Deconstructing the Eviction Protections Under the Revised European Social Charter: A Systematic Content Analysis of the Interplay Between the Right to Housing and the Right to Property

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ABSTRACT

This article analyses the eviction protections provided by the Revised European Social Charter by conducting a systematic content analysis of the European Committee on Social Rights’ (ECSR) Conclusions and Decisions on Articles 16 and 31. The findings reveal that the ECSR has established nine consistent eviction protections throughout its jurisprudence. Additionally, this article examines how the ECSR considers the right to property within the context of evictions, revealing additional eviction protections inconsistently applied by the ECSR that addresses the conflict between the right to housing and property. To provide insight into how the ECSR could address the conflict more directly, this paper compares the ECSR’s approach with that adopted by the United Nations Committee on Economic, Social and Cultural Rights (UN CESCR). Ultimately, this study concludes that the UN CESCR engages with the right to property in the context of evictions more directly than the ECSR.

KEYWORDS: evictions, the right to housing, the right to property, Article 16 Revised European Social Charter, Article 31 Revised European Social Charter, Article 11 International Covenant on Economic, Social and Cultural Rights

1. INTRODUCTION

In the context of evictions (the involuntary loss of one’s home), the right to housing and the right to property can be seen as both friends and foes. When residents own their homes (owner-occupiers), the right to property will strengthen the protection against eviction provided by the right to housing, thus acting as a friend.\(^1\) In situations where residents do not own their homes and property right holders initiate evictions of residents who can ‘only’ rely on the right to housing, the right to property and the right to housing stand in opposition. In this context,

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the right to housing can limit how property owners can implement their right to property, thus acting as foes.\(^2\)

The right to housing protects many aspects of housing, including adequacy, affordability, accessibility and habitability.\(^3\) Moreover, it protects the security of tenure, which guarantees protection against the loss of homes through evictions.\(^4\) Elements of the right to housing are found in international and regional human rights treaties, such as Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8 of the European Convention on Human Rights (ECHR) and Article 31 of the Revised European Social Charter (RESC).

The right to housing is closely intertwined with the right to property. Essential aspects of the right to property include the exclusive right to use (a piece of) property and the right to offer it for use or sale.\(^5\) Furthermore, a property owner can exclude others from their property and choose how it is used ‘without seeking the permission of others’.\(^6\) The right to property is codified in various human rights instruments, such as Article 1 of the First Protocol to the ECHR and the African Charter on Human and Peoples’ Rights (1981). The late André Van der Walt argued that the right to property often has the status of a trump right, meaning that in eviction cases, property rights are generally seen as more robust than other rights, including the right to housing.\(^7\) Hohmann suggests that both rights can conflict in certain circumstances.\(^8\) There has been considerable research into this issue.\(^9\) This research often considers the role of the international right to housing and the domestic right to property in domestic housing litigation.\(^10\) Fewer scholars have assessed the relationship between the right to housing and the right to property in an international or regional human rights context.\(^11\) Moreover, scholars analysing this relationship have mainly focused on the ICESCR and the ECHR.\(^12\) This research has yet to be mirrored in studies on the RESC.

The RESC contains a right to housing under Article 31.\(^13\) This Article contains three subsections that oblige States parties to (1) promote access to housing of an adequate standard, (2)

\(^2\) See Wilson, ‘The right to adequate housing’ in Dugard et al. (eds), Research Handbook on Economic, Social and Cultural Rights as Human Rights (2020) at 181.


\(^7\) Van der Walt, ‘Property in the Margins’ (2015) at 27.


\(^11\) Hohmann supra n 8.

\(^12\) Coomans and Ruiz Díaz-Reixa, ‘Effectiveness of the ICESCR Complaint Mechanism—An Analysis and Discussion of the Spanish Housing Rights Cases’ in Boost et al. (eds) Myth or Lived Reality: On the (In)Effectiveness of Human Rights (2021) 17–47; Hohmann supra n 8; Vols supra n 9.

prevent and reduce homelessness and (3) make the price of housing accessible to those without adequate resources. Additionally, Article 16 acts as a right to housing in disguise, by ensuring the State provides families with housing. The concept of forced eviction is identical under Articles 16 and 31. Moreover, the European Committee on Social Rights (ECSR) appears to ‘import the requirements of Article 31’ into Article 16 but focuses its assessment on families. In addition, the ECSR has examined eviction protections under Article 16 in relation to States that have not accepted Article 31. Articles 15, 19, 23 and 30 may be relevant to the right to housing, and may briefly be mentioned to enrich the analysis in this paper. However, Articles 16 and 31 will be focused on as they contain substantial eviction protections.

Comprised of 15 independent experts, the ECSR assesses State compliance with the RESC in two ways. First, the ECSR examines the reports submitted by States and publish 'Conclusions', describing the States' compliance with the RESC. Second, the ECSR considers complaints under the Collective Complaints Procedure and issues ‘Decisions’ clarifying if a violation of the RESC occurred. Through the Conclusions and Decisions, the ECSR elaborates on eviction protections that States must enforce to conform with Articles 16 and 31.

The academic literature that addresses the RESC primarily explores the doctrinal meaning of the RESC’s articles. Other publications have compared the RESC and the ECHR. Additionally, publications on Article 31 deal predominantly with Decisions under the Collective Complaint Procedure. For example, Brillat concentrates on the Decisions with a cursory look at the Committee’s Conclusions. Cullen discusses the Decisions' methods of interpretation. While Sâmboan gives insight into the ECSR’s strategies to legitimise and enforce its judgments,
they do not offer insight into the Conclusions.\textsuperscript{27} Consequently, the ECSR’s Conclusions on Articles 16 and 31 remain understudied. Akandji-Kombé identified the ‘monopolising’ of the Decisions in 2005.\textsuperscript{28} He argues that the Conclusions should be looked at more closely as they contain ‘interpretative innovations’ that later become important in the collective complaints procedure.\textsuperscript{29} An exception is Kenna and Jordan’s study published nearly 10 years ago.\textsuperscript{30} They conducted an insightful investigation into the ECSR’s right to housing by analysing Decisions and Conclusions, yet they did not focus on eviction protections.

This article fills these gaps by examining the ECSR’s Articles 16 and 31 Decisions and Conclusions. It will combine doctrinal legal analysis with a systematic content analysis (SCA) of all available Conclusions and Decisions on Articles 16 and 31. This method is not widely used in legal research but is used in this article to offer new insights into the ECSR’s eviction protections and the relationship between them and the right to property. To provide inspiration on how the ECSR could address this relationship to a greater extent, this article compares the ECSR’s approach with that adopted by the United Nations Committee on Economic, Social and Cultural Rights (UN CESCR).

The objectives of this article are: (1) to provide a rich overview of Article 16 and 31 Conclusions and Decisions, (2) to explore what eviction protections the RESC (as interpreted by the ECSR) offers, (3) to analyse whether and how the ECSR conceptualises the right to property in its Articles 16 and 31 Decisions and Conclusions and (4) to compare the ECSR’s approach with that adopted by the UN CESCR in balancing the right to housing and the right to property.

This article is divided into six sections. Section 2 describes the data and research methods. Section 3 presents an overview of the results and an analysis of the identified eviction protections. Section 4 discusses if and how the ECSR balances the right to housing and the right to property. Section 5 compares the ECSR’s approach to balancing the right to housing and property with that of the UN CESCR. In the final section, a conclusion is presented.

\section*{2. DATA AND RESEARCH METHODS}

\subsection*{A. Data}

We conducted a SCA to study the RESC’s eviction protections mentioned in Articles 16 and 31 Conclusions and Decisions. While the provisions of the RESC are binding, the Conclusions and Decisions are not.\textsuperscript{31} Still, they carry considerable weight for domestic judges and policymakers, leading to significant changes in the legal systems of State parties.\textsuperscript{32} In total, 26,199 Conclusions are published in English on the HUDOC-ESC database between 31 May 1969 and 12 April 2023. Out of the total population of Conclusions, 119 concern State compliance with Article 31 relating to 14 countries.\textsuperscript{33} Spain accepted Article 31 in 2021 and has yet to receive an Article 31

\begin{thebibliography}{99}
\bibitem{29} Ibid, 89–108.
\bibitem{33} Andorra, Finland, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovenia, Sweden, Turkey and Ukraine.
\end{thebibliography}
Conclusion. There are considerably more Article 16 Conclusions. There were 395 Article 16 Conclusions, relating to 30 countries.

In the Conclusions, the ECSR examines States’ reports on the implementation of and compliance with the RESC provisions. The ECSR can conclude that the State is in conformity with or not in conformity with the Charter. The ECSR can also defer the Conclusion, meaning no conclusion is reached, if the State Party did not provide sufficient information. The ECSR can also find that certain aspects of the country’s laws conform with the RESC while other parts of the laws do not. For example, the ECSR concluded that Lithuania’s eviction framework lacked essential elements as there was no reasonable notice period before evictions, nor was there compensation available in the event of illegal evictions. Still, the ECSR concluded that the existence of an appeal procedure for evictees and a proportionality assessment by domestic courts conformed with Article 31(2). The ECSR’s Decisions are the outcomes of the Collective Complaints Procedure, an optional measure that States can adopt by signing the Additional Protocol. In March 2023, only 14 States had ratified the Additional Protocol. Quesada notes that the Decisions impact even States that have not accepted the Protocol as the reasoning from the Decisions is often applied in the Conclusions.

Under the Collective Complaints Procedure, only certain qualified bodies are entitled to lodge a complaint. These bodies include European social partners (such as the European Trade Union Confederation), specific international non-governmental organisations (such as the European Roma Rights Centre) and trade unions in the country concerned (such as Confédération Générale du Travail in France). During this procedure, the ECSR reviews the submissions to ascertain if the RESC has been violated, considering each alleged breach of the RESC’s provisions individually. For example, in Médecins du Monde—International v France the ECSR considered the alleged violations of Article E in conjunction with Article 31(1), Article 31(2), Article 30 and Article 16 separately. According to Akandji-Kombé, the Decisions are formulated with a ‘rigour that we normally considered reserved to courts of law’. Quesada notes that the collective complaints procedure is becoming increasingly judicial. However, unlike traditional legal judgments, the Decisions do not consider individual situations but examine the general legal situation in the State.

There is a total of 161 Decisions on Merits published in English on the HUDOC database between 9 September 1999 and 12 April 2023. Out of the total population of Decisions on Merits, 15 Decisions deal with the implementation of Article 31, concerning six countries: France, Greece, Italy, the Netherlands, Portugal and Slovenia. There are 24 Article 16 Decisions on Merits relating to 12 countries: Belgium, Bulgaria, Croatia, Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal and Slovenia.

Spain accepted the Revised European Social Charter on 17th May 2021.
Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Malta, Republic of Moldova, Montenegro, Netherlands, North Macedonia, Norway, Portugal, Romania, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Turkey, Ukraine.
European Committee on Social Rights, ‘Conclusion Article 31(2), Lithuania’ (2019).
Quesada, supra n 40 at 9.
B. Methodology

This article adopts two research methods: SCA and doctrinal legal research. SCA is a highly beneficial supplement to the traditional legal doctrinal method, offering researchers new insights into their sources. It is used to analyse texts in a systematic and replicative way. Hall and Wright distinguish four steps for conducting SCA: (1) collecting a set of documents, (2) systematically reading them, (3) recording consistent features and (4) drawing inferences about the features’ use and meaning. In this article, step one involved collecting all Article 16 and 31 Conclusions and Decisions. During the collection stage, 119 Conclusions and 15 Decisions on Merits relating to Article 31, and 395 Conclusions and 24 Decisions on Merits relating to Article 16 were gathered. Decisions on admissibility were excluded from the analysis as they do not contain substantial eviction protections. Steps two and three involved a process known as coding. This involved carefully reading the texts and recording consistent features. Coding allows for the identification of patterns across many documents, offering more meaningful insights than a deeply reflective understanding of a single case. The coding involved selecting ‘variables’ based on the article’s objectives. Examples of the variables are the type of eviction protection endorsed and the outcomes of the Conclusion or Decision. The variables were transcribed to a coding form which the coder used when analysing the documents. Once completed, the first drafts of the coding form and codebook were used on a pilot test of a third of Article 31 Conclusions (n = 38) and Decisions (n = 5). This was done to identify any issues with the coding form. The fourth and final step of the SCA involved drawing inferences about variables’ use and meaning. For example, one variable gathered was whether the ECSR mentioned a proportionality analysis in eviction cases. The results of this variable were interpreted to analyse how the ECSR engages with proportionality and what interests they consider.

Besides the SCA, we applied the doctrinal legal method. This method aims to describe the law in a ‘neutral, consistent and clear’ manner. It also allows for the analysis of ‘the relationship between rules, explains areas of difficulty and perhaps, predicts future developments.” The doctrinal legal analysis was used to interpret the Article 16 and 31 eviction protections to analyse if and how the ECSR considers the right to property in eviction cases and to compare this with the UN CESC’s approach.

3. THE REVISED SOCIAL CHARTER’S PROTECTIONS AGAINST EVICTION: NUMBERS AND INTERPRETATION

This section presents the descriptive quantitative and doctrinal findings of the SCA. By analysing these, the Conclusions and Decisions, the scope and content of the eviction protections described are unravelled. This section argues that the practical effect of the right to housing may be hindered by the ECSR’s vague exposition of these protections.

Figure 1 shows that 46 countries have signed the RESC, of which 42 have ratified the Charter. However, only 15 countries have accepted Article 31 obligations. Figure 1 illustrates the different paragraphs of Article 31 that States have accepted.

47 Ibid at 66.
48 Vols, Legal Research: One Hundred Questions and Answers (2021) at 28.
50 Andorra, Finland, France, Greece, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, Slovenia, Spain, Sweden, Turkey and Ukraine.
Figure 1. Acceptance of Article 31.

Figure 2 shows that a total of 37 States have accepted Article 16, either as part of the European Social Charter 1961 or the RESC. Of these 37 States, 12 States that have also accepted Article 31. Furthermore, five countries have signed the RESC but have not accepted Article 16.

A. Overview of the Data

Table 1 presents the number of Conclusions on Articles 16 and 31. It shows that most Conclusions concern Article 16. The State was found in conformity with Article 16 in 42 per cent of the Conclusions. The ECSR publishes Conclusions on each subsection of Article 31 separately. Table 1 depicts that most of the Article 31 Conclusions address paragraph 2. In half of the Conclusions on Article 31, the State did not conform with the provision. The ECSR found that the State conformed with Article 31 in only 24 per cent of the Conclusions. The ECSR deferred issuing a Conclusion, meaning they did not decide on the State’s compliance, on 107 occasions because the State Party did not provide sufficient information. This Table also shows that a significant number of Articles 16 and 31 Conclusions address evictions. In more than half of these Conclusions, the ECSR ruled that the State Party did not conform with the RESC.

Table 2 focuses on Article 16 and 31 Decisions. In Article 31 Decisions, the ECSR considers each subparagraph of the Article separately. However, this table illustrates the occasions in which at least one paragraph of Article 31 was found to be violated. Within the Article 16 Decisions, the ECSR often considers how Article 16 applies to a range of legal issues presented by the applicants. As such, within one Decision, a State can be found to have violated Article 16 in relation to one issue, but found in conformity in relation to another. This table presents the times in which Article 16 was found to be violated in relation to at least one issue in the Decision. This table reveals that evictions are discussed in 10 Article 31 Decisions and 10 Article 16 Decisions.
The table also indicates the overlap between Article 16 and 31 as 10 Decisions concerning evictions refer to both articles.

To ensure that RESC rights are practically enforced in the domestic legal context, the ECSR has interpreted both Articles as offering safeguards against eviction. Through our analysis, we identified and revealed two distinct types of eviction protections existing under Articles 16 and 31: ex-ante and ex-post protections. This categorisation, inspired by Brems’ analysis of the

51 Article 16 is included in both the European Social Charter (1961) and the Revised European Social Charter (1996). Some States have only accepted Article 16 when ratifying the 1961 Charter, while others have accepted Article 16 when ratifying the 1996 Charter.

52 The dataset for this article is available at: https://doi.org/10.34894/KAI0ZS.

Table 2. The outcomes of the Decisions on Article 16 ($N = 24$) and Article 31 ($N = 15$)\textsuperscript{54}

<table>
<thead>
<tr>
<th>Decisions referring to</th>
<th>Number of times a violation of the article was established (%)</th>
<th>Number of times no violation of the article was established (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 16</td>
<td>24 (100)</td>
<td>0 (0)</td>
<td>24 (100)</td>
</tr>
<tr>
<td>Article 16 (mentioning evictions)</td>
<td>19 (100)</td>
<td>0 (0)</td>
<td>19 (100)</td>
</tr>
<tr>
<td>Article 31</td>
<td>15 (100)</td>
<td>0 (0)</td>
<td>15 (100)</td>
</tr>
<tr>
<td>Article 31 (mentioning evictions)</td>
<td>10 (100)</td>
<td>0 (0)</td>
<td>10 (100)</td>
</tr>
<tr>
<td>Both Articles 16 and 31 mentioning evictions</td>
<td>10 (100)</td>
<td>0 (0)</td>
<td>10 (100)</td>
</tr>
</tbody>
</table>

ECtHR’s procedural protections,\textsuperscript{55} allows for a deeper understanding of the RESC framework. In the context of the RESC, ex-ante pertains to the procedures leading up to eviction and ex-post is intended to mitigate the adverse effects of evictions when the ex-ante protections were not adhered to. We will examine these safeguards in the following subsections.

B. Ex-Ante Eviction Protections

The ECSR focuses its eviction protections on forced evictions, which it defines as ‘the deprivation of housing which a person occupied due to insolvency or wrongful occupation’.\textsuperscript{56} This subsection concentrates on the ECSR’s ex-ante eviction protections.\textsuperscript{57} To comply with the RESC, State parties must ensure that these protections are integrated into the domestic legal system.\textsuperscript{58} If only some of these protections are implemented, the ECSR deems the State non-compliant with the RESC.\textsuperscript{59} Our analysis reveals the ex-ante protections oblige States Parties to: (1) ensure that people threatened with evictions can access legal remedies and aid, (2) ensure a reasonable notice period before an eviction, (3) consult parties affected to find alternative solutions to evictions, (4) prohibit night and winter evictions and to (5) prohibit evictions from shelters.

Table 3 shows that the obligation to provide evictees with access to legal remedies and aid is mentioned 96 times. The ECSR states that this obligation means that occupiers and tenants must have access to ‘affordable and impartial legal and non-legal remedies’,\textsuperscript{60} especially ‘for those who

\textsuperscript{54} The ECSR’s Decisions address multiple provisions of the RESC, including the three subsections of Article 31. As such, each of the fifteen studied Article 31 Decisions could include multiple judgments regarding a possible violation of the provisions. Consequently, there is a differing number of Decisions for each subsection.


\textsuperscript{56} European Committee on Social Rights, Conclusion Article 31(2) Ukraine (2011).

\textsuperscript{57} We focus on Article 31(2) Conclusions because Article 31(1) and (3) Conclusions references in Table 2 do not discuss eviction protections.

\textsuperscript{58} This requirement is evident in Lithuania’s 2017 Article 31(2) Conclusion where the ECSR listed several legal protections that States must provide to persons threatened by eviction in order to comply with Article 31(2).

\textsuperscript{59} This can be seen for example in Portugal’s 2019 Conclusions Article 31(2) where Portugal was found to be not in conformity with Article 31(2) on the grounds that there was not adequate legal protection for persons threatened by eviction and because the law did not prohibit eviction from shelters without the provision of alternative accommodation. For example, in Italy’s 2011 Article 31(2) Conclusion, the ECSR noted that ‘certain elements of the Italian system on evictions . . . are in conformity with respect to the principles it has laid down under Article 31(2)’. However, Italy was still found not in conformity with Article 31(2) because evictions continue to be carried out without procedural safeguards to respect the dignity of persons.

\textsuperscript{60} European Committee on Social Rights, Conclusion Article 16 Spain (XIX-4).
Table 3. Ex-ante eviction protections in the Article 16 Conclusions \((n = 86)\) and Decisions \((n = 17)\) on evictions, and Article 31 Conclusions \((n = 42)\) and Decisions \((n = 10)\) on evictions

<table>
<thead>
<tr>
<th>Eviction Protection</th>
<th>Article 16 Conclusions (%)</th>
<th>Article 16 Decisions (^{61}) (%)</th>
<th>Article 31 Conclusions (%)</th>
<th>Article 31 Decisions (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Access to legal remedies and aid</td>
<td>57 (59)</td>
<td>5 (5)</td>
<td>26 (27)</td>
<td>8 (8)</td>
<td>96 (100)</td>
</tr>
<tr>
<td>Fix a reasonable notice period before eviction</td>
<td>55 (63)</td>
<td>3 (3)</td>
<td>25 (29)</td>
<td>4 (4)</td>
<td>87 (100)</td>
</tr>
<tr>
<td>Consultation with parties affected to find alternative solutions to eviction</td>
<td>46 (60)</td>
<td>3 (3)</td>
<td>24 (31)</td>
<td>4 (5)</td>
<td>77 (100)</td>
</tr>
<tr>
<td>Prohibit night and winter evictions</td>
<td>13 (27)</td>
<td>5 (10)</td>
<td>26 (53)</td>
<td>5 (10)</td>
<td>49 (100)</td>
</tr>
<tr>
<td>Prohibition on eviction from shelters</td>
<td>0 (0)</td>
<td>1 (2)</td>
<td>30 (86)</td>
<td>4 (11)</td>
<td>35 (100)</td>
</tr>
</tbody>
</table>

cannot pay legal fees themselves’.\(^{62}\) This requirement entails evictees being sufficiently aware of their right to challenge an eviction notice and how to exercise this right.\(^{63}\) The ECSR seems satisfied when individuals can access legal aid based on their ‘income, expenditures, wealth and maintenance liability’.\(^{64}\) However, in one Article 16 Decision, the situation whereby Travellers could only access free legal advice and representation from a charity was not sufficient to meet this requirement.\(^{65}\) In another Article 16 Decision, the ECSR found the State in violation of Article 16 partly because the legal remedies available in the country were not sufficiently accessible to Roma families threatened by eviction.\(^{66}\) The requirement to ensure a reasonable notice period before an eviction is mentioned in a total of 87 Conclusions and Decisions. The ECSR illustrated that a notice period of at least 2 months before an eviction is reasonable and acceptable, anything less is insufficient.\(^{67}\)

The third ex-ante eviction protection deals with the obligation to consult parties to find alternative solutions to eviction and is mentioned in 77 Conclusions and Decisions. This protection aims to ensure everyone has a ‘degree of security of tenure’.\(^{68}\) The Conclusions show

\(^{61}\) In this column, we included only the Article 16 Decisions that address Article 16 without substantial reference to Article 31.

\(^{62}\) European Committee on Social Rights, Conclusion Article 31(2) Netherlands’ (2015).


\(^{64}\) European Committee on Social Rights, Conclusions Article 31(2) Finland’ (2011).

\(^{65}\) ERRC v Ireland, (Complaint No. 100/2013), Decision on Merits of 1st December 2015, at para 141.


that there should be a `genuine consultation with those affected’, particularly before mass forced evictions or community relocations.69 In one Decision, the ECSR found a violation of Article 16 because the legislation governing evictions did not contain all the necessary safeguards, including a prior consultation of affected parties.70 Genuine consultation consists of more than informing an occupant that an eviction will occur; it involves a dialogue with the evictee in which the exact time and date of the eviction are clear and information about the relocation site is provided (if applicable).71 One Conclusion suggests that the consultation process should also include a discussion of the relocated people’s housing needs.72 In the Decisions, the ECSR elaborates on this protection by referencing the UN CESC’s General Comment No. 7.73 This General Comment states that genuine consultation should attempt to avoid or minimise the need to use force in all evictions.74 Apart from this, neither the Decisions nor Conclusions offer guidance on how the consultation process ought to be conducted or what the desired outcome is. Additionally, the ECSR does not review the State parties’ consultation practice to ascertain whether the evictees are sufficiently involved in the decision-making process. The limited information regarding this protection is noteworthy as it is mentioned in 77 Conclusions and Decisions, thus reaffirming its indispensable nature.75

The fourth ex-ante eviction protection is more straightforward and deals with the obligation to prohibit night and winter evictions. It seems to protect people from eviction during what is the coldest time of the day and the year.76 The ECSR has found States not in conformity with Article 16 if families can be evicted during winter.77 While this protective measure is mentioned in 49 Conclusions and Decisions, the ECSR does not give any additional information on this protection. The final ex-ante eviction protection prohibits evictions from shelters or emergency accommodations and is mentioned in 36 Conclusions and Decisions. The ECSR says it is vital to ban evictions from shelters or other basic emergency homeless accommodation as ‘it would place the person concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity’.78 Although the Conclusions make it clear that everyone within the State is entitled to this protection,79 the ECSR’s discussion in the Decisions has thus far concentrated solely on ‘unlawfully present persons’ within the State.80 Furthermore,

69 European Committee on Social Rights, ‘Conclusion Article 31(2), Slovenia’ (2011).
70 European Roma and Travellers Forum v the Czech Republic (Complaint No. 104/2014), Decision on Merits of 17th May 2016 at para 85; ERRC v Ireland, supra n 65.
71 European Committee on Social Rights, ‘Conclusion Article 31(2), Lithuania’ (2017) and Slovenia’ (2015).
72 European Committee on Social Rights, ‘Conclusion Article 31(2), Turkey’ (2011).
74 Centre on Housing Rights and Evictions (COHRE) v Italy, supra n 73, at para 21 & Centre on Housing Rights and Evictions (COHRE) v France, supra n 73, para 18.
75 The Decisions in which this requirement is mentioned are International Movement ATD Fourth World v France, supra n 67 para 78; FEANTSA v France supra n 67 at para 86; Médecins du Monde—International v France supra n 42, at para 42. This requirement is also mentioned in many Article 16 Conclusions, including: Romania (2016) and (2015), Czech Republic (XIX-4) and Latvia (XIX-4).
76 FEANTSA v France, supra n 67 at para 86.
77 European Committee on Social Rights, ‘Conclusion Article 16 Romania’ (2011).
78 European Committee on Social Rights, ‘Conclusion Article 31(2) Turkey’ (2011).
80 For example: In Defence for Children International (DCI) v the Netherlands Complaint No. 47/2008, European Committee on Social Rights, decision on merits of 20 October 2009 at para 63, the ECSR stated that ‘in the case of unlawfully present
Since 2015, some Conclusions have emphasised that evictions from shelters must be prohibited ‘without the provision of alternative accommodation’ (emphasis added). Yet again, the lack of clarity surrounding the requirements of this protection contributes to confusion regarding its scope and implementation.

### C. Ex-Post Facto Eviction Protections

Our analysis also assessed the ECSR ex-post eviction protections. Table 4 displays the obligations stemming from these protections, which include: (1) the provision of compensation for illegal evictions; (2) ensuring the availability of alternative accommodation for those who have been evicted; (3) if the eviction is justified by public interest, measures to re-house or financially assist the persons concerned; and (4) the existence of procedural rules that provide adequate protection for the rights and dignity of the individuals involved. Like the ex-ante protections, implementing these eviction protections is necessary for a State party to conform with the RESC.

<table>
<thead>
<tr>
<th>Eviction Protection</th>
<th>Article 16 Conclusions (%)</th>
<th>Article 16 Decisions</th>
<th>Article 31 Conclusions (%)</th>
<th>Article 31 Decisions (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Compensation for illegal eviction</td>
<td>55 (58)</td>
<td>5 (5)</td>
<td>31 (33)</td>
<td>4 (4)</td>
<td>95 (100)</td>
</tr>
<tr>
<td>Ensure the availability of alternative accommodation for those who have been evicted</td>
<td>8 (20)</td>
<td>4 (10)</td>
<td>19 (48)</td>
<td>9 (26)</td>
<td>40 (100)</td>
</tr>
<tr>
<td>Measures to re-house or financially assist the persons evicted in case of eviction justified by the public interest</td>
<td>6 (19)</td>
<td>0 (0)</td>
<td>23 (72)</td>
<td>3 (9)</td>
<td>32 (100)</td>
</tr>
<tr>
<td>Rules of procedure sufficiently protective of the rights and dignity of the persons in evictions</td>
<td>6 (20)</td>
<td>5 (17)</td>
<td>14 (47)</td>
<td>5 (17)</td>
<td>30 (100)</td>
</tr>
</tbody>
</table>

Persons no alternative accommodation may be required by States, eviction from shelter should be banned as it would place the persons concerned, particularly children, in a situation of extreme helplessness which is contrary to the respect for their human dignity. This is repeated in PLENTSA v the Netherlands (Complaint No. 86/2012) decisions on merits of 2 July 2014; Conference of European Churches (CEC) v the Netherlands (Complaint No. 90/2013) decision on merits of 1 July 2014; International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece (Complaint No. 173/2018) decisions on merits of 26 January 2021.

81 In this column, we included only the Article 16 Decisions that address Article 16 without substantial reference to Article 31.


83 This requirement is evident in Lithuania’s 2017 Article 31(2) Conclusion where the ECSR listed a number of legal protections that States must provide to persons threatened by eviction in order to comply with Article 31(2).
The first protection deals with the provision of compensation after an illegal eviction and is discussed in 95 Conclusions and Decisions. In the Conclusions, the ECSR has approved of instances whereby domestic law ensures tenants receive compensation from their landlord for, what the CESCR characterises as ‘inconvenience’ or harm caused by the eviction. In one Conclusion, the ECSR refers to the UN CESCR’s recommendation that compensation should be enough to enable the evictee to acquire adequate accommodation. However, the ECSR does not describe the amount of compensation or the threshold of inconvenience that must be reached before an evictee is entitled to compensation. The ECSR does not develop this protection in the Decisions.

The two following ex-post eviction protections are closely related. They are concerned with the obligation to ensure that alternative accommodation is available for evicted persons and to adopt measures to re-house or financially assist the persons involved where an eviction is justified by public interest. The requirement to ensure that alternative accommodation is available after an eviction can be interpreted as both ex-ante and ex-post. In some Conclusions, it is interpreted as prohibiting an eviction if there is ‘no possibility to access alternative accommodation’.

Still, in most cases, it seems to primarily be an ex-post protection.

In the Decisions, the ECSR sketches out what proposals for alternative accommodation should consist of. One Decision stated that offers of alternative accommodation must be ‘sufficiently long-term’ for evicted members of the Roma community. The alternative accommodation should not be such that Roma or Travellers are in danger of being excluded from access to services and amenities. Furthermore, proposals for alternative accommodation should be culturally appropriate for members of the Roma community. The ECSR has found Ireland in violation of Article 16 where there is no obligation on local authorities to provide alternative accommodation where Travellers are evicted from both local authority and non-local authority land.

Closely related to the above obligation is the requirement that ‘even when an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the persons concerned’. This statement of ‘even when’ suggests that the ECSR views it as a requirement in all evictions, including those not justified in the public interest. There is limited insight into what the ECSR mean by the public interest but they have stated that it may include situations where ‘dwellings are unfit for habitation’ or ‘when they are being demolished, reconstructed or repurposed’. However, the ECSR does not comprehensively explain the

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84 European Committee on Social Rights, Article 31(2) Conclusions on Finland (2011) and Lithuania (2019). European Committee on Social Rights, Article 16 Conclusions on Romania (2019), Latvia (2019), Hungary (2011).


87 European Committee on Social Rights, ‘Article 31(2) Conclusion on Slovenia’ (2017). Variations on this are repeated in European Committee on Social Rights, Article 31(2) Conclusions on Andorra (2017) and Finland (2019).

88 European Committee on Social Rights, Article 31(2) Conclusions on Finland (2011), Sweden (2011), Italy (2011) and Greece (2019).

89 ERRC v Italy, supra n 86 at para 41; Defence for Children International (DCI) v the Netherlands Complaint, supra n 80 at para 63; ERRC v France, supra n 86 at para 68; Centre on Housing Rights and Evictions (COHRE) v Italy, supra n 73 at para 72; International Movement ATD Fourth World v France Complaint, supra n 67 para 77; Médecins du Monde—International v France, supra n 42 at para 75 and European Roma and Travellers Forum v France (Complaint No. 64/2011), decision on merits of 24 January 2012 at para 124.

90 Médecins du Monde—International v France supra n 42 at para 80.


92 ERRC v Portugal (Complaint No. 61/2010), decisions on the merits of 30 June 2011 at para 49.

93 ERRC v Ireland, supra n 65.

94 International Movement ATD Fourth World v France, supra n 67 at para 78, emphasis added.

95 European Committee on Social Rights, ‘Article 31(2) Conclusion on Lithuania’ (2019).
public interests that may justify a forced eviction or the steps the domestic authorities should take to re-house or financially assist the affected person(s).

The fourth ex-post protection aims to ensure that when eviction is taking place, they are ‘carried out under conditions which respect the dignity of the persons concerned’. This suggests that during eviction procedures, States must continuously monitor their behaviour to ensure they are respecting the dignity of the evictee throughout the process. In the Conclusions, the ECSR mentions the obligation to respect the person’s rights separately from the person’s dignity. However, in this section, we consider the person’s rights and dignity together as they overlap significantly. States have been found not in conformity with Article 31 if their eviction procedures do not respect this requirement. In Italy’s 2011 Conclusion, the destruction of the personal belongings of Roma and Sinti people during an eviction was said to disrespect the person’s dignity. In some Conclusions, the ECSR suggests that the very existence of procedural safeguards ensures that evictions are carried out concerning the dignity of persons. For example, the ECSR stated that the prohibition of night and winter evictions protects ‘the human dignity of the persons concerned’.

The Decisions provide additional insight into the meaning of this protection. One Decision stated that evictions that occurred without consideration of the presence of children, pregnant women, elderly, sick or disabled persons, along with the destruction of possessions, were a breach of human dignity. However, the lack of clarity regarding what specific eviction measures respect a person’s dignity and rights is striking, considering that the ECSR has regarded respect for human dignity as a ‘fundamental value at the core of positive European human rights law’.

D. Flexibility and Inconsistencies in International Law

Our analysis has demonstrated that the ECSR has left room for interpretation regarding the content, scope and domestic implementation of the Article 16 and 31 eviction protections. This allows States to develop the protections to fit their legal system. This could be viewed as an intentional tactic to facilitate and mobilise ‘the consent of states required to establish binding international law’. Petit writes that this flexibility is a positive feature of the RESC system because ‘its effectiveness is based primarily on the principle of persuasion to achieve long-term aims’. Nevertheless, this approach allows for inconsistencies regarding eviction protections. However, it has been observed that inconsistency in international law is unavoidable and perhaps even necessary. On the one hand, Richemond suggests that ‘given the present state of the

96 European Committee on Social Rights, ‘Article 31(2) Conclusion on France’ (2003).
98 European Committee on Social Rights, ‘Article 31(2) Conclusion Italy’ (2011).
99 European Committee on Social Rights, ‘Article 31(2) Conclusion Turkey’ (2011) and Slovenia, (2015).
100 European Committee on Social Rights, ‘Article 31(2) Conclusion Lithuania’, (2015).
101 The dignity requirement is mentioned in the following Decisions: FEANTSA v France, supra n 67 para 86; European Roma Rights Centre v Italy supra n 86 at para 41; International Movement ATD Fourth World v France, supra n 67 at para 77; Defence for Children International (DCI) v the Netherlands, supra n 80 at para 63; ERRC v France, supra n 86 at para 68; Centre on Housing Rights and Evictions (COHRE) v Italy, supra n 73 at para 67; Médecins du Monde—International v France, supra n 42 at para 75; European Roma and Travellers Forum v France supra n 89 at para 118 and 120. Rights of the person: ERRC v France, supra n 86 at para 67; COHRE v France, supra n 73 at para 64.
102 Defence for Children International (DCI) v the Netherlands, supra n 80 at para 62.
103 Ibid at para 73.
105 Petit, ‘The Follow-up to the Decisions of the European Committee of Social Rights’ in Angeli and Nivard (eds) supra n 18 at 117.
international system, the codification of a precise norm may not be preferable to the ambiguous regime currently in place’. On the other hand, Crossley argues that ‘inconsistent practice diminishes the prospects of the development of norms of protections and associated practices and institutions’. Particularly in relation to the right to housing, while the ECSR’s flexibility allows States to define the content of the eviction protections, it is often unclear what States need to do in order to conform with their international obligations. Ultimately, the clarity, content and application of the right to housing are hindered by the ECSR’s, often abstracted approach.

4. THE RIGHT TO HOUSING AND THE RIGHT TO PROPERTY IN THE REVISED EUROPEAN SOCIAL CHARTER

There is no right to property under the RESC. As a result, property rights are not usually expressly discussed in Articles 16 and 31 Decisions and Conclusions. The most extensive discussion occurred in one Article 16 Decision where the majority of ECSR members dismissed the idea that Article 16 contains a right to enjoy property, like that provided by Article 1 of the First Protocol to the ECHR. They stated that Article 16 guarantees an entitlement to housing ‘which could, in certain cases, encompass elements of the right of property’. In the dissenting opinion, three ECSR members argued that the decision to dismiss the analogy between Article 16 and Article 1 of the First Protocol was ill-founded and undermined the indivisibility of all fundamental rights as limitations on property must conform to a relation of proportionality with the aim pursued. Beyond this, the discussion of the right to property in the Articles 16 and 31 jurisprudence is rather limited.

The ex-ante and ex-post eviction protections discussed in Section 3 are frequently and consistently mentioned in the Decisions and Conclusions. They can be described as ‘must have’ protections, as States can be found in violation of Articles 16 and 31 if they are found not to have these protections in place. However, there are some protections against evictions which are infrequently mentioned. In contrast to the “must have” protections, there are some protections which the ECSR does not review in a consistent manner. These can be described as ‘nice to have’ protections as the ECSR does not find the State in violation of the RESC if these protections are not mentioned in the State report. Yet, in instances where these protections exist in domestic law, the ECSR notes their existence with approval but does not state that they are necessary in order to conform with the RESC.

Regarding the ‘must have’ protections, the right to property is not dealt with in a substantial manner. Instead, the right to property is acknowledged indirectly, as evidenced in their discussions on the distinctions between tenants’ and property owners’ rights, domestic property rights provisions, references to ECtHR’s judgments on the right to property and housing, references to domestic peak court decisions that discuss property
Table 5. ‘Nice to have’ eviction protections endorsed by the ECSR in Article 16 Conclusions (n = 89) and Decisions (n = 17) and Article 31 Conclusions (n = 42) and Decisions (n = 15) on evictions

<table>
<thead>
<tr>
<th>‘Nice to have’ eviction protections</th>
<th>Article 16 Conclusions (%)</th>
<th>Article 16 Decisions (%)</th>
<th>Article 31 Conclusions (%)</th>
<th>Article 31 Decisions (%)</th>
<th>Total (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proportionality analysis</td>
<td>7 (21)</td>
<td>3 (9)</td>
<td>16 (47)</td>
<td>8 (24)</td>
<td>34 (100)</td>
</tr>
<tr>
<td>A tenant’s right to appeal the eviction</td>
<td>4 (16)</td>
<td>2 (8)</td>
<td>14 (56)</td>
<td>5 (20)</td>
<td>25 (100)</td>
</tr>
<tr>
<td>Obligation to obtain a court order before an eviction</td>
<td>9 (53)</td>
<td>0 (0)</td>
<td>4 (24)</td>
<td>4 (24)</td>
<td>17 (100)</td>
</tr>
<tr>
<td>Limitations on evictions of illegal occupiers</td>
<td>0 (0)</td>
<td>6 (43)</td>
<td>5 (36)</td>
<td>3 (22)</td>
<td>14 (100)</td>
</tr>
</tbody>
</table>

The ECSR acknowledges the role of the right to property to a greater extent in the ‘nice to have’ protections. In examining these protections, the ECSR acknowledges the existence of a right to property and its clash with the right to housing, by referring to landlords’ rights or by explaining that the rights of occupiers need to be considered. Table 5 presents the four ‘nice to have’ protections against evictions, which include (1) the obligation to carry out a proportionality analysis, (2) a tenant’s right to appeal an eviction, (3) limitations on the evictions of illegal occupiers, and (4) the obligation to obtain a court order before an eviction.

In 25 Conclusions, the ECSR acknowledges the importance of a tenant’s right to appeal an eviction order. Sometimes, the ECSR requests that State reports contain more information about this requirement. While the ECSR does not state it, this requirement could be viewed as curtailing a property owner’s right to exclude tenants from the property.

The ECSR has mentioned instances where a forced eviction is only possible if the landlord has obtained a court order. In an Article 16 Conclusion, the ECSR requested that the State provide more information about this requirement and noted that without this information, there would be ‘nothing to establish that there are adequate safeguards against eviction for families’.

Again, this measure presents an obstacle for property owners as they should apply to a court before getting an eviction order.

Furthermore, the ECSR noted that illegal occupation of a site or dwelling might justify the eviction of the occupants. Thus, it implicitly acknowledges that some other interests (such

116  FEANTSA v Slovenia, supra n 73 at para 20–23 and 52, Centre on Housing Rights and Evictions (COHRE) v France, supra n 73 at para 14 and 47; European Roma and Travellers Forum v France, supra n 89 at para 17.
117  Médecins du Monde—International v France, supra n 42 at paras 78–79.
118  European Committee on Social Rights, Article 31 (2) Conclusion on Sweden (2005), Norway (2005) and the Netherlands (2011).
119  Including: European Committee on Social Rights, ‘Article 31 (2) Conclusion on Sweden (2005), Lithuania (2005), Slovenia (2005), Norway (2005).
121  European Committee on Social Rights, ‘Article 16 Conclusions XX-4 on Luxembourg’.
122  European Committee on Social Rights, ‘Article 16 Conclusions on Romania’ (2019).
123  European Committee on Social Rights, ‘Article 31 (2) Conclusion on Greece (2019), Ukraine (2011) and ERRC v France supra n 86 at 67.
as property interests) may justify an eviction. However, they state that the criteria for illegal occupation must not be unduly wide.\textsuperscript{124} Again, by interpreting Articles 16 and 31 as protecting illegal occupiers’ the right to housing, an owner’s right to reclaim possession over their property may be restricted.

In 34 Conclusions and Decisions, the ECSR mentioned the requirement to conduct a proportionality analysis in eviction cases. The remainder of this section focuses on this protective measure for two reasons. Firstly, as it is the most mentioned measure, the data availability will lead to a rich analysis. Moreover, the proportionality analysis is often used to tackle conflicts of rights, which will provide beneficial insights into whether and how the ECSR has used or developed this concept to tackling conflicts between the right to housing and property in eviction cases.

A. Proportionality in Articles 16 and 31

The meaning, definition and use of proportionality in human rights law have been the subject of much academic literature.\textsuperscript{125} Sieckmann describes proportionality as a test which applies to conflicts of principles which protect rights.\textsuperscript{126} A proportionality analysis can help to determine whether a human rights interference is justified by looking at the reasons for and intensity of the interference.\textsuperscript{127} Young outlines that a proportionality analysis can consist of a set of ‘sequential questions’, beginning once a human right has been infringed.\textsuperscript{128} These questions can be summarised as follows: (1) Does the infringement further a legitimate aim?, (2) Is the measure causing the infringement necessary?, (3) Do the benefits outweigh the costs imposed on the rights-bearer?\textsuperscript{129}

The ECSR stated that a ‘proportionality principle’ is required under the RESC, particularly in the context of Article E, the non-discrimination clause.\textsuperscript{130} However, in the context of evictions, the application of a proportionality analysis is inconsistent and unclear.\textsuperscript{131} There are limited direct references to a proportionality analysis in relation to Article 31. However, in discussing Article E in conjunction with Article 31, the ECSR stated that there must be a ‘reasonable relationship of proportionality between the means employed and the aim sought to be realised’.\textsuperscript{132} Interestingly, this is similar to the ECtHR wording when discussing proportionality.\textsuperscript{133} In terms

\textsuperscript{124} European Committee on Social Rights, ‘Article 31(2) Conclusion on Greece (2019), Ukraine (2011).
\textsuperscript{126} Sieckmann, ‘Proportionality as a Universal Human Rights Principle’ in Duarte and Silva Sampaio supra n 125 at 3 and 11.
\textsuperscript{127} Ibid at 3.
\textsuperscript{128} Young, ‘Proportionality, Reasonableness, and Economic and Social Rights’ in Jackson and Tushnet (eds.) Proportionality: New Frontiers, New Challenges (2017) at 257.
\textsuperscript{129} Ibid at 257.
\textsuperscript{130} European Roma and Travellers Forum v France supra n 89.
\textsuperscript{131} Ibid.
\textsuperscript{133} For information on the ECtHR’s proportionality analysis see: Smet and Brems (eds.) When Human Rights Clash at the European Court of Human Rights: conflict or harmony? (2017); Zysset, Freedom of expression, the right to vote, and proportionality at the European Court of Human Rights: an internal critique International Journal of Constitutional Law (2019) at 230–251; Jackson and Tushnet n 128.
of establishing this relationship of proportionality, the ECSR merely states that Governments enjoy ‘a margin of appreciation in determining ( . . . ) the balance to be struck between the general interest and the interests of a specific group.’ 134 On one occasion, ECtHR case law was cited to explain that the margin of appreciation will be narrower where the right at stake is crucial to the individual’s enjoyment of intimate or critical rights.135 Nevertheless, the ECSR has only assessed if the State exceeded its margin of appreciation in one Decision.136 In one Article 16 Conclusion, the ECSR requested Spain to give examples from domestic case law on how the judicial review of evictions is carried out and if it includes a proportionality analysis.137

There has also been some insight into how a proportionality analysis regarding housing and evictions can be carried out in relation to Articles E and 19. While these statements do not directly apply to Article 16 or 31, the ECSR has stated that it ‘is impossible to draw watertight divisions between the material scope of each article or paragraph’ of the RESC.138 Hence, by examining the application of the proportionality principle in specific contexts, we can gain insight into its potential application to Articles 16 and 31. The ECSR explained that the unlawful occupation of private property can constitute a genuine and serious threat to the fundamental interests of society that could justify an eviction.139 However, in balancing the interests in this case, the ECSR did not consider that the unlawful occupation of private property poses a serious threat to the fundamental interests of society. This shows that the rights of the illegal occupiers must be balanced with other rights, including the rights of the property owners.

In conclusion, we see that the ECSR has been unclear about the necessity of a proportionality test in the context of evictions. They apply this test infrequently and in an inconsistent manner. In particular, insights into the proportionality analysis are scattered across Conclusions and Decisions of several articles, which makes it unclear how a proportionality test in eviction cases should be applied.

**B. Balancing of Interests in Eviction Cases**

A proportionality analysis often presupposes a balancing exercise.140 There is an intrinsic relation between proportionality and balancing: both are used to establish a priority relation between conflicting arguments and assigning relative importance or weight to the competing arguments.141 The priority assigned to these interests will depend on the facts of the case and the relative importance of the competing principles.142 In the context of evictions, the occupier’s circumstances and interests and the property owner’s interests can come into conflict. The ECSR has provided insight into the consideration of an individual’s circumstances and the weight afforded to this aspect before an eviction occurs. The following circumstances have been considered relevant to the balancing of interests: the circumstances of the individual or family being evicted,143 illness or other circumstances impacting the individual’s ability to pay

134 FEANTSA v France, supra n 67 at para 95 and repeated in European Roma and Travellers Forum v France, supra n 89 at para 95; International Commission of Jurists (ICJ) and European Council for Refugees and Exiles (ECRE) v Greece, supra n 80 at para 112 and Médecins du Monde—International v France, supra n 42 at para 54; ERPC v France, supra n 86 para 82.

135 This reference was in relation to Article 16 as regards the housing rights of Roma and Sinti families in Centre on Housing Rights and Evictions (COHRE) v Italy, supra n 73 at para 120. But it is relevant to the discussion of Article 31 as it involved housing rights claims.

136 European Roma and Travellers Forum v France, supra n 89 at para 95.

137 European Committee on Social Rights, ‘Article 16 Conclusions XXI-4 on Spain’.

138 ERRC v Bulgaria, supra n 15.

139 European Roma and Travellers Forum v France, supra n 89 at para 60.

140 Duarte, ‘Gains and Losses in Balancing Social Rights’ in Duarte and Silva Sampaio, supra n 125 at 51.

141 Sieckman, ‘Proportionality as a Universal Human Rights Principle’ in Duarte and Silva Sampaio n 125 at 5 and 8.

142 Ibid at 5.

143 European Committee on Social Rights, ‘Article 31(2) Conclusion on France (2019).
Deconstructing the Eviction Protections Under the Revised European Social Charter

Rent, extreme social difficulties that hinder the tenant’s ability to pay rent, and exceptional circumstances, such as a death in the family or loss of employment, that may impact the tenant’s ability to pay rent. In one Conclusion on Article 16, the State was advised to show how their judicial proportionality assessment considers the effects of the eviction on the persons concerned.

The Decisions adopt a slightly different approach by focusing on particular vulnerabilities of specific minority groups. For example, ECSR found that France violated Article 31 as the ‘specific differences of Travellers’ were not considered when implementing the right to housing. Additionally, the ECSR found Bulgaria in violation of Article 16 because the domestic eviction legislation had a disproportionate effect on Roma people. Furthermore, in the European Roma and Travellers Forum v Czech Republic decision, the ECSR endorsed the ECtHR’s proportionality assessment which stated that ‘special consideration’ should be given to Gypsies and Travellers vulnerable position when dealing with unlawful settlements and evictions. In other instances, the ECSR outlined how some States carry out proportionality analyses, but they do not state if this conforms with the RESC.

The ECSR does not consider the landowner’s right to property in the proportionality analysis in-depth. The ECSR has noted with approval a proportionality test prescribed by Estonian law, which considers the property owner’s interests and other circumstances, including the debtor’s family and economic situation. In an Article 31(2) Conclusion, the ECSR approvingly notes that both the tenant’s and landlord’s circumstances and interests are considered. In European Roma and Traveller Forum v France, the ECSR mentions balancing a specific group’s interests but does not suggest ways to achieve this balance. Many Decisions deal with the evictions of illegal occupiers, but the ECSR does not discuss the ownership of the occupied land, even though some property interests must be involved to warrant an eviction. However, the acknowledgement of the necessity to balance the tenant’s interests insinuates that there are some other interests (such as property interests) to weigh against.

C. The Necessity of Consideration of the Right to Property

The above analysis shows that Articles 16 and 31 Conclusions and Decisions fail to elaborate on how the right to housing and the right to property could be balanced. This is disappointing because to protect and develop Articles 16 and 31, clashes between the property owner’s right to property and occupier’s right to housing should be addressed. By ignoring this clash, States are left struggling to understand how these articles and the right to property can be harmonised in their legal systems.

This is seen in State reports under the State Reporting Procedure. For example, in the 17th national report published by the French government, the French Declaration of the Rights

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144 European Committee on Social Rights, Article 31(2) Conclusions on Lithuania (2017) and Sweden (2003).
145 European Committee on Social Rights, ‘Article 31(2) Conclusion on Slovenia’ (2003).
146 European Committee on Social Rights, ‘Article 31(2) Conclusion on Slovenia’ (2015).
147 European Committee on Social Rights, ‘Article 16 Conclusion on Romania’ (2019).
148 ERRC v Bulgaria, supra n 15 at para 56.
149 European Roma and Travellers Forum v Czech Republic, supra n 70 at para 160.
152 European Committee on Social Rights, ‘Article 31(2) Conclusion on Italy’ (2007).
153 European Roma and Travellers Forum v France, supra n 89 at para 95.
154 Médecine du Monde International v France, supra n 42; ERRC v Italy, supra n 86; ERRC v France, supra n 86; Centre on Housing Rights and Evictions (COHRE) v Italy, supra n 73 and International Movement ATD Fourth World v France, supra n 67.
of the Citizen is quoted as describing the right to property as an ‘inviolable and sacred right’ that ‘no one can be deprived of’. 156 The report refers to the limitations that this right places on the right to housing, particularly regarding evacuating illegal camps to ‘put an end to an illegal infringement of property rights’. 157 It remains unclear how this can be harmonised with the RESC’s right to housing.

Besides that, the Applicants’ and State Parties’ submissions under the Collective Complaints Procedure illustrate that the clash between the right to housing and property is an important topic.158 For example, in Médicines du Monde v France, the Government notes that the evictions are intended to bring an end to unlawful occupation that infringes on the property owners’ rights.159

Lastly, this issue is also seen in the State reports explaining why they have not accepted certain RESC provisions. Ireland’s fourth report on the non-accepted RESC provisions stated that Article 31 could not be adopted due to existing provisions in Bunreacht na hÉireann (the Irish Constitution).160 While the report does not explicitly refer to the provision in question, it can be presumed it refers to Article 43, which protects the right to property.161

Krause notes that property rights are closely connected with the ‘social and economic policies of states, and thus there will always be a certain amount of reluctance towards international supervision of these rights’.162 Nevertheless, it is clear that the ECSR’s lack of guidance on how the right to housing and property can be interpreted to make them compatible (through a proportionality analysis, for example) does not assist or encourage the State to develop the right to housing. The ECSR, as a body separated from domestic political pressures, are uniquely positioned to address this clash. By pretending this conflict between the right to property and housing does not occur or exist, the ECSR fails to strengthen the right to housing in Europe and ultimately limits its implementation in the domestic context.

The ECSR needs to elaborate more on how the interests involved in an eviction could be balanced to develop the right to housing. The main gateway to do so seems to be the proportionality analysis. Perhaps, the meaning and content of the proportionality analysis can be developed over time as more Articles 16 and 31 Conclusions and Decisions are published by the ECSR. This is likely because the ECSR has already endorsed instances whereby the occupiers’ circumstances are considered before an eviction is issued. Furthermore, the ECSR’s statement that States cannot enforce any sanction or measures against illegal occupiers due to the mere fact that they are illegally occupying land shows that the ECSR recognises that the landowner’s right to property is an essential factor to consider. Yet, it is also clear that this right does not trump an illegal occupier’s right to housing. It seems that the ECSR could, therefore, make a substantial challenge to the assumption that the right to housing and the right property are incompatible.

156 Government of France, supra n 155 at 21.
157 Ibid at 21.
158 Médicines du Monde v France, supra n 42 at para 78; FEANSTA v Slovenia, supra n 73 at para 34.
159 Médicines du Monde v France, supra n 42 at paras 71 and 78.
161 Article 43, Bunreacht na hÉireann (Constitution of Ireland), Dublin, Oifig an tSoláthair (1945).
5. COMPARISON OF THE UNITED NATIONS COMMITTEE ON ECONOMIC SOCIAL AND CULTURAL RIGHTS’ AND THE EUROPEAN COMMITTEE ON SOCIAL RIGHTS’ APPROACHES

A. The UN CESCR’s Proportionality Analysis

To provide inspiration on how to address the conflict between the right to housing and the right to property, this section compares the ECSR’s approach with the UN CESR’s approach. We outline the approach adopted by the UN and conclude that it engages with the different interests at play in eviction cases to a greater extent, in particular, the right to property. The ICESCR acknowledges a right to housing under Article 11 ICESCR but does not protect a right to property. Through General Comments and the individual complaint procedure, the UN CESCR has interpreted Article 11 as requiring States to ensure that a proportionality test is carried out before an eviction occurs. In-depth research into the individual complaint procedure has been published. This article contributes to this research by focusing on the UN CESCR’s proportionality analysis and comparing this analysis to that of the ECSR.

Before we examine the proportionality assessment, it is important to acknowledge that the UN CESCR’s definition of forced eviction is different from that of the ECSR. The UN CESCR defines forced eviction as the ‘permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection’. The UN CESCR requires that all evictions need to be carried out ‘in accordance with general principles of reasonableness and proportionality’. If this requirement is not met, the eviction qualifies as a forced eviction under the ICESCR. The ECSR uses a much broader definition, explaining a forced eviction as ‘the deprivation of housing which a person occupied due to insolvency or wrongful occupation’.

Two studies have considered the role of property rights in the UN CESCR’s eviction cases within the individual complaint procedure. Benito Sánchez notes that States are advised to ensure a framework is in place that ‘allows judicial authorities to carry out a proportionality assessment having regard to the aim pursued by the eviction measure and its consequences for the evicted person’. He explains that the UN requires that the evictee’s specific situation be balanced with the interests of private property owners during an eviction procedure.

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166 UN Committee on Economic, Social and Cultural Rights, General Comment No 7, supra n 73 at para 3.
167 Ibid, para 14.
168 European Committee on Social Rights, ‘Conclusion Article 31(2) Ukraine’ (2011).
170 Benito Sánchez, supra n 169 at 370.
171 Benito Sánchez, supra n 169 at 371.
However, Casla claims that the UN CESCR has not sufficiently addressed the right to property and whether it should be restricted in the name of economic, social and cultural rights.\textsuperscript{172} He points out that property ‘is of huge significance when dealing with housing, particularly in eviction disputes and therefore it is necessary to acknowledge the role of property to develop the right to housing.’\textsuperscript{173} Casla concludes that this could be done by weighing or balancing the interests based on proportionality.\textsuperscript{174}

The proportionality requirement stemming from Article 11 ICESCR is developed through the individual complaint procedure.\textsuperscript{175} When explaining how to determine the proportionality of an eviction, the UN CESCR has recognised that the right to property is a domestic factor that State parties need to engage with when deciding on the proportionality of an eviction. An example of this can be found in the complaint of López Albán.\textsuperscript{176} In this case, a single mother and her five dependent children were evicted from a bank-owned property she was illegally occupying.\textsuperscript{177} The UN CESCR stated that while ‘the right to property is not a Covenant right’, the ‘State party has a legitimate interest in ensuring protection for all rights established in its legal system so long as it does not conflict with the rights contained in the Covenant’.\textsuperscript{178} In particular, they noted that the State party has a valid reason for evicting illegal occupants, as failing to do so would ‘constitute a violation of the owner’s right to property under national law’.\textsuperscript{179} In this proportionality assessment, the UN CESCR explicitly recognises both the consequences of the eviction on the evictee and the owner’s need to recover possession of the property.\textsuperscript{180} In the Ben Dżazia case, the UN CESCR insisted that the State party demonstrate that the case’s specific circumstances were considered before an eviction was ordered.\textsuperscript{181} The circumstances that should be considered include: (1) the possible consequences the eviction would have for the applicant;\textsuperscript{182} (2) if assurance was given to the evictee that they would not be left homeless or exposed to other human rights violations following the evictions and (3) to take into account the availability of alternative accommodation and the evictee’s financial ability to obtain private rental accommodation.\textsuperscript{183}

Another example of the proportionality analysis is seen in the case of Fátima El Ayoubi.\textsuperscript{184} Again, the right to private property was considered a legitimate interest that should be protected insofar as it does not conflict with ICESCR rights.\textsuperscript{185} It was noted that allowing illegal occupiers to remain on a property where the owner has contested their right to occupy the premises, could violate the owner’s right to property.\textsuperscript{186} To ascertain if the eviction was proportionate to the aim pursued, the UN CESCR stated that the applicant’s circumstances needed to be considered,
including their ‘vulnerable economic situation’, relevant health issues, their lack of alternative accommodation and the fact that the competent authorities did not find a solution to the family’s situation. Yet, these circumstances need to be balanced with ‘the owner’s need to recover possession of the property’. As the State had failed to carry out this proportionality analysis, a violation of Article 11 ICESCR was found.

Similarly, in Hakima El Gourmari and Ahmed Tidli, the UN CESCR noted that the right to property and the non-payment of rent are legitimate reasons for a property owner to seek an eviction order. But these property interests need to be balanced with the consequences for the evicted persons. However, in the Soraya Moreno Romero case, the UN CESCR noted that State parties enjoy a degree of discretion when regulating unlawful occupation of property, but that this discretion must be compatible with the ICESCR. Again, they repeated that a proportionality test should consider the aim of the eviction and the impact on the consequences for the evicted person. The State was found in conformity with Article 11 because the State had taken all steps to protect the rights of the author, including offers of alternative accommodation which were declined by the applicant.

B. Comparison with the ECSR and Concluding Remarks

In this section, we conduct a comparative analysis of the approaches taken by the UN CESCR and the ECSR regarding the balancing of the right to housing and the right to property. Our focus will be on identifying the three most relevant similarities and the two most striking differences between the two bodies. The aim of this comparison is not to provide an exhaustive comparison of all differences between both systems. Instead, we aim to compare the manner in which both bodies deal with conflicts of the right to property and housing in the context of evictions and to demonstrate how the UN CESCR might serve as an inspiration to the ECSR in this regard.

The first similarity is that, in general, neither bodies carries out a direct proportionality analysis. Instead, they require (in the case of the UN CESCR) or advise (in the case of the ECSR) contracting parties to ensure one is included in their eviction procedure. However, in some recent cases, such as L.J.W v Belgium, the UN CESCR seem to carry out the proportionality by considering the impact on the applicant. The second similarity is that both bodies outline the individual circumstances that should be taken into account when carrying out a proportionality analysis. Most notably both bodies necessitate that the impact of the eviction on the evicted person be considered, for example, the availability and accessibility of alternative accommodation. The third similarity is that both bodies agree that the right to housing should apply to instances of illegal occupancy, establishing that the right to housing is not reserved for those with legal tenancy agreements. However, there are some clear differences in both approaches. First, the UN CESCR provides in-depth information regarding their eviction protections. For example, in relation to the obligation to provide alternative housing to evicted persons who need it, the UN CESCR explain in-depth what this should consist of and outline that if the Applicant refused these offers, they must demonstrate why this offer was unacceptable.

This is unlike the ECSR, who offer less information in relation to this requirement.

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188 Ibid, at para 14.5.
191 Ibid at para 10.3.
193 Ibid at para 12.4.
194 Ibid at 12.6
196 Soraya Moreno Romero v Spain, supra n 192 at para 12.6.
A second notable difference is their approaches to a proportionality analysis of evictions. The UN CESCR is more explicit about the interests that should be considered; they acknowledge that the evictee’s individual characteristics should be taken into account, and they explicitly say that the right to property is an essential factor to be considered. The ECSR does not expand on the right to property as much. Furthermore, they do not consistently note that a property owner’s right to property is a legitimate interest that must be grappled with when addressing the right to housing.

A possible explanation for this difference may be related to the different contexts in which both bodies function. The UN CESCR is tasked with assessing individual eviction cases, enabling them to draw attention to the rights of individuals in a particular situation. In contrast, the ECSR lacks the ability to conduct in-depth examinations of individual evictions; instead, their focus lies in assessing the proportionality of evictions based on national legislation and policies. Consequently, the individual complaints procedure places the UN CESCR in a better position to consider the impact of violating the right to housing on individuals. Furthermore, it is worth noting many of the UN CESCR’s decisions are more recent, spanning the last 5 years, while a significant number of the ECSR’s Decisions were published over a decade ago. This temporal disparity highlights that the UN CESCR’s body of decisions is more up-to-date, potentially reflecting evolving perspectives and addressing contemporary issues related to the right to housing.

Despite the differences regarding the context in which both systems operate, this comparison demonstrates that there are inconsistencies in relation to the approaches adopted by both bodies to their proportionality analyses, which may hinder the development and implementation of the right to housing. The disregard for the interplay between the right to property and housing weakens the effectiveness of the right to housing. But acknowledging this inconsistency could lead to a new direction for ECSR to increase effectiveness. The UN CESCR demonstrates that the right to property can be recognised in an instrument that has not codified it, suggesting that the ECSR’s approach can be revised by recognising the role of property rights in protecting the right to housing. Ignoring the significance of property is not helpful for human rights, as recognised by Casla.

6. CONCLUSION

This article is a novel contribution to research on the RESC and the development of the right to housing in Europe. Firstly, it offers a comprehensive overview of the RESC’s eviction protections under Articles 16 and 31. Through an SCA, the study reveals that the ECSR has established nine consistent eviction protections that fall into two categories: ex-ante, relating to the procedures leading up to the eviction, and ex-post, aimed at mitigating the adverse effects of eviction. By analysing how these protections are developed in the ECSR’s Conclusions and Decisions, the article highlights that while some protections have been sufficiently explained, others require a more detailed description. Overall, this study enhances our understanding of the RESC’s right to housing, and identifies opportunities for further research and improvement in this area.

Secondly, this article provides a quantitative and doctrinal analysis of the international right to housing and its interplay with the right to property in the context of evictions. This research contributes to preceding academic research by finding that the right to property is discussed infrequently and inconsistently in the ECSR’s Decisions and Conclusions. We focus on the requirement to carry out a proportionality analysis. By discussing the ECSR’s approach to
Deconstructing the Eviction Protections Under the Revised European Social Charter

proportionality in eviction cases, this article shows that the ECSR provides some guidance regarding the relevant circumstances to consider when balancing interests. Yet, the right to property is not discussed to a sufficient degree in order to understand how it can be balanced with the right to housing.

This article highlights the presence of both flexibility and inconsistencies in the development and application of the international right to housing. Through our analysis, we demonstrate that the RESC system allows for significant flexibility in the domestic implementation of eviction protections. This can be viewed as both a positive and negative attribute. On one hand, this flexibility allows States to adapt the protections to their specific contexts. On the other hand, it can also create confusion due to the lack of clear guidance on the content of the protections, making it difficult for States to conform to the RESC’s standards. Furthermore, our study finds that the flexibility in the RESC system has resulted in some inconsistencies in the ECSR’s approach towards proportionality. While the ECSR acknowledges the existence of a proportionality principle under the RESC, it is unclear how this principle should be applied to evictions. This article sheds light on these issues, highlighting the need for guidance to improve the consistency and effectiveness of the right to housing.

The comparison between the ECSR and the UN CESC R highlighted significant differences in their approaches to balancing the right to housing with the right to property. The UN directly acknowledges the role and importance of the right to property when assessing the proportionality of evictions, while the ECSR only indirectly addresses the right to property. In the context of the RESC, the property interests at stake in eviction cases are not dealt with in-depth. This lack of attention to all of the relevant interests, including the occupier’s right to housing and the landowner’s right to property, is concerning because it can weaken the practical impact of the international right to housing. State parties may use concepts, such as bindingness, enforceability and hierarchy between different human rights instruments to shield themselves from responsibility. Bakirtzi suggests that engaging in more dialogue between the ECSR and the UN CESC R could lead to the development of human rights by aligning the two systems within a global network of human rights protection. This alignment could reduce the risk of conflicting approaches and increase the effectiveness of the right to housing. Moreover, this dialogue could provide guidance on the development of the RESC’s eviction protections, strengthening the protection of the right to housing.

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199 Benito Sánchez, supra n 170 at 376.