

# Strategic litigation before the European Committee of Social Rights: Fit for purpose?

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# Strategic litigation before the European Committee of Social Rights: Fit for purpose?

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## Abstract

This article examines the structural elements of the Collective Complaints Procedure, seen as an avenue of socio-economic rights strategic litigation, that potentially enable or impede NGOs and trade unions in addressing violations of the European Social Charter before the European Committee of Social Rights. The findings show that the procedure is a unique form of collective redress in the human rights system, with exceptional structural characteristics, which render it an avenue of strategic litigation by its nature. Its main strength lies in that it enables the participation of organisations and vulnerable groups of people that are denied access in political or judicial fora, either at the domestic or supranational level, to deliberate on social policy issues and put pressure on States to address social issues on the basis of economic and social rights.

## Keywords

Economic and social rights, strategic litigation, legal mobilisation, European Committee of Social Rights, European Social Charter, Collective Complaints Procedure, international monitoring, NGOs, trade unions

## I. INTRODUCTION

Strategic litigation is essentially law-based advocacy and mobilisation intended to secure judicial or quasi-judicial rulings to clarify, expand, or enforce rights for persons beyond the individuals named

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in the case at hand.<sup>1</sup> Its underlying objective is to influence progressive change in relation to domestic or international laws, policies, or practices.<sup>2</sup> Nonetheless, strategic litigation may be used to pursue broader goals than intra-legal objectives, such as galvanising popular attention, changing the terms of public debate on an issue, or raising social awareness.

Recently, there has been an increased interest in the study of human rights strategic litigation before courts and treaty bodies in Europe by minority and other vulnerable groups, represented by NGOs and other organisations.<sup>3</sup> The focus has been, predominantly, on examining the opportunities that exist to influence government policies when strategically litigating before the Court of Justice of the EU (CJEU) and the European Court of Human Rights (ECtHR).<sup>4</sup> Through the development of the supremacy and the direct effect doctrines, the CJEU has enabled vulnerable and minority groups to pursue their cases before the Luxembourg Court.<sup>5</sup> The ECtHR, on its side, has served as a *locus* of mobilisation by minorities, immigrants and asylum seekers through its interpretation of the European Convention on Human Rights (ECHR).<sup>6</sup> However, critics have argued that only actors that have access to domestic courts and sufficient resources are capable of mobilising EU law.<sup>7</sup> Through the preliminary reference procedure, domestic judges have the discretion to refer the case at hand to the CJEU, but most of the EU law-related claims are settled in domestic courts.<sup>8</sup> On the other hand, the ECtHR's victimhood and exhaustion of domestic remedies requirements for standing have been criticised as being structural barriers for NGOs and other collective actors.<sup>9</sup>

Several scholars have criticised the heavy focus of the human rights strategic litigation literature on campaigns for civil and political rights at the expense of socio-economic rights.<sup>10</sup> In fact, socio-economic rights are now considered the 'new frontier' in human rights advocacy,<sup>11</sup> while various commentators have asserted that litigation before domestic and international courts and treaty bodies is an important strategic tool for individual and collective actors to ensure the realisation

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1. Michael Ramsden and Kris Gledhill, 'Defining Strategic Litigation' (2019) 38 *Civil Justice Quarterly* 407, 417.
  2. James A. Goldston, 'Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges' (2006) 28 *Human Rights Quarterly* 492; Tawanda Hondora, 'Civil Society Organisations' Role in the Development of International Law through Strategic Litigation in Challenging Times' (2018) 25 *Australian International Law Journal* 115.
  3. See, for example, Dilek Kurban, *Limits of Supranational Justice: The European Court of Human Rights and Turkey's Kurdish Conflict* (Cambridge University Press 2020).
  4. See, for example, Dia Anagnostou (ed), *Rights and Courts in Pursuit of Social Change: Legal Mobilisation in the Multi-Level European System* (Hart Publishing 2014).
  5. Lisa Conant, *Justice Contained: Law and Politics in the European Union* (Cornell University Press 2002); Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization, and Governance* (Cambridge University Press 2007).
  6. Anagnostou (n 4).
  7. Tanja Börzel, 'Participation through Law Enforcement: The Case of the European Union' (2006) 39 *Comparative Political Studies* 128, 147.
  8. Direct review of EU measures by individuals before the CJEU is possible through actions for annulment or liability actions, set out in Articles 263 and 340 TFEU respectively, but the rules regulating them are very strict. See, for example, Alicia Hinarejos, 'Judicial Review' in Robert Schütze and Takis Tridimas (eds), *Oxford Principles Of European Union Law: The European Union Legal Order: Volume I* (Oxford University Press 2018).
  9. Dia Anagnostou, 'Law and Rights' Claiming on behalf of Minorities in the Multi-level European System' in Anagnostou (n 4) 10.
  10. See, for example, Sandra R. Levitsky, 'Law and Social Movements' in Austin Sarat and Patricia Ewick (eds), *The Handbook of Law and Society* (John Wiley & Sons 2015) 387.
  11. Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing 2010).

of such rights since the 1980s.<sup>12</sup> Notwithstanding, there is a lack of Europe-based studies specifically showcasing whether and how international socio-economic rights norms are advocated before courts and treaty bodies at the European level by collective actors, such as NGOs and trade unions.<sup>13</sup>

In particular, there has been a recent abundance of literature on the justiciability and enforceability of socio-economic rights. Despite this, there has been little emphasis on the avenues of socio-economic rights strategic litigation that collective actors may avail themselves of, especially at the European level,<sup>14</sup> and in the contemporary era of economic austerity and neoliberalism.<sup>15</sup> Despite remarkable attempts to incorporate socio-economic rights into the ambit of EU law and the ECHR, the former still places greater emphasis on economic rights and anti-discrimination.<sup>16</sup> Furthermore, the ECHR – mainly enshrining civil and political rights – can only offer fragmented protection of socio-economic rights.<sup>17</sup> Therefore, socio-economic rights mobilisation before courts in Europe has resulted in limited participation of individuals and collective actors in supranational venues.<sup>18</sup> Most civil society organisations limit their socio-economic rights-based mobilisation practices to the national or local level, where a variety of legal systems, rules, and opportunity structures exist. As shown by Guillaume, for instance, some trade unions prefer to find national collective solutions to labour relations issues, even when opportunities may exist in EU law or under the ECHR.<sup>19</sup>

The recent crisis era in Europe and the ‘rights shock’ that it has precipitated, in conjunction with the judicial self-restraint demonstrated by the socio-economic rights jurisprudence of the CJEU and the ECHR (as well as most domestic courts) in times of austerity,<sup>20</sup> has led collective actors to develop different litigation strategies at the European level. They increasingly engage with a quasi-judicial treaty body to put pressure on States and influence the development of national law and policy.<sup>21</sup> That is the European Committee of Social Rights (ECSR or Committee), which authoritatively monitors compliance with the provisions of the European Social Charter (ESC or Charter),<sup>22</sup> the sister treaty of the ECHR in the field of economic and social rights within the

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12. Levitsky (n 10) 390. See also: Varun Gauri and Daniel Brinks (eds), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008); Malcolm Langford, César Rodríguez Garavito and Julieta Rossi (eds), *Social Rights Judgments and the Politics of Compliance: Making It Stick* (Cambridge University Press 2017).

13. See, for example, Filiz Kahraman, ‘A New Era for Labor Activism? Strategic Mobilization of Human Rights Against Blacklisting’ (2018) 43 *Law & Social Inquiry* 1279, 1282.

14. See, for example, Siri Gloppen, ‘Legal Enforcement of Social Rights: Enabling Conditions and Impact Assessment’ (2009) 2 *Erasmus Law Review* 465.

15. Levitsky (n 10).

16. Lisa Conant and others, ‘Mobilizing European law’ (2018) 25 *Journal of European Public Policy* 1376, 1378.

17. Eva Brems, ‘Indirect Protection of Social Rights by the European Court of Human Rights’ in Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2011).

18. Lisa Conant, ‘Individuals, Courts, and the Development of European Social Rights’ (2006) 39 *Comparative Political Studies* 76.

19. Cécile Guillaume, ‘Understanding the Variations of Unions’ Litigation Strategies to Promote Equal Pay: Reflection on the British Case (1970–2000)’ (2015) 39 *Cambridge Journal of Economics* 363.

20. Matthias Goldmann, ‘Contesting Austerity: Genealogies of Human Rights Discourse’ (2020) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No 2020-09 <<https://dx.doi.org/10.2139/ssrn.3561660>> accessed 21 September 2022.

21. Claire Kilpatrick and Bruno de Witte, ‘A Comparative Framing of Fundamental Rights Challenges to Social Crisis Measures in the Eurozone’ (2014) 1 *European Journal of Social Law* 2.

22. European Social Charter 1961, ETS 035 and European Social Charter (Revised) 1996, ETS 163.

Council of Europe (CoE) framework.<sup>23</sup> In particular, since 1998, compliance with the ESC has been monitored – in addition to the Reporting Procedure – through a Collective Complaints Procedure (CCP) of a ‘quasi-judicial’ nature. This procedure enables trade unions and NGOs to apply directly to the ECSR for decisions on potential non-implementation of the ESC provisions in the countries that have ratified the optional Additional Protocol to the Charter, adopted in 1995, which established the CCP (CCP Protocol).<sup>24</sup> Notably, there is no need in that context for the claimant organisation to have exhausted domestic remedies or to be a victim of a relevant violation.

In particular, since the outbreak of the 2008 financial crisis, the CCP has served as a *locus* for strategic litigation practices, which aim to put forward socio-economic rights concerns of vulnerable and marginalised groups not often reaching – or succeeding in – the domestic courts and policy, or at pressuring governments to mitigate the crisis repercussions.<sup>25</sup> Between the coming into force of the CCP Protocol in 1998 and the onset of the global financial crisis in 2008, 55 collective complaints were submitted to the ECSR; between 2009 and September 2022, 157 collective complaints were lodged. Nevertheless, unlike the ECHR or EU law, very little attention has been paid to the ESC system’s perspective on strategic litigation under the CCP. This gap in the literature goes hand in hand with the limited number of studies focusing on socio-economic rights strategies before quasi-judicial human rights treaty bodies,<sup>26</sup> rather than courts. Furthermore, the CCP has recently attracted increased interest from NGOs, trade unions, and other organisations around Europe bringing complaints to the ECSR about violations of the ESC rights relating to the COVID-19 pandemic.<sup>27</sup> Nonetheless, the general overshadowing of the ESC system by the ECHR or the social dimension of the EU has resulted in a lack of analysis of the structural elements of the CCP that potentially enable or impede collective actors in addressing violations of the ESC before the ECSR.

This article is situated against this background, and aims to bring to the forefront of the debate the CCP as an avenue of socio-economic rights strategic litigation by NGOs and trade unions in Europe. The underlying goal is to shed light on the prospects or obstacles of strategically litigating economic and social rights at the European level by means of the CCP, especially given the relatively limited strategic litigation potential for such rights under the ECHR or EU law. The existing research gaps may be seen as important impediments for collective actors advocating for economic and social rights in Europe to effectively use the CCP as part of their litigation strategies. As a result, addressing these gaps could be instrumental for the ESC and its supervisory system to enhance its visibility and raise awareness among individuals and collective actors, but also to further the objectives of the Charter; objectives that are also of

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23. On the complementarity of the ECHR with the ESC, see Nikolaos A. Papadopoulos, ‘Revisiting the Preamble of the European Social Charter: Paper Tiger or Blessing in Disguise?’ (2022) 22 Human Rights Law Review 1.

24. Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995, ETS 158.

25. See also Colm O’Cinneide, ‘The Present Limits and Future Potential of European Social Constitutionalism’ in Katharine G. Young (ed), *The Future of Economic and Social Rights* (Cambridge University Press 2019).

26. See, for example, Jasper Krommendijk, ‘The Domestic Effectiveness of International Human Rights Monitoring in Established Democracies. The Case of the UN Human Rights Treaty Bodies’ (2015) 10 The Review of International Organizations 489.

27. See, for example, *Open Society European Policy Institute (OSEPI) v Bulgaria* Complaint No 204/2022 (ECSR, Complaint registered 25 January 2022); *Validity v Finland* Complaint No 197/2020 (ECSR, Complaint registered 26 November 2020); *European Roma Rights Centre (ERRC) v Belgium* Complaint No 195/2020 (ECSR, Complaint registered 27 April 2020); *Greek Bar Associations v Greece* Complaint No 196/2020 (ECSR, 23 March 2021 Admissibility and Immediate Measures).

crucial importance for the realisation of economic and social rights in a Europe in crisis. Therefore, this article poses the following research question: what are the structural elements of the CCP that enable or impede NGOs and trade unions to strategically litigate before the ECSR to address violations of the ESC?

To address the question, this article first systematises and describes the relevant CCP features and the conduct of the ECSR within the procedure. Thereafter, it assesses a number of collective complaints submitted to the ECSR by NGOs and trade unions, as well as the interpretive response of the Committee in its corresponding decisions on the merits, under a doctrinal lens. In that context, this article attempts to discern, relying on the relevant literature and CoE documents,<sup>28</sup> the function of these features of the CCP, seen as a strategic litigation avenue, in practice, by focusing on a few collective complaints cases. The selected cases concern, in particular, the right to housing for Roma families across Europe, the basic rights of unlawfully residing migrants in the Netherlands, and workers' rights in austerity-struck Greece. The selection has been based on the high density of collective complaints lodged by NGOs and trade unions concerning these specific areas of focus; the fact that the selected cases involve different rights enshrined by the ESC, thus covering economic (labour) as well as social (welfare) rights; and the fact that these cases have arisen either following the 2008 financial crisis or prior to that. The article concludes by synthesising the findings and discussing the added value of the CCP for the participation of collective actors in the protection of socio-economic rights in Europe by means of strategic litigation before the ECSR.

## 2. THE CCP AS A STRATEGIC LITIGATION AVENUE

The CCP was inspired by the collective complaints procedure within the International Labour Organization (ILO), under which the Committee on Freedom of Association is the competent Governing Body to receive complaints by the representatives of workers and employers, but only concerning the right to freedom of association and collective bargaining laid down in the relevant ILO Conventions. The CCP Protocol entered into force on 1 July 1998. The procedure was envisaged at the time of its adoption as a means to 'improve the effective enforcement of the social rights guaranteed by the Charter' by 'strengthen[ing] the participation of management and labour and of non-governmental organisations',<sup>29</sup> through a more transparent, open and democratic monitoring system than the one based on national reports.<sup>30</sup> In contrast to other human rights treaties, the ESC explicitly mentions the principle of participation of the above organisations as a fundamental objective. The underlying goal has been a common aspiration not to allow governments to have a monopoly on defining and implementing social policy in Europe.<sup>31</sup> At the same time, the CCP has been deemed to constitute a major breakthrough in

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28. The submitted collective complaints and all other documents relevant to the CCP can be accessed online via the European Social Charter Caselaw Database (HUDOC Charter) and the CoE website <<https://www.coe.int/en/web/european-social-charter/collective-complaints-procedure>> accessed 21 September 2022.

29. See Recitals 1 and 2 of the preamble to the CCP Protocol (n 24).

30. On the limitations of the reporting procedure see, for example, Colm O'Cinneide, 'Bringing Socio-Economic Rights Back into the Mainstream of Human Rights: The Case-Law of the European Committee on Social Rights as an Example of Rigorous and Effective Rights Adjudication' (2009) 13 *Revista Europea de Derechos Fundamentales* 259.

31. Jonathan Peuch, '« Participer » à la Charte sociale à travers une épreuve quasi judiciaire : enjeux, intérêts et limites du système de réclamations collectives' (2018) 1 *Journal européen des droits de l'homme* 202, 219.

terms of the general resistance of governments to submit socio-economic rights matters to international adjudication of any sort.<sup>32</sup>

Given that, under the CCP, the ECSR assesses the compatibility of the States Parties' laws, policies, and practice with the economic and social rights guaranteed by the Charter, the procedure reflects a systemic approach to addressing social issues affecting specific groups of people, as members of the society.<sup>33</sup> Due to its exceptional characteristics, the CCP could be seen as a unique form of collective redress in the human rights system. One fundamental consequence of these characteristics is that there is no need under the CCP for the claimant organisation to have exhausted domestic remedies or to be a victim of a relevant violation.

Collective complaints may be brought against contracting parties to the ESC that have ratified the CCP Protocol or that have made a declaration of acceptance when ratifying the 1996 Revised ESC (RevESC),<sup>34</sup> which is gradually replacing the original 1961 ESC. So far, this number amounts to only 16 out of the 46 CoE Member States. Given the *à la carte* nature of the ESC's acceptance procedure,<sup>35</sup> collective complaints can only concern Charter provisions that have been expressly accepted by the defendant State. This particularity of the ESC system may understandably reduce the otherwise rich 'legal stock' of Charter rights provisions available to potential claimants. The ESC, especially in its revised version, is widely regarded as one of the – if not *the* – most inclusive and comprehensive instruments in terms of the rights guaranteed therein among international instruments enshrining socio-economic rights.<sup>36</sup> Additionally, through its analytical and sophisticated interpretation, the ECSR substantiates and gives further impetus to the Charter provisions, thus reinforcing the substance, scope, and justiciability of the Charter rights.

Four categories of organisations have standing to submit a collective complaint:

1. International organisations of employers ('International Organisation of Employers - IOE' and 'BusinessEurope') and trade unions ('European Trade Union Confederation - ETUC');
2. Other international NGOs that have a consultative status with the CoE and have been put on a pre-approved list established for this purpose by the Governmental Committee;<sup>37</sup>
3. 'Representative' national organisations of employers and trade unions within the jurisdiction of the contracting party against which they lodge a collective complaint; and
4. Representative national NGOs with 'particular competence' in the matters governed by the Charter, within the jurisdiction of contracting parties that have made a relevant declaration.<sup>38</sup>

32. Philip Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 66.

33. Karin Lukas, 'The Collective Complaint Procedure of the European Social Charter: Some Lessons for the EU?' (2014) 41 *Legal Issues of Economic Integration* 275, 277.

34. See Article D para 2 RevESC.

35. Part III, Article A RevESC (and the corresponding Part III, Article 20 of the original Charter). See, for example, Peggy Ducoulombier, 'La liberté des États parties à la Charte sociale européenne dans le choix de leur engagement : une liberté surveillée' (2013) 96 *Revue trimestrielle des droits de l'homme* 829.

36. Stefan Clauwaert, 'The Charter's Supervisory Procedures' in Niklas Bruun and others (eds), *The European Social Charter and the Employment Relation* (Hart Publishing 2017) 131.

37. See CoE-Secretariat General, 'List of International Non-Governmental Organisations (INGOS) Entitled to Submit Collective Complaints' (2021) <<https://rm.coe.int/gc-2021-11-bil-list-ingos-01-07-2021/1680a302bf>> accessed 21 September 2022.

38. See Articles 1 and 3 of the CCP Protocol (n 24).

So far only Finland has made such a declaration. Notwithstanding, national NGOs could ‘act through’ an international NGO that is put on the relevant list.<sup>39</sup> Through this indirect manner, national NGOs could evade a potential head-on clash with the State from which they originate and a disruption of their relationship with their respective governments.<sup>40</sup> It goes without saying that the CCP is not accessible by international NGOs that have not been put on the above-mentioned pre-approved list of the Governmental Committee of the CoE, or by national organisations of employers and trade unions that are not considered ‘representative’, according to the relevant interpretative criteria of the ECSR.

As mentioned above, collective complaints do not require domestic remedies to have been exhausted.<sup>41</sup> In addition, in contrast to the ECtHR’s requirements, the fact that the matter at hand is pending or has been resolved by a domestic or international body is not an obstacle to a collective complaint being lodged (the *ne bis in idem* and *res judicata* principles do not apply).<sup>42</sup> Successive collective complaints against the same State and concerning the same matter – even if already examined under the reporting procedure – can also be brought before the ECSR, as long as the defendant State has been given a reasonable period of time to take corrective action.<sup>43</sup> Furthermore, there is no time limit for bringing a collective complaint and organisations do not have to prove being victims of a violation. Another difference compared to the ECHR system is that collective complaints cannot be considered as manifestly ill-founded; they are either deemed inadmissible (infrequently), or admissible and examined on the merits. Finally, the States Parties to the CCP Protocol are invited to intervene and make observations in relation to every complaint – as is the case with international organisations of employers and trade unions – while the ECSR may also invite any other organisation, institution, or person to intervene as *amicus curiae*.

Evidently, as noted by Úbeda de Torres, the CCP ‘is not a classic human rights monitoring tool which is victim-oriented and established to seek reparation’ of a violation inflicted upon an individual.<sup>44</sup> Similarly, ‘it is not a pure *ex-post facto* redress mechanism’. Its goal is not only to redress past violations but also to prevent their reoccurrence in the future.<sup>45</sup> Therefore, it is not so much the protection of individual rights and the redress of their violation that is at stake but rather the compatibility of the States Parties’ laws and policies with the economic and social rights guaranteed by the Charter. This refers to a matter which may affect the rights of individuals as members of the society as a whole.<sup>46</sup> The CCP could, therefore, also be

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39. This actually occurred in the case leading to the ECSR’s decision on the merits of Complaint No 49/2008, where the national NGO ‘Greek Helsinki Monitor’ acted through the international NGO ‘International Centre for the Legal Protection of Human Rights (INTERIGHTS)’. See, generally, Robin R. Churchill and Urfan Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?’ (2004) 15 *European Journal of International Law* 417.

40. Peuch (n 31) 224.

41. This is also in contrast to the requirement for the exhaustion of domestic remedies under the individual complaints mechanism envisaged by the 2008 Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

42. *International Commission of Jurists v Portugal* Complaint No 1/1998 (ECSR, 10 March 1999 Admissibility) para 13.

43. Churchill and Khaliq (n 39) 433.

44. Amaya Úbeda de Torres, ‘The Horizontal Effect of Social Rights in the Light of the European Social Charter and the European Committee of Social Rights’ Case Law’ in Cristina Izquierdo-Sans, Carmen Martínez-Capdevila and Magdalena Nogueira-Guastavino (eds), *Fundamental Rights Challenges Horizontal Effectiveness, Rule of Law and Margin of National Appreciation* (Springer 2021) 79; Lukas (n 33) 276–278.

45. Úbeda de Torres (n 44) 79–80.

46. *ibid.*



considered as ‘strategic’ by its nature. Hence, the labels ‘collective redress’<sup>47</sup> or ‘*actio popularis*’<sup>48</sup> mechanism are used and there is an absence of any requirement for complainant organisations to exhaust domestic remedies before lodging a complaint to the ECSR. After all, requiring contracting parties to exhaust domestic remedies before lodging a collective complaint would also impede the accessibility of the ECSR and the effectiveness of the CCP. This is the case, in particular, given that some economic and social rights are not regarded as judicially enforceable under the constitutions of all contracting parties to the Charter, and that some Charter provisions may not be part of domestic law or be considered as self-executing.<sup>49</sup>

Consequently, the procedure is not meant to address individual situations or redress individual grievances. Nonetheless, organisations may provide evidence of individual situations to support their pleas,<sup>50</sup> while individuals whose rights under the Charter have been violated under a ‘general pattern of non-compliance’ could contact an organisation entitled to make a collective complaint.<sup>51</sup> In any case, however, potential actions by defendant States to rectify the situations considered by the ECSR not to be in conformity with the Charter will not remedy the detriment suffered by the individuals, as is the case under the ECHR or EU law, but will only seek to ensure that there is no violation of the Charter in the future.

The CCP is the first ‘quasi-judicial’ mechanism in international human rights law concerned specifically with economic and social rights,<sup>52</sup> as it incorporates many features of a judicial process.<sup>53</sup> It thus gives the complainant organisation the opportunity to engage in a direct dialogue with the defendant State on socio-economic rights issues, framed in legal language. The ECSR, composed of 15 independent and impartial experts, is the sole international entity with the express mandate to assess States’ conformity with the ESC and to engage in an authoritative legal interpretation of the Charter provisions,<sup>54</sup> in a similar manner to the role of the UN Committee on Economic, Social and Cultural Rights within the International Covenant on Economic, Social and Cultural Rights system.<sup>55</sup> The ECSR considers the arguments of both the complainant organisation and the defendant State in a court-like fashion, applying law to the facts through precedent-based and well-structured reasoning. In that endeavour, it frequently incorporates various techniques, principles, and insights from other human rights systems and international sources.<sup>56</sup>

The ECSR deliberates privately and issues detailed ‘decisions on the merits’, which are not published immediately, but are transmitted to the Committee of Ministers, comprising the Foreign Affairs Ministers (or their representatives) of all the CoE Member States. Despite the generally receptive stance of the ECSR, the Committee of Ministers, which is in charge of monitoring the implementation of its decisions on the merits, has taken a rather unreceptive stance, even in the face of successive and serious violations of the Charter rights. The Committee of Ministers may

47. Lukas (n 33) 276.

48. Churchill and Khaliq (n 39) 454.

49. *ibid* 434.

50. *International Movement ATD Fourth World v France* Complaint No 33/2006 (ECSR, 5 December 2007) paras 52–53.

51. Churchill and Khaliq (n 39) 432.

52. Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) 9 *Human Rights Law Review* 61.

53. Lukas (n 33) 279.

54. See Article 24(2) Protocol amending the ESC, 1991.

55. Colm O’Cinneide, ‘The European System’ in Jackie Dugard and others (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar Publishing 2020) 51.

56. Cullen (n 52).

adopt either a resolution on the collective complaint or a recommendation (in case the ECSR has found a violation of the Charter) to the State concerned to take corrective action.<sup>57</sup>

In theory, the Committee of Ministers is competent to make political determinations, which could strike a balance among competing interests, provide legitimacy to the ECSR, and put political pressure on States to change their laws and practices to bring them into conformity with the legal assessment of the ECSR. However, in practice, the Committee of Ministers is generally reluctant to adopt recommendations to contracting parties that have been considered by the ECSR as violating the ESC. In addition, the Committee of Ministers usually downplays in its resolutions the significance of the ECSR's decisions, thus weakening their policy impact and undermining the credibility of the whole procedure. As a result, the political interests that underlie the outcomes of the Charter's supervisory procedure may not lead to the desired effect in terms of human rights protection.<sup>58</sup> Therefore, the stance of the Committee of Ministers arguably undermines the overall effectiveness of the ESC system and may disincentivise NGOs from mobilising before the ECSR, and deter States Parties from taking corrective action in compliance with the Charter. Consequently, the affected groups of people may also be unable to capitalise on the findings of the ECSR by means of advocacy campaigns at the domestic level.<sup>59</sup>

Nonetheless, the Committee of Ministers can only include social and economic policy considerations, without being able to reverse the legal assessment of the ECSR, which has the final say on the legal interpretation of the Charter.<sup>60</sup> Remarkably, collective complaints cases, in which a violation has been found, can never be considered 'closed',<sup>61</sup> as the ECSR conducts follow-up assessments, through its monitoring under the reporting procedure, of whether the State concerned has brought the situation into conformity with the Charter.

Additionally, collective complaints are dealt with through an entirely written procedure, which accelerates the procedure even further, unless the ECSR accepts the complainant's request to organise a hearing with the representatives of the parties in Strasbourg.<sup>62</sup> It should be noted, on the other hand, that the legal and technical language used throughout the CCP may discourage potential complainant organisations. In that context, in terms of the complainants' organisational and legal resources, the fact that the CCP does not have the same visibility, as for example, the procedure before the ECtHR, understandably makes the costs for expert legal advice somewhat high. Finally, the fact that collective complaints – as well as all the other documents of the procedure – must be submitted by international organisations in English or French, may require translation costs for some organisations.<sup>63</sup>

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57. See Article 9 of the CCP Protocol (n 24).

58. Tineke Dijkhoff, 'Supervision of Social Security Standards: Between Law and Politics' in Frans Pennings and Gijsbert Vonk (eds), *Research Handbook on European Social Security Law* (Edward Elgar 2015) 172.

59. Daniel M. Brinks, 'Solving the Problem of (Non)compliance in Social and Economic Rights Litigation' in Langford, Rodríguez Garavito and Rossi (n 12) 475.

60. See Explanatory Protocol to the CCP Protocol (n 24) para 46.

61. Peuch (n 31) 212.

62. As of 21 September 2022, only nine hearings have been organised by the ECSR, even though complainant organisations regularly make requests for a hearing to be organised. Frequently organising hearings could enhance the quasi-judicial character of the CCP, its legitimacy in the eyes of the defendant states, as well as the participation of the organisations in the procedure.

63. National organisations, on the other hand, can submit collective complaints in an official language of the State concerned. See Rule 24 of the ECSR's 'Rules', <<https://rm.coe.int/rules-rev-320-en/1680a2c899>> accessed 21 September 2022.

Given the prevalence of the exhaustion of remedies and subsidiarity principles in international human rights law, it is generally presupposed that strategic litigators need first to bring a legal dispute before national courts. If not won there, then litigators appeal to international courts and bodies. By contrast, as discussed, under the CCP, complainant organisations do not have to exhaust domestic remedies to appeal before the ECSR. As a result, the CCP is somewhat unique in international human rights law, which may be to the advantage of strategic litigators; instead of devoting time and resources on bringing a legal dispute all the way through the domestic judicial hierarchy before being able to appeal before the ECtHR or international treaty bodies (for example at the UN level), complainant organisations can submit a collective complaint to the ECSR. Within less than two years on average, the decision on the merits of the ECSR is published and could then (or perhaps even before that, for instance in case a decision on immediate measures has been adopted by the ECSR) be leveraged by individuals and collective actors, including before domestic courts, that seek change of law and policy.

The decisions of the ECSR are not legally binding, nor directly enforceable like the judgments of the ECtHR, but their impact has, nonetheless, been witnessed recently across national jurisdictions, including before domestic courts.<sup>64</sup> The rather soft law nature of the ECSR decisions, as well as their political implications, make it clear that several actors at the domestic level (for example NGOs, trade unions, academics, lawyers, politicians, and the media) have to build on these decisions and on the ECSR's interpretation of the Charter as part of their advocacy campaigns to put pressure on the defendant States to amend their laws and policies.<sup>65</sup> In fact, the 'jurisprudence' of the ECSR has been increasingly influential for civil society organisations and trade unions as of late,<sup>66</sup> mainly due to its sophisticated and dynamic interpretation of the Charter provisions,<sup>67</sup> as developed in particular through the CCP. This procedure has also proved attractive to NGOs and trade unions, as it is grounded on simple and clear rules and is a rather cost- and time-efficient procedure. This is particularly the case, given that there is no requirement for the exhaustion of domestic remedies and the number of complaints submitted is not that significant.<sup>68</sup> Individuals and collective actors also increasingly invoke the Charter, as interpreted by the ECSR in its collective complaints decisions, before domestic courts, strategically seeking for a change in law and policy.

However, the ESC and the ECSR's collective complaints decisions may not have the desired effectiveness at the domestic level in terms of strategic litigation. First, reliability on the Charter at the domestic level is variable and dependent on various factors, which differ from jurisdiction to jurisdiction. For example, the availability of Charter rights for actors who wish to strategically litigate before domestic courts on the basis of the ESC, as interpreted by the ECSR, may depend on the Treaty's status and ranking in domestic law; whether the State concerned has accepted to be bound by the right that is at stake; whether the State has legislatively implemented the Charter provisions that are deemed non-self-executing; or whether the State has ratified the CCP

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64. Nikolaos A. Papadopoulos, 'Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice' in Claire Boost and others (eds), *Myth or Lived Reality: On the (In)Effectiveness of Human Rights* (T.M.C. Asser Press 2021).

65. O'Conneide (n 55) 53.

66. Nicolas Moizard, 'La Charte sociale valorisée par les juges nationaux : le rôle perturbateur des syndicats' (2020) 1 *Europe des Droits & Libertés* 76.

67. O'Conneide (n 30).

68. As of 21 September 2022, 212 collective complaints have been submitted to the ECSR.

Protocol, thus being bound by the ECSR's collective complaints decisions. Furthermore, rules on standing – and, in general, accessibility to courts – and legal costs differ among contracting parties, and may therefore prove to be an important impeding factor for actors that wish to mobilise the Charter at the domestic level on the basis of the ECSR decisions. Equally, the configuration of power among domestic judges and their receptivity to the Charter system is variable and may be dependent on various legal and extra-legal factors.

### 3. THE FUNCTION OF THE CCP, AS A STRATEGIC LITIGATION AVENUE, IN PRACTICE

One of the fields in which the CCP has been most utilised is in relation to the rights of Roma minorities, as well as of unlawfully residing migrants across Europe. As has been shown by Alter and Vargas, 'the greater the political strength of a group, and the more access the group has to the policy-making process, the less likely a group is to mount a litigation campaign.'<sup>69</sup> This 'political disadvantage'<sup>70</sup> of Roma communities and unlawfully residing migrants in traditional political arenas probably explains the turn of organisations representing the interests of such groups to strategic litigation across Europe. Strategic litigation practices in this field have generated significant legal precedents and have shown that they have the potential to improve the living conditions of these groups of people.<sup>71</sup> Various NGOs petitioning in particular about the situation of Roma minorities (and other ethnic groups) – primarily in regard to housing – and the rights of undocumented migrants in various European countries, have made great use of the CCP. This is evidenced by the significant number of relevant collective complaints submitted to the ECSR, which amount to 16% of the total complaints submitted so far.<sup>72</sup> Interestingly, the ECSR has found violations of the Charter in all the relevant complaints that have been processed to date. Nonetheless, the litigation strategies of these NGOs before the ECSR and their impact on law and policy have not attracted the same interest in the literature as their strategies have before the ECtHR.<sup>73</sup>

Another field in which the CCP has yielded some results is workers' rights strategic litigation by trade unions.<sup>74</sup> In fact, the major bulk of collective complaints submitted to the ECSR are lodged by trade unions and concern either individual or collective labour rights. Research has shown that trade unions put forward legal strategies to enforce employment rights where a collective use of the courts (or other bodies) can act as a substitute for, or a complement to, collective bargaining,<sup>75</sup> or when the

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69. Karen J. Alter and Jeannette Vargas, 'Explaining Variation in the Use of European Litigation Strategies' (2000) 32 *Comparative Political Studies* 466, 472.

70. Lisa Vanhala and Jacqui Kinghan, 'Literature Review on the Use and Impact of Litigation' (2018) Public Law Project (PLP) Research Paper <<https://publiclawproject.org.uk/content/uploads/2018/04/Literature-Review.pdf>> accessed 21 September 2022.

71. See, for example, *Yordanova and others v Bulgaria* App No 25446/06 (ECtHR, 24 April 2012); *Winterstein and others v France* App No 27013/07 (ECtHR, 17 October 2013).

72. 26 out of the 212 submitted complaints to the ECSR so far concern Roma (and other ethnic groups, such as Travellers) and 8 concern undocumented migrants.

73. Mark Dawson and Elise Muir, 'Individual, Institutional and Collective Vigilance in Protecting Fundamental Rights in the EU: Lessons from the Roma' (2011) 48 *Common Market Law Review* 751.

74. Judy Fudge, 'Constitutionalizing Labour Rights in Canada and Europe: Freedom of Association, Collective Bargaining, and Strikes' (2015) 68 *Current Legal Problems* 267, 294.

75. Simon Deakin and others, 'Are Litigation and Collective Bargaining Complements or Substitutes for Achieving Gender Equality? A Study of the British Equal Pay Act' (2015) 39 *Cambridge Journal of Economics* 381.

limitations of collective bargaining become evident.<sup>76</sup> Trade unions define their members as rights holders, but, in contrast to large trade unions, smaller trade unions generally refuse to engage with formal structures and institutional power.<sup>77</sup> Notwithstanding, compared to other legal strategies, such as collective bargaining or dispute resolution, the litigation strategies of trade unions remain under-researched, especially in Europe.<sup>78</sup> This is particularly true because litigation has been quite controversial within the trade union movement, as it has been feared as being a sign of the weakened power of such unions or as a drain on time and resources.<sup>79</sup> Nonetheless, as organised labour has been in decline in recent decades in many parts of the world, there has been an increase of litigation by trade unions, particularly at the supranational level, which employ a human rights-based approach to frame their claims. A development that has further contributed to trade union litigation at a European multi-level arena, including before the ECSR, is the impact that the 2008 financial crisis has inflicted upon workers' rights, as well as upon trade unions' bargaining power.

### 3.1. THE RIGHT TO HOUSING OF ROMA MINORITIES ACROSS EUROPE

There are several important structural factors of the CCP that have enabled such a large wave of strategic litigation by international NGOs complaining before the ECSR about the right to housing of Roma groups – among other socio-economic rights – across Europe. The first factor is a result of the ECSR's interpretive approach to the Charter, and in particular its personal scope of application, which is restricted to foreigners 'only insofar as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned.'<sup>80</sup> Roma living in Europe may or may not have the nationality of the country where they reside, whereas legal measures taken by governments may cover both of these sub-groups together. Through its collective complaints 'jurisprudence',<sup>81</sup> the ECSR has extended the Charter's personal scope to cover unlawfully residing migrants, as well as heterogeneous groups of the population of a country whose members may not have the conditions for the application of the Charter, such as Roma.<sup>82</sup>

The ECSR has done this by teleologically interpreting the Charter as a living human rights instrument based on human dignity, that complements the ECHR. According to the ECSR, groups of Roma living in a country may indeed include both nationals of parties to the Charter and third-country nationals or persons without a residence permit. As a result, it is extremely complex to identify and distinguish among Roma to whom the protection of the Charter shall be compulsorily guaranteed and those Roma to whom, according to the Charter's Appendix, the

76. Trevor Colling, 'What Space for Unions on the Floor of Rights? Trade Unions and Enforcement of Statutory Individual Employment Rights' (2006) 35 *Industrial Law Journal* 140.

77. Cécile Guillaume, 'When Trade Unions Turn to Litigation: "Getting All the Ducks in a Row"' (2018) 49 *Industrial Relations Journal* 227, 229.

78. Trevor Colling, 'Court in a Trap? Legal Mobilisation by Trade Unions in the United Kingdom' (2009) 91 *Warwick Papers in Industrial Relations* 1 <<https://www.econstor.eu/bitstream/10419/48542/1/60401631X.pdf>> accessed 21 September 2022.

79. Guillaume (n 19) 365.

80. See the first paragraph of the Charter's Appendix.

81. See, primarily, *FIDH v France* Complaint No 14/2003 (ECSR, 8 September 2004).

82. *ERRC v Italy* Complaint No 27/2004 (ECSR, 7 December 2005); *COHRE v Italy* Complaint No 58/2009 (ECSR, 25 June 2010).

guarantee of such protection remains within the remit of States Parties.<sup>83</sup> Consequently, in the view of the ECSR, ‘the part of the population at stake which does not fulfil the definition of the Appendix cannot be deprived of their rights linked to life and dignity under the Charter’.<sup>84</sup> This approach of the ECSR concerning the rights of Roma in Italy quickly showed its immediate advocacy impact,<sup>85</sup> as two NGOs brought similar collective complaints against France shortly afterwards.<sup>86</sup> The precedent-based style of reasoning of the ECSR and its interaction with the ECHR system seems to have also played a significant role for the choice of other NGOs to mobilise before the ECSR again on these matters.

A second structural factor that has enabled international NGOs dealing with the right to housing of Roma minorities to mobilise before the ECSR also results from a different interpretive technique of the ECSR, this time concerning the material scope of the Charter, known as ‘overlapping rights’. The housing of Roma is generally very inadequate, cut off from infrastructure and geographically separate from other population groups, while forced evictions are often a harsh reality they face.<sup>87</sup> The right to housing is enshrined in Article 31 RevESC, whereas the original Charter of 1961 does not explicitly guarantee such a right. This obviously limits the legal stock available to NGOs that wish to bring a complaint concerning the housing situation of Roma in a country that has only ratified the original Charter or that has not accepted to be bound by Article 31 RevESC. This deficiency is further accentuated by the fact that the ECSR is accessible under the CCP from few ‘Roma-dense’ countries.<sup>88</sup> However, already in its first decision on the merits concerning the situation of Roma,<sup>89</sup> the ECSR interpreted Article 16 ESC, enshrining the right of the family to social, legal, and economic protection, as also covering the right to housing. The ECSR added, in particular, that the two provisions partially overlap with respect to several aspects of the right to housing.<sup>90</sup> It is also important to note, in that context, that, under Article B(1) RevESC, a State Party to the RevESC is also bound by the case law developed under the same article of the original Charter, that was not amended.

A third factor that makes the CCP attractive for Roma rights NGOs is that – unlike the ECtHR – this procedure enables them to apply directly before the ECSR, and not only as *amicus curiae*. It thus provides them with a valuable opportunity to confront the defendant governments head-on through an adversarial procedure examining the bigger picture and not just individual grievances, as well as allowing them to participate in the political discourse and bring forward a matter concerning valuable groups of people that do not have such access at the domestic

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83. Complaint No 27/2004, *ibid*, para 18.

84. Complaint No 58/2009 (n 82) para 33.

85. Aoife Nolan, ‘Aggravated Violations’, Roma Housing Rights and Forced Expulsions in Italy: Recent Developments under the European Social Charter Collective Complaints System’ (2011) 11 Human Rights Law Review 343.

86. *COHRE v France* Complaint No 63/2010 (ECSR, 28 June 2011); *Médecins du Monde – International v France* Complaint No 67/2011 (ECSR, 11 September 2012). See on this, Carole Nivard, ‘Roms, France et Conseil de l’Europe’ (2013) 25 *Revue des Droits et Libertés Fondamentaux* 1.

87. Karolina Grygierowska, ‘When a Home Is Not a House: The Deconstruction of Romani Personal Property as a Human Rights Violation’ (2014) 28 *Emory International Law Review* 557; Olivier de Schutter, ‘La contribution de la Charte sociale européenne à l’intégration des Roms d’Europe’ (2007) 7 *L’Europe des libertés* 2.

88. Lilla Farkas and Theodoros Alexandridis, ‘The Potential of Positive Obligations Against Romaphobic Attitudes and in the Development of ‘Roma Pride’’ (2020) 13 *Erasmus Law Review* 65, 67.

89. *ERRC v Greece* Complaint No 15/2003 (ECSR, 8 December 2004).

90. Giovanni Guiglia, ‘Il diritto all’abitazione nella Carta Sociale Europea: a proposito di una recente condanna dell’Italia da parte del Comitato Europeo dei Diritti Sociali’ (2011) 3 *Rivista Associazione Italiana dei Costituzionalisti (AIC)* 1.

level. This may explain the fact that Roma rights NGOs have continued to bring more and more collective complaints before the ECSR, even against the same inexorable States. It is apparent that they consider the CCP to be a valuable avenue to yield either direct or indirect advocacy results in the field of Roma rights protection, such as putting such issues on the agendas of their respective governments.<sup>91</sup>

Notwithstanding, NGOs advocating for Roma rights through the CCP have to deal with an important restraint that exists within this procedure: the role of the Committee of Ministers, which, as discussed above, often does not shy away from weakening the policy impact of the ECSR's decisions. Despite the receptive stance of the ECSR, the Committee of Ministers, which is in charge of monitoring the implementation of its decisions on the merits, has taken a very passive stance even in the face of successive and serious violations of the rights of Roma populations,<sup>92</sup> as guaranteed by the Charter. It is striking that the Committee of Ministers has on most occasions failed to adopt a recommendation to the defendant State to take corrective action against Roma rights violations. As argued by Dobrushin and Alexandridis, even conceding that States should be afforded a wide margin of appreciation when implementing resource-intensive policies in the socio-economic fields, the failure of the Committee of Ministers to confront the large-scale violations of Roma rights across Europe adequately is emblematic of the unpopularity and deeply entrenched institutional prejudice of States against the Roma community.<sup>93</sup> The stance of the Committee of Ministers undeniably undermines the overall effectiveness of the Charter system *vis-à-vis* the protection of the rights of Roma groups (as well as other ethnic groups) and may disincentivise NGOs from mobilising before the ECSR and deter States Parties from taking corrective action in compliance with the Charter. As a result, the affected Roma communities may also be unable to create political opportunities at the domestic level.<sup>94</sup>

### 3.2. BASIC RIGHTS OF UNLAWFULLY RESIDING MIGRANTS IN THE NETHERLANDS

Three out of the total five collective complaints that have so far been lodged before the ECSR against the Netherlands concerned a thorny issue in Dutch law and politics: the (non)entitlement of foreign nationals without lawful residence to a minimum of social assistance amenities (commonly known as 'Bed, Bath and Bread').<sup>95</sup> The legal rules and the reception policy of the Dutch central government have been very strict for many years and have caused wide political and social debate. The underlying objectives of this policy have been to control and limit migration by deliberately excluding undocumented migrants from services of the welfare state, in order to force them to return 'voluntarily' to their country of origin.<sup>96</sup> In the late 2000s, this resulted in

91. Goldston (n 2).

92. The ECSR has characterised the violations of the rights of Roma as 'aggravated violations of human rights', thus voicing its concern about the situation of Roma in different countries in very strong terms. See Nolan (n 85).

93. Andi Dobrushin and Theodoros Alexandridis, 'International Housing Rights and Domestic Prejudice: The Case of Roma and Travellers' in Langford, Rodríguez Garavito and Rossi (n 12) 467.

94. Daniel M. Brinks, 'Solving the Problem of (Non)compliance in Social and Economic Rights Litigation' in Langford, Rodríguez Garavito and Rossi (n 12) 475.

95. *DCI v the Netherlands* Complaint No 47/2008 (ECSR, 20 October 2009); *FEANTSA v the Netherlands* Complaint No 86/2012 (ECSR, 2 July 2014); *CEC v the Netherlands* Complaint No 90/2013 (ECSR, 1 July 2014).

96. Manon Pluymen, *Niet toelaten betekent uitsluiten: Een rechtssociologisch onderzoek naar de rechtvaardiging en praktijk van uitsluiting van vreemdelingen van voorzieningen* (Boom Juridische uitgevers 2020) 320.

thousands of undocumented migrants (children and adults) ending up on the streets, creating an underclass that lived with the danger of degrading and inhuman treatment.

This dangerous and imminent situation prompted three international NGOs to bring collective complaints before the ECSR, for the first time against the Netherlands. Interestingly, and also for the first time in its 'jurisprudence', the Committee accepted two of the organisations' urgent requests to issue two 'decisions on immediate measures', addressed to the Dutch government. When considering the merits of the decisions, the ECSR found violations of the undocumented migrants' rights to social and medical emergency assistance (Article 13(4) RevESC), to social, legal and economic protection of their family (Article 17(1) RevESC), and to housing (Article 31(2) RevESC).

As in the case of Roma minorities, an essential structural factor that facilitated the NGOs in mobilising before the ECSR was the Committee's approach to the extension of the Charter's personal scope of application to another vulnerable group – that is, unlawfully residing migrants. Despite the outright rejection of the ECSR's teleological approach by the Dutch government as '*contra-legem*',<sup>97</sup> the ECSR, based on its precedent-based style of interpretation, reiterated its settled case law on the matter. It considered, in particular, that the above Charter rights apply to all foreign nationals without exception, as they are closely linked to their human dignity.

A second notable factor is undeniably the expeditious nature of the CCP, which – in contrast to national or supranational judicial avenues – can quickly result in a condemnatory decision by an international treaty body, which could then be leveraged to pressure the government. Indeed, despite the rather weak formulation of the Committee of Ministers' resolutions on its follow up to the ECSR's decisions on the merits,<sup>98</sup> the latter had a rapid impact on the subsequent campaigns by Dutch civil society. Remarkably, it is without doubt that there have not been many decisions of international human rights treaty monitoring bodies that have received such political attention and have caused such dramatic political effects as the ECSR's decision on the merits of the third collective complaint on the matter, No 90/2013 – *CEC v the Netherlands*. Among the significant ramifications, the decision of the ECSR almost led to the fall of the Dutch coalition government shortly after it became public.<sup>99</sup>

The ECSR's collective complaints decisions proved beneficial for the Dutch municipalities,<sup>100</sup> which engaged directly with a human rights treaty monitoring body as the ECSR, providing an example of effective local invocation of international socio-economic rights.<sup>101</sup> In particular, the Dutch municipalities, which had been given the decentralised responsibility to implement the governmental policy under a downward delegation of tasks of migration control, stepped up to defy (and later influence) the policy and provide minimum social assistance to foreign nationals

97. See, for example, Complaint No 47/2008 (n 95) paras 30–31; Complaint No 90/2013 (n 95) paras 63–64. See also Lieneke Slingenberg, 'European Case Law on Migrants' Social and Mobility Rights: The Need for a Comparative Approach in Assessing 'Human Rights Overreach'' (2022) 40 *Netherlands Quarterly of Human Rights* 98, 102.

98. For a critique, see Theo van Boven and others, 'Bed, bad en brood: een mensenrecht' (2015) 90 *Nederlands Juristenblad* 1093.

99. See, for example, Editorial, 'Coalitie struikelde bijna over bed-bad-brood-akkoord' (Trouw 22 April 2015) <<https://www.trouw.nl/nieuws/coalitie-struikelde-bijna-over-bed-bad-brood-akkoord~b154f986/>> accessed 21 September 2022.

100. Sanne Kos, Marcel Maussen and Jeroen Doomernik, 'Policies of Exclusion and Practices of Inclusion: How Municipal Governments Negotiate Asylum Policies in the Netherlands' (2016) 4 *Territory, Politics, Governance* 354.

101. Moritz Baumgärtel and Barbara Oomen, 'Pulling Human Rights Back In? Local Authorities, International Law and the Reception of Undocumented Migrants' (2019) 51 *The Journal of Legal Pluralism and Unofficial Law* 172, 184.



without lawful residence. By providing – on their own means and in conflict with the central government – stable shelter and basic amenities to these people, in various facilities that were created for that goal, many Dutch municipalities acted as ‘frontier cities for human rights’. They forthrightly diverged from national policies and managed to put increased pressure to the government to change its restrictive migration policy and eventually provide ‘Bed, Bath and Bread’ to many persons in need, thus enhancing the effectiveness of human rights law and contributing to its legitimacy.<sup>102</sup>

The contribution of the Dutch civil society, including private organisations, churches, and individual citizens, who engaged, either directly or indirectly,<sup>103</sup> with the ESC system, was also crucial to this accomplishment. These actors increased the Charter’s visibility towards the general public and gave meaning to the CCP’s notion of ‘participation’ of NGOs in monitoring the implementation of socio-economic rights. The potential of strategic litigation to challenge the assumption that the protection of human rights can be conditioned on citizenship is manifest in this case.

### 3.3. WORKERS’ RIGHTS IN AUSTERITY-STRUCK GREECE

As widely known, Greece was among the countries that faced the harshest repercussions of the 2008 financial crisis. To cope with its high public debt and deficit, Greece received financial assistance from various European loan facilities between 2010 and 2018, under the strict conditionality requirement to implement numerous austerity measures, including structural reforms in its labour market. These measures were contained in so-called ‘bailout programmes’, monitored by the ‘Troika’, which comprised the International Monetary Fund, the European Commission, and the European Central Bank.

Against this background, in 2011 and later in 2014, three of the most representative trade union confederations in Greece lodged a number of collective complaints, alleging several violations of the original Charter of 1961, as Greece had not ratified the RevESC until 2016.<sup>104</sup> The ECSR’s stance was highly receptive and rather forceful. Following a dynamic and sophisticated interpretive approach, which was in contrast to the position of other treaty bodies and courts during the crisis,<sup>105</sup> the ECSR found plenty of violations of the Charter provisions concerning workers’ rights, such as the rights to work (Article 1 ESC), to just conditions of work (Article 2 ESC), and to a fair remuneration (Article 4 ESC).

Remarkably, although several other organisations had brought collective complaints before the ECSR against Greece in the past, it was only the first time that Greek trade unions made use of the CCP. It is crucial to note that the austerity measures adopted by the Greek government under strict

102. Barbara Oomen and Moritz Baumgärtel, ‘Frontier Cities: The Rise of Local Authorities as an Opportunity for International Human Rights Law’ (2018) 29 *European Journal of International Law* 607, 619.

103. See, for example, the campaign ‘No child put onto the streets’ which the NGO ‘Defence for Children (DCI)’ orchestrated to bring Complaint No 47/2008 (n 95) before the ECSR and, then, aided by activists, to generate strong media attention after the ECSR had made its decision public. See Barbara Oomen, *Rights for Others: The Slow Home-Coming of Human Rights in the Netherlands* (Cambridge University Press 2013) 145.

104. *GENOP-DEI and ADEDY v Greece* Complaints Nos 65-66/2011 (ECSR, 23 May 2012); *GSEE v Greece* Complaint No 111/2014 (ECSR, 23 March 2017). Greek pensioners’ associations also lodged several complaints before the ECSR (Complaints Nos 76-80/2011).

105. Lorenza Mola, ‘The Margin of Appreciation Accorded to States in Times of Economic Crisis: An Analysis of the Decision by the European Committee of Social Rights and by the European Court of Human Rights on National Austerity Measures’ (2015) 5 *Lex Social: Revista de los Derechos Sociales* 174.

conditionality requirements were not subjected to any kind of social dialogue prior to their adoption.<sup>106</sup> As a result, the exclusion of Greek trade unions from any consultation *vis-à-vis* such intrusive measures may have been a contributing factor in their decision to mobilise for the first time before the ECSR to contest such measures. Taking this path, Greek trade unions had a unique opportunity to participate in the deliberation and delegitimisation of the measures based on their inconsistency with socio-economic rights standards, even following their ‘forced’ imposition. In addition, the adversarial nature of the CCP proved particularly useful for the trade unions in confronting the Greek government head-on, but also the European Commission that intervened – for the first time under the CCP – in the proceedings, following an invitation by the ECSR, and defended the social impact of the measures.<sup>107</sup>

Furthermore, the trade unions were the principal organised civil society actors resisting austerity measures in Greece, rather than domestic NGOs or other organisations.<sup>108</sup> Therefore, trade unions became very active in contesting austerity measures across different supranational fora, such as the ECtHR and the CJEU, as well as the ILO Committee on Freedom of Association. Notwithstanding, the trade unions’ strategic litigation before such fora was inadequate to contest austerity measures. Following a questionable interpretation that enlarged the application of the margin of appreciation doctrine with respect to the public interest,<sup>109</sup> the ECtHR declared the claims of a Greek trade union confederation as manifestly ill-founded and thus inadmissible.<sup>110</sup> This was also the case with the CJEU, which deemed an action for annulment brought by the same Greek confederation to be inadmissible.<sup>111</sup> The ILO Committee on Freedom of Association found numerous violations of ILO Conventions concerning the right to collective bargaining, but the soft and unassertive wording of its recommendations did not provide much leverage to capitalise politically on its findings.<sup>112</sup>

This development seems to have been a catalyst for the legal mobilisation of the Greek trade union confederations before the ECSR. But, equally at the domestic level, challenging austerity measures was not a viable option. Specifically, the Greek supreme courts showed signs of self-restraint during the first years of the crisis, justifying interference of the legislature with fundamental rights under the Constitution and international treaties for the sake of the ‘financial public interest’.<sup>113</sup> In addition, concerning the applicability of international socio-economic rights provisions, the Greek supreme courts have traditionally denied the direct effect of the Charter, except for the right of the worker to earn his living in an occupation freely entered upon (Article 1(2) ESC).<sup>114</sup> Consequently,

106. Aristeia Koukiadaki and Lefteris Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’ (2012) 41 *Industrial Law Journal* 276, 284.

107. Complaint No 111/2014 (n 104) paras 47–54.

108. See Claire Kilpatrick, ‘Taking the Measure of Changing Labour Mobilization at the International Labour Organisation in the Wake of the EU Sovereign Debt Crisis’ (2019) 68 *International & Comparative Law Quarterly* 665, 689.

109. Ioanna Pervou, ‘Human Rights in Times of Crisis: The Greek Cases before the ECtHR, or the Polarisation of a Democratic Society’ (2016) 5 *Cambridge Journal of International and Comparative Law* 113.

110. *Koufaki and ADEDY v Greece* App Nos 57665/12 and 57657/12 (ECtHR, 7 May 2013).

111. *ADEDY and Others v Council of the EU* Order of the General Court (First Chamber) T-541/10 (CJEU, 27 November 2012) ECLI:EU:T:2012:626.

112. *GSEE, ADEDY, GENOP-DEI-KIE, OIYE and ITUC v Greece* Case No 2820/2010 (1–16 November 2012) Report of the Committee on Freedom of Association No 365 (GB.316/INS/9/1).

113. See, for example, Matina Yannakourou, ‘Austerity Measures Reducing Wage and Labour Costs Before the Greek Courts: A Case Law Analysis’ (2014) 11 *Irish Employment Law Journal* 36, 39.

114. Nikolaos A. Papadopoulos, ‘The Impact of the European Social Charter on Greek Courts’ Case Law’ (2019) 78 *Epitheoresis Ergatikou Dikaiou* 1351, 1366 (in Greek).

given that under the CCP there is no requirement to exhaust domestic remedies, Greek trade union confederations were able to directly apply to the ECSR, thus bypassing the delays and obstacles that a litigation campaign before domestic courts would necessarily entail.

Finally, as also transpired in the other two cases discussed in this article, the interpretive approach of the ECSR played a pivotal role for the mobilisation of the Greek trade unions under the CCP. In its 2009 Conclusions, the ECSR warned States Parties that ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter’.<sup>115</sup> Additionally, in 2010, the ECSR considered, in a collective complaints decision, that the fact that national provisions are based on EU law does not remove them from the ambit of the Charter.<sup>116</sup> As a result, even accepting that the austerity measures implemented in Greece were within the ambit of EU law, the ECSR would still be competent to assess their compliance with the Charter. Apparently, the collaboration of the Greek trade unions with legal experts having knowledge of such elements in the ‘jurisprudence’ of the ECSR enabled them to formulate their anti-austerity strategies on the basis of the Charter system with a higher expectancy of yielding positive results.

#### 4. CONCLUSION

As this article has demonstrated, the CCP is a unique form of collective redress in the human rights system, with exceptional structural characteristics, which render it an avenue of strategic litigation by design. The CCP establishes a quasi-judicial process that follows a systemic approach to addressing economic and social rights issues, affecting groups of people rather than merely individual victims. Its objective is not so much the redress of individual rights violations but rather to ensure the compatibility of the States Parties’ laws and policies with the economic and social rights guaranteed by the ESC.

The CCP offers flexible and convenient admissibility requirements and is grounded on relatively clear and simple rules. In addition, it is a generally inexpensive and expeditious procedure, which may be apt to serve as an advocacy tool by active collective actors that seek change of law and policy at the domestic level through various means. The efficient nature of the CCP can relatively quickly lead to a decision on immediate measures or a condemnatory decision on the merits by the ECSR, which could then be leveraged by various collective actors at the domestic level to put pressure on the government.

Evidently, the CCP does not purport to – and does not – lead to a legally binding result, while its effectiveness at the domestic level in terms of strategic litigation is dependent of various legal and extra-legal factors and may not have the desired effects. Nonetheless, the main strength of the procedure lies in its ability to enhance the participation of NGOs and trade unions in deliberating and implementing social policy in Europe, as well as in pressuring States and their authorities to address social issues on the basis of economic and social rights. In effect, the fact that the CCP enables NGOs and trade unions to apply directly to the ECSR, and not only as *amicus curiae*, provides them with an opportunity that they may not have had when strategically litigating via other fora, namely to confront the defendant governments (and possibly other intervening institutions) head-on and participate in the political discourse by bringing forward a socio-economic rights matter that is of interest to a large number of people – particularly vulnerable groups of people.

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115. General Introduction to Conclusions XIX-2 (ECSR 2009).

116. *CGT v France* Complaint No 55/2009 (ECSR, 23 June 2010) paras 32–33.

The conduct of the ECSR within the CCP, especially its approach on the interpretation of the ESC provisions, has given further impetus and visibility to the procedure and has streamlined its reach in practice. The ECSR has reinforced the quasi-judicial character of the procedure and has strived to make up for the inherent weaknesses and complexities of the ESC and its monitoring system, including the role of the Committee of Ministers therein. On many occasions, the ECSR has acted by authentically interpreting the ESC as a bulwark against socio-economic rights violations of vulnerable groups in Europe, particularly in times of crisis. Consequently, the CCP has drawn the attention of more and more NGOs and trade unions that face difficulties in litigating socio-economic rights before courts in Europe or that mobilise before various international and national avenues in tandem. Furthermore, use of the CCP without the need to exhaust domestic remedies may be seen as an important tool to compensate for the potential lack of judicial enforceability of the ESC – or economic and social rights in general – before domestic courts, or the obstacles that litigation campaigns may face at the domestic level or before the ECtHR, the CJEU, and other bodies.

Notwithstanding, having expert knowledge of the particularities and complexities of the ESC system and of the analytical ‘jurisprudence’ of the ECSR may prove to be a prerequisite for organisations that choose to mobilise the ESC system in order to pursue their goals. Additionally, a flaw of the CCP that may disincentivise potential organisations from submitting collective complaints and States from taking corrective action and respecting their Charter obligations is the passive stance of the Committee of Ministers in the whole procedure. Nevertheless, in the last couple of years, the Committee of Ministers seems to have changed its long-standing passive stance and has started addressing recommendations to the contracting parties that have been found by the ECSR, under the CCP, as violating the ESC provisions. While between 1998 and 2020, the Committee of Ministers had only issued one recommendation following-up a collective complaint decision by the ECSR,<sup>117</sup> in 2021-2022 it issued twenty-three.<sup>118</sup> This could be a sign that the Committee of Ministers has started taking more seriously its role in the ESC’s supervisory procedure, particularly under the CCP.

To conclude, the CCP has proven itself to be a reliable platform that enables the participation of organisations and vulnerable groups of people that are denied access in political or judicial fora, either at the domestic or supranational level, to deliberate on social policy issues and put serious socio-economic rights concerns on the governments’ agendas and on public debate. However, further research is required to bring forward, under an empirical lens, the perspective of NGOs and trade unions employing the CCP and to examine the tangible impact of the CCP’s structural features on their strategies to expose socio-economic rights violations in Europe. Furthermore, this article has identified the need for further research focusing on the potential of strategic litigation under the CCP in causally inducing changes in contracting parties’ law, policy, and practice. Admittedly, evaluating the impact of a strategic legal intervention on subsequent changes in law,

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117. CoE-Committee of Ministers, Recommendation CM/RecChS (2001) 1 on Collective Complaint No 6/1999 *Syndicat national des Professions du tourisme v France* <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016804c01a3](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016804c01a3)> accessed 21 September 2022.

118. See, for example, CoE-Committee of Ministers, Recommendation CM/RecChS (2021) 16 on Collective Complaint No 157/2017 *European Roma Rights Centre (ERRC) and Mental Disability Advocacy Centre (MDAC) v the Czech Republic* <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a2cf56](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a2cf56)> accessed 21 September 2022. All recommendations can be found in the CoE website on the Committee of Ministers <<https://www.coe.int/en/web/cm/home>> accessed 21 September 2022.

policy and in reshaping understandings of socio-economic rights, such as those enshrined in the ESC, is not always clear cut.<sup>119</sup> Nevertheless, the CCP has now been operative for 25 years and an adequate number of collective complaints has been processed by the ECSR.

Addressing such questions could help evaluate the strategic litigation dynamics of the CCP on the ground, as well as its overall strengths and weaknesses for the effective monitoring and enforcement of economic and social rights. This could also be instructive for collective actors that have not yet made use of the procedure, or are contemplating to, as well as for Member States to the CoE that have not yet ratified the optional CCP Protocol. Acceptance of the CCP by more contracting parties to the ESC would undeniably be essential in order for the procedure to reach its full strategic litigation potential. The role of NGOs and trade unions, as well as academics, lawyers, politicians, and other actors, in disseminating information and exerting pressure towards that goal, is crucial.

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119. Lisa Vanhala, Shauneen Lambe and Rachel Knowles, 'Let Us Learn': Legal Mobilization for the Rights of Young Migrants to Access Student Loans in the UK' (2019) 10 *Journal of Human Rights Practice* 439, 442.