁸ evictions⁵⁹ and certain aspects of leases such as rent levels.⁶⁰

⁴⁵ Antoine Buyse: «Strings Attached...», cit.; *Cossey v. the United Kingdom*, 27 September 1990, para. 35, Series No. A184.

⁴⁶ *McCann v. United Kingdom*, No. 19009/04, para. 47, ECHR, 13 May 2008.

⁴⁷ *Selçuk and Asker v. Turkey*, 24 April 1998, para. 86, Reports 1998 II.

⁴⁸ *Cyprus v. Turkey* [GC], No. 25781/94, paras. 165-177, ECHR 2001 IV.

⁴⁹ *Murray v. the United Kingdom*, 28 October 1994, para. 88, Series A No. 300 A, *Chappell v. United Kingdom*, cit.; *Funke v. France*, 25 February 1993, para. 48, Series A No. 256 A.

⁵⁰ *Evcen v. The Netherlands*, No. 32603/96, Commission (instance preceding the ECHR until 1998) decision of 3 December 1997; *Kanthak v. Germany (dec.)*, No. 12474/86, Commission decision of 11 October 1988.

⁵¹ *Buckley v. United Kingdom*, cit. para. 60.

⁵² *Howard v. United Kingdom*, No. 10825/84, Commission decision of 18 October 1985, Decisions and Reports (DR) 52, p. 198 at p. 204.

⁵³ *López Ostra v. Spain*, cit.; *Powell and Rayner v. the United Kingdom*, 21 February 1990, para. 40, Series A No. 172, p. 18.

⁵⁴ *Klass and Others v. Germany*, 6 September 1978, para. 41; Series A No. 28.

⁵⁵ *Novoseletskiy v. Ukraine*, No. 47148/99, ECHR 2005 II (extracts).

⁵⁶ *Hatton v. United Kingdom*, No. 36022/97, paras. 129-130, ECHR 2003-VIII.

⁵⁷ *Chapman v. the United Kingdom*, cit.; *Connors v. United Kingdom*, No. 66746/01, ECHR, 27 May 2004; *Beard v. United Kingdom*, No. 24882/94, ECHR, 18 January 2001.

⁵⁸ *Mehmet Salih and Abdülsamet Çakmak v. Turkey*, No. 45630/99, para. 22, 29 April 2004; *Mutlu v. Turkey*, No. 8006/02, para. 23, 10 October 2006; *Sarica and Dilaver v. Turkey*, No. 11765/05, ECHR, 27 May 2010.

⁵⁹ *Sarica and Dilaver v. Turkey*, cit.

⁶⁰ *Langborger v. Sweden*, 22 June 1989, para. 39; Series A No. 155, p. 17.

The following sections address some examples of application of Article 8 and Article 1 of Protocol No. 1, as well as in combination with Articles 3, 6 and 14.

2.1.3 Article 8 ECHRFF

In *Marzari v. Italy*,⁶¹ the obligation for public authorities to provide housing assistance to an individual suffering from a severe disability, because of the impact of such refusal on the private life of the individual, was advanced.⁶² Respect for the home may also entail the adoption by public authorities of measures to secure that right in the sphere of relations between individuals such as preventing their entry into and interference with the applicant's home.⁶³

Interestingly, there is a line of case law concerning the special situation of the Roma⁶⁴ where the ECHR has recognized the positive obligation on the Member States under Article 8 to facilitate the gypsy way of life (travelling around and settling in different places) as the vulnerable position of gypsies as a minority meant that some special consideration had to be given to their needs and their different lifestyle⁶⁵ both in the relevant regulatory framework and in reaching decisions in particular cases.

In *Moldovan and Others v. Romania*,⁶⁶ the ECHR concluded that apart from burning the applicants' houses and failing to provide them with alternative dwellings, which amounted to a serious violation of Article 8 of a continuing nature, the applicants' living conditions and the racially discriminatory manner in which their grievances were handled by the public authorities constituted an interference with their human dignity. In the special circumstances of the case, this amounted to «degrading treatment» within the meaning of Article 3 («No one shall be subjected to torture or to inhuman or degrading treatment or punishment»).

While there is no obligation under the ECHRFF for a universal state housing provision, the combination of obligations under Articles 3 and 8 can lead to further positive obligations. Such obligations have been found by the ECHR under Article 8 in relation to protection from smells and nuisance from a waste

⁶¹ *Marzari v. Italy*, ECHR, 4 May 1999, 28 EHRR CD 175.

⁶² *Marzari v. Italy*, cit., para. 179; *Botta v. Italy*, No. 21439/93, ECHR 1998-I.

⁶³ *Novoseletskiy v. Ukraine*, cit., para. 68; *Surugiu v. Romania*, cit., para. 59, and references therein.

⁶⁴ *Chapman v. the United Kingdom*, cit.; *Connors v. United Kingdom*, No. 66746/01, para. 84, ECHR, 27 May 2004; *Codona v. United Kingdom* (dec), No. 485/05, ECHR, 7 February 2006.

⁶⁵ *Buckley v. United Kingdom*, cit., para. 80.

⁶⁶ *Moldovan v. Romania* (No. 2), No. 41138/98; 64320/01, ECHR2005-VII (extracts).

treatment plant,⁶⁷ toxic emissions emanating from a chemical factory,⁶⁸ environmental pollution from a steel plant,⁶⁹ and noise from bars and nightclubs.⁷⁰

2.1.4 Article I of Protocol No. I

The case of *Dokic v. Bosnia and Herzegovina*⁷¹ concerns the repossession of a flat in Sarajevo which the applicant had left at the start of the Bosnian war and of a violation of Article I of Protocol No. I. It is notable that the ECHR held that the case did not disclose an interference with Article 8, since Dokic had shown no intention of returning to his former flat. This is an application of principles established in *Demopoulos v. Turkey*⁷² and is an opposite situation (but same application) of older case law which stressed the need for continuing links with the dwelling at issue (e.g. *Gillow*).^{73 74}

There is a line of ECHR cases showing that entitlements to social assistance can amount to a property right, benefiting from the protection of Article I of Protocol I.⁷⁵

In *Stretch v. United Kingdom*⁷⁶ the ECHR held that the notion of «possessions» included the tenant's interest in the continuation of a tenancy. Once this property right is established, any interference with that right must satisfy the requirements of Article I of Protocol No. I, Article 6, and also Article 14.

*James v. United Kingdom*⁷⁷ showed that Article I of Protocol No. I does not guarantee a right to full compensation in all circumstances. Legitimate objectives of «public interest», as pursued by measures of economic reform or measures designed to achieve greater social justice, may call for less than full market value reimbursement.

The definition of «possessions» also includes the right of a landlord to derive profit from rented property as part of tenants' rent payments.⁷⁸ The ECHR distinguished this case from others⁷⁹ where limiting the rights of landlords had been proportionate on the grounds that the landlord here had never entered a

⁶⁷ *López Ostra v. Spain*, cit.

⁶⁸ *Geurra v. Italy*, 19 February 1998, Reports 1998-I.

⁶⁹ *Fadeyeva v. Russia*, No. 5723/00, ECHR 2005-IV.

⁷⁰ *Moreno Gómez v. Spain*, cit.

⁷¹ *Dokic v. Bosnia and Herzegovina*, No. 6518/04, ECHR, 27 May 2010

⁷² *Demopoulos v. Turkey (dec.)*, No. 46113/99, ECHR, 1 March 2010.

⁷³ *Gillow v. United Kingdom*, cit.

⁷⁴ *Dokic v. Bosnia and Herzegovina*, cit., para. 66.

⁷⁵ *Koua Poirrez v. France*, No. 40892/98, ECHR2003-X; *Gaygusuz v. Austria (No. 14)*, 16 September 1996, Reports 1996-IV; *Feldbrugge v. The Netherlands*, 29 May 1986, Series No. A99.

⁷⁶ *Stretch v. United Kingdom*, No. 44277/98, ECHR, 24 June 2003.

⁷⁷ *James v. United Kingdom*, 21 February 1986, Series No. A98.

⁷⁸ *Hutten-Czapska v. Poland*, No. 35014/97, ECHR, 2006-VIII.

⁷⁹ *Spadea and Scalabrino v. Italy*, 28 September 1995, Series No. A315-B; *Mellacher v. Austria*, 19 December 1989, Series No. A169.

freely negotiated lease, had lost the right to terminate the lease and the rent levels set were below that required to cover necessary maintenance expenses.

The variety of the case subject matters before the ECHR suggests the interaction of different human rights to secure the right to (adequate) housing. Moreover, the right to housing is rather seen through the concept of 'home' than «property» which attaches the right a human dimension. Yet, there are still many groups of people who do not receive the minimum core housing rights protection across Europe, including Roma and gypsies, people with disabilities, refugees, immigrants, third-country nationals, asylum-seekers, migrants, national minorities and other discriminated groups, people in the lowest parts of the labor market and women who are victims of violence.⁸⁰ The latter category serves as a point of further interest.

2.1.5 The connection between homelessness and domestic violence

An average of 50-60% of all homeless women report that they are homeless because they are fleeing domestic violence. Domestic violence occurs to a greater or lesser degree in all regions, countries, societies, and cultures; it affects women irrespective of income, class, or ethnicity.⁸¹

In this regard the ECHR has adopted a significant⁸² decision in case *Opuz v. Turkey*⁸³ concerning domestic violence. It held that Turkey had violated, *inter alia*, Article 14 read in conjunction with Article 2 (right to life) and Article 3 of the ECHRFF on account of the violence suffered by the applicant and her mother having been gender-based, which amounted to a form of discrimination against women, especially bearing in mind that, in cases of domestic violence in Turkey, the general passivity of the judicial system and impunity enjoyed by aggressors mainly affected women.⁸⁴

It is interesting, that although the applicant did not rely on either Article 8 ECHRFF or Article 1 of Protocol No. 1 in her application, there are several references in the judgment that the applicant was forced to leave her home due to

⁸⁰ Padraic Kenna: «Housing Rights: Positive Duties and Enforceable Rights at the European Court of Human Rights», *European Human Rights Law Review*, Vol. 2 (2008), p. 207.

⁸¹ See, e.g. Human Rights Watch: «Domestic Violence», in *The Human Rights Watch Global Report on Women's Human Rights* (1995), p. 341 (available online at www.hrw.org/about/projects/womrep). Cited in Giulia Paglione: «Domestic Violence and Housing Rights: A Reinterpretation of the Right to Housing», *Human Rights Quarterly*, Vol. 28 (2006), p. 121.

⁸² So far the *Fernandes* case before the Inter-American Commission of Human Rights has been one of the most progressive concerning state responsibility towards domestic violence: the Brazilian government was held complicit in the pattern of domestic abuses against women not only because it had tolerated the abuses but also because it had effectively created a climate that increased the perpetration of such violations, as they went unpunished. See *Fernandes v. Brazil*, Case 12.051, Inter-Am. C.H.R., Report No. 54/01 (2001). Cited in: Giulia Paglione: «Domestic Violence and Housing Rights...», cit., p. 142.

⁸³ *Opuz v. Turkey*, No. 33401/02, ECHR, 9 June 2009.

⁸⁴ *Ibid.*, para. 200.

threats from her husband.⁸⁵ Thus, by admitting that the domestic violence in the current case amounted to discrimination on grounds of sex, the ECHR has implied that Article 14 of the ECHRFF has also been indirectly violated as regards to the applicant's right to housing, since she was not able to enjoy it adequately on the grounds that she was a woman.

However, as Giulia Paglione suggests, there is a common limitation in the otherwise progressive domestic violence cases: housing rights, are still excluded or ignored in any analysis of domestic violence.⁸⁶

Consequently it is clear that only by correctly interpreting the right to housing as a universal, justiciable human right, which incorporates the right to live free from domestic violence, can the fight against such violence qualitatively improve and reach in a substantial way the numerous abused women.⁸⁷

2.2 The European Social Charter

The ESC guarantees social and economic human rights complementing the civil and political rights protection secured by the ECHRFF. It was adopted in 1961 and revised in 1996.

The ESC sets out the right to adequate housing (Article 31) and a number of housing-related rights and freedoms and establishes a supervisory mechanism carried out by, *inter alia*, the European Committee of Social Rights (hereinafter, ECSR) aiming to guarantee their respect by the states' parties. Since 1995, a Collective Complaints Protocol was established, allowing approved NGOs to lodge complaints against states to the ECSR in relation to breaches of the ESC.

Article 31 of the ESC provides:

«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.»

Accordingly, the main elements of the right to housing envisaged under the ESC are «adequacy», «prevention and reduction of homelessness» and «accessibility». Like the CESCR, the ECSR has carried out its interpretation of the right to housing in its case-law, specifying its scope.

Thus, Article 31 cannot be interpreted as imposing on states an obligation of «results». However, the States Parties must show a practical and effective application of rights by adopting the necessary means of ensuring steady progress towards achieving the goals of the ESC, maintaining meaningful statistics on needs,

⁸⁵ *Ibid.*, paras. 209, 156, 172.

⁸⁶ Giulia Paglione: «Domestic Violence and Housing Rights...», cit., p. 143.

⁸⁷ Giulia Paglione: «Domestic Violence and Housing Rights...», cit., p. 147.

resources and results, undertaking regular reviews of the impact of the strategies adopted, establishing a timetable for achieving the objectives of each stage, and paying close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.⁸⁸ Article 31 must be considered in the light of the ECHRFF and the ICESCR.⁸⁹

States Parties should promote access to housing in particular to the different groups of vulnerable persons.⁹⁰ «Adequate housing» means a dwelling which is safe from a sanitary and health point of view, not over-crowded, with secure tenure supported by the law (covered by Article 31(2)).⁹¹

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

The effectiveness of the right to adequate housing requires its legal protection through adequate procedural safeguards, affordable and impartial legal and non-legal remedies.⁹² Any appeal procedure must be effective.⁹³

States must take action to prevent categories of vulnerable people from becoming homeless. In addition to a housing policy for all disadvantaged groups of people to ensure access to social housing (Article 31(3)), states must set up procedures to limit the risk of eviction.⁹⁴

Reducing homelessness requires the introduction of emergency measures, such as the provision of immediate shelter. There must be enough places,⁹⁵ and the conditions in the shelters should be such as to enable living in keeping with human dignity.⁹⁶ The temporary supply of shelter, however adequate, cannot be considered satisfactory. Measures should be taken to help such people overcome

⁸⁸ *Digest of the Case Law of the European Committee of Social Rights*, 1 September 2008, Council of Europe, p. 169 (available online at: www.coe.int/t/dghl/monitoring/socialcharter/Digest/DigestSept2008_en.pdf (viewed 13 September 2010).

⁸⁹ *Ibid*, p. 170.

⁹⁰ *Conclusions 2003, Italy*, p. 342 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 170).

⁹¹ *Conclusions 2003, France*, p. 221 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 170).

⁹² *Conclusions 2003, France*, p. 224 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 171).

⁹³ *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, Complaint No. 39/2006, decision on the merits of 5 December 2007, paras. 80-81 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 171).

⁹⁴ *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 171.

⁹⁵ *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, cit., para. 107 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 172).

⁹⁶ *European Federation of National Organisations Working with the Homeless (FEANTSA) v. France*, cit., paras. 108-109.

their difficulties and to prevent them from returning to a situation of homelessness.⁹⁷

Housing is affordable if the household can afford to pay initial costs (deposit, advance rent), current rent and/or other housing-related costs (e.g. utility, maintenance and management charges) on a long-term basis while still being able to maintain a minimum standard of living, according to the standards defined by the society in which the household is located.⁹⁸

Apart from the general right to housing, the ESC also contains rights to housing in relation to physically and mentally disabled persons (Article 15), children and young persons (Article 17) and social, legal, and economic protection for families, including a state obligation to provide family housing (Article 16). The ESC grants migrant workers an explicit right to be treated equally in relation to access to housing (Article 19) and sets out the right of elderly persons to social protection and independent living by means of provision of housing suited to their needs and their state of health, or of adequate support for adapting their housing (Article 23). Article 30 on rights to protection against poverty and social exclusion includes an obligation on contracting states to promote effective access to, *inter alia*, housing.

However, the regime provided for by the ESC is not deemed to be as effective as the supervision mechanism laid out in the ECHRFF involving the ECHR. Unlike the obligation to pay damages for a breach of the ECHRFF, derived from Article 41 of the ECHR, the scenario under the ESC supervisory regime leads to a Committee of Ministers' recommendation on an unsatisfactory application of the ESC (Article 9 of the Additional Protocol to the ESC Providing for a System of Collective Complaints)⁹⁹ addressed to the state party, which further has to provide information on the measures it has taken to give effect to the recommendation. Therefore the satisfaction for the injured individuals is substantially greater under the ECHRFF than under the ESC.

The greater popularity of the ECHRFF might have been partially initiated by the ECHR itself as, according to Padraic Kenna, it deals with housing rights in an oblique manner, almost indifferent to its sister ECSR which is developing the jurisprudence on state obligations in this area on a regular basis. The ECHR could find much useful case-law there.¹⁰⁰

⁹⁷ *Conclusions 2003, Italy*, p. 342 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 173).

⁹⁸ *Conclusions 2003, Sweden*, p. 655 (cited in *Digest of the Case Law of the European Committee of Social Rights*, cit., p. 173).

⁹⁹ Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Council of Europe, 9 November 1995, CETS No. 158.

¹⁰⁰ Padraic Kenna: «Housing Rights: Positive Duties and Enforceable Rights...», p. 208.

3. EU Housing Rights

3.1 Pre-Lisbon era

Until the Treaty of Lisbon came into force, there was no legal basis in the 1957 Treaty of Rome and the subsequent European Union Treaties that allowed housing policy to be developed at the level of the EU. Social issues, of which housing is a component part, are subject to the subsidiarity principle.¹⁰¹

Nevertheless, much EU social policy, particularly the drive toward a single market in goods and services, had a bearing on housing rights and housing policy.¹⁰² Indeed, the diversity of the measures affecting housing is becoming increasingly large, including consumer protection, freedom of movement, rights of establishment, environmental protection, monetary union issues, and social policy and rights initiatives.¹⁰³

The EU Regulations in the 1960s and 1970s¹⁰⁴ ensured that migrating non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of Member States on the principle of non-discrimination.¹⁰⁵ There are legally defined steps at the EU level to harmonize the conditions of asylum-seekers across Europe, including standardizing housing conditions.¹⁰⁶ The Council Directive 2000/43/EC of June 2000 promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin (excluding non-citizens of EU states) and specifically,

«shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: [...] (h) access to and supply of goods and services which are available to the public, including housing.»¹⁰⁷

¹⁰¹ Bill Edgar, Joe Doherty, Henk Meert: *Access to Housing: Homelessness and Vulnerability in Europe*, The Policy Press, Bristol, 2002, p. 18.

¹⁰² Padraic Kenna: «Globalization and Housing Rights», cit. p. 450.

¹⁰³ Housing Ministers of the European Union: *Interactions Between National Housing Policies and Legislation, Initiatives, and Decisions of the European Union: Reflections and Summary Report (October 31, 2003)*. Available online at: http://mrw.wallonie.be/dgat/pllogement/logement_euro/Dwnld/RAPPORT%20EUROPEEN%20En_2003.pdf (viewed 4 September 2010).

¹⁰⁴ For example, Regulation (EEC) No. 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, *OJ L* 257, 19.10.1968, p. 2–12; Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, *OJ L* 149, 5.7.1971, p. 2–50.

¹⁰⁵ Padraic Kenna: «Housing Rights –the New Benchmarks for Housing Policy in Europe?», *The Urban Lawyer*, Vol. 37, No. 1 (2005), p. 99.

¹⁰⁶ Council Directive 2003/9/EC, Laying Down Minimum Standards for the Reception of Asylum Seekers, 2003 *OJ L* 031) 18.

¹⁰⁷ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, *OJ L* 180, 19.7.2000, p. 22–26, Article 3(1)(h).

In 2004, the «Gender Directive» implementing the principle of equal treatment between women and men in the access to and supply of goods and services, also addressed housing.¹⁰⁸ The EU Unfair Contract Terms Directive 1993/13/EEC has had an impact on housing rights in many EU states¹⁰⁹ and is creating a body of jurisprudence across Europe in relation to house purchase and tenancy agreements. It is possible to conclude that the EU legislator provides, however, a limited framework with regard to housing rights.

Case law relating to the EU housing policy is almost non-existent. In the case *Commission v. Germany*,¹¹⁰ the ECJ held that a German law making the grant of a residence permit conditional on a worker having continual housing in the host state was in breach of former EC law. Similarly, in the case *Commission v. Italy*,¹¹¹ a restriction of access to reduced mortgage rates and other access to social housing, based on a requirement of Italian nationality, residence qualifications, and the granting of social housing for those near to their place of work, was held in breach of rules on the right to establishment under Articles 52 and 59 of the former EC Treaty.¹¹²

3.2 After-Lisbon era

Perhaps the closest step to actual housing rights in the EU instruments is contained in the EU Charter of Fundamental Rights¹¹³ (hereinafter, the Charter). With the coming into force of the Treaty of Lisbon on 1 December 2009, the Charter has become directly enforceable by the EU and national courts. Article 6(1) of the Treaty on the European Union provides that «the Union recognizes the rights, freedoms and principles set out in the Charter».¹¹⁴ Accordingly, the Charter has been accorded the same legal force as the founding treaties of the EU. However, there are doubts whether the Charter contains actual housing rights and whether they are enforceable.

Firstly, the Charter does not include a genuine right to housing, but the right to housing assistance. Article 34(3) of the Charter states:

¹⁰⁸ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, *OJ L 373*, 21.12.2004, p. 37–43.

¹⁰⁹ Report From the Commission on the Implementation of Council Directive 93.13.EEC of 5 April 1993 on Unfair Terms in Consumer Contracts, COM (2000) 248 final (April 27, 2000). Cited in Padraic Kenna: «Globalization and Housing Rights», cit., p. 454.

¹¹⁰ Case 249/86, *Commission v. Germany*, 1989 E.C.R. 1263.

¹¹¹ Case 63/86, *Commission v. Italy*, 1988 E.C.R. 29.

¹¹² Treaty establishing the European Community (consolidated text) *OJ C 325* of 24 December 2002.

¹¹³ Charter of the Fundamental Rights of the European Union, *OJ C 83* of 30 March 2010.

¹¹⁴ Treaty on the European Union (consolidated text) *OJ C 83* of 30 March 2010.

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

The academic Van der Mei explicitly argues that the right to housing is absent from the Charter.¹¹⁵

Secondly, it is entirely unclear what is covered by the term «housing assistance». The wording of Article 34 of the Charter does not elaborate further. Article 34 (1) in relation to social security merely states that:

«The Union recognizes and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age».

The Charter housing assistance provisions may also be limited under Article 34(2),

«Everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.»

Thus the term might be restricted as to incorporate all assistance (financial, social, legal) needed to access housing. According to the Explanations relating to the Charter, the legal provision has been inspired by Articles 30 (the right to protection against poverty and social exclusion) and 31 (the right to housing) of the revised European Social Charter and paragraph 10 of the Community Charter of the Fundamental Social Rights of Workers (the right to social security).¹¹⁶ Thus the careful phrasing of the Article 34 (3) will probably limit the impact and usefulness of the article.

Thirdly, as indicated in the Explanations relating to the Charter, Article 34 relates to a principle.¹¹⁷ The term «principles», by contrast to the term «rights», is used in the Charter to refer to economic, social and cultural rights –such as the right to housing.¹¹⁸ Principles do not create any directly enforceable rights. However, the principles might impact on the law-making process in the EU and member states. They could be seen as providing a *foundation* on which more precise rights can be based. As a consequence, it is intended that by means of the jurisprudence of the ECJ principles will evolve into rights which will then become

¹¹⁵ Anne Pieter van der Mei: «The Justiciability of Social Rights in European Union», in Fons Coomans (ed.): *Justiciability of Economic and Social Rights. Experiences From Domestic Systems*, Intersentia, Antwerp-Oxford, 2006, p. 404.

¹¹⁶ See Explanations Relating to the Charter of Fundamental Rights of the European Union, p. 32 (available on-line at: www.europarl.europa.eu/charter/pdf/04473_en.pdf, viewed 8 September 2010).

¹¹⁷ Ibid.

¹¹⁸ Lord Goldsmith: «A Charter of Rights, Freedoms and Principles», *Common Market Law Review* Vol. 38 (2001), p. 1201.

directly enforceable. It is also unclear how the ECJ will interpret the Charter.¹¹⁹ Nevertheless, a *legalization* of the Charter has clearly set in motion a process at the end of which the housing rights have been acknowledged as a part of the EU founding treaties.

4. SOME NATIONAL PERSPECTIVES

Besides the fact that national governments have acknowledged their duty to ensure that all citizens have adequate housing by signing and ratifying international and regional treaties, there are numerous countries that recognize the right to adequate housing in their constitution or determine it in the domestic law.

Approximately 38 percent of the world's constitutions refer to housing or housing rights.¹²⁰ For example, Article 31 of the Armenian Constitution specifies that:

«Every citizen is entitled to an adequate standard of living for himself or herself and his or her family, to adequate housing, as well as to the improvement of living conditions. The state shall provide the essential means to enable the exercise of these rights.»

Article 23 of the Belgian Constitution provides that:

«Everyone has the right to lead a life in keeping with human dignity. To this end, the laws, federate laws and rules referred to in Article 134 [Regional decrees] guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them. These rights include among others, the right to decent accommodation.»

Furthermore, Article 19 of the Finish Constitution provides that «the public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing»; Article 21 of Greek Constitution states that «the acquisition of a home by the homeless or those inadequately sheltered shall constitute an object of special State care»; Article 78 of the Slovenian Constitution declares that «the state shall create opportunities for citizens to obtain proper housing»; and Article 40 of the Russian Constitution provides that «each person has the right to housing. No one may be arbitrarily deprived of housing».¹²¹

Meanwhile, many countries have introduced legislation granting specifically enforceable housing rights. For instance, in Scotland the 1987 Housing Act provides a right to accommodation for homeless persons, including a right to temporary accommodation for all homeless persons, and a right to long-term

¹¹⁹ Elizabeth Defeis: «The Treaty of Lisbon and Human Rights», *ILSA Journal of International & Comparative Law*, Vol. 16 (2009-2010), p. 418.

¹²⁰ Scott Leckie: «The Justiciability of Housing Rights», in Coomans & van Hoof (ed.): *The Right to Complain about Economic, Social and Cultural Rights - SIM Special No. 18*, SIM, Utrecht, 1995, p. 6.

¹²¹ Christophe Golay, Melik Özden: *The Right to Housing*, CETIM, Geneva, 2007, pp. 49-57.

accommodation for broadly defined categories encompassing the majority of homeless applicants. This right is enforceable in the civil courts which may order in appropriate cases, that accommodation be provided to homeless persons. In France, an enforceable right to housing has also been established through the *Droit au logement opposable Act 2007*, which provides for a two-tier remedial mechanism with regional mediation committees, and the possibility to take a case before administrative courts. The use of planning law to achieve integration of affordable and private housing, control of land use and quality of infrastructure and amenities is now becoming widely recognized as a somewhat lateral, but practical, means of realizing housing rights.¹²² Similarly, the British Housing Act 1996 incorporates comprehensive legal framework on financial assistance, housing benefits and homelessness. Thus, the right to housing has become part of the discourse of housing politics and has, as a result, encouraged the promotion of a wider range of measures than might otherwise exist.¹²³

There are, of course, no guarantees that the inclusion of housing rights within the national legal framework will lead to a comprehensive implementation of this right.

To illustrate the many legal strategies to guarantee the right to housing the authors have chosen to analyze two national perspectives as regards the right to housing; one country having developed statutory guarantees (the Netherlands), and one country having a developed jurisprudence (South Africa).

4.1 The Netherlands

The Netherlands has long-established housing laws and tribunals upholding a nationally recognized right to housing for all Dutch citizens.¹²⁴ The Netherlands adopted its first housing legislation creating social housing at the turn of the 20th century with the Housing Act of 1901.¹²⁵ Additionally, the Netherlands was one of the first European countries to include the right to housing in its Constitution.¹²⁶ It has been a leader in providing the right to housing, becoming the country with the largest publicly-funded housing for rent (36%),¹²⁷ showing that it is possible to

¹²² Padraic Kenna: «Can Housing Rights Be Applied to Modern Housing Systems?», *International Journal of Law in the Built Environment* Vol. 2 (2010), p. 107.

¹²³ Barry Goodchild: «The 'Right to Housing': Searching For Its Practical Meaning and Implications», *Journal of Housing Law*, Vol. 6 (2003), p. 64.

¹²⁴ André Ouweland, Gelske van Daalen: *Dutch Housing Associations: a Model For Social Housing*, Onderzoeksinstituut OTB, Delft, 2002.

¹²⁵ Christine Whitehead & Kathleen Scanlon (eds.): *Social Housing in Europe*, London School of Economics, London, 2007, p. 133 (available online at <http://www.lse.ac.uk/collections/LSELondon/pdf/SocialHousingEurope.pdf>).

¹²⁶ Article 22(2) of the Constitution of the Kingdom of the Netherlands: «It shall be the concern of the authorities to provide sufficient living accommodation».

¹²⁷ Liana Giorgi & Angelika Kofler: «European Housing Policies Compared», unpublished manuscript presented by *The Interdisciplinary Centre for Comparative Research in the Social Sciences*,

enforce the right to housing in the national courts without overwhelming the judicial system.

Over 100 years ago the Housing Act of 1901 created housing associations, and authorized the state to support them financially. These housing associations make the Dutch housing policy rather unique. Although largely independent, the associations are funded and regulated by the state to ensure that they meet national housing needs and increase the supply of affordable housing. However, throughout the years, the associations have increasingly financed the buildings on their own; the Dutch government now subsidizes the rent to make housing affordable. Moreover, the 1997 Housing Allowance Act regulates housing allowances. Housing allowances have been evaluated several times, and as a result, the program has improved step by step. Every tenant whose rent is relatively high in relation to household income and who meets certain conditions is entitled to a housing allowance.¹²⁸ Tenants additionally have standing to challenge unreasonable rents through the Rent Tribunal Act.¹²⁹

All in all, the Netherlands serves as a role model for other countries seeking to make the right to housing justiciable. The Netherlands has taken steps within its economic resources to uphold the right to housing. First, the Housing Allowance Act provides that all those in need can get the financial assistance to find housing. Second, the Rent Tribunal Act empowers citizens to challenge unreasonable rents. These clearly articulated rights guarantee to citizens affordable housing and make it possible for Dutch courts to interpret the right to housing broadly.¹³⁰

4.2 South Africa

In South Africa, the poorest and most vulnerable members of the society are evicted without being given an opportunity to present their case in court (or oppose the eviction) or an adequate notice of when the eviction order will be carried out. Others have been evicted without the provision of alternative accommodation.¹³¹ However, South African Constitutional Court has strived in ensuring greater constitutional rights to adequate housing and protection against arbitrary evictions.

Vienna, p. 20. Available online at www.iccr-international.org/impact/downloads.html; viewed on 13 September 2010).

¹²⁸ See details in Hugo Priemus, Peter Kemp, David Varady: «Housing Vouchers in the United States, Great Britain, and the Netherlands: Current Issues and Future Perspectives», *Housing Policy Debate*, Vol. 16, No. 3 (2005), p. 590-591.

¹²⁹ Kyra Olds: «The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons From France and the Netherlands», *Wisconsin International Law Journal*, Vol. 28, No. 1 (2010), p. 186.

¹³⁰ Kyra Olds: «The Role of Courts...», cit., p. 187.

¹³¹ Lilian Chenwi: «Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions», *Human Rights Law Review*, Vol. 8 (2008), p. 108.

The South African Constitution creates an extensive system for the realization of socio-economic rights, including the right of everyone to housing.¹³² There are a number of aspects of the formulation of the right to housing which warrants comment. First, the right is formulated as an access right, rather than a right to housing *per se*. Second, the South African right is qualified by the requirements of reasonable measures, the availability of resources and progressive realization. Third, the prohibition on eviction in subsection three is freestanding. In other words, it is not subject to the qualifications attached to the general right.¹³³

The case of *Grootboom*¹³⁴ was the first major decision of the South African Constitutional Court which considered the issue of judicial enforcement of the right to adequate housing in detail. First of all, the Court noted that for a person to have access to adequate housing, there must be land, appropriate services such as the provision of water and the removal of sewage, and the financing of all these, including the building of the house itself.¹³⁵ The Constitutional Court interpreted Article 26 (1) as placing, at the very least, a negative obligation on the state, other entities and persons to desist from preventing or impairing the right of access to adequate housing. Thus, the state's duty is to create the conditions for access to adequate housing for people at all economic levels.¹³⁶

Furthermore, the formulation of a housing programme is only the first stage in meeting the state's obligation, as an otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations. A reasonable programme must also take account of different economic levels in the society, including those who can afford to pay for housing and those who cannot. Of particular importance is the requirement that short, medium and long-term provision must be made for housing needs. Measures aimed at realizing the right to have access to adequate housing, to be reasonable, cannot ignore those whose housing needs are the most urgent and whose ability to enjoy all human rights is most in peril.¹³⁷

¹³² Article 26 of the South African Constitution provides:

«(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources to achieve the progressive realization of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.»

¹³³ For further details see Evadne Grant: «Enforcing Social and Economic Rights: the Right to Adequate Housing in South Africa», *African Journal of International and Comparative Law*, Vol. 15 (2007), p. 16.

¹³⁴ *Government of the Republic of South Africa and Others v. Irene Grootboom and Others*, Judgement of the Constitutional Court of South Africa, 4 October 2000 (available online at: www.saflii.org/za/cases/ZACC/2000/19.html; viewed 20 September 2010).

¹³⁵ *Ibid*, para. 35.

¹³⁶ *Ibid*, paras. 34, 36.

¹³⁷ *Ibid*, para. 42.

As regards eviction from homes, forced removals and the relocation, these actions have to be replaced with a system in which the State must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified. Hence, any measure that removes from people their pre-existing access to adequate housing limits the right to housing in the Constitution.¹³⁸ In *Port Elizabeth Municipality* case,¹³⁹ the state had applied for an order to evict squatters from private land in terms of Prevention of Illegal Eviction from and Unlawful Occupation of Land Act. The act allows a court to grant such an order only if it is just and equitable to do so, taking into account various factors, including «the availability [...] of suitable alternative accommodation». The Constitutional Court denied the eviction order, holding that article 26 (3) of the Constitution, under certain circumstances requires the state when it seeks to evict to provide suitable alternative accommodation to the evictees. Significantly, in this case the municipality had offered to allow the occupiers to move to two possible alternative sites. However, the Court went so far as to find that neither of those sites was suitable, most importantly because the municipality could not guarantee the evictees security of tenure if they were removed there. As a result, the occupiers were allowed to remain on the land in question.¹⁴⁰

Although the Constitutional Court has not determined a minimum threshold for the progressive realization of the right to adequate housing so far, it is clear that housing means a lot more than just a roof over one's head.

5. CONCLUDING REMARKS

There is a growing agreement on the necessity of an effective enforcement of the right to housing and the range of obligations for states to ensure the essential elements of this right. Many aspects of the right to housing are already justiciable via international, regional, and national human rights protection bodies.

As regards the international level, the minimum core content of housing rights should be fulfilled despite the reference of the state to the inadequacy of resources. However, this content of housing rights may differ depending on the circumstances and locations. Before the Council of Europe bodies, the variety of the case subject matters suggests the interaction of different human rights to secure the right to housing. The right is rather seen through the concept of

¹³⁸ *Jaftha v. Schoeman and Others; Van Rooyen v. Stoltz and Others*, paras. 29, 34. Cited in: Lilian Chenwi: «Putting Flesh on the Skeleton...», cit., p. 115.

¹³⁹ *Port Elizabeth Municipality v. Various Occupiers*, Judgement of the Constitutional Court of South Africa, 1 October 2004 (available online at www.saflii.org/za/cases/ZACC/2004/7.html; viewed 20 September 2010).

¹⁴⁰ Danie Brand: «Socio-Economic Rights and Courts in South Africa: Justiciability on a Sliding Scale». in Coomans & van Hoof (ed.), *The Right to Complain about Economic, Social and Cultural Rights...*, cit. p. 214.

«home» than «property» which attaches the right a human dimension. Within the EU the right to housing has never been among the legislators' competences due to the subsidiarity principle. Only recently housing assistance principle had been acknowledged as a part of the EU founding treaties. Nevertheless, more clarification is extremely needed. Meanwhile, some countries have found their way to safeguard the right to adequate housing. The Dutch system has taken steps within its economic resources to ensure comprehensive implementation of the right; while South Africa delegates to the Constitutional Court to secure greater constitutional rights to adequate housing and protection against arbitrary evictions.