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Preambles

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"*Preamble*

The governments signatory hereto, being members of the Council of Europe,

Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realisation of human rights and fundamental freedoms;

Considering that in the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950, and the Protocols thereto, the member States of the Council of Europe agreed to secure to their populations the civil and political rights and freedoms therein specified;

Considering that in the European Social Charter opened for signature in Turin on 18 October 1961 and the Protocols thereto, the member States of the Council of Europe agreed to secure to their populations the social rights specified therein in order to improve their standard of living and their social well-being;

Recalling that the Ministerial Conference on Human Rights held in Rome on 5 November 1990 stressed the need, on the one hand, to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural and, on the other hand, to give the European Social Charter fresh impetus;

Resolved, as was decided during the Ministerial Conference held in Turin on 21 and 22 October 1991, to update and adapt the substantive contents of the Charter in order to take account in particular of the fundamental social changes which have occurred since the text was adopted;

Recognising the advantage of embodying in a Revised Charter, designed progressively to take the place of the European Social Charter, the rights guaranteed by the Charter as amended, the rights guaranteed by the Additional Protocol of 1988 and to add new rights,

Have agreed as follows:"

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The preamble of European Social Charter, as drafted in the Treaty open for signature on October 18th, 1961, in Turin is without any doubt and inextricably linked to the preamble of each of the other's treaty-based instruments that, throughout the years, have amended and integrated the original text. Such amendments have been carried out with the aim of widening and improving the system of protection granted in such treaty-based context. The preambles of the Additional Protocol of 1988, the Additional Protocol of 1995 and the preamble of the European Social Charter as revised in 1996. The second, introduced the system of collective complaints, while the latter progressively substituted the European Social Charter of 1961, are particularly worth of attention.

Before delving into the analysis of the content of these preambles, it should be born in mind that the scholarship has widely debated on the legal effectiveness of the preambles of international treaties[1]. While

[1] Cf., in particular, Paul YOU, *Le Préambule des Traités Internationaux*, Fribourg, Librairie de l'Université, 1941, spec. pp. 11 ff. and pp. 42 ff.; Ludwig DISCHLER, "Präambel", in Karl STRUPP and Hans-Jürgen SCHLOCHAUER (eds.), *Wörterbuch des Völkerrechts*, Bd. 2, Berlin, De Gruyter, 1961, pp. 790-791; Hans-Dietrich TREVIRANUS, "Preamble", in Rudolf BERNHARDT (ed.), *Encyclopedia of Public International Law*, Vol. III, Amsterdam, Elsevier, 1997, pp. 1097-1098; Eric SUY, "Le Préambule", in Emile YAKPO and Tahar BOUMEDRA (eds.), *Liber Amicorum Judge*

participating in such a discussion, would be interesting on a theoretical sphere, it would nonetheless result in a redundant exercise. Indeed, it would not be possible to determine *a priori* the legal effectiveness of the principles contained in a preamble without verifying first its concrete application[2]. Therefore, after having analysed the text of such preambles, it would be more productive verifying whether the practice – on the interpretation and on the application of these instruments[3] – highlights any data that could then be translated into the theoretical and into the normative context. Nevertheless, in both the legal literature[4] and in the manuals of international law[5] the opinion of those who deny any legal value to the preamble of international treaties is still widespread. The international jurisprudence[6] and its practice move instead in the opposite direction,[7] especially when it comes to the importance of treaties' preambles in the process of interpretation, which will be addressed shortly[8]. For the purpose of this analysis, is equally useful to examine

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Mohammed Bedjaoui, The Hague, Kluwer Law International, 1999, pp. 253 ff.; Richard K. GARDINER, *Treaty Interpretation*, Oxford, OUP, 2nd ed., 2015, spec. pp. 205-206.

[2] See also *ex multis*, Eduardo JIMÉNEZ DE ARÉCHAGA, *Derecho Constitucional de las Naciones Unidas. Comentario teórico-práctico de la Carta*, Madrid, Escuela de Funcionarios Internacionales, 1958, p. 32; José Antonio CORRIENTE CÓRDOBA, *Valoración jurídica de los preámbulos de los Tratados Internacionales*, Pamplona, EUNSA, 1973, pp. 16-17 and p. 63.

[3] I am referring to the successive practice of States Parties and to the practice resulting from the activity of the organ that exercises control over the respect and application of the instruments at hand, which is the European Committee of Social Rights (ECSR).

[4] Many authors of the last century have denied the legal value of the preambles of international treaties, see in particular Raoul GENET, *Traité de Diplomatie et de Droit Diplomatique*, Tome III, Paris, Pedone, 1932, p. 383.

[5] Cf., e*x multis*, Nguyen QUOC DINH, Patrick DAILLIER, Alain PELLET, *Droit international public*, 7e éd., Paris, L.G.D.J., 2002, p. 131.

[6] In this context, since the European Social Charter is considered to be the *pendant* of the ECHR, and given that both treaties are fundamental instruments of the Council of Europe and, that they both contain a preamble, it is worth reminding that, thanks to the jurisprudence of ECtHR, the preamble of the ECHR, especially with reference to the principle of the "rule of law", that it has acquired a specific normative value therefore not only an interpretative, potentially expansive. Cf., in favour of this thesis according to which the "prééminence du droit"(primacy of law), which is the "rule of law", is a "principe fondamental"(fundamental principle) and also a "principe substantiel"(substantial principle): Mouloud BOUMGHAR, *Une approche de la notion de principe dans le système de la Convention européenne des droits de l'homme*, Paris, Pedone, 2010, pp. 195 ss.; Xavier SOUVIGNET, *La prééminence du droit dans le droit de la Convention européenne des droits de l'Homme*, Bruxelles, Bruylant, 2012, spec. pp. 133 ss. However, there are various positions on the subject; cf., *ex multis*, Patrick WACHSMANN, "La prééminence du droit dans la jurisprudence de la Cour EDH", in Jean-François FLAUSS, Patrick WACHSMANN, *Le droit des organisations internationales. Recueil d'études à la mémoire de Jacques Schwob*, Bruxelles, Bruylant, 1997, pp. 241-285; Serhiy HOLOVATY, *The Rule of Law*, Kiev, Phoenix Publishing House, 2006; Robert McCORQUODALE (ed.), *The Rule of Law in International and Comparative Context*, London, British Institute of International and Comparative Law, 2010. See also: CDL-AD(2011)003rev-e, *Report on the rule of law - Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)*, p. 5 s., at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e. With reference to the content and to the legal value of the preamble of the ECHR, see also: Theo Van BOVEN, "Préambule", in Louis-Edmond PETITTI, Emmanuel DECAUX, Pierre-Henri IMBERT (dir.), *La Convention européenne des droits de l'homme. Commentaire article par article*, 2e éd., Paris, Economica, 1999, pp. 125-134 ; Giovanni CONSO, "Preambolo", in Sergio BARTOLE, Benedetto CONFORTI, Guido RAIMONDI (a cura di), *Commentario alla Convenzione Europea per la tutela dei diritti dell'uomo e delle libertà fondamentali*, Padova, CEDAM, 2001, pp. 5-21; William A. SCHABAS, "Preamble", in ID., *The European Convention on Human Rights, A Commentary*, Oxford, OUP, 2015, pp. 53-83, spec. p. 71 s. in relation to the "Rule of Law"; Javier GARCÍA ROCA, "The Preamble, The Convention's Hermeneutic Context: A Constitutional Instrument of European Public Order", in Javier GARCÍA ROCA, Pablo SANTOLAYA (eds.), *Europe of Rights: A Compendium on the European Convention of Human Rights*, Leiden-Boston, Martinus Nijhoff, 2012, pp. 1-25.

[7] For example, in the case regarding the citizens of the United States of America in Morocco, where France and the US had opposing views, The International Court of Justice (ICJ) noted that the protection of the equality of treatment was included in the preamble of Final Act of the Conference of Algeciras of April 7th, 1906 and concluded that, "Considered in the light of these circumstances, it seems clear that the principle was intended to be of a binding character and not merely an empty phrase." (Cf. ICJ, Judgment of August 27th 1952, Rights of Nationals of the United States of America in Morocco (*France v. United States of America*), p. 184, at: https://www.icj-cij.org/public/files/case-related/11/011-19520827-JUD-01-00-EN.pdf). On this judgement, see also Makane Moïse MBENGUE, "The Notion of Preamble", in Rüdiger WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, OUP, 2008, at: https://archive-ouverte.unige.ch/unige:56190. Moreover, the Court noted as well that the preamble or the specific clause contained in it, could acquire a mandatory value by virtue of the customary process of law formation. The "Martens Clause", as included in the preamble of the Hague Convention of 1899, concerning the law and customs of land war, constitute a good evidence in this respect.

[8] The increased consideration on the part of international judges, in particular those of the ICJ, given to the preambles through their activity of interpretation; has at length been signalled by the scholarship cf. Paul YOU, *Le Préambule des Traités*, cit., pp. 17-19. Such legal trend has been confirmed throughout the time. See also the Judgment mentioned in this text of August 27th 1952, Rights of Nationals of the United States of America in Morocco, cit.; ICJ, Judgment of 17 December 2002, Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia v. Malaysia*), p. 625, spec. pp. 652 and 661, at: https://www.icj-cij.org/public/files/case-related/102/102-20021217-JUD-01-00-EN.pdf; ICJ, Judgment of 19 November 2012, Territorial and Maritime Dispute (*Nicaragua v. Colombia*), p. 624, spec. p. 669, at: https://www.icj-cij.org/public/files/case-related/124/124-20121119-JUD-01-00-EN.pdf. It should also be noted that the ICJ in its Judgment of 12 November 1991, Arbitral Award of 31 July 1989 (*Guinea-Bissau v. Senegal*), p. 53, spec. pp. 72-73, at: https://www.icj-cij.org/public/files/case-related/82/082-19911112-JUD-01-00-EN.pdf, did not recognise the prevalence of the preamble on the act under consideration, notwithstanding its badly redacted provision. An interesting discussion (critique) on these cases is contained in Max H. HULME, "Preambles in Treaty Interpretation", *University of Pennsylvania Law Review*, Vol. 164, 2016, pp. 1324-1330, at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9527&context=penn_law_review. See also: Permanent Court of International Justice (PCIJ), Advisory Opinion of 12 August 1922 (including the text of the declaration of Judge Weiss), Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture, series B, No. 2, pp. 36-41, at: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_B/B_02/Competence_OIT_Agriculture_Avis_consultatif.pdf; International Labour Organization (ILO), *Report of the Committee on Maternity Protection*, Provisional Record No. 20, Eighty-eighth Session, Geneva, 2000, § 68, at:

the activity of the organ that exercises control over the respect and the application of the said instruments by States Parties, which is the European Committee of Social Rights (ECSR). By looking at the activity of the ECSR it will be possible to evaluate whether the theories that usually deny any legal value to the preambles are also reflected, in its conclusions and in its decisions, thanks also to its interpretative observations[9], or not.

In this way, it will also be possible to verify whether those theories that attribute to the preamble of an international instrument a self-standing legal value[10] – specifically with reference to its capacity to fill the emerging gaps in the operative part of treaties, by integrating clarifying its meaning through the use of complementary norms[11] – are reflected in the application and in the interpretation of the European Social Charter of 1961 and in the Charter as revised in 1996, as well as its Protocols. Nonetheless, experts agree on denying to the preambles of international instruments primacy over contrasting norms contained their operative part[12].

In any case, there can be little doubt around the crucial role played by the preamble of the European Social Charter on an interpretative level, including both the preamble of the Charter as amended in 1996 as well as of the ones that precede the operative parts of two of its three Protocols. This is possible thanks to art. 31 of the Vienna Convention on the Law of the Treaties[13] of 1969 which reads "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes (…)". In other words, in order to determine the meaning attributable to a specific provision of treaty, the analysis of its entire text, including its preamble[14] cannot be transcended.

Articles 31 and 32 of such Convention, are unanimously considered to be customary international law[15]. These articles indicate that every treaty must be interpreted according to the objective[16] method, in good faith, and according to the ordinary meaning to be attributed to its words, in its context and within the scope of the treaty (art. 31, paragraph 1)[17].

This Article points out, *inter alia*, that a term can be also interpreted according to a particular meaning, if such a will emerged from the intention of the parties (art. 31, paragraph 4)[18]. According to the same Article, in addition to the context in which the treaty was drafted, it is also necessary to consider other factors in

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https://www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/pr-20.pdf, in which the Representative of the Legal Adviser of the International Labour Office affirms that: "The Preamble set the context and circumstances in which the Convention was adopted and formed part of the general context. (…) The Preamble would only be resorted to in the final analysis in accordance with the Vienna Convention on the Law of Treaties.".

[9] These are the three main documents that characterise the activity of the ECSR: a) the conclusions of the States' periodic report, in which the domestic norms and the applicative practice of the Charter are taken into consideration b) the decisions on the admissibility of collective complaints; c) the interpretative observations contained in the general introduction that open the reports cycle.

[10] On this respect it is essential to look at the work of Paul YOU, *Le Préambule des Traités*, cit., p. 140, according to whom, in particular, "(…) un engagement plus ou moins général inséré dans le préambule reste un engagement. Il n'y a pas lieu de nier sa force obligatoire pour la seule raison qu'il est dans le préambule et non dans le dispositif."; Paul YOU, "L'interprétation des traités et le rôle du préambule dans cette interprétation", *Revue de droit international, de sciences diplomatiques, politiques et sociales*, 1942, Tome II, pp. 22-45.

[11] See, in particular, Georges SCELLE, *Précis de droit des gens : principes et systématique*, Vol. II, Paris, Sirey, 1934, p. 464 ; Mustafa Kamil YASSEEN, "L'interprétation des traités d'après la Convention de Vienne sur le droit des traités", *Collected Courses of the Hague Academy of International Law*, 1976-III, Vol. 151, pp. 1-114, spec. p. 35; Charles ROUSSEAU, *Droit international public*, Tome I, Paris, Sirey, 1970, p. 87.

[12] See, *ex multis*, Mustafa Kamil YASSEEN, *L'interprétation des traités*, cit., p. 35, e Paul YOU, *Le Préambule des Traités*, cit., p. 16, whom supports the idea that an article of a treaty that contradicts its preamble gives rise to "(…) une exception particulière à l'application de la règle ou de l'idée générale inscrite dans le préambule." and that "On pourra appliquer ici la règle *a contrario*.". In turn, José Antonio CORRIENTE CÓRDOBA, *Valoración jurídica de los preámbulos*, cit., p. 29, justifies the primacy of the operative part of the treaty over its preamble due to its recognition on the same as "lex specialis", which is "como excepción al régimen general del tratado".

[13] Cf., among the numerous commentaries dedicated to such treaty, it is worth of note the work of Oliver DÖRR and Kirsten SCHMALENBACH (eds.), *Vienna Convention on the Law of Treaties*, Berlin, Springer, 2nd ed., 2018.

[14] Long time before the adoption of the Vienna Conventions on the Law of the Treaties of 1969 the use and the value of the preambles on the interpretation of international instruments was supported by distinguished scholars; cf., among many others, Ludwik EHRLICH, "L'interprétation des traités", *Collected Courses of the Hague Academy of International Law*, 1928, Vol. 24, pp. 100 ff.; Charles DUPUIS, "Règles générales du droit de la paix", *Collected Courses of the Hague Academy of International Law*, 1930, Vol. 32, p. 79 ; Antoine-F. FRANGULIS, *Théorie et pratique des traités internationaux*, Paris, Académie Diplomatique Internationale, 1934, p. 109. Cf. also *Yearbook of the International Law Commission*, 1966, Vol. II, spec. p. 118, at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1966_v2.pdf.

[15] Therefore, they are binding also for the States Parties to a Treaty that have not ratified the Convention at hand, such as France. Cf., *ex multis*, Dominique CARREAU and Fabrizio MARRELLA, *Droit international*, 11e éd., Paris, Pedone, 2012, § 20, p. 152.

[16] Cf., *ex plurimis*, Antoine Favre, "L'interprétation objectiviste des traités internationaux", *Annuaire Suisse de Droit International*, Vol. XVII, 1960, pp. 75-98.

[17] On the interpretation of the treaties, *ex plurimis*, cf. Ludwik EHRLICH, *L'interprétation des traités*, cit., pp. 1-143; Richard K. GARDINER, *Treaty Interpretation*, cit.

[18] Cf., *ex multis*, Eirik BJORGE, "The Vienna Rules, Evolutionary Interpretation, and the Intentions of the Parties", in Andrea BIANCHI, Daniel PEAT, Matthew WINDSOR (eds.), *Interpretation in International Law*, Oxford, OUP, 2015, pp. 189-204.

such analysis, such as: any further agreement among the parties on the interpretation of the treaty; every other successive practice followed by the parties in the application of the treaty (art. 31, paragraph 3).

The preparatory work and the circumstances in which the treaty was drafted are also considered to be complementary means of interpretation (art. 32). The aim of this provision is to clarify any ambiguous or unclear meanings of the norms[19] of a treaty. Indeed, the preparatory work represents a useful tool of interpretation, especially if the preambles contain sentences or expressions that can be relevant in the practice, in order not to attribute to them a merely moral or exhortative value.

I. THE PREAMBLE IN THE PREPARATORY WORK OF THE EUROPEAN SOCIAL CHARTER

The preparatory work of the European Social Charter, open for signature in 1961, which started even in 1953, need to be analysed in light of what had been said in previous occasions. In particular, it comes out from the first three volumes of the five in which they were collected and published, that in the first project of such instrument, elaborated by the Commission on the Social Issues of the Consultative Assembly of the Council of Europe and presented in October 1955 (doc. 403), the title of the first part was "Preamble", in order to repeatedly reiterate the mere moral relevance of this part. The Commission itself was keen to clarify that the preamble should not have been included as an integral part of the instrument in the process of being drafted. The question of its efficacy was addressed in the following way: "The intention of this section is not quite certain. Are these clauses binding commitments or simply a declaration of principles? If the former, the parties may decline to adopt the text: if the latter, the purpose is to express the underlying Idea, for which a preamble would be more appropriate". (Vol. III, p. 173). After all, such a question was more than justified, if the tenor of the other fifteen paragraphs that composed Part I of the 1955 project (Doc. 403) – as already mentioned, defined as "Preamble" – were to be taken into account. In it, the principles, the objectives and the political will, emerge diffusely[20] in such a way as to anticipate the realisation in States Parties of an economic and social model certainly alternative to the one then predominant within the Soviet systems as well as completely separated from the one realised in Europe during the nineteenth-century liberal period. In this perspective, in my opinion, some of its paragraphs are particularly relevant. Indeed, paragraph 3, states: "The High Contracting Parties regard economic policy not as an end in itself, but as means of attaining social objectives, which are defined in terms of the moral and spiritual values inherent in the common heritage of the European peoples". And in paragraph 7 it is commanded that: "The High Contracting Parties recognise it as one of the conditions for the development of the human personality that workers should have a share in the fruits of their labours, particularly by participation in the profits of the undertaking by which they are employed".

In my opinion equally relevant, is the content of paragraph 9, if it was to be considered in light of the preamble of the Charter in force at the moment[21] : "The High Contracting Parties are opposed to all forms of discrimination on grounds of sex, race, colour, language, religion, property, national or social origin, or political or other opinions". This is the so-called "non-discrimination clause" that, as will be clarified in the next paragraphs, has been - and still is - of outstanding importance within this protection system.

By following the logical progression of the preamble, paragraph 14 stands out. Notwithstanding its collocation in the preamble, had this paragraph made it to Charter, it would have without any doubts, contributed to increase the efficacy of the preamble beyond the level of the policies involved: "The High

[19] Cf. Luigi SBOLCI, "Supplementary Means of Interpretation", in Enzo CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, OUP, 2011, pp. 145-163.

[20] Hans WIEBRINGHAUS, "La Charte sociale européenne", *Annuaire Français De Droit International*, Vol. 9, 1963, pp. 709-721, is among the commentators that have highlighted the peculiarity of the "policies" of the project and of the preamble of the Charter, elaborated by the Commission on social questions of 1955 expressed his view in this way: "(…) un projet de Charte qui se distinguait par des dispositions allant fort loin dans la reconnaissance des droits sociaux et économiques. C'est ainsi qu'il prévoyait, par exemple, le droit de l'ouvrier de prendre sa part dans la direction et dans les bénéfices d'une entreprise, aussi bien qu'une garantie des prestations sociales contre les conséquences des fluctuations monétaires. Par ailleurs, le projet préconisait la création d'un Conseil économique et social pour les États européens, chargé du contrôle de l'application de la Charte.". Of the same author are other works relative to the period following the adoption of the Charter; cf. p. 709, note 2.

[21] The third "Considering" of the ESC states: "Considering that the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;".

Contracting Parties will therefore further develop their co-operation in social and economic matters, and, in particular, will harmonise their social legislation and practice at the highest level attainable".

With, the reviews and amendments of 1956, to the initial project of the Commission on Social Issues, in light of the remarks made by the Commission on Economic Issues, the term "Preamble", initially assigned to the whole Part I, disappeared and was replaced by "Principles and objectives of social policy" (Doc. 488). Due the notorious hesitancy on the legal efficacy of the preambles, that emerged during the preparatory work of the Charter, at the time, the lack of any reference to a preamble in the context of the same Charter could have assumed a particular meaning. No longer identified as preamble and inserted in the operative part of the treaty, although titled to principles and objectives of social policy, as a matter of facts this first part could have foreshadowed a major efficacy, at least on an interpretative level. In the end, it still included fifteen paragraphs. Although mitigated compared to the initial project, the ideal and political content was still very emphasised.

Nonetheless, in the same year more changes were made. Once the project was handed to the General Affairs Commission, in turn, this Commission proposed to rename the Charter using the denomination "European Convention on Social and Economic Rights". This was nonetheless the title occasionally proposed by the Committee of the Ministers. The text "Draft European Convention on Social and Economic Rights", of the General Affairs Commission, jointly elabourated in collabouration with the two mentioned Commissions, is based on its predecessors and was attached to the recommendation project that such Commission directed to the Assembly (Doc. 536). In this version the idea of a preamble came back and was explicitly dedicated to the "Principles and Objectives of Social Policy", while Part I, was specifically named after the "Social and Economics Rights" (Vol. III, pp. 535 ff., spec. p. 537). This new distinction was intentional, or in the words of rapporteur Lujo Toncic-Sorin, nominated by the General Affairs Commission, in an address to the Assembly: "The division into a general Preamble and a more specific Part I is intentional, because there is a general agreement by all about the principles expressed in the Preamble but there are many different opinions on the specific rights mentioned in Part I. The scope of this latter part has been slightly modified." (Vol. III, p. 576). The text of the project, attached to the recommendation addressed to the Assembly is then retaken in the annex to the Recommendation 104, which the Assembly in turn addresses to the Committee of Ministers (Vol. III, pp. 645 ff). It is particularly relevant that in these documents the preamble is still mostly identical to the one included in the 1955 project (Doc. 403). From the perspective of the objectives and of the social policy principles to be pursued – as already mentioned – to the social model it intended to shape, this project was very ambitious.

Between 1956 and 1957, the content of the Preamble changed dramatically. These changes were operated by the Working Group entrusted with the preparation of the drafts to be presented to the Social Committee. This organ was mainly composed of government officials and had been originally created by the Committee of Ministers with the aim of elabourating the Charter to be presented to the first. The content of the preamble presented in this version was significantly different to the previous version, since the Working Group decided to base its version on the version presented by the United Kingdom's delegation[22] (Doc. CE/Soc (56) 7), instead of on the one drafted by the Secretariat of the Council of Europe (Doc. CE/Soc/WP II (57) I). In this version the preamble was dramatically downsized, since the British version was only made of three Considering, that coincided with the first and with the second Considering of the preamble in force in the 1961 Charter and to its final paragraph. The non-discrimination clause is instead completely erased. This clause was originally included in the text of the Charter and then moved to the third Considering of the preamble currently in force.

The text of the preamble elabourated by the Social Committee and its Working Group, included in the information document drafted by the Social Affairs Division (31 October 1957- Doc. CE/Soc (57) 19) was therefore identical to the British version and did not undergo any changes even after the revision operated in November of the same year by the Legal Service of the Secretariat of the Council of Europe[23]. The text of the preamble, included in the project presented by the Social Committee to the Committee of Ministers in December 1957, continued to be substantially identical to the British version, on which, as already mentioned it was based on[24].

[22] Cf. *Collected "Travaux préparatoires"*, Vol. IV, p. 210 and pp. 230-231.
[23] Cf. *ivi*, p. 297.
[24] Cf. *ivi*, p. 386.

In 1958 the Social Committee presented its report to the Committee of Ministers (Doc. CM (58) 18). In this version of the preamble, the Social Committee did not operate any further amendments; it is therefore self-evident that the choice to eliminate the non-discrimination clause was made on the basis of an explicit indication of the Secretariat of the Council of Europe[25]. Therefore, the Social Committee sharpened the text of the preamble (Doc. CM (58) 27), especially with reference to the Considering formulation. However, the "Considering" dedicated to the non-discrimination clause, as opposed to the preamble of the 1961 Social Charter, was removed. Such gap is only incidentally noted during the Tripartite Conference organised by the ILO upon request of the Council of Europe and held in Strasbourg in December 1958[26].

The non-discrimination clause only reappeared during the drafting phase of the Charter of the Consultative Assembly. Indeed, the project presented by the Assembly to the Committee of Ministers in January 1959 (Doc. 927) still corresponded to the text of the Charter elabourated by the Social Committee. In the project finalised by the Assembly itself, in January 1960 (Doc. 32), located in the third Considering of the preamble, the non-discrimination clause reappeared. Such clause had, *inter alia*, already been inserted in the version submitted by the Commission on Social Issues to the Assembly in September 1959 (Doc. 1035).

It is worth to note that the text of the non-discrimination clause elabourated in this phase is not identical to the one present in the preamble currently in force. The inclusion of such principle in the Charter fills the gap generated during the antecedent preparatory work. In doing so, it indirectly paved the way for its concrete application during the control activities of the European Committee on Social Rights over the respect of the Charter that, in so doing, paved the way for the successive inclusion of the principle in the revised version of the Charter.

Overall, the text of the preamble of the 1961 Social Charter, considered in the context in which it is included, does not seem to leave much space for useful considerations that could support its legal efficacy. Specifically, the first two "Considering", seem not to allow for specific conclusions in such direction. Indeed, they simply recall the existence of the ECHR, notably entrusted with the protection of the fundamental human rights and liberties, specifically civil and political rights, putting upon States Parties only a general objective to progress on an economic and social level, as it can be also already deducted from art. 1 of the Statute of the Council of Europe. However, if this first part of the preamble is read in light of its last sentence, which recalls the commitment of the Contracting States "(…) to make every effort in common to improve the standard of living and to promote the social well-being of both their urban and rural populations by means of appropriate institutions and action", from these few sentences is immediately possible to deduct two fundamental principles. Those are the basic principles on which to lay the foundations for the duty of States to progress and not to regress, in the definition of their economic and social policies and, above all, in the adoption of the relevant norms, that are necessary to realise them to the benefit of the effective enjoyment of the right enshrined in the Charter.

The principles of progressiveness and non-regression[27] were already envisaged *in essence* in the preamble of the ESC. They were then fully recognised in the interpretation and in the application of the preamble of the ESC (rev) as will be dealt with in more details in the following text.

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[25] Cf. *Collected "Travaux préparatoires"*, Vol. V, p. 39: "107. The Secretariat drew the attention of the Committee to the following clause which is included in the draft Charter appended to Recommendation 104 (1956) of the Assembly: 'The H.C.P. are opposed to all forms of discrimination on grounds of sex, race, colour, language, religion, property, nationality, national or social origin, or political or other opinion.' It was decided not to include such a clause, but to mention the question in the Report.".

[26] Cf. *Recueil des travaux préparatoires*, Vol. V, p. 580: "64. Un membre travailleur (France) a regretté que la Charte ne contienne pas de dispositions interdisant de façon générale toute discrimination. À son avis, l'article 4, paragraphe 3, devrait an moins interdire toute discrimination fondée sur le sexe et ne se référer qu'à titre d'exemple au problème de la rémunération.". In the edition in English of the preparatory work p. 580 is missing.

[27] It is well known that such principles have been included in the system of protection of United Nations for a long time. Indeed, the first paragraph of art. 2 of the International Covenant on Economic, Social and Cultural Rights that entered into force in 1976, explicitly envisages the principle of progressiveness while the principle of non-regression is deduced by means of interpretation from the same provision. This allows to conclude that States Parties once achieved the minimum levels of protection concerning a specific right, are nonetheless bound to progressively continue in their effort to ensure their full and effective enjoyment. In such cases they are not only bound by an "obligation of means" or of "progressive attitude", but also by a real "obligation of result" as it is possible to deduct from § 9 of the General Comment No. 3, adopted in 1990 by the Committee on Economic, Social and Cultural Rights (CESCR): "The principal obligation of result reflected in article 2 (1) is to take steps 'with a view to achieving progressively the full realization of the rights recognized' in the Covenant. […T]he fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content.". In this respect, it is worth noting that the most attentive scholarship has highlighted how the progressive character of the norms on the protection of social, economic and cultural rights does not exclude that the same might have mandatory efficacy allowing for an attentive syndicate to reasonableness on the balance States have to strike between the protection of such rights and their financial obligations; cf., in particular, María Magdalena SEPÚLVEDA, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen-Oxford-New York, Intersentia, 2003, spec. p. 157 ss.

Thanks to its literal tenor, the legal value of the third Considering – as anticipated – dedicated to the non-discrimination principle emerges with clarity. This principle was added in the final phase of the preparatory work of the Charter, in it, it finally appeared a precise reference to the social rights, whose enjoyment, indeed, was expressly linked to the principle of non-discrimination[28]. Although, only inserted in the preamble of the Charter, that has been – and still is – possible to attribute to the same, a legal efficacy comparable to the one that derives from art 14 of the ECHR[29]. Such principle, in the interpretative dynamism of the ECSR has been intended as a truly "horizontal clause". This clause is to be combined with the different provisions of the Charter that deal with the social rights with the aim of increasing its efficacy, as will be looked into more details later on.

Nonetheless, in the ESC there is not any provisions aimed at introducing the general principle of equality listed and combined with each of the social rights thereby recognised. The preparatory work shows repeated discussions and reflections on the equality of treatment within States Parties, between domestic and migrant workers as well as on the equality of treatment of the citizens of the Contracting States with respect to the right to social security. However, no reference is made to the principle of equality before the law, in such a way as to express its force before the law in relation to the advantageous positions derivable from the text of the Charter and, therefore, to a duty to grant such principle within the legal systems of States Parties. It is, *inter alia*, another of the limits that can be understood in light of the ECHR, whose ESC, has been historically indicated as its *pendant* on the social rights sphere.

Among other things, it should be borne in mind that its only with Protocol No. 12 that it was included in the system of the ECHR, thanks to the innovative efficacy of its preamble, "(…) the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law", notoriously full of possible consequences for the benefit of the effective enjoyment of the rights enshrined in the respective domestic norms, within the States that have decided to ratify it.

II. THE PREAMBLES OF THE ADDITIONAL PROTOCOLS OF 1988 AND 1995

Between 1961 and 1988 the Social Charter did not undergo any changes. The works for the adoption of an Additional Protocol that would widen the list of the economic and social rights worth of protection within the Council of Europe, date back to then years before, which is even before the Declarations of Human rights of April 27, 1978[30] was adopted. The preparatory work of such Protocol[31], that is indicated as sort of "extension" and update of the Charter of 1961, are not limited to its preamble. The preamble as a matter of facts, is extremely concise and makes just a rough reference to the decision of adding "new measures to extend the protection of the social and economic rights guaranteed by the European Social Charter"[32].

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[28] The third "Considering" of the preamble at hand envisaged that: "(…) the enjoyment of social rights should be secured without discrimination on grounds of race, colour, sex, religion, political opinion, national extraction or social origin;".

[29] See also art. 14 ECHR definitely has a wider a scope compared to the preamble of the Social Charter of 1961 and from the point of view of the situations it aims at protecting, not only for a bigger number of reasons of possible discrimination that it lists, but also for the use in its operative part of the adverb "notamment" in its conclusive formula "ou toute autre situation", that allow to consider it only as illustrative and non-exhaustive list.

[30] Cf. *Declaration on Human Rights* (Decl (27/04/78), adopted by the Ministry of Foreign Affairs of the Member States of the Council of Europe on April 27, 1978, during the 62nd Session of the Committee of Ministers, at: https://rm.coe.int/ 0900001680536865. By virtue of such Declaration the Member States of the Council of Europe: "6. Recalling, moreover, that within the Council of Europe proposals are under consideration to extend the lists of rights of the individual to be protected by the European Convention on Human Rights and other relevant European conventions, including rights in the social, economic and cultural fields; 7. Noting in this respect the initial contribution that the European Social Charter has made in the field of social and economic rights and being prepared to consider the possibility of further enlarging in the framework of the Council of Europe the protection of those rights; (…) II. Decide to give priority to the work undertaken in the Council of Europe of exploring the possibility of extending the lists of rights of the individual, notably rights in the social, economic and cultural fields, which should be protected by European conventions or any other appropriate means; III. Resolve to play an active part in the protection and further realisation of human rights and fundamental freedoms including, in a wider concept, those in the social, economic and cultural fields, thus contributing to the strengthening of world peace and security and international co-operation as well as to the economic and social development of all peoples".

[31] The references to the preparatory works of the Protocol of 1988 are summarised in its Explanatory Report, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800cb346.

[32] Cf. *Additional Protocol to the European Social Charter, European Treaty Series - No. 128*, at: https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a84e.

While the Amending Protocol open for signature in 1991, in Turin, during the thirteenth anniversary of the Charter, did not include any preamble[33], the preamble of the Additional Protocol that in 1995 introduced and disciplined the procedure of collective complaints, although, extremely concise, opened up to some considerations.

First of all, in this Protocol appeared an objective which, I think, signalled a further detachment, not only on a terminological level but also from the point of view of the ideals pursued, from the preamble of the Charter of 1961. In such Charter, as already mentioned, - no reference is made to the protection of social rights, exception made for the formal acknowledgement of a right to enjoy a (general) principle of non-discrimination. The objective of such Protocol is indeed: "(…) to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter"[34]. This is to be read in light of the preamble of the 1988 Protocol. This Protocol marks an evident progress towards the relaunch and the concrete application of the Charter. All the social rights, including those envisaged in the 1988 Protocol, are seen in the perspective of their efficacy. To a certain extent, such preamble marks a shift from a mere recognition and only formal protection of the existence of such rights, to their concrete realisation through the adoption of further control procedures, more efficiently and concretely operating. The (apparently) simple expressions of the preamble of the 1995 Protocol are susceptible of concretely reflecting in the control activity of the European Committee of Social Rights and in its Protocols, which is indeed called upon assessing the norms and the applicative practices of the Charter and of its Protocols. The ECSR can – and indeed does – consider and investigate closely also the economic and social policy adopted by the Contracting States, in order to ensure their effective realisation as well as the concrete protection of the social rights protected within this treaty-based Charter's system.

Secondly, the "Considering" that the preamble of the said Protocol dedicate to the introduction of the collective Complaints procedure, assumes – in my opinion – a meaning that goes beyond any formal presentation of a new control procedure. It supports not only an enhancement and an increase of the control instruments for the application of the Charter, but also a strengthening of participation of the subjects called upon to support the realisation of the social rights that it recognises. In this way, the control over the realisation of the objectives established in the Social Charter, and on the correct application on the part of the States, extends also to the parties and to the domestic and international Social Entities, that can be activated in synergy before the ECSR, and not anymore only within the report procedure submitted by the States. After all, the type of participation mentioned in the preamble, reminds the formal acts from which the preparatory work of the Charter of 1961 took inspiration. First, the Memorandum presented by the General Secretariat of the Council of Europe in 1953, pertaining the role of the Council itself within the social sphere (Doc. SG (53) 1), from which it is possible to deduce, indeed that, in accordance with democratic principles, the Governments must recognise the importance of the participation of all the competent entities for the elabouration of the social policy trough the most inclusive process of participation[35]. Secondly, the proposals of the Consultative Assembly itself, that shortly after confirmed the same trend[36].

This Protocol is therefore an essential element in the construction of the system of treaties based on the 1961 Charter as preconized from its inception. At the same time, by introducing the collective complaints procedure, jointly with the classic States' report procedure, it represents an evident rationalisation of the democratic principle. In this way it operates both in the (progressive) phase of realisation of the social and economic policy and, on cases of persisting inaction on the part of the States that have accepted to be bound by the Charter both in its (continuous) phase of conforming their norms and in their practice of application, following the control of the ECSR. Thus, the wider perspective of participation of the Social Entities and of the Non-Governmental Organisations in the control procedure based on collective complaints set as an objective also, a perceivable increase in the cohort of subjects that can initiate them. In this way, it managed to overcoming some States Parties' hesitations while adopting anyway – thanks to

[33] This Protocol is of particular relevance. Its relevance is due to some of the amendments operated in the report procedures that States have to periodically submitted, in order to have the norms they have adopted and their relative practice of application checked, and for having anticipated an Additional Protocol project, relating to a collective complaints procedure, directed, indeed exercise a stricter and a more diffuse control over States.

[34] Cf. *Additional Protocol to the European Social Charter Providing for a System of Collective complaints*, *European Treaty Series - No. 158*, at: https://www.coe.int/it/web/conventions/full-list/-/conventions/rms/0900001680007cdad.

[35] Cf. *Collected "Travaux préparatoires"*, Vol. I, p. 6, § 11.

[36] Cf. *ivi*, p. 46, § 5.

the ECSR – an admissibility scrutiny that take into the highest consideration the scope that overwhelmingly imposed itself in the preamble of the Protocol of 1995: "to improve the effective enforcement of the social rights guaranteed by the Charter".

III. TOWARDS THE REVISION OF THE EUROPEAN SOCIAL CHARTER

The nineties of the past century surely mark a turning point in the elaboration of this conventional system. Only few years passed in between the amendment of the Protocol, open for signature in Turin in 1991, during the thirteenth anniversary of the Charter, and the Additional Protocol that – as recently mentioned – introduced the control system based on collective complaints. After a long period of stasis, silence and standstill, that lasted until the end of the eighties, the European Social Charter gained again the attention, in perspective of an increased consideration for social rights.

The implosion of the Soviet economic and social model without any doubts contributed to create an increased sensitiveness towards the Charter. The Charter was conceived in the fifties in the middle of the "Cold War", as *pendant* of the ECHR, in order to complete the democratic, economic and social, model to be put into contrast to the one in place in the Soviet Eastern bloc. The Charter included an alternative model to both the liberal tradition and to the "Real Socialism" and gained force precisely in the period in which the socialist-communist model dissolved in both the Soviet Union and its satellites. Probably, it was not a mere coincidence that the relaunch of the Social Charter was boosted during an informal Conference of Ministers on Human Rights held in Rome in November 1990, just one year after the fall of the Berlin wall.

The previously mentioned Protocols, jointly with the Social Charter as revised in 1996, constitute a tangible response to the need to provide to the States in the process of accessing the Council of Europe[37], after the break-up from the Soviet Union, a social and economic model in line with the expectations of their populations. Indeed, in such countries was not enough to support only the rebirth of the Rule of law enriching it with civil and social rights as granted and recognised in the ECHR. It was also necessary to put in place conditions for the social and economic rights to reach the same levels of protection of the firsts and older rights. The indivisibility, the interdependency and the interconnection of the rights had to – and, evidently, have to – to be concretely reflected also in the treaty-based system of the Council of Europe. After all, since the fifties of the past century the Council of Europe supported the need to dispose within its system of a complementary treaty-based system, dedicated to the first and to the other human rights. The Council of Europe demonstrated to share the assumption according to which the civil and political rights make sense only if they are associated with the protection of all the others: social, cultural and, economic rights. In the end, this is what came out from the Declaration adopted at the end of the World Conference on Human Rights organised in Vienna by the United Nations. This was the first conference on human rights – that took place in Vienna in 1993 – to be held after the end of the Cold War. Indeed, the revision of the ESC was held based on these ideals, and values. The revision work of the ESC, led in 1996 to the adoption and to the opening for signature of the Social Charter which was indeed titled "revised": ESC (rev)[38].

IV. THE PREAMBLE OF THE EUROPEAN SOCIAL CHARTER REVISED

The preamble of the ESC (rev) mostly retraced the one of the ESC. In it, the first "Considering", was repeated just as it was, dedicated to the realisation of a tighter union among the member of the Council of

[37] It is worth of note that the mentioned Interministerial informal Conference held in Rome in November 5th, 1990 and that Hungary accessed the Council of Europe November 6th of the same year, de facto paving the way to the majority of the States formerly part of the Soviet block and shortly after also to the ones of the former Yugoslavia. Poland accessed the Council of Europe in 1991; Bulgaria in 1992; Estonia, Lithuania and Slovenia in 1993, with the Czech Republic, Slovakia and Romania; Latvia, Albania, Moldova, North Macedonia and Ukraine in 1995; Croatia in 1996, with Russia, before Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia and Montenegro, that instead all accessed throughout the successive decade.

[38] The short process that led to the adoption of the ESC (rev) was traced, in particular in the Explanatory Report: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800ccde4.

Europe, with the aim of safeguarding and promoting the ideals and the principles that represent their common heritage and in order to favour their economic and social progress. In particular, through the protection and development of human rights and fundamental freedoms. Yet, the second "Considering", exception made for a more general reference to Protocols of the ECHR, was substantially identical – and, as a matter of facts of little use – to the end of guaranteeing an effective protection of the social rights. The third "Considering" is instead completely different from the one inserted in the preamble of the ESC. With the pretext of including the principle of non-discrimination in an *ad hoc* Article in the operative part of the Treaty, which is Article E of the ESC (rev), any reference to it in its preamble obviously vanished.

Given the more general content of the preamble of the Charter of 1961, the third "Considering" is other than redundant. It was dedicated to the relevant affirmation according to which member States of the Council of Europe have convened to grant to their populations those social rights specified in treaty-based instruments considered in combination, in order to improve their life tenors and to promote their wellbeing. There is no doubt that the commitment that States undertook before their citizens, and at an international level, of protecting the Social Rights set forth in the Charter's treaty-based system, with the aim of improving their life tenor and their wellbeing, allowed the ECSR to verify whether their practice in their economic and social policies were coherent with this instrument. Therefore, the control activity of the ECSR was not only limited to the associated norms and the application practices, with respect to such rights and to the achievement of such objectives. By means of exercising control over them, the Committee was allowed to declare the non-conformity with the Charter every time they resulted unreasonably or disproportionally regressive, or in any case to be unreasonably compromising the level of well-being achieved through the protection of one or more of the social rights set forth in the Charter. However, the lack of/or insufficient information from the Contracting States, that would allow the ECSR to verify the effective protection of the rights as recognised in the system of protection enshrined in the Charter for the objectives indicated in its preamble which means for the effective improvement of the life tenors of their respective populations and for their wellbeing, could also constitute a violation within this system. Finally, it was also considered a violation of the Charter the ascertained inaction of States in rendering effective the social rights States are concretely bound to respect, having them ratified the Charter and its Protocols, starting from the preambles themselves.

Once finished the list of "Considering", the preamble of the ESC (rev) continued, remembering the Conference of Ministers on human rights held in Rome in 1990, highlighting the need on the one hand to preserve the indivisible character of all of human rights: being them social, civil, political, cultural and economic and on the other hand, to give fresh air to the Charter. The clarification concerning the indivisibility of such rights, is not to be underestimated, at least at a hermeneutic level. As already pointed out, this aspect reflected the results of the World Conference on human rights held in Vienna in 1993. Indeed, it is clear that if one is to share the view of using the teleological method[39] as means of interpretation of the texts that are included in the complex system of conventions, by combining this part of the preamble with the operative part of the Charter, as seen in light of art. 31 of the Vienna Convention on the Law of the Treaties of 1969, the result is a relevant reinforcement of its "useful effect", that goes beyond a mere moral and exhortative value which in the past, resulted in a stigmatisation of the preambles of international instruments.

The preamble concluded with the recognition of the need of updating and adapting the material content of the Charter, in order to include the fundamental social changes that happened at the moment of its adoption in 1961. It also took into consideration the need to add new sets of rights to the amended Charter in order to complete the updating process that started with the Additional Protocol of 1988. This Charter progressively substituted the Charter of 1961.

The system of protection offered by the Charter and its Protocols allowed for both an evolutive interpretation in its operative part, with the aim of maximising the protection of the rights included this section, and for an extensive one that, combined with the teleological method interpretation (*ut res magis valeat quam pereat*), allowed for an adequate level of protection also for the new set of rights – such as the rights on environmental protection – that could be based on the ones already recognised in the treaties.

[39] To better understand its relevance, it is sufficient to remind of the work of Ervin Paul HEXNER, "Teleological Interpretation of Basic Instruments of Public International Organizations", in Salo ENGEL and Rudolf A. MÉTALL (eds.), *Law, State, and International Legal Order: Essays in Honor of Hans Kelsen*, Knoxville, University of Tennessee Press, 1964, pp. 119-138.

V. THE PREAMBLES OF THE CHARTER AND ITS PROTOCOLS IN THE PRACTICE OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

A. THE PREAMBLES IN THE CONTROL PROCEDURE OVER STATES' REPORTS

After having analysed the preambles of European Social Charter of 1961 and its relative amendments, including the revised Charter of 1966, it will be useful to analyse the control activity operated by the organ that exercises control over the respect and the application of such treaties as applied by States Parties, which is the European Committee on Social Rights. The aim of this analysis is to verify whether from its practice data emerge that can stimulate reflections on a theoretical and on a normative level.

By following the chronological order of the conclusions adopted by the ECSR with respect to States periodic reports – therefore as a result of the control procedure over the norms and the practice as adapted by States' control – some examples, emerge that can help clarify the value associated to the preambles. These examples emerge from the control procedure over the norms and States application of the Charter and its Protocols.

First of all, we want to make reference to the Conclusions adopted by the 1977 Committee, within the framework of the V Control cycle, regarding the application in France of art. 5 of the ESC, on freedom of trade union association. From this, it is possible to deduct that: "2. The committee also wished to know the reasons for the restrictions imposed on the right of foreign workers to assume managerial and administrative function in trade unions, so that it could weight this restriction against the requirements of the Charter, as embodied in the preamble and paragraph 5 of Part I"[40]. Although implicitly the non-discrimination clause included in the preamble of the Charter of 1961 is evoked in combination with a provision of the same Charter. This clause allows the Committee to request clarifications to the State involved that, thanks to the ratification of such instrument, is bound to provide for a response to the Committee in the next report.

In 1984, during the VIII Control cycle, in reference to the application in Germany of art 1, § 2, of the ESC, for the protection of the rights of the worker in order to earn its living with a job freely undertaken, the Committee detects an erroneous interpretation of its previous Conclusions (VII Cycle) on the part of the State, highlighting that: "(…) the 'right of the worker to earn his living in an occupation freely entered upon' certainly does not confer upon any worker, whether in the public service or not, the right to employment of his choice regardless of his qualifications. Nevertheless, *certain requirements are not admissible under the Charter, such as those based on race, colour, sex, political opinion, religion, etc. (see the preamble of the Charter).* That is to say that the Charter does not prevent an employer from stipulating whatever qualifications he may wish, provided they do not take the form of requirements not admissible by the Charter (…)"[41]. Therefore, from the case at hand, it clearly emerges a combination between the preamble of the ESC, specifically of the non-discrimination clause, jointly with the above-mentioned provision. In my opinion, this does not represent, a mere example of how the preamble of the Charter assumed an interpretative value, but the affirmation of its legal efficacy itself in the practice, it is indeed only from the joint interpretation of the third "Considering" with the second paragraph of art. 1 that, the exact norm to bed respected can be deduced and applied in these cases[42].

Continuing with the analysis of the Conclusions of the Committee, of particular relevance are those adopted in 1991, within the framework of Cycle XI-2, on Ireland. Yet again, with reference to the application of art. 1, § 2, of the ESC, the Committee recalls its jurisprudence having considered, inter alia, a number of norms aimed at allowing women to work during night-time, on Sunday and on mines: "(…) according to which it regards 'the principle of non-discrimination on grounds of sex as well as on the other grounds enumerated in the Preamble, as basic' but considers 'that this principle should be applied without

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[40] Cf.: http://hudoc.esc.coe.int/eng/?i=V/def/FRA/5//EN.

[41] Cf.: http://hudoc.esc.coe.int/eng/?i=VIII/def/DEU/1/2/EN. Emphasis added.

[42] It is *inter alia* well known that with reference to its legal value and not only to its interpretative one deductible from the preamble of the ECHR, the scholarship is not unanimous. Cf., in particular, in favour of its legal and ontological value are, Mouloud BOUMGHAR, *Une approche de la notion de principe dans le système de la Convention européenne des droits de l'homme*, cit., spec. pp. 195 ss. In the sense of adhering to the thesis of such author relatively to the principle of the *rule of law*, as enshrined in the preamble of the ECHR and read in light of the jurisprudence of the ECtHR, cf. Xavier SOUVIGNET, *La prééminence du droit dans le droit de la Convention européenne des droits de l'Homme*, cit., spec. pp. 133 ss.

prejudice to measures designated to protect women in appropriate cases, when required."[43]. Such Conclusions are a clear expression of the dynamic interpretative method used by the Committee. The ECSR, has adopted this method of interpretation on many occasions. Thanks to this dynamic method of interpretation of 1961 was introduced in the Social Charter the technique of the so-called "unequal right", intended to bind to respecting implicitly the principle of non-discrimination, as well as the principle of equality. On the one hand, in this way the most diverse forms of discrimination[44], including indirect[45] ones, are prevented. On the other hand, norms of States Parties that cause phenomena of discrimination that contrasted both with the formal equality among individuals as recognised by the norm and with its substantial achievement, were removed.

The ECSR deals again with art. 5 of the ESC in France, within the framework of the Conclusions adopted in 2000 in relation to the Control cycle XV-I. By means of reference to the *ratione personae* criteria, "The Committee notes that foreign nationals are ineligible for election to employment tribunals even if they are trade-union representatives (Article L 513-2 of the Labour Code). It notes that the reason is the principle that justice, which is a sovereign function of the state and a prerogative of national sovereignty, can only be exercised by nationals. The Committee considers that this exception to the general principle of non-discrimination laid down in the Preamble to the Charter, is based on an *objective and reasonable justification* and is therefore acceptable under the terms of the Charter"[46]. Drawing from these considerations of the Committee, can be clearly deduced the criteria employed to exclude a provision of the French Labour code that can be considered discriminatory in relation to the Social Charter. These criteria show that objective reasons and considerations of reasonableness represent further essential elements for the evaluation of the norms involved in the control activity of the Committee. The Committee went even further, by specifying- and in my opinion, increasing as well – the legal effect, not only the interpretative one, of the non-discrimination clause as envisaged in the preamble of the ESC.

Another relevant example of the efficacy that the preamble of the ESC has reached during the control activities of the Committee on the reports periodically submitted from the States Parties, is represented by the Conclusions adopted in 2005, during the Cycle XVII -I, regarding the application of art. 1, § 2, of the Charter on the Aruba territory, that belongs to the Netherlands. The conclusion reads: "The Committee draws the Government's attention to the scope of Article 1 § 2 of the Charter. In its view, compliance with this provision carries the implicit obligation for Contracting Parties to lay down in their legislation the prohibition of discrimination in employment. *All grounds of discrimination mentioned in the Preamble to the Charter must be prohibited*. The discriminatory acts and provisions forbidden by this clause of the Charter are all those that may operate in the context of recruitment and in conditions of employment generally (including remuneration, training, promotion, transfer and dismissal)"[47]. Notwithstanding its unquestionable hermeneutical value, the strength of the third Considering of the preamble emerges with clarity. This "Considering", combined with the provision at hand, included in Part II of the ESC, expresses all of its force in the juridical sphere. The Committee further lists meticulously to the State involved all the obligations it is bound to respect in order to comply with the application of the Article at hand[48], necessarily in combination with the non-discrimination clause as inscribed in the preamble.

In the same Conclusions of 2005, the Committee adopts a Statement of interpretation of Article 11 of ESC, dedicated to the right to health, which reads: "In assessing whether the right to protection of health can be effectively exercised, the Committee pays particular attention to the situation of disadvantaged and vulnerable groups. Hence, it considers that any restrictions on this right must not be interpreted in

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[43] Cf.: http://hudoc.esc.coe.int/eng/?i=XI-2/def/IRL/1/2/EN.

[44] Worth of mention is the analysis on the jurisprudence of the ECSR and of the ECtHR and of the European Court of Justice that have highlighted multiples and different notions of "direct discrimination", "indirect discrimination", "positive discrimination" and "reverse discrimination". Cf., in particular, the exhaustive analysis of Manuela BRILLAT, *Le principe de non-discrimination à l'épreuve des rapports entre les droits européens*, Bayonne, Institut Universitaire Varenne, 2015, spec. pp. 27-139.

[45] The analysis of the decisions of the ECSR highlights that it has been elaborated a concept of "indirect discrimination" as disjointed and overall, more articulated compared to the one that emerges from the jurisprudence of both the European Court of Human Rights and the European Court of Justice. In particular, the Committee has ascertained and sanctioned the indirect discrimination "systemic" (cf. ECSR, *European Roma and Travellers Forum v. France*, complaint No. 64/2011, decision on the merits of 24 January 2012) considered that the lack or insufficient consideration of all the differences of treatment on the part of the States, as well as the absence of adequate measures to guarantee to all the subjects involved specific benefits and the effective access to them, amount to a subspecies of indirect discrimination: cf. ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, complaint No. 58/2009, decision on the merits of 25 June 2010.

[46] Cf.: http://hudoc.esc.coe.int/eng/?i=XV-1/def/FRA/5//EN. Emphasis added.

[47] Cf.: http://hudoc.esc.coe.int/eng/?i=XVII-1/def/NLDABW/1/2/EN. Emphasis added.

[48] *Ibid.*

such a way as to impede the effective exercise by these groups of the right to protection of health. *This interpretation imposes itself because of the non-discrimination requirement (Article E of the Revised Charter and Preamble of the 1961 Charter) in conjunction with the substantive rights of the Charter*"[49]. Yet again, the Committee reaffirms the legal value of the non-discrimination clause included in the preamble of the ESC, that is even mentioned in combination with art. E of the ESC (rev), implicitly stating – at least according to the ECSR – that this clause enjoys its same legal power. It also clarifies that this clause is to be combined with all the 'substantial' rights as set off in the Charter itself, analogously to what happens in relation to art. E of the ESC (rev). It is also worth of note that, as will be better pointed out shortly, by having a closer look at the decisions of the ECSR, within the framework of the collective complaints procedure, art. E of the ESC (rev) has to be necessarily combined as well with another provision of the revised Charter, in order to produce its effect on a legal level, analogously to what–usually but not necessarily happens[50] – in the ECHR system with respect to art. 14. The fact that the preamble of the ESC – or better to the non-discrimination clause included in it – was associated to art. E of the ESC (rev), evidently contributed to equalise their efficacy in the legal sphere, beyond its doubtless hermeneutical value.

B. THE PREAMBLES WITHIN THE COLLECTIVE COMPLAINTS' PROCEDURE

This analysis will now focus on the control activity exercised by the ECSR in relation to the collective complaints, submitted after the entry into force of Additional Protocol of 1995. This Protocol introduced its own procedure[51], combining it with the classic control procedure of the reports, periodically submitted by States Parties, which has been dealt with earlier in this chapter. In this framework, some of its decisions are particularly worth of attention.

Following its logical progression, of particular relevance is the decision on the admissibility of the first collective complaint to the Committee, Complaint No. 1/1998 submitted by the International Commission of Jurists (ICJ) against Portugal, with the aim of obtaining control over the declaration of non-compliance in the application of art. 7, § 1, of the 1961 Charter in such State.

In my opinion, this is a relevant decision, since the State involved asked for a declaration of inadmissibility for such complaint, as it would have generated a useless proceeding contrary to the principles of the *res judicata* and of the *ne bis in idem*, being the object of the complaint a norm and a practice already examined by the ECSR during the Control cycle of XIII-5 (1994-1995), and having the Committee itself already adopted negative conclusions on this respect, followed by a recommendation from the Committee of Ministers of the Council of Europe. In other words, by following the reasoning adopted by the Government of Portugal, the collective complaints procedure would have been available to the parties only if it was based on new objections on the part of the complaining entity and was presented according to the

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[49] Cf.: http://hudoc.esc.coe.int/eng/?i=2005_Ob_1-1/Ob/EN. Emphasis added.

[50] Cf. EUROPEAN COURT OF HUMAN RIGHTS, *Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention*, pp. 7-8, at: https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf.

[51] The most recent and well documented study on this procedure is of Giuseppe PALMISANO, "La procédure de réclamations collectives en tant qu'instrument de protection internationale des droits sociaux", *Revue Générale de Droit International Public*, 2020, No. 3-4, pp. 513-563, at: http://pedone.info/site/wp-content/uploads/2021/02/Version-internet-Num%C3%A9ro-complet-RGDIP-2020-3-4.pdf. See also: Jean-François AKANDJI-KOMBÉ, "L'application de la Charte sociale européenne : la mise en œuvre de la procédure de réclamations collectives", *Droit social*, No. 9, 2000, pp. 888-896; Robin R. CHURCILL and Urfan KHALIQ, "The Collective complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?", *European Journal of International Law*, 2004, Vol. 15, No. 3, 2004, pp. 417-456, at: http://www.ejil.org/pdfs/15/3/358.pdf; Gregor T. CHATTON, "The Collective complaints Mechanism within the European Social Charter: Making Economic and Social Human Rights Really Matter", in Samantha BESSON, Michel HOTTELIER, Franz WERRO (eds.), *Human rights at the center/Les droits de l'homme au centre*, Zürich, Schulthess, 2006, pp. 103-157; Jean-François AKANDJI-KOMBÉ, "Les réclamations collectives dans le cadre de la Charte sociale européenne : bilan et perpectives", *L'Europe des Libertés*, 2009, No. 28, pp. 11-21; Holly CULLEN, "The Collective complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights", *Human Rights Law Review*, No. 9, 2009, pp. 61-93; Aleksander GADKOWSKI, "Les réclamations collectives dans le système de la Charte sociale européenne", *Cahiers genevois et romands de sécurité sociale*, No. 46, 2011, pp. 9-61, at: https://archive-ouverte.unige.ch/unige:18493; Riccardo PRIORE, "Il sistema di controllo della Carta sociale europea: la procedura dei reclami collettivi", in Marilisa D'AMICO, Giovanni GUIGLIA, Benedetta LIBERALI (eds.), *La Carta Sociale Europea e la tutela dei diritti sociali*, Napoli, ESI, 2013, pp. 99-107; Riccardo PRIORE, "Les systèmes de contrôle de l'application de la Charte sociale européenne : la procedure de réclamations collectives", in Marilisa D'AMICO, Giovanni GUIGLIA (eds./dir.), *European Social Charter and the Challenges of the XXI Century/La Charte Sociale Européenne et les défis du XXIe siècle*, Napoli, ESI, 2014, pp. 159-170; Luis JIMENA QUESADA, "Interdependence of the Reporting System and the Collective complaint Procedure: Indivisibility of Human Rights and Indivisibility of Guarantees", *ivi*, pp. 143-158.

provisions entered into force in the meantime, aimed at fixing the original declaration of non-compliance and in order to comply with the consequent recommendation of the Committee of Ministers.

In the complete opposite direction moved instead the ECSR, that reminded: "(…) *that according to the wording of the Preamble to the Additional Protocol of 1995* the collective complaints procedure was established to improve the effective implementation of the social rights guaranteed by the Charter and to consolidate the participation of the social partners and non-governmental organisations. (…) Neither the fact that the Committee had already examined this situation in the framework of the reporting system, nor the fact that it will examine it again during subsequent supervision cycles do not in themselves imply the inadmissibility of a collective complaint concerning the same provision of the Charter and the same Contracting Party"[52].

Therefore, from the case at hand, it is clear that the Committee mentions the preamble of Additional Protocol of 1995 not only with the objective of supporting a teleological interpretation of the instrument it is a fundamental part of, which is to highlight its real objective, but also in order attribute to the whole collective complaints' procedure legal efficacy. Had the Committee followed the reasoning of the Portuguese government, instead, such system would have been deprived of real effects in the practice, and lead to the failure of the main objective of the Protocol which is indeed: to favour the effective enjoyment of social rights within States Parties to the treaty-based system of the Charter. In this framework, the preamble assumes in the reality a well different value, compared to the moral or simply exhortative one that, one part of scholarship on the matter, used to attribute indiscriminately to the preambles of any international instruments.

The ECSR, in its Decision on Complaint No. 15/2003, presented by the European Roma Rights Center against Greece for violations of art. 16 of the ESC, that sets forth the right of the family to social, legal and economic protection that, in turn, finds its confirmation in the axiological expansion of the non-discrimination clause as included in the preamble of the ESC. The Committee, even in persisting absence in the Charter of a general provision on the matter, combined again the principle of equality and the principle of non-discrimination[53], as it had already done in 1991, in the occasion of the Conclusions related to Ireland and adopted at the end of the Cycle XI-2: "(…) In addition the principle of equality and non-discrimination form an integral part of Article 16 *as a result of the Preamble*"[54].

In this way the original meaning and value of the non-discrimination clause, as included in the preamble of the ESC were extended. Therefore, the principle of equality becomes a principle protected in the Charter as notoriously combined with the principle of non-discrimination[55]. The first has a wider efficacy as compared to the latter, which instead, came out downsized on both a theoretical and a practical level[56], since it is only aimed at labelling as discriminatory every distinction or difference of treatment that lacks any reasonable and objective justification or balance between the means employed and the scope pursued. From the non-discrimination principle, does not follow *directly and immediately*[57], that positive

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[52] Cf. ECSR, *International Commission of Jurists (ICJ) v. Portugal*, complaint No. 1/1998, decision on admissibility of 10 March 1999, § 10, at: http://hudoc.esc.coe.int/eng/?i=cc-01-1998-dadmiss-en. Emphasis added.

[53] In other important instruments of international law; it is instead their operative part in itself to favour or even to determine such phenomenon. See also Giovanni GUIGLIA, "Non discriminazione ed uguaglianza: unite nella diversità", *Gruppo di Pisa. Dibattito aperto sul Diritto e la Giustizia costituzionale*, 2012, No. 2, p. 2, at: https://www.gruppodipisa.it/images/rivista/pdf/Giovanni_Guiglia_-_Non_discriminazione_ed_uguaglianza_unite_nella_diversita.pdf, where it is highlighted "la Dichiarazione [Universale dei Diritti dell'Uomo del 1948], pur dedicando disposizioni distinte alla non discriminazione e all'uguaglianza (artt. 2 e 7), accosta in esse varie nozioni, miscelando i principi di non discriminazione, di uguaglianza davanti alla legge e di eguale protezione da parte della legge.". Such intertwining can be found also in the International Covenant on Civil and Political Rights (artt. 2, § 1, 3 e 26), in the American Convention on Human Rights, "Pact of San Jose", Costa Rica (art. 1, § 1, e 24) as well as Charter of Fundamental Rights of the European Union (artt. 20, 21 e 23). "Non stupisce, quindi, se la Corte interamericana dei diritti dell'uomo, giudicando sulla base dell'omologa Convenzione, ha poi finito per sistematizzare il coacervo concettuale, consacrando un unico principio di uguaglianza e di non discriminazione".

[54] Cf. ECSR, *European Roma Rights Center v. Greece*, complaint No. 15/2003, decision on the merits of 8 December 2004, § 26, at: http://hudoc.esc.coe.int/eng/?i=cc-15-2003-dmerits-en. Emphasis added.

[55] Cf., *ex plurimis*, Xavier BIOY, "L'ambiguïté du concept de non-discrimination", in Frédéric SUDRE and Hélène SURREL, *Le droit à la non-discrimination au sens de la Convention européenne des droits de l'homme*, Bruxelles, Bruylant, 2008, pp. 51-84.

[56] Manuela BRILLAT, *Le principe de non-discrimination*, cit., p. 10, reminds indeed (In turn, making reference to Gérard CORNU (dir.), *Vocabulaire juridique*, Paris, Dalloz, 2014, p. 388) that: "(…) l'égalité se définit par l'absence de discrimination, rendant ainsi ces deux expressions équivalentes sauf sur un point : l'égalité contient aussi « *l'idéal d'égalité effective que les règles et institutions tendraient progressivement à réaliser en atténuant les inégalités de fait* », ce à quoi le principe de non-discrimination ne semble pas renvoyer de prime abord.".

[57] With reference to the Social Charter and the control activity of the ECSR, of particular relevance is the fact that it significantly introduced the principle of non-discrimination and the principle of equality, putting on States the positive duties, falling from the first and intended to effectively realising the latter, specifically in its substantial meaning. The duty on States to put in place positive actions is indeed a consequence of the control activity of Committee on indirect discriminations, in particular those due to ethnic and racial reasons, or descending from situations of handicap. Of particular relevance are the following decisions of the ECSR: complaint No. 27/2004, *European Roma Rights Centre (ERRC) v. Italy*, decision on

actions characterised by particular and distinctive rules, created – for example – by the lawmaker in order to put in practice different treatments, can be justified if reasonable and proportional to the objective pursued, in situations only superficially identical or at least similar and comparable. It is worth of noting that the extensive interpretation concerning positive actions, that the ECSR consider necessary on the part of States members in order to reach a full and effective factual equality, that has its foundations on the preamble of the ESC of 1961[58], can be at least partially included in the system of the ECHR, thanks to Protocol No. 12, adopted in 2000, which affirms: "(…) the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures".

However, a substantial difference persisted between the two treaty-based instruments, since, as already explicitly mentioned in the Explanatory Report at § 16: "(…) the present Protocol does not impose any obligation to adopt such measures. Such a programmatic obligation would sit ill with the whole nature of the Convention and its control system which are based on the collective guarantee of individual rights which are formulated in terms sufficiently specific to be justiciable". It is only thanks to the bold and non-ambiguous jurisprudence of the ECtHR[59] that, it is possible to reach a level of protection analogous to the one afforded under ECSR.

Similar relevance has then the clarifications that the Committee articulated around the legal value and efficacy non-discrimination principle, that are deductible from the paragraphs of this decision rendered on the merit of Complaint No. 45/2007, submitted by the International Centre for the Legal Protection of Human Rights (INTERIGHTS) against Croatia. In such Complaint Croatia was accused of not respecting Articles 11 § 2, and 16, considered separately and in combination with the non-discrimination clause as enshrined in the preamble of the ESC. Some parts of the decision pinpoint how the Committee intended to direct to the State Party involved in the violation towards a pervasive application of the non-discrimination clause in such a way as to inform in synergy all the policies potentially implicated and all the specific norms intended to be applied in the Charter: "Having regard to the non-discrimination clause in the Preamble to the Charter, sexual and reproductive health education must be provided to school children without discrimination on any ground, direct or indirect, it being understood that the prohibition of discrimination covers the entire range of the educational process, including the way the education is delivered and the content of the teaching material on which it is based. (…) [W]here these courses are approved and/or wholly or partially funded by the Government and/or invoked by the State Party as an element in fulfilling its obligations under the Charter, the sexual and reproductive health education taught through them must remain objective and must comply with the non-discrimination principle. (…) The Committee therefore hold that the discriminatory statements contained in educational material used in the ordinary curriculum constitute a violation of Article 11 § 2 in light of the non-discrimination clause."[60].

With its observations the Committee did not limit itself to use the non-discrimination clause for mere hermeneutical reasons, but it also combines it with a precise provision of the Charter that is recalled

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the merits of 7 December 2005, §§ 19, 21, 46, and complaint No. 13/2002, *International Association Autism-Europe (IAAE) v. France*, decision on the merits of 4 November 2003, §§ 51-54. Regarding the latter, the following paragraph is particularly relevant § 52: "(…) in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.".

[58] With reference to the Social Charter and the Control activity exercised by the ECSR, it is worth of note that the latter introduced within the principle of non-discrimination the principle of equality, placing on States positive obligations, that derive from the first and are aimed at the effective realisation of the latter, especially with reference to its substantial meaning. The duty on States to pursue positive actions derives from the control activity on direct and indirect discriminations, in particular those determined by racial and ethnical reasons or descending from situations of handicap, performed by the Committee. In this sense, of particular relevance are the following decisions of the ECSR: complaint No. 27/2004, *European Roma Rights Centre (ERRC) v. Italy*, decision on the merits of 7 December 2005, §§ 19, 21, 46, and complaint No. 13/2002, *International Association Autism-Europe (IAAE) v. France*, decision on the merits of 4 November 2003, §§ 51-54. In latter, of particular relevance is the following passage of § 52: "(…) in a democratic society should not only be viewed positively but should be responded to with discernment in order to ensure real and effective equality.".

[59] Cf. ECtHR [GC], 16 March 2010, *Oršuš and Others v. Croatia*, No. 15766/03, § 177 and ECtHR, 29 January 2013, *Horváth and Kiss v. Hungary*, No. 11146/11, § 104. On the topic: Edouard DUBOUT, "La Cour européenne des droits de l'homme et la justice sociale – Á propos de l'égal accès à l'éducation des membres d'une minorité. Cour européenne des droits de l'homme, Gde. Ch., *Orsus et autres c. Croatie*, 16 mars 2010 (2010)", No. 84, *RTDH*, 2010, pp. 987-1011; Julie RINGELHEIM, "La discrimination dans l'accès à l'éducation : les leçons de la jurisprudence de la Cour européenne des droits de l'homme", *RTDH*, No. 105, 2016, pp. 77-96; ID., "Le préambule du Protocole n° 12 à la Convention européenne des droits de l'homme", 2019, at: http://hdl.handle.net/2078.1/194395, that in light of the jurisprudence of the ECtHR expresses its view in the following way : "La position de la Cour sur la question de savoir si, et dans quelle mesure, la règle de non-discrimination au sens de la Convention peut emporter une obligation d'adopter des mesures d'action positive, reste donc ambiguë. La maigre jurisprudence développée sur la base du Protocole n°12 n'a, jusqu'à présent, fourni aucun éclaircissement sur ce point", p. 6.

[60] Cf. ECSR, *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Croatia*, complaint No. 45/2007, decision on the merits of 30 March 2009, §§ 48, 49 and 66, at: http://hudoc.esc.coe.int/eng/?i=cc-45-2007-dmerits-en.

by the Claimants which is art. 11. In doing so it obtains an evident reinforcement on its legal and practical level. In the case mentioned as an example, as in many other decisions, the legal efficacy of the non-discrimination clause as enshrined in the preamble is in turn, entirely evident: only thanks to its combination with art. 11 of the Charter that it has been possible to give visibility in all of its extension the potential of the latter; conversely the right to health, as formally recognised in the ESC, would have been unacceptably and concretely amputated of its efficacy.

In many of its decisions, the ECSR remarks the need to combine the non-discrimination clause, included in the preamble of the ESC, with the provisions it dedicates to the social rights as for example, deductible from the decision on the admissibility of Complaint No. 52/2008, deposited by Centre on Housing Rights and Evictions (COHRE) against Croatia that aimed at obtaining a declaration of non-compliance with respect to the measures adopted by the said State in relation to art. 16 of such instruments. This decision is particularly interesting. The Croatian Government attempts to make the Committee declare the inadmissibility of the complaint basing its argument on the fact that the claiming organisation would have based its complaint solely on the violation of the preamble. The Committee substantially confirmed that the non-discrimination clause did not have an independent application within the collective complaints procedures, and had only regard in relation to, at least, one or more norms of the 1961 Charter[61], similarly to what happens within the ECHR system in relation to art. 14, notoriously dedicated as well to the principle of non-discrimination.

The preamble of the ESC (rev) is as well applicable within the framework of the collective complaints' procedure. In a decision on the matter based on Complaint No. 58/2009 – submitted by Centre on Housing Rights and Evictions (COHRE) against Italy, which was accused that the situation of Roma and Sinti people in Italy was contrary to Articles 16, 19, 30 and 31 of the revised Charter – all the mentioned articles were to be read in combination with its art. E which is dedicated to the principle of non-discrimination. The Committee recalled a principle inherent in the preamble of such instrument reminding that: "such realisation of the fundamental social rights recognised by the Revised Charter is guided by *the principle of progressiveness, which is explicitly established in the Preamble* and more specifically in the aims to facilitate the 'economic and social progress' of States Parties and to secure to their populations 'the social rights specified therein in order to improve their standard of living and their social well-being'"[62]. These affirmations are self-explaining. The preamble of the ESC (rev), such as the one of the ESC, at least for the part recalled by the ECSR, possess a legal scope and an efficacy that extend beyond its hermeneutical value.

The equalisation of the legal efficacy recognised to the non-discrimination clause, as envisaged in the preamble of the ESC, with the one recognised to art. E of the ESC (rev), notwithstanding the differences traceable on their respective provisions, was already recognised by the Committee in the Interpretative Observation of 2005 regarding art. 11 of the ESC, dedicated to the right to health, as already mentioned, was reiterated in the same manner on the decision regarding Complaint No. 104/2014, presented by the European Roma and Travellers Forum (ERTF) against the Czech Republic, with the aim of ascertaining the violations of art. 16 and 11 of the ESC, to be read separately or in combination, with the mentioned non-discrimination clause.[63]

Instead, the interpretation of decision rendered on Complaint No. 117/2015 is not of an easy interpretation compared to the constant jurisprudence of the Committee intended to combine the non-discrimination clause of the 1961 Charter with the social rights recognised on other of its parts. This complaint was deposited by Transgender Europe and ILGA-Europe against the Czech Republic, with the aim of verifying the violation of art. 11 of the ESC, to be read both separately and in combination with the non-discrimination clause as enshrined in its preamble. The reasons that led the majority of the ECSR to such decision are still unclear. The Committee expressed is viewpoint through following argument: "The Committee however considers that while there may be discrimination issues in the complaint, as the complaint has been lodged under the 1961 Charter the Committee will not consider the complaint in light

[61] Cf. ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Croatia*, complaint No. 52/2008, decision on admissibility of 30 March 2009, §§ 4, 8, 17, at: http://hudoc.esc.coe.int/eng/?i=cc-52-2008-dadmiss-en.

[62] Cf. ECSR, *Centre on Housing Rights and Evictions (COHRE) v. Italy*, complaint No. 58/2009, decision on the merits of 25 June 2010, § 27, at: http://hudoc.esc.coe.int/eng/?i=cc-58-2009-dmerits-en. Emphasis added.

[63] Cf. ECSR, *European Roma and Travellers Forum (ERTF) v. Czech Republic*, complaint No. 104/2014, decision on the merits of 17 May 2016, § 112, cit.

of the Preamble to the 1961 Charter"[64]. In my opinion, the Separate Concurring Opinion of one of the members of the ECSR, Karin Lukas, is totally understandable and is summarised by the following few sentences: "(…) the sterilisation requirement is discriminatory on the ground of gender identity. Transgender persons are discriminated when compared to cisgender persons, whose gender identity is recognized at birth without any seriously infringing medical interventions being imposed, such as sterilisation. (…) This difference in treatment lacks an objective and reasonable justification. Under international human rights law, medical treatment may only be imposed in emergency situations for the benefit of the health of the individual concerned, where that individual is not able to give his or her consent. Sterilisation for the purposes of legal gender recognition clearly does not meet these conditions and is therefore in grave violation of Article 11 § 1 and the Preamble to the 1961 Charter"[65].

CONCLUDING REMARKS

Since the very beginning of its drafting process started in 1953, the European Social Charter was conceived as an international treaty that would reflect the common core principles of the European States' social policies. Although the first years of the preparatory works were characterized by significant divergences of views with regard to the value to be attributed to the Charter itself, to its content and form, on 1st April 1955 a first draft was elaborated within the mentioned Doc. 403. The latter represented an important basis for following discussions among CoE's institutions on the Charter's structure. In this regard, it can be argued that one of the drafters' aim was to ensure that the Charter did not provide a lower level of protection for social rights than that ensured by other international conventions.

Remarkably, the Charter's drafting process witnessed the involvement of both workers and employers. Indeed, in December 1958, these parts of civil society engaged in the preparatory works on the occasion of the Tripartite Conference, where the participation of representatives for each category was ensured. This represented an essential opportunity for discussion and improvement for the European Social Charter drafting process as, following a comparison between the draft European Social Charter and the ILO conventions, a recommendation of important amendments to the former was proposed which carefully took into consideration the level of protection granted to the social rights recognized by the Charter itself. These proposals contributed to the creation of the necessary background for the adoption of the final text of the European Social Charter, on 6th July 1961, by the Committee of Ministers and, ultimately, to open it for signature in Turin.

The European Social Charter drafting process continued until the revised European Social Charter was adopted in 1996. The next chapter addresses the Charter's preparatory works in the context of the reform process.

[64] Cf. ECSR, *Transgender-Europe and ILGA-Europe v. Czech Republic*, complaint No. 117/2015, decision on the merits of 15 May 2018, § 88, at: http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en.

[65] Cf. the §§ 6 and 7 of the Separate Concurring Opinion, at: http://hudoc.esc.coe.int/eng?i=cc-117-2015-dmerits-en.