Revisiting the Preamble of the European Social Charter: Paper Tiger or Blessing in Disguise?

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ABSTRACT

The European Social Charter has recently received increased attention due to the evolution of its monitoring mechanism and the need to address a multitude of contemporary challenges to socio-economic rights. Although the treaty’s preamble has played a crucial role in the interpretation of substantive provisions and in shaping state obligations, little attention has been paid to the way in which the preamble has defined the fundamental lines of the ‘jurisprudence’ of the Charter’s monitoring body. The European Committee of Social Rights has deduced from the Charter’s preamble several important general principles for the protection of socio-economic rights, on which it grounds its interpretation. This article analyses these principles and evaluates their effects in the relevant practice. The findings suggest that the Charter’s preamble serves different purposes and performs multiple functions in international law, thus challenging the common assumption that human rights treaty preambles are empty phrases of a merely ceremonial nature.

KEYWORDS: treaty interpretation, preamble, international monitoring, economic and social rights, European Committee of Social Rights, effectiveness and progressive realisation

1. INTRODUCTION

Treaty preambles are generally considered to be preliminary or introductory statements preceding the operative part of the treaty.1 Preambles set out the general context or reasons for adopting the treaty, as well as the intentions of the contracting parties.2 While the question of the legal value or status of preambles has not (yet) been resolved,

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1 Suy, ‘Le Préambule’ in Yakpo and Boumedra (eds), Liber Amicorum: Judge Mohammed Bedjaoui (1999) 253.
2 Voermans, Stremler and Cliteur, Constitutional Preambles: A Comparative Analysis (2017).
it is generally accepted that preambles containceremonial and politically fuelled ideas that do not give rise to enforceable rights or obligations under international law. Nevertheless, preambles cannot be considered legally inconsequential. The 1969 Vienna Convention on the Law of Treaties (VCLT) does not contain a separate provision on preambles or their legal effects. However, the general rule of interpretation under Article 31(1) VCLT provides that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’. More specifically, according to Article 31(2) VCLT, the context for the purpose of the interpretation of a treaty shall inter alia comprise the text of the treaty, which is defined to include its preamble and annexes. Therefore, on the one hand, the Vienna Convention explicitly recognises the indivisible link that exists between the body of the treaty and the preamble, which should be aligned with the operative part, but only in terms of the context of the treaty. On the other hand, the Vienna Convention leaves ample room for preambles to exercise legal power.

In fact, the importance of preambles lies in their role as an important framework in which to interpret the treaty, as well as the obligations it entails, or to infer its ‘object and purpose’ (telos). Moreover, preambles play an important role in preventing inconsistencies between the principles they contain and the treaty, or in filling lacunae in the text of the treaty. This is particularly relevant in the case of human rights treaties, i.e. quasi-legislative multilateral treaties that have an ‘objective’ rather than a contractual nature. Consequently, although preambles do not possess a normative binding force by stating obligations, they do have a hermeneutic binding force, meaning that they can impose interpretive commitments. In addition, they can perform several functions or even reflect independent rules of customary international law. As a result, the

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3 Backer, ‘Preamble; Analysis of Principles, Context, and Textual Analysis’ (2019) 14 Emancipating the Mind: Bulletin of the Coalition for Peace & Ethics 169.
4 Vienna Convention on the Law of Treaties 1969, 1155 UNTS 331. See, generally, Dörr and Schmalenbach (eds), Vienna Convention on the Law of Treaties. A Commentary, 2nd edn (2018).
5 Coomans et al., ‘The Preamble of the Convention on Human Rights’ in Coomans et al. (eds), Human Rights from Exclusion to Inclusion; Principles and Practice: An Anthology from the Work of Theo van Boven (2000) 401.
6 See Cot and Pellet (eds), La Chartede Nations Unies: Commentaire, Article par Article (1985).
7 Hulme, ‘Preambles in Treaty Interpretation’ (2016) 164 University of Pennsylvania Law Review 1281.
8 See, for example, in international practice: European Court of Human Rights, Golder v United Kingdom Application No 4451/70, Merits, 21 February 1975, at para 34; Demir and Baykara v Turkey Application No 34503/97, Merits, 12 November 2008, at paras 65–76. International Court of Justice, Asylum Case (Colombia v Peru) Merits, Judgment, ICJ Reports 1950, 266 at 282; Rights of Nationals of the United States of America in Morocco (France v United States) Merits, Judgment, ICJ Reports 1952, 176 at 184, 196.
9 Beate, Freeman and Chinkin, The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary (2012) 36. See, for example, on this European Court of Human Rights, Ireland v United Kingdom Application No 5310/71, Merits, 18 January 1978, at para 239.
10 Gardiner, Treaty Interpretation, 2nd edn (2015) at 206.
11 See Mbengue, ‘The Notion of Preamble’ in Wolfrum (ed.), The Max Planck Encyclopedia of Public International Law, online edn (2008) 1; Klabbers, ‘Treaties and Their Preambles’ in Bowman and Kritsiotis (eds), Conceptual and Contextual Perspectives on the Modern Law of Treaties (2018) 172; Orgad, ‘The Preamble in Constitutional Interpretation’ (2010) 8 International Journal of Constitutional Law 714.
12 Villiger, Commentary on the 1969 Vienna Convention on the Law of Treaties (2009) at 43.
preamble may be given so much importance in the interpretation of the treaty that it may even come close to becoming enforceable.\textsuperscript{13}

It has been argued that the size of a treaty’s preamble depends on ‘the measure of agreement underlying the convention at issue’.\textsuperscript{14} This means that the more controversial or ambitious the regime envisaged in the treaty, the longer the preamble tends to be. According to another view, not all preambles are of equal value; some are negotiated very carefully, while others are put together as an afterthought.\textsuperscript{15} In this regard, a number of indicators can reveal whether thorough attention has been paid to the content of the preamble: namely, the preparatory work, the text and problems of interpretation thereof, as well as the relevant practice.\textsuperscript{16} The scope and meaning of the preamble should therefore be verified on an \textit{ad hoc} basis.\textsuperscript{17} That said, in many cases, the preambular language can come across as rather vague or programmatic. Legal doctrine suggests that the importance of a preamble for the interpretation of the treaty’s text depends on the precision with which the principles of the treaty are formulated.\textsuperscript{18} Consequently, the preamble must be regarded as a mandatory factor in the interpretation, although this largely depends on the content of the particular preamble under consideration.\textsuperscript{19}

Additionally, by providing the context and defining the object and purpose of the treaty, preambles undoubtedly contain some of the hermeneutic criteria used by treaty monitoring bodies, courts or dispute settlement organs to interpret the substantive provisions of treaties. However, as far as human rights treaties are concerned, according to a widely held view, the VCLT does not pay particular attention to their unique features, including those of their preambles.\textsuperscript{20} Therefore, human rights treaty bodies have employed a variety of interpretive methods to remedy these shortcomings.

Against this background, a glance at the structure of the European Social Charter (ESC or ‘Charter’), the legally binding regional human rights treaty of the Council of Europe,\textsuperscript{21} is illustrative of its particularities \textit{qua} international treaty. The 1996 Revised European Social Charter (‘RevESC’)\textsuperscript{22} amends the provisions of the 1961 European Social Charter\textsuperscript{23} and incorporates the provisions of the 1988 Additional Protocol extending the social and economic rights of the 1961 Charter,\textsuperscript{24} in addition

\textsuperscript{13} Klabbers, supra n 11 at 172; See, also, concerning constitutional preambles Ginsburg, Foti and Rockmore, “We the Peoples”: The Global Origins of Constitutional Preambles’ (2014) 46 George Washington International Law Review 305.
\textsuperscript{14} Klabbers, supra n 11 at 178.
\textsuperscript{15} Gardiner, supra n 10 at 206.
\textsuperscript{16} Tzanakopoulos, ‘Le Préambule du Pacte de la Société des Nations’ in Kolb (ed.), Commentaire sur le Pacte de la Société des Nations (2015) 79.
\textsuperscript{17} Suy, supra n 1 at 253–7.
\textsuperscript{18} Mbengue, supra n 11 at 2.
\textsuperscript{19} Hulme, supra n 7 at 1304.
\textsuperscript{20} See, for example, García Roca, ‘The Preamble, the Convention’s Hermeneutic Context: A Constitutional Instrument of European Public Order’ in García Roca and Santolaya (eds), Europe of Rights: A Compendium of the European Convention of Human Rights (2012) 1.
\textsuperscript{21} All EU member states, and 47 Council of Europe member states in total, are parties to the Charter either in its original or revised version, albeit with varying levels of commitment.
\textsuperscript{22} European Social Charter (Revised) 1996, ETS 163.
\textsuperscript{23} European Social Charter 1961, ETS 035.
\textsuperscript{24} Additional Protocol to the European Social Charter 1988, ETS 128.
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to introducing new rights that were not previously guaranteed. However, the adoption
of the Revised Charter does not respond to the technique of concluding supplementary
international treaties. Rather, it is an autonomous international treaty, which allows
any member state to the Council of Europe to become a contracting party—albeit in
variable geometry of commitments—whether or not it was a contracting party to the
original Charter.

The main objective of the 1996 Revised Charter, which was concluded as part of
a process of updating its substantive contents in order to adapt to the ‘fundamental
social changes’ that have occurred since the adoption of the original Charter, is to
gradually replace the latter. Notwithstanding, 36 states of the 47 Council of Europe
member states have so far ratified the Revised Charter, whereas seven member states
have only ratified the 1961 Charter. In any case, however, since several states have not
yet initiated the ratification of the revised treaty, we are faced with the rather peculiar
situation of the parallel existence of two treaties, and thus two treaty preambles.

The particularities of the Charter system do not end there, as the preamble of the
Charter appears to fulfil several functions in international (human rights) law. For
instance, the fourth recital of the Revised Charter’s preamble explicitly recalls the
need to preserve the indivisible nature of all human rights, be they civil, political,
economic, social or cultural, as initially proclaimed in 1993 by the Vienna Declaration
and Programme of Action of the World Conference on Human Rights. Such a
reference by the preamble of the Revised Charter to this very important principle for
the justiciability and enforceability of economic and social rights is not inconsequential.
As the principle of indivisibility is expressed in unequivocal language, the relevant
recital fulfils a declaratory function; it reflects a specific state of affairs in human rights
protection existing at the time the Charter was concluded, which is difficult for States
Parties to deny at a later stage.

Nevertheless, in contrast to the preamble of the European Convention on Human
Rights (ECHR) or of other human rights treaties, the Charter’s preamble has,
curiously enough, never been examined for its actual legal effects or functions and, in
particular, for its role in interpreting the treaty’s provisions. It is thus superficially seen
as a ‘paper tiger’: strong in meaning but weak in terms of its content. Furthermore,

25 Aust, Modern Treaty Law and Practice (2000) at 221.
26 See Part III, Article A of the Revised Charter (and the corresponding Part III, Article 20 of the original
Charter) establishing an à la carte system of acceptance of Charter provisions.
27 Bonet Pérez, ‘The European Social Charter’ in Gómez and de Feyter (eds), International Human Rights Law
in a Global Context (2009) 689 at 728.
28 See the fifth and sixth recitals of the preamble of the Revised European Social Charter.
29 As of 6 July 2021, Croatia, Czech Republic, Denmark, Iceland, Luxembourg, Poland and the United
Kingdom have only ratified the 1961 Charter. Four Council of Europe member states have signed but not
ratified the original or the Revised Charter: Liechtenstein, Monaco, San Marino and Switzerland. Notably,
Germany ratified the Revised Charter on 29 March 2021 and Spain on 15 May 2021.
30 UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993. See, also, the fourth
recital of the preamble of the Optional Protocol to the International Covenant on Economic, Social and
Cultural Rights, GA RES 63/117, 10 December 2008; and the third recital of the preamble of the UN
Convention on the Rights of Persons with Disabilities 2006, 2515 UNTS 3.
31 See on this Klabbers, supra n 11 at 180.
32 European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, ETS 005.
33 See, for example, García Roca, supra n 20.
although the changes to the text and the monitoring mechanism of the Charter have recently received considerable attention in the legal doctrine, no study has so far been devoted to assessing the amendments to its preamble brought forward with the adoption of the Revised Charter. The role and impact of the Charter’s preamble on the interpretation of the treaty’s provisions therefore remain largely unknown, even in times of crisis, where economic and social rights are under severe pressure and present many challenges with regard to their interpretation.

In this context, revisiting the Charter’s preamble aims to rectify the above shortcomings. This article analyses the missions and principles underpinning the Charter’s preamble and evaluates their effects in the relevant practice. Particular attention is paid to the ‘jurisprudence’ of the European Committee of Social Rights (ECSR or ‘Committee’), the Charter’s monitoring body, which authoritatively monitors compliance with the treaty’s provisions under an express mandate. Special attention is also given to the relevant decisions of domestic courts. The article then evaluates the role of the Charter’s preamble for the interpretation of the treaty’s provisions and the corresponding implications for the protection of economic and social rights in Europe.

2. THE PARTICULARITIES OF THE EUROPEAN SOCIAL CHARTER’S PREAMBLE

The position that prevailed during the 1961 Charter negotiations was that its preamble must be regarded as a statement of general principles of moral value, on which the Charter is grounded, and not as an embodiment of an undertaking. Remarkably, unlike most international treaties, the preamble of the Charter is not followed as usual by the operative part of the treaty, but rather by a preamble-like enumeration of 19 social policy principles and objectives, forming Part I of the treaty. According to the travaux préparatoires of the Charter, Part I of the treaty was also regarded during the negotiations as a preamble in itself or, more precisely, as a continuum to the preamble, because it is a declaration of social policy principles and objectives. However, despite the consensus reached on the principles expressed in the Charter’s preamble, there was no general agreement on the specific rights mentioned in Part I. As a result, it was decided to distinguish between a general preamble and a more specific Part I. Therefore, the

34 See, for example, Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) 9 Human Rights Law Review 61; Harris, ‘Collective Complaints under the European Social Charter: Encouraging Progress?’ in Warbrick, Kaikobad and Bohlander (eds), International Law and Power: Perspectives on Legal Order and Justice: Essays in Honour of Colin Warbrick (2009) 3; Alston, ‘Assessing the Strengths and Weaknesses of the European Social Charter’s Supervisory System’ in de Búrca, de Witte and Ogertschnig (eds), Social Rights in Europe (2005) 45; Churchill and Khaliq, ‘The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance With Economic and Social Rights?’ (2004) 15 European Journal of International Law 417.

35 See Article 24(2) Protocol amending the European Social Charter 1991, ETS 142.

36 ‘Collected (Provisional) Edition of the “Travaux Préparatoires” to the European Social Charter’, supra n 23, Vol II (1955) at 131.
declaration of aims set out in Part I is binding as an objective to be pursued\(^{37}\) and may guide the interpretation of the rights listed in Part II of the Charter.\(^{38}\)

The consensus reached on the Charter’s preamble is also reflected in the brief and precise wording of its recitals (considérants or preambular paragraphs) and the principles outlined therein. These are undoubtedly important principles for the protection of economic and social rights in Europe. The preamble was the subject of lengthy negotiations that resulted in carefully negotiated and balanced recitals in both the 1961 Charter and the 1996 Revised Charter. The latter in fact contains the preamble of its predecessor and adds three recitals that reflect the progress made in this interim period of 35 years.\(^{39}\) Arguably, the content and legal effects of the Charter’s preamble are particularly important, as will be shown later, since some of the principles set out in its recitals are not substantiated in the operative provisions of the treaty. Moreover, the fact that the Charter’s preamble has been drafted with particular care reinforces its normative value.

The ECSR, which consists of 15 independent international experts, has expressly referred to these particularities in its decisions under the Collective Complaints Procedure. This procedure was established by the (optional) 1995 Additional Protocol to the ESC,\(^{40}\) which has so far been ratified by 16 contracting parties to the ESC. This unique form of collective redress in international human rights law enables social partners and (international) NGOs with participatory status at the Council of Europe, to lodge collective complaints before the Committee, for rulings on possible non-implementation of the Charter in the countries concerned.\(^{41}\) Remarkably, it is not necessary in this context that the claimant organisation has exhausted domestic remedies or is the victim of a relevant violation.

As argued in the legal doctrine, the ECSR has established itself as a ‘quasi-judicial’\(^{42}\) body in the performance of its duties under the Collective Complaints Procedure.\(^{43}\) The Committee has the power to declare national laws and practice legally incompatible with the Charter, following an adversarial and coherently structured process encompassing most of the essential elements of judicial decision-making. The Committee’s decisions do not conclude the procedure but serve as a basis for the adoption of a resolution or recommendation by the Committee of Ministers of the Council of Europe.\(^{44}\) However, the Committee of Ministers can only include social and economic

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\(^{37}\) Article A, para 1a Explanatory Report to the Revised European Social Charter, supra n 22.

\(^{38}\) de Schutter, ‘The Two Lives of the European Social Charter’ in de Schutter (ed.), *The European Social Charter: A Social Constitution for Europe* (2010) 11 at 15–16.

\(^{39}\) See supra n 28.

\(^{40}\) Additional Protocol to the European Social Charter Providing for a System of Collective Complaints 1995, ETS 158.

\(^{41}\) Papadopoulos, ‘Paving the Way for Effective Socio-economic Rights? The Domestic Enforcement of the European Social Charter System in Light of Recent Judicial Practice’ in Boost et al. (eds), *Myth or Lived Reality: On the (In)Effectiveness of Human Rights* (2021) 99 at 101.

\(^{42}\) See, generally, Fromageau, ‘Quasi-Judicial Body’ in Wolfrum, supra n 11 (2020) 1.

\(^{43}\) See, for example, Cullen, supra n 34.

\(^{44}\) See Article 9 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, supra n 40.
policy considerations, without being able to reverse the legal assessment of the
ECSR, which has the final say on the interpretation of the Charter. 45

Against this background, since its early collective complaints decisions, the ECSR
has explicitly asserted that ‘when it has to interpret the Charter, it does so on the basis
of the 1969 Vienna Convention on the Law of Treaties.’ 46 Such a reference to the VCLT,
and in particular to Article 31(1) and (3) thereof, has served the Committee on several
occasions. For example, it has enabled the Committee to construe restrictively—in a
few exceptional cases—the well-known limitations of the Charter’s scope ratione personae, set out in the first paragraph of the treaty’s Appendix, 47 by means of a teleological
interpretation. 48 In this context, according to the Committee, ‘the Charter should so
far as possible be interpreted in the light of the object and purpose of the treaty’, 49 and
‘in harmony with other relevant and applicable rules of international law of which it
forms part’. 50 The ECSR’s precedent-like reasoning has also helped to consolidate its
interpretive approach, 51 especially given that the ECSR, unlike United Nations human
rights treaty bodies, does not produce General Comments to spell out its interpretive
position in a general manner.

Despite numerous references to Article 31(1) and (3) VCLT, the ECSR does not
generally refer to the Charter’s preamble under Article 31(2) VCLT to interpret the
Charter in its quasi-case law. The only explicit references made by the Committee to
the Charter’s preamble are linked to the blanket non-discrimination clause found in
the third recital of the 1961 Charter’s preamble. 52 As noted in the literature, the fact
that the 1961 Charter’s discrimination provisions appear only in the preamble, and
not in the operative part of the treaty, does not deny the importance of the Charter’s

45 See Explanatory Report to the Additional Protocol to the European Social Charter Providing for a System
of Collective Complaints, ibid., para 46; Confédération Française de l’Encadrement (CFE CGC) v France
Collective Complaint No 16/2003, Merits, 12 October 2004, at paras 20–1.
46 International Federation of Human Rights Leagues (FIDH) v France
Collective Complaint No 14/2003, Merits, 8 September 2004, at paras 26–32.
47 Para 1 of the Charter’s Appendix reads: ‘Without prejudice to Article 12, paragraph 4, and Article 13,
paragraph 4, the persons covered by Articles 1 to 17 and 20 to 31 include foreigners only in so far as they are
nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned,
subject to the understanding that these articles are to be interpreted in the light of the provisions of Articles
18 and 19.’
48 See, for example, European Organisation of Military Associations (EUROMIL) v Ireland Collective Complaint
No 112/2014, Merits, 12 September 2017, at para 45; European Council of Police Trade Unions (CESP)
v France Collective Complaint No 101/2013, Merits, 27 January 2016; Defence for Children International
(DCI) v Belgium Collective Complaint No 69/2011, Merits, 23 October 2012. See, generally, Panzera,
‘The Personal Scope of the European Social Charter: Questioning Equality’ (2014) 24 Revista Europea de
Derechos Fundamentales 51.
49 European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France
Collective Complaint No 114/2015, Merits, 24 January 2018, at para 52.
50 Defence for Children International (DCI) v the Netherlands Collective Complaint No 47/2008, Merits, 20
October 2009, at para 35.
51 Cullen, supra n 34 at 71.
52 It reads: ‘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’. See, for example,
European Roma Rights Centre v Greece Collective Complaint No 15/2003, Merits, 8 December 2004, at para 19.
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preamble. On the contrary, in the absence of a substantive provision in the 1961 Charter enshrining the right to non-discrimination—which was later inserted as a horizontal provision in Article E of the Revised Charter, with the addition of a few grounds—this clause has been interpreted by the Committee as being an integral part of all the Charter’s substantive provisions. Any exception to the general principle of non-discrimination, as set out in the preamble of the 1961 Charter, can only be accepted if it is based on an ‘objective and reasonable justification’. As a result, the legal doctrine has interestingly singled out this recital for having legislative effects, i.e. the same binding force as the operative part of the Charter, since its purpose is to establish an obligation in connection with other content of the treaty.

Nevertheless, the Committee has implicitly paid attention to the Charter’s preamble, thus recognizing its great importance for the identification of the treaty’s object and purpose, as well as for its interpretation in general. In particular, the Committee, in similar way to the interpretation of the ECHR by the European Court of Human Rights (ECtHR), has put forward arguments that are implicitly based on the Charter’s preambular paragraphs. More specifically, it has deduced from the wording of these paragraphs the ‘underlying purposes of the social rights protected by the Charter.’ The preamble of the Charter has therefore been a decisive tool for the Committee in setting out its interpretive approach and articulating its views on the core values underlying the Charter.

The Committee has therefore inferred several important general principles of interpretation from the Charter’s preamble, on which it bases its reasoning in its collective complaints decisions, as well as in its ‘conclusions’ under the reporting system. This is particularly possible as the Committee ‘incorporates’ the findings under its collective complaints decisions in its ‘conclusions’ under the reporting procedure and vice versa. Nonetheless, the causal link between the Charter’s preamble and the treaty’s interpretation by the Committee is not easy to detect. This may explain the lack of attention paid by the legal doctrine to the role that the Charter’s preamble plays in the interpretive approach of the Committee, and the impact of the preamble on the reasoning of domestic courts. The analysis that follows addresses this incongruity.

53 Mac Amhlaigh and Nedelka, ‘Forty Years of the European Social Charter: Celebration or Commiseration’ (2001) 1 University College of Dublin Law Review 67 at 78.
54 See on this, as well as on the differences of the 1961 Charter with the 1996 Charter vis-à-vis non-discrimination, Besson, ‘Evolutions in Non-Discrimination Law within the ECHR and the ESC Systems: It Takes Two to Tango in the Council of Europe’ (2012) 60 The American Journal of Comparative Law 147.
55 European Roma Rights Centre v Greece Collective Complaint No 15/2003, Merits, 8 December 2004, at para 19.
56 European Committee of Social Rights, Conclusions XV—France—Article 5 (2000).
57 Klabbers, supra n 11 at 193.
58 Kelsen, ‘The Preamble of the Charter—A Critical Analysis’ (1946) 8 The Journal of Politics 134.
59 García Roca, supra n 20.
60 International Federation for Human Rights (FIDH) v Belgium Collective Complaint No 75/2011, Merits, 18 March 2013, at para 206.
61 O’Cinneide, ‘Bringing Socio-Economic Rights Back Into the Mainstream of Human Rights: The Case-Law of the European Committee of Social Rights as an Example of Rigorous and Effective Rights Adjudication’ (2009) 13 Revista Europea de Derechos Fundamentales 259 at 293.
62 On the Committee’s approach concerning the relationship of the two monitoring procedures, see ICJ v Portugal Collective Complaint No 1/1998, Admissibility, 10 March 1999.
3. THE EUROPEAN SOCIAL CHARTER’S PREAMBLE IN THE INTERPRETATION OF THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

The study pays particular attention to three principles that the ECSR has inferred from the preambles of the Charter and its Additional Protocols. These general principles have greatly assisted the Committee in identifying the telos of the Charter and in shaping its interpretive approach under the Collective Complaints Procedure. The first two are the interrelated principles of ‘effectiveness’ and ‘progressive realisation and resource availability’, which reflect the interpretive function of the Charter’s preamble. The third principle analysed is a rather systemic one that will be referred to here as ‘complementarity with the European Convention on Human Rights’, reflecting the incorporative function of the Charter’s preamble.

A. Effectiveness

The principle of effectiveness is not found in the preamble of the 1961 or 1996 Charters but is rather explicitly mentioned in the preamble of the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints. According to the first recital, States Parties are ‘resolved to take new measures to improve the effective enforcement of the social rights guaranteed by the Charter’. The same principle is also found in the first recital of the preamble of the 1991 Amending Protocol Reforming the Supervisory Mechanism, which states that parties are ‘resolved to take some measures to improve the effectiveness of the Charter, and particularly the functioning of its supervisory machinery’.

However, in addition to the preambles of the Charter’s Protocols, the principle of effectiveness forms a foundational part of the Charter’s operative provisions. Indeed, most of the Articles of Part II of the RevESC begin with the words ‘with a view to ensuring the effective exercise’ of the rights enshrined therein, followed by a series of obligations. The use of the word ‘effectiveness’ in the operative part of the Charter thus seems to refer to the exercise of a right that exists in reality, and to the guarantee that the obligations arising therefrom are intended to ensure that a given right will have an impact on reality.

Nonetheless, the approach of the ECSR is essential for the effective implementation of the Charter’s provisions, as it allows detailed legal analysis and determination of the extent to which a State Party is complying with its obligations under the Charter. In this context, the Committee generally follows the methods of the ECtHR, which has on several occasions cited the ECHR’s preamble on the basis of Article 31(2) VCLT to identify the treaty’s object and purpose. The Strasbourg Court has pursued the

63 Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, supra n 40.
64 See supra n 35.
65 See Papadopoulos, supra n 41.
66 Bétaille, Les conditions juridiques de l’effectivité de la norme en droit public interne, illustrations en droit de l’urbanisme et en droit de l’environnement (PhD Thesis, Université de Limoges, 2012) at 23–4.
67 Churchill and Khaliq, supra n 34 at 449.
68 See, for example, Golder, supra n 8; Artico v Italy Application No 6694/74, Merits, 13 May 1980.
rendering of the Convention ‘practical and effective’,\textsuperscript{69} based mainly on the principle of ‘collective enforcement’, created by case law through an interpretation of the third, fourth and fifth recitals of the Convention’s preamble.\textsuperscript{70}

In a similar way, the Committee has—already in its first collective complaints decision, and later in many instances—also affirmed that ‘the aim and purpose of the Charter, being a human rights protection instrument, is to protect not merely theoretical but effective rights’.\textsuperscript{71} In this respect, the Committee has asserted that the implementation of the Charter requires the States Parties to take not merely legal action but also practical action to make available the resources and introduce the operational procedures necessary, and thus give full effect to the rights recognised in the Charter.\textsuperscript{72}

In this context, proper implementation ‘cannot be achieved solely through legislation if its application is neither effective nor strictly controlled’.\textsuperscript{73} Consequently, ‘the relevant national authority, whether legislative, regulatory or judicial, is to intervene, either to bring about the repeal [of domestic provisions infringing the Charter] or to rule out their implementation’.\textsuperscript{74} The Committee assesses the achievement of this objective through various interpretive methods, which form part of what it has labelled its ‘human rights approach’.\textsuperscript{75} This approach plays an important role in determining the extent of state obligations under the Charter.\textsuperscript{76}

Consequently, the preambles of the Charter’s Protocols, in conjunction with the text of the treaty’s operative part, fulfil an interpretive function;\textsuperscript{77} they have assisted the Committee in interpreting the Charter in such a way that it imposes an immediate obligation on States Parties to adopt the required measures or take other action to realise the right concerned.\textsuperscript{78} Accordingly, States Parties may be found by the Committee to be in breach of their obligations where their laws are in order, but their operation in practice is unsatisfactory. This rather strict approach is, however, counterbalanced by the \textit{à la carte} nature of the Charter’s acceptance procedure;\textsuperscript{79} States Parties may simply choose not to be bound by certain Charter

\textsuperscript{69} Harris et al. (eds), \textit{Law of the European Convention on Human Rights}, 4th edn (2018) at 18.

\textsuperscript{70} García Roca, supra n 20.

\textsuperscript{71} \textit{International Commission of Jurists (ICJ) v Portugal} Collective Complaint No 1/1998, Merits, 9 September 1999, at para 32; \textit{FEANTSA v Slovenia} Collective Complaint No 53/2008, Merits, 8 September 2009, at para 28.

\textsuperscript{72} \textit{Autism-Europe v France} Collective Complaint No 13/2002, Merits, 4 November 2003, at para 53; \textit{European Roma Rights Centre v Greece} Collective Complaint No 15/2003, Merits, 8 December 2004, at para 21.

\textsuperscript{73} \textit{DCI v Belgium} Collective Complaint No 69/2011, supra n 48 at para 69.

\textsuperscript{74} \textit{Confederation of Swedish Enterprise v Sweden} Collective Complaint No 12/2002, Merits, 22 May 2003, at para 28.

\textsuperscript{75} \textit{Conference of European Churches (CEC) v the Netherlands} Collective Complaint No 90/2013, Merits, 1 July 2014, at para 67.

\textsuperscript{76} See O’Cinneide, supra n 61 at 290.

\textsuperscript{77} Klabbers, supra n 11 at 186; Mbengue, supra n 11 at 2.

\textsuperscript{78} Harris, supra n 34 at 12.

\textsuperscript{79} See supra n 26. This particularity of the Charter’s acceptance procedure, which has been criticized at being at odds with the principle of indivisibility of human rights, was envisaged as a temporary means to facilitate the ratification of the Charter by Council of Europe states. The ECSR has, through the object-and-purpose
provisions. Nevertheless, an examination of the provisions accepted by each of the contracting parties shows that the vast majority of states accept far more commitments than are necessary to satisfy the treaty’s requirements.

B. Progressive Realisation and Resource Availability

Examining ‘progressive realisation and resource availability’ as a single distinctive principle is suggested here, because the former has a direct link to the latter. Indeed, the pace of the progressive realisation of the economic and social rights guaranteed by the Charter depends to a large extent on the presence and efficient use of adequate resources. Contrary to the International Covenant on Economic, Social and Cultural Rights (ICESCR), which explicitly recognises and regards the principle of progressive realisation and resource availability as fundamental, the text of the ESC (including its preamble and Protocols) does not explicitly refer to this principle. Nevertheless, the ECSR has deduced the principle of progressive realisation from a conjunctive reading of the Charter’s preambular paragraphs, bringing the Charter closer to the ICESCR in that respect.

In Centre on Housing Rights and Evictions (COHRE) v Italy, the Committee asserted 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 State Parties and to secure to their populations ‘the social rights interpretation of the Charter under Article 31(1) VCLT and through a holistic approach of the Charter’s—interconnected and sometimes overlapping—provisions, attempted to mitigate the negative impact of the procedure’s à la carte nature. See on this Ducoulombier, ‘La liberté des États parties à la Charte sociale européenne dans le choix de leur engagement: une liberté surveillée’ (2013) 96 Revue trimestrielle des droits de l’homme 829.

80 Harris, ibid.
81 de Schutter and Sant’Ana, ‘The European Committee of Social Rights (the ECSR)’ in de Beco (ed.), Human Rights Monitoring Mechanisms of the Council of Europe (2012) 71 at 75–6.
82 Bilková, ‘The Nature of Social Rights as Obligations of International Law: Resource Availability, Progressive Realization and the Obligations to Respect, Protect, Fulfil’ in Binder et al. (eds), Research Handbook on International Law and Social Rights (2020) 19 at 30.
83 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.
84 See Article 2 para 1 of Part II of the ICESCR as well as the fifth recital of the preamble of the Optional Protocol to the ICESCR.
85 de Schutter and Sant’Ana, supra n 81 at 76–7.
86 These are, specifically, the first and third recitals of the 1996 Revised Charter’s preamble (originally laid down in the first and fourth recitals of the 1961 Charter’s preamble). The first recital—taken verbatim from the third recital of the ECHR’s preamble—reads: ‘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.’ The third recital reads: ‘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.’
specified therein in order to improve their standard of living and their social well-being.’

It is important to note, however, that the Committee’s understanding of the principle of progressive realisation is fundamentally different from the ‘minimum core/progressive realisation’ dual-track general approach adopted by the United Nations Committee on Economic, Social and Cultural Rights (CESCR)—the treaty body monitoring compliance with the ICESCR. Labelled ‘Europe’s Social Constitution’, the Charter is considered the ideal instrument for coordinating the social policies of the ‘developed’ European States Parties to the Council of Europe. As such, the ESC does not contain a provision such as Article 2(1) ICESCR, which imposes on States Parties a general obligation to progressively realise all the rights enshrined therein to the maximum of their available resources. Nor does the Charter—except for Articles 2(1), 3(4), 12(3) and 31(2) RevESC—provide for a general allowance for financial resources, even in the case of phenomenally ‘expensive’ social rights.

As a result, the Committee has not interpreted the Charter as allowing states to invoke a lack of financial resources as a justification for non-compliance with the relevant provision, even when states are faced with the consequences of a severe economic crisis. Rather, the Committee carries out a ‘dynamic’ interpretation for each provision of the specific obligations imposed upon States Parties, which the Committee sees as an amalgam of both positive and negative obligations, as well as obligations

87 Collective Complaint No 58/2009, Merits, 25 June 2010, at para 27. See also the separate concurring opinion of Luis Jimena Quesada, the Committee’s former President, on Finnish Society of Social Rights v Finland Collective Complaint No 88/2012, Merits, 9 September 2014.

88 See, for example, Committee on Economic, Social and Cultural Rights, General Comment No 3: The Nature of States Parties’ Obligations, 14 December 1990; O’Cinneide, supra n 61 at 292.

89 Council of Europe, ‘General Report of the High-level Conference on the European Social Charter (Turin 1)’, 17–18 October 2014, available at: rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048acf8 [last accessed 3 January 2021].

90 Article 2(1) RevESC reads: ‘... to provide for reasonable daily and weekly working hours, the working week to be progressively reduced to the extent that the increase of productivity and other relevant factors permit’; Article 3(4) RevESC reads: ‘... to promote the progressive development of occupational health services for all workers with essentially preventive and advisory functions’; Article 12(3) RevESC, which, as has been noted in the legal doctrine (Harris and Darcy, The European Social Charter, 2nd edn (2001) at 159) is the only provision of Part II of the Charter, which explicitly provides as an obligation of the Parties to achieve a result, reads: ‘... to endeavour to raise progressively the system of social security to a higher level’; Article 31(2) RevESC reads: ‘... to prevent and reduce homelessness with a view to its gradual elimination.’

91 Harris, supra n 34 at 11.

92 Ibid.

93 See European Committee of Social Rights, General introduction to Conclusions XIX-2 (2009) at para 15, laying down the Committee’s non-retrogression stance in the face of the 2008 crisis: ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need the protection most’; See also Collective Complaints Nos 65/2011, 66/2011, 76–80/2011 and 111/2014 against Greece. On the Committee’s ‘anti-crisis’ collective complaints decisions against Greece see Papadopoulos, ‘Austerity-Based Labour Market Reforms in Greece v. Fundamental Rights in the Aftermath of the European Debt Crisis: An Analysis of Supranational and National Bodies’ Jurisprudence’ (2020) 26 European Public Law 421 at 440–7.
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of means and results. In doing so, the Committee gives substance even to allegedly indeterminate or programmatic economic and social rights under the Charter. This approach, in turn, paves the way for their justiciability and enforceability by courts, including at the domestic level.

The Committee has elaborated this approach in detail in its collective complaints quasi-case law. In particular, it has shown its willingness to give full consideration to the principle of progressive realisation and resource availability only ‘when it is exceptionally complex and expensive to secure one of the rights protected by the Revised Charter’. In that case, in the view of the Committee,

the measures taken by the state to achieve the Revised Charter’s aims must fulfil the following three criteria: (i) a reasonable timeframe, (ii) a measurable progress, and (iii) a financing consistent with the maximum use of available resources.

For instance, in European Roma Rights Centre v Bulgaria, the Committee asserted that although the ‘effective implementation of the right to housing [under Article 31 RevESC] may require time’, given the urgency of the housing situation of Roma families, ‘a time frame of six years (1999-2005) should have been enough to realise significant improvements’. In this context, according to the Committee, states ‘enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards the choices which must be made in terms of priorities and resources’.

The Committee has further substantiated this approach—which undeniably alludes to the one laid down in Article 2(1) ICESCR—by linking it to the other interpretive principle that it deduced from the Charter’s preamble: the principle of effectiveness. Therefore, in order to comply with the Charter, a number of assessment criteria must be fulfilled:

States Parties must: (a) adopt the necessary legal, financial and operational means of ensuring steady progress towards the goals laid down in the Charter, (b) maintain meaningful statistics on needs, resources and results, (c) undertake regular reviews of the impact of the strategies adopted, (d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage, and (e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

94 O’Cinneide, supra n 61 at 292.
95 Mental Disability Advocacy Centre (MDAC) v Bulgaria Collective Complaint No 41/2007, Merits, 3 June 2008, at para 39.
96 European Roma Rights Centre v Bulgaria Collective Complaint No 31/2005, Merits, 18 October 2006, at para 37; Autism-Europe v France Collective Complaint No 13/2000, Merits, 4 November 2003, at para 53.
97 Collective Complaint No 31/2005, ibid. at para 39.
98 Ibid. at para 35.
99 FEANTSA v Slovenia Collective Complaint No 53/2008, supra n 71 at para 28.
Having said that, it is important to point out that in most cases, the Committee does not choose to delve into this assessment.\(^\text{100}\)

C. Complementarity with the European Convention on Human Rights

The second recital of the preambles of both the 1961 and 1996 Charters appears to fulfil an incorporative function.\(^\text{101}\) It explicitly takes into account another treaty, the ECHR, rendering it the Charter’s counterpart in the field of civil and political rights.\(^\text{102}\) This crucial assertion was eventually confirmed by the ECSR:

Concerning the object and purpose of the Charter, the Committee reiterates that it is a human rights treaty which aims to implement at a European level, as a complement to the ECHR, the rights guaranteed to all human beings by the Universal Declaration of Human Rights of 1948.\(^\text{103}\)

In this context, it should be noted that the Charter is the international treaty most frequently referred to by the ECtHR in its case law.\(^\text{104}\) Moreover, the Strasbourg Court considers the ECSR to be a ‘particularly well-qualified’ body.\(^\text{105}\) In this respect, the ECtHR has asserted that it ‘certainly’ accepts the interpretive value of the ECSR and ‘has repeatedly had regard to the ECSR’s interpretation of the Charter and its assessment of State compliance with its various provisions’.\(^\text{106}\) Notably, there is no formally institutionalised interaction between the ECSR and the ECtHR laid down in treaty rules. The above explicit reference of the Charter’s preamble to the ECHR as a complementary treaty instrument therefore becomes particularly important in terms

\(^\text{100}\) See, also, Brems, ‘Human Rights: Minimum and Maximum Perspectives’ (2009) 9 Human Rights Law Review 349 at 358.

\(^\text{101}\) Mbengue, supra n 11 at 4.

\(^\text{102}\) The second recital of the Charter’s preamble reads: ‘Considering that in the European Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950, and the Protocol thereto signed at Paris on 20th March 1952, the member States of the Council of Europe agreed to secure to their populations the civil and political rights and freedoms therein specified.’

\(^\text{103}\) European Committee for Home-Based Priority Action for the Child and the Family (EUROCEF) v France Collective Complaint No 114/2015, Merits, 24 January 2018, at para 53; DCI v Belgium Collective Complaint No 69/2011, supra n 48 at para 30; DCI v the Netherlands Collective Complaint No 47/2008, supra n 50 at para 26; FIDH v France Collective Complaint No 14/2003, supra n 46 at para 27.

\(^\text{104}\) Council of Europe/European Court of Human Rights-Research Division, ‘The Use of Council of Europe Treaties in the Case-law of the European Court of Human Rights’, 2011, available at: www.echr.coe.int/Documents/Research_report_treaties_CoE_ENG.pdf [last accessed 3 January 2021]. On the relationship between the ECSR and the ECtHR see, for example, de Schutter and San’Ana, supra n 81 at 92–7; But see, also, concerning the difficulties for the ECtHR to rely to a great extent on the ESC and the ECSR’s output Glas, ‘The European Court of Human Rights’ Use of Non-Binding and Standard-Setting Council of Europe Documents’ (2017) 17 Human Rights Law Review 97 at 117–18; Nußberger, ‘Hard Law or Soft Law—Does it Matter? Distinction Between Different Sources of International Law in the Jurisprudence of the ECtHR’ in van Aaken and Motoc (eds) The European Convention on Human Rights and General International Law (2018) 41.

\(^\text{105}\) Tüm Haber Sen and Çınar v Turkey Application No 28602/95, Merits, 21 February 2006, at para 39.

\(^\text{106}\) National Union of Rail, Maritime and Transport Workers v United Kingdom Application No 31045/10, Merits, 8 April 2014, at para 94.
of an integrated dimension in the protection of human rights. Furthermore, the Committee is a strong advocate of this integrated (and interdependent) approach to the interpretation of human rights and the ECHR is an important parameter in its reasoning. The dynamics of the principle of complementarity between the two treaty instruments have recently been manifested in judicial practice at the domestic level, as demonstrated below.

(i) The Italian perspective

In its judgment No 120/2018, the Italian Constitutional Court (‘ItCC’) — for the first time in its jurisprudence — addressed the question of whether it is admissible to invoke the ESC as an ‘intermediate standard of review’ of the constitutionality of ordinary legislation (parametro interposto). This does not result in constitutionalising international treaties such as the Charter, but rather in providing them with a force of resistance, rendering them superior to ordinary laws and inferior to the Italian Constitution (on condition that they do not conflict with the latter). Consequently, statutory norms that contradict international norms are considered unconstitutional, as they indirectly conflict with Article 117(1) of the Italian Constitution. However, the question of (un)constitutionality that arises when there is a contrast between a treaty provision and a domestic law provision, cannot be addressed by ordinary judges, but solely by the ItCC.

Remarkably, the ItCC pointed out in its judgment that the Charter has specific and distinctive characteristics compared to other international treaties. It stated, in particular, that the Charter has distinctive aspects that are highly specific compared to ordinary international agreements, which aspects it shares with the ECHR. It is noteworthy that in the past, the inclusion of the 1989 United Nations Convention on the Rights of the Child as one of the intermediate standards of review, was not

107 See, generally, Brems and Desmet (eds), Integrated Human Rights in Practice (2017); For an integrated perspective on the relationship between the ECtHR and the ECSR in times of financial crisis, see Brems, ’Protecting Fundamental Rights During Financial Crisis’ in Ginsburg, Rosen and Vanberg (eds) Constitutions in Times of Financial Crisis (2019) 163.
108 Koch, Human Rights as Indivisible Rights: The Protection of Socio-Economic Demands Under the European Convention on Human Rights (2009) at 295.
109 Corte costituzionale, No 120/2018, 11 April 2018 (ECLI:IT:COST:2018:120:120), available (in English) at: https://www.cortecostituzionale.it/documenti/download/doc/recent_judgments/S_2018_120_EN.pdf [last accessed 3 January 2021].
110 See on this Cataldi and Iovane, ’International Law in Italian Courts 1999–2009: An Overview of Major Methodological and Substantive Issues’ (2009) 19 The Italian Yearbook of International Law 3; Cataldi, ’Italy’ in Shelton (ed.), International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion (2011) 328.
111 Article 117(1) of the Italian Constitution reads: ’Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from the [European] community’s legal order and international obligations.’
112 See, relevantly, the ItCC’s reasoning on the so-called twin judgments: Corte costituzionale, Nos 348 and 349/2007, 22 October 2007 (ECLI:IT:COST:2007:348 and ECLI:IT:COST:2007:349). For a comment, see Biondi Dal Monte and Fontanelli, ’The Decisions No. 348 and 349/2007 of the Italian Constitutional Court: The Efficacy of the European Convention in the Italian Legal System’ (2008) 9 German Law Journal 889.
113 ItCC Judgment No 120/2018, supra n 109, at para 10.1.
114 Convention on the Rights of the Child 1989, 1577 UNTS 3.
accompanied by a similar statement from the ItCC, which would potentially distinguish it from other treaties because of ‘distinctive aspects’.¹¹⁵

Subsequently, the ItCC emphasised the complementarity of the Charter with the ECHR by explicitly referring to the Charter’s preamble.¹¹⁶ It argued in particular that whereas the ECHR sought to create a ‘system for the uniform protection’ of fundamental civil and political rights, the Charter constitutes its natural completion on the social level since, as is stated in the Preamble, the Member States of the Council of Europe sought to extend protection also to social rights, recalling the indivisibility of all human rights.¹¹⁷

With this important statement, which attributes decisive importance to the Charter’s preamble, the ItCC posits itself in line with the prevailing legal doctrine that considers economic and social rights as fundamental human rights, in the same way as civil and political rights. Moreover, the Constitutional Court makes a significant opening to the integrated dimension of human rights protection. In conclusion, the ItCC unprecedently asserted that ‘by virtue of these characteristics, the Charter must be classified as international law within the meaning of Article 117(1) of the Constitution.’

More specifically, the ItCC explicitly focused on Article 5 RevESC (which enshrines the right to organise), in order to find that it ‘has a precise content’ and concluded that it is ‘similar to the corresponding ECHR provision’. Consequently, according to the Constitutional Court, ‘it must also be concluded that the exclusion by the signatory states of the right for military personnel to associate within a trade union is incompatible with it [Article 5 RevESC].’¹¹⁸ It is worth noting that Article 5 RevESC, although it is a socio-economic right, has the same structure as a ‘classic’ freedom (of association in this case), which is assimilated to Article 11 ECHR (enshrining the freedom of assembly and association). This ascertainment seems to have played an important role in the Constitutional Court’s reasoning.

These considerations led the ItCC to hold that ‘in the light of both parameters [the Charter and the ECHR], which are binding pursuant to Article 117(1) of the Constitution, military personnel must be recognised the right to join professional trade unions’. The ItCC then elucidated this general finding by stating that ‘the scope and extent of that right must be clarified in the light of the overall content of the international provisions invoked’. It therefore conducted a joint examination of the said provisions of the ECHR, as interpreted by the ECtHR,¹¹⁹ and the RevESC.²²²

¹¹⁵ See, for example, Corte costituzionale, No 31/2012, 15 February 2012 (ECLI:IT:COST:2012:31); Corte costituzionale, No 236/2012, 22 October 2012 (ECLI:IT:COST:2012:236).
¹¹⁶ ItCC Judgment No 120/2018, supra n 109, at para 10.1.
¹¹⁷ Ibid.
¹¹⁸ Ibid. at para 10.2.
¹¹⁹ Matelly v France Application No 10609/10, Merits, 2 October 2014; Adefdromil v France Application No. 32191/09, Merits, 2 October 2014.
¹²² For the ECSR’s position on the matter, which is explicitly inspired by and resembles that of the ECtHR, but was not given particular weight by the ItCC (despite being explicitly regarded as ‘authoritative’), see European Council of Police Trade Unions (CESP) v France Collective Complaint No 101/2013, Merits, 27 January 2016. See, more recently, concerning the issue at stake in Italy following the publication of ItCC judgment No 120/2018, Confederazione Generale Italiana del Lavoro (CGIL) v Italy Collective Complaint
Noting that the wording of the Charter’s provisions ‘does not depart from the ECHR’, the Constitutional Court eventually concluded that the contested legislative provision prohibiting military personnel from establishing professional trade union associations is partly unconstitutional in the light of a conjunctive reading of the ECHR and the RevESC.

(ii) The Dutch perspective

In a somewhat similar manner, in 2015, the Administrative Jurisdiction Division of the Council of State, the highest Dutch administrative court with general jurisdiction, and the Central Appeals Tribunal, the highest Dutch court in legal issues pertaining to social security and civil service, coordinated their jurisdictions. The aim was to render simultaneous decisions that would, inter alia, provide a more detailed understanding of their position with respect to the ESC, and especially the role of the ECSR’s decisions for the interpretation of the ECHR. To do this, judges from both courts took part in each other’s hearings of these cases.

The cases concerned a thorny issue in Dutch law and politics, the (non)entitlement of foreign nationals without lawful residence to a minimum of social assistance amenities (commonly known as ‘Bed, Bath and Bread’). The matter became particularly pressing for the unity of the Dutch government coalition at the time, following the publication of a number of collective complaints decisions by the ECSR. The Committee condemned the Netherlands for the existence of legislation and practice that denied the rights to emergency assistance, medical care and shelter—enshrined in Articles 13(4) and 31(2) RevESC—to children and adult migrants in an irregular situation and without adequate resources in the Netherlands. It is very interesting in this context that the Committee in its interpretation of Article 13(4) RevESC took note of—and accorded great importance to—the ‘so-called core obligations’ under the ICESCR. These core obligations are considered by the CESCR in the interpretation under its General Comments to be ‘non-derogable’ and linked to the dignity of the
human person, thus including ‘access to basic shelter and minimum essential food for everyone, regardless of residence status.’

Remarkably, drawing inspiration from the Charter’s preamble to identify the treaty’s purpose and object, as a human rights treaty complementing the ECHR, the Committee delved into a teleological interpretation of the Charter’s Appendix. As a result, following an earlier precedent, the Committee has overcome, through its interpretation, the limitations with respect to the Charter’s scope of application vis-à-vis foreign nationals without lawful residence—in this case in the Netherlands. Shortly after, the ECtHR accepted the above interpretation of the ECSR in its case law. In particular, the Strasbourg Court used the Committee’s interpretation as a source of inspiration to determine the obligations of Belgium and the Netherlands with regard to the provision of minimum guarantees to asylum seekers under the ECHR.

The Dutch Supreme courts asserted that the decisions of the ECSR are not binding on the contracting parties, so that no direct claims can be derived from them. Nonetheless, the courts accepted that the decisions of the Committee are ‘authoritative’ and were given value by the ECtHR with respect to the issue raised through the interpretation of Articles 3 and 8 ECHR, enshrining the prohibition of torture and the right to respect for private and family life, respectively. However, according to the Administrative Jurisdiction Division of the Council of State, this does not alter the fact that, ultimately, the interpretation that the ECtHR gives to the ECHR provisions is decisive. This position was reiterated in more recent decisions of the two Supreme courts.

Crucial in this respect is that Articles 3 and 8 ECHR are generally regarded by Dutch case law as ‘binding on all persons’ within the meaning of Articles 93 and 94 (supremacy clause) of the Dutch Constitution. This means that these ECHR provisions are higher in rank than the acts of Parliament and the Constitution itself, and that they have a direct effect on the Dutch legal order. Consequently, domestic courts—regardless of the degree of jurisdiction—have the power to review constitutional law and primary or subordinate legislation for conflicts with the international obligations laid down in Articles

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128 Ibid. at paras 36–8 citing Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food, 12 May 1999 at paras 4, 15; Committee on Economic, Social and Cultural Rights, General Comment No 4: The right to adequate housing, 13 December 1991 at paras 6–7; Committee on Economic, Social and Cultural Rights, General Comment No 14: The right to the highest attainable standard of health, 11 August 2000 at paras 43, 47.
129 V.M. and others v Belgium Application No 60125/11, Merits, 7 July 2015, at paras 159–60; Gadaa Ibrahim Hundev the Netherlands Application No 17931/16, Merits, 5 July 2016, at para 53.
130 To support that argument, the two highest Dutch administrative courts referred to the judgments of the ECtHR in National Union of Rail, Maritime and Transport Workers v United Kingdom, supra n 106; V.M. et al. v Belgium ibid.
131 Afdeling bestuursrechtspraak van de Raad van State, No 201904775/1/A3, 1 April 2020 (ECLI:NL:RVS:2020:922); Centrale Raad van Beroep, No 18/3001PW, 29 September 2020 (ECLI:NL:CRVB:2020:2315).
132 See, generally, Brouwer, ‘The Netherlands’ in Hollis et al. (eds), National Treaty Law and Practice (2005) 483; Alkema, ‘Netherlands’ in Shelton, supra n 110, 407; Nollkaemper, ‘The Netherlands’ in Sloss (ed.), The Role of Domestic Courts in Treaty Enforcement: A Comparative Study (2010) 326.
3 and 8 ECHR. This confirmation becomes particularly important considering that the direct effect of the invoked Charter provisions (Articles 13(4) and 31(2) RevESC) has traditionally been denied by Dutch courts.

It is therefore apparent that the two Dutch Supreme courts recognise the fact that the ECSR’s decisions are authoritative and play a role in the interpretation of ECHR provisions. The Central Appeals Tribunal also explicitly took into account the ECSR’s main starting points in its interpretation on the above-mentioned collective complaints decisions against the Netherlands, despite the outright rejection of the ECSR’s approach by the Dutch Government as ‘contra-legem’. The perspective of the Dutch courts is therefore emblematic of the indirect, albeit significant, effects that the explicit and substantive consideration of the Committee’s decisions may have on the rulings of national courts applying the ECHR, especially when the direct effect of the Charter’s provisions is denied.

But most importantly for the purpose of this study, the above practice of Dutch courts is an exemplar of the important role that the incorporative function of the Charter’s preamble can play in identifying the Charter’s purpose and object and in shaping the interpretation of its provisions by the ECSR and domestic courts. Moreover, the jurisprudence of both Italian and Dutch courts illustrates the following: civil and political rights, as well as economic and social rights—enshrined, respectively, in the ECHR and its counterpart the ESC as construed by their monitoring bodies—can be interpreted in a coherent manner by reference to their ‘normative environment’. This is made possible in particular through the use of the systemic integration (of human rights) technique, which is founded upon the principles of indivisibility, interdependence and interrelatedness of human rights, as well as on cross-fertilisation and convergence.

4. CONCLUSION

The above assessment of the missions and principles underpinning the preamble of the ESC, as well as their implications for the relevant practice, reveals several important considerations in terms of the value of human rights treaties’ preambles in the interpretation of substantive rights and state obligations. First of all, the findings suggest that the Charter’s preamble fulfils multiple functions in international law, albeit not always in a straightforward manner, and therefore deserves further attention. On closer inspection,

135 Gerards and Fleuren, ‘The Netherlands’ in Gerards and Fleuren (eds), Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law. A Comparative Analysis (2014) 217 at 223.

136 See, for example, Afdeling bestuursrechtspraak van de Raad van State, No 200603538/1, 17 January 2007 (ECLI:NL:RVS:2007:AZ6424) at para 2.2.2; Afdeling bestuursrechtspraak van de Raad van State, No 201801357/1/A2, 10 October 2018 (ECLI:NL:RVS:2018:3277) at para 4.2.

137 See, for example, DCI v the Netherlands, supra n 50 at paras 30–1; CEC v the Netherlands, supra n 75 at paras 63–4.

138 d’Aspremont, ‘The Systemic Integration of International Law by Domestic Courts: Domestic Judges as Architects of the Consistency of the International Legal Order’ in Fauchald and Nollkaemper (eds), The Practice of International and National Courts and the (de-)Fragmentation of International Law (2012) 141 at 148. See, also, Koch, ‘Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective’ (2006) 10 The International Journal of Human Rights 405.

139 See Article 31(3)c Vienna Convention on the Law of Treaties, supra n 4.
its recitals seem to extend across all ends of the spectrum of treaty preambles’ functionalities and legal effects. They serve as a reflection of the state of affairs in the protection of economic and social rights (principle of indivisibility) or as interpretive commitments (principles of effectiveness, progressive realisation and resource availability). At the same time, the recitals of the Charter’s preamble serve as tools to incorporate other human rights treaties—and in particular its sister treaty, the ECHR—into the Charter system (principle of complementarity with the ECHR). In addition, they even contain quasi-legislative obligations, when considered in connection with the operative content of the treaty (principle of non-discrimination). On the one hand, this has to do with the particularities of the ESC qua international treaty, which should not be overlooked.

On the other hand, the concise, precise and carefully negotiated wording of the principles laid down in its preambular paragraphs has enabled the ECSR, the Charter’s monitoring body, to infer the underlying purposes of the economic and social rights protected by the Charter, in conjunction with its text. Remarkably, inspired either explicitly or implicitly by the general rule of interpretation under the Vienna Convention on the Law of Treaties (Article 31), the ECSR has grounded the fundamental lines of its interpretation under the Collective Complaints Procedure on these preambular principles. The Committee’s creative and dynamic interpretation serves as an example of a human rights treaty body that responds to the contemporary challenges of identifying the treaty’s object and purpose, by engaging directly or indirectly with the content of its preamble through its reasoning. Furthermore, the interpretive practice of the Committee illustrates the importance of the Charter’s preamble in substantively influencing the rights and obligations arising from the treaty.

It is striking that the Charter and the Committee’s approach have recently acquired considerable relevance at the domestic level. This has been facilitated in particular by the recognition of the Committee’s authority by the ECtHR and by the impact of that recognition on the reasoning of domestic courts. Regardless of the differing views within national jurisdictions vis-à-vis the relationship between international treaty law and national law (for example monism-dualism, supremacy, direct effect), domestic courts have provided examples of the indirect justiciability and enforcement that can be attributed through the ECHR system to the economic and social rights provisions enshrined in the Charter. The interpretive principles derived by the ECSR from the Charter’s preamble have made a major contribution in that respect. Therefore, as a ‘blessing in disguise’, the Charter’s preamble could eventually be considered a decisive factor in the interpretation of the treaty’s provisions, with important implications for the protection of economic and social rights in Europe.

However, the obstacles that impede the effective implementation of the principles that are embodied in the Charter’s preamble should not be disregarded. The relatively low number of ratifications by the contracting parties to the ESC of the optional Protocol establishing the Collective Complaints Procedure, through which the Committee has articulated its core vision of the underlying purposes of the Charter rights, undermines the legitimacy and credibility of the treaty. In addition, it creates a fragmented ‘two-speed’ system of economic and social rights protection under the ESC in Europe. Although the Committee has made a commendable effort to incorporate the
collective complaints findings in its ‘conclusions’ under the reporting procedure (and vice versa), the point still stands.

One of the factors explaining the reluctance of states to ratify the Collective Complaints Protocol is essentially their unease in accepting the Committee’s contextual and teleological interpretation of the Charter provisions, as grounded inter alia on the treaty’s preambular principles. The unease of states revolves in particular around a potential ‘expansion’ of state obligations through the Committee’s dynamic-evolutive interpretation, and the impact that this may potentially exert on legislation and national welfare State systems. For the same reason, it is not uncommon for the domestic courts of states that have ratified the Collective Complaints Protocol to merely evoke the non-binding character of the ECSR’s collective complaints decisions as an excuse to dismiss relevant pleas. Similarly, states that have ratified the Protocol often show reluctance to respect the collective complaints findings of the ECSR by bringing the situation in question into conformity with the Charter. Hence, compliance with the principle of effectiveness, which is the main mission of contracting parties under the preamble of the Collective Complaints Protocol to the Charter, still seems to be a long march.

All in all, taking the example of the ESC, this article challenges the common assumption that treaty preambles—and especially those of human rights treaties—are empty phrases of a merely ceremonial nature. Preambles can perform several functions in international (human rights) law and serve as a reference point for the interpretation of human rights obligations by treaty monitoring bodies and courts at the international and national level. More research in this area, and more generally on the effects of courts and treaty bodies’ interpretive engagement with human rights treaties’ preambles and the principles laid down therein, especially in the field of economic and social rights, would be enlightening.

141 See Council of Europe Steering Committee for Human Rights, ‘Improving the Protection of Social Rights in Europe. Report Identifying Good Practices and Making Proposals with a View to Improving the Implementation of Social Rights in Europe’, 18–21 June 2019, Vol II at paras 10, 70–2.