

Strengthening Compliance with Economic and Social Rights:

A Theoretical and Practical Approach

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List of abbreviations

| | |
|--------|-----------------------------------------------------------------------------------------|
| ICCPR | International Convention on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ILO | International Labour Organization |
| UDHR | Universal Declaration on Human Rights |
| UN | United Nations |
| ECOSOC | Economic and Social Council |
| ESCR | Economic Social and Cultural Rights |
| ICEDAW | International Convention on Elimination of All forms of Discrimination against Women |
| CRC | Convention on the Rights of the Child |
| ECHR | European Court of Human Rights |
| ACHPR | African Court on Human People's Rights |
| ESC | European Social Charter |
| CPR | Civil and Political Rights |
| CESCR | Committee on Economic, Social and Cultural Rights |
| ECSR | European Committee on Social Rights |

Abstract

The thesis presents some reflections regarding the potency of socio-economic rights. The paper points out the role of socio-economic rights and the interdependence of the two sets of rights. The aim of this paper is to argue that there is no reason to deny the economic, social and cultural rights legally binding status under international law and a black-and-white distinction between civil and political rights on one side and economic, social and cultural rights on the other is mistaken and instead a more integrated approach encompassing both sets of rights must be endorsed.

Acknowledgement

Abstract

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Chapter I - Introduction

1. Presentation of topic

In recent years, increased attention has been given to economic, social and cultural rights internationally and, to a certain degree, domestically. Economic, social and cultural rights are found in a range of international human rights instruments including the International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966 (ICESCR), the International Convention on the Elimination of All forms of Discrimination Against Women adopted on 18 December 1979 (CEDAW), the Convention on the Rights of the Child adopted on 20 November 1989 (CRC), the International Labour Organization's created in 1919 (ILO).

One of the dominant normative features of the Universal Declaration of Human Rights is the relatively integrated manner in which the aspiration to protect human dignity is translated into enumeration of fundamental human rights. The strong bifurcation of what we now tend to think of as two grand categories of human rights (so-called "civil and political rights" and so-called "economic, social and cultural rights") occurred through the creation of two instruments; the ICCPR and ICESCR.

In addition to the political disputes, which essentially contributed to the adoption of two separate covenants, there was also apparently the non-ideological impact for substantive and procedural differences between both categories of rights. The accumulation of these disputes, excessive politicisation and the bias of many states towards one side or another in their policy-making and practice, brought forth the expected response: the promotion of the principle of indivisibility and interdependence of all human rights.

Economic, social and cultural rights have a number of particular characteristics. It is helpful to know what these are in order to advocate for strengthening of a State's obligations:

Firstly, States can 'progressively realize' economic, social and cultural rights. Under Article 2(1) of the ICESCR a state party is to 'undertake steps individually and through international assistance and co-operation ... to the maximum of its available resources with a view to achieving progressively the full realization of the rights recognized in the ... Covenant'.

Significantly, the steps towards fulfilling the rights are to be taken within a 'reasonably short time' and should be 'deliberate, concrete and targeted' toward fulfilling ESC rights.¹ Thus, it is not only once a state has reached a certain level of economic development that the obligations provided for under the Covenant are to be

¹ CESCR General Comment No. 3 on the Nature of the states Parties' Obligations, UN doc. E/1991/23, Annex III, 1990, para. 2

undertaken. The duty in question obliges state parties, regardless of their level of national wealth, to move towards the realization of ESC rights. Also any process aimed at fulfilling the rights is immediately subject to the application of the principle of non-discrimination.²

2. Research Question and Justification

The following are the intended research questions:

- What is the legal status of Socio-Economic Rights?
- What is the legal relation between the Economic, Social and Cultural Rights and Civil and Political Rights? How could one have an integrated approach?

The overall objective of this study is to contribute to the improvement of promotion, protection and fulfilment of the ESCR. This research will be conducted from a legal and international point of view, since my background is international law.

Since the formation of the United Nations (UN) in 1945 the world has witnessed an unprecedented expansion of internationally recognized human rights.

Nevertheless, a world in compliance with human rights continues to be one of the most important challenges facing the international community. Respecting the dignity of every individual human being and creating a legal climate in which human rights can flourish are not only fundamental ethical requirements, but also preconditions for sustainable political stability, as well as for economic and social development in the world.

The Human Rights are written agreements, which let each state decide whether they want to comply by signing the agreement, or not. These agreements are called treaties and/or conventions. States that decide to comply with one or more of these agreements, in fact, choose to cede a part of their sovereignty as a state. By complying, the state itself (and not its individuals), undertake an obligation to treat each and every individual inside their jurisdiction in accordance with such. From this perspective, the human rights can be considered as international law with effect on individuals.³

The purpose of this thesis is to examine socio-economic rights in the context of the contemporary international legal order. The main theme in accessing this debate will be to consider what is at stake when determining the normative content of the human rights regime and of socio-economic rights within it. Also, this paper is to argue that there is no reason to deny the economic, social and cultural rights legally binding status under international law and a black-and-white distinction between civil and political rights on one side and economic, social and cultural rights on the other is

² *Ibid.*, para. 1.

³ Høstmælingen, Njål. Hva er Menneskerettigheter. 1sted. Oslo, Universitetsforlaget, 2005. p. 8

mistaken and instead a more integrated approach encompassing both sets of rights must be endorsed.

In order to access of the debate relating to socio-economic rights, a rather broad understanding of human rights law within the larger structures of international law and politics is required. Therefore the paper initially describes some characteristics and functions – as well as some of the relevant historical and political background – of international law, human rights law and socio-economic rights.

This thesis will therefore look at the legal framework of the ESCR with the interest of resolving the issue of legal status of these rights. This will include an analysis of the content of the ESCR, its general relationship with CPR and some of the issues that have arisen in negotiations.

3. Methodology and Material

For the completion of this thesis, information from a variety of sources, mainly books and articles, have been gathered and studied. This thesis will be a legal analysis of the ESCR. I have chosen the ICESCR as my primary international human rights tool. Also regional instruments such as African Commission on Human and Peoples' Rights, Inter-American Commission on Human Rights, European Social Charter and the European Convention on Human Rights. An assessment will also be borrowed from case studies. Writings of authors on the relevant research topics will also be borrowed. Appropriate websites will also be an added source.

This study comes across with concepts and terms that basically have to be understood as defined here. For instance, implementation means the structures and procedures that are placed by the government to give effect to the ESCR at the national level. Enforcement is understood as the legal action and mechanism which a person is able to use to launch a judicial complaint regarding a violation of his rights and make them effective through the necessary remedy.

Justiciability means that people who claim to be victims of violation of ESCR are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation have been found to have occurred or to likely to occur, and to have any remedy enforced.' In addition to this legal term is the concept of accountability which means holding government responsible for its actions in order to realise ESCR as well as the obligation to explain to the people all aspects of those actions within an acceptable time.

4. Structure

The study is structured in five chapters. Chapter one will be an introduction to this work, that is, research objectives, sources and the methodology used. A delimitation and structure of the thesis will be inclusive. Chapter two provides the role of Economic, Social and Cultural Rights and the protection of such rights in the international arena. Chapter two and three considers the formal relationship between the two sets of rights, primarily as regards to the development of implementation and enforcement mechanisms. Also chapter three present us in a detailed manner the role of the Committee on the ESCR and his Optional Protocol. This chapter together with chapter two provide an important background for the first question of the thesis. Chapter four investigates the principle of indivisibility and interdependence of human rights and international law. Also this chapter gives us a detailed icon how the two sets of rights could have an integrated approach. This chapter give us the answers for the second question of the thesis. Lastly chapter five will be on the conclusions and recommendations of the thesis study.

Chapter II – ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. *The Concept of Economic, Social and Cultural Rights*

Economic and social rights are an essential part of the normative international code of human rights. They have their place in the UDHR,⁴ in universal and regional general conventions on human rights and in the network of human rights treaties aimed at the eradication of discrimination and the protection of certain vulnerable groups.⁵

The Universal Declaration of Human Rights recognizes two sets of human rights: the traditional civil and political rights, as well as economic, social and cultural rights. In transforming the Declaration's provisions into legally binding obligations, the United Nations adopted two separate International Covenants which, taken together, constitute the bedrock of the international normative regime for human rights.

The realisation of ESCR depends fundamentally on the respect to the rule of law. In 1993 the UN World Conference on Human Rights in Vienna underlined that principle of the rule of law and the protection and promotion of human rights are inseparable. Realisation of ESCR means to give effect to the provisions of ESCR in order to make them real and effective.⁶

The subsequent division of human rights into two main categories resulted from a controversial and contested decision made by the UN General Assembly in 1951, during the drafting of the International Bill of Human Rights. The General Assembly decided that two separate human rights covenants should be prepared, one on civil and political rights and another on economic, social and cultural rights. Civil and political rights were considered to be absolute and immediate, whereas economic, social and cultural rights were held to be programmatic, to be realized gradually and therefore not a matter of rights.⁷

Both in the literature and the international practice, Economic, Social and Cultural Rights are generally regarded and discussed as a single category. In discussing them, reference is usually made to Articles 22-27 of the Universal Declaration of Human Rights, where these rights are grouped together. It has been asserted that Economic, Social and Cultural Rights constitute a 'second generation' of human rights, the first generation being civil and political rights, and a later on a third generation of solidarity rights has been added, such as the right to self-determination and the right to development. This notion of three generations, which

⁴ See, in particular, Articles 22-25 of the UDHR.

⁵ See, e.g., Article 5 of the Convention on the Elimination of all forms of Racial Discrimination, Article 11 to 14 of the International Convention on the Elimination of Discrimination against Women.

⁶ The World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23.

⁷ E.W. Vierdag, 'The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights'. Vol.9 (1978) p.69-103 at p.103

was first put forward by Karel Vasak in 1979, appeared quite suggestive and has been repeated by many.⁸

The two covenants came to reflect the diverging opinions of the debate, constituting a compromise between those in favour of one and those in favour of two documents. On the one hand, the countries declared their dedication to the interdependence principle; meaning that the two sets of rights are interdependent and interrelated, thus can neither logically nor practically be separated and should be respected and promoted just the same. On the other hand, a formal imbalance between the two sets of rights appears in favour of the civil and political rights.

A further categorization might be made as follows. Economic rights relate to guarantees and claims to participation in the economic life of the community in order to gain advantage from (professional) activities undertaken. An example is the right to property, although this is not included in the International Covenant on Economic, Social and Cultural Rights, but is included in the Universal Declaration of Human Rights (Article 17), the first Protocol to the European Convention on human Rights (Article 1), the American Convention of Human Rights (Article 21) and the African Charter on Human and People's Rights (Article 14).⁹

The Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights create binding legal obligations for the states parties. Therefore, as between them, issues relating to compliance with and the enjoyment of the rights guaranteed by the covenants are matters of international concern and thus are no longer exclusively within their domestic jurisdiction.¹⁰

The covenants have a number of common substantive provisions. Two of this deal with what might be described as 'people's' or 'collective' rights. Article 1(1) of both Covenants proclaims that "all peoples have the right to self-determination by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."¹¹

Both instruments recognize in article 1(2) that all peoples have the right to freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. And that, 'in no case, may a people be deprived of its own means of subsistence.'¹²

Economic, social and cultural rights have become part and parcel of international human rights law, not only at the universal but also to the regional level. They are contained in the European Social Charter, in the Additional Protocol to the American

⁸ See K. Drzewicki, 'The Right to Work and the Rights in Work, Chapter 13 and M. Nowak, 'The Right to Education', Chapter 14.

⁹ For a review of the codification of the right to property as a human right, see L. Valencia Rodriquez, The right to own Property Alone as Well as in Association with Others, Final Report, UN Doc. E/CN.4/1993/15, section 1.

¹⁰ See T. Buerghenthal, Human Rights, International Law and the Helsinki Accord 21, (1997) p.29-33.

¹¹ See Hannum "Rethinking Self-Determination" 34 Va. J. Int'l L. 1 17-18 (1993).

¹² See Morphet, "The Development of Article 1 of Human Rights Covenants" (1989)

Convention on Human Rights in the Area of Economic, Social and Cultural Rights, and in the African Charter on Human and Peoples Rights.¹³

2. The relationship between the Two Sets of Rights

The two covenants came to reflect the diverging opinions of the debate, constituting a compromise between those in favour of one and those in favour of two documents. On the one hand, the countries declared their dedication to the interdependence principle; meaning that the two sets of rights are interdependent and interrelated, thus can neither logically nor practically be separated and should be respected and promoted just the same. On the other hand, a formal imbalance between the two sets of rights appears in favour of the civil and political rights.

The formal imbalance embedded in the two documents is described in this section.

The first imbalance has to do with the nature of the obligations of the parties. The general obligation of the ICCPR requires member states to undertake: to “...respect and to ensure...” the rights of the covenant, whilst the obligation in the socio-economic covenant requires states to “...take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Looking at the specific obligations, the rights of the civil and political charter are presented in terms such as “everyone has the right to...” or “no one shall be...”, while the socio-economic rights are presented with terms like “State Parties recognize the right of everyone to...” These formulations have been subject of critique, as the covenant on civil and political rights calls for immediate implementation and compliance by all states while the covenant on economic, social and cultural rights calls for progressive realization and since the realization of socioeconomic rights depends on the availability of resources.¹⁴

When it comes to implementation mechanisms and judicial enforcement, another imbalance appears, as the covenant on civil and political rights requires states to “develop the possibility of judicial remedy” (art 2(3b)) while there is no equivalent provision in the covenant on socio-economic rights. However, article 8 of the Universal Declaration states that “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”, which arguably applies to socio-economic rights as well as civil and political rights. The covenant of socio-economic rights says that governments must use “all appropriate means” in order to put them into effect, and does not specify the meaning of this other than that it includes “particularly the

¹³ A. Eide, C. Krause, A. Rosas, ‘Economic, Social and Cultural Rights’ A Textbook Second Edition (2001) p.4

¹⁴ Steiner, H and Alston, P: “International Human Rights in Context: Law, Politics, Morals”, Oxford, Oxford University Press, 2000, p. 246.

adoption of legislative measures” (art 2(1)). Even so, this provision could reasonably be interpreted as requiring the provision of judicial remedies.¹⁵

The covenant on civil and political rights and the covenant on socio-economic rights are equally authoritative legal instruments. Thus, it is the Universal Declaration together with the covenant on civil and political rights, as well as the covenant on socio-economic rights which constitute the International Bill of Human Rights.

Furthermore, in accordance with the interdependence principle and fundamental to the human rights doctrine, all human rights are interdependent and interrelated, must be treated with the same emphasis and shall be respected and promoted just the same. The covenants necessitate one and other, which means that there can be no civil and political rights without socio-economic rights and vice versa.

Some of the critique of socio-economic rights even go as far as saying that it is an insult to insist on socio-economic rights as being human rights when there is no realistic prospect of them being upheld, as hundreds of millions of people on the planet suffer from malnutrition and vulnerability to disease and starvation. Even those rights which seem more fundamental, such as nutrition, health care and sanitation cannot be defined legally; at what level should these rights be considered as violated? While it is reasonable to require from states not to torture their citizens, it is not obvious that we can require them to guarantee them all livelihood, adequate housing and a healthy environment.¹⁶

The response to such critique is that human rights most urgently need to be asserted and defended, both theoretically and practically, where they are most denied. The argument that socio-economic are less justifiable since they require state expenditures is not persuasive, as the maintenance of all rights does depend on financial means. The state is responsible for the protection and promotion of all rights. Neither civil and political rights, nor socio-economic rights are free of costs or self-generating; they need legislation, promotion and protection which all require resources.

3. The Protection of Economic, Social and cultural Rights

The approaches to implementation and enforcement of socio-economic vary, but some methods are for instance the application of non-enforceable directive principles of state policy, constitutional entrenchment in a bill of rights, protection of socio-economic rights through civil rights guarantees and enforcement at the state level in a federal system.¹⁷

The United Nations system for the protection of human rights does include certain possibilities for individual complaints in the case of economic, social and cultural rights being violated.

¹⁵ General Comment No. 9, para. 10

¹⁶ See *supra*, note 14 p. 255

¹⁷ Woods, J: “Emerging Paradigms of Protection “Second Generation” Human Rights”, 6 Loy. J Pub. Int. L. 103 2004-2005, p 104.

The ‘1503 Procedure’, established by the Commission on Human Rights and Article 14 of the Convention on the Elimination of all Forms of Racial Discrimination (CERD) make no distinction of the right in question. Still, the role of these procedures for the creation of institutionalized lines of legal interpretation has remained limited and, therefore, attention must be devoted to the International Covenant on Civil and Political Rights (CCPR) and the CESCR and to the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

On the international plane, a number of cases decided by the UN Human Rights Committee or the supervisory organs of the ECHR are used to illustrate the so-called integrated approach, the possibility of the treaty bodies in question to protect or at least to take into account social and economic rights through their task to afford international protection to those rights explicitly covered by the treaties in question.¹⁸

The UN Committee on Economic, Social and Cultural Rights has emphasized the importance of judicial remedies for the protection of the rights recognized in the CESCR. It considers that, in many cases, the other ‘means’ could be rendered ineffective if they are not reinforced or complemented by judicial remedies.¹⁹ The inclusion of economic and social rights as justiciable rights in a country’s constitutions provides a great deal of scope for developing effective judicial remedies for these rights.²⁰

The Committee on Economic, Social and Cultural Rights has also commented as follows:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.²¹

¹⁸ *Ibid.*, note 11, p.31-32

¹⁹ General Comment No. 9 (1998) on the domestic application of the International Covenant on Economic, Social and Cultural Rights, para., 3. These other means include legislation as well as administrative, financial, educational and social measures.

²⁰ Sandra Lienberg, “*The Protection of Economic and Social Rights in Domestic Legal Systems*”, In E. Asbjorn, C. Crause and A. Rosas (eds.), *Economic, Social and Cultural Rights: A Textbook*, Second Revised Edition, Dordrecht: Martinus Nijhoff Publishers, 2001. p. 57.

²¹ General Comment No. 9, para. 10

Chapter III – THE IMPLEMENTATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. The Implementation of the Rights: State Obligations

As mentioned above the ICESCR represents a legal instrument to implement ESCR universally. It requires States “to take steps, individually and through international assistance and cooperation, especially economic and technical” towards the realization of the rights under the Covenant (Art. 2(1)). Article 2(1) is the key to the ICESCR. It identifies the steps the government must take in order to realise each substantive right.

Article 2

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Social rights are seen as different from civil and political rights in that they are supposed to be implemented progressively, or over time, rather than immediately. Article 2(1) of the ICCPR requires States Parties to “respect and ensure” the rights set forth in that Covenant. The ICESCR, by contrast, requires States Parties to “take steps...to the maximum of available resources” to realise its rights.

The third General Comment, adopted by the Committee, deals with the nature of the obligations imposed on States party under Article 2(1) of the ICESCR²² A State Party should act quickly once the Covenant enters into force for that State with a view to take measures as required by Article 2(1).

The States must respect, protect and contribute to the realization of all ESCR, such as the right to health, to food, to water and to adequate housing, nationally and in other countries.

A better way to conceive of the obligations under the Covenant and human rights obligations in general, is that they include three types of obligations. The *obligation to respect* requires the State not to do anything that would actively interfere with the realisation of the right (e.g. banning unions, forced evictions). The *obligation to protect* requires the State to ensure that individual’s rights are not violated by private non-state actors, such as corporations, landlords or paramilitaries (e.g. refusing to enforce labour laws, illegal expropriations of land). The *obligation to fulfil* the State to take positive steps to ensure the realization of the right in question,

²² See *supra* note 3.

which may include “... legislative, administrative, judicial and other measures towards the full realization of such rights”²³

A progressive obligation under the Covenant is an obligation to implement the right over time, to the maximum of available resources. A careful reading of General Comment No. 3 reveals that a Government is required to do at least three concrete things to implement its obligations progressively. First, it must take specific steps, and cannot do nothing. Second, the steps must be ‘expeditious’ and ‘effective’. Third, the steps must be “deliberate, concrete and targeted as clearly as possible...”²⁴

It is clear that progressive obligations must be acted on immediately, and thus contains sub-obligations that are of immediate effect. The difference between a progressive obligation and an immediate obligation appears to be that all of the elements of a specific immediate obligation must be realised at once or as a matter of first priority. A final point about progressive obligations is that they impose equally onerous obligations on rich countries. Since the obligation is to promote the rights to the maximum of available resources, rich countries must also spend heavily to respect, protect and fulfil the rights of the people living on their territory.

State Parties to the present Covenant has also immediate obligations. For example, if a State has an immediate obligation to adopt a plan of action for primary education, merely commencing the plan will not suffice. It must adopt a completed one. If it does not, it violates the Covenant. If it has a progressive obligation to adopt a plan of action for higher education, commencing the plans implementation in an expeditious manner will suffice.²⁵

Other examples of immediate obligations include the obligation to take steps under the Covenant, to guarantee all of the rights on a non-discriminatory basis, to monitor for instance the housing rights situation, and to adopt a national plan of action in respect of certain rights.²⁶

The Committee also feels that every State Party to the Covenant has a basic obligation to assure its own subjects of a minimum level of enjoyment of every right. That is to say, every right possesses a certain *minimum core* content without which that right becomes meaningless.

The Committee is of a view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party. In order for a State Party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.²⁷

²³ Jeff. K, *An Activist's Manual on the International Covenant on Economic, Social and Cultural Rights*, Law and Society Trust, March 2003, p.39.

²⁴ *Ibid*

²⁵ *Ibid*, p.41

²⁶ *Ibid*

²⁷ General Comment No. 3, para. 10.

In Colombia, the Constitutional Court recognises that obligations concerning economic, social and cultural rights are progressive in character but has drawn on General Comment No. 3 to stress that, at a minimum the State ‘must devise and adopt a plan of action for the implementation of the rights’. It has intervened to immediately enforce such rights by broadly interpreting the right to life, dignity and security and enforcing a ‘minimum conditions for dignified life’ (borrowing directly from the German on Existenzminimum) although it has a fairly enlarged vision of the minimum core.²⁸

In its General Comments on rights as well as in numerous recommendations to states, the Committee applied the notion to define the scope of some rights. Other Human Rights bodies, such as the Inter-American Commission and the Inter-American Court of Human Rights, have also used this tool. The Inter-American system has used the notion of essential core or minimum core on various occasions, though this usage is not limited to economic and social rights.²⁹ For instance, in the *Street Children case*³⁰, the Inter-American Court of Human Rights said that the right to life includes a right to a dignified existence, thus, it established a minimum content of a civil right and linked it with general minimal conditions to be guaranteed on the ESC realm.³¹

The minimum core concept maintains that there are some (part of) rights – especially in ESCR – that should be immediately attended and implemented, i.e., that generate an immediate obligation for results instead of being subjected to progressive implementation and; therefore, should receive priority over other (parts of) rights.

The African Charter requires States Parties to implement socio-economic rights immediately. However, in recent case law the African Commission seems to have taken a contrary position. The African Commission attempted to outline the socio-economic obligations of states in greater detail for the first time in the *SERAC Case*.³² It stated that all rights generate the duties to respect, protect, promote and fulfil.³³

In the *SERAC Case*, the African Commission made statements suggesting that it has adopted the minimum core obligations concept developed by the UN Committee on economic, social and cultural rights, which monitors the implementation of the ICESCR. It stated that the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources.³⁴ It stated similarly that the minimum obligation embodied in the right to shelter obliged the Nigerian government ‘not to destroy the houses of its citizens and not to obstruct efforts by individuals or communities to rebuild lost homes. It could therefore be argued that

²⁸ Langford, M. “*Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*”, Cambridge University Press, 2008, p. 22

²⁹ This could be explained since the Committee monitors the ICESCR, while the Court possess jurisdiction over a wider range of rights.

³⁰ I/A Court H.R., Case of the “Street Children” *Villagran Morales v. Guatemala*. Merits. Judgment of November 19, 1999. Series C NO. 63.

³¹ “In essence, the fundamental right to life includes, not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence.

³² Communications 155/96 *SERAC Case*, Ref. ACHPR/COMM/A044/1, 27 May 2002

³³ *Ibid*, para., 44

³⁴ *Ibid*, para 65

both the duty to respect and the minimum core obligations implicit in socio-economic rights under the African Charter are claimable immediately.³⁵

1.1 National Implementation of Economic, Social and Cultural Rights

Economic, Social and Cultural Rights have also been developed at the national and regional level. The Limburg Principles on the Implementation of the ICESCR state that at the national level States parties shall use all appropriate means, including legislative, administrative, judicial, economic, social and educational measures, consistent with the nature of the rights in order to fulfil their obligations under the Covenant.³⁶

Three basically modalities of ESC-rights realization have been chosen by states:

They either provide *specific constitutional provisions* on ESC rights, but usually only in a haphazard and ancillary manner, as compared with civil and political rights formulations in the constitutional texts. Constitutions that have been formulated or changed after 1970 tend to contain more express ESC rights than older constitutions.³⁷

The second modality is to lay down *constitutional structural principles* like the human dignity clause linked to the social state principle under the German Basic Law, serving an umbrella function. ESC rights are thereby included, as far as the existential minimum; the 'survival kit' of every individual is concerned. If, for example, a fundamental social right belonging to survival requirements were not covered in a National Assistance Act, then the individuals concerned would retain an immediate claim right before the German Federal Constitutional Court.³⁸

The third modality is that of the realization of the ESC-rights entirely to the *ordinary statutory level*. Numerous laws exist dealing with ESC rights, but ultimately, the doctrine of the supremacy of Parliament as in the United Kingdom requires that the democratically elected members of Parliament should remain free in making their policy choices regarding these ESC policies.³⁹

³⁵ Langford, M. "Social Rights Jurisprudence: Emerging Trends in International and Comparative Law", Cambridge University Press, 2008, p. 326

³⁶ Limburg principles para 17

³⁷ C. Krause, M. Scheinin, 'International Protection of Human Rights' A Textbook, Abo Akademi University, 2009, p.146.

³⁸ *Ibid*

³⁹ *Ibid*, p.147

2. Justiciability of Economic, Social and Cultural Rights

An issue is 'justiciable' when a court is the capable and legitimate institution for resolving it.

Jean Ziegler, the special Rapporteur of the UN has defined justiciability as the possibility that a human right, which is recognised in general terms, can be invoked before judicial and semi-judicial organisms that can determine whether the right has or has not been violated and can decide about the redemptive measures to be taken. There are two main issues that have been raised in the various arguments on 'justiciability.' The first is the complex questions of resource constraints and the appropriate role of the judiciary in this regard and secondly the existence of a mechanism or procedure to resolve alleged violations of the rights in question.⁴⁰ This means that with the coming into force of the optional protocol to the ICESCR this will make ESCR justiciable.

The ICESCR makes no provision for remedy but the CESCR has asserted the importance of individuals having access to national courts or other appropriate bodies to seek remedies for violations of the Covenant. In General Comment No. 9 (1998), *the domestic application of the Covenant*, it asserted that 'whenever a Covenant right cannot be made fully effective without some role for the judiciary, judicial remedies are necessary' and that 'there is no Covenant right which could not, be considered to possess at least some significant justiciable dimensions.'

A starting assumption of the argument for justiciable social rights is that they represent fundamental moral entitlements. The international human rights law obligates states to provide legal remedies or explain why they have not. When States ratify the ICESCR, they undertake to implement its provisions "...by all appropriate means". The Committee is of the view that the burden is upon the State to show why the judicial protection of the Covenant's rights is not among the 'appropriate means.'⁴¹

A second argument is that judicial remedies are the natural recourse for violations of human rights. This is so because the political forum does not adequately protect rights. The concept of human rights is precisely about imposing requirements upon governmental conduct. Human rights delineate a sphere of entitlements that the government may not invade or disregard.⁴²

A third argument is that judicial recourses provide an effective means of protecting social rights. Courts are an effective and disciplined forum for evaluating evidence, adjudicating adversarial claims, reviewing the unforeseen consequences of policies and laws, giving an official audience to claims about rights violations and more.⁴³

⁴⁰ Dennis Michael et al. Justiciability of Economic, Social and Cultural Rights: In: The American Journal of International Law, Vol 98, No.3 (2004), p.462.

⁴¹ General Comment No. 9, para. 3.

⁴² See *supra*, note 39, p. 139.

⁴³ *Ibid.*

According to Langford 2008, although domestic legislation in many countries provides a measure of judicially enforceable labour and social rights, legislative rights are not always sufficient to protect human rights, and they are subject to amendment by simple majority of the population. He goes on to state that on the other hand judges in adjudicating cases make law which can be used as precedence.⁴⁴

The argument that socio-economic are less justiciable since they require state expenditures is not persuasive, as the maintenance of all rights does depend on financial means. In fact, the preservation of civil and political rights require large outlays, as the upholding of for instance police forces, prisons, a judiciary system and the organization of parliamentary elections are not inexpensive. At the same time, there are socio-economic rights that do not require state expenditures, such as the implementation of minimum wage standards, parental leave requirements, child labour laws and agrarian reforms. The state is responsible for the protection and promotion of all rights. Neither civil and political rights, nor socio-economic rights are free of costs or self-generating; they need legislation, promotion and protection which all require resources.⁴⁵

The preceding account demonstrates that the enhanced acceptance of a measure of justiciability of socio-economic rights is part and parcel of the more general acknowledgement of the interdependence and indivisibility of all fundamental rights.

To the extent that civil and political rights are interpreted in a way that identifies positive state obligations that pertain, *de facto*, to socio-economic rights, those socio-economic rights are – at least to some extent – justiciable. Similarly, as state obligations in relation to social, economic and cultural rights become more clearly and more strictly circumscribed, their justiciability increases.

New paradigms of judicial enforcement of socio-economic rights are emerging in many liberal states, challenging many of the previous assumptions and the preoccupation with civil and political rights. The directive principles approach was launched in India. The Indian constitution includes directive principles for state policy which contain most socio-economic rights. The provisions were originally of non-judicial character, but have developed to become enforceable in courts in so called public interest litigation or social action litigation.⁴⁶

In the Indian Constitution, the social rights are not framed as rights but as ‘directive principles of state policy’. Nevertheless the Indian Supreme Court has recognized the justiciability of these particular directive principles. It has not only developed a creative interpretation of the right to life (so as to include social rights) but has also underscored that these directive principles concern issues that are crucial to a meaningful life with dignity and thus should be considered as complementary to the Constitution.

⁴⁴ Langford M. *The justiciability of Social Rights: From Practice to Theory. Social Rights Jurisprudence*. Cambridge University Press, 2008. p.3

⁴⁵ Gordon, J. "The Concept of Human Rights: the History and Meaning of its Politization", 23 *Brook J Int'l*, 1998, p 712.

⁴⁶ Steiner, H and Alston, P: "International Human Rights in Context: Law, Politics, Morals", pp 283-285.

In South Africa, socio-economic rights are enacted in the constitution as fundamental rights guaranteed the citizens and enforceable towards the government. The rights are not structurally of lower status, but are subject to the availability of public resources. Nevertheless, many important cases have been issued on the grounds of socio-economic rights in areas such as the right to health, education, housing and poverty.⁴⁷

The South African Constitution explicitly enshrines the right to health, while recognizing that the state's obligations are progressive and constrained by the available resources. The case law of the South African Constitutional Court with regard to social rights shows that, even though it refuses to use the minimum core obligation doctrine developed under the ICESCR, it does evaluate state compliance with its constitutional obligations in relation to social rights.

The South African Constitution Court has precisely understood its role in this way: 'Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only...and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic are justiciable under our constitution, but how to enforce them in a given case.'⁴⁸

Scholars have long noted that ESC rights require not only government action, but also restraint. For the right to health, protecting existing access to community health care and clean air and water can be as important as State provision of health care facilities. The nature and degree of the State obligations and financial burden to realize ESC rights will thus vary according to context. Likewise, the assumption that CPR's are concerned with protection of personal freedoms from State malevolence has been shown conceptually problematic. The right to a fair trial is largely a positive right requiring significant expenditure of state resources on courts, prison systems and legal aid.⁴⁹

The meaningless of such divisions between the two sets of rights has not escaped judicial notice. The South African Constitutional Court remarked that 'many of the CPR entrenched in the text will give rise to similar budgetary implications without compromising their justiciability' and the 'fact that ESC rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability.'⁵⁰

⁴⁷ Woods, J: "Emerging Paradigms of Protection "Second Generation" Human Rights", 6 Loy. J Pub. Int. L. 103 2004-2005, p.111

⁴⁸ See *supra*, note 46. p.30

⁴⁹ *Ibid*

⁵⁰ *Ibid*, p.31

3. Making Things Work: The Role of the Committee on Economic, Social and Cultural Rights

The Committee on Economic, Social and Cultural Rights (CESCR) operates as the principle supervisory body to the Covenant. The CESCR is composed of eighteen experts, sitting in an independent capacity, chosen with due regard to equitable geographical distribution. It was created by ECOSOC, and its mandate is merely to assist ECOSOC in the consideration of state reports. In particular, its role is to consider States parties reports and to make suggestions and recommendations of a general nature, including suggestions and recommendations as to fuller compliance with the Covenant by States parties.

The main function of the Committee is to ensure compliance with the undertakings of the relevant treaty. Mathew Craven identifies three basic functions of human rights reporting:⁵¹

1. To clarify and develop the applicable standards;
2. To assess the degree to which States Parties are conforming with their obligations;
3. To take remedial or preventive action, this would ensure compliance (which includes making recommendations and noting concern with certain policies or practices).

The decisions of the Committee are not binding on States Parties. It is allowed only to issue recommendations or opinions on whether the obligation in question has been complied with. Thus effecting compliance is left to domestic and international political pressure, esteem in the eyes of the international community, and the good faith of States Parties.

The main goal of the Committee is to conduct a ‘constructive and mutually rewarding dialogue’ to assist State Parties in implementing their obligations under the Covenant. This means that the Committee shall engage in a process of pointing out areas of concern and making recommendations, without resorting to formal declarations of non-compliance or violations. The decisions of the Committee are not binding on States Parties. It is allowed only to issue recommendations or opinions on whether the obligation in question has been complied with.⁵² The benefit of this approach is that governments have been less offended by the process than they have in the more confrontational approach.

When reviewing a country’s record, the Committee considers information from five sources:⁵³

⁵¹ M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford: Oxford University Press, 1995) p. 31.

⁵² See *supra*, note 25, p. 29.

⁵³ *Ibid.*

1. A country file created by the Secretariat of the United Nations, and in which relevant information from other UN organs as well as NGO submissions are placed;
2. Submissions from specialised agencies of the UN (ILO, UNESCO, WHO, FAO, UNDP);
3. Submissions from NGOs;
4. The State Party report;
5. The general information available to Committee members as experts in their field.

Under the reporting procedure, States are required to submit a report on the domestic implementation of the articles in the Covenant once every five years. Those reports must indicate the problems encountered and the progress made.⁵⁴

Secondly, the reporting process is to ensure that the State Party monitors the actual situation with respect to each of the rights on a regular basis and is thus aware of the extent to which the various rights are, or are not, being enjoyed by all individuals within its territory or under its jurisdiction. Moreover, the reporting process is to enable the State Party itself to develop a better understanding of the problems and shortcomings encountered in efforts to realize progressively the full range of ESC rights.⁵⁵

The concluding observations by treaty bodies usually follow the *constructive dialogue* approach, whereby it is felt that it is better to encourage the State Party to take the necessary measures on its own free will, rather than insisting on a *violations approach* which clearly identifies violations of the Covenant by the State Party. In the Committee practice both these approaches are employed. Suggestions and recommendations usually follow the constructive dialogue approach, where it is felt that the State Party is making every effort to impose the ESC rights situation domestically. Where the State Party does not make any serious efforts or even denies the existence of problems, or where gross and massive violations of Covenant obligations are clearly documented, the Committee switches to the violations approach as a last resort.⁵⁶

The CESCR has attempted to develop some form of template for understanding the normative content of the rights but wide variances remain between their General Comments on different rights. Such unevenness is arguably a good thing since each right does vary in conception and possible forms of implementation. However, it is clear from the Committee that each right carries bundles of claims relating to:

- Accessibility (e.g., in the case of housing, accessibility includes security of tenure, physical accessibility, affordability and appropriate location, or, in the case of social security, coverage, fair eligibility requirements etc),
- Availability of either the subject of the right (e.g., food, education) or the requisite facilities or systems (e.g., hospitals or social security system); and

⁵⁴ See *supra*, note 11, p. 463.

⁵⁵ C. Krause, M. Scheinin, '*International Protection of Human Rights*' A Textbook, Abo Akademi University, 2009, pp.141-142.

⁵⁶ *Ibid.*

- Some level of adequacy, quality or cultural appropriateness whether it be the safety of the water, the level of social benefits or the cultural dimension of education.⁵⁷

The CESCR has said that the right to adequate food is indivisible from the inherent dignity of the human person.⁵⁸ In a final observation regarding Chile's compliance with the Covenant, the Committee sustained this same view.⁵⁹

One area of jurisprudence involves the Committee's interpretation of Article 13(1), dealing with the right to social and medical assistance to those in need, as creating a positive obligation on the state. The main element of this case law is the Committee's determination that social assistance must be a claimable right in domestic law:

“[I]t is compulsory for those states accepting the article to accord assistance to necessitous persons as of rights; the Contracting Parties are no longer merely empowered to grant assistance as they think fit; they are under an obligation which they may be called on in court to honour.”⁶⁰

Several countries have applied this basic principle on a number of occasions and many have required a right of appeal as well. Although the Committee does press governments on adequacy of benefits under article 13(1), it appears to concentrate its efforts on requiring states to make the level of benefits subject to domestic judicial evaluation.⁶¹

A second area involving the level of protection is that dealing with compulsory education, as guaranteed by article 7(3) of the Social Charter. In this respect, ECSR criticized an Irish order which permitted children to do up to thirty-five hours a week of light, non-industrial work during holidays. The Committee held the restrictions on children's work to be “insufficient” and criticised Ireland for its failure to provide a list of permitted and prohibited types of work.⁶²

A third significant area of case law that shows a much more confident level of inquiry concerns the right guaranteed by Article 4 (1) “to a remuneration [sufficient for] a decent standard of living.” In this area the Committee has established a “decency threshold” by which to judge the situation of different groups in the wage economy, placing considerable emphasis on the situation of vulnerable sectors of society.

The Committee has stated that the lowest wage actually paid in an economic sector or occupation cannot fall below 68 % of the national average wage, with social

⁵⁷ See *supra*, note 46, p.13.

⁵⁸ CESCR, General Comment 12, *The right to adequate food* (Art. 11), Twentieth session, May 1999, E/C.12/1999/5.

⁵⁹ CESCR, “*Informe sobre el Segundo period de sesiones*” Chile, E/1988/14 – E/C.12/1988/4, Para., 184-218.

⁶⁰ Conclusions of Independent Experts on the European Social Charter Conclusions I (1969-70) at p. 64. The Committee ties the Charter requirement that there be a court-enforceable domestic legal right to a view that the Charter involved an “attempt to break away from the old idea of assistance, which was bound up with the dispensing of charity”

⁶¹ See CIE Conclusions XII-1 (1988-89), p.190-192, indicating that the United Kingdom's benefits scheme was deficient because it was overly discretionary.

⁶² See CIE Conclusions IX-2 (1986) at p.52-53

benefits and taxation factored in. This allow “member states to meet the criteria of Article 4(1) by using [fiscal and social transfer] policies in those cases where wages alone were not sufficient”⁶³

Unlike the Human Rights Committee under the ICCPR, the Committee on Economic, Social and Cultural Rights is limited to supervision to state reports. However, there are signs of an embryonic willingness and ability to indicate whether or not a state is in compliance with its obligations under the Covenant. As the Committee struggles with its own procedures and the normative content of Covenant rights, it has been not unknown for individual Committee members to indicate that in their view a right has not been respected.⁶⁴

Significantly, the Committee has begun discussions on the possibility of encouraging states to draft an Optional Protocol for ICESCR that would allow for a right of individual petition similar to that which exists for the ICCPR.⁶⁵ At its sixth session in 1991, the Committee began to address ways to render some or all of the rights in the Covenant justiciable at the international level.⁶⁶ This compliments the Committee’s consistent concern to learn about justiciability within states’ domestic system, a concern which has culminated in the Committee setting out a non-exhaustive list of rights found in the Covenant which “would seem to be capable” of being immediately justiciable⁶⁷. In its discussion of justiciable rights, the Committee highlights the unequivocal justiciability of Article 2(2)’s right to non-discrimination with the respect to the rights found in the Covenant.

4. The Optional Protocol to the ICESCR

Ever since the adoption of the ICESCR and the ICCPR in 1966, proponents of economic, social and cultural rights have complained that the ICSECR lacks implementation mechanism equal to that in ICCPR and its Optional Protocol. Eventually in 1990, the Committee on Economic, Social and Cultural Rights formally started discussions on an Optional Protocol to ICESRC, with a view to establishing an individual complaint mechanism under the Covenant similar to those existing under all the other main UN human rights treaties (with the exception of the Convention of the Rights of the Child).⁶⁸

⁶³ CIE Conclusions XII-1 (1998-89), p. 93

⁶⁴ See P.Alston, No Right to Complain about being poor: The Need for an Optional protocol to the UN Covenant in A. Eide and J. Helgesen (eds.), *The Future of the Human Rights Protection in a Changing World: Fifty Years since the Four Freedoms Address*, Oslo: Norwegian University Press, 1991, p. 89

⁶⁵ Ibid. p.91-93

⁶⁶ See Report on the Sixth Session, U.N. Doc. E/1992/23,E/C.12/1991/4 (1992). “The members of the Committee... supported the drafting of an optional protocol since that would enhance the practical implementation of the Covenant as well as the dialogue with states parties and would make it possible to focus the attention of the public opinion to a greater extent on economic, social and cultural rights.” para.362

⁶⁷ Report on the Fifth Session, supra note 54, para.5

⁶⁸ <http://www2.ohchr.org/english/issues/escr/document.htm>

In 1997 the Committee presented a draft Optional Protocol to the Commission on Human Rights, which the Commission sent to Governments, intergovernmental organizations and NGOs for comments. In 2001 the Commission on Human Rights appointed an independent expert, Mr Hatem Kotrane, to examine the question of a Draft Optional Protocol to ICESCR adopted under Resolution 2001/30. Mr Kotrane submitted reports to the Commission in 2002 and 2003 recommending the adoption of a complaint mechanism.⁶⁹

In the Independent Expert report, headed by Hatem Kotrane, he proceeded to focus on four practical, but fundamental questions concerning the proposed optional protocol: (1) which specific rights articulated in the Covenant should be encompassed by the complaints procedure? (2) what body should have the competence to receive and resolve complaints? (3) who should be entitled to bring a complaint, and what admissibility criteria should apply to those complaints? (4) what range of remedies should be available for justified complaints? Hatem recommended that the complaints mechanism be limited to situations revealing a species of gross, unmistakable violations of or failure to uphold any of the rights set forth in the Covenant.

Other justifications made during the Working Group debate included the need to reaffirm the universality, interdependence and indivisibility of all human rights hence correction be made in the division made between civil political rights and social economic and cultural rights.⁷⁰

Langford also argues that concerning the abstract nature of economic social and cultural rights, they are phrased no differently than civil and political rights; the right to freedom of speech is no more concrete in expression than the right to social security.⁷¹

The deliberations of the Human Rights Council working group, and its predecessors, on an Optional Protocol to the ICESCR for complaints concerning violations of the covenant have been substantially affected by presentations on the experiences of justiciability. Even Dennis and Stewart, in their clarion call to States not to adopt an Optional Protocol, acknowledge this fact, stating that they 'do not reject out of hand the notion that some social and economic rights may be domestically justiciable'.⁷²

The Optional Protocol has been approved and it provides for an inquiry procedure whose duty is to investigate a gross violation. Article 11 of the Optional Protocol states that, "A State Party to the present Protocol may at any time declare that it recognizes the competence of the Committee..." It further states that "if the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the ESCR set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned."⁷³

⁶⁹ *Ibid*

⁷⁰ WG OP ICESCR 2006.

⁷¹ Langford M. *The justiciability of Social Rights: From Practice to Theory*. In *Social Rights Jurisprudence*. Cambridge University Press, 2008, p.30

⁷² *Ibid*, p.29

⁷³ Optional Protocol to the ICESCR article 11(2)

Chapter IV - THE PRINCIPLE OF INTERDEPENDENCE OF HUMAN RIGHTS AND INTERNATIONAL LAW

1. The Concept of Indivisibility, Interdependence and Interrelation of Human Rights.

The language of indivisible, interdependent, and interrelated (sometimes “interconnected”) human rights first emerged in the late 1940s and early 1950s in relation to the two “grand categories” of civil, political, and economic, social, cultural rights. The model is divided in two different areas, one of them the universality, the other indivisibility or interdependence. An impact in one right could have effects in others, and whatever factor that causes that impact is likely to directly affect other rights. This notion supposes that no human right is meaningless and that the fulfilment of one depends, to some extent, on the fulfilment of others. The corresponding effect could occur due to external factors (interrelation) or to interferences with the rest of human rights (indivisibility and interdependence).⁷⁴

The Vienna Declaration and Programme of Action, adopted at the World Conference on Human Rights held in Vienna from 14 to 25 June 1993, gave formal and institutional acceptance to a depiction of human rights that had been gestating over two decades. Article 5 of the final text reads:

All Human Rights are universal, indivisible and interdependent and interrelated. The International Community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.⁷⁵

If there is no ethical difference between death from torture and the pain of the parents whose child dies because they have no electricity in their slum dwelling, then there should not be any legal or political difference either. This is of the essence; especially as – to pursue this example - this aspect of a right to an adequate standard of living can be secured by setting a mandatory energy supply level, which can be claimed in court. Such a line of reasoning holds for all economic, social and cultural rights.

More recently, the U.N. has declared that all human rights are interdependent, indivisible, and interrelated. This includes other categories of human rights that have been recognized in treaties that have been adopted since the 1960s, including the rights of women, of children, and of vulnerable populations, such as refugees and migrant workers. Drawing on the interrelatedness and interdependence between ESC rights and civil and political rights can expand the scope for advocacy. For example,

⁷⁴ Nickel, J.W, “*Rethinking Indivisibility: towards a theory of supporting relations between human rights*” Human Rights Quarterly, Vol. 30 No. 4 November 2008 p. 987

⁷⁵ World Conference on Human Rights “Vienna Declaration and Programme of Action”, Vienna 14-25 June 1993, A/CONF. 157/23

bodies that monitor state compliance with the treaties addressing civil and political rights have considered cases with distinct socio-economic components.⁷⁶

This principle found its official recognition in the resolutions of the International Conference on Human Rights in Teheran (1968). The long running and unproductive debate about the importance of economic, social and cultural rights relative to civil and political rights was officially closed in 1993⁷⁷ with reaffirmation in the Vienna Declaration and Programme of Action that "[all] human rights are universal, indivisible, and interdependent and interrelated." On the usual interpretation the imperatives of the principle are to regard all human rights as an indivisible whole and hence not to accord certain rights priority over others.

Nowadays, within the human rights community, it is no longer seriously questioned, at least on a theoretical level, that economic, social and cultural rights are indeed human rights and as indispensable as civil and political rights in enabling human beings to lead lives of dignity.

The interdependence principle, apart from its use as political compromise between advocates of one or two covenants, reflects the fact the two sets of rights can neither logically nor practically be separated in watertight compartments. Civil and political rights may constitute the condition for and thus be implicit in ESR.

To say that rights are interdependent despite their distinctiveness as particular rights means that the enjoyment of one right (or group of rights) requires enjoyment of others - which may or may not be part of the same "category." For example, freedom of movement (a civil right) is a necessary precondition for the exercise of other civil rights (such as freedom of assembly), political rights (e.g., the right to vote), economic rights (the right to work, for example), and so forth.

The ICCPR and the ICESCR are equally authoritative legal instruments. Furthermore, in accordance with the interdependence principle and fundamental to the human rights doctrine, all human rights are interdependent and interrelated, must be treated with the same emphasis and shall be respected and promoted just the same.

Indivisibility could be understood as a condition that creates a conceptual, monolithic connection among all rights (a strong intra-systemic interrelation), at least in the sense that all of them should be treated as a single normative existence without preference for any of them. The indivisibility of human rights can be understood as the need to define, interpret and ensure respect for all rights equally, taking into account both interaction and logical differences. Interdependence is a consequence of indivisibility. It means that interpretation and enforcement of any right must allow for interpretation and enforcement of all other rights.⁷⁸ This in no way detracts from the

⁷⁶ Kitok v. Sweden, HRC Communication No. 197/1985 (1988); Apirana Mahuika et al. New Zealand, HRC Communication No. 167/1984 (2000);

⁷⁷ A. Chapman and S. Rusell, Current Issues Affecting the Realization of Economic, Social and Cultural Rights in *Human Rights Workshop "Economic, Social and Cultural Rights: Fifty Years after Universal Declaration"*, 1998, p. 33

⁷⁸ Still the notion of interdependence may be seen in different ways. The term interdependence attempts to capture the idea that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation. (C. Scott, *The Interdependence and Permeability of*

principle that each right is of priority importance and that its enforcement cannot wait for the enforcement of another. Interdependence is a condition that creates a conceptual dynamic connection among all human rights (a weak intra-systemic interrelation) in the sense that all of them produce some effects on the others. However, it is difficult to visualize, for example, the supportive relation between the right to water and the right not to be subject of torture. Therefore, interdependence of the rights is not an ever-present phenomenon.

In principle, not all rights could be indivisible because strong interactions of rights are not found among all of them. It is clear, for example, that the enjoyment of all the other rights depends upon the right to life, i.e. the right to life is indispensable to all the others, and therefore, a relation of indivisibility exists. However, dependency could be a one way alley; arguably, the right to health is indispensable to the right to life, but the later does not need the right to vote.

Although interdependence is more likely to occur, it is not clear how it could be a generalized phenomenon among all rights. Certainly, the right to education is supportive to the (effective) right to vote, since can be sustained that a better level of literacy would generate more conscious citizens who are better equipped to operate and maintain the gears of democracy.

There is to be no chronology or hierarchy among rights or any pretext of certain rights conditioning other. The covenants necessitate one and other, which means that there can be no civil and political rights without socio-economic rights and vice versa.

1.1. Related and Organic interdependence

Interdependence may be understood as having two senses: organic and related interdependence. In simplified terms organic interdependence refers to a situation where one right forms a part of another right and may therefore be incorporated into that latter right. From this perspective interdependent rights are inseparable in the sense that one right (the core right) justifies the other (the derivative right).⁷⁹ Thus, to protect right *x* will mean directly protecting right *y*. Organic interdependence can be seen as the direct protection of an ICESCR right because that right is incorporated into, or is a part of, a particular right in the ICCPR. To take a central example, the right to life in article 6(1) of ICCPR can be interpreted to include a “right to an adequate standard of living” in article 11(1) of ICESCR, because various aspects of the latter right falling to be adjudicated in the name of the former.⁸⁰

Human Rights Norms: Towards Partial Fusion of the International Covenants on Human Rights, in 27 Osgoode Hall Law Journal (1989) p.786.

⁷⁹ See J. Raz “*On the nature of rights*” (1984) at p. 197-199. Raz notes at p. 197: “Just as rights are grounds for duties and powers so they can be for other rights. I shall call a right, which is grounded in another right, a derivative right. Non-derivative rights are core-rights. The relationship between a derivative right and the core right from which it derives is a justificatory one.”

⁸⁰ The rights of infants to be protected from health threats that lead to infant mortality as part of the rights to life. Second example is the relationship between Article 22 in the ICCPR on freedom of association and Article 8 in the ICESCR on various trade unions rights.

The terms related and organic rights emerged from a concrete situation before the organ of the European Convention on Human Right, involving the issue whether elements of Article 6 of the European Social Charter, including the right to strike, could be incorporated into article 11(1) of the Convention. In *National Union of Belgian Police* case, the former European Commission of Human Rights interpreted article 11(1) of European Convention on Human Rights as a “hybrid right” containing elements of “traditional liberal right or civil liberty, and an economic right.” Commission provided that “[I]t cannot be denied that one of the fundamental elements of the right to take trade union action is the trade union’s right to protect the economic and social rights of its members.”⁸¹

The concept of interdependence is not limited to the relationship between social, civil and political rights, although that is historically the axis of concern and almost certainly still provides the context in which the concept is the most useful. But as a general matter, interdependence connotes primarily the inextricable quality of all rights, including for example freedom of expression and freedom of assembly and association.⁸²

2. Interdependence of Human Rights and International Law

The principle of indivisibility and interdependence of human rights means that civil and political, economic, social and cultural rights are interrelated and are co-equal in importance. They form an indivisible whole and only if these rights are guaranteed that an individual can live decently and in dignity. "Freedom from fear, and want," says Amnesty International, "can only be relieved if conditions are created where everyone may enjoy his or her economic, social and cultural rights and his or her civil and political rights".⁸³

The interdependence of human rights is also embodied in international instruments. One example is the Declaration on the Right to Development which was adopted by the General Assembly of the U.N. on December 4, 1986.⁸⁴ The basic ideas in this Declaration include (1) recognition that the human person is the central subject of development and should be the active participant and beneficiary of the right to development; (2) acknowledgment that all human rights are indivisible and interdependent; (3) the realization that the failure to observe civil and political rights, as well as economic, social and cultural rights constitute obstacles to development.

Article 3(3) of the Declaration on the Right to Development provides that "states have the duty to co-operate with each other in ensuring development and in eliminating obstacles to development". At the same time and in order to eliminate

⁸¹ Report of the European Commission on Human Rights on application No. 4464/70, Eur.Ct.H.R. Ser. B, No.17, *National Union of Belgium Police Case*, para.59

⁸² See *Plattform Artze Fur Das Leben v Austria*, 139 Eur. Ct. H.R. (ser. A) at 12 (1988) – a state’s failure to provide protection for those wishing to assemble freely could deter associations or other groups... from openly expressing their opinions.

⁸³ www.amnesty.org/en/library/asset/ior41/012

⁸⁴ United Nation - General Assembly, Declaration on the right to development, adopted at the 97th plenary meeting, 4 December 1986 by Resolution 41/128.

such obstacles, it is essential that the integral role of human rights in the development process is fully recognized and further developed by governments and by intergovernmental organizations. All governments should consistently at all times seek to ensure that their national and international development policies promote all aspects of civil, political, economic, social and cultural rights.⁸⁵

When we examine the way in which the international law on human rights is developed, it becomes clear that the more signatories there are to an international treaty the more difficult is to find a compromise in establishing a common standard of human rights. While the desired standard form a minimum for individual countries, it, will in reality, constitute a maximum acceptable to member states.

The primary responsibility for implementing and monitoring international treaties on human rights lies with national legislature, executive, courts of law, etc. However, the international human rights standards ought not to be regarded just as an external source of pressure; they are also a manifestation of the public policy of every state that has committed itself to them.

2.1. The International Bill of Rights: The Universal Declaration and Two Covenants.

The development of the International Bill of Human Rights was reached via the adoption of the Universal Declaration and the 1966 International Covenants. Each of the treaties was related to one set of rights.

The principle of interdependence of human rights underlies the cornerstone of contemporary international human rights law. The Universal Declaration represents an idealistic global recognition of human rights exposed by societies that claimed membership in the United Nations at the time the document was drafted.⁸⁶ The Declaration recognizes rights to social security and those “economic, social and cultural rights indispensable” to “human dignity and the free development of ... personality”.⁸⁷

It has been argued that in order to face unexpected difficulties, ESC rights require constant policy adjustments, decisions that could be properly achieved only in the presence of well-informed inputs from social based groups or individuals. Since political rights to free association, speech, and press are necessary to provide such an input, they are necessary for the fulfilment of ESC rights.⁸⁸

⁸⁵ See *supra*, note 82

⁸⁶ J. Morsink, *The philosophy of Universal Declaration* in *Human Rights Quarterly*, 1984, Vol. 6, p. 310

⁸⁷ Article 22. Article 22 of Universal Declaration serves as an “umbrella article” for the articles immediately following it. J.P. Humphry, *The Universal Declaration of Human Rights; Its History, Impact and Juridical Character* in *Human Rights: Thirty Years after Universal Declaration*, Nijhoff, 1979, p. 28

⁸⁸ Howard. R, “The Full-Belly Paper: Should Economic Rights Take Priority over Civil and Political Rights? *Human Rights Quarterly*, Vol. 5 No. 4 November 1983, p. 473

As clearly pointed out by Donnelly, the Universal Declaration of Human Rights treats HR in a holistic way in the sense that no right could be unattached from others and presence of every one reinforces the importance of the rest of them.⁸⁹ This legal phenomenon is called the indivisibility, interdependence and interrelation of Human Rights.

Despite its initial prominence in the Universal Declaration, the principle of interdependence of human rights was immediately submerged by an international debate over what legally binding treaties could be parented by Declaration. The primary source of controversy was whether to include some kind of quasi-judicial machinery to oversee states' obligations and, if so, whether all Declaration rights could be subject to such machinery. The debate was explicitly over justiciability, with proponents of dividing the Declaration into two Covenants arguing that social rights were non-justiciable and therefore could not be included in a unified document, if that document was to go beyond the purely normative statement of the Declaration.

Despite pronounced emphasis on the equal claim to legitimacy of social rights through the principle of interdependence, the United Nations General Assembly decide to split the Declaration's catalogue into ICCPR and the ICESCR. To underscore the fact that the principle of interdependence was in fact affirmed rather than rejected, the preamble of the ICCPR makes direct reference to the principle of interdependence:

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal for free human beings enjoying civil and political freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights as well as his economic, social and cultural rights.....

The corresponding preamble paragraph in the ICESCR reverses the order of the relationship of the two sets of rights⁹⁰. The wording of these documents clearly conveys the message that pragmatic considerations concerning the judiciary's competence to adjudicate social rights prevented states from incorporating social and political rights in a single covenant.

The Committee on Economic, Social and Cultural Rights has commented as follows:

The adoption of a rigid classification of economic, social and cultural rights which puts them, by definition, beyond the reach of courts would thus be arbitrary and incompatible with the principle that the two sets of human rights are indivisible and interdependent. It would also drastically curtail the capacity of the courts to protect the rights of the most vulnerable and disadvantaged groups in society.⁹¹

The Human Rights Committee, in two related cases arising out of the Netherlands, has helped to draw attention, at least implicitly, to the principle of interdependence. In both cases the petitioners invoked the principle of interdependence as one justification for interpreting generally worded right to equality

⁸⁹ Donnelly, J. *Universal Human Rights in Theory and Practice*, Second Edition, Cornell University Press, New York, 2003, p.27.

⁹⁰ These two preamble paragraphs serve as the textual interpretive basis for mediating the unity and distinctiveness of the two Covenants. See *Scott*, p. 809-11

⁹¹ General Comment No. 9 see *note* 18, para. 10

in Article 26 of the ICCPR to include the rights to non-discrimination with respect to social welfare benefits. In *Broeks v The Netherlands* and *Zwaan-de Vries v The Netherlands*⁹², two unemployed female workers had unemployment benefits terminated pursuant to the Dutch Unemployment Benefits Act, which provided that benefits could not be awarded to married women who were neither “breadwinners” nor permanently separated from their spouses. The act did not contain a similar exclusion for married man.

In both cases, the Committee held that discrimination is prohibited by the ICCPR, thereby declining to endorse a principle of non-overlap that would have had the Committee interpret Article 26 on the basis of a proposition that might be expressed as “what is there (in the ICESCR) explicitly cannot be here (in the ICCPR) implicitly”. Instead, in refusing to accord dispositive importance to the presence of Article 2(2) of the ICESCR, thereby enabling it to become justiciable in concrete cases by way of article 26 of the ICCPR, the Committee noted an “interrelated drafting history” of two Covenants, but explicitly stated that it was restricting its analysis to the wording of article 26. However, the petitioner, Broeks, had expressly argued that the human rights in the two Covenants were interdependent. These arguments were set out in detail in the decision of the Committee and it did little to distance itself from this proposition.⁹³

2.2. The Council of Europe Experience

The fracturing of civil and political rights from social and economic rights also finds expression in two governing documents adopted by the Council of Europe; the European Convention on Human Rights and the ESC.⁹⁴ The European Convention on Human Rights in many ways mirrors the ICCPR, guaranteeing a number of civil and political rights and establishing a ECHR for purposes of interpretation and enforcement. The Social Charter, by contrast, is akin to ICSECR. Supervision has been based on a reporting system which has been able to develop an extensive and relatively detailed case law even in an absence of an individual petition procedure.

The European Court has relied forcefully on the principle of the interdependence of human rights in its reasoning in *Airey case* that dealt with the positive duty of Ireland to provide free civil legal aid to a woman petitioning for judicial separation:

“The Court is aware that the further realisation of social and economic rights is largely dependent on the situation-notably financial-reigning in the state in question. On the other hand, the Convention must be interpreted in the light of the present day conditions... and it is designated to

⁹² Applications No. 172/1984 and 182/1984 in *Selected Decisions of the Human Rights Committee under the Optional Protocol*, Vol. 2 (October 1982-April 1998), United Nations 1990, p.196-213

⁹³ See *Scott*, p.856-59-considering the significance of the style of judgement in this case for the Committee’s view on the question of interdependence.

⁹⁴ Often the European approach is considered as a two-tier approach. European Convention on Human Rights must be accepted by the states as a whole, while the Charter permits states to accept its rights and principles selectively.

safeguard the individual in a real and practical way as regard those areas which it deals... Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social and economic nature. [T]he mere fact that an interpretation of the Convention may extend to the sphere of social and economic rights should not be a decisive factor against such a interpretation; there is no water-tight division separating the sphere from the field covered by the Convention.”⁹⁵

In so holding the court made explicit what in our view is implicit in the nature of relationship between civil and political rights and social rights; namely each category is indispensable to the realisation of the other. However the Court has failed to rely on the “Airey principle” in some other cases submitted before it, even by way of general citation and further more in some others seem to reflect a working principle diametrically contrary to that advanced in Airey.⁹⁶

Teachers were dismissed from their job on the basis of German Authorities’ evaluation that they were not loyal to the Basic Law and its principles for a free democracy (one was linked to the extreme left and the other to the extreme right). They claimed a breach of their right to free expression under Article 10 of the European Convention, but the Court found that either that freedom of expression was not the issue or that it was sufficiently affected to have been breached.

In any case, the Court cast the issue as one of equal access to public service employment and held that such a right was deliberately omitted during the drafting stage of the Convention, as compared to its express inclusion in the Universal Declaration and ICCPR. So, it seems that the Court was so ready to interpret the omission of what could be viewed as a kind of a social right as having covered the field to the extent that freedom of expression was not viewed as implicated at all.

Compared to the limited inspiration coming from the European Court, the bodies of European Social Charter have been slowly building the case for the justifiability of social rights. Supervision of Social Charter is implemented through a cumbersome review process.⁹⁷ Furthermore, creating most of the jurisprudence, the European Committee on Social Rights (ECSR) sits on the lowest rung of a process that in technical legal terms can only result in non-binding recommendations.

The ECSR has been able to establish a dialogue with social policy makers in governments. Over a period of twenty-five years it has been able to generate a wealth of conclusions that demonstrate the possibility of assessing with considerable precision whether or not a state has lived up to its international obligations in the social rights field.⁹⁸

⁹⁵ *Airey v Ireland*, 32 Eur. Ct. H.R. (ser. A) at para. 14-15

⁹⁶ See for example *Glassenap*, 104 Eur.Ct.H.R. (ser.A) 1986 and *Kosiek*, 105 Eur.Ct.H.R.

⁹⁷ The member states are required to submit reports on their compliance with those terms of the Social Charter that they agreed to follow. A report based on these reports is prepared by the CIE and then submitted to the Governmental Social Committee of the Council of Europe. On the base of these conclusions the latter drafts a report which in turn is submitted to the Committee of Ministers, which together with the Parliamentary Assembly decides whether ”recommendations” to member states in question are appropriate.

⁹⁸ D. Harris, *The European Social Charter*, in R.Hanski and M. Suksi, *An Introduction to the International Protection of Human Rights*, Abo Academy University, 1997, p. 261

2.3. The Inter-American System

The American Declaration of the Rights and Duties of Man was adopted by the member states of the Organization of American States in 1948, prior to the Universal Declaration. Like the Universal Declaration, the American Declaration guarantees not only civil and political but also social and economic rights such as health care, food, clothing, housing and education as well as the more general right to life. The Inter-American Commission on Human Rights, an organ established by the OAS Charter, is granted a general mandate to both promote and protect human rights as well as broad powers to determine its own structure, procedures and jurisdiction.

Of particular interest with respect to the principle of interdependence is the following statement of the framework the Commission claims to utilize:

“When examining the situation on human rights in various countries, the Commission has had to establish the organic relationship between the violation of the rights to physical safety on one hand, and the neglect of economic and social rights and suppression of political participation, on the other. That relationship, as has been shown is in large measure one of cause and effect. In other words, neglect of social and economic rights, especially when political participation has been suppressed, produces the kind of polarization that then leads to acts of terrorism by and against the government.

.....
The essence of the legal obligation incurred by any government in this area is to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education. The priority of the “rights of survival” and “basic needs” is a natural consequence of the right to personal security.”⁹⁹

By interpreting the Declaration to be incorporated into the general human rights provision of the Charter of the Organization of American States, the Inter-American Commission has empowered itself to hear individual petitions and render recommendations to individual states on the basis of the Declaration.

In respect to the Inter-American System of Human Rights, the Protocol of San Salvador explicitly recognizes this notion in its preamble. International Human Rights bodies have recognized this conception.

The Inter-American organs have developed jurisprudence consistent with the indivisible and interdependence properties of Human Rights. The Inter-American Court of Human Rights interpreted that the right to life is interwoven with the right to health, to food and to education.¹⁰⁰

In the *Juvenile Re-education case*, the Court held that the right to education was related to the right to a dignified life, as extended previously by the Court from

⁹⁹ Annual Report 1979-1980 reprinted in Buergenthal, p.167

¹⁰⁰ F. Tinta, M., “Justifiability of Economic, Social and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions” Human Right Quarterly, Vol. 29, May 2007, p.437

the right to life.¹⁰¹ The right to education was linked to the right to legal recognition in the *Yean and Bosico case*.¹⁰²

Quoting the CESCR, the Inter-American Commission on Human Rights argued that taking into account the indivisibility and the interdependence of Human Rights competent tribunals should be able to adjudicate them.¹⁰³

In the Yanomami case, several human rights groups alleging violations of the Yanomami Indians presented a petition against Government of Brazil.¹⁰⁴ Thousands of them had been forced to abandon their homeland after a plan, approved by the Brazilian Government; to exploit the natural resources of the Amazon region was implemented. The plan led to the construction of a highway, which cut through the Yanomami's territory, and to the discovery of rich mineral deposits in the area.

The Commission held, *inter alia*, that the failure of the Brazilian Government to take "timely and effective measures" on behalf of the Yanomami Indians resulted in violation of their rights to life, liberty and personal security, rights to residence and movement, and rights to the preservation of health and well-being as guaranteed by the American Declaration of the Rights and Duties of Man.¹⁰⁵ It further recommended that the government continue to "take preventive and curative health measures to protect the lives and health of Indians exposed to infectious or contagious diseases."¹⁰⁶

Despite the fact that the Commission has only the power to issue recommendations, the Yanomami case illustrates the fact that social rights can be adjudicated by quasi-judicial bodies. By viewing the American Declaration of the Rights and Duties of Man as containing non-enforceable secondary duties to protect and fulfil certain social rights, the Commission in effect recommended that the Government take steps to ensure the well being of the Yanomami people.

However, the Inter-American Court has addressed the extent to which social rights could be subjected to quasi-judicial or judicial review, and whether and instrument providing for such review should be a separate convention. It did so in response to a request to give its opinion on what was then a draft protocol to the American Convention dealing with social rights. On both issues the Court tied its reasoning to the principle of interdependence. Its approach to the justiciability of social rights relied on a relatively fluid conception of justiciability, one that does not embrace a sharp distinction between civil and political, and social and economic rights and that acknowledges that the boundaries of justifiability are fluid ones. In admitting that justiciability is a moving target, the Court advocated looking, *inter alia*, to the experience under the ESC. The Court appealed to the interdependence principle

¹⁰¹ I/A Court Human Rights *Case of the "Juvenile Re-education institute" v. Paraguay*, Judgment of September 2, 2004 Series C, No. 112

¹⁰² I/A Court Human Rights *Case of the Girls Yean and Bosico v. Dominican Republic*, Judgment of September 8, 2005. Series C, No. 130

¹⁰³ Inter-American Commission on Human Rights, Guidelines for preparation of progress indicators in the area of economic, social and cultural rights, OEA/Ser/L/V/II.132, Doc. 14, 19 July 2008 p.45

¹⁰⁴ Resolution No.12/85, Case No.7615 (1985) (Brazil) reprinted in 1985 Inter-American Yearbook at p. 264

¹⁰⁵ *Ibid* at p. 276

¹⁰⁶ *Ibid* at p. 278

to emphasize both the importance of social rights and the urgency of securing more effective protection for them, as well as to support their view that the Protocol should be seen as part of the basic civil and political rights convention and not set apart in the manner of the Covenants.¹⁰⁷

2.4. The African Human Rights System

The adoption of the African Charter on Human and Peoples' Rights (African Charter) marked the introduction of a third regional human rights system after the creation of the European and Inter-American systems respectively. One of the most important features of the African Charter is the recognition of Economic, Social and Cultural Rights on the same footing as Civil and Political Rights. The African Charter formulates socio-economic rights neither with claw-back clauses nor with conventional limitations as 'progressive realisation' and 'within available resources.'¹⁰⁸

Article 1 of the Charter states that, "The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them."

The Charter's commitment to both individual and collective rights reaffirms the interdependence of all Human Rights. In its preamble, the Charter recognises the rights of peoples as constituting a condition *sine qua non* of the realization and guarantee of individual rights.¹⁰⁹

The African Charter entrenches the principle of indivisibility and interdependence of all human rights. According to the preamble of the Charter, "It is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights".

So the African Charter declares that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as their universality and, rather controversially, that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights. While this Declaration is an affirmation of the important notion of the interdependence and indivisibility of all human rights, some commentators have warned that it could be

¹⁰⁷ See *Observations of the Inter-American Court of Human Rights on the Draft additional Protocol to the American Convention on Human Rights* in *Inter-American Yearbook*, 1986, p.440

¹⁰⁸ Chirwa, Danwood. *African Regional Human Rights System: The Promise of Recent Jurisprudence on Social Rights*. In: *Social Rights Jurisprudence*. University of Oslo, (Cambridge University Press) 2008 p325

¹⁰⁹ Fifth preambular paragraph of the African Charter: recognizing, on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their national and international protection, and on the other hand, that the reality and respect of peoples' rights should necessarily guarantee human rights.

misconstrued to mean that the African Charter gives evidence to the idea that the implementation of economic, social and cultural rights in the African context deserves priority over the protection of civil and political rights.¹¹⁰

Recognition of the indivisibility and interdependence of human rights has progressively characterized modern international and regional human rights instruments. However, the African Charter was one of the first instruments to combine all types of rights in one instrument. Inclusion of the right to development (Art 22) and the right to a generally satisfactory environment favourable to... development (Art 24) evidences a progressive system, ahead of the contemporary legal thought.

However, the African Commission has adopted an approach to interpreting the African Charter that cogently reinforces the concept of the indivisibility of all rights. When considering communications brought before it, the Commission considers the facts in light of all relevant rights applicable. Consequently the Commission has in some cases found violations of rights belonging to all, or two of the three traditional categories of rights, for example in the SERAC Case.¹¹¹

In some other cases, the African Commission has found certain conduct, which would otherwise have been determined solely on the basis of civil and political rights, to constitute violations of certain socio-economic rights. In *Malawi African Association and Others v. Mauritania*, for example, it held that holding people in solitary confinement both before trial and during trial, especially where such detention is arbitrary, amounts to an infringement of the right to respect for one's life and integrity of person.¹¹²

The African Commission has also upheld the indivisibility and interdependence of all rights by considering some human rights issues as posing a 'special threat to human rights', entailing violations of both civil and political rights and economic, social and cultural rights. For instance, in *Union Interafricaine des Droit de l'Homme and Others v. Angola*, it stated that mass expulsion of aliens 'calls into question a whole series of rights' recognised in the African Charter, including the right not to be discriminated against, the right to property, the right to work, the right to education and the right to family protection.¹¹³

This jurisprudence demonstrably underscores the interdependence and indivisibility of all rights and allows for a holistic development of all Charter rights.

¹¹⁰ Langford, M. "Social Rights Jurisprudence: Emerging Trends in International and Comparative Law", Cambridge University Press, 2008, p. 324

¹¹¹ *Ibid*

¹¹² *Ibid*

¹¹³ *Ibid*, p.325

2.5. The Prohibition on Discrimination in Article 26 and Equality Rights

The principle of non-discrimination in the guarantee of economic and social rights is spelled out in the ICESCR, article 2(2). Non-discrimination is required to ensure equality between all individuals that is substantive not merely formal equality. It requires equality in the allocation and distribution of Covenant rights. The ICCPR Articles 2(1) and 26, prohibits discrimination on the basis of sex. Article 2(1) prohibits discrimination with respect to Covenant rights while article 26 is a free-standing equality clause. The importance of the latter for the protection of economic and social rights is illustrated by the UN Human Rights Committee opinion in *Zwaan-de Vries v. Netherlands*¹¹⁴ and *Broeks v. Netherland*.¹¹⁵

The principle of non-discrimination is spelled out in all human rights instruments. The Inter-American Court of Human Rights has asserted it to constitute a peremptory norm:

Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens.¹¹⁶

International Convention on Elimination of All forms of Discrimination against Women includes economic and social rights as well as civil and political rights. ICEDAW's article 3 is a general provision that requires States parties to 'take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation to ensure the full development and advancement of women'.

Other articles provide more specifically for equality between women and men in economic and social life: education (article 10); employment (article 11); healthcare (article 12); family benefits and access to credit (article 13). Discrimination in the allocation of and access to these rights undermines personal development (as indicated in ICEDAW, article 3) and while equal distribution is a step towards the wider achievement of equality: 'A vital way in which equality guarantees are underpinned is by ensuring that basic social protections for the most vulnerable are secured, such as housing, food and education'.¹¹⁷

¹¹⁴ Communication No. 182/1984, CCPR/C/29/D/182/1984, 1987.

¹¹⁵ Communication No. 172/1984 CCPR/C/29/D/172/1984, 9 April 1987

¹¹⁶ Juridical Condition and Rights of the Undocumented Migrants. Advisory Opinion, Inter-Am. Ct.H.R. (Ser.A), No.18 (2003), para. 101.

¹¹⁷ C. McCrudden, 'Equality and Discrimination', in D. Deldman (ed.), *English Public Law*; OUP, 2004, chapter 11, p.588

The CESCR has explicitly encouraged a more progressive approach stating that ‘Guarantees of equality and non-discrimination should be interpreted, to the greatest extent possible, in ways which facilitate the full protection of ESCR. Farha notes the substantive vision of equality of the ICEDAW, which has recognised ‘that inequality exists when...differential disadvantage of women is not addressed by laws, policies or practices. For example, the Committee urged Cuba to introduce temporary special measures to address the high levels of unemployment found amongst women and Romania to ‘improve the availability, acceptability and use of modern means of birth control to avoid the use of abortion as a method of family planning’ including provision of ‘sex education systematically in schools’.¹¹⁸

The European Court of Human Rights has also scrutinized the application of the principle of non-discrimination on the basis of national origin in relation to social security and social assistance benefits. In the *Gaygusuz* case,¹¹⁹ the Court considered that the difference in treatment between nationals and non-nationals in their eligibility for a contributory emergency assistance asheme was not based on any objective and reasonable justification, and was therefore discriminatory. In the *Koua Poirrez* case,¹²⁰ the court ruled that the refusal of a non-contributory allowance to an adult with a disability on the basis of their national origin was unjustifiable and amounted to discriminatory treatment as well as a violation of their right to property.

If the non-discrimination clause in Article 26 has been suitable for extending the protection of the covenant to some aspects of economic and social rights, the same can be said about the fair trial clause in article 6(1) of the ECHR. The right to free legal assistance as a ‘social’ dimension of the right to a fair trial was emphasized by the European Court of Human Rights already in the *Airey* case.¹²¹

In the *Gueye at al.*, case which involved 743 retired soldiers of Senegalese nationality as complainants, the Human Rights Committee established that Article 26 had extraterritorial applicability in the sense that persons affected by the laws of a State party could claim protection under the provision although physically situated abroad. Holding that the nationality fell under ‘other status’ as a prohibited ground of discrimination under Article 26, the Committee concluded that France had violated Article 26 by providing different pension benefits for retired soldiers of its armed forces, depending on whether they were French citizens or not.¹²²

The equality rights and non-discrimination in ICCPR Article 26 is the best known and most important substantive area of human rights law where the Human Rights Committee has made a contribution in the protection of economic, social and cultural rights. At least until a complaint mechanism is operative under the Covenant on Economic, Social and Cultural Rights Committee will be the most important forum

¹¹⁸ See *supra*, note 106, p.25

¹¹⁹ See European Court of Human Rights, *Gaygusuz v. Austria*, September 16, 1996, para. 46-52.

¹²⁰ See European Court of Human Rights, *Kouoa Poirrez v. France*, September 30, 2003, para. 46-50.

¹²¹ *Airey* case, judgment of 9 October 1979, Publications on the European court of Human Rights, Serie A, No.32.

¹²² Langford, M. “*Social Rights Jurisprudence: Emerging Trends in International and Comparative Law*”, Cambridge University Press, 2008, p. 542.

for the further evolution of jurisprudence in respect of equality and non-discrimination in the enjoyment of economic, social and cultural rights.¹²³

According to the Committee, the prohibition on discrimination in Article 26 of the ICCPR does not require a State to ‘enact legislation to provide for social security’; only that social security legislation, once enacted, does not discriminate. However, it seemingly later expanded this position in a General Comment by stating that ‘the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant.’¹²⁴

In Canada, this broader position was clearly articulated in the *Eldridge* case, in which the Supreme Court dismissed the British Columbian provincial government’s arguments that the right to equality did not require governments to allocate resources in healthcare in order to address pre-existing disadvantage of particular groups such as the deaf and hard of hearing. The Court rejected this ‘thin and impoverished vision of equality’ and held that the government’s failure to fund or provide sign language services in the provision of healthcare to the deaf was discriminatory.¹²⁵

The Human Rights Committee of the ICCPR represents a constructive avenue for redress of violations of the principle of non-discrimination with respect to social and economic rights of non-nationals. The HRC has decisively held that Article 26 of ICCPR is an autonomous right, proscribing discrimination in relation to any area regulated by States, including the social and economic field. The ‘integrated approach’ shows much promise in the effective implementation of social and economic rights, both with respect to non-discrimination, and in other fields where overlap may occur.¹²⁶ Examples of the latter include the right to life under ICCPR 6 (which has been interpreted by the HRC to encompass health issues such as infant mortality, life expectancy, malnutrition and epidemics), and the right to education in conformity with religious and moral convictions (ICCPR 18(4)).¹²⁷

The provision has been the source of delicate interpretations, both as the various elements of ‘fair trial’ are at issue, and in relation to the concept of ‘civil rights’. To the extent that the provision is interpreted to cover services or benefits that develop economic and social rights, these rights receive far-reaching procedural protections which, however, is not without material implications. In matters covered by article 6(1), the States Parties are obliged to provide, for example, access to a court, full equality of arms with administrative authorities; free legal aid under certain conditions; independent, impartial, and timely decision-making; full reasoning for the decision; and under certain conditions oral hearings.¹²⁸

¹²³ *Ibid*

¹²⁴ *Ibid*, p.24

¹²⁵ *Ibid*, p.25

¹²⁶ Matthew Craven, *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995), at 174: “[E]ven if non-nationals are not entitled to equal treatment in all respects, it is important to stress that this does not deprive them of all rights under the Covenant. Certainly, in so far as the Covenant establishes the rights of ‘everyone’, non-nationals would have a right to the enjoyment of the minimum core content of those rights. Thus, in practice, the Committee will censure situations where aliens enjoy few rights and are the object of exploitation.”

¹²⁷ Human Rights Committee. General Comment 6, at para. 5.

¹²⁸ *Ibid*, note 11, p.35.

In *Feldbrugge v. The Netherlands*¹²⁹ and *Duemeland v. Germany*,¹³⁰ cases the European Court of Human Rights took its first major step in extending the protection of article 6(1) to social security benefits. In those cases, the decisive criterion was that the private law features of the benefits in question were predominant in relation to coexisting public law features and that; therefore, the right to the benefits in question was a ‘civil right’.

In 1993, the European Court of Human Rights took a second major step. In the cases *Salesi v. Italy*¹³¹ and *Schuler-Zgraggen v. Zwitterland*,¹³² the protection of Article 6(1) was extended to statute-based social security benefits with a public law character. Irrespective of whether a certain form of social security or allowance has a background in private-law relationships (notably an employment contract) or is a right guaranteed by public law, its allocation must meet all the standards of a fair trial.¹³³

The non-discrimination clause in Article 26 of the ICCPR and the right to a fair trial under Article 6 of the ECHR are just two examples of the potential treaties on civil and political rights have in strengthening the judicial protection of social and economic rights through an integrated approach. Other similar fields can be identified and elaborated on through the interpretation of treaty provisions on, for example, *the right to life or the right to private and family life*.¹³⁴

¹²⁹ *Feldbrugge case, judgment of 29 May 1986*, Publications of the European Court of Human Rights, Series A, No.99.

¹³⁰ *Duemeland case, judgment of 29 May 1986*, Publications of the European Court of Human Rights, Series A, No.100.

¹³¹ *Salesi v. Italy*, judgment of 26 February 1993, Publications of the European Court of Human Rights, Series A, No. 257-E.

¹³² *Zchuler-Zgraggen v. Zwitterland*, judgment of 24 June 1993, Publications of the European Court of Human Rights, Series A, No. 263.

¹³³ *Ibid*, note 11, pp.35-37.

¹³⁴ For more instances of interpretations of the ECHR provisions with implications for social and economic rights, see M. Pellompaa, ‘Economic, Social and Cultural Rights’, in: R. St. J. Macdonald et al. (eds.), pp. 855-874.

Chapter - V. CONCLUSIONS

With the demise of East-West conflict the resultant tensions in the field of human rights vanished on political level, and it seems that a more integrative approach called "holistic" one is slowly gaining ground. However, a series of problems in the legal status of social rights and their interrelationship with political rights remained for further conceptualisation. The development of jurisprudence allow us to conclude that realisation of socio-economic are necessary for the forward movement toward realization of a progressive vision of social justice; socio-economic rights constitute an aggregate made up of not only the diverse obligations of states, but also of self executing rules capable of judicial enforcement.

The above analyses are not afforded to romantize the place of the principle of indivisibility and interdependence in the international law experience. We need to encourage the idea of interdependence but not until the point that it helps to promote a discussion where all human rights and as a result all human rights violations are treated as legally indistinguishable.

Within the legal framework of this principle a considerable views are raised on the issue of legally binding or non-binding nature of the internationally proclaimed economic, social and cultural rights and, closely connected with it, the issue of the alleged fundamental differences between civil and political rights on the one hand and economic, social and cultural rights on the other. The latter, in its extreme form, endorse the idea that economic, social and cultural rights differ from civil and political rights in such fundamental respects that it become impossible to escape the conclusion that these rights are inferior from the legal point of view.

The aim of this essay is to argue that there is no reason to deny the economic, social and cultural rights legally binding status under international law and a black-and-white distinction between civil and political rights on one side and economic, social and cultural rights on the other is mistaken and instead a more integrated approach encompassing both sets of rights must be endorsed. However, this does not detract from the fact that they may constitute useful tools for analysis, provided that they are employed in a more flexible manner. In any event, the distinctions should not be constructed so as to result in the creation of an anti-thesis between civil and political rights versus economic social and cultural rights.

The issue of human rights is a very wide one for a discussion in a thesis. This very study has had a limitation of time and space. A discussion on for example the enforcement mechanism of ESCR would require an in depth discussion at both national and international levels including court decisions. This has not been satisfactory.

However, the study is indeed enlightening on the relation between the two sets of rights and the interdependence between them. Another strong point is that the thesis discusses very current issues of enforcement and justifiability of ESCR.



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