Judicial Enforcement of Economic, Social and Cultural Rights at the International and Regional Levels: Challenges in the Assessment of State Obligation and Provision of Effective Remedies

A comparative study of the UN, Inter-American and African human rights systems

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Executive Summary

The main objective of the present thesis is to evaluate the effectiveness of judicial enforcement of economic, social and cultural rights (hereinafter "ESC rights" or "socio-economic rights") at the international and regional levels. The thesis, specifically, focuses on the individual complaint procedures set up by the judicial and quasi-judicial organs that deal with complaints related to these rights. With this end in mind, the thesis will comparatively study the procedures available at the United Nations, Inter-American and African Human rights systems for the adjudication of socio-economic rights.

The thematic focus of the thesis is, particularly, tailored to assessment of state obligation in adjudication of individual cases and provision of effective remedies when violation is found, since they are the main areas to which challenges on judicial enforcement of socio-economic rights are associated. These thematic issues will be systematically analysed by reference to the case laws of the jurisdictions selected for this study and other relevant jurisdictions as the case may be. Accordingly, the paper yearns to identify the normative lacunas and practical challenges encountered in the enforcement of ESC rights through individual complaint procedures in order to give insight as to the necessary reforms.

Acronym

CESCR	Committee on Economic, Social and Cultural Rights
ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council
ECtHR	European Court of Human Rights
ESC	Economic, social and cultural
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILC	International Law Commission
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCIJ	Permanent Court of International Justice
UN	United Nations

Introduction

Statement of the problem

The past couple of decades have witnessed various debates and controversies concerning the status and practical implementation of economic, social and cultural rights. Some commentators assert that these rights do not qualify as human rights and their recognition as such is not plausible. Others argue on the basis of practicality; socio-economic rights are too vague and the difficulty associated with their implementation outweighs their importance. The other challenge posed against these rights, usually regarded as 'second generation rights', is their position in relation to civil and political rights. Proponents of the later set of rights regard socio-economic rights as less important and assume that priority should be accorded to civil and political rights as they are the core attributes of human dignity. These views can be traced back to the political prejudice associated to ESC rights; since the early development of these rights is connected to authoritarian regimes in history, there is a belief that their recognition would threaten civil and political rights.

The strongest argument against the acknowledgement of socio-economic rights on equal footing with civil and political rights, however, is related to justiciability of ESC rights- whether or not they can possibly be claimed and enforced judicially. This controversy mainly arises due to the very nature of these rights and the peculiar state obligation they entail. Since the positive obligations attached to socio-economic rights will certainly have resource and budget implication, they require progressive realization as opposed to immediate implementation. This special characteristics of ESC rights coupled with the doubt as to their status as human rights have led many to argue that these rights are not judicially enforceable.

Nevertheless, currently, it is well recognized that "all human rights are universal, indivisible and interdependent and interrelated."[1] This principle not only affirms the status of socio-economic rights as human rights, but also necessitates their implementation both at the national and international level with the same emphasis as civil and political rights. The legal and institutional developments at different levels, including the adoption of the first Optional Protocol to the ICESCR that provides for individual communications at the UN level and progressive jurisprudence of regional and domestic courts, have also answered the justiciability quest. Even if the debate of justiciability is still lingering to some extent, now it has less important place at the international arena. Hence, it is safe to conclude that the above arguments are fading and the judicial enforcement of ESC rights is being accepted more, although there is still a long way to go in order to guarantee judicial enforcement at all levels.

Now the concern has shifted to the actual effectiveness of judicial enforcement, which is the main thirst of this work. The special nature of state obligation described above not only makes the assessment of obligation cumbersome for judicial bodies, but also affects the success of enforcement in general. Particularly at the international and regional levels, the availability of resources and the principle of progressive realization are usually used by states as a defence for their failure to guarantee ESC rights. Hence, this calls for specific standards of assessment to be employed and the efficacy of these standards in determining state obligation itself poses another difficulty. The other challenging area with regard to judicial enforcement of socio-economic rights is provision of remedies for violations. Judicial implementations of human rights will necessary entail the existence and provision of remedies, which can have both procedural and substantive aspects. However, providing a remedy which will give redress for the victim and also address the systemic problem in the state, if any, is more challenging in the cases of ESC rights. In relation to this, there is also an

[1] UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23, par.5.

issue of implementation at the national level, particularly when the remedies ordered require policy or legislative change. These are the main issues the present thesis will seek to address.

Choice of jurisdiction

As the title indicates, the paper is confined to enforcement of ESC rights at the international and regional levels with particular focus on individual complaint mechanisms. It will be based on a comparative study of three jurisdictions: the United Nations, African and Inter-American human rights systems. Unlike the UN system, the two regional systems did not make a demarcation between socio-economic rights and civil and political rights and, relatively, they have more advanced jurisprudence on the matter. Compared to European human rights system, which has extensive jurisprudence on civil and political rights, the African and Inter-American systems have more progressive decisions on ESC rights. Hence, undoubtedly, they are the most suitable comparative jurisdictions for this study, which will analyse the enforcement of socio-economic rights through individual complaint procedures.

Methodology

The research will be conducted based on applied doctrinal research methodology. Thus, primary sources, such as legal instruments with their authoritative interpretation and case laws from the comparative jurisdictions and secondary sources including commentaries and scholarly publications will be utilized. The study will not be confined to theoretical discourse, rather it will analyse the application of normative standards on concrete cases and identify the gaps in the law and practice.

Contents of the thesis

The thesis will have three main chapters. The first chapter provides a conceptual, legal and institutional background to enforcement of ESC rights. This chapter will particularly look at the legal and institutional framework within the three selected jurisdictions based on

comparative perspective. The normative content of some selected socio-economic rights will also be touched upon comparatively. The chapter will also cover the debate regarding justiciability of socio-economic rights and other contemporary challenges hindering proper implementation of these rights.

The second chapter is dedicated to the analysis of assessment of state obligation in relation to individual complaint procedures. Particularly, it will deal with the tests employed by the judicial or quasi-judicial bodies and the effectiveness of those tests based on the case law of the jurisdictions chosen for comparative study.

Last but not least, the third chapter will engage with the concept of the right to effective remedies and its application in cases of ESC rights. It will deal with the standards developed to evaluate the effectiveness of remedies and their applicability in cases involving socio-economic rights. The chapter will also identify the procedural and substantive aspects of remedies in relation to ESC rights. More importantly, this part of the paper will specifically deal with the remedies adopted by the judicial/quasi-judicial organs for violation of rights and evaluate whether these remedies are effective based on international standards. Finally, the work will culminate by suggesting certain reforms to improve the judicial enforcement of ESC rights at international and regional levels and providing a brief conclusion of important findings.

Chapter one

1. Comparative Overview of ESC Rights and their Enforcement

The recognition and enforcement of ESC rights have gone through various challenges both at the international or regional and national levels. Even when the world has reached a consensus as to the importance of human rights and strived for their normative recognition, socio-economic rights have received lesser attention and given inferior position. This lack of attention is backed by deficiency in political willingness of states and the academic discourse that attacked the status of these rights and their capacity to be enforced by judicial intervention. Nevertheless, in the last few decades the recognition and judicial enforcement of ESC rights have demonstrated considerable momentum both at supranational and national levels. Since, these rights have been explicitly recognized in binding treaties and national constitutions coupled with progressive interpretation of judicial bodies.

However, the judicial enforcement of socio-economic rights through individual complaint mechanisms is still grappling with various challenges attributable to plenty of factors including historical facts. This chapter, which is meant to introduce the conceptual and normative basis of ESC rights and their enforcement, will commence by giving a brief historical background on recognition of these rights in those three jurisdictions selected for this study. The chapter will also dwell upon theoretical justifications for protection of ESC rights and provide the peculiar features attached to them in relation to civil and political rights. The institutional and legal frameworks available for protection of socio-economic rights including the normative content of certain selected rights will also be analysed comparatively. Finally, the chapter will conclude by giving a brief evaluation of the justifiability debate and contemporary challenges of enforcement.

1.1. Historical Background

International recognition of socio-economic rights can be traced back to the adoption of the Universal Declaration of Human Rights (UDHR), which is a non-binding instrument that incorporates civil and political rights and ESC rights in the same document. The adoption of this "standard-setting" legal framework is preceded by the irreparable damages of the two World Wars followed by the devastating socio-economic crisis, which escalated the need for international legal framework for the protection of human rights. The early efforts could not, however, result in more than few general remarks in the UN Charter and formation of Commission on Human Rights, an organ entrusted to come up with detailed and authoritative human rights instrument. Nevertheless, another historical calamity, the eruption of cold war, divided East and West and hindered states from reaching to agreement on a binding treaty. Hence, the UDHR is adopted in 1948 as a compromise between extreme ideological differences.[1]

To overcome lack of agreement on a single treaty, the UN General Assembly adopted a Resolution in 1952, commonly called "Separation Resolution", opting for preparation of two separate treaties.[2] Consequently, the Commission prepared two drafts in the same year by dividing rights stipulated under the UDHR. On subsequent negotiations, the Western states wholeheartedly accepted and pushed for two separate treaties, since it complies with their long held position that civil and political rights and ESC rights are naturally different and the latter category of rights cannot be judicially enforceable. On the other hand, the Eastern bloc and a large number of non-aligned states argued for equal protection of ESC rights and the

[1] Eibe Riedel, Gilles Giacca and Christophe Golay (eds), Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges (Oxford University Press, 2014), p.5 & 6.
[2] UN General Assembly Resolution, Preparation of two Draft International Covenants on Human Rights, 4 February 1952, A/RES/543.

adoption of a single treaty that encompass both categories of rights. Apparently, the latter groups had to compromise and the two separate treaties, International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), were adopted in 1966 and entered into force in 1976.[3]

Separation of human rights guarantees in two different documents is not without any effect; the two Covenants convey some important differences, particularly with regard to implementation, which will be discussed in subsequent sections of this paper. Unlike the Human Rights Committee, the Committee on ESC rights was not established by the Covenant itself. Originally, the task of monitoring the implementation of rights provided in the ICESCR was left to the Economic and Social Council (ECOSOC) that established the Committee later on.[4] The Committee was established on 28 May 1985 by the ECOSOC Resolution.[5]

At the international level, judicial enforcement of socio-economic rights has historical background in early discrimination cases.[6] In 1935, the Permanent Court of International Justice entertained a claim on the issue of the right to equality in relation to minorities based on the Charter of League of Nations. In this case, the Court dealt with whether or not the Alabanias decision to close Greek-speaking schools was in line with the right to equality of the minorities concerned.[7] Even if these early cases did not deal with socio-economic rights as such, they laid a foundation for judicial enforcement of these rights.

[3] Riedel, Giacca and Golay, supra note 2, p.6 & 7.
[4] Ibid, p.7.
[5] The Economic and Social Council (ECOSOC), Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights, Resolution 1985/17.
[6] Malcolm Langford , Justifiability of Economic, Social and Cultural Rights, in Malcolm Langford (ed), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, (Cambridge University Press, 2008), p.5.
[7] *Minority Schools in Albania* , PCIJ Reports 1935, series A/B, No.64.

In the Inter-American human rights system, the recognition of human rights dates back to the adoption of the Charter of the Organization of American States in 1948, although it only has few general provisions on human rights. The Protocol of Buenos Aires adopted as an amendment to the Charter in 1970 has more provisions on human rights including certain ESC rights. However, the rights incorporated therein are vague and not specific enough. The first comprehensive instrument in the region is the American Declaration of the Rights and Duties of Man adopted in the same year as the UDHR. This Declaration stipulates both civil and political rights and ESC rights, although the fact that it is adopted as a Resolution makes it non-binding. Despite this, the Declaration has actually acquired authoritative status by subsequent institutional recognition and acceptance through state practice. Nevertheless, a formally binding human rights instrument is achieved with the adoption of the American Convention on Human Rights in 1969. Although the first draft incorporates both categories of rights in the same document, they decided to exclude ESC rights due to the international experience of separate instruments and partly for fear that states would not be willing to ratify it. Finally, socio-economic rights have been extensively recognized in the 1988's Additional Protocol to the American Convention on Human Rights in the Area of ESC Rights, commonly called Protocol of San Salvador.[8]

Compared to the two systems discussed above, the African human rights system is established more recently, mainly because of the colonialism and the struggle for independence the continent was going through. Even though, the Organization of the African Unity (OAU) is established by a Charter (OAU Charter) in 1963, the Charter did not make reference to human rights and it was not listed as one of its objectives. The regional safeguard of human rights at the African level formally began with the adoption of the African Charter

[8] Craven, Matthew, The Protection of Economic, Social and Cultural Rights under the Inter-American System of Human Rights, in D. Harry and S. Livingston (eds.), *The Inter-American System of Human (Rights* Oxford University Press, 1998), pp. 290-309.

on Human and Peoples' Rights (Banjul Charter) in 1981, which is based on the principle of indivisibility and interdependence of rights and recognized a whole range of different rights in the same instrument. Subsequently, the African regional human rights system has demonstrated encouraging progress with the interpretation of enforcement organs and adoption of supplementary instruments for protection of vulnerable groups, such as children and women.[9]

1.2. Theoretical foundations

The status of ESC rights has been susceptible to various controversies and attacks in the past many decades. Diverse views, from extremely sceptical discourse that denies the human rights status of ESC rights to more pragmatic argument that doubts the enforceability of these rights due to procedural and substantive difficulties, have been staged in global debate. This section will justify socio-economic rights as human rights and answer questions raised in relation to the status of these rights: are ESC rights really human rights? What are the justifications for recognizing and protecting these rights? Human rights are based on the notion that human beings are endowed with certain basic rights because of their humanity, which apply universally and built upon overriding moral justifications.[10] Hence, do these justifications apply to ESC rights?

1.2.1. Human dignity considerations

The basic concept behind fundamental rights guaranteed to everyone for the sole reason of being human is dignity consideration, which is a core value and driving force for promotion and protection of human rights in general. This is evidenced in the opening statement of the

[9] Manisuli Ssenyonjo An Introduction to African Regional Human Rights System, in Manisuli Ssenyonjo (ed.), The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights (Martinus Nijhoff Publishers, Leiden, Netherlands, 2012), pp. 5-8.
[10] Hugh Collins, Theories of Rights as Justifications for Labour Law, available at https://www.lse.ac.uk/collections/law/staff%20publications%20full%20text/collins/ch9.pdf last visited 3 Dec. 2016, p.140.

UDHR, which provides: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".[11]

Human dignity rests on the assumptions that human beings are autonomous in themselves and they are capable of shaping their own destiny and values of the society they live in. They have inherent freedom to make choices for themselves instead of passively accepting choices made for them.[12] This is closely embodied in Amartya Sen's, a Nobel prize winning economist, 'capability approach'[13], which claims that individuals are capable of choosing the life they consider worthy. This is different from utilitarianism or resources approaches, the emphasis of which is tailored to the existence of certain means that are believed to be indispensable for good life.[14] Martha Nussbaum has particularly connected this approach with the concept of human dignity asserting that, "'all human beings ought to acknowledge and respect the entitlement of others to live lives commensurate with human dignity."[15]

These considerations of human dignity require not only the respect of civil liberties of a person, but also ensuring social and economic means crucial for physical and psychological development of a person. Human dignity requires a conducive social and economic environment where free personal choice of life can be made. The higher value and worth given to human beings necessitates the existence of conditions that enable individuals to get access to opportunities and benefit from social resources in order to lead a standard of life

[11] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), preamble.
[12] Andries Johannes Van der Walt (ed.), Theories of Social and Economic Justice (published by Sun Press, 2005), p.146.
[13] Capability Approach is a theory prominently developed by Amartya Sen and Martha Nussbaum in 1980's to answer the quest for justice in social construction.
[14] Amartya Sen. 1993. 'Capability and Well-being', In The Quality of Life, Martha Nussbaum and Amartya Sen, (Oxford: Clarendon, 1993).
[15] Martha Nussbaum, 2006. Frontiers of Justice, (Cambridge, MA: The Belknap Press, 2008), p.53

worth their value.[16] This can only be achieved by adequate guarantees of all fundamental rights including socio-economic rights.

Hence, human dignity as a major justification for recognition of fundamental rights also comes into play when we talk about socio-economic rights. Dignified life is hardly imaginable without adequate housing, food, water healthcare and the opportunity to earn decent living through work. In recent cases decided by the Inter-American Court of human rights (the cases will be discussed in the coming section), this justification is highly stressed to give broader interpretation to the right to life in a way it can incorporate socio-economic rights. The Court asserted that the right to life entails more than just a mere existence or survival, rather it means "dignified existence", which hinges upon the availability of adequate living conditions.[17] This makes socio-economic rights indispensable for the protection of human dignity.

Similarly, human dignity is one of the foremost principles of the South African Constitution,[18] which is praised for its explicit and comprehensive recognition of both civil and political rights and ESC rights. This has been also affirmed in the landmark *Kohsa case* decided by South African Constitutional Court. In this case where the laws that limit old-age and child welfare supports are challenged, the Court used human dignity justification, among others, to decide in favour of the applicants and declare the contested provisions invalid.[19] The Court, particularly, stressed that unfair discrimination contravenes this paramount constitutional value, quoting its previous decision: "at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of

[16] Van der Walt, supra note 13, pp.147-151.
[17] Case of the *Yakye Axa Indigenous Community v Paraguay*, IACHR Series C no 125, IHRL 1509 (IACHR 2005), 17th June 2005, Inter-American Court of Human Rights [IACtHR].
[18] Constitution of the Republic of South Africa , 10 December 1996, Section 1.
[19] *Khosa and Others v Minister of Social Development & Ors* (2004) 6 BCLR 569 (CC), par.70.

their position in society, must be accorded equal dignity."[20] Hence, human dignity necessitates the guarantee of all sets of rights and it is the foremost justification for recognition of ESC rights.

1.2.2. Social justice justification

Social justice is relatively new perspective of justice, as the classical philosophers like Aristotle and Plato had not addressed the theory of justice from this point of view. The rise of this concept is mainly traced back to industrial revolution and the following advent of socialist ideology. Social justice, which reflects the principles of 'progress and fraternity', was used as a sign of protest against the existing capitalist exploitation and the resulting deterioration of human condition.[21] In the modern context, social justice is closely linked with distributive justice, which asserts equal participation and benefit of all peoples in economic and social opportunities and fruits of development. The economic aspect of social justice, particularly, addresses adequate employment chances and reasonable benefit derived from it. Social justice calls for economic advancement that provides better quality of life, which will benefit all people equally without discrimination.[22]

This extensive objective of social justice can hardly be achieved by mere guarantees of civil and political liberties. The recognition and enforcement of ESC rights, such as the right to work, education and health among others, is indispensable to uphold fundamental attributes of social justice that embodies equitable standard of living.[23] For instance, if access to employment opportunities and adequate conditions of work is not protected through the right to work, income inequality and labour exploitation is the inevitable result, which is contrary

[20] *Hoffmann v South African Airways*, (2001) AHRLR 186 (SACC 2000), cited in *Kohsa* case, supra note 20, par.70.
[21] United Nations Department of Economic and Social Affairs, Social Justice in an Open World: the Role of the United Nations (United Nations publication, 2006, ST/ESA/305, p.12.
[22] Ibid, p. 13 & 14.
[23] Collins, supra note 11, p.142.

to the central yearning of social justice. Socio-economic rights can also have a redistributive effect, since the resource-intensive nature of these rights and positive measures states are required to undertake can narrow down wealth inequality. For example, states can achieve this by taxing the rich in order to provide for the poor, which is one of the commonly used economic policies in this regard.

Moreover, the absence of social justice and economic inequality are one of the main causes of internal violence; a number of conflicts have been triggered by devastating socio-economic conditions coupled with other political issues.[24] Hence, the concern of ESC rights from the perspective of social justice is not only limited to fairness in economic opportunities and distribution of wealth, it also has a broader implication that will extend to peace and stability.

1.2.3. Interdependence and indivisibility of rights

The other major justification for protection of ESC rights emanates from the inevitable connection and co-dependence that exists between rights. Vienna Declaration has come up with a noble principle that responded to the debate, which has been lingering for a long time. Pursuant to this Declaration, "all human rights are universal, indivisible and interdependent and interrelated."[25] Due to this interrelationship and interdependence of human rights, it is undeniable that the realization of one set of rights cannot be guaranteed without similar level of protection to other rights.[26] In other words, all human rights are part of the same package that cannot be selectively applied without destroying the very essence of the package.

Human rights cannot give a complete picture, if it is solely focused on protection of civil and political rights that are usually considered as first generation rights. As Riedel, Giacca and Golay firmly argued:

[24] Shedrack C. Agbakwat, Reclaiming Humanity: Economic, Social and Cultural Rights as a Cornerstone of African Human Rights, Yale Development and Human Rights Law Journal, vol.5, 2002, pp.181 & 182.
[25] Vienna Declaration, supra note 1, par.5.
[26] Agbakwat, supra note 25, 183.

> Without minimum claim rights in working life, health protection, and education systems, and without the guarantee of an adequate standard of living, flowing from human dignity, guaranteeing a 'survival kit' that sets a minimum existence protection standard, the overall picture of human rights would be incomplete, missing out crucial dimensions of protection for the most needy, in particular marginalized and disadvantaged persons and groups of persons.[27]

Hence, the whole purpose of human rights will be distorted if states' protection only extends to a limited spectrum of rights neglecting the needs of the majority who are deprived of the required quality of life.[28] Moreover, states cannot possibly respect rights selectively, since the protection of a certain right will inherently depend on protection of other rights. Needless to say that neglecting socio-economic rights not only affects rights categorized as such, but it also affects the realization of civil and political rights. We can easily look at how lack of education will have adverse impact on participation of citizens in political affairs to demonstrate this assertion. Even states that are only committed to protection of civil and political rights should put socio-economic rights on equal footing, since the former cannot be materialized without the later.[29] Hence, the classification of rights with different levels of protection in practice is not as easy as it sounds in theory.

Therefore, similar to other fundamental rights, socio-economic rights are basic guarantees all human beings are endowed with for the sole reason of their humanity. Consequently, they can rightly be vindicated by the justifications that necessitated the international recognition of all human rights at the first place. Hence, this will give affirmative response to the questions raised at the beginning of this section.

[27] Riedel, Giacca and Golay, supra note 2, p.6.
[28] Agbakwat, supra note 25, p.181.
[29] Ibid, p.184.

1.3. Peculiar features of ESC rights

The debate as to the status of ESC rights did not culminate after the adoption of the two Covenants; there are still some important distinctions drawn between the two categories of rights: civil and political rights and socio-economic rights. Most of these distinctions emanate from the perceptions associated with these rights, although some of them are justified by the existing material reality. There is an argument that has been held for a long time that these two categories of rights are so distinct that civil and political rights possess a higher status while socio-economic rights are "second-rate human rights."[30]

The first difference commonly raised between these rights is the nature of obligation they entail. Civil and political rights are considered as negative rights that require states to refrain from abridging rights recognized therein. On the other hand, ESC rights are regarded as positive rights, since their realization require positive engagements from states.[31] In the latter category, the role of a state is more active while in the former, a state is considered as a passive bystander who is only expected to act when rights are threatened by interveners.

Consequently, it has been argued that civil and political rights can be fulfilled without significant resource implication. On the contrary, socio-economic rights are regarded as "resource-intensive" that cannot be realized without huge amount of cost.[32] Even if certain amount of resource is inevitably required to guarantee civil and political rights, such as fair trial and right to vote, the cost incurred in ensuring these rights is minimal as compared to ESC rights. It does not go beyond the budget required for the very existence of the state.[33]

[30] G.J.H Van Hoof, The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views, p.103.
[31] Philip Alston and Gerard Quinn, The Nature and Scope of States' Parties Obligation under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly 9 (1987), p.159.
[32] Ibid.
[33] Van Hoof, supra note 31, p.103.

What follows from this distinction is that civil and political rights are characterized as more susceptible to immediate realization whereas ESC rights are expected to be fulfilled in a long run.[34] According to some commentators, the former must be complied with totally while the latter can be respected partially. It has also been claimed that civil and political rights has to be guaranteed for every beneficiary, but certain groups may be accorded priority regarding socio-economic rights.[35]

However, the academic discourse on the subject and the practical necessities revealed that these rigid distinctions cannot stand in reality. It is hard to imagine the realization of some civil and political rights without active involvement of the government; fair trial rights can be a good example for this.[36] Even rights that are traditionally perceived as purely negative entail some positive actions from state. For instance, in a case involving freedom of expression, the European Court of Human Rights (ECtHR) asserted that a state is required to create conducive environment for exchange of ideas of public interest and for everyone to take part in public debate without any intimidation. The Court has, particularly, stressed that freedom of expression also entails positive obligation of protecting journalists from attack by third parties.[37] Furthermore, ESC rights also require the state to abstain from interfering in the enjoyment of these rights apart from taking positive steps. For instance, in order to realize right to health, the state has to protect the existing healthcare service centres and not deny access to these facilities.[38]

Meanwhile, realization of civil and political rights also depends on significant resource allocation. For countries that are struggling with resource constraint, particularly, the costs

[34] Alston and Quinn, supra note 32, p.159.
[35] Van Hoof, supra note 31, p.104.
[36] Ibid, p.103.
[37] *Dink v Turkey*, Application Nos 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09 judgment of 14 September 2010.
[38] Langford, supra note 7, p.30.

associated with conducting elections and setting up a judicial system cannot be understated.[39] It is undeniable fact that ESC rights require greater financial investment than civil and political rights. However, the difference is on the amount rather than a clear cut distinction of expensive and free rights.[40] Moreover, although socio-economic rights require states to take steps towards their progressive realization, there are also some duties that should be complied with immediately, like non-discrimination. Generally, most of the distinctions drawn between these two sets of rights are artificial or overstated, even if certain divergence exists.

1.4. Legal framework for the protection of ESC rights

1.4.1. General overview

At the UN level, "the most comprehensive treaty" for the protection of socio-economic rights is the ICESCR, which is composed of 31 articles.[41] However, this does not mean that the Covenant is the only human rights document that incorporates ESC rights in the international human rights fora; there are also other instruments that guarantee these rights along with the so called first generation rights, including the Convention on Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and Convention on Rights of Persons with Disabilities.

The principal human rights instrument in the Inter-American system is the American Convention on Human Rights, although there are various supplementary instruments adopted subsequently, including the two Additional Protocols, the Inter-American Convention on forced Disappearance of Persons and the Inter-American Convention on Prevention, Punishment and Eradication of Violence Against Women among others.[42] The American

[39] Van Hoof, supra note 31, p.103.
[40] Langford, supra note 7, p.31.
[41] Marco Odello and Francesco Seatzu, The UN Committee on Economic, Social and Cultural Rights: the Law, Process and Practice (New York : Routledge, 2012), p. 9.
[42] Jo M. Pasqualucci, The Practice and Procedure of the Inter-American Court of Human Rights, (Cambridge University Press, Ney York, 2003), p.3.

Convention, however, does not have detailed rules on socio-economic rights, rather it only has one article which entitles these rights in general terms. Article 26 of the Convention reads:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.[43]

This provision is calls for states' accountability in a very abstract manner and it does not entitle specific rights. The more detailed guarantees of socio-economic rights are available in the first Additional Protocol to the Convention, commonly known as the Protocol of San Salvador. However, the Inter-American Court has given a number of progressive decisions that imply socio-economic rights from those rights explicitly granted in the Convention, which will be discussed in detail subsequently.

In African regional context, the principal legal framework on ESC rights is the African Charter on Human and Peoples Rights (hereinafter African Charter or Banjul Charter), which incorporates all categories of rights in the same document. These rights recognized in the Charter are extensively framed and they call for interpretation to be applied by states. Hence, the decisions of the African Commission on Human and Peoples' Rights are quite important in order to get the full picture of the normative content of these rights. Particularly, the

[43] Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, article 26.

judgments given after 2001 are more specific enough to address the vagueness resulted from the generality of the law.[44]

1.4.2. Comparative study of selected rights

Providing a detailed commentary of all ESC rights is beyond the scope of this thesis and is not directly relevant for thematic issues under consideration. However, some rights are selected for brief discussion in order to illustrate the normative content of socio-economic rights and the obligation they entail as well as to depict the differences between the three jurisdictions under study. These rights are selected on the basis of cases that the analysis of subsequent chapters will be based on.

I. The right to work

The right to work is one of the fundamental rights recognized in different international and regional human rights instruments and it directly correlates to human dignity. According to the Committee on Economic, Social and Cultural Rights (CESCR):

> The right to work is essential for realizing other human rights and forms an inseparable and inherent part of human dignity. Every individual has the right to be able to work, allowing him/her to live in dignity. The right to work contributes at the same time to the survival of the individual and to that of his/her family, and insofar as work is freely chosen or accepted, to his/her development and recognition within the community.[45]

Furthermore, the realization of other rights, such as right to food, housing, health and education, is hardly imaginable without the recognition of the right to work.[46] This right gives

[44] Manisuli Ssenyonjo (Ed.), The African Regional Human Rights System: 30 Years after the African Charter on Human and peoples' Rights (Martinus Nijhoff Publishers, Leiden, Netherlands, 2012), p.58.
[45] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 18: The Right to Work (Art. 6 of the Covenant)*, 6 February 2006, E/C.12/GC/18, par.1.
[46] Ben Saul, David Kinley and Jaqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights : cases, materials, and commentary, (Oxford : Oxford University Press, 2014), p.273.

individuals a chance to earn their living with protection of the law and provide for themselves and families in order to live with dignity.

The right to work is clearly recognized under Article 6 of the ICESCR, which is further construed through the authoritative interpretation of the Committee in General Comment No.18. On the other hand, the subsequent provisions of the Covenant, Article 7 and Article 8, contain separate but interdependent entitlements to the right to work. They enumerate required conditions of work and collective aspect of the right, respectively.[47] From these provisions it is clear that right to work has both individual and collective aspects and it can be exercised accordingly. Moreover, it applies impartially without any distinction as to the type of work and the remuneration associated to it. However, right to work does not imply unconditional entitlement to get employment.[48]

The right to work is expansively detailed in the Covenant and the normative content, consequently, is also extensive. The main provision, article 6 reads:

> The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.
>
> The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.[49]

[47] General Comment 18, supra note 46, par.2.
[48] Ibid, par.6.
[49] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, article 6.

This provision incorporates four basic elements. The first is access to opportunity to earn a living from work and the autonomy of a right holder to choose or accept a given work. This element also implies that a person should not be arbitrary deprived of employment.[50] Second, the opportunity must be equally accessible without any discrimination based on different status. The prohibition of discrimination extends from the recruitment process to culmination of employment. The third element is related to the negative aspect of the right to work, the option of not working or in other words, prohibition of compulsory labour. Fourthly, Article 6 also obliges states to formulate employment policy at the national level in order to expand the number and quality of employment opportunities progressively. States are required to apply such policies based on their resources and within the limited time frame as much as possible. These policies must be directed to making employment opportunities available and accessible.[51]

Pursuant to the Committee's authoritative interpretation, the obligation of states has three major components: states must not only ensure that employment opportunities are available but also provide assistance for individuals to access those opportunities; states must ensure that the labour market is accessible physically and with regard to information to everyone without any discrimination. Moreover, the employment opportunities and conditions of work must be acceptable and of adequate quality.[52]

The right to work is not limited to the availability and accessibility of employment opportunities, it also extends to the minimum conditions that should be guaranteed in a given employment. Article 7 of the Covenant enumerates "just and favourable conditions of work", which are vital components of the right to work. The purpose of these conditions goes beyond ensuring the right to work, it also has various inter-related goals. For instance, the

[50] Saul, Kinley and Mowbray, supra note 47, p.280, see also General Comment No.18, supra note 38, par.6.
[51] Saul, Kinley and Mowbray, supra note 39, p.280.
[52] General Comment No.18, supra note 46, par.12.

requirements related to remuneration, "fair wages" and "decent living for [workers]" are inalienable for realization of adequate standard of living guaranteed under Article 11 of the Covenant.[53]

The term 'work' employed in the Covenant refers to "decent work", which means it must comply with basic human dignity requirements regarding remuneration and safety conditions. Workers should be able to get an income that will enable them to provide for themselves and their families. Moreover, the tasks required by the employment should respect physical and mental integrity of workers.[54]

As it has been mentioned before, the American Convention does not guarantee socio-economic rights specifically, apart from the general provision that recognize these rights in abstract. ESC rights are recognized in detail in San Salvador Protocol, which recognizes both the individual and collective aspects of the right to work in its three provisions.[55] Article 6 of the Protocol provides that "Everyone has the right to work, which includes the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity."[56] This provision has attached the qualification of "dignified and decent existence", in which the means obtained from work should provide for. Moreover, the quality of working conditions and the rights related to trade unions are stipulated under Article 7 and 8 respectively in the same way as the ECESCR, although the Protocol is a little more detailed.

In contrast to the instruments in the above two jurisdictions, the African Charter provides for the right to work in a very general and brief manner; Article 15 reads: "Every individual shall

[53] Saul, Kinley and Mowbray, supra note 47, p.393.
[54] General Comment No.18, supra note 46, par.7.
[55] Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 16 November 1999, A-52, Article 6, 7, & 8.
[56] Ibid, Article 6 (1).

have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."[57] The Charter does not enumerate what "equitable and satisfactory conditions' of work stands for, unlike the ICESCR and San Salvador Protocol. The reference to equality of payment has a gender aspect and indirectly prohibits discrimination on the basis of sex or other status. On the other hand, the Charter does not stipulate a right to form a trade union as a collective aspect of the right to work, however, this can be implied from freedom of association and assembly explicitly guaranteed in the Charter.[58]

Overall, the right to work is explicitly recognized in all three jurisdictions, although the degree of intensity might vary. The splendid requirements under the UN and the Inter-American mechanisms provide more protection compared to the more abstractedly defined entitlement in the African Charter. Moreover, since the adequacy of working conditions is one of the challenges raised in relation to employment issues, it would be more preferable to have standards at the regional level. Even if these standards can be adopted by interpretation of the Commission or other enforcement bodies, the level of their authority would not be equal to the binding instrument. In this respect, the role of international and regional standards in providing a guideline for national protections should not be overlooked.

II. The right to an adequate standard of living

Adequate standard of living as human rights is incorporated under Article 11 of the Covenant[59], which is drawn from the UDHR provision that guarantees similar right[60]. Nevertheless, this provision of the Covenant is broader and it encompasses various fundamental rights; on the other hand, it does not include the right to health and social

[57] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 15.
[58] Amnesty International, A Guide to the African Charter on Human and Peoples' Rights (Amnesty International Publications, 2006), p. 20 & 21.
[59] ICESCR, supra note 50, Article 11.
[60] UDHR, supra note 12.

security under the right to adequate standard of living, those are recognized under separate provisions, unlike the Declaration.[61]

Pursuant to the commentary on the ICESCR, Article 11 of the Covenant has two major parts. First, it entitles individuals and families the right to live in adequate standard of living by placing a corollary duty on state to take appropriate measures to realize these standards. More specifically, such standard of living calls for "adequate food, clothing and housing" and the right to adequate water is also implicitly recognized in this provision. Secondly, the Article also gives emphasis to alleviation of hunger by particularly putting forward certain means and measures.[62] In the next sections, the right to food and housing will be discussed briefly in comparison with the Inter-American and African human rights systems, since all components of adequate standard of living cannot possibly be covered by this paper.

a. Right to food

The paramount importance of the right to food is summed up in the statement of the Australian delegate during the drafting of the Covenant- "no human right is worth anything to a starving man."[63] The UN Special Rapporteur on the right to food, Jean Ziegler, has also stressed the importance of this right to safeguard human dignity in his statement on hunger. After expressing his concern about the alarming number of children killed every year due to malnutrition despite the increase of wealth in the world, he strongly asserted that "all human beings have the right to live in dignity, free from hunger."[64] This is also reiterated by the Committee on ESC rights, in its authoritative interpretation, which provided:

> The right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International

[61] Saul, Kinley and Mowbray, supra note 47, p.862.
[62] Ibid, p.862.
[63] Ibid, p.868.
[64] The UN Special Rapporteur on the right to food, Jean Ziegler, UN Special Rapporteur on Right to Food Deplores Increase in Number of People Suffering from Hunger, 16 October 2007.

> Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all.[65]

The right to adequate food, which is guaranteed for everyone irrespective of social and biological differences, does not refer to the nutrition content of the food in the strict sense. The precise content of the term "adequacy" is to be determined by taking into account several factors of the existing economic, social, cultural, climate and ecological conditions. It also gives rise to the notion of "sustainability", which implies "food being accessible for both present and future generations"[66] Overall, according to the committee, the core content of this right implies two elements: "the availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and acceptable within a given culture" and "the accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."[67]

Similar to other socio-economic rights, states are required to take appropriate steps and ensure the realization of adequate food progressively. However, states have immediate obligation to alleviate hunger and make "minimum essential food" accessible to everyone within their jurisdiction. This standard requires that the food must be ample in its amount, nutritious in its content and adequate for the wellbeing of the consumers.[68] Hence, a state is in violation if it failed to comply with this minimum requirement and discriminated in ensuring access to food on the bases of the prohibited grounds.[69]

[65] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, par. 4.
[66] Ibid, par.7.
[67] Ibid, par.8.
[68] Ibid, par 14.
[69] Ibid, par.17 & 18.

On the other hand, the original version of both the American Convention on Human Rights and the African Charter on Human and Peoples' Rights do not incorporate the right to food. However, both systems have subsequently recognized this fundamental right through their subsequent instruments and case law of their respective enforcement bodies.[70] In the Inter-American system, right to food is expressly provided in the Protocol of San Salvador in similar way as to the Covenant.[71] Furthermore, the progressive case law of the Inter-American Court of Human Rights read this right into the right to life. In the case of *Yakya Axa v. Paraguay*, the Court asserted that the right to food is inevitably implicated in the right to life by using the rationales invoked by the UN Committee in General Comment No.12. The case involves the claims of an indigenous community that are living in harsh living conditions as a result of state's deprivation of access to their ancestral land. The Court depicted that the right to life requires the fulfilment of essential conditions for full exercise of that right, which requires positive obligation from state. The Court further implied that the right to food, among other rights like the right to health and education, is indispensable to live a "decent life", which is the meaning given by the Court to the right to life.[72]

Although the African Charter does not expressly provide for the right to food, this right is included in the special instruments that supplement the Charter. For instance, the African Charter on the Rights and Welfare of the Child provides for the "provision of the adequate nutrition" under the duty of state in relation to health care.[73] Similarly, the Protocol on the Rights of Women in Africa obliges states to provide "nutritious food".[74]

[70] Saul, Kinley and Mowbray, supra note 47, p.894.
[71] Protocol of San Salvador, supra note 56, Article 12.
[72] Case of the *Yakye Axa*, supra note 18 ; see also Saul, Kinley and Mowbray, supra note 47, pp.894-897.
[73] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), Article 14(2)(c).
[74] African Union, *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*, 11 July 2003, Article 15(a).

Furthermore, in its seminal judgment, *SERAC v. Nigeria*, the African Commission on Human and Peoples' Rights articulated that the right to food is impliedly guaranteed in the right to life, health and economic, social and cultural development, which are explicitly provided in the Charter. In this case, the Commission found the violation of the right to food even if it is not expressly stated in the Charter. The Commission further noted that: "the right to food is inseparably linked to the dignity of human beings and is therefore essential for the enjoyment and fulfilment of other rights, such as health, education, work and political participation."[75] Hence, unlike the instruments in the two systems discussed above, which have explicit reference to it, the right to food is impliedly recognized in the Banjul Charter.

b. Right to housing

The right to housing is also a fundamental right that is indispensable for full realization of other rights, which is also reiterated by the Committee[76]. Due to this essential nature, this right has received considerable attention from the Committee and other stakeholders, which is demonstrated by the adoption of two General Comments and appointment of a Special Rapporteur.[77]

The Committee has clearly asserted that the right to housing should not be construed narrowly; it does not mean "the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity." It should be more broadly understood as " the right to live somewhere in security, peace and dignity."[78] What follows from this is that the

[75] *Social and Economic Rights Action Center & the Center for Economic and Social Rights v. Nigeria,* (Communication No. 155/96), (2001) AHRLR 60, 27 October 2001, (African Commission on Human and Peoples' Rights), par.65.
[76] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant),* 13 December 1991, E/1992/23, par.1.
[77] Saul, Kinley and Mowbray, supra note 47, p.927.
[78] General Comment No.4, supra note 77, par.7.

requirement of adequacy is the most essential component of this right and it constitutes various elements that determine the quality of a given shelter.[79]

Even if adequacy is determined by taking various factors based on the context of the country, the Committee has identified certain conditions that should be duly considered. The first condition is security of tenure: despite the nature and type of the tenure, everyone should be guaranteed legal protection against unlawful eviction and harassment. The second condition extends to the quality of the shelter: "an adequate house must contain certain facilities essential for health, security, comfort and nutrition."[80] Third, housing should be affordable; in other words the cost of housing should not be too high to the level that compromises the fulfilment of other basic needs. The other requirement is habitability, which the Committee interpreted as housing with enough space that provides safe living environment and protects the inhabitants from "cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors."[81] Fifth, housing must be accessible, particularly to disadvantaged groups including children, disabled people and elderly who should be provided with "full and sustainable access". Furthermore, the location of housing should not be susceptible to pollution and it should be close by to other essential resources, such as healthcare centres, schools, employment opportunities and other relevant facilities. The final condition requires the policy framework in relation to housing and the construction details of the housing to allow expression of cultural values and identity.[82] In other words, as the housing constitutes the vital part of the way of living of the community, it has also a cultural dimension. Hence, the policy towards the development of housing and modernization of the construction must not inhibit the expression of cultural values.

[79] Ibid, par.8.
[80] Ibid, par.8.
[81] Ibid, par.8.
[82] Ibid, par.8.

Neither the American Convention nor the San Salvador Protocol expressly recognizes the right to housing. The Inter-American Court and the Commission, however, referred to the right to property in cases involving destruction of shelter and held states responsible.[83] For instance in a series of cases against Guatemala, the Commission found the violation of the right to property guaranteed under the Convention for state's destruction of houses along other properties of the community.[84] In other cases, the issue of housing has also been raised in relation to privacy matters and inviolability of dwellings.[85] Nevertheless, these rights do not give the full picture of the right to housing and only attribute responsibility to the state when it interferes in the enjoyment of rights. In other words, they do not require the state to take positive measures in order to realize the entitlement of adequate housing, which should be the core content of the right.

The right to housing is also not explicitly provided under the African Charter; it is one of the implied rights that are read into the Charter by interpretation of the Commission. In the case of *SERAC*, the Commission pronounced that right to housing can be implied from the combined reading of the right to health, property and protection of family, which are expressly guaranteed in the Charter. According to the Commission, the deprivation of shelter, particularly the destruction of the houses in this case, will negatively affect those rights depicted in the Charter.[86] This progressive interpretation, nevertheless, does not clearly show the normative content of the right and the standards applied to assess the fulfilment of the right.

[83] Centre on Housing Rights and Evictions, Enforcing Housing Rights in the Americas: Pursuing Housing Rights Claims within the Inter-American System of Human Rights (a resource guide for practitioners, Centre on Housing Rights and Evictions (COHRE), 2002), pp. 21 & 30.
[84] Case 10.588 Isabela Velásquez and Francisco Velásquez, CASE 10.608 Ronal Homero Mota et al., Case 10.796 Eleodoro Polanco Arévalo, CASE 10.856 Adolfo René and Luis Pacheco Del Cid, and Case 10.921 Nicolás Matoj et al., v. Guatemala (13 April 2000).
[85] Centre on Housing Rights and Evictions, supra note 84, p.21.
[86] SERAC v. Nigeria, supra note 76.

Overall, the right to housing one of the entitlements indispensible for adequate standard of living as it can be deduced from Article 11 of the ICESCR and the interpretation of the Committee. The realization of this right extends beyond the existence of some sort of shelter; housing has to meet certain conditions in order to be considered as adequate, which are extensively enlisted by the Committee at the UN level. The human rights instruments at the two regional levels under consideration, however, do not explicitly stipulate the right to housing. Rather, this right is impliedly recognized by their respective monitoring bodies, which read the right to housing into other rights, such as the right to property, health and family among others, guaranteed under their respective instruments. This fails short of adequately depicting the normative content of the right and providing a clear guidance for states as to the standards of adequate housing their policies should be geared towards in order to realize this right progressively.

III. The right to health

Similar to other ESC rights recognized in the Covenant and regional instruments, the right to health is directly related to human dignity and vital for the attainment of other rights. As the Committee on ESC rights stated: "Health is a fundamental human right indispensable for the exercise of other human rights. Every human being is entitled to the enjoyment of the highest attainable standard of health conducive to living a life in dignity."[87]

Article 12 of the ICESCR guarantees this right in the most comprehensive manner, including the general entitlement to the right to "highest attainable standard of physical and mental health" and measures to be taken by states to realize this.[88] Not only is the right to health indispensable for the fulfilment of other rights, but it is also dependent on other civil and political and ESC rights, such as right to food, work, life, housing, prohibition of torture and

[87] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, par.1.
[88] ICESCR, supra note 50, Article 12; see also General Comment No.14, supra note88, par.2.

access to information, for its full realization.[89] For instance, the fulfilment of the right to health is inconceivable without the existence of adequate working opportunities where a person can earn a living from and afford health care. This again signifies the interdependence of rights.

The right recognized under Article 12 is not limited to access to health care, rather it has a wider scope that includes other socio-economic conditions, including nutritious food, adequate housing, acceptable working conditions and sanitation among others, creating a conducive environment for a healthy life.[90] It also takes into account biological or genetic makeup as well socio-economic conditions of a person apart from the resource allocation by state. There are some elements that are beyond the reach of state, which cannot be responsible for every cause of illness.[91]

The right to health does not mean "the right to be healthy" either. According to the Committee, this right has two aspects: freedoms and entitlements. The former refers to autonomy over one's body and health, which also extends to sexual and reproductive decisions and informed consent as a precondition for medical treatment, while the latter is related to the existence and access to health protection mechanisms on the bases of equality.[92] Overall, "the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realization of the highest attainable standard of health."[93]

Pursuant to the Committee, the concept of "the highest attainable standard of health" encompasses four essential elements that are mutually reinforcing. The first element pertains to the availability of health-care facilities and other socio-economic conditions that are

[89] General Comment No.14, supra note 88, par.3.
[90] Ibid, par. 4.
[91] Ibid, par. 9.
[92] Ibid, par.8.
[93] Ibid, par.9.

indispensable for realization of the right to health: clean water, sanitation, nutrition and other related factors. Second, these facilities must be physically and economically accessible to everyone without any discrimination. The third element, acceptability, requires health facilities and services to comply with medical ethics rules and not to be offensive to the culture of the community. Last but not list, the facilities as well as the medical personnel delivering the services must be of a good quality and meet medical standards.[94]

In the context of the Inter-American Human Rights System, the Protocol of San Salvador has incorporated the right to health, which is defined as "the enjoyment of the highest level of physical, mental and social well-being".[95] In addition, the Protocol stipulates detailed and concrete obligation of states for the attainment of this right.[96] Contrary to the ICESCR, which put forward the goals to be attained through steps taken by states, the San Salvador Protocol enumerates specific measures states need to take for realization of the right. For instance, the Protocol requires states to make available "primary health care" to all individuals and families.[97] This approach is more convenient to make states accountable, which will consequently facilitates the enforcement by the organizations, since states are required to take concrete steps against which their actions or omissions are judged. Nonetheless, the pitfall of this instrument is that it has only been ratified by 16 states so far, although it was adopted in 1988.[98]

On the other hand, in three recent cases, the Inter-American Court defined the right to life, recognized under Article 4 of the Convention, in a way that depicts the right to health as an indispensable component of it. In the case of *Yakye Axa*, the Court stressed that 'life' is not

[94] Ibid, par.12.
[95] Protocol of San Salvador, supra note 56, Article 10(1).
[96] Ibid, Article 10(2).
[97] San Salvador Protocol, supra note 56, Article 10(2)(a).
[98] Information obtained from the Inter-American Commission on Human Rights, available at https://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm last assessed 04 February 2017; on the other hand, the American Convention is ratified by 25 states, which means 9 of the states that are parties to the Convention are not parties to the Protocol.

just a mere existence, rather it means a "dignified existence", which gives rise to obligation of states to refrain from obstructing access to dignified life as well as to provide or facilitate essential conditions to achieve that. Consequently, the Court found violation, since Paraguay has contributed to the situations that deteriorated the living condition of the indigenous community. Moreover, the right to health is mirrored in the remedies ordered by the Court that requires the state to supply adequate drinking water, hygiene, medical care and essential medicine among others.[99]

The Court also reiterated this interpretation in the subsequent case of *Sawhoyamaxa*, another case against Paraguay with regard to indigenous communities.[100] One thing that differentiates this case is that the Court found violation because of the individuals who died due to unfavourable living conditions of the community rather than the existence of the condition, which was the case in *Yakye Axa*. In the latter case, the Court did not find the violation of the right to life because of the individuals died as the result of the terrible living condition, rather the right to life is violated because of the mere existence of such condition.[101] In the case of *Sawhoyamaxa*, on the other hand, right to life is primarily violated due to the death of the victims. Nevertheless, the Court also held Paraguay responsible for insufficiency of the efforts made by it to ensure adequate medical care among other inactions, since the state was aware of the situation on the ground and failed to take actions within the its scope of authority.[102]

[99] Case of *Yakye Axa*, supra note 18; see also Steven R. Keener and Javier Vasquez, A Life Worth Living: Enforcement of The Right to Health Through the Right to Life in the Inter-American Court of Human Rights, Columbia Human Rights Law Review, Rev.595, p.6 & 7.
[100] *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, IACHR Series C No 146, IHRL 1530 (IACHR 2006), 29th March 2006, Inter-American Court of Human Rights [IACtHR].
[101] Steven R. Keener and Javier Vasquez, A Life Worth Living: Enforcement of The Right to Health Through the Right to Life in the Inter-American Court of Human Rights, Columbia Human Rights Law Review, Rev.595, p.8
[102] Case of *Sawhoyamaxa* , supra note 100.

In another right to life case, *Ximenes-Lopez*, the Court affirmed obligation of state to regulate health care services and found violation of Article 4 for failure of the state to have adequate supervision of these services.[103] In this case, even if the state did not cause the death of Ximenes-Lopez, the Court imputed it to Brazil, since it has failed to supervise the conduct of the medical institution responsible for the death.[104]

Overall in these cases, the Inter-American Court has indirectly recognized the right to health by giving a broad interpretation to the right to life. As Keener and Vasquez put it "[in these three decisions], the Inter-American Court of Human Rights has knocked a hole through the wall that has long separated civil and political rights from economic and social rights"[105] Hence, these progressive decisions of the Court create important link between the right to life and the right to health, consequently holding states accountable to realize the latter even if they did not ratify the Protocol of San Salvador.

In the African system, the Banjul Charter expressly provides for the right to health using almost the same language as the ICESCR, "Every individual shall have the right to enjoy the best attainable state of physical and mental health."[106] This provision also obliges states to undertake important steps in order to safeguard the health of their people and make health care services available for those in need of medical assistance.[107] Since the right to health cannot be realized with the mere existence of health care facilities, the duty of state also extends to environmental protection, providing access to water and sanitation. In the case of *SERAC*, the Commission held the government of Nigeria responsible for contamination of air, water and soil and consequently found the violation of the right to health.[108] Thus, the

[103] Case of *Ximenes Lopes v Brazil, Ximenes Lopes v Brazil*, IACHR Series C no 139, IHRL 1523 (IACHR 2005), 30th November 2005, Inter-American Court of Human Rights [IACtHR].
[104] Ibid; see also Keener and Vasquez, supra note 102, p. 10.
[105] Keener and Vasquez, supra note 102, p.2.
[106] Banjul Charter, supra note 58, Article 16 (1).
[107] Ibid, Article (2).
[108] *SERAC v. Nigeria*, supra note 76.

protection of the right to health is also contingent in other environmental and social factors, which led to the violation of it in this case.

Generally, right to health has been explicitly recognized in all three systems and broadened by interpretations of their respective monitoring bodies to encompass adequate living conditions indispensable for its realization. Thus, the realization of this right is dependent on the protection of other rights and the existence of conducive environmental and social conditions. Moreover, as it can be deduced from the preceding discussions, this right is defined in absolute terms using the test of 'highest attainable standard of health', which makes it distinctive from other socio-economic rights.

1.5. Institutional framework for the enforcement of ESC rights

There are various judicial and quasi-judicial organs available for the enforcement of human rights standards both at the international and regional levels. These mechanisms utilize various tools, such as periodic reporting, country visits, inter-state and individual communications, to assess states' compliance with their human rights obligations. Similarly, there are a number of general and specialized organs entrusted with the enforcement of socio-economic rights, although their jurisprudence on these rights is not developed well compared to the jurisprudence available on civil and political rights. This section will give a brief overview of the enforcement bodies available at the UN, Inter-American and African human rights systems in order to build the basis for analysis in the subsequent chapters. Since the main focus of this thesis is on the enforcement of ESC rights through individual complaint procedures, the discussion on this section would be limited to enforcement bodies endowed with this mandate.

The UN mechanism is composed of various organs that contribute for enforcement of rights one way or another. Similarly, a number of Charter based and treaty based institutions work

towards the realization of ESC rights through different means. There are also specialized procedures, including working groups and special rapporteurs that are playing active role in the enforcement of specific rights they are mandated to look after. Nevertheless, since the scope of this study is limited to individual complaint mechanisms, the principal enforcement organ relevant in this regard is the UN Committee on Economic, Social and Cultural Rights (CESCR). The Committee has four major enforcement mandates: reviewing periodic reports by state parties; providing authoritative interpretation of the Convention through General Comments; dealing with inter-state and individual communications.[109]

In the Inter-American human rights system, both the Inter-American Commission on Human Rights (IACHR) and Inter-American Court of Human Rights are endowed with a mandate to enforce the human rights instruments in the region. The Commission has a broader mandate, which is "to promote respect for and defence of human Rights"[110] The Commission fulfils this responsibility through various activities including monitoring the human rights condition of member states and publishing reports.[111] The other important function of the Commission is to receive individual and group complaints regarding alleged violation of human rights. Upon deciding the admissibility of the case, the Commission either invites the parties for negotiation in order to reach to friendly settlement or declare violation and forward recommendations accordingly.[112] Since the Commission is a quasi-judicial body, its recommendations are not legally binding. If the state concerned failed to comply with its recommendations, however, the Commission can refer the case to the Court, if the state has received the jurisdiction of the Court to that effect.[113] Overall, the Commission is a crucial

[109] Odello and Seatzu, supra note 42, p.25.
[110] American Convention, supra note 44, Article 41.
[111] Lea Shaver, The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?, Washington University Global Studies Law Review, Volume 9 | Issue 4 (January 2010), p.647.
[112] American Convention, supra note 44, Article 43-44; see also Shaver, supra note 112, p.648.
[113] Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, art. 45; Shaver, supra note 112, p.648.

institution in the Inter-American system and it has decided a large number of cases so far including those involving socio-economic rights.

On the other hand, the Inter-American Court on Human Rights is a judicial body entrusted with the power to enforce the Convention and other human rights instruments in the region. The Court has two types of jurisdictions. The first one is a contentious jurisdiction that empowers the Court to deal with violation of individual rights by states and pronounce appropriate remedy. Second, the Court also has advisory jurisdiction regarding legal issues that arise in relation to the Convention. The latter jurisdiction is not limited to parties to the Convention; states that are not parties to the Convention are also eligible to apply for an advisory opinion. The other important power entrusted to the Court is that it can order states to take provisional measures to protect persons under imminent threat of danger.[114]

Similar to the Inter-American system, the African Human Rights System is also a two-tier system where both the Commission and the Court is empowered to entertain individual communications. The primary responsibility to enforce the rights guaranteed under the African Charter, including ESC rights, rests on the African Commission. The Commission, composed of eleven independent members, is responsible to monitor the enforcement of the Charter and subsequent supplementary instruments in all member states.[115] To this end, the Commission reviews state reports that the parties of the Banjul Charter are required to submit every other year and adopts recommendations accordingly.[116] The Commission also adopts authoritative interpretations of the rights guaranteed under the Charter through declarations, General Comments and other soft law documents. As a quasi- judicial organ, it also receives inter-state communications and other communications submitted by individuals and NGOs

[114] Pasqualucci, supra note 43, p.10 & 11.
[115] Ssenyonjo, supra note 45, p.235.
[116] Banjul Charter, supra note 58, Article 62; see also Open Society Justice Initiative, African Commission on Human and Peoples' Rights (Fact Sheet, June 2013), (Hereinafter 'the OSJI fact sheet'), p.1.

alleging the violation of rights enumerated under the Charter.[117] Although the decisions of the Commission are not binding on states, they play a vital role in the enforcement of human rights in the African regional system. Since the Commission derived its mandates from the Charter itself, these decisions have authoritative nature and states are expected to comply with them in good faith.

The other important organ in the African human rights system is the African Court on Human and Peoples' Rights, a judicial organ established by the Additional Protocol to the Charter adopted in 1998. The Court's jurisdiction is limited to states that are parties to the Protocol; moreover, individuals will only have a direct standing before the Court if the respective state makes specific declaration to that effect.[118] Nevertheless, only eight states have made such declaration at this point.[119] As to other states, cases can only reach the Court indirectly though the African Commission.[120] The Court is empowered to consider contentious cases between individuals and states as well as provide advisory opinion at the request of the African Union or its organs and member states regarding legal issues.[121]

However, the AU assembly decided to merge this Court with the African Court of Justice, which created the African Court of Justice and Human Right. The new Court with broader jurisdiction has two separate sections that deal with general issues and matters related with human rights.[122] Despite the merger decision, the previous Court is still operational and only five states, namely Libya, Mali, Burkina Faso, Benin and Congo, have ratified the merger Protocol yet.[123] Moreover, unlike the Commission, the Court has only dealt with very few

[117] Banjul Charter, supra note 58, Article 48 & 55; see also the OSJI fact sheet', supra note 117.
[118] Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998,Article 5(3).
[119] The African Court on Human and Peoples' Rights website (http://www.african-court.org/en/ last accessed 16 September 2017).
[120] Additional Protocol to the African Charter, supra note 119, Article 5(1)(a).
[121] Ssenyonjo, supra note 45, pp.272-275.
[122] Ibid, p.279 & 280.
[123] Ibid, p.281.

cases and the former remains the most important enforcement organ in the continent. Apart from these major organs, there are also other specialized bodies that are contributing for the enforcement of human rights in the region, including the African Committee of Experts on the Rights and Welfare of the Child, special rapporteurs appointed by the Commission and sub-regional organs.

When we compare the principal adjudicatory bodies in these systems, the Inter-American Court appears to be the stronger one, since it has full judicial powers and its decisions are binding in addition to its richer jurisprudence. Although the decisions of the African Court are also binding, its jurisprudence is not as advanced as its Inter-American counterpart. However, the CESCR and the African Commission are quasi-judicial organs whose judgments are not formally binding, although they are regarded as authoritative due the instruments these bodies derive their mandate from and general state acceptance.

1.6. Justiciability of ESC rights

The term "justiciability" does not have one settled definition and it has been used in various, but to some level related, contexts. In some literatures, justiciability is depicted as a jurisdictional matter, which refers to whether or not a judicial or quasi-judicial review organ exists. In others, it has been construed as an attribute of the right under consideration, whether the nature and scope of the right is susceptible to review by a judicial or quasi-judicial body. Justiciability has also been understood more comprehensively involving both the content of the right and the existence of an authoritative review mechanism.[124] In this material, this term is used to denote the capacity of rights to be enforced through judicial involvement or the ability of courts to deal with such cases.

[124] Sisay Alemahu Yeshanew, The Justiciability of Economic, Social and Cultural Rights in the African Regional Human Rights System: Theory, Practice and Prospect (Intersentia, Antwerp, 2013), p. 36 & 37.

The capacity of socio-economic rights to be judicially enforced has been the point of contention for so long and plenty of commentaries have been forwarded on both sides of the debate. Various reasons have been raised to demonstrate that these rights are beyond the reach of the judicial organs, ranging from arguments related to the nature of the rights themselves to the practical difficulties associated with judicial enforcement. Malcom Langford, one of the prominent scholars on socio-economic rights who gave a convincing analysis of this debate, identified three major areas of contestation against justiciability of ESC rights with possible points of refutes,[125] which the author of this thesis agrees with.

The first argument relates to the nature of socio-economic rights, which is considered by commentators as vague and abstractly tailored that are difficult to enforce. In relation to this, the inherent differences of these rights from civil and political rights, which are mentioned in the previous section, have been asserted to contest justiciability of ESC rights. However, most of these distinctions are artificial as discussed before and do not depict the real nature of rights. Furthermore, the abstract nature of phrasing rights is not unique to socio-economic rights; even civil and political rights are tailored in abstract manner in order to allow courts to apply these rights by taking into account individual circumstances and changing realities.[126]

The second argument is lack of legitimacy of adjudication of socio-economic rights. This argument asserts that judicial enforcement of these rights does not correspond to democratic principles, particularly, separation of power. Courts will infringe upon powers specifically reserved to the legislature elected by the people when they give decision on matters of public policy and resource allocation. This argument, however, is an overstatement. Judicial review power is given to courts in most constitutions and the court is not overstepping its mandate when it scrutinizes the actions of the legislature and the executive even on issues that involve

[125] Langford, supra note 7, pp. 31-37.
[126] Ibid, p.30 & 31.

policy and budget allocation. When courts are deciding cases that involve policy issues, they are not making a policy or law as such, but they reviewing it on the basis of pre-determined requirements. Moreover, true democracy is hardly imaginable without social rights, which are indispensable to create a democratic society and their enforcement by the judiciary goes hand in hand with democratic values.[127]

The third scepticism is related to the capacity of the judiciary to entertain these cases and provide adequate remedies. Pursuant to this argument, courts are not appropriate forums to deal with policy and budgetary matters, since they are not in a position to weigh all the issues involved and calculate the cost. The challenge of obtaining relevant and dependable evidence is also another calamity raised by commentators, particularly in cases involving complicated social set up, such as indirect discrimination cases. Nonetheless, the contrary argument considers this as an advantage instead of a challenge because judicial enforcement brings social issues to the attention of the public as well as the legislature that can address the issue by legislation. Particularly, the involvement of the court is crucial to protection of marginalized groups. The argument on lack of expertise of the court to deal with 'complex social and financial' issues does not hold water either, since the role of the judiciary is to conduct a review as mentioned before.[128]

The other major concern raised in relation to capacity is that judicial adjudication in socio-economic cases have inevitable implication that would be far reaching beyond the individual case under consideration, which is called 'polycentric dilemma'[129]. The remedies provided by the court will inevitably encroach upon policy choice. Many courts, however, are aware of

[127] Ibid, pp.31-34.
[128] Ibid, p.35 & 36.
[129] It is a term used to denote a situation where the judicial verdict in a given case has a far reaching consequence that extends beyond the parties concerned and the factual circumstances involved. Scholars like Lon Fuller have strongly argued that the judiciary should not be involved in these types of cases (Lon Fuller, The Forms and Limits of Adjudication, Harvard Law Review, vol.92 (1978-1979)) This is, particularly raised against the judicial enforcement of ESC rights, since it is believed that the judgment given in cases involving these rights will necessary have policy implication..

this dilemma and they have come up with certain tests not to step out of the boundary set by separation of power.[130] Overall, despite these arguments, justiciability of ESC rights is generally accepted now, although there are still lingering debates in some jurisdictions. In the past couple of years courts have been effectively adjudicating cases involving these rights and providing remedies for the victims as well as addressing structural problems meanwhile. This can be demonstrated by the case of laws of various jurisdictions analysed in the subsequent chapters. Therefore, socio-economic rights are indeed justiciable.

Concluding remarks: Challenges of judicial Enforcement - a shift from the debate of justiciability

The debate on justiciability is now loosening with the adoption of the Optional Protocol to the IESCR that made individual communications possible at the international level and the adoption of encouraging decisions by the regional judicial and quasi-judicial bodies. This can be evident from the progressive judgments given by the Inter-American Court and the African Commission, which will be examined in the coming chapters. Socio-economic rights are also getting momentum at the national level with the adoption of many constitutions that give explicit recognition to these rights and active involvement of the judiciary. In countries like South Africa, Courts have challenged the government to give priority to ensuring the welfare rights and adequate living conditions of the community despite the inherent lack of resource defence. Nevertheless, there are still plenty of practical challenges associated with judicial enforcement of ESC rights both at the international and national levels. Here the question lies not whether or not these rights are susceptible to judicial enforcement, rather the questions has shifted to the actual effectiveness of judicial enforcement and the challenges affecting this.

[130] Langford, supra note 7, p.36 & 37.

One of the challenging issues that are taxing the judicial enforcement of ESC rights is difficulty in assessment of states obligations. Socio-economic rights call for positive steps to be taken to the extent of the available resources for full realization of these rights progressively, except the minimum obligations and the duty of non-discrimination that should be fulfilled immediately. The qualification of 'available resources' and the progressive nature of these duties as well as the discretion left to states to determine the specific positive steps to be taken makes the task of judicial bodies cumbersome. When should steps taken by states or failure to act amount to violation of these rights contrary to the latitude left to states? Various jurisdictions dealt with this issue in different ways and some principles have been adopted to assess state obligation. The application of these principles in concrete cases will be vigorously analysed in chapter two including the challenges faced by the judicial bodies in this regard.

The other area of challenge is the provision of adequate remedy for violation of socio-economic rights, which is not well advanced yet. National and international judicial systems are not easily accessible to victims, particularly when public interest litigation is not allowed, which hinders the procedural remedy. Even after access to these judicial mechanisms is acquired and violation is pronounced, the provision of fair compensation coupled with special remedies addressing the problem on the ground is a challenge these bodies face.[131] Thus, the provision of effective remedies that provide due compensation for the victims as well as address the structural problem that caused the violation is one of the key elements that determine the effectiveness of judicial enforcement. The other issue related to this is the follow up procedure or the implementations of the decisions at the national level, especially when they have policy or resource implication. The challenges associated with this area will

[131] International Commission of Jurists, Judicial Enforcement of Economic, Social and Cultural Rights, Geneva Forum Series no 2, July 2015, pp.8 & 9.

be evaluated in detail in chapter three with reference to cases decided by judicial and quasi-judicial organs.

Chapter two

2. Assessment of State Obligation in Adjudication of ESC Rights

Socio-economic rights are characterized by the peculiar nature of state obligation they entail, which is usually used to contest the justiciability of these rights. Unlike civil and political rights that require states to immediately ensure the protection of rights classified as such, ESC rights obliges states to take appropriate measures in order to progressively realize them. Moreover, the obligation of states is also qualified by availability of resources, which tolerates some compromise based on the economic capacity of states. Although the watertight distinction between these two sets of rights cannot be maintained, as it has been clarified in the first chapter, it is a vivid fact that the fulfilment of ESC rights requires more active and positive measures from states than their civil and political rights counterpart.

These features make the assessment of state obligation more difficult in cases of socio-economic rights, particularly in individual complaint procedures. There is always a dilemma between the individual entitlements these rights guarantee and the progressive and resource intensive nature of their realization. It has to be noted here that there is only a limited jurisprudence of individual complaint cases in the three jurisdictions under consideration, particularly in the UN system. Moreover, most of these cases are related to the failure of the states to comply with their negative obligation rather than failure to undertake adequate measures in order to realize these rights. Hence, this dilemma might not be that obvious from the cases. Nevertheless, due to the conceptual difficulties associated with nature of state obligation and the difficulty of harmonising them with the individual nature of rights, the dilemma will be inevitable as the jurisprudence develops.

This chapter is dedicated to analysis of the nature and assessment of state obligation in relation to socio-economic rights, particularly, as they apply in individual cases. The first section of the chapter will dwell upon the nature of state obligation socio-economic rights entail. The three types of state obligation required under human rights regimes- duty to respect, protect and fulfil- will be dealt with under the second section with particular focus in their application on ESC rights. The third and final section will quest for standards of review used to assess state obligation and their application in concrete cases. All these issues will be supported by the case law of the three jurisdictions under consideration and other jurisdictions, mainly the jurisprudence of the South African Constitutional Court, when the need arises. Finally, the chapter will culminate by providing few concluding remarks on important points.

2.1. The nature of state obligation in relation to ESC rights

As it has been deduced before, ESC rights entail peculiar type of state obligations, particularly, compared to civil and political rights. Since, states are predominantly required to take positive measures in order to fulfil these rights progressively. Under the ICESCR, the general characteristic of state obligation is formulated under article 2(1), which reads:

> 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 its 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.[1]

Compared to its counterpart in the ICCPR, this provision differs in the nature of state obligation demonstrated therein. In the ICESCR, states are required to take all necessary

[1] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, article 2.

measures within their resource capacity in order to ensure the protection of these rights. On the other hand, the duties of states are more straightforward in the ICCPR, they are expected "to respect and to ensure" the rights guaranteed in the Covenant. The important elements of state obligation enumerated under the article cited above will be examined in detail in the next sections.

The other important issue commonly raised in relation to socio-economic rights is individual and collective nature of these rights, which might create difficulty in the assessment of state obligation. Similar to other rights, ESC rights are entitlements accorded to individuals by the mere fact of their humanity. However, these rights also have collective nature, since they usually affect a large number of people and realizing them calls for collective action in terms resource mobilization and active engagement of the public sector.[2] This is one of the reasons that necessitated the adoption of the principle of progressive realization, which will be examined below. However, as individuals are part of the community or group, the collective realization of socio-economic rights will eventually lead to the protection of individual rights. In the meantime, the fact that these rights are predominantly individual guarantees should not be overlooked. According to OHCHR:

> A child excluded from primary school because of school fees, a woman paid less than her male colleague for the same work, a person in a wheelchair unable to enter a theatre because there is no ramp, a pregnant woman refused entry to a hospital to give birth because she is unable to pay, an artist whose work is publicly altered, distorted or mutilated, a man refused emergency medical care on account of his migrant status, a woman forcibly evicted from her home, a man left to starve when food stocks lie unused—these are all examples of individuals denied their economic, social and cultural rights.[3]

[2] Office of the United Nations High Commissioner for Human Rights (OHCHR), Frequently Asked Questions on Economic, Social and Cultural Rights (Fact Sheet No. 33), p.8.
[3] Ibid.

The justiciability of socio-economic rights or the effectiveness of their judicial enforcement, which is the prominent focus of this thesis, particularly, rests on the recognition the individual nature of these rights. Although it is undeniable that the ultimate yearning of state action should be to progressively realize ESC rights to the collective majority, this should not be used as a shield to deny individual entitlements. The rights accorded to individuals should be protected by the provision of minimum core guarantees, prioritizing immediate obligations and avoiding regressive measures, which will be elucidated subsequently. These two interdependent features of socio-economic rights can sometimes create dilemma during the assessment of the state obligation in individual cases. The author of this thesis is of the conviction that proper balancing is required between the collective and individual nature of ESC rights in order to avoid the infringement of individual guarantees.

In the Inter-American human rights system, the San Salvador Protocol also provides the general nature of state obligation almost in a similar way to the ICESCR; only two additions can be observed in the Protocol. Apart from the resource qualification, the Protocol also mentions "degree of development of states" as an additional condition in which certain compromise is left to states. The Protocol also reserves some autonomy to states regarding the steps they should take to realize these rights; states are expected to take measures in accordance to their own internal laws.[4] However, these conditions are not peculiar to the Protocol as such; what makes the Protocol different from the ICESCR is its explicit reference to them. The degree of development of states as a factor and the discretion left to states in determining the measures they take is also implied in the Covenant.

The African Charter is quite different from the above two instruments in relation to the nature of state obligation it enumerates. As it has been discussed in the previous chapter, the Banjul

[4] Organization of American States (OAS), *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador")*, 16 November 1999, A-52, Article 1.

Charter stipulates both sets of civil and political rights and ESC rights in the same document. The Charter does not make distinction regarding state obligation either. Article 1 of the Charter provides that "the Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them."[5] This is applicable to all sets of rights incorporated in the Charter.

However, in the guidelines for implementation of ESC rights adopted by the African Commission, the obligation of states to take necessary measures for progressive realization of these rights has been fully endorsed. According to the Commission, even if this principle is not expressly mentioned in the Banjul Charter, it can be implied from the collective reading of other provisions, as it is a well-accepted characteristic of state obligation in relation to socio-economic rights.[6] Furthermore, in the landmark case of *SERAC v. Nigeria*, the Commission has made reference to the above cited Article 2(1) of the Covenant and reinforced the duty of states to take necessary measures to realize ESC rights progressively.[7]

Hence, it is safe to conclude that the nature of state obligation with regard to ESC rights is generally similar in all three jurisdictions. Hence, to avoid redundancy, the author has opted to evaluate the main components of states' treaty obligations using the thematic approach and taking the UN framework as a baseline instead of dealing with each jurisdiction separately. In the subsequent sections, these components will be examined by reference to the case law and interpretative documents of the three jurisdictions. It has to be noted here that, in the interest of space, each jurisdiction may not necessarily be mentioned in each section unless there is

[5] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 1.
[6] African Commission on Human and People's Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights, par.13.
[7] *Social and Economic Rights Action Center (SERAC) & the Center for Economic and Social Rights (CESR) v. Nigeria* (Communication No. 155/96), (2001) AHRLR 60, 27 October 2001, (African Commission on Human and Peoples' Rights), par.48.

divergence or additional element and, due to the existence of limited jurisprudence, all issues elucidated hereinafter may not be corroborated by case laws of all three jurisdictions.

2.1.1. Obligation to take steps

Despite the proposal by some of state representatives during the drafting process of the ICESCR to stipulate state obligation in more demanding terms, such as "to guarantee" and "to ensure", the majority of the members of the Commission agreed to use the term "to take steps". Since it is believed that the former phrases would make the duty of states more onerous in unrealistic way. The obligation to take steps requires states to act positively or to take concrete actions to realize the rights in question. Moreover, although states are expected to realize ESC rights progressively, the duty to take necessary steps has immediate application. In other words, states are required to start taking positive actions immediately or within rationally short period of time after ratification of the treaty.[8] The Inter-American Commission has also reiterated that states are not at liberty to postpone their obligation indefinitely; they must start taking measures immediately.[9]

While states are obliged to take concrete measures by "all appropriate means", they are left with wide discretion in determining the particular means they employ. However, states do not have unfettered discretion in this regard. According to the Committee, "steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."[10] The steps taken by states must be adequate in relation to the resources they have at their disposal. In assessing whether or not a state party has complied with its duty to partake sufficient measures to the maximum of resources available at its

[8] Philip Alston and Gerard Quinn, The Nature and Scope of States' Parties Obligation under the International Covenant on Economic, Social and Cultural Rights, Human Rights Quarterly 9 (1987), pp. 165 & 166.
[9] Inter-American Commission of Human Rights, Report on the Situation of Human Rights in Ecuador, oEa/ser.L/v/II.96, doc. 10 rev. 1, 23 (1997).
[10] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), par.2.

disposal, the Committee enquires into the adequacy of the steps taken by states compared to its economic capability. The Committee employs certain criteria to assess the reasonableness of the measures adopted by states, which will be discussed in subsequent sections, particularly in dealing with individual communications.

As the African Commission clearly illustrated, the steps taken by states must move towards ensuring key elements of socio-economic rights: availability, adequacy, accessibility and acceptability.[11] Since these key features are discussed in the previous chapter in relation to selected rights of ESC rights, it does not call for lengthy discussion here on what obligation they entail. The important point here is that the measures undertaken by states must make social goods and services that are essential to guarantee these rights available and accessible in adequate amount and in the way acceptable to the society.

Even if the specific steps states should take are not explicitly enumerated, the Covenant particularly mentions 'legislative measures'.[12] However, it is not vivid whether legislative measures are mandatorily required and what kind of legislative action is required from states. There were some suggestions that this obligation entails integration of the Covenant into domestic law, which is also implemented by some states. Nevertheless, this is not even considered during the drafting process and Article 2 does not necessarily imply such kind of obligation.[13] States are given wide margin of appreciation to decide the type and scope of legislative action they take; some of them opt for adoption of the Covenant in its entirety, but others only set up procedural laws that will be instrumental to implement rights. Similarly, some states have given constitutional protection for socio-economic rights while others are only confined to recognition in subsidiary laws.

[11] African Commission Principles and Guidelines, supra note 6, par.3.
[12] General Comment No.3, supra note 10, par.3; see also Alston and Quinn, supra note 8, p.166.
[13] Alston and Quinn, supra note 8, p.166.

Some commentators also claim that legislative measures are indispensable for proper enforcement of ESC rights and they are mandatory under all circumstances. However, instead of making the legislative measures mandatory, this provision stresses the adequacy of legislative measures while allowing some flexibility.[14] Hence, states are at liberty to adopt legislative measures based on their particular needs except when the existing law contravenes the Covenant.[15] The Committee has stressed the desirability of legislative measures while maintaining that the adoption of legislation can be indispensable in some situations. For instance, averting discrimination could be hardly imaginable, if there is no adequate legislative framework that provides for procedural protection.[16]

On the other hand, although the importance of legislative measure can be generally agreed upon, the mere adoption of legislation is not sufficient by itself to fulfil the obligation of states under the Covenant.[17] This is clearly affirmed by the Committee in its General Comment.[18] In its seminal judgment of *Goosboom* case, the South African Constitutional Court specifically addressed that legislative undertaking is not sufficient to exhaust a state's obligation. It has to be accompanied by other grassroots policies that should reasonably be implemented on the ground.[19]

Overall, ESC rights call for adoption of concrete and targeted measures that can result in better protection of rights and provisions of essential services, such as health care, education and clean water among others. These measures can be legislative or administrative in nature and the states are at liberty to decide the type and scope of the steps they take as long as they comply with standards set by monitoring bodies. The important objective that should be

[14] Ibid, p.167.
[15] Ibid, p.167.
[16] General Comment No.3, supra note 10, par. 3.
[17] Alston and Quinn, supra note 8, p.167.
[18] General Comment No.3, supra note 10, par. 4.
[19] *Government of the Republic of South Africa and Others vs. Grootboom (Grootboom)* 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC), par. 42.

central to these measures is 'progressive realization' of ESC rights, which will be discussed below.

2.1.2. 'Progressive realization'

The resource implication of socio-economic rights is mirrored in the notion of progressive realization, which allows states to realize these rights step by step taking into account their level of economic capacity. This is based on a pragmatic assumption that ESC rights cannot be fully realized within a short time frame.[20] Thus, although it is clear that this concept leaves certain latitude for states, the question will arise as to whether or not there is a definite timeframe set for states to fulfil these rights. Does the element of 'progressive realization' take away the normative value of ESC rights?

During the preparatory work of the Covenant, Hungary argued that this notion will allow states to postpone their obligations for indeterminate time period.[21] There was also a contention by some representatives that the incorporation of this qualifier would be used as an excuse by some states to justify their reluctance to protect rights. However, on the other end, this condition is viewed as a necessary compromise given to the economic impediments of states, particularly, of developing countries. There was also a proposal by Costa Rica to insert a phrase "at an accelerated rate" in order to overcome unnecessary delay in taking appropriate steps. But the majority felt that the prerequisite of minimum time frame is already implied in the concept of progressive duty.[22]

The Committee has vividly pointed out that the notion of progressive realization would not negatively affect the legal status of state obligations under the Covenant; rather it is a mere reflection of the reality in the world and a way to compensate the obstacle states face in

[20] General Comment No.3, supra note 10, par.9.
[21] Report of the International Law Commission, 10 UN GAOR at para.9, U.N. Doc. A/2910/Add.6 (1955); see also Alston and Quinn, supra note 8 p.172.
[22] Ibid; see also Alston and Quinn, supra note 8, pp.175-177.

realizing these rights. Furthermore, the phrase must be construed in line with the whole rationale of the Covenant, which is "to establish clear obligations for States parties in respect of the full realization of the rights in question."[23] Hence, it requires states "to move as expeditiously and effectively as possible" to achieve this objective.[24] The same principle also applies to the African Charter as the Commission has endorsed this using almost the verbatim copy of the Committee's expression.[25]

Progressive realization implies obligation of result. The adequacy of the steps taken by states is evaluated by the actual progress they result in protection of rights. States are expected to move forward in a continuous phase and regressive measures are highly condemned.[26] The administrative, legislative and economic measures undertaken by states must have the effect of changing the situation on the ground and improving the provision of rights.

Here the valid question is that how progressive realization is measured by the international and regional monitoring organs? In this regard, three different approaches have been suggested and used by human rights experts and monitoring bodies. The first approach is using various quantitative indicators that can be assessed based on the available statistical data. The state's compliance to its obligation of progressive realization is evaluated by the statistical advancement it achieved towards those indicators, which may vary for different rights. As a complementary to this method, the second approach allows states to set certain benchmarks regarding the indicators enlisted by monitoring bodies to be achieved in specific time frame. For instance, if the key indicator is to decrease child mortality rate, states will be given a chance to set the rate and the period of time towards this goal based on their special circumstances and economic capacity. This approach is frequently employed by the

[23] General Comment No.3, supra note 1o, par.9.
[24] Ibid.
[25] African Commission Principles and Guidelines, supra note 6, par.13.
[26] Manisuli Ssenyonjo, Reflections on state obligations with respect to economic, social and cultural rights in international human rights law, the International Journal of Human Rights, Vol. 15, No. 6, August 2011, pp. 977.

Committee. The third approach assesses states' budget allocation to specific sectors and the progressive nature of this national spending.[27] For instance, this is used by the Committee in assessing the Second Periodic Report of the Republic of Korea where it expresses its concern on a large amount of budget preserved for defence compared to the decreasing amount of budget allocated for realization of socio-economic rights.[28]

Nevertheless, these approaches have been used for examining reports submitted by states and they are not suitable to measure states' compliance with their obligation in individual complaint cases as such. The mere statistical advancement or proper allocation of budget cannot give a state a complete defence when individual complaint is brought and the general progress may not always result in advancement of the lives of individuals or groups. This contrast and the challenges of the threshold of progressive realization in individual cases can be exemplified by the following cases from the Inter-American Court of Human Rights.

In the case of *Jorge Odir Miranda-Cortez et al. v. El Salvador*, a case concerning the adequacy of therapeutic treatment provided for the petitioners who were HIV patients, the Inter-American Court considered certain factors to determine the state's compliance with its obligation of progressive realization. The first is whether there is negligence on the part of the state in undertaking the required treatment. In this case, three of the victims have died, which the petitioners alleged that their death is attributable to the inadequate medical coverage provided by state. The Court on the other hand pronounced that since negligence on the part

[27] Eitan Felner, Closing the 'Escape Hatch': A Toolkit to Monitor the Progressive Realization of Economic, Social, and Cultural Rights, Journal of Human Rights Practice Vol 1 | Number 3 | 2009, pp.409-412.
[28] Committee on Economic, Social and Cultural Rights (CESCR), 'Concluding Observations on the Second Periodic Report of Korea'. 2001 (E/ C.12/1/Add.59) para. 9. Available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2f1990%2f6%2fAdd.23&Lang=en , last visited 26 April 2017.

of the state is not proven, the state cannot be responsible for these casualties as long as sufficient measures are taken.[29]

To determine the sufficiency of the steps taken by the state, the Court resorted to technical matters regarding therapeutic treatment for HIV patients and took into consideration the complex nature of the procedure by reference to expert reports. The Court consequently measured the progressive provision of the treatment based on the burdensome nature of the treatment, which requires particular caution and expertise.[30] Hence, this illustrates that progressive realization is not only judged in abstract and there is no procedure that applies generally in all cases. Rather, the specific circumstances must be considered on case by case basis.

The other factor the Court puts much emphasis on is whether there is a regressive measure taken by states. In the Court's words "the progressive development of economic, social, and cultural rights (ESCR) entails the obligation for States parties to the American Convention not to adopt retrogressive measures in connection with such rights."[31] This assertion and the Court's general emphasis on lack of regressive measures to evaluate progressive realization shows an over simplification of the notion to some extent. There is no doubt that progressive nature of state obligations in socio-economic rights gives rise to prohibition of retrogressive measures, which is also firmly asserted by the Committee and the African Commission. Nevertheless, the main essence of this notion lies on the duty to 'move forward' by taking necessary positive actions and this case fails to give more emphasis to this essential factor.

However, the Court did not totally disregarded to consider what actual progress has been made by the state. It has briefly dealt with the obligation of result required from states by

[29] *Jorge Odir Miranda Cortez et al v. El Salvador*, CASE 12.249, REPORT No. 27/09, OEA/Ser.L/V/II.111 Doc. 20 rev. at 284 (2000), par.102.
[30] Ibid, par.103 & 104.
[31] Ibid, par.105.

making reference to the fact that Salvadoran free health service scheme to HIV/AIDS patients has been expanded progressively.[32]

In '*Five Pensioners'* case also the Inter-American Court has dealt with the assessment of progressive realization in individual cases. Pursuant to the Court, this principle should be evaluated by taking into account the impact of the measure on the living condition of the whole population, not specific group of individuals.[33] Although this interpretation is generally true, its application in this case puts into question the justiciability of ESC rights, particularly, through individual complaint mechanism. In this case, the state measure has significantly reduced the pension payments (78% in average) of the complainants for some time.[34] Consequently, the Commission requested the Court to decide on whether this measure and the subsequent condition of the applicants violate the principle of "progressive development" enshrined under Article 26 of the American Convention among other rights.[35]

The Court rightly contended that progressive realization is judged based on the prevailing condition of the general population.[36] Nevertheless, the significant reduction of pension payment in the case can amount to a regressive measure, as the applicants also claimed, which the Court has failed to give proper explanation to. Moreover, the Court's over insistence on the collective nature of ESC rights defeats the entitlements accorded to individuals. According to the concurring opinion of judge Ramirez, "the Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called "justiciable nature"

[32] Ibid, par.108.
[33] *Case of the "Five Pensioners" v. Peru*, Inter-American Court of human Rights (ser. C) No. 98, ¶¶ 147-148 (28 feb. 2003), par.147.
[34] Ibid, par.88(e).
[35] Ibid, par.2; see also Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 26.
[36] Five Petitioners case, supra note 33, par.147.

of the latter…"[37] Hence, the justiciability of ESC rights hinges upon the acceptance of their individual nature without which individual complaint mechanisms would not be effective.

Furthermore, the magnitude of the population affected by the state measure should not be the sole test in the assessment of progressive rights. Meanwhile, monitoring the general human rights situation of the state is beyond the mandate of the Court in the Inter-American system. In his concurring opinion in the case, judge Rengifo asserted that:

> …the reasoning according to which only State actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political, or economic, social and cultural. The Court can only act when the human rights of specific persons are violated, and the Convention does not require that there should be a specific number of such persons.[38]

Hence, the Court should have analysed Article 26 in its individual nature and its reasoning could be different despite the outcome.

This case is also a good example to demonstrate the difficulties associated with application of 'progressive realization' standard in individual cases. When monitoring bodies examine state reports, evaluation of the progress in enforcement of rights can be relatively easy, if the necessary data is provided. However, establishing states' responsibility using this principle is quite painstaking in individual communications, since there is a dilemma between the individual and collective nature of these rights. In principle, progress should be assessed by taking into account the level of improvement evidenced in the living condition of the

[37] Ibid, Reasoned Concurring Opinion of Judge Sergio Garcia Ramirez, (p.3).
[38] Ibid, Reasoned Concurring Opinion of Judge De Roux Rengifo, (p.4); see also Langford, Malcolm (ed), Social Rights Jurisprudence: Emerging Trends in International and Comparative Law, (Cambridge University Press, 2008), p.377 & 388.

population in its entirety. This means, a state may not be held accountable for not improving the lives of certain individuals, as long as it has taken all the necessary measures and there are no other violations, such as discrimination. This should not, however, undermine the individual entitlements of socio-economic rights and the claims that arise from them. If a given measure only affects certain individuals, the situation of those specific individuals affected by the measure should be taken into account to assess state obligation. When the measure involves regressive measures, in particular, the assessment should be more stringent.

2.1.3. Availability of resources

The full realization of ESC rights is incumbent on the availability of adequate resources in a given state. States are required to undertake proper measures in order to continuously improve protection of rights guaranteed under the Covenant "to the maximum of [their] available resources". States in this regard are required to make every effort in order to utilize all the resources available at their disposal including resources obtained from international assistance, particularly giving priority to 'minimum core obligations',[39] which will be discussed later. The Committee further stated that even during economic difficulties, caused by recession or other reasons, states must protect vulnerable groups by implementation of minimum cost projects.[40] The application of resource qualification will inevitably have subjective effect on the rate and scope of compliance expected from different states based on their economic capacity. In other words developed states are required to demonstrate higher compliance with and progress towards the realization of ESC rights than low income countries.[41]

Nevertheless, the meaning of the phrase 'maximum available resources' and its exact scope is not clarified either by the Committee or regional monitoring bodies. From the economics

[39] General Comment No.3, supra note 10, par.10.
[40] Ibid, par.12.
[41] Ssenyonjo, supra note 26, pp. 980.

perspective, resource can have various implications, including human, technological and natural resources, apart from its normal monetary connotation. The dominant view is that resource refers the amount of government spending.[42] This paper will also employ this narrower definition to avoid indulging into complex matters that are not relevant to this work.

The major issue in compliance to ESC rights is related to distribution of available resources instead of the availability of the resource itself.[43] States enjoy certain latitude to determine the amount and scope of budget reserved towards these rights. However, the states do not have unfettered discretion and their budget allocation policies should not have the effect of defeating the very essence of their obligation under the Covenant.[44] Particularly, states must show that resources are equitably allocated to provide essential services indispensable for protection of ESC rights by giving due regard to the special needs of vulnerable groups. While they enjoy certain discretion, states are also required to give priority to their human rights obligation in allocation of resources.[45]

The African Commission has gone further in this regard and stipulated that states should put in place "effective and fair taxation system" in order to meet the resource requirement. This emanates from one of the peculiar features of the African Charter, which imposes duties on individuals too in addition to states. One of these obligations, the duty to pay taxes, is explicitly provided in the Charter, which in turn requires states to create adequate taxation system. The Commission has also stressed the duty of states to give priority to enforcement of ESC rights in allocation of budget.[46]

[42] Gilles Giacca, Economic, Social, and Cultural Rights in Armed Conflict (Oxford University Press 2014), p.37.
[43] Ssenyonjo, supra note 26, p.980.
[44] Alston and Quinn, supra note 8, p.177.
[45] Ssenyonjo, supra note 26, p.980.
[46] African Commission Principles and Guidelines, supra note 6, par.15.

Although resource is a justified qualifier to states obligation in relation to ESC rights, the defence of 'resource constraint' does not always relieve states from their obligations. They must demonstrate that they have done everything in their power to ensure such rights. The Committee, particularly, looks into the following factors in assessing whether a state acted 'to the maximum of available resources' or whether the defence of resource constraint is justified:

> (a) The country's level of development;
>
> (b) The severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant;
>
> (c) The country's current economic situation, in particular whether the country was undergoing a period of economic recession;
>
> (d) The existence of other serious claims on the State party's limited resources; for example, resulting from a recent natural disaster or from recent internal or international armed conflict.
>
> (e) Whether the State party had sought to identify low-cost options; and
>
> (f) Whether the State party had sought cooperation and assistance or rejected offers of resources from the international community for the purposes of implementing the provisions of the Covenant without sufficient reason.[47]

The Committee has particularly stressed the importance of these factors in determining violations in individual communications, although they have not been raised in concrete cases yet.

2.1.4. Immediate obligation of states

Even though ESC rights are mainly characterized by progressive nature of obligations, there are also certain obligations states are expected to fulfil immediately. As it has been mentioned before, taking necessary steps is one of these obligations. Under the ICESCR, states have immediate obligation to take legislative, administrative, social and other measures

[47] Statement of CESCR, supra note, par.10.

towards full realization of socio-economic rights.[48] Similar nature of immediate obligation also applies to the two regional human rights systems under consideration.[49]

In relation to this, the other immediate obligation of states, recognized by all three jurisdictions under this study, is proscription of taking regressive measures, which entail prima facia violation of rights.[50] Regressive measures cannot be justified by lack of resource and the measures taken by states should always be progressive towards better guarantee of rights.

The other immediate obligation of states is non-discrimination based on various statuses. Pursuant to Article 2(2) of the Covenant, states are required to guarantee rights enlisted in the treaty without any sort of discrimination.[51] In this regard, states are particularly required to enact anti-discrimination laws that provide procedural and substantive remedies for discriminatory practices. Anti-discrimination laws should not only address differential treatment in the public sector, but also seek to rectify discrimination in private sphere. For instance, equal payment for similar jobs without differentiation between genders should be implemented in both private and public sectors of employment.[52] In relation to the right to education, the Committee has noted that:

> The prohibition against discrimination enshrined in article 2 (2) of the Covenant is subject to neither progressive realization nor the availability of resources; it applies fully and

[48] Giacca, supra note 42, p.27.
[49] African Commission Principles and Guidelines, supra note 6, par.15; see also San Salvador Protocol, supra note 4, Article 1 and American Convention, supra note 35, Article 26.
[50] African Commission Principles and Guidelines, supra note 6, par.20; see also General Comment 3, supra note 10, par.9; the prohibition of retrogressive measure is also implied under Article 26 of the Inter-American Convention and Article 1 of the San Salvador Protocol.
[51] ICESCR, supra note 1, Article 2 (2).
[52] Ssenyonjo, supra note 26, pp. 975 & 976.

> immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination.[53]

Non-discrimination as an immediate obligation is also incorporated in the African Charter through the interpretation of the Commission.[54] In the case of *Open Society Justice Initiative v. Côte d'Ivoire,* the Commission ruled in favour of the applicants and declared violation of Article 15 (right to work), since the government has denied individuals from the Dioula ethnic group access to certain position. This discriminatory practice on unacceptable grounds will disrupt the main essence of the right to work.[55]

Similarly, socio-economic rights stipulated under the ICESCR have "minimum core content" that are usually detailed in General Comments and these minimum essentials entail immediate state obligation.[56] The African Commission guidelines have also identified certain key elements of rights as 'minimum core' that have immediate effect of application.[57] As the Committee pointed out:

> …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. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant.[58]

If these minimum essentials are disregarded, the Committee is of the view that it will disrupt the whole rationale of the Covenant. Moreover, lack of resource is not a defence for failure to fulfil these obligations, unless the state satisfactorily demonstrated that it has taken every

[53] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 13: The Right to Education (Art. 13 of the Covenant), 8 December 1999, E/C.12/1999/10, par.31.
[54] African Commission Principles and Guidelines, supra note 6, par.16.
[55] *Open Society Justice Initiative v. Côte d'Ivoire* (Communication 318/06), African Commission on Human and People's Rights, par.177.
[56] Ssenyonjo, supra note 26, p. 978.
[57] African Commission Principles and Guidelines, supra note 6, par.15.
[58] General Comment No.3, supra note 10, par.10.

effort to utilize all available resources by giving priority to those core undertakings.[59] The general nature of minimum core and its application in individual cases will be analysed in more detail in the upcoming sections.

2.2. Elements of state obligation

Apart from the general nature of state obligation examined above, the specific rights guaranteed by the Covenant and respective regional instruments also require states to undertake certain duties. These duties are clarified by the authoritative interpretations of the Committee and regional monitoring organs. However, the specificity and the approach utilized to clarify the necessary steps states are expected to take is not uniform for all rights. Moreover, while some provisions are formulated in a very abstract manner, others have more detailed rules including the specific duties of states. For instance, Article 11 of the Covenant encompasses more explicit measures states should take to alleviate hunger.[60] Nonetheless, there are three layers of obligations that are common to all human rights, including ESC rights, which will be briefly dealt in the next section.

2.2.1. Obligation to respect

This is the most straightforward and minimum level of obligation attached to all rights. Obligation to respect is a passive undertaking, which requires states not to take actions that have the effect of infringing rights or interfering in their enjoyment. The duty to respect has immediate effect and states' obligation to abstain from engaging in any activity that has the effect of infringing rights cannot be postponed to be realized progressively.[61] Not only are states condemned from taking actions that have direct negative impact on the enjoyment of the right in question, but also prohibited from partaking in any activity that will have indirect

[59] Ibid, par.10.
[60] ICESCR, supra note 1, Article 11; see also Alston and Quinn, supra note 8, p.165.
[61] Giacca, supra note 42, p.52.

impact on the right. Taking the right to health as an example, states are required to refrain from taking measures that will pollute the environment and have negative health consequences, even if this devastating effect is realized only in the long run.[62] Hence, a state should refrain from interfering in the enjoyment of rights either by direct or indirect actions.

Nevertheless, this duty should not construed as a mere negative obligation of non-interference, it also entails positive obligation of providing the necessary legal and judicial safeguards.[63] In other words, there has to be adequate legal and institutional machinery that recognize rights, condemns interference by state agents and set up appropriate remedy in case of interference. This is distinct from the legal and judicial safeguard a state has to put in place to protect right holders from interference by third parties, which falls under a duty to protect. In the former case, a state is required to create a system that protects right holders from the state itself. Because a state's duty to respect rights is unthinkable if the right in question is not recognized with appropriate legal safeguard at the first place and a necessary legal and institutional structure is set up to limit state power. In the case of *I.D.G. v. Spain*, the Committee has clearly asserted that a state should set up appropriate legal and judicial mechanisms to respect the right to housing, which was the main issue in this case. Moreover, a state is required to put in place 'effective remedy' to rectify any trespass on the enjoyment of this right not only by private but also by public bodies.[64] This case can also be used to read the right to effective remedies into the Covenant, since it does not explicitly guarantee this right, unlike the ICCPR. Overall, there are some positive measures a state has to undertake to make sure that its own system does not interfere with enjoyment of rights and there is a remedial procedure in case interference occurred.

[62] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, par. 34.
[63] Giacca, supra note 39, p.53.
[64] *I.D.G. v. Spain*, The Committee on Economic, Social and Cultural Rights, Communication No. 2/2014, E/C.12/55/D/2/2014, par. 11.3 & 11.4.

In the case of SERAC v. Nigeria, the African Commission stressed that "[the state] should respect right-holders, their freedoms, autonomy, resources, and liberty of their action"[65] More specifically, the Commission put forward what the duty to respect entails in the case of socio-economic rights.

> With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs.[66]

The duty to respect can be violated by direct action of the state or when it facilitates violation by third parties. In the above case against Nigeria, the government has directly interfered in the rights of the community through its security forces that have destroyed the houses and food sources of the people.[67] Through these actions the state has directly interfered in the enjoyment of the right to housing and food and, consequently, failed to comply with its duty to respect. The Commission also held that the government of Nigeria accountable for not consulting the community members in utilization of their resources and consequently facilitating exploitation of their resources by the companies.[68] Even with regard to the violations committed by non-state actors, the duty to respect is also under stake here, apart from duty to protect. Since the state has facilitated the exploitation and taken part in the violation by directly supporting the oil companies. As the Commission rightly pronounced, this involves the violation of obligation to respect. In other words, a state's inaction in the face of interference by third parties entails the violation of duty to protect, as it will be

[65] *SERAC v. Nigeria*, supra note 7, par.45.
[66] Ibid.
[67] Ibid, par.54.
[68] Ibid, par.55.

examined below, and a state's positive action to facilitate infringement by non-state actors entails the violation of duty to respect in addition to duty to protect.

The other scenario of infringement by direct action of the state was also an issue in the case against Sudan regarding the right to work. The Commission clarified the content of right to work in this case stating that it entitles the right holder not only to get equal access to employment but also a right not to lose employment without just cause. Consequently, it found violation of this right, since the government has closed down the organization the applicants were running and frozen its bank account.[69] In a similar case against Zimbabwe, the right to work is infringed upon by the state's decision to close business office of the complainants without justified reason.[70] Thus, the infringement of the right to property in these two cases also entails the violation of the right to work of the property owners and their employees in its secondary impact. In the latter case, Commission also pronounced that the right to health is contravened, since the applicants have sustained torture and inhuman treatment during their detention, which has negative effect on their physical and psychological health.[71]

Non-compliance with the obligation to respect also occurs when a state denies access to goods and services indispensable for the exercise of a given right. In the above case against Sudan, one of the reasons for violation of the right to health is that one of the applicants has been denied access to health care while he was in detention and this affects the core entitlement of the right.[72] The obligation of the state is, particularly, intensified when the state has direct physical control over individuals or when the latters are under custody of the state. In the case of *Ken Saro-Wiwa v. Nigeria*, the higher responsibility of states to ensure rights

[69] *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan* (Communication 379/09), African Commission on Human and People's rights, par.129 & 131.
[70] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/Republic of Zimbabwe* (284/03), African Commission on Human and People's rights, par.178.
[71] *Elgak, Hummeida and Suliman v Sudan*, supra note 69, par.134 &135.
[72] Ibid, par.136.

guaranteed under the Charter for individuals under detention is again stressed. The state as a custodian has a direct obligation in these cases. The Court declared violation of the right to health in this case, since the government of Nigeria has denied the detainee (Ken Saro-Wiwa) access to medical treatment.[73] The heightened duty of the government to protect the health of detainees is also reiterated in the case of *Media Rights Agenda v. Nigeria*, which the Commission found violation of the right to health for denial of access to medical care.[74]

Overall, as the basic obligation expected from states in human rights law, duty to respect urges states to refrain from any negative engagements that will disturb the enjoyment of rights. The duty to respect can be threatened by various actions and omissions of states. As we can deduce from the cases discussed above, it will be infringed when a state interferes in the enjoyment of rights by a direct action or when it facilitates violation by non-state actors. It will also be violated when a state denies access to facilities incumbent for exercise of these rights.

2.2.2. Obligation to protect

Unlike the preceding obligation, duty to protect requires states to safeguard rights from interference by third parties. This layer of duty also requires state to set up legislative and administrative machinery that provide adequate protection to right holders, including the provision of effective remedies for infringement of rights by non-state actors.[75] In case of *Suarez Peralta v. Ecuador*, the Inter-American Court elucidated that a state has to regulate and supervise private health care providers in order to make sure that they comply with the

[73] *International PEN, Constitutional Rights Project, Civil Liberties Organisation and Interights (on behalf of Ken Saro-Wiwa Jnr.) v. Nigeria* (137/94-139/94-154/96-161/97), African Commission on Human and People's rights, par.112.
[74] *Media Rights Agenda, Constitutional Rights Project, Media Rights Agenda and Constitutional Rights Project v. Nigeria* (105/93-128/94-130/94-152/96), African Commission on Human and People's rights, par.90.
[75] Giacca, supra note 42, p.58.

required quality of health care.[76] The Court used the same logic in the case of *Ximenes-Lopez* to impute the death of the victim due to in adequate private health care to state. Since, the state has failed to supervise the quality of services provided by private health institutions.[77]

As the African Commission asserted in the *SERAC v. Nigeria* cited above, this obligation specifically requires states to protect right holders through legislative framework and by providing effective remedies in case of violations. It obliges states to create conducive legal and regulatory environment that are necessary for enjoyment of rights recognized in the treaty in question. Overall, duty to protect entails the responsibility of states to safeguard individuals and groups from "political, economic and social interferences".[78] The difference in this element of state obligation and the duty to respect, formerly discussed, lies on who the source of interference is. Both obligations require the state to set up appropriate legal and institutional machinery in order to avoid interference- interference that emanate from the state itself in the case of duty to respect and from private actors in the case of duty to protect.

In this case, the Commission emphasized the duty of states to protect individuals and communities from violation by private actors, by taking various positive measures is not limited to adopting legislation and providing complaint mechanism. The Commission further strengthened its position by making reference to seminal cases decided by the Inter-American Court of Human Rights and ECtHR, namely *Velàsquez Rodríguez v. Honduras* and *X and Y v. Netherlands* respectively.[79] Contrary to this obligation, the Nigerian government has given 'a green light' to private companies to infringe rights of the community by failing to take action and even facilitating exploitation through state machinery.[80] Hence, the Commission

[76] *Case of Suarez Peralta v. Ecuador*, Judgment of May 21, 2013, Inter-American Court of Human Rights, par.135.
[77] *Case of Ximenes Lopes v Brazil, Ximenes Lopes v Brazil*, IACHR Series C no 139, IHRL 1523 (IACHR 2005), 30th November 2005, Inter-American Court of Human Rights [IACtHR].
[78] *SERAC v. Nigeria*, supra note 7, par.46.
[79] Ibid, par.57.
[80] Ibid, par.58.

found violation, since the government has failed to undertake the necessary care to protect the health and the environment of the Ogoni community from contamination by private companies.

Thus, the duty to protect attributes the actions of private actors to states and requires the latter to take positive measures in order prevent interference by third parties. The state inaction on the face of exploitation and human rights abuse by private actors contravenes the duty of states to protect. This element of state obligation is particularly important for protection of socio-economic rights, since the economic interest of corporations or other private actors will usually compromise the enjoyment of social goods and services by the community. Some of these corporations might even have enormous power that can be comparable to the government organs and a potential to highly misuse this power to the detriment of protection of rights unless the state steps in.

2.2.3. Obligation to fulfil

The duty to fulfil encompasses "obligations to facilitate, provide, and promote",[81] which have wide spectrum of application. This is the most demanding duty imposed on states and it entails taking positive measures in order to facilitate the enjoyment of rights and providing certain services to the extent states' resource allows. Obligation to fulfil is a twofold requirement: states should take substantive and procedural measures in order to facilitate access to various good and services essential for the enjoyment of ESC rights and to provide those good and services when necessary.[82]

According to the reasoning of the African Commission in the case of *SERAC v. Nigeria*, the duty to fulfil requires states to move to realization of rights by directly providing essential

[81] Giacca, supra note 42, p.59.
[82] Mesenbet Assefa, Defining the Minimum Core Obligations-Conundrums in International Human Rights Law and Lessons from the Constitutional Court of South Africa, Mekelle University Law Journal Vol. 1 No. 1, August 2010, p.5.

needs, such as food or social security.[83] The Commission also identified the duty to promote, which has the features of both duty to protect and fulfil, as a separate layer of obligation. Under this duty states are expected to create awareness, promote tolerance and generally create enabling environment so that individuals can exercise their rights.[84]

The obligation to fulfil can be contravened not only by total inaction of a state, but also when the measures taken by state are inadequate. In the case of *Elgak, Hummeida and Suliman v Sudan,* the violation also emanated from inadequate medication provided for the detainee and failure to take appropriate measures for the protection of the right, particularly given to the fact that the complainants were under detention.[85]

This layer of state obligation is particularly controversial in cases of socio-economic rights, since it requires states to take concrete actions in order to provide goods and services essential for the enjoyment of these rights, which can be resource intensive. However, as it has been clarified in the previous section, states are not automatically required to fulfil all aspects of rights at a given time. They are rather required to take adequate positive measures based on the resources found at their disposal in order to move forward in realization of rights. Hence, although all human rights entail these three limps of duties (respect, protect and fulfil), the specific obligation they entail might vary depending on the nature of the right. In nutshell, duty to fulfil in relation to ESC rights requires states to facilitate and strive to provide basic needs indispensable for the enjoyment of these rights.

2.3. Assessment of state obligation: a quest for standards of review

The application of the above set of obligations in individual complaint cases is not an easy task. There need to be some standards and guidelines in order to assess compliance of states

[83] *SERAC v. Nigeria*, supra note 7, par.47.
[84] Ibid, par.46.
[85] *Elgak, Hummeida and Suliman v Sudan*, supra note 69, par.137.

with those peculiar duties. This section will inquire the existence and application of standards used in this regard. Particularly, the concept, application and challenges of the principle of minimum core obligation and the test of reasonableness will be evaluated by reference to concrete cases to the extent the jurisprudence allows. Although the idea of minimum core obligation is not originally established as a standard of review for individual complaint cases, the author is of the opinion that it would be vital in this respect too.

2.3.1. 'Minimum core obligation'

The Concept

The notion of 'minimum core obligation' implies the basic guarantees that should be provided for all individuals while states are expected to achieve full realization progressively. Giacca defined this concept as "a starting point, an intangible baseline that must be guaranteed for all individuals in all situations and on the basis of which states parties can envisage a progressive realization."[86] Minimum core obligations are the basic essentials of every right guaranteed in the Covenant without which the adherence to the treaty in general would be at risk. The normative value of ESC rights is hardly realistic if significant number of the population does not have access to "essential foodstuffs, of essential primary health care, of basic shelter and housing".[87] Hence, unlike certain latitude normally left to states to realize socio-economic rights progressively, minimum core obligations entail immediate action from states.

There is no explicit list of minimum core obligations that apply to ESC rights in general; rather the detailed content of these obligations is provided by the authoritative interpretation of the Committee and the regional monitoring bodies in relation to each right. For instance, in relation to the right to food, "every State is obliged to ensure for everyone under its

[86] Giacca, supra note 42, p.30.
[87] Genaral Comment No.3, supra note 10, par.10.

jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger."[88] Instead of defining what obligations are required from states, the Committee has opted to define the core essence of each right and minimum core obligation, consequently, refers to "the obligation necessary to satisfy the minimum core content of the right."[89] Thus, based on the Committee's interpretation of what fundamental contents of rights are, the duties required from states in order to meet those fundamentals can be implied.

The African Commission has also followed similar approach as the Committee and identified minimum core content of specific rights through its guidelines. The African system in this regard is highly shaped by the UN jurisprudence and the principle of minimum core obligation is enumerated in the guideline using the same language to the Committee. As per the Commission's definition, "the minimum core obligation is the obligation of the State to ensure that no significant number of individuals is deprived of the essential elements of a particular right."[90]

Despite the clarifications made by way of subsequent interpretations, the actual scope of the 'core content' of rights is still contestable.[91] The boundary of those core entitlements and the corollary obligations they impose on states are not clearly defined. Some commentators have resorted to the concept of 'survival rights' in order to better understand the scope and constituent elements of minimum core obligation. Survival rights encompass elements from both civil and political rights and ESC rights under one umbrella;[92] in other words, all the basic needs that are essential for adequate living are covered under this concept. According to the Human Rights Committee, the notion of "inherent right to life" should not be construed

[88] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 12: The Right to Adequate Food (Art. 11 of the Covenant)*, 12 May 1999, par.14.
[89] Giacca, supra note 42, p.32.
[90] African Commission Principles and Guidelines, supra note 6, par.17.
[91] Giacca, supra note 42, p.31.
[92] Ibid, p.31.

narrowly and it also imposes positive obligations on states to take necessary measures in order to fulfil essentials for life, apart from the obvious negative obligation to non-interference. Specifically, states have to strive to increase life expectancy and cut infant mortality rate by adopting positive actions that will alleviate malnutrition and epidemics.[93] Hence, pursuant to this concept minimum core obligation of states comprises those duties that are indispensable for a survival of individuals and communities. However, the concept of survival is still misleading, do we consider a mere survival as sufficient to dispense state obligation?

Resort to the jurisprudence of the Inter-American Court of Human Rights can be a desirable approach to resolve this quest. As it has been briefly touched upon in chapter one, the Inter-American Court has the concept of 'dignified life', which envisions the right to life beyond a mere survival and extends it cover the basic needs indispensible to live in dignity. In the case of *Yakye Axa*, the Court stressed that "[the right to life] includes not only the right of every human being not to be arbitrarily deprived of his life, but also the right that conditions that impede or obstruct access to a decent existence should not be generated."[94] Furthermore, the Court pointed out the corollary duty of the state to provide for minimum conditions essential for living that corresponds to this broad conception of the right. In the words of the Court:

> One of the obligations that the State must inescapably undertake as guarantor, to protect and ensure the right to life, is that of generating minimum living conditions that are compatible with the dignity of the human person and of not creating conditions that hinder or impede it. In this regard, the State has the duty to take positive, concrete measures geared toward

[93] UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, par.5.
[94] *Case of the Yakye Axa Indigenous Community v Paraguay*, IACHR Series C no 125, IHRL 1509 (IACHR 2005), 17th June 2005, Inter-American Court of Human Rights [IACtHR], par. 161.

> fulfilment of the right to a decent life, especially in the case of persons who are vulnerable and at risk, whose care becomes a high priority.[95]

Hence, when the content and scope of minimum core obligation is indeterminate, resort to the concept of 'survival rights' can be relevant to clarify what is required from states. However, the writer is convinced that if this notion is restricted to a mere survival, it would defeat the general objective of ESC rights. Because survival without the minimum essential needs of life does not correspond to human dignity, which is the major rationale behind protection of human rights. Thus, reference to the broader construction of the right to life by the Inter-American Court is essential in this regard, since it represents a progressive understanding of social rights and their interdependence with other sets of rights. By borrowing the concept of 'dignified life' from the Court's jurisprudence, minimum core obligations can be defines as basic essential goods and services a state has to provide or facilitate in order to enable individuals and communities to live with dignity.

The other important nature of minimum core obligation is that they have an absolute nature, which makes them non-derogable even in times of emergency.[96] The Committee, in its concluding observation on Israel, has also asserted that basic elements of socio-economic rights must be observed even during the time of armed conflicts.[97] Similarly, International Humanitarian Law rules also endorse minimum essential guarantees during war times, although they have limited application and scope.[98] Nevertheless, from a pragmatic point of view non-derogability of minimum core entitlements seems far from the reality, which will lead as to one of the challenges faced in application of this standard (these challenges will be analysed in detail subsequently).

[95] Ibid, par.162.
[96] Giacca, supra note 42, p.31.
[97] Committee on Economic, social and Cultural Rights (CESCR), Concluding Observations: Israel, UN Doc E/C.12/1/Add.90, 26 June 2003, par. 31.
[98] Giacca, supra note 42, p.32.

Application in concrete cases

The conceptual construction of the notion of minimum core obligation is complex as it is let alone its application in actual cases. Moreover, as it has been elucidated before, these core values are the mere minimum undertakings expected from states. Hence, this standard might not be instrumental in dealing with violations that occur above this minimum threshold. However, it can be a good starting point in dealing with cases, particularly when it relates to group complaint. If a state failed to give effect to these minimum undertakings, violation can be rightly declared without the need to apply other higher standards.

The African Commission has used the principle of minimum core obligation in the seminal case of *SERAC v. Nigeria*. In relation to each rights it dealt with, it has identified the minimum undertaking expected from states and found violation for state's failure to comply with those essentials, accordingly. For instance, in relation to the right to food, states are minimally required to refrain from destroying or contaminating food sources by direct state action and through private actors. The government has also minimum obligation not to hinder the access of the community to food sources. The Nigerian government failed to comply with all these minimum undertakings.[99] Thus, although it has not been used much, this principle can be useful to make the initial assessment in individual complaints.

Challenges of using this standard

The first shortcoming of this principle is related to its normative status. The principle of minimum core is not incorporated in the original text of the Covenant; rather it is subsequently adopted by the interpretation of the Committee through General Comments, which are not binding in principle.[100] However, General Comments are regarded as 'authoritative interpretations' mainly due to the instrument where treaty bodies drive their

[99] *SERAC v. Nigeria*, supra note 7, par.65 & 66.
[100] Giacca, supra note 42, p.34.

mandate from. They are mandated to monitor the treaty in question by the treaty itself. Hence, a state accepts this mandate when it becomes party to the given treaty including their interpretation of the provisions there in. Nevertheless, this argument would be hard to maintain, although not impossible, in relation to the Committee on ESC rights given to the fact that it has not been established by the Covenant. As it is mentioned in the previous chapter, this Committee is not originally mandated in the Covenant, it is subsequently established by the ECOSOC. Thus, application of the interpretations of the Committee to states that did not ratify the Optional Protocol is contestable. However, this is not as such a strong challenge, since the authoritative interpretation of UN treaty bodies are usually supported by state practice.[101] It is also possible to argue that the interpretations are still authoritative, since the ECOSOC is originally mandated by the Covenant, which gives indirect authority to the organ established by it. Moreover, due to the well regarded expertise of members of the Committee, the documents produced by them have high persuasive value, which makes them acceptable as a source of international law.[102] Hence, the notion of minimum core obligation adopted by the interpretative documents of the Committee has an authoritative nature, although its normative value may not equate to obligations explicitly recognized in binding treaties.

From more sceptical point of view, selection of some elements of rights and designation as 'core' might have the effect of implying less importance to other contents of rights. In principle, these core values are adopted in order to balance the realistic latitude left to states by the condition of progressive obligation on the one hand and the normative nature of socio-economic entitlements on the other hand. Consequently, the application of minimum core

[101] Gier Ulfstein, Law-Making by Human Rights Treaty Bodies, available at https://www.duo.uio.no/bitstream/handle/10852/43310/Lawmaking+by+Human+Rights+Treaty+Bodies.pdf?sequence=4, last visited 29 October 2017, p.4.

[102] United Nations, Statute of International Court of Justice, 18 April 1946, Article 38 [This provision lists sources of international law, one of which is writings of prominent experts that can be used as a subsidiary sources. Hence, the interpretative documents of UN Committees can also fall under this category, since their adoption involves various experts.].

principle does not give rise to disregard of the full realization of rights; in other words states are not relieved from their obligation by solely complying to those basic elements.[103]

The major challenge associated with the application of minimum core obligation actually emanates from the inevitable conflict between this approach and the two qualifying conditions of state obligation in relation to ESC rights: progressive realization and availability of resources. In principle, minimum core obligations are not qualified by these two conditions. However, pragmatically speaking, it might not always be feasible to expect states to fulfil these minimum core values irrespective of their economic status and resources at their disposal.[104] The reality is also far from this expectation; still millions of people are deprived of those entitlements that are regarded as 'core' by the Committee.

The Committee's position in this regard does not give definitive answer to this dilemma, rather it is self-contradictory. On the one hand, it treats minimum core obligations as absolute undertakings, in which non-adherence is not justified under any circumstances.[105] On the other hand, it asserted that the resource qualification should also be looked at when assessing states' compliance with their minimum core duties. The Committee has noted that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned."[106] The same dilemma is also observed from the interpretative guidelines of the African Commission that stipulated the non-derogable nature of these obligations on the one hand while accepting the justified departure in cases of extreme resource constraints.[107]

[103] Ibid, p.35.
[104] Ibid.
[105] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant)*, 11 August 2000, E/C.12/2000/4, par.47.
[106] General Comment No.3, supra note 10, par.10.
[107] African Commission Principles and Guidelines, supra note 6, par.17.

There is also a contention that minimum core obligation is not flexible enough to accommodate the peculiar nature of each case under consideration. The South African Constitutional Court has explicitly rejected to use this test for the same reason. In the Seminal *Grootboom* case, the Court has elucidated the difficulty of employing this standard:

> It is not possible to determine the minimum threshold for the progressive realization of the right to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right…[108]

Hence, the application of certain core values to assess state obligation might fail to give due regard to special circumstances of each case or individuals involved.

Here it has to be stressed that minimum core obligation is the least undertaking expected from states and compliance with these essentials alone does not relieve a state from its duty. As the South African Constitutional Court puts it in the above case, "It is the floor beneath which the conduct of the state must not drop if there is to be compliance with the obligation."[109] The application of this principle alone is not sufficient to assess the compliance of a state with its treaty obligation. The measures taken by states must achieve results beyond the minimum core taking into account the economic capability of the state and other related factors. Hence, there has to be another standard that will be used to evaluate the adequacy of the steps taken by a state, which leads as to the discussion of 'reasonableness' test.

[108] *Grootboom*, supra note 19, par. 31.
[109] Ibid.

2.3.2. The 'Reasonableness' test

The Concept

The Optional Protocol to the ICESCR explicitly adopted a standard used to review individual communications in case of socio-economic rights. This standard stipulates that the Committee will assess whether or not the measures undertaken by states are 'reasonable' by giving due regard that states may adopt diverse policy devices to enforce rights guaranteed in the Covenant.[110] Although the explicit reference to this standard is made in this provision, the reasonableness test can also be deduced from other connotations used in the Covenant; for instance, the term 'appropriate means' mentioned under Article 2(1).[111]

The adoption of this test had been a point of contention and heated debate during the negotiation of the Protocol. Some representatives expressed their fear that the standard may give the Committee a green light to meddle in policy matters and budget allocation, which is reserved for national discretion. There was a suggestion to restrict the review power of the Committee by expressly granting states 'wide margin of appreciation'. On the other hand, some representatives called for even stringent test of 'unreasonableness'.[112] In the compromise, the working group has tried to strike a fair balance by leaving to states the discretion to determine the type of measure they adopt in order to comply with their obligation under the Covenant while giving the power of scrutiny to the Committee.[113] Hence, states are at liberty to adopt the necessary steps based on their domestic particularities, but this discretion is subject to assessment by the Committee based on reasonableness test.

[110] 38. UN General Assembly, Optional Protocol to the International Covenant on Civil and Political Rights, 19 December 1966, United Nations, Treaty Series, vol. 999, Article 8(4).
[111] C. Courtis, Commentary on the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, op. cit., p. 81.
[112] Geneva Academy of International Humanitarian Law and Human Rights, The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, ACADEMY IN-BRIEF No. 2, p.26.
[113] Ibid, p.27.

In applying this standard the Committee draws lessons from other jurisdictions, particularly South Africa, in which the test is frequently applied in adjudication of constitutionally guaranteed socio-economic rights. Even the way the test is phrased and terms used under the above cited provision of the Protocol corresponds to the landmark *Grootboom* case.[114] Hence, it is crucial to resort to this case in order to understand what the test of reasonableness actually implies. Quoting one of the most famous paragraphs of the judgment:

> A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.[115]

The judgment again reiterates the relevance of the 'availability of resource' qualification in determining the reasonableness of measures partaken by states. Moreover, the Court emphasized that the measures taken by states should not leave out the most needy and vulnerable portion of the society. It is not sufficient that those measures have shown advancement in the statistics.[116] Particularly, in relation to the right to housing, which was the main issue in this case, the Court asserted that the steps taken by state to alleviate the problem of housing must be dynamic based on the historical and social context of the society. This reference was made by the Court to pinpoint that the root cause of the problem is traced back to the discrimination during the Apartheid era. A reasonable measure must also give due consideration to ability of the existing state machinery and it must be flexible enough to adapt

[114] Ibid.
[115] Grootboom case, supra note 19, par.41.
[116] Ibid, par.44.

to changing circumstances.[117] Hence, reasonableness test is also meant to avoid mere idealism and focus on realistic steps that can be implemented.

In its guideline, the Committee has also identified certain considerations that should be taken into account in this regard; the following criteria are used to measure the reasonableness of a state's actions:

> (a) The extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights;
>
> b) Whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;
>
> (c) Whether the State party's decision (not) to allocate available resources was in accordance with international human rights standards;
>
> (d) Where several policy options are available, whether the State party adopted the option that least restricts Covenant rights;
>
> (e) The time frame in which the steps were taken;
>
> (f) Whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk.[118]

These general criteria will be applied based on the specific needs of the rights under consideration and the clarifications made by General Comments. Overall, the reasonableness of the steps and measures taken by states will be judged based on these considerations by giving due regard to peculiar circumstances of a given case.

However, it has to be noted that reasonableness test is not always employed to assess state's compliance to its treaty obligations. In some cases, violation can be determined without resort to this standard. For instance, where a state has failed to comply with its immediate

[117] Ibid, par.43.
[118] UN Committee on Economic, Social and Cultural Rights (CESCR), An Evaluation of the Obligation to Take Steps to the "Maximum of Available Resources" under an Optional Protocol to the Covenant, Statement, E/C.12/2007/1, 21 September 2007, par.8

obligations, such as non-discrimination and duty to take steps, it is regarded as 'prima facia' violation and the test of reasonableness would not be relevant. The same applies to cases where states undertake regressive measures, as this is vividly against the central objective of rights.[119]

Unlike the Protocol, the human rights instruments as well interpretative documents of both the Inter-American and the African human rights systems neither explicitly put forward for a standard of review nor adopt the reasonableness approach specifically. The African Commission usually considers state obligation by reference to the three limps of human rights duty: respect, protect and fulfil. It also looks into whether or not the measures taken by states have resulted in making provision of rights more available, accessible and acceptable. The Inter-American Court also assesses state obligation using a case by case approach by taking into account the particular circumstances of the case. It does not explicitly adopted the reasonless test or other standard of review for assessment of state obligation.

Application in concrete cases

Although reasonableness test is explicitly provided under the Protocol as a standard of assessment of state obligation in individual communications, it has not been applied by the Committee as such. As it has been elucidated in chapter one, the Committee has only started entertaining individual cases very recently and there are only few cases that are finally decided so far. These cases did not call for the application of this standard either because they mainly related to the negative obligation of states or they can rightly be resolved without the need to apply particular standard. Hence, unfortunately, the standard of reasonableness has not been tested by the Committee in concrete cases yet. Accordingly, in order to shade a light on this issue, it is crucial to resort to the jurisprudence of the South African Constitutional Court, which has applied the test in some cases. These cases have also been referred to during

[119] Geneva Academy Brief, supra note 112, p.32.

the negotiation process of the Optional Protocol; hence, it is desirable to provide a brief analysis here in order to better understand the application of reasonableness test.

The South African Constitutional Court first applied this test in its seminal judgment cited above, *Grootboom* case. In this case, the Court scrutinized a government's decision to forcibly evict certain people from their informal dwellings. The Court first reiterated that as it is required by the Constitution, a government is expected to take "reasonable legislative and other measures". In this regard, the first consideration is that "a reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available."[120] The Court also alluded that a wide range of reasonable measures can be taken by state and the choice is left to the discretion of the state. What matters is the reasonableness of the measures taken, not whether or not other alternatives exist. However, the measures must move towards progressive realization of the right under consideration, right to housing in this case.[121]

The other important consideration identified by the Court in the application of this standard is that due regard must be given to the background circumstances of the problem the measure is yearning to solve. The historical, economic and social realities on the one hand and the institutional capacities of organs entrusted to implement the measures on the other hand must be considered. The measures taken must not only address short term problems, but also long term calamities of the community. A significant portion of the society should not be excluded from such measures and they must be flexible enough to accommodate changing circumstances. The Court also clarified that the test of reasonableness cannot solely be achieved by showing statistical advance, rather they must aspire to provide basic essentials of

[120] *Grootboom case*, supra note 19, par.39.
[121] Ibid, par.41.

life in accordance with the notion of human dignity.[122] Applying these considerations, the Court found that the housing program undertaken by the government in this case are unreasonable, since it cannot give redress to those in dire need. It particularly disregards the short term needs of those in crisis and the time taken to provide affordable housing is beyond reasonable.[123]

The reasonableness standard was also applied in the case of *Treatment Action Campaign* where the adequacy of the government action to respond to health challenges of HIV/AIDS to expectant mothers was an issue. The High Court decided against the government asserting that it failed to take sufficient measures to minimize the risk of mothers living with HIV/AIDS transmitting the disease to their new born. After reiterating the tests of reasonableness put forward in the *Grootboom* case, the Constitutional Court affirmed that the application of this standard may have a budget implication but they are not meant to rearrange budgeting, which implies the constitutional separation between different branches of government.[124] Similar to the *Grootboom* case, the Court also found that the policy measures taken by the government are not adequate enough to satisfy the test of reasonableness, since it failed to address the needs of vulnerable groups in this case- mothers and new born children.[125]

In the case of *Khosa*, which is related to the right to social security, the Court again reiterated the difference left to the government in determining a reasonable measure while affirming that the contextual backgrounds should be duly considered to evaluate the reasonableness of these measures. Particularly, when it considers the exclusion of permanent residents who lack citizenship status from the social security scheme, the Court took into account three factors: "the purpose served by social security, the impact of the exclusion on permanent residents

[122] Ibid, par. 43 & 44.
[123] Ibid, par. 64 & 65.
[124] *Minister of Health v Treatment Action Campaign* (2002) 5 SA 721 (CC), par.38.
[125] Ibid, par. 67.

and the relevance of the citizenship requirement to that purpose."[126] Moreover, it is also essential to consider the effect this exclusion has on the group concerned and applying this factors to the facts of the case, the Court found the exclusion unreasonable.[127]

Overall, as it can be grasped from these cases, the reasonableness of a measure taken by a state is assessed on case by case basis by taking the particular circumstances of the case and the requirements of the rights under consideration. The state is left with wide discretion in determining the measure and the mere existence of other alternative does not make this measure unreasonable. Nevertheless, a reasonable measure has to be comprehensive, flexible and take into account the special needs of vulnerable groups or person under dire need of access to goods and services. Moreover, it must take into account the historical, social and economic context of the matter and meant to address both short term and long term challenges. Most importantly, reasonable measure should result in progressive realization of ESC rights. These factors and considerations can be rightly emulated by the Committee and regional monitoring bodies in assessing state obligation in individual complaint cases.

Challenges of using this standard

One of the setbacks of employing reasonableness test is that it will adversely affect "the possibility of individuals to claim immediate delivery of goods and services from the state."[128] The assessment under this standard looks into the reasonableness of the programs and policies adopted by states rather than the provision of rights to a specific individual. This will affect the individual nature of socio-economic rights, which will in turn compromises the effectiveness of the individual complaint mechanisms. Moreover, as we can deduce from the cases discussed above, a wide discretion is left to states in determining reasonable measures,

[126] *Khosa and Others v Minister of Social Development & Ors* (2004) 6 BCLR 569 (CC) at par.49.
[127] Ibid, par.59.
[128] Assefa, supra note 82, p.14.

which will again have the effect of compromising individual rights.[129] Nevertheless, as this standard is not yet adequately applied by the Committee, it might be premature to point out challenges of application at this stage.

Concluding remarks

It is clear that ESC rights entail different and to some extent complex nature of state obligation, which makes assessment of state obligation conceptually and practically difficult. Unfortunately, there is only a limited jurisprudence so far that might not allow one to fully grasp the practical aspect of issues raised in relation to this. Moreover, most of the cases brought to the Committee and the regional monitoring bodies relate to the negative obligation of state. In other words, they mainly raise the violation of duty to respect- when the state interferes in enjoyment of rights by various actions and omissions. To some extent there are also cases concerning failure by states to comply with their duty to protect right holders from interference by private actors. Yet states are not frequently called accountable through individual complaints for inability to take adequate measures to realize rights progressively or comply with their duty to fulfil, which is the most controversial aspect of state obligation. As it can be deduced from few cases discussed so far, the South African Courts Jurisprudence is different in this regard; some cases have been brought against the government for failure to provide essential goods and services to the extent required, which resulted in some progressive judgments.

Nevertheless, from concepts elucidated in this chapter and few cases discussed, two types of dilemmas can be evident. First, there is a clear dilemma between the nature of state obligations required for realization of ESC rights and the individual nature of rights as well as the complaint mechanism. The qualifications of progressive realization and availability of

[129] Brian Griffey, The 'Reasonableness' Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Human Rights Law Review 11:2 (2011), p.313.

resource do not rightly go with the individual entitlements of the rights, even if these qualifications are inevitable for pragmatic reasons. Second, there is a collision between the power of international and regional monitoring organs to hear individual communications and the margin of appreciation left to states in determining the measures they take and their budget allocation. The monitoring bodies have to question the policy decisions of states to decide their compliance with their obligations under their respective instruments and the line between this scrutiny and discretion of states is still a grey area.

To solve these dilemmas, there has to be clear and well-articulated standards of review against which a state action will be judged. The only effort undertaken in this regard is the reasonableness test adopted by the Optional Protocol at the UN level. The two regional systems, the Inter-American and African human rights systems, have not explicitly put forward specific standard or guideline for assessment of state obligation when dealing with individual complaints, even if they have richer jurisprudence. Although the reasonableness test is abstract and vague in its face value, it can be proper standard of scrutiny, if it is elaborated more by case law and interpretative guidelines. Nevertheless, this elaboration has not been adequately achieved yet. The South African Constitutional Court's jurisprudence can be emulated by other systems by making proper adjustment. Overall, to alleviate the conceptual and practical difficulties of assessing state obligation in individual cases, clear, concrete and flexible standards of review is indispensable.

Chapter three

3. Provision of Remedies for Violation of ESC Rights

The effectiveness of human rights adjudicative procedures partly, even most importantly, hinges upon the adequacy of remedies they grant and the implementation of the same. This assertion also holds water with regard to international and regional monitoring bodies established to receive individual complaints related to socio-economic rights. Remedies can serve two major functions: they are meant, first, to rectify the pecuniary and non-pecuniary damage sustained by the particular victim, and second, to resolve systematic problems existing in the state machinery in order to ensure the non-repetition of the act. Hence, the role of remedies is not confined to correcting the past but also shaping the future by providing reforming measures a state has to undertake. The adequacy of remedies awarded by international and regional human rights bodies is also assessed based on these two benchmarks. On the other hand, the implementation of remedies granted at these supranational levels depends on how well they are accepted and enforced at the domestic level, which is usually the challenge of these human rights systems.

This chapter examines those points in relation to individual complaint mechanisms dealing with the violation of ESC rights, with particular reference to the case laws of the three jurisdictions under consideration. The chapter has four major sections. The first two sections are meant to give a conceptual background about the right to effective remedies and its application in ESC rights, respectively. The third and the most important section is dedicated to an in-depth analysis of procedural and substantive remedies awarded for violation of socio-economic rights with reference to concrete cases. The last section examines follow up procedures put in place by the international and regional bodies under consideration to make

sure that the remedies they grant are implemented at the national level. Finally, the chapter culminates by commenting on the effectiveness of the remedies provided and the follow up procures as concluding remarks.

3.1. The right to effective remedies: conceptual and legal framework

International human rights law discourse is not well developed as such regarding provision of remedies that rectify human rights violations, particularly when it comes to the role of international or regional monitoring bodies in this regard.[1] At the international level, most human rights treaties do not originally include provisions that endow to a monitoring organ a power to hear complaints of human rights violations and provide adequate remedies. The power to hear individual communication is subsequently added through additional protocols, which is particularly true for the ICESCR. Even these subsequent agreements do not usually specify the type of remedies that should be provided and the scope of power of monitoring organs in this regard. The rules on remedies are rather developed by the work of human rights bodies that are derived from various other sectors of international law.[2] This lack of explicit rules on the law of remedies and infant jurisprudence is not unique for the UN system; the regional human rights systems also share the same limitations, although some can be better than the others. Having this background in mind, this section will shade a light on the general concept, types and purposes of remedies in human rights law.

Since remedies are meant to rectify the wrongs done to the interest of a person, they are contingent on certain preconditions. In other words, a right to claim remedies arises upon the fulfilment of a number of prerequisites. The first important condition is the existence and breach of a legal obligation. In the context of human rights law such legal obligation may arise from treaties, customs, general principles of law and various national legal frameworks.

[1] Dinah Shelton, Remedies in International Human Rights Law (Oxford University Press, 3rd ed., 2015), p.1.
[2] Ibid, p.3.

The second requirement is that there has to be a harm or damage incurred as the result of the breach of obligation. Various factors, such as the gravity of the violation and the individual context of the victim, should be taken into account to assess harm in case of human rights violation. In this context, harm is not confined to physical or pecuniary damage suffered by a person, human rights law also recognizes dignitary harm, which is moral in nature. The third condition dictates the existence of identified or identifiable victim of the harm caused by the breach of obligation, which is particularly essential to claim redress using the formal legal procedures.[3] Thus, these three requirements must be cumulatively fulfilled to claim remedy using human rights adjudicatory mechanisms.

The term remedies indicate two different concepts. The first is procedural that is related to the process by which courts or administrative agencies accept and decide cases of human rights violations. The second notion corresponds to the substantive remedies provided or the outcome of the procedure.[4] The first concept, particularly, refers to access to justice, which the duty to provide effective remedies is contingent upon. Access to justice mainly implies the existence of independent and impartial institutions to which the victim of human rights violations can resort to in order to get redress.[5] In spite of the outcome of the case, the fairness of the procedure is an important determinant of the effectiveness of the remedy. The outcome of this process may result in pecuniary or non-pecuniary redress, which corresponds to the second concept of remedies.[6] These two notions will be analysed in the subsequent sections with reference to cases of violation of ESC rights.

Provision of remedies serves various purposes, a brief discussion of which is crucial here, since the effectiveness of remedies is assessed based on its success in meeting these purposes.

[3] Ibid, pp. 13-16.
[4] Ibid, p.16; see also Black's Law dictionary, (10th edn, n.p., 2014), p.1085, it defines remedies as "the means by which a right is enforced or the violation of a right is prevented, redressed or compensated."
[5] Shelton, supra note 1, p.17.
[6] Ibid, p.19.

The primary function of legal remedies is to make good the wrong done to a person; in other words remedies serve the moral goal of correcting injustice. "Remedies aim to place an aggrieved party in the same position as he or she would have been had no injury occurred."[7] Hence, remedies play a vital compensatory role. The other purpose of remedies is retribution that emanates from the need to make wrongdoers take responsibility for their actions. Although the remedies are mainly about rectifying the wrong done to the victim, they also serve the purpose of condemnation by making the person responsible for the harm suffered by the former pay for his conduct.[8] Remedial justice also serves an important function of individual and general deterrence that is influencing the future conduct of the wrongdoer and other potential perpetrators, respectively.[9]

The other function of remedies, particularly praised in recent years for crime prevention, is 'restorative or transitional justice'. According to United Nations' definition:

> Transitional justice is an approach to systematic or massive violations of human rights that both provides redress to victims and creates or enhances opportunities for the transformation of the political systems, conflicts, and other conditions that may have been at the root of the abuses.[10]

This notion embraces a broader approach of addressing the community, apart from repairing the wrong done to the specific victim. Transitional justice is, particularly, pivotal in the context of human rights law where there are widespread violations, which necessitates the healing process of the whole society.[11] For instance, this approach is employed in South

[7] Ibid, p.19; see also Aristotle, Ἠθικὰ Νικομάχεια', trans. J.A.K Thompson as The Ethics (London, 1955), p.148 & 149.
[8] Shelton, supra note 1, p.20.
[9] Ibid, p.22.
[10] United Nations, What is Transitional Justice, 20 February 2008, available at http://www.un.org/en/peacebuilding/pdf/doc_wgll/justice_times_transition/26_02_2008_background_note.pdf last visited 28 October 2017, p.1.
[11] Raymond Koen, The Antinomies of Restorative Justice, in Van der Spuy, E., Parmentier, S. and Dissel, A. (eds.), Restorative Justice - Politics, Policies and Prospects (published at Acta Juridica 2007), p.254.

Africa to address the grave violations committed by the Apartheid system and facilitate the transition of the country.[12] Hence, transitional justice is one of the contemporary objectives of human rights remedies.

The right to effective remedies is explicitly recognized in a number of international and regional human rights instruments. For instance, Article 8 of the UDHR guarantees the right of every person to get effective redress by competent national organs.[13] The same right is provided in the ICCPR under the obligation of states in relation to the rights recognized therein.[14] Similarly, the American Convention on Human Rights also recognizes the right to get prompt redress for human rights violation and obliges states to make adequate remedial procedures available and enforce the remedies granted.[15] On the other hand, the right to effective remedies is not explicitly provided in the African Charter. However, the Commission has read this right into the rights guaranteed under the Charter through its interpretative guidelines and case laws.[16] In addition to this, the Protocol to the African Charter providing for the rights of women departs from the Charter by explicitly guarantying the right to effective remedies for women who are victims of human rights violation.[17] Overall, it is safe to conclude that the right to effective remedies, which guarantees adequate redress for people whose rights have been infringed and imposes a correlative duty on states

[12] David Backer, Evaluating Transitional Justice in South Africa From a Victim's Perspective, The Journal of the International Institute, Volume 12, Issue 2, Winter 2005.
[13] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 8.
[14] UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, Article 2(3).
[15] Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969, Article 25.
[16] African Commission on Human and People's Rights, Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and People's Rights, available at http://www.achpr.org/instruments/economic-social-cultural/ last visited 16 September 2017, par.27; see also African Commission on Human and Peoples' Rights, General Comment No. 4 on the African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), (Adopted at the 21st Extra-Ordinary Session, held from 23 February to 4 March 2017); see also *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000), African Commission on Human and People's Rights.
[17] African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, 11 July 2003, Article 25(a).

to make such remedies available, is recognized by all the three jurisdictions either explicitly or implicitly.

Since exhaustion of local remedies is one of the admissibility requirements to access international and regional remedial procedures, the remedy provided at the national level should comply with certain conditions. It has to be available for the victims concerned and effective enough to redress the harm inflicted. As the African Commission clearly stated in the case of *Jawara v Gambia*, "a remedy is considered available if the petitioner can pursue it without impediment, it is deemed effective if it offers a prospect of success, and it is found sufficient if it is capable of redressing the complaint."[18] Hence, effectiveness of a given remedy is determined by taking into account both the procedural and substantive components. There has to be an accessible remedial procedure available for the victims of human rights violation that is capable of providing adequate redress for the loss sustained.

However, the right to effective remedies recognized under the human rights frameworks discussed above mainly applies to remedies provided at the national level. Hence, the important question here is whether this right also applies to procedures available at the international or regional level in the same manner. In other words, are these inter-state judicial and quasi-judicial bodies empowered and/or obliged to provide effective remedies for victims of human rights violations?

To answer this question, it is important to resort to the general principles accepted in international law regarding remedies. In its seminal judgment of the *Chorzow Factory Case*, the Permanent Court of International Justice (PCIJ) asserted a vital principle on the issue of reparation and the ability of international tribunals in granting the same. As the Court stated in this case, "It is a principle of international law that the breach of an engagement involves

[18] *Jawara v The Gambia*, Communications 147/95 and 149/96, AHRLR 107, African Commission on Human and People's Rights, May 2000, par.32.

an obligation to make reparation in an adequate form."[19] The Court also considered its capacity to order adequate reparation as inherent to this principle.[20] The same argument is employed by the successor of PCIJ, the International Court of Justice (ICJ), during its advisory opinion in the Reparation for Injuries case.[21] Hence, it is a well-founded principle of international law that breach of obligation naturally gives rise to adequate redress, despite the type and level of the adjudicative organ the case is brought to. Moreover, providing effective remedies should go hand in hand with the power to receive complaints, since the latter would not stand alone.

The Maastricht guidelines is, particularly, straightforward in answering the question raised above; it asserts that "any person or group who is a victim of a violation of an economic, social or cultural right should have access to effective judicial or other appropriate remedies at both national and international levels."[22] This is also reiterated by the Committee in relation to the right to health, for it has articulated in its general comment that victims of violation of this right should be accorded adequate remedies both at the domestic and international level.[23] Thus, in principle, the victims' right to get effective procedural and substantive remedies is not limited to domestic level, such right also extends to the complaint procedures available at the regional and international levels. However, the existing state of things might not always comply with this.

[19] *Factory At Chorzów, Germany v Poland*, Judgment, Claim for Indemnity, Merits, Judgment No 13, (1928) PCIJ Series A No 17, ICGJ 255 (PCIJ 1928), 13th September 1928, p.21.
[20] Ibid.
[21] *Reparation for injuries suffered in the service of the Nations*, Advisory Opinion, [1949] ICJ Rep 174, ICGJ 232 (ICJ 1949), 11th April 1949.
[22] International Commission of Jurists (ICJ), Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, 26 January 1997, available at: http://www.refworld.org/docid/48abd5730.html last visited 29 August 2017, par.22.
[23] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000, E/C.12/2000/4, par.59.

3.2. The application of the right to effective remedies to ESC rights

Contrary to the ICCPR, states' obligation of making effective remedies available for the victims of the infringement of rights guaranteed under the Covenant is not explicitly stated under Article 2 of the ICESCR. Nevertheless, the right to effective remedies can be considered as implied right, since the protection of rights recognized in human rights instruments can hardly make sense if there is no redress for their violation. As the Latin maxim *ubi jus ibi remedium* depicts the existence of a right necessary entails a remedy.[24] Moreover, the Committee has clarified this through its authoritative interpretation in General Comment 9, which states:

> …the Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.[25]

Hence, violation of ESC rights also entails the right to effective remedies for the victims of violation and the obligation of the state to put in place accessible and effective remedial procedures to rectify the wrong.

Similar to other human rights violations, the remedy should include measures that make good the specific damage suffered by the victim; address systematic problems, if any; and provide a legal safeguard so that the wrong does not happen again.[26] The remedy does not necessarily have to be judicial; administrative remedies can also be adequate in some cases, if they are

[24] Godfrey M Musila, The right to an effective remedy under the African Charter on Human and Peoples' Rights, African Human Rights Journal, Number 6, 2006, p.447.
[25] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 9: The domestic application of the Covenant*, 3 December 1998, E/C.12/1998/24, par.2.
[26] Amnesty International, Human Rights for Human Dignity: A primer on economic, social and cultural rights, (Amnesty International, 2nd ed., 2014), p.56.

"accessible, affordable, timely and effective."[27] By the same token, the Maastricht Guidelines also stipulates that victims of ESC rights violations should have access to adequate and effective remedies. Moreover, they are also entitled to get sufficient reparation for the loss they suffered.[28] As it has been mentioned in the previous section, the right to effective remedies provided under the guideline also extends to the procedures available at the international level.

Apart from these general principles, the right to effective of remedies of victims of violation and the correlative duty of states is also emphasized by the Committee in relation to specific rights guaranteed under ICESCR. For instance, as it has been mentioned before, the Committee has depicted in its authoritative interpretation regarding the right to health that victims have a right to effective remedies both at the national and international level for the violation of this right.[29] In the case of *I.D.G. v. Spain*, the Committee has clearly asserted that a state is required to put in place 'effective remedy' to rectify any trespass on the enjoyment of this right not only by private but also by public bodies.[30] Furthermore, one of the main reasons the Committee has found violation in the case of *I.D.G v. Spain* is because the state has failed to afford an effective remedy to the victim.[31] This case can be used to read the right to effective remedies into the Covenant. As it has been depicted in the first chapter, the two regional systems under consideration, particularly the African human rights system, did not follow the footsteps of the UN system in making division between the two sets of rights. The same is true with the rules and principles related with effective remedies.

Overall, although it is not explicitly mentioned in the Covenant, the right to effective remedies equally applies to the socio-economic rights guaranteed therein. This on the one

[27] General Comment No.9, supra note 25, par.9.
[28] Maastricht Guidelines, supra note 22, par.22 & 23.
[29] General Comment No. 14, supra note 23, par.59.
[30] *I.D.G. (represented by counsel, Fernando Ron and Fernando Morales) v. Spain*, Communication No. 2/2014, Committee on Economic, Social and Cultural Rights, E/C.12/55/D/2/2014, 13 October 2015, par. 11.3 & 11.4.
[31] Ibid, par. 15.

hand guarantees redress for victims of human rights violations and on the other hand imposes a duty on states to make sure that adequate remedies are available and accessible. Moreover, the same arguments illustrated in the previous section[32] are applicable with regard to the power and duty of international or regional adjudicative mechanisms that hear complaints related ESC rights in providing appropriate remedies.

3.3. Remedies provided for violation of ESC rights

As it has been elucidated in the first section of this chapter, the concept of remedies refers to both the procedure under which a complaint is heard, particularly access to justice, and the substantive outcome of the case. These dual elements must be properly analysed in order to evaluate the effectiveness of a remedy in rectifying the past loss of the specific victim as well as ensure the non-repetition of the wrong by reforming the systematic setbacks. Hence, the next sections are dedicated to an in-depth analysis of these two sets of remedies by reference to the legal frameworks and case laws of the jurisdictions under consideration. It has to be noted here that the cases finally decided by the UN Committee on ESC rights are very few and only in one of these cases the Committee did find violation so far (*I.D.G. v. Spain*). Thus, this case coupled with other authoritative documents of the Committee will be the basis of analysis in the coming sections.

3.3.1. Procedural remedies: access to justice

Procedural remedy implies the process under which the complaint of human rights violations is heard; it is particularly related to access to independent and impartial organs. This is undoubtedly important to assess the effectiveness of a remedy, since it is not solely based on the outcome of the case but also the process that leads to the final outcome. Hence, this section will deal with this procedural aspect of effective remedies mainly by reference to the

[32] See Section 3.1 of this thesis.

standing requirements of the jurisdictions that are subject of this study. In other words, it particularly focuses on the question of who can take a complaint to these monitoring bodies in cases of violation of ESC rights?

In relation to communications brought to the Committee on ESC rights, Article 2 of the Optional Protocol to the Covenant deals with the above question of standing. According to this provision and the rules of procedure of the Committee, communication can be brought by the victims of the alleged violation of socio-economic rights or by other authorized actors on behalf of the victims. In the latter scenario, the victims must give explicit consent to be represented by whoever is submitting the communication, unless such lack of consent is justified in extreme circumstances.[33] Thus, the Committee's standing requirements are quite restrictive, since only victims or their representatives are allowed to submit individual complaint.

As it has been alluded in the first chapter, in the Inter-American human rights system, both the Commission and the Court have competence to receive individual cases. Pursuant to Article 44 of the Convention, the standing requirements to access the Commission are broadly framed.[34] Apart from the victim, a petition can be filed by any natural or legal person without representation from the former, as long as there is an identifiable victim. "Petitioners do not have to prove before the Commission that they, themselves, are victims, nor that they have the consent of the victim to present the petition on their behalf."[35] Thus, the doctrine of *actio popularis* is accepted before the Commission. On the other hand, individuals and NGOs

[33] UN General Assembly, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights : resolution / adopted by the General Assembly, A/RES/63/117, 5 March 2009, Article 2; see also Committee on Economic, Social and Cultural Rights, Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), (Procedures for the consideration of Individual Communications received under the Optional Protocol), E/C.12/49/3, 3 December 2012, Rule 4.
[34] Inter-American Convention on Human Rights, supra note 15, Article 44.
[35] Diego Rodríguez Pinzón, The "Victim" Requirement, the Fourth Instance Formula and the Notion of "Person" in the Individual Compliant Procedure of the Inter-American Human Rights System, ILSA Journal of Int'l & Comparative Law, Vol. 7:1, p.4.

(including the victims) do not have a direct access to the Court. Cases can only reach the Court through the Commission, which will review them first and forward to the former, if it deems necessary. Practically, only a limited number of cases are submitted to the Court.[36] Hence, even if the judgments of the Court are binding unlike the Commission, access to the former is quite limited than the latter.

Similar to the Inter-American System, the African human rights enforcement system is also a 'two-tier' system where both the African Commission and the Court have competence to receive individual communications. Although the decision of the former is not binding as opposed to the latter, the Commission has a richer jurisprudence, particularly in the area of socio-economic rights. On the other hand, these bodies have different standing requirements, which made the Commission more accessible than the Court.

The African Charter, which established the Commission, does not explicitly specify who is entitled to file a complaint before the Commission other than states. In case of inter-state communications, any member state of the Charter can bring a complaint against other member state, if it has a reasonable conviction that the latter has violated the Charter.[37] This section would not indulge into a deeper analysis of this procedure, since it is beyond the thematic scope of this thesis. However, the Charter does not enumerate who can bring complaints that it categorized as 'other communications'[38], which includes individual and group cases. It merely states admissibility requirements of communications submitted to the Commission without answering the question of standing. However, by referring to the jurisprudence of the Commission it is not hard to infer that the door of the Commission is

[36] Michael J. Camilleri and Viviana Krsticevic, Making International Law Stick: Reflections on Compliance with Judgments in the Inter-American Human Rights System, Derechos Humanos, Relaciones Internacionales Y Globalizacion, available at: http://www.bristol.ac.uk/law/research/centres-themes/ihrsp/events.html last visited 26 August 2017, p. 237.
[37] Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 47.
[38] Ibid, Article 55.

open to communications from various actors and there is no victim requirement unlike the case of the UN Committee. In other words, a communication can be filed by the victims of human rights violation or by any natural or legal persons on behalf of the victim. NGOs are also at liberty to bring cases to the Commission as it has been frequently done in the past.[39] Landmarks cases in the area of socio-economic rights, such as *SERAC v Nigeria* and *Open Society Justice Initiative v. Côte d'Ivoire* among other cases, are brought by NGOs.

On the other hand, even if the admissibility requirements employed by the Court are similar to those used by the Commission[40], the Court follows narrower rules of standing. Individuals and NGOs can only directly bring a case to the Court against states that have made special declaration accepting the jurisdiction of the Court to that effect.[41] However, only eight states have made such declaration so far, although thirty African states are party to the Protocol that established the Court.[42] The only alternative available for individuals and NGOs who want to bring a complaint against a state that did not make such declaration is to request the Commission to refer the case to the Court, in which case all state parties of the African Charter are obliged by the jurisdiction of the Court.[43] Few cases have reached the Court so far through this alternative.

Overall, access to justice is the first test for the effectiveness of remedies in particular and individual complaint procedures in general. As it has been illustrated above, access to the Committee on ESC rights is more limited than the complaint procedures at the two regional systems, since only victims and their representatives are allowed to submit application. This

[39] Sabelo Gumedze, Bringing communications before the African Commission on Human and Peoples' Rights, African Human Rights Journal, p.121.
[40] Organization of African Unity (OAU), Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights, 10 June 1998, Article 6(2); see also Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Article 56.
[41] Protocol establishing the African Court, supra note 40, ,Article 5(3).
[42] The African Court on Human and Peoples' Rights website (http://www.african-court.org/en/ last accessed 16 September 2017).
[43] Protocol establishing the African Court, supra note 40, Article 5(1)(a).

makes it harder for most human rights violation victims from different parts of the world to access the Committee. On the other hand, *actio popularis* is acceptable both by the African and Inter-American Commissions, which are quasi-judicial bodies. Contrary to this, direct access to the Courts of both regional systems, the decisions of which are binding, is relatively restricted. The two regional human rights systems, however, are more effective than the UN system in terms of procedural remedies. Since at least their quasi-judicial organs accept *actio popularis* and, as it has been depicted in this section, even the standing requirements of their courts are less stringent than the UN Committee, they are more accessible to the victims of human rights violations. This procedural openness is also corroborated by the geographical advantage of the regional systems, which escalates their accessibility.

3.3.2. Substantive remedies

If the victim is granted access to the human rights adjudicative organs and violation is found, various substantive remedies, that range from a mere declaratory judgment to compensation or specific remedy that requires a state to undertake certain conducts, may be ordered. Although, these remedies may not be able to fully restore what the victim has lost in most human rights cases, they should strive to reinstate the status of the victim to where it was before the violation occurred as much as possible. Moreover, as a large number of human rights violation are the result of flaws in policy and legal system of the state, substantive remedies should also be able to address these flaws in order to ensure that similar violations will not likely occur in the future. These are the benchmarks against which the remedies provided by regional and international human rights adjudicative organs are evaluated.

I. Declaration of violation

A declaratory judgment, stating that the respondent state has breached its obligation under international law, is at the heart of remedies granted by international or regional tribunals.

Although it is considered as the least intrusive remedy from the viewpoint of the state against which the judgment is given, declaration of violation is naturally one of the commonly employed remedies in international human rights law. In some instances, it can also be an effective remedy to put an end to the violation concerned as well as prevent the repetition of the wrongful acts in the future, particularly if the defendant state is genuinely committed to fulfil its treaty obligation. Moreover, a binding declaratory judgment can tantamount to injunction, since the defendant state can be reasonably expected to modify its practice or law in accordance with it.[44] After all, 'naming and shaming' is the major enforcement tool in international law.

This remedy is used by all international and regional adjudicating bodies. For instance, the European Court on Human Rights (ECtHR) usually considers declaration of violation as a sufficient remedy to accord 'just satisfaction' and rejects a claim for a moral damage.[45] On the other hand, most of the other international complaint organs also agree that declaratory judgment can be considered as a remedy in itself, although they don't limit the redress only to such declaration in most cases.[46] For instance, in the case of *Acosta-Calderon v. Ecuador*, the Inter-American Court rejected the respondent state's request of limiting the remedy to only declaration of violation. Yet it did not contend that declaratory judgment itself can accord some redress.[47]

The application and importance of declaratory judgment is no different when it comes to individual complaint cases involving the violation of ESC rights. Similar to other human rights adjudications, a declaratory judgment is given whenever violation of socio-economic

[44] Shelton, supra note 1, p.19, p.286.
[45] Ibid, p.19, p.286.
[46] Ibid, p.295.
[47] *Case of Acosta Calderón v Ecuador*, Merits, Reparations and Costs, Inter-American Court of Human Rights, Series C No 129, [2005] IACHR 10, IHRL 1513 (IACHR 2005), 24th June 2005, par.156; see also *Case of Suárez Rosero v. Ecuador*, Reparations and Costs, Inter-American Court of Human Rights, Series C No. 44, Judgment of January 20, 1999, par.72.

rights is found. Hence, it is not plausible to examine individual cases here, since all cases discussed in the subsequent sections also contain this remedy and a declaratory judgment is self-explanatory.

There is no doubt that declaration of violation is the first remedy that should be accorded for breach of human rights obligation of states, which is also true in case of socio-economic rights. Such declaration alone can sometimes be fruitful enough to result in the change of the law and the practice of states. However, this remedy alone is not adequate to redress the past injustice and loss suffered by the victim in most cases, which is one of the primary purposes of remedy at the first place. Hence, most violations call for others types of pecuniary or non-pecuniary remedies that will corroborate the declaratory judgment and rectify the wrong done to the victim as well as address structural problems, if any. In the following sections, these remedies will be examined with reference to substantive rules and case law of the human rights bodies under consideration.

II. Restitution

Restitution is the best available remedy for violation of international law, since it will restore the victim's status as it is prior to the wrong. This remedy is not meant to penalize the wrongdoer, but to take back what he has taken unlawfully and which the victim is entitled to. Inter-governmental human rights complaint bodies also agree that restitution should be the preferred remedy whenever it is possible and in other instances, other alternative remedies would be provided. In most cases involving human rights violations, nonetheless, restitution is not practicable. It would be unthinkable in cases involving physical or mental harm, such as violation of the right to life and torture, among others.[48] On the other hand, restitution can be and should be rightly applied in some human rights cases, such as those involving claims

[48] Shelton, supra note 1, p. 298.

of detention, land and employment.[49] In these scenarios, restitution can be ordered when it is appropriate, since the victim is still in a position to regain his previous status.

Meanwhile, restitution as a best alternative for violation of ESC rights is rightly recognized by all the three jurisdictions that are subjects of this study, although it has only been ordered in a very few cases. At the UN level, the Committee has not ordered restitution in a case it has finally decided and found violation (*I.D.G. v. Spain*). Thus, due to lack of jurisprudence on the subject, it is difficult to determine the practice of the Committee in this regard.

The practice of the Inter-American Court, however, is more progressive and bold; the Court orders restitution in almost all cases, including those involving the violation of ESC rights, where it deems such measure is possible.[50] For instance, in *Loayza Tamayo case*, the Court ordered the state to reinstate public employees who were illegitimately dismissed or alternatively provide them with access to other jobs with comparable benefits.[51] In another case involving the right to work, the Court ordered the reinstatement of judges who have been arbitrarily terminated from their post.[52] The Court also ordered reinstatement of employees in a group complaint involving 270 public employees leaving the alternative for state to provide them with other employment opportunities that have equivalent benefits, if restitution is not possible.[53] The Court did not limit the application of restitution to cases involving land and employment either, it has also ordered different forms of restitutions in other types of human rights violations. The case of *Garrido v. Argentina* can be a good example for this where the

[49] Ibid.
[50] Ibid, p. 311.
[51] *Case of Loayza-Tamayo v. Peru*, Inter-American Court of Human Rights, Judgment of September 17, 1997 (Merits), par.155-158.
[52] *Case of Apitz Barbera ET AL. ("First Court of Administrative Disputes") v. Venezuela*, Inter-American Court of Human rights (Preliminary Objection, Merits, Reparations and Costs), , Judgment of August 05, 2008, par.246.
[53] *Case of Baena-Ricardo et al. v. Panama*, Inter-American Court of Human Rights, Judgment of November 28, 2003 (Competence), par.214.

Court applied this remedy to the violation of the right to health and reputation. In this case, the Court made reference to 'medical rehabilitation' as one type of restitution.[54]

The African Commission has also applied restitution in the case of *Dino Noca v. Democratic Republic of the Congo* where it ordered the state to reinstate the property right (title deed of the building) of the applicant after declaring the violation of Article 14 of the Charter.[55] However, the Commission has not granted this remedy in other cases involving ESC rights, such as the right to work where restitution can be conveniently applied.

In conclusion, although all the three jurisdictions are in agreement on the importance of restitution as a preferred remedy to rectify the damages incurred due to the violation of ESC rights, the UN and the African human rights systems jurisprudence, particularly the former's, has not developed much in this regard. The Inter-American Court, nevertheless, has ordered this remedy in a number of cases, particularly those involving the violation of the right to work. It has to be stressed here that since restitution will restore the rightful entitlement of the victim, it is capable of directly redressing the loss sustained by the victim. Hence, although its application in human rights cases can be limited, adjudicative organs should give priority to this remedy whenever it is possible.

III. Compensation

Compensation is a remedy that is commonly applied for both pecuniary and non-pecuniary damage. By its nature, compensation is a substitutive remedy, since it is not capable of restoring the rights that have been infringed upon or even fully redress the loss sustained. Hence, it is usually applied as an alternative remedy when restitution is not possible in the

[54] *Case of Garrido and Baigorria v. Argentina*, Inter-American Court of Human Rights, Judgment of August 27, 1998 (Reparations and Costs), par.41.
[55] Dino Noca vs Democratic Republic of the Congo, Communication 286 /2004, African Commission on Human and Peoples' Rights, par.207.

circumstances of the case.[56] However, compensation plays a vital role in rectifying the pecuniary and non-pecuniary loss sustained by the victims of human rights. In most cases, it is the best possible alternative available to correct the past wrongs and injustices.

Most international human rights instruments do not specify when compensation should be awarded and how it should be quantified, apart from some general provisions for the award of damage. Similarly, the UN treaty bodies do not either specify the amount of compensation commensurate when they declare violation of rights, rather they merely order compensation to be paid, the amount of which is determined by the state concerned.[57] The practice of the Committee on ESC rights is also not different from this. The Committee urges the state concerned to provide sufficient remedy instead of quantifying the amount of compensation due, as it can be inferred from the case of *I.D.G. v. Spain*.[58]

The practice of the African Commission in this regard is also quite similar to the UN treaty bodies. In the few cases where it awarded compensation, the Commission left the determination of the amount to the domestic authorities.[59] In the case of *Monim Elgak, Osman Hummeida* and *Amir Suliman v. Sudan*, for instance, the Commission requested the defendant state to grant sufficient compensation to the victims, which will be determined as per the domestic laws of the state.[60] In this case, the Commission found the violation of the right to work, due to the unjustifiable closure of the applicant's company, and the right to

[56] Shelton, supra note 1, pp. 315 & 319.
[57] Ibid, p.321; see also *Saed Shams, Kooresh Atvan, Shahin Shahrooei, Payam Saadat, Behrouz Ramezani, Behzad Boostani, Meharn Behrooz and Amin Houvedar Sefad (all represented by Refugee Advocacy Service of South Australia) v. Australia*, Communications Nos. 1255, 1256, 1259, 1260, 1266, 1268, 1270, 1288/2004, Human Rights Committee, 20 July 2007 [the Committee ordered the state to provide for the victims appropriate compensation for unlawful detention of the victims without determining the amount due.]; see also *Alex Soteli Chambala v. Zamibia*, Coomunication No.856/1999, Human Rights Committee, 15 July 2013 [similarly, the Committee did not determine the amount of compensation, rather it left this for the state against which the judgment is given].
[58] *I.D.G. v. Spain*, supra note 30, par.16.
[59] Shelton, supra note 1, p.321.
[60] *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v Sudan*, Communication 379/09, African Commission on Human and Peoples Rights, par.142; see also *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Republic of Zimbabwe*, communication 284/03, African Commission on Human and Peoples Rights, par. 182.

health, as the result of ill treatment in detention and denial of access to health care among other rights.[61] Nonetheless, it left the determination of the amount of compensation for the state concerned, although the commission has mentioned that the amount should be 'adequate'. This subjective standard, however, is not good enough to guarantee the provision of appropriate remedies that will rectify the loss incurred by the victims. The Commission should have specified the amount of compensation due or provide a clear guideline for the state to quantify the amount.

The same approach is followed in the landmark case of *SERAC v Nigeria*, which sets numerous important principles in the field of ESC rights. The Commission in this case requested Nigeria to award appropriate compensation particularly aimed at "relief and resettlement assistance to victims of government sponsored raids."[62] Despite the specific direction given as what the compensation should focus on, the determination of the amount of compensation is still left for the discretion of the state. In some cases, the Commission does not even suggest the state to award compensation, although the pecuniary and non-pecuniary loss sustained can be evident from its reasoning and findings. The case of *Nubian Community of Kenya*, which the Commission found the violation of socio-economic rights such as right to work and health among other rights due to the discriminatory treatment of the community, can rightly demonstrate this.[63] Although the Commission has ordered other non-monetary remedies, in this case, it did not include compensation in its recommendations. These cases demonstrate that the African Commission does not have strong jurisprudence in awarding adequate compensation for the victims of human rights violations including ESC rights cases. It does not have the practice of quantifying the amount of compensation adequate enough to

[61] *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, supra note 60, par.142
[62] *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, communication 155/96, African Commission on Human and Peoples Rights, par.69.
[63] *The Nubian Community in Kenya v. The Republic of Kenya*, Communication 317 / 2006, African Commission on Human and Peoples Rights.

redress violation found. The Commission does not either provide a clear guidelines for determination of compensation.

On the other hand, the practice of the Inter-American Court of Human Rights is different from the two jurisdictions elucidated above. The Court has frequently awarded specific amount of compensation for both pecuniary and non-pecuniary damage caused as a result of human rights infringements apart from other sets of remedies. The jurisprudence of the Court is particularly set by the two landmark cases decided at the end of 1980's, *Velasquez-Rodriquez v. Honduras and Godinez-Cruz v. Honduras*, which are about enforced disappearance.[64] Even though these cases do not involve the violation of ESC rights as such, it would be plausible to briefly examine them here, since they are the source of the rules of remedies subsequently followed by the Court.

In these cases, after declaring the violation of the prohibition of enforced disappearance, the Court first left the amount of compensation to be determined by the agreement of the parties that are expected to negotiate and decide the damage, which will be subject to the approval of the Court.[65] Upon the parties failure to reach into agreement, the Court set compensation it deems adequate based on different principles and factors. The Court also referred to the deliberation of ICJ in *Chorzow Factory and Reparation for Injuries* cases discussed above, which set the principle that non-compliance to international obligation entails adequate reparation of the loss sustained.[66] The Court stressed that violation of rights should be redressed by restitution as the primary alternative. Nevertheless, since this is not possible in all cases, adequate compensation that redress all the consequences of the infringement should be awarded. Furthermore, compensation should include the reasonable estimate of pecuniary

[64] *Case of Velásquez Rodríguez*, , IACHR (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrtHR), 29 July 1988; see also Case of Godínez Cruz v Honduras, IACHR Series C no 10, IHRL 1391 (1990), Inter-American Court of Human Rights [IACtHR], 17th August 1990.
[65] *Velasquez-Rodriquez v. Honduras*, supra note 58, *par.191-192; Godinez-Cruz v. Honduras*, supra note 58.
[66] *Chorzow Factory case*, supra note 19; see also *Reparation for Injuries case*, supra note 21.

loss and moral damage assessed on the basis of 'equity'.[67] Hence, these principles inform the subsequent jurisprudence of the Court on the provision of remedies.

The practice of the Inter-American Court does not diverge from these general principles set in previous cases when it comes to cases involving the violation of socio-economic rights. For instance, in the case of *Acevedo Buendia v. Peru*, a case involving pension reduction and non-compliance with domestic judicial orders, the Court recognized that compensation can be rewarded for both pecuniary and non-pecuniary damage. However, the Court did not award compensation for pecuniary damage in this case, since the victims failed to procure sufficient evidence up to the loss they sustained.[68] With regard to non-pecuniary loss the Court set a specific amount of compensation ($2000 for each of the 273 victims) taking into account various factors, such as the psychological distress suffered by the victims and their age.[69]

Similarly, in the case of *Apitz Barbera et al. v. Venezuela* where the right to work is violated due to illegal dismissal of judges, the Court awarded a specific amount of compensation for both pecuniary and non-pecuniary loss. For pecuniary loss, the Court set the compensation in the amount of US$ 48,000.00 considering the income lost as the result of the dismissal and the back payment for the salary the victims have not received.[70] Moreover, the Court also awarded US $40,000.00 for the moral damage sustained by the victims.[71]

Overall, compared to the practice of the UN and African systems, the Inter-American Court has more advanced jurisprudence in awarding and quantifying adequate compensation to rectify socio-economic rights violations. Unlike the former two systems, the Court does not leave the determination of the amount of compensation for the state against which the

[67] *Velasquez-Rodriquez v. Honduras,* supra note 64*; see also Godinez-Cruz v. Hondura,* supra note 64.
[68] *Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Comptroller") v. Perú*, Inter-American Court of Human Rights, Judgment of July 1, 2009, par.117.
[69] Ibid, par.118-134.
[70] *Apitz Barbera et al. v. Venezuela*, supra note 52, par.236.
[71] Ibid, par.242.

judgment is given, rather it sets the amount it deems appropriate save for the parties agreement. This is more progressive in guarantying the victims of human rights violation a redress for the damage they incurred.

IV. Other non-monetary remedies

Apart from the remedies discussed above, there are other non-monetary remedies that require specific course of conduct from the party responsible for the violation. These remedies are, particularly, important in rectifying damages that compensation may fail short of. These specific remedies, such as various forms of injunctions, are especially pivotal where there is a likely chance that the violation may continue or be repeated. As Shelton rightly puts it, "an order for specific conduct does more than eliminate the present unlawful conditions. It denies to the wrongdoer the ability to pay damages and continue to do harm."[72] These types of remedies are also crucial in adjudication of human rights violations at the international and regional levels including cases involving socio-economic rights, particularly, where there is structural problem in the state's system.

Human rights violations usually call for non-monetary remedies, since 'less intrusive remedies like compensation'[73] might not be effective enough to push states to respond promptly to the wrongful acts. Moreover, the loss caused by these violations is hardly quantifiable in most cases as proving economic loss can be cumbersome for the victims not to mention the irreparable injury sustained.[74] The violations may also be the result of the very existing state system or laws, in which case monetary redress alone cannot guarantee the non-repetition of the wrongful acts. These is particularly true in cases of ESC rights violations that

[72] Shelton, supra note 1, p.378.
[73] Compensation is regarded as less intrusive in the sense that the state can simply relieve its duty by paying a certain amount of money without making any legal and institutional changes. On the other hand, specific remedies, such as remedies that require the state to amend its laws and undertake some sort of conduct to rectify the violation, will highly intrude in the autonomy of the state (which is necessary to resolve systematic problems and ensure the non-repetition of the wrong).
[74] Shelton, supra note 1, p.379.

usually emanate from lack of commitment from states, which are expected to undertake adequate measures in order to fulfil them progressively. As it has been depicted at the very beginning of this chapter, one of the important functions of a remedy is to put an end to a systematic problem that caused the violation concerned, apart from rectifying the past loss sustained by the particular victim. Hence, the contribution of specific non-monetary remedies to achieve this goal cannot be overlooked.

International or regional human rights tribunals also order various specific remedies, the type of which will depend on the nature of the infringement. Restitution as it is previously discussed is one of these specific remedies. There are also different types of injunctions that apply to human rights violations as the case may be. The first is preventive injunctions, which is ordered where there is a reasonable likelihood that the violation might be repeated. Structural injunction is the other type and it is aimed at reforming the existing social, political or legal system so that it can be compatible with human rights standards. For instance, remodelling the school system to eliminate discrimination in educational opportunities falls under this category of injunctions.[75] The practical application of these remedies will be clarified through the case study in the following paragraphs.

These diverse forms of injunctions have been employed in some concrete cases brought before the human rights bodies that are subject to this study. For instance, in a case against Burkina Faso, the African Court on Human and People's Rights have pronounced that the defamation law of the respondent state to be amended, since it contravenes freedom of expression standards recognized in the Banjul Charter.[76] The African Commission has also applied various forms of non-monetary remedies in cases involving detention, property,

[75] Ibid, p.384.
[76] *Lohé Issa Konaté v. The Republic of Burkina Faso*, App. No. 004/2013, African Court on Human and People's Rights, December 2014.

freedom of assembly, freedom of movement and other similar violations.[77] The Inter-American Court is particularly consistent in ordering states to undertake specific measures in order to rectify a violation.[78] Now the question is whether these special remedies are also applied in cases where violation of socio-economic rights is found and how effective they are, which will be analysed in subsequent paragraphs with reference to the case of laws of these bodies.

The UN Committee on ESC rights does not have an advanced jurisprudence in the law of remedies, although this is also true for other UN treaty bodies, the former is even at an infant stage compared to the others. The Committee commonly prescribes specific measures and general measures to redress the damage sustained by that particular victim and address systematic problem, respectively. In the case of *IDG v. Spain*, for instance, it recommended the respondent state to accord effective remedies for the victim after it declared violation without specifying the type of measure the state has to take.[79] In this case where it found the violation of the right to housing guaranteed under Article 11 of the Covenant, the Committee did not grant any monetary and non-monetary remedy for the victim; rather it left for the state concerned to grant adequate remedy. However, the Committee indicated one particular step a state has to take to ensure that the victim has get appropriate redress, which is to make sure that the auction of the house that resulted in violation be conducted giving due regard to

[77] Shelton, supra note 1, p.389.
[78] *Case of the "Street Children" (Villagran-Morales et al.) v. Guatemala*, Inter-American Court of Human Rights (IACrtHR), 19 November 1999 (In this case, after declaring the violation of various provisions of the American Convention, the Court ordered a number of specific remedies including the state to build school for street children and to amend its law in compliance with children's rights granted under the Convention.); see also *Case of the "Juvenile Reeducation Institute" v. Paraguay*, Inter-American Court of Human Rights (IACrtHR), 2 September 2004 (The Court granted various medical remedies in this case, such us 'psychological rehabilitation' for the large number of victims and even surgery, if required. The Court also ordered the state to establish educational facilities for child detainees.); see also *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, Inter-American Court of Human Rights (IACrtHR), 25 November 2003 (This case shows how specific the remedies granted by the Court can be; it ordered the state to undertake various conducts to honour the victim of the violation, including to set up a scholarship fund in her name and to name a square or a street after her, among others.)
[79] *I.D.G. v. Spain*, supra note 30, par. 16.

procedural protection for the victim.[80] This amounts to specific remedy, even if the adequacy of it in remedying the loss sustained by the victim is still contestable. Moreover, the recommendations of the Committee are broadly framed and the specifics are left for the state that has failed to comply with its human rights obligation at the first place.

Apart from recommendations aimed at redressing the specific victim, the Committee also makes general recommendations that are meant to resolve structural problems or ensure non-repetition of the violation. In the case of against Spain discussed above, for example, the Committee put forward various specific measures the state should undertake to prevent similar infringements. These includes to make sure that its domestic laws are in line with the standards stipulated in the Covenant; to set up accessible legal remedies for people facing the same fate as the victim for failure to repay mortgage in time and other specific measures regarding the procedure of mortgage enforcement.[81] It is evident from this case that the general measures recommended by the Committee (those aimed at ensuring the non-repetition of the act) are more straightforward than the remedies awarded to rectify the loss incurred by the specific victim of the violation.

As it has been mentioned in the preceding sections, Article 63 of the American Convention allows the Court to grant broader range of remedies.[82] This is even expanded by the application of the Court; the judgments of the Court are particularly progressive in cases involving violation of socio-economic rights. In most cases, the Court orders the state to publish the relevant parts of the judgments given against it in the Official Gazette. This is employed, for instance, in the case of *Apitz Barbera et al. v. Venezuela* apart from the order of reinstatement of the judges removed from their posts.[83] In this case, the Court even went as far as ordering the state to adopt the pending "Code of Judicial Ethics" within one year in

[80] Ibid.
[81] Ibid, par.17.
[82] Inter-American Convention, supra note 15, Article 63.
[83] *Apitz Barbera et al. v. Venezuela*, supra note 52, par.249.

order to ensure the independence of the judiciary.[84] The Court has also granted wide range of specific remedies in several other cases involving socio-economic rights.

The African Commission has also appealed to the defendant states in some cases involving ESC rights violations to take certain specific measures to rectify the violation. For instance, in the case of *Media Rights Agenda v. Nigeria* where the Commission found the violation of various provisions of Charter, including the right to health, it recommended the state to take appropriate measures in order to bring its laws in conformity with the Charter.[85] Since most of the violations in this case are caused by the number of decrees adopted after the dissolution of the election at the time. However, the Commission left the determination of the specific measures to be undertaken for the state concerned.

In the case against Sudan discussed above where it found the violation of the right to work and health, the Commission ordered the state to undertake certain conducts in order to remedy the violations found in the case. One of these remedies is for the state to 'investigate and prosecute' people responsible for illegal detention and ill treatment of the victims. The other conduct orders to redress the violation of the right to work is reopening the applicant's company and unfreezing its bank account.[86] This case is more progressive in terms of rectifying the loss sustained by the victims, since the only possible measure to rectify the loss of employment in this case is the specific conduct ordered by the Commission to this effect.

In some cases, the specific remedies awarded by the African Commission are more specific and bold. The case of *Open Society Justice Initiative v. Côte d'Ivoire* is a perfect example for this where the Commission has strongly recommended the state concerned to take various specific measures to redress the loss sustained by the victim as well as ensure the non-

[84] Ibid, par.253.
[85] *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, application number 105/93-128/94-130/94-152/96, African Commission on Human and Peoples Rights.
[86] *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, supra note 60, par.142.

repetition of the violation. The Commission even urged Côte d'Ivoire to amend two provisions of its Constitution to make sure that it complies with the Banjul Charter. It also recommended the state to bring its nationality laws, which resulted in the violations in the case, in compliance with the provisions of the Charter.[87] In this case, the Commission has stipulated a number of other specific measures the state has to take to implement its decision. Similarly, in the case of *Purohit and Moore v Gambia*, the Commission urged Gambia to amend 'Lunatics Detention Act' that resulted in the violation of the right to health and to make sure that people suffering from mental illness get adequate health care.[88]

As it has been illustrated in this section, specific non-monetary remedies are vital to redress human rights violations adequately as well as bring systematic change and ensure non-repetition of the wrongful act. These remedies have been applied in concrete cases by all the three jurisdiction under consideration. Although the practice of the African and Inter-American systems is more progressive and developed in this regard, it has to be noted that the UN system is not at a comparable stage yet. Since the individual complaint procedure still is at an infant stage and not many cases are finally decided yet.

3.4. Follow up procedures: enforcement of remedies at the domestic level

The quest for a remedy does not end by the provision of certain remedies at the international or regional level. The effectiveness of a remedy is not only determined by the type of redress granted or whether it is equitable to the loss sustained, but also how well it is enforced at the domestic level. The effectiveness of international and regional adjudicative organs is particularly contingent on the political willingness and commitment of states at the end. Hence, this section dwells upon the follow up procedures put in place to look after the

[87] *Open Society Justice Initiative v. Côte d'Ivoire*, Communication 318/06, African Commission on Human and People's Rights, par.207.
[88] *Purohit and Moore v. The Gambia*, Communication No. 241/2001, African Commission on Human and Peoples' Rights, par.85.

enforcement of judgments given by inter-state enforcement bodies under consideration at the national level.

Even if the European human rights system is not a subject of this study, the writer has opted to briefly touch upon its follow up procedure, since it has special organ for the enforcement of the decision of the ECtHR. In contrast to the human rights instruments in other systems, Article 46 of the ECHR expressly obliges states to comply with the decision of the Court.[89] Moreover, the Committee of Ministers is formally entitled to follow through the implementation of the decisions of the Court.[90] The Committee requires the state concerned to provide reports as to the steps it has taken to implement the judgments of the Court and continue to require additional explanation until it deems that the judgment is fully enforced.[91] A new procedure has also been introduced through Protocol 14, which empowers the Committee if Ministers to bring a case against the state that failed to take satisfactory measures to implement the decision of the Court.[92] As it will be discussed in the coming paragraphs, the three jurisdictions under consideration do not have a comparable formal body that follows up the compliance to their judicial decisions.

The practice of the UN treaty bodies in this regard is diverse. For instance, the UN Human Rights Committee (HRC) has a "Special Rapporteur for Follow-up on Views", which is established by the Optional Protocol to the ICCPR.[93] This is also envisaged by the rules of procedure of the Committee on ESC right, which urges the Committee to assign a special

[89] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, Article 46(1).
[90] Ibid, Article 46(2).
[91] Human Rights Implementation Centre, Bristol University, 'Follow-Up and Implementation of Decisions by Human Rights Treaty Bodies', (Summary of issues and recommendations of an expert seminar held on 10 September 2009), p.11.
[92] ECHR, supra note 89, Article 46(4).
[93] UN General Assembly, *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, United Nations, Treaty Series, vol. 999, p. 171.

rapporteur or Working Group to undertake follow up on the implementation of the views adopted by it.[94] Nevertheless, this has not been given effect yet.

On the other hand, according to its rules of procedure, the Committee shall set a six months' time period for the state to submit a written report regarding the steps it has taken to implement the views and recommendations of the Committee.[95] For instance in the case of *I.D.G. v. Spain,* the Committee gave 6 months for Spain to submit this report and also required the later to publish and disseminate the decision so that it can be accessible to the public.[96] After the expiry of this period, the Committee is at liberty to require further information on the measures taken by the state.[97] Thus, the follow up procedure of the Committee is dependent upon the reports submitted by states.

The state reporting mechanism can promote the implementation of human rights in the long ran and its advantage in bringing the human rights situation of a large number of states to the attention of the Committee plus the international community cannot be overlooked. However, this system grapples with certain practical challenges that will hamper its efficacy in implementation of human rights. The main challenge raised in relation to this is lack of state compliance with their reporting obligations, which is generally true for all UN treaty bodies including the Human Rights Committee. The existing data also shows this low level of compliance; for instance, from the reports due between 2010 and 2011, only 16% were submitted in time.[98] Consequently, this creates differential treatment of those states that

[94] Committee on Economic, Social and Cultural Rights, Provisional Rules of Procedure under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted by the Committee at its forty-ninth session (12-30 November 2012), (Procedures for the consideration of Individual Communications received under the Optional Protocol), E/C.12/49/3, 3 December 2012, Rule.18.
[95] Ibid.
[96] *I.D.G. v. Spain*, supra note 30, par.18.
[97] Rules of Procedure of the Committee, supra note 94, rule.18.
[98] Navanethem Pillay, Strengthening the United Nations human rights treaty body system: A report by the United Nations High Commissioner for Human Rights, (Published by United Nations High Commissioner for Human Rights, June 2012), p.21.

genuinely comply with their reporting obligation as they are scrutinized more often.[99] Moreover, as the follow up procedures should be mainly aimed at the implementation of remedies provided by the judicial/quasi-judicial bodies in due time, the sole reliance on the reporting mechanism would not be effective enough, given to the low level of compliance by states. Victims of human rights should get redress in due time, which necessitates other more active procedures that follow through the implementation of cases. The author of this work believes that this can be achieved by designation of special organ entrusted with the mandate of follow that can take proactive measures to look after the enforcement of cases.

The Inter-American Court has several follow up procedures in place. In some instances the Court requires the state concerned to submit a report regarding the steps it has taken to implement its judgment. The Court also receives information from victims or their representatives and NGOs. [100] It has also put in place a special hearing procedure named "hearings on monitoring compliance" where the parties to the case are invited to present about the implementation of the judgments of the Court. The Court then pronounces the necessary measures that should be taken by the state, if the state has failed to fully implement its decision.[101] The other important follow up under this system is provided under Article 65 of the American Human Rights Convention, which requires the Court to submit a report to the General Assembly of the OAS as to the level of implementation of its decisions at the domestic level.[102] Since this is a public report, it exerts pressure on the state concerned by way of naming and shaming. The Commission also follows similar follow up methods,

[99] Ibid, p.22.
[100] Inter-American Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, available at http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp last visited 17 September 2017, Article 69.
[101] Ibid.
[102] The American Human Rights Convention, supra note 15, Article 65.

although the judgments of the Court are implemented better than the Commission's, which might be attributable to the quasi-judicial nature of the latter.[103]

As it has been described under the first chapter, the decisions of the African Commission are not binding unlike the judgments of the Court, although states are expected to implement them in good faith. This setback is further escalated by the lack of proper follow up procedure that makes sure states have taken appropriate measures in accordance with the decisions of the Commission. The existing Special Rapporteurs and Commissioners on thematic and country issues are not active in looking after the implementation of the recommendations of the Commission until they are approached by the victims or their representatives.[104] Thus, the follow also rests on the shoulder of the complainants themselves. According to the estimates of the Pretoria University Centre for Human Rights, only up to 34-35% of the Commission's decisions have been executed by states in the year 2004-2005.[105] Even if there is no comprehensive recent data, the low level of implementation is likely to continue, since there is no systematic follow up procedure set, which remains one of the intricate challenges to the efficacy of the Commission.

Notwithstanding its effectiveness, the rules of procedure of the Commission have set out certain follow up procedures it can undertake. Accordingly, it provides that the Commission will set a six months' time limit within which the state responsible for the violations can submit a report regarding the measures it has taken to implement its decision.[106] The same requirement is reiterated in the case law of the Commission. In the case against Sudan discussed in preceding sections, for example, the Commission gave six months for the state to

[103] Camilleri and Krsticevic, supra note 36, p.238.
[104] Sheila Keetharuth, Implementing Decisions of the African Commission on Human and Peoples' Rights, Op.cit. p.2.
[105] Ibid.
[106] Rules of Procedure of the African Commission on Human and Peoples' Rights, Approved by the African Commission on Human and Peoples' Rights during its 47th ordinary session held in Banjul (The Gambia) from May 12 to 26, 2010, Rule 112.

submit such report.[107] The same measure is prescribed by the Commission in the case of *Open Society Justice Initiative v. Côte d'Ivoire*.[108] In some cases, the Commission might require the state to include information about the steps it has taken regarding the cases decide against it within its periodic report, which is employed in the case of *Purohit and Moore v. The Gambia.*[109]

Generally, all the three jurisdictions under this study lack a designated body that looks after the implementation of cases or even strong follow up procedures as such. This highly affects the effectiveness of the remedies and the overall complaint procedures, since the cases implemented at the domestic level can be significantly lower than those finally decided. This can be deduced from the data of Pretoria University mentioned above. Hence, the victims of human rights will be left without remedy after going through the long adjudicative process and structural problems will be left intact. This necessitates a special body that will diligently follow through the measures taken by states to implement the decisions. The practice of the Council of Europe human rights system in this regard can be emulated by other systems. Since, as it has been described above, the Committee of Ministers is endowed with a mandate of following through the implementation of cases decided by the ECtHR.

Concluding remarks: evaluating the effectiveness of remedies

The effectiveness of remedies provided by the human rights adjudicative bodies determines the overall success of the individual complaint mechanisms available at the international and regional levels. However, the jurisprudence of these bodies as well as the academic discourse on this subject is not well developed yet. Most supranational human rights bodies do not provide detailed sets of remedies to redress the damage caused by the violations found; rather they urge the responsible state to grant adequate redress for the victims. This practice

[107] *Monim Elgak, Osman Hummeida and Amir Suliman v Sudan*, supra note 60, par.142.
[108] *Open Society Justice Initiative v. Côte d'Ivoire*, supra note 87, par.207.
[109] *Purohit and Moore v. The Gambia*, supra note 88, par.85.

delegates the pivotal task of human rights adjudication to the discretion of the state that might not have appropriate legal and institutional mechanisms as well as political willingness to undertake, the problem of which is escalated by lack of effective follow up procedures.

This intricate challenge is mainly true for the international or regional complaint mechanisms dealing with ESC rights, which are at the infant stage compared to their civil and political counterpart, particularly in the UN system. The peculiar nature of state obligation associated with these rights, which is based on the principle of progressive realization based the resources available at the disposal of the state, also limits the scope of remedies provided. To start with, as it has been depicted in the preceding sections, access to adjudicative mechanism under consideration, particularly to the UN Committee on ESC rights, is quite limited. Although the African and Inter-American systems are better in this regard, since *actio popularis* is allowed in relation to their respective Commissions, the Courts of both systems do not open their doors for individuals or NGOs directly except in limited circumstances. This will restrict the chance of victims of human rights violations who have not received adequate redress at the domestic level from resorting to the procedures available at these international or regional systems. Particularly, in continents like Africa and South America where the economic and political framework is not enabling for individuals to have easy access to such inter-state legal orders, the proactive involvement of NGOs cannot be overlooked.

As it has been elucidated throughout this chapter, human rights remedies are aimed at both correcting the past and shaping the future. The specific victim of the violation should get adequate redress for the pecuniary and non-pecuniary damage occurred as the result of the violation. Nonetheless, remedies do not stop there; they need to address the drawbacks in the states' legal and institutional system that caused the violation, which is crucial to ensure non-repetition of the same infringements. Hence, the important question here is whether the

remedies provided for the violation of ESC rights illustrated in the preceding sections are effective in meeting these yearnings.

Undoubtedly, human rights violations cause various damages, which can or cannot be quantified in terms of the money, on the victims. This can be rectified by restitution, if possible, and compensation or other specific remedies, if restitution is not possible. From the discussions, in the preceding sections, it can be construed that the jurisprudence of the UN Committee is not well developed in this regard, which might be attributable to its infant age or lack of strong standing of UN treaty bodies in general. On the other hand, the Inter-American Court is very progressive in awarding appropriate remedies that meet the needs of the specific victims. The Court has strong jurisprudence in granting a determined amount of compensation and special measures on case by case basis. The scope and the specificity of these remedies ensure the provision of effective remedies for the victim. Even if the African system is in a better position than the UN system, it still has some drawbacks in terms of providing effective remedies, particularly in quantifying the compensation due.

Since human rights violations can be the result of systematic problems in the states' legal, political and institutional machinery, remedies should also address these calamities, which is pivotal to ensure that the wrongful act would not be repeated in the future. Hence, apart from restitution and compensation directed at redressing the loss the victim has suffered, specific non-monetary remedies should be ordered to reform structural setbacks. As it can be deduced from the analysis in the preceding section, all the three jurisdictions under consideration have employed these remedies, including the amendment of domestic laws, if necessary. Here again, the Inter-American system is in a better position due to the broader range of remedies it grants and their specificity.

In a nutshell, the justiciabiity of ESC rights at the international and regional levels cannot be effectively realized without the provision of adequate remedies and the enforcement of the same at the domestic levels. The international human rights jurisprudence is not well advanced in this regard, which is particularly true for the adjudicative mechanisms set in place to accept individual complaints regarding the violation of socio-economic rights. Although there are some progressive case laws, mainly from the Inter-American system, the monitoring bodies covered under this study still have a long way to go in terms of provision of effective remedies and following up through their implementation.

Conclusion

The current study has commenced with the aim of evaluating the effectiveness of enforcement of ESC rights at the international and regional levels, particularly, through individual complaint procedures. With this end in mind, the thesis has identified the major legal frameworks and judicial and quasi-judicial organs available at UN, Inter-American and African human rights systems. It has also evaluated how the assessment of state obligation is undertaken in individual cases and the scope of remedies provided for violation of socio-economic rights with reference to the case law of the three jurisdictions under consideration. Most importantly the comparative study undertaken in this thesis has pointed out the prevalent gaps and challenges in the judicial enforcement of these rights. It has to be stressed here that individual complaint is not the sole enforcement procedure available at the human rights systems under study. There are also other procedures, such as inter-state complaint mechanisms and country reporting, which can be more effective in some cases. However, the focus of this study is, specifically, tailored to individual complaint procedures and their role in the enforcement of socio-economic rights. Since the justiciability of these rights- whether they are capable of being judicially enforced- has been the point of contention for a long time. Thus, it is not intended to diminish the importance of other enforcement mechanisms.

The first challenge of judicial enforcement of socio-economic rights is related to assessment of state obligation in the adjudication of individual complaint cases. As it has been elucidated throughout the second chapter of this thesis, ESC rights entail peculiar nature of state obligation that is qualified by the principles of progressive realization and availability of resources. In other words, states would not be automatically responsible for failure to fulfil these rights as long as they have taken the necessary steps to the level of their economic capacity. Moreover, states are left with wide margin of appreciation in determining the

measures they will undertake in order to implement these entitlements. The other important nature of state obligation attached to ESC rights, which sometimes creates dilemma in adjudication of cases, is the individual and collective nature of these rights. As it has been depicted in chapter two, socio-economic rights, similar to other human rights, are primarily individual entitlements and over fixation on their collective nature might undermine individual claims before judicial organs.

In order to apply this complex nature of state obligation socio-economic rights entail, the author of this work believes that there has to be a pre-determined standard of assessment used in adjudication of cases. The pre-set standard would allow judicial and quasi-judicial bodies to apply these peculiar features of state obligation in individual cases and determine when the state action cannot be excused by the latitude of progressive realization and resource constraint. Out of the jurisdictions under study, only the Protocol to the ICESCR has explicitly adopted the 'reasonableness test' as a standard of assessment in individual cases. Judging the effectiveness of this principle as it is applied by the UN Committee would be premature at this stage, since the jurisprudence of the Committee is at an infant stage (only few cases have been finally decided yet and out of which violation is declared only in one of them). The other two systems, the Inter-American and the African human rights systems, do not have a pre-determined standard of assessment, although their jurisprudence is richer. This will create uncertainty and affect the overall efficacy of individual complaint procedures. Hence, the author would strongly recommend the adoption of explicit standard of assessment emulating the experience of South Africa depicted in the case studied under chapter two.

The other crucial point, which was the centre of evaluation under this thesis is the provision of effective remedies whenever the violation of socio-economic rights is declared. Remedies play a vital role in rectifying the loss sustained by specific victim and reforming the systematic problem in the state in order to make sure that the wrongful act will not happen

again. This is at the heart of the effectiveness of any adjudicative mechanisms. International human rights law, nevertheless, is not well advanced in this regard, which is not limited to socio-economic rights. The effectiveness of a remedy begins with the procedure under which the cases is ceased and dealt with, which is mainly related to access to justice. As it has been alluded under the third chapter, the CESCR fails short of being accessible to the victims of human rights, since *actio popularis* is not allowed. This will hinder victims of ESC rights violations from different parts of the world and with diverse economic background from getting redress at the international level.

On the other hand, the next stage of remedial justice is provision of substantive remedies, which are indispensable to meet the twin goals described above, i.e. rectifying past injustice and shaping the future. This can be achieved through a range of pecuniary and non-pecuniary remedies. In this regard, the jurisprudence of the Inter-American system is more progressive. The Court has awarded specific amount of compensation, ordered restitution and other specific remedies including amendment of laws in a number of cases. On the other hand, the UN and the African human rights adjudicative organs, particularly the former, does not usually specify the amount of compensation due and the non-monetary remedies they order are not specific enough to rectify the past injustice suffered by the victim. This will affect the right of the victim to get adequate redress in particular and the effectiveness the individual complaint mechanism in general.

The quest for effective remedies does not end at the time violation is declared and some remedies are ordered; the works of international or regional human rights bodies does not end when the case is finally decided either. There has to be follow up procedures that look after the implementation of the decisions at the domestic level. The three jurisdictions under consideration have set various procedures to this effect, which are mainly based on country reporting. Although the importance of country reporting as a tool of enforcement of

international human rights law cannot be overlooked, the sole dependence on this system for follow up would affect the overall of implementation of cases decided at the supra-national levels. This is evidenced by the low level of enforcement of individual cases finally decided in the African and Inter-American systems (the UN system is not determined yet). Therefore, the author of this thesis suggests the assignment of a specific organ in each system that look after the domestic implementation of cases and take appropriate action when states are failed to comply with those decisions. This can be rightly emulated from the Council of Europe human rights system where the Committee of Ministers is empowered to follow up the judgments of ECtHR.

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